

FALK LAW FIRM, LLC.

James K. Falk

(843) 606-6007

(843) 972-9005 Fax Admitted to practice: KY(1984) S.C. (2010) jfalklaw@gmail.com

July 14, 2016

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

JUL 19 2016

S.C. SUPREME COURT

Re: Frank Middleton, 2014-CP-10-05043

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Charleston County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc: Rutledge Johnson, Esq.; Frank Middleton 284177.

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable Doyet A. Early, III, Circuit Judge

RECEIVED

JUL 19 2016

Case No.: 2014-CP-10-05043

S.C. SUPREME COURT

Frank Middleton 284177.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Frank Middleton appeals the Honorable Doyet A. Early, III June 15, 2016, Order of Dismissal. Undersigned counsel received notice of entry of the order on July 11, 2016. A copy of the order on appeal is attached hereto.



James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

July 14, 2016

Rutledge Johnson, Esq
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

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Court of Common Pleas

Honorable Doyet A. Early III, Circuit Judge

JUL 19 2016

S.C. SUPREME COURT

Case No.: 2014-CP-10-05043

Frank Middleton 284177.....PETITIONER

V.

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PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Rutledge Johnson, Esq, Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this July 14, 2016.



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Charleston, SC 29402

Esquire, represented the Applicant during pleading. On April 19, 2014, the Applicant pled guilty before the Honorable Thomas L. Hughston, Jr. and was sentenced to fourteen (14) years for each charge to run concurrently. The Applicant received credit for time served in the amount of one year and three-hundred and fifty three (353) days. The Applicant did not appeal his convictions or sentences.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
 - a. "Counsel informed defendant to take plea deal of time served and recommendation of no sentence."
2. "The court erred in accepting guilty plea without advising defendant of the consequence"
 - a. "Had defendant known he was going to get 14 years he would not have take [sic] the plea"
3. "The Solicitor office did not honor the verbal plea agreement with Counsel"
 - a. "By not honoring plea deal the Solicitor Office reneged on promise to defendant"

SUMMARY OF TESTIMONY

At the evidentiary hearing, Applicant testified that Counsel represented him at his plea, however, Beattie Butler, Esquire had represented him throughout the case before Mr. Butler fell ill. Applicant then testified he spoke with the Solicitor's office on the Marley Lyons' case in order to offer assistance because he knew the identification of the shooter. There were no promises made

from the solicitor; however, Applicant testified at the trial on behalf of the State, which resulted in a conviction.

Concerning Counsel, Applicant testified he and Counsel discussed Applicant's county jail activities. Applicant claimed the solicitor was going to offer a strong arm robbery plea with a sentence of time served. Applicant stated that Counsel said the judge "may" grant Applicant five years' probation. Applicant then stated he and Counsel did not discuss the armed robbery charge. Applicant stated he told the judge there were no promises made in his case because of the discussions he had with Counsel. He also claimed if he answered "no" to certain questions during his plea, the plea judge may not accept the plea deal. Applicant claimed he was ready to go to trial. Applicant then testified he knew there was a 10-30 year exposure if he pursued a trial and that he had prior strikes. Applicant's main claim was that he pled guilty because other inmates knew he cooperated with police and was scared of being labeled "a snitch." Applicant did not want to get a prison and thought he was getting a sentence of time served. Applicant admitted there were no written offers in this case, but should have asked for this so-called offer for time served in writing. Applicant then claimed if he knew he was getting prison time than he would not have pled guilty. Applicant lastly admitted that he rejected plea offers of 10 years and 0 to 15 years.

On cross-examination, Applicant admitted that he knew if he were successful in this post-conviction relief action, he would be eligible for a sentence of life without parole based on his prior criminal history. Applicant admitted he was guilty of this crime. Applicant further admitted there were no threats or promises made to get him to plead guilty. Lastly, Applicant admitted he apologized for his actions in this case.

Counsel testified that he met with the Applicant a day before or the day of the plea for the first time. Counsel stated he had spoken to the solicitor on the case and the solicitor had admitted that Applicant was a huge help in the Marley Lyons case. Counsel stated he attempted to get an offer from the State for a strong arm robbery charge instead of armed robbery. Counsel said the solicitor on the case expressed, "I do not care if [Applicant] gets time." Counsel thought this was a great offer because he could ask for a sentence of time served but did not know what the plea judge was going to do. Counsel then testified that the final plea offer was for Applicant to plea to strong arm robbery and for the solicitor to *nol prosee* the gun charges. During Applicant's plea, Counsel, during mitigation, stated, "I do not believe the Solicitor's asking for active time. I think the time that he's done is sufficient, according to the solicitor, but if a period of probation might be granted I don't think we'll be seeing Mr. Middleton back." (p. 11 lines 6-10). However, at the end of Applicant's plea, the plea judge stated, "[u]nfortunately, that record is so overwhelming, Mr. Middleton, and that all the good things you are doing now just dwarf, go very small in comparison to that." (p. 11 lines 21-24).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

DAEY

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). 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, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability 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 (1985).

DAES

This Court finds the Applicant's testimony regarding Counsel's ineffectiveness is not credible while also finding Counsel's testimony is credible.

This Court also finds Counsel provided effective assistance of counsel in this case. Counsel advised Applicant of the charges and the sentences the charges carried. Counsel negotiated with the State in Applicant's best interest, namely that Counsel negotiated a sentence in which he could argue for a time served-sentence. However, the plea judge, in his proper discretion, decided that based on Applicant's prior criminal history, he would serve an active prison sentence. Applicant testified he pled because Counsel promised him a sentence of time served and because he was afraid of being labeled a snitch by other inmates; this Court does not find this credible as Applicant certainly could have asked the plea judge to clarify any plea offers from the State. Applicant admitted nobody threatened him to plead guilty, and there were no promises other than the negotiations to entice him to plead guilty. This Court finds Applicant made the decision to plead guilty on his own accord with the help of learned, prepared counsel. Additionally, this Court finds Applicant made this decision freely and voluntarily without any threats or promises from anyone else. Furthermore, this Court finds that it was ultimately the Applicant's decision to plead guilty.

This Court also finds the guilty plea transcript dispositive of this case as it is a contemporaneous recording of the proceedings. This Court finds the Applicant waived his rights to a jury trial. This Court further finds Counsel made a strategic decision to negotiate a strong arm robbery charge for dismissal of the gun charges as Applicant contributed to the solving of a murder case.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, these allegations are denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice. This Court also finds as to all other allegations that Applicant failed to present evidence of such claims and thus, this Court deems them abandoned.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!

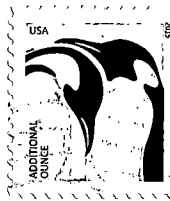


Doyet A. Early, III
Presiding Circuit Court Judge
Ninth Judicial Circuit

June 15, 2016

Bamberg, South Carolina

2014-CP-10-5043



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