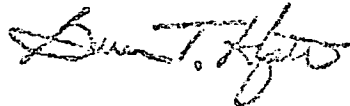


STATE OF SOUTH CAROLINA)
COUNTY OF DILLON 2016 JAN 27 PM 2:09)
Isaiah Brown, #347241.)
Applicant.)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
C/A NO: 2014-CP-17-414

ORDER GRANTING PCR.
A CERTIFIED
TRUE COPY



CLERK OF COURT

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on September 10, 2014, and subsequently amended on January 6, 2016. Respondent made its return on November 21, 2014. An evidentiary hearing into the matter was convened on January 12, 2016, at the Darlington County Courthouse. Applicant was present at the hearing and was represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Jessica Kinard of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate that the Applicant is currently confined in the South Carolina Department of Corrections pursuant to the Dillon County Clerk of Court's orders of commitment. Applicant was indicted by the Dillon County Grand Jury for criminal conspiracy (2010-GS-17-616), murder (2010-GS-17-494), possession of a weapon during the commission of a violent crime (2010-GS-17-617) and armed robbery (2010-GS-17-618). Applicant was represented by William E. Grove, Esquire. On August 8, 2011, Applicant pled guilty as indicted. The Honorable Howard P. King sentenced the Applicant to concurrent sentences of forty-five (45) years for murder, five (5) years for criminal conspiracy, five (5) years for possession of a weapon during the commission of a violent crime, and thirty (30) years

for armed robbery. Applicant subsequently filed a timely Motion to Withdraw the Plea/Motion to Reconsider. Following a hearing on March 7, 2012, Judge King denied Applicant's Motions.

Applicant filed a timely notice of appeal. Robert M. Dudek, Esq., of the Office of Appellate Defense perfected the appeal with the filing of an Anders brief. The South Carolina Court of Appeals dismissed Applicant's appeal on March 5, 2014. State v. Brown, Op. No. 2014-UP-96 (S.C. Ct. App. filed March 5, 2014). The remittur was returned to the circuit court on March 21, 2014.

ALLEGATIONS

In his original Application filed September 10, 2014, Applicant alleges that he is being held in custody unlawfully for the following reasons:

- (i) "Denial of effective assistance of counsel"
 - a. "Failure to investigate; failure to properly (sic)"
- (ii) "Involuntary Guilty Plea"
 - a. "counsel's ineffectiveness resulted in plea"

Applicant filed his amended Application on January 6, 2016, alleging that he was being held in custody unlawfully based on the following allegations:

- (i) Counsel failed to investigate co-defendant, Mikal Bethea.
- (ii) Counsel failed to prepare for trial.
- (iii) Counsel failed to investigate, review and/or discuss trial strategy, defenses and evidence with Applicant.
- (iv) Counsel was not present during a meeting involving the Solicitor's office and Applicant.
- (v) Prosecutorial misconduct for attempting to interview Applicant in the absence of counsel.



- (vi) Counsel failed to properly advise Applicant of possible sentencing range for the charges.
- (vii) Counsel failed to challenge statements made by Applicant while he was interviewed at the age of 16 without being able to consult with his parent.
- (viii) Counsel failed to bring to the Court's attention Applicant had a pending Motion to Relieve Counsel. The Motion was never heard or ruled upon.
- (ix) Counsel failed to properly prepare for Reconsideration hearing.
- (x) Ineffective assistance of appellate counsel.
- (xi) Involuntary guilty plea.

At the evidentiary hearing, Applicant testified on his own behalf. Applicant's former co-defendant, Mikal Bethca ("Bethca") also testified. The State presented testimony from William E. Grove, Esq ("counsel"). This Court also had before it a copy of the guilty plea transcript, reconsideration transcript, appellate records, the Dillon County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR Application and amendment and the State's Return.

STANDARD OF REVIEW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 268 S.C. 441, 334 S.F.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. Butler, 286 S.C. 441, 334 S.F.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.F.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is reasonable probably that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

Based on the record and testimony presented at the PCR hearing, this Court finds Applicant has met his burden of proof.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Ineffective Assistance of Counsel/Involuntary Guilty Plea

At the evidentiary hearing, Applicant alleged and testified counsel failed to meet with him during a meeting involving the Applicant and Solicitor resulting in ineffective assistance of counsel and prosecutorial misconduct. He further alleged and testified counsel failed to properly advise Applicant of the possible sentencing range for the charges; failed to challenge Applicant's



statements given to law enforcement at the age of 16 without being allowed to consult with his mother; failed to alert the plea court Applicant had a pending Motion to Relieve Counsel; and counsel failed to properly prepare for the hearing on Applicant's Motion for Reconsideration.

Counsel testified he met with the Applicant on several occasions prior to the plea. Counsel further testified he did not think Applicant had any viable defenses at trial. Counsel indicated he recalled there being a meeting between the Applicant and Solicitor in which he was not present, however, counsel testified another attorney from the Public Defender's office was present to advise Applicant during the meeting. Counsel further testified he advised the Applicant of the potential penalties for the charges. Counsel also testified that he was aware law enforcement interviewed the Applicant while he was 16 years old. He further indicated had the case proceeded to trial, he would have filed the appropriate motions to challenge the statements Applicant made to law enforcement. Counsel testified that he was very surprised the Applicant received a 45 year sentence. Counsel further indicated had he thought the Applicant could have realistically received a 45 year sentence, he would have advised the Applicant to move forward with a trial. Following the plea and the sentence, Counsel indicated he initially filed a Motion to Reconsider the sentence, however, he could not find any law to support his position. He further testified, and the record reflects, he also orally amended the Motion to include a Motion to Withdraw the plea. Counsel testified he could not recall whether the Applicant had filed a Motion to Relieve him as counsel, however, he recalled the relationship was strained. He acknowledged no hearing was ever held regarding a Motion to Relieve.

This Court finds Applicant has failed to meet his burden of proof in alleging counsel was ineffective as it relates to these specific allegations. This Court finds although appointed counsel was not present at the meeting with the Applicant and Solicitor, Applicant was sufficiently



represented and accompanied by another attorney from the Public Defender's office. This Court further finds that because Applicant was represented by a member of the Public Defender's office, there was no prosecutorial misconduct. This Court also finds that counsel testified and the record reflects, the Applicant was advised of the potential penalties for the charges he faced. This Court also finds counsel was not ineffective for failing to challenge the statements Applicant made to law enforcement. Counsel testified he would have challenged the statements had the case proceeded to trial and this Court finds counsel's testimony to be credible. This Court further finds counsel was not deficient in his representation of Applicant at the hearing on the Motion to Reconsider the sentence. This Court finds after reviewing the hearing transcript, counsel made the appropriate arguments on Applicant's behalf. This Court further finds that counsel was not ineffective for failing to bring to the plea court's attention that there was a pending Motion to Relieve counsel filed by the Applicant. The plea transcript reflects Applicant testified he was satisfied with plea counsel. Accordingly, this Court finds that counsel was not ineffective regarding these specific allegations.

However, Applicant also alleged and testified counsel was ineffective for failing to prepare for trial and also for failing to investigate and interview his co-defendant, Bethca. At the PCR hearing, Bethca testified that in July 2012, he contacted the Applicant by letter and indicated he was willing to testify on his behalf in a court setting. Bethca testified that he and the Applicant were co-defendants along with a third individual named Matthew Cade.¹ Bethca testified that he was the most culpable of the three (3) defendants and admitted both at his own

¹ This Court notes the Dillon County Clerk of Court records reflect that Bethca and Cade were originally charged with the same crimes as the Applicant. The records further reflect Bethca pled guilty to voluntary manslaughter on November 16, 2011, and was sentenced by the Honorable J. Michael Baxley to fifteen (15) years. The records also reflect Cade pled guilty to voluntary manslaughter on November 17, 2011, and was sentenced by Judge Baxley to seven (7) years.

guilty plea and during the PCR hearing he had the weapon and shot the victim. Bethea also testified he forced the Applicant to participate in the robbery. Bethea testified he was previously represented by Myesha Brown, Esq., and Marshall Weaver, Esq.² Bethea indicated, to his knowledge, Applicant's counsel never attempted to interview him either directly or through his attorneys. Bethea further testified he would have made the same statements on the Applicant's behalf prior to and at the time of Applicant's plea. Counsel testified he never contacted either of Bethea's attorneys to investigate Bethea or any statements he may have made.

"Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. 668, 687 (1984). Prejudice from counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992). This Court finds the testimony of the Applicant, Bethea and counsel to be credible as it relates to this allegation. This Court finds counsel was ineffective for failing to interview Bethea, resulting in Applicant's involuntary guilty plea. This Court finds had counsel investigated Bethea, he would have discovered Bethea would have presented favorable testimony to aid in Applicant's defense at trial. This Court further finds had counsel investigated Bethea, Applicant would not have pled guilty but would have insisted on proceeding to trial. Without this information, Applicant could not have made a knowing and intelligent decision on whether to proceed to trial or plead guilty. Accordingly, this Court finds Applicant has met his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174. Accordingly, this Court finds Applicant is entitled to a new trial.

2. Ineffective Assistance of Appellate Counsel

² Bethea testified that he had the opportunity to consult with his former attorney, Mr. Weaver, prior to testifying at the PCR hearing and he also understood he was not under any obligation to testify.

Applicant alleged and testified appellate counsel was ineffective for for filing an Anders brief.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005). When a claim of ineffective assistance of counsel is based upon a failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id. Where the result of appeal would have been different had counsel not been deficient, the appropriate remedy is to grant a new trial. Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001).

Based on the Applicant's testimony and a review of the record, this Court finds Applicant did not receive ineffective appellate counsel. Applicant failed to show appellate counsel was ineffective or that there were any valid direct appeal issues which appellate counsel should have raised. Accordingly, this Court denies Applicant any relief as it relates to his claim against appellate counsel.

CONCLUSION

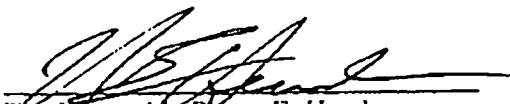


Based on all the foregoing, this Court finds and concludes Applicant has met his burden of proof in showing he received ineffective assistance of counsel and counsel's performance prejudiced him as it relates to counsel's failure to investigate Bethea. This Court further finds and concludes Applicant has met his burden of proof in establishing that his guilty plea was unknowingly and involuntarily entered. Applicant's remaining allegations are dismissed with prejudice. Accordingly, this application for post-conviction relief must be granted.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief is granted;
2. Applicant's convictions are vacated; and
3. Applicant receive a new trial.

AND IT IS SO ORDERED this 25th day of January 2016.


The Honorable Roger E. Henderson
Presiding Judge
Fourth Judicial Circuit

