

THE

GIESE

LAW FIRM, LLC

July 6, 2016

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RECEIVED

JUL 11 2016

S.C. SUPREME COURT

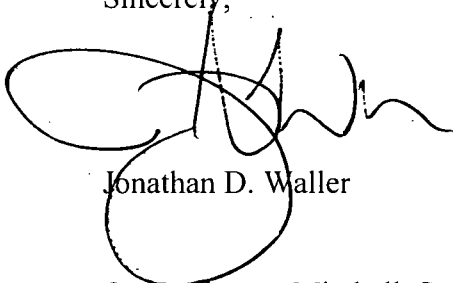
Re: Kentrell T. Liburd vs. State of South Carolina
C/A No: 2014-CP-38-00738

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Liburd in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-708-6767.

Sincerely,



Jonathan D. Waller

Cc: J. Clayton Mitchell, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Maité Murphy, Circuit Court Judge

2014-CP-38-00738

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JUL 11 2016

Kentrell T. Liburd, #357498,

Appellant,

v.

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Kentrell T. Liburd, #357498, appeals the Order of Dismissal denying his Application for Post-Conviction Relief, issued by the Honorable Maité Murphy, Presiding Judge, First Judicial Circuit, and served on counsel by letter dated June 8, 2016.



Jonathan D. Waller
Giese Law Firm
SC Bar No.: 76290
1315 Blanding Street
Columbia, SC 29201
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803-708-6769 (fax)
jwaller@thegieselawfirm.com
ATTORNEY FOR PETITIONER

This 7 day of July, 2016.

Other Counsel of Record:
J. Clayton Mitchell, Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Maité Murphy, Circuit Court Judge

2014-CP-38-00738

RECEIVED

JUL 11 2016

SC SUPREME COURT

Kentrell T. Liburd, #357498,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Clayton Mitchell, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 7th day of July 2016, to his office located at P.O. Box 11549, Columbia, SC 29211.


Kelly Giese

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Kentrell T. Liburd, #357498,

2014-CP-38-00738

Applicant, ATTEST: TRUE COPY

ORDER OF DISMISSAL

v.

State of South Carolina,

Winnifa B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA
Respondent.

FILED FOR RECORD
WINNIFA B. CLARK
CLERK OF COURT
ORANGEBURG, S.C.

2015 AUG 26 1 A 12 02

This matter comes before the Court pursuant to an application for post conviction relief (PCR) filed June 12, 2014. Respondent made its Return on February 2, 2015, requesting an evidentiary hearing be convened. Jonathan D. Waller, Esquire was appointed by the Orangeburg County Clerk of Court. An evidentiary hearing was held on May 21, 2015, at the Dorchester County Courthouse. Applicant was present and represented by Counsel Waller. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's plea counsel, Margaret E. Hinds, Esquire. This Court had before it the Orangeburg County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, and the guilty plea transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was indicted at the June and December 2012 terms of the Orangeburg County Grand Jury for Murder (2012-GS-38-0678) and Armed Robbery (-2053). Applicant was represented by Margaret Elizabeth Hinds, Esquire. On October 22, 2013, Applicant appeared before the Honorable Edgar W. Dickson and

pleaded guilty to the lesser included charge of Voluntary Manslaughter and to Armed Robbery pursuant to a negotiated plea agreement. Judge Dickson sentenced Applicant to twenty-five years' (25) imprisonment for Voluntary Manslaughter and ten years' (10) imprisonment for Armed Robbery, to be served consecutively.

A notice of appeal was filed on November 1, 2013. The South Carolina Court of Appeals dismissed the appeal for failure to provide a sufficient explanation as required by the rules. The Remittitur was returned on January 24, 2014.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel in failing to investigate Applicant's codefendant's competency.

II. SUMMARY AND EVIDENCE PRESENTED AT THE PCR HEARING

Applicant's Testimony

Applicant testified he is nineteen (19) years old and was sixteen (16) when the incidents occurred. Counsel Hinds was appointed to represent Applicant. He testified they met one time where they discussed the potential penalties murder and armed robbery carry. He testified they discussed some but not all of the evidence the State planned to present if the case were to go to trial.

Applicant alluded to the fact that he was enrolled in school at the time of the incident and that he could not be in two places at once. He testified that he learned that his codefendant Gregory Foye was found to be not competent on October 16, 2013. He testified that he gave ^{investigator's} ~~investigator's~~ Foye's name and further detailed his involvement at the plea hearing before Judge Dickson. He testified he understood that he was being charged under the hand of one, hand of all

theory. Applicant had issues with the statement he gave to investigators and did not believe that statement to be an accurate recitation of his version of events.

Counsel Margaret E. Hinds's Testimony

Counsel testified she first met Applicant on March 30, 2012, while he was incarcerated at the Department of Juvenile Justice. Counsel reviewed the charges and the possible punishment and collateral consequences of the charges Applicant would be facing if convicted. Counsel acknowledged that she knew one of Applicant's ^{codefendant's} codefendant gave a statement incriminating Applicant and that the codefendant was later found not competent. Counsel testified there was plenty of other evidence that pointed to Applicant, including his own written confession. The fact that a codefendant's statement could be challenged did not change the fact that the State had overwhelming evidence of Applicant's involvement, according to Counsel. She further testified that Applicant conveyed his wishes to plead guilty on August 8, 2013, at a meeting the two had. Applicant ultimately entered into a negotiated plea agreement where he was able to plead to the lesser included offense of voluntary manslaughter.

III. APPLICABLE LAW

In a post-conviction relief action, 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 the application alleges ineffective assistance of counsel as a ground for relief, 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, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order 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. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show 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, 59 (1985).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds counsel's testimony to be credible and persuasive

on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Failure to Investigate

This Court finds Applicant failed to meet his burden to prove that counsel's performance was either deficient or ineffective for failing to investigate the fact that a codefendant who had given a statement implicating Applicant's involvement in the crime was later found to be not competent. "Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted). In light of Counsel's credible testimony that she evaluated and apprised Applicant on the matter, Applicant has produced no reliable testimony that would diminish his culpability on the charges. Counsel was aware of this information at the time of representation and did not consider it helpful to Applicant's case. Counsel's testimony is persuasive as there is clearly overwhelming evidence to support Applicant's guilty plea including his own confession. Counsel not only knew about the codefendant's competency issue, but she made a decision that it would not be helpful to Applicant.

Additionally, the record reflects Applicant fully admitted his guilt to the plea court. "A guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 129 (2014) (citing State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013); Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Notably the South Carolina Supreme Court has held "[a] guilty plea represents a break in the chain of events which has preceded it in the criminal

process.” Id (citations omitted). “When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” Id (citing Rice, 401 S.C. at 332, 737 S.E.2d at 486). Thus, this allegation is readily denied and dismissed.

All Other Allegations

As to any and all allegations that were raised in the application not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

V. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate ^{Counsel's} ~~counsel's~~ performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf.

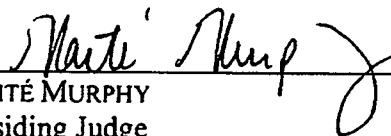
Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

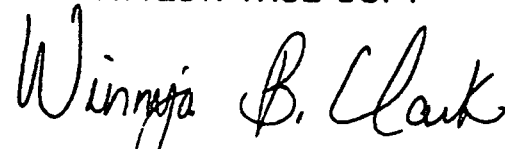
IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 18 day of Aug., 2015.

St. George, South Carolina


MAITÉ MURPHY
Presiding Judge

ATTEST: TRUE COPY

CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA



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