



RECEIVED

JUL 28 2016

SC SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

July 28, 2016

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

Re: Carlos Dewan Smith v. State of South Carolina
2014-CP-42-2410

Dear Mr. Shearouse:

Enclosed are the following:

1. Notice of Appeal
2. Proof of Service of the notice of appeal on the Respondent
3. A copy of the order which is to be challenged on appeal.
4. A letter ordering the PCR transcript from the court reporter

Sincerely,

Alicia A. Olive
Assistant Attorney General

AAO/ah
Enclosures

cc: J. Brandt Rucker, Esquire
The Honorable M. Hope Blackley, Clerk of Court of Spartanburg County
The Honorable Barry J. Barnette, Seventh Circuit Solicitor
SCCID, Division of Appellate Defense
David M. Tatarsky, Esquire
Trisha Allen, Victims Services

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2014-CP-42-2410

Carlos Dewan Smith, #276619,

Respondent,

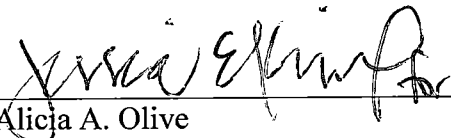
v.

STATE OF SOUTH CAROLINA

Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable R. Ferrell Cothran's order dated June 8, 2016 and filed June 24, 2016 granting post-conviction relief to the Respondent. The State received notice of entry of the order on June 28, 2016. A copy of the order on appeal is attached to this notice.


Alicia A. Olive
Assistant Attorney General
South Carolina Bar No. 102089
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

July 28, 2016

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL TO SPARTANBURG COUNTY
COURT OF COMMON PLEAS

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2014-CP-42-2410

CARLOS DEWAN SMITH, #276619,

Respondent,

v.

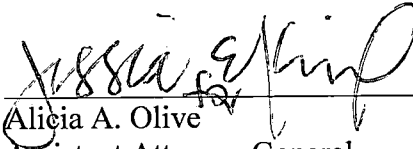
STATE OF SOUTH CAROLINA

Petitioner.

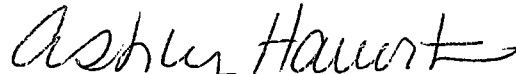
PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on July 28, 2016, to J. Brandt Rucker, Esquire, his attorney of record, to the address below.

Mr. John Brandt Rucker, Esquire
Brandt Rucker Attorney At Law
522 North Church Street
Greenville, SC 29601


Alicia A. Olive
Assistant Attorney General

SWORN to before me this 28th day of July, 2016.


Notary Public for South Carolina.
My Commission Expires: 3-18-2023

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Carlos Dewan Smith, #276619)
)
 Applicant,)
))
 v.)
))
 State of South Carolina,)
))
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT
 2016 JUN 24 AM 10:25
 M. HOPE BLACKLEY
 2014-CP-42-2410

**ORDER GRANTING
 RELIEF**

This matter came before the Court by way of an Application for Post-Conviction Relief (PCR). The Applicant is represented by Brandt Rucker, Esq. The State of South Carolina was represented by Assistant Attorney General Alicia Olive. The Applicant is currently serving two twenty year concurrent sentences in the South Carolina Department of Corrections pursuant to a guilty plea. Of note, the

A hearing was held on January 12, 2016. The Applicant appeared and testified. The applicant's former attorney, Timothy Ray, Esq., appeared and also gave testimony. The Court reviewed the entire case file, including the plea transcript, and heard the testimony of all parties and witnesses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the January 2013 term of the Spartanburg County Grand Jury for four counts of distribution of crack cocaine, third offense (2012-GS-42-1993, -

6353, -6354, -6357), possession of marijuana, second offense, (2012-GS-42-2490); contributing to the delinquency of a minor (2012-GS-42-2482); distribution of crack cocaine within one half mile of a school (2012-GS-42-6356); possession of a weapon having been convicted of a crime of violence (2012-GS-42-6355); and possession of Oxycodone, third offense (2012-GS-42-6352).

On October 8, 2013, the applicant pled guilty as indicted. The Honorable J. Mark Hayes II sentenced the applicant to concurrent terms of twelve years imprisonment for each distribution of crack cocaine charge; five years for possession of a firearm by a person convicted of a violent felony; one year for possession of marijuana; three years for contributing to the delinquency of a minor; five years for the possession of Oxycodone, third offense, and ten years for the distribution of crack within one half mile of a school. The applicant was also on probation at the time of the guilty plea, and that probation was revoked and the remaining sentence was to be served concurrently. Additionally, the applicant has the following criminal record as announced by the assistant solicitor at the guilty plea: 1998 public disorderly conduct, 2000 possession of marijuana second offense, possession of Alprazolam, two counts of possession of crack cocaine, second offense, unlawful sale of a pistol, and two counts of assault and battery with the intent to kill. In 2010, he was convicted of simple possession of marijuana and possession with the intent to distribute crack cocaine, first offense.

The applicant filed a timely application on July 16, 2014. In his application the applicant alleges he is being held in custody unlawfully for the following reason: Ineffective assistance of counsel, subject matter jurisdiction, and violation of constitutional rights. The applicant alleges that his plea attorney gave him erroneous

advice, and that erroneous advice prejudiced him and that he should be granted a new trial. This court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has had the opportunity to weigh the testimony of the witnesses, review the transcript, and review and weigh the evidence in this case pursuant to S.C. Code Ann. § 17-27-80 (2003).

The Applicant alleges he received ineffective assistance of counsel. For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052). Additionally, 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).

QJC | A guilty plea defendant is also entitled to the effective assistance of plea counsel. Hill v. Lockhart, 474 U.S. 52, 58 (1985); Hyman v. State, 397 S.C. 35, 43, 723 S.E.2d 375, 379 (2012). The two-prong Strickland analysis applies to PCR claims alleging plea counsel was ineffective. Hill, 474 U.S. at 58. "In the context of a guilty plea, the

deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered." Taylor v. State, 404 S.C. 350, 360, 745 S.E.2d 97, 2008 (2012), TAM 10: 25 show prejudice, a guilty plea defendant must establish there is a reasonable probability that, but for plea counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill, 474 U.S. at 58-60; Hyman, 397 S.C. at 43, 723 S.E.2d at 379. The prejudice prong "focuses on whether [plea] counsel's constitutionally ineffective performance affected the outcome of the plea process." Taylor, 404 S.C. at 360, 745 S.E.2d at 102. "In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Bennett v. State, 371 S.C. 198, 204, 638 S.E.2d 673, 675 (2006).

The applicant claims that his plea counsel failed to adequately inform him of the effect of his prior record on his potential sentence, and that this ineffective performance led him to enter a guilty plea. Specifically, the applicant alleges, and plea counsel agrees, that the applicant was told by his plea attorney that he was eligible for a sentence of life without the possibility of parole if he was tried and convicted of because of his two previous assault and battery with the intent to kill (ABWIK).

The law governing life without parole sentences in South Carolina is at South Carolina Code § 17-25-45:

SECTION 17-25-45. Life sentence for person convicted for certain crimes.

(A) Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has either:

(1) one or more prior convictions for:

(a) a most serious offense; or

(b) a federal or out-of-state conviction for an offense that would be classified as a most serious offense under this section; or

(2) two or more prior convictions for:

(a) a serious offense; or

(b) a federal or out-of-state conviction for an offense that would be classified as a serious offense under this section.

(B) Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has two or more prior convictions for:

(1) a serious offense;

(2) a most serious offense;

(3) a federal or out-of-state offense that would be classified as a serious offense or most serious offense under this section; or

(4) any combination of the offenses listed in items (1), (2), and (3) above.

(C) As used in this section:

(1) "Most serious offense" means:

16-1-40 Accessory, for any offense enumerated in this item 16-1-80 Attempt, for any offense enumerated in this item 16-3-10 Murder 16-3-29 Attempted Murder 16-3-50 Voluntary manslaughter 16-3-85(A)(1) Homicide by child abuse 16-3-85(A)(2) Aiding and abetting homicide by child abuse 16-3-210 Lynching, First degree 16-3-210(B) Assault and battery by mob, First degree 16-3-620 Assault and battery with intent to kill 16-3-652 Criminal sexual conduct, First degree 16-3-653 Criminal sexual conduct, Second degree 16-3-655 Criminal sexual conduct with minors, except where evidence presented at the criminal proceeding and the court, after the conviction, makes a specific finding on the record that the conviction obtained for this offense resulted from

2016 JUN 24 AM 10:25

2016 JUN 24 AM 10:25

M. HOPE BLACKLEY

consensual sexual conduct where the victim was younger than the actor, as contained in
Section 16-3-655(3) 16-3-656 Assault with intent to commit criminal sexual conduct,
First and Second degree 16-3-910 Kidnapping 16-3-920 Conspiracy to commit
kidnapping 16-3-1075 Carjacking 16-3-2020 Trafficking in persons 16-11-110(A) Arson,
First degree 16-11-311 Burglary, First degree 16-11-330(A) Armed robbery 16-11-
330(B) Attempted armed robbery 16-11-540 Damaging or destroying building, vehicle,
or other property by means of explosive incendiary, death results 24-13-450 Taking of a
hostage by an inmate 25-7-30 Giving information respecting national or state defense to
foreign contacts during war 25-7-40 Gathering information for an enemy 43-35-85(F)
Abuse or neglect of a vulnerable adult resulting in death 55-1-30(3) Unlawful removing
or damaging of airport facility or equipment when death results 56-5-1030(B)(3)
Interference with traffic-control devices or railroad signs or signals prohibited when
death results from violation 58-17-4090 Obstruction of railroad, death results.

(2) "Serious offense" means:

(a) any offense which is punishable by a maximum term of imprisonment for thirty years
or more which is not referenced in subsection (C)(1);

(b) those felonies enumerated as follows:

16-3-220 Lynching, Second degree 16-3-210(C) Assault and battery by mob, Second
degree 16-3-600(B) Assault and battery of a high and aggravated nature 16-3-810
Engaging child for sexual performance 16-9-220 Acceptance of bribes by officers 16-9-
290 Accepting bribes for purpose of procuring public office 16-11-110(B) Arson, Second
degree 16-11-312(B) Burglary, Second degree 16-11-380(B) Theft of a person using an
automated teller machine 16-13-210(1) Embezzlement of public funds 16-13-230(B)(3)
Breach of trust with fraudulent intent 16-13-240(1) Obtaining signature or property by
false pretenses 16-25-20(B) Domestic violence, First degree 16-25-65 Domestic violence
of a high and aggravated nature 38-55-540(3) Insurance fraud 44-53-370(e) Trafficking
in controlled substances 44-53-375(C) Trafficking in ice, crank, or crack cocaine 44-53-
445(B)(1)&(2) Distribute, sell, manufacture, or possess with intent to distribute

2016 JUN 24 AM 10:25

M. HOPE BLACKLEY

controlled substances within proximity of school 56-5-2945 Causing death by operating
vehicle while under influence of drugs or alcohol; and

2016 JUN 24 AM 10:25

(c) the offenses enumerated below:

16-1-40 Accessory before the fact for any of the offenses listed in subitems (a) and (b)

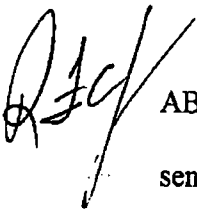
M. HOPE BLACKLEY

16-1-80 Attempt to commit any of the offenses listed in subitems (a) and (b) 43-35-85(E)

Abuse or neglect of a vulnerable adult resulting in great bodily injury.

(3) "Conviction" means any conviction, guilty plea, or plea of nolo contendere.

Plea counsel advised the applicant that his two previous ABWIK combined with a conviction for distribution of crack cocaine within one half mile of a school made him eligible for a potential life without parole sentence because it is a serious offense. Specifically, plea counsel advised him the two ABWIK's would be treated as two prior convictions for most serious offenses, and combined with the a conviction for distribution of crack cocaine within one half mile of a school would be a serious offense, and those combined convictions would require a sentencing judge to sentence him to life without parole.

 Plea counsel failed to investigate and research the law to determine if the prior ABWIK's qualified as two prior most serious offenses, Based on the review of the sentencing sheets from those cases, and the testimony of the applicant, it is apparent that the two ABWIK's arose out of one occurrence. South Carolina § 17-25-50 states "in determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses."

The South Carolina Supreme court illustrated a proper application of section 17-25-50 to

preclude a life without parole sentence. Woody was convicted of second-degree burglary and had two prior convictions for armed robbery. The State sought to use both robbery convictions for enhancement purposes and a life without parole sentence. The State's position was rejected because the armed robberies constituted, as a matter of law, one offense for purposes of section 17-25-50. The two armed robberies arose from a single incident at the same time and at the same location—a robbery of the store's clerk and the store itself. State v. Woody, 359 S.C. 1, 596 S.E.2d 907 (2004).

In this case, the applicant's previous convictions for ABWIK arose out of his pleading guilty to shooting at two people in a car. Under Woody, it is clear that this would be deemed one occurrence or one course of conduct, and would only be counted as one strike because it counted as one most serious offense. Plea counsel misinformed the applicant about the status of the law. South Carolina's Supreme Court has ruled that "the Sixth Amendment guarantee of effective assistance of counsel requires that counsel accurately inform a defendant, to the extent possible, of the qualifying nature of a prior offense for enhancement purposes." Berry v. State 381 S.C. 630, 675 S.E.2d 425 (2009)

In this case, plea counsel did not meet the proper standard under Strickland, and the applicant was prejudiced by this failure. Accordingly, this case must be remanded for a new trial.

CONCLUSION

Based on the foregoing, the Court finds and concludes the applicant has met his burden, and that this case must be remanded for a new trial.

IT IS THEREFORE ORDERED:

1. The applicant's current sentence should be vacated and the matter should be remanded for a new trial.

2016 JUN 21 AM 10:25
M. HOPE BLACKLEY

AND IT IS SO ORDERED this 8 day of June, 2016.

Manning, S.C.

R. Ferrell Cothran, Jr.
The Hon. R. Ferrell Cothran, Jr.
Presiding Judge, Seventh Judicial Circuit

Spartanburg, SC

Date: _____

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239



M. Hope Blackley
Clerk of Court

June 28, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH JUDICIAL CIRCUIT

Carlos Deven Smith
Applicant #27609

CASE # 2016CP42-2410

VS
Shel
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Order last, Ruling
In this action dated 6-8 2016 on 6-28-16

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Oskey Hawthath
John Rucker
Suzanne White

6-28-16
(Date)

Corie Sear
(Signature)