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August 16, 2016

RECEIVED

AUG 22 2016

SC SUPREME COURT

Via US Mail

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

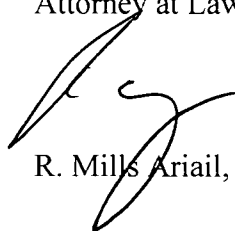
***Re: Notice of Intent to Appeal from Trenton James Black v. State of SC C.A. No.:
2013-CP-39-0101***

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable Knox McMahon's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Pickens County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law



R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

AUG 22 2016

SC SUPREME COURT

R. Knox McMahon, Circuit Court Judge

Case No. 2015-CP-39-0101

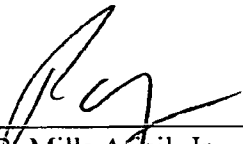
Trenton James Black,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable Knox McMahon's Order of Dismissal dismissing Appellant's application for post-conviction relief. On July 29, 2016, the Honorable Knox McMahon signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on August 11, 2016. A copy of the Honorable Knox McMahon's Order of Dismissal is attached.



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Attorney for Trenton James Black

Greenville, South Carolina
August 16, 2016

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AUG 22 2016

SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2015-CP-39-0101

Trenton James Black,..... Appellant,

v.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this August 16, 2016, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Patrick Schmeckpeper, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

Pickens County Clerk's Office
Pickens County Courthouse
214 East Main Street
Pickens, SC 29671

Trenton James Black SCDC# 282569
Perry Correctional Institution
430 Oaklawn Road, Q-3-101
Pelzer, SC 29669

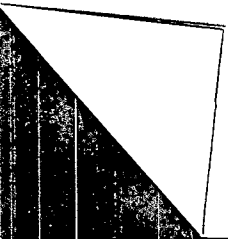
SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck

Denise Tanner LaBeck

August 16, 2016

1944



STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

Trenton James Black,
S.C.D.C. No. 282569

Applicant,

v.

State of South Carolina,

Respondent.

2015 AUG 11 24
IN THE COURT OF COMMON PLEAS
CLERK OF COURT
THIRTEENTH JUDICIAL CIRCUIT
PICKENS COUNTY
SOUTH CAROLINA
C.A.C. No. 2015-CP-39-0101

**ORDER OF DISMISSAL
(with prejudice)**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on January 23, 2015. Respondent filed its Return on June 2, 2015. An evidentiary hearing into the matter was convened on April 18, 2016, at the Pickens County Courthouse. Applicant was present at the hearing and was represented by Mills Ariail, Jr., Esquire. Respondent was represented by Patrick Schneckpeper, Esquire, of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Pickens County Clerk of Court's orders of commitment. The Pickens County Grand Jury indicted the Applicant at the June 2013 term of General Sessions for resisting arrest with assault (2013-GS-39-1809), resisting arrest with a deadly weapon (2013-GS-39-1810), possession of a weapon during commission of a violent crime (2013-GS-39-1811), attempted murder (2013-GS-39-1812), and unlawful carrying of a pistol (2013-GS-39-1814). Steven Alexander, Esquire represented the Applicant.

On May 22, 2014, the Applicant pled guilty.¹ The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of 10 years for resisting arrest with assault, 10 years

¹ The State not prossed a charge of possession of methamphetamine (2013-GS-39-1807).

for resisting arrest with a deadly weapon, 5 years for possession of a weapon during commission of a violent crime, 30 years for attempted murder, and time-served for unlawful carrying of a pistol. The Applicant did not appeal.

Allegations

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Statute unconstitutional."
 - a. The attempted murder statute is unconstitutionally vague.
2. "Ineffective of counsel."
 - a. Failed to object to or withdraw the Applicant's guilty plea because the State disregarded its oral agreement that it would not make a sentence recommendation.
 - b. Failed to object to the State's misleading statements concerning the facts of the case.
 - c. Induced the Applicant's guilty plea with false information.
 - d. Failed to "properly object to prosecutor's statement that 'he viewed Applicants plea to attempted murder as a plea to murder.'"
3. "Due process violated."
4. "Plea agreement breached."
 - a. "Applicant pled guilty on the basis of promises by the State which were not fulfilled."
5. "Prosecutorial misconduct."
 - a. "The prosecutor stated to the court concerning Applicants guilty plea to attempted murder, that he viewed the charge as murder since Officer Ticknor could have been killed."

In an "Amendment to Application for Post Convict Relief" filed March 31, 2015, the Applicant made the following allegations:

1. Ineffective assistance of counsel:
 - a. Failed to properly object to the statement made by the Sheriff during the guilty plea hearing.

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 reviewed the Clerk of Court records regarding the subject guilty pleas, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court makes the following findings of fact and conclusions of law based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler, 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, 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, 286 S.C. 441, 334 S.E.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.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." Id. at 117-18, 386 S.E.2d at 625. Because Applicant pled guilty, he 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).

Plea Agreement

Applicant first argued counsel was ineffective failing to object when the solicitor allegedly violated the terms of his plea agreement by recommending a forty (40) year sentence. This Court finds he has failed to meet his burden.

In the context of a guilty plea, a defense attorney may be deficient in failing to object when a solicitor makes a sentencing recommendation in violation of a plea agreement. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000). The record and testimony in this case, however, indicate that there was never an actual agreement that the solicitor would not make a recommendation. Counsel testified that he told Applicant it was a straight up plea, and that they could ask the judge for the sentence they thought was right. He said he did not remember telling Applicant whether the solicitor would make a recommendation. Counsel clarified that he may have told Applicant the solicitor would not give a favorable recommendation, but that he never told Applicant the State would not ask for a specific amount of time. Compare Smith v. State, 407 S.C. 270, 277, 754 S.E.2d 900, 904 (Ct. App. 2014) (finding counsel deficient where she told defendant the solicitor was not going to make a sentencing recommendation, and admitted she made a mistake in failing to put all of the terms of the plea agreement on the record and failing to object when the solicitor requested the maximum sentence), aff'd, 413 S.C. 194,

775 S.E.2d 696 (2015).² This Court finds counsel's testimony credible. Applicant's contrary testimony is not credible.

Even assuming, however, that Applicant was telling the truth at the evidentiary hearing, there is nothing in the record to indicate counsel knew or should have known Applicant misunderstood the terms of the agreement with the solicitor and believed there would not be a recommendation. See Strickland at 690, 104 S.Ct. at 2066 (reviewing courts are required to make every effort to "eliminate the distorting effects of hindsight," and "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct **from counsel's perspective at the time.**") (emphasis added). Counsel was not required to make objections based on information that was not available to him at the time. See, e.g., Lee v. State, 396 S.C. 314, 322, 721 S.E.2d 442, 447 (Ct. App. 2011) (holding counsel could not be deficient for failing to request competency hearing or evaluation if she had no indication of client's mental status); Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial."). Further, Applicant had the opportunity to speak up to either the judge or counsel during his plea hearing. The solicitor made the sentencing recommendation immediately following his recitation of the facts. Plea Tr., p. 12, l. 22-23. Thereafter, rather than express his misunderstanding – which would have given counsel the opportunity to stand down or make an objection - Applicant said that the solicitor's statement of the facts was true and accurate. Plea Tr., p. 13, l. 3-5. Given the record and testimony presented at the evidentiary hearing, this Court

² The Supreme Court issued a published opinion affirming the court of appeals' reasoning in Smith, but clarifying that the appropriate remedy for ineffective assistance of counsel in this context was a new trial rather than a new sentence. 413 S.C. at 195, 775 S.E.2d at 696. However, because neither party appealed the court of appeals' ruling remanding the matter for resentencing, the Supreme Court affirmed *in toto*. Id. at 196, 775 S.E.2d at 697.

finds counsel's performance was objectively reasonable. Moreover, any misunderstanding on Applicant's part was unreasonable in light of counsel's credible testimony.

Applicant has also failed to show prejudice, or that but for counsel's allegedly deficient performance he would have refused to plead guilty and insisted on proceeding to trial. There is no serious indication that Applicant wanted a trial. Compare, Smith, 407 S.C. at 277, 754 S.E.2d at 904 (court concluded that both plea counsel and defendant intended to go to trial on the charge, and it was only when the solicitor offered to reduce the charge and remain silent on sentencing in exchange for his cooperation that Smith changed his mind about going to trial and pled guilty). Counsel testified that based on the state's evidence, this was not a case he would have wanted to take to trial.³ This Court agrees that the evidence against Applicant was substantial. The record indicates that Deputy Ticknor and at least two bystanders witnessed the event and were involved in detaining Applicant at the scene. Plea Tr., p. 10, l. 8-21. Further, as Applicant testified at the evidentiary hearing, he was truly remorseful for the incident, to the point that he wrote Deputy Ticknor a letter apologizing against the advice of his attorney. Plea Tr., p. 20, l. 11-17. Accordingly, in light of counsel's credible testimony, the strength of the State's evidence, and Applicant's apparent remorse to the potential detriment of his case, this Court finds his current testimony that he would have proceeded to trial had he known the solicitor was going to make a sentencing recommendation is not credible. As Applicant has failed to meet his burden with respect to this allegation, it is denied and dismissed.

Factual Recitation at Plea Hearing

Applicant further alleged counsel was ineffective for failing to inform him that the solicitor could recite the facts of his offense at the plea hearing, and failing to object when the

³ Counsel said that had the case gone to trial, Applicant's defense would have been that he was trying to kill himself rather Deputy Ticknor.

solicitor misstated the facts during that recitation. This Court finds Applicant has failed to meet his burden. First, counsel credibly testified that he told Applicant the solicitor could state his version of the facts at the hearing. He further testified that he did not object because of the serious nature of the other offenses. This Court finds both explanations are objectively reasonable.

Regardless, Applicant has failed to show that but for counsel's alleged deficiencies, he would have refused to plead guilty and proceeded to trial. Specifically, even if both allegations are factually true, Applicant admitted to the facts as recited by the solicitor at the plea hearing and pled guilty anyway. Plea Tr., 13, l. 3-5. As a result, his contrary testimony at the evidentiary hearing is not credible. This allegation is therefore denied and dismissed.

Statement by Law Enforcement

Applicant next alleges counsel was ineffective for failing to object to the statement by Sheriff Clark at his guilty plea hearing. This is also without merit. Counsel testified that he anticipated multiple law enforcement officers speaking at Applicant's guilty plea hearing because they also spoke during the bond hearing. Counsel said he would have objected if anything objectionable had occurred, and Applicant has failed to raise anything Sheriff Clark said that was factually or legally objectionable. Sheriff Clark spoke after Applicant pled guilty, and during sentencing. In determining what sentence to impose, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come. State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976). This allegation is therefore denied and dismissed.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and 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.

[Signature follows]

CONCLUSION

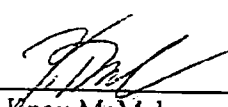
Based on the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCPP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

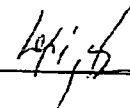
IT IS THEREFORE ORDERED

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

AND IT IS SO ORDERED this 29 day of July, 2016.

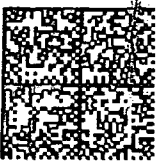


R. Knox McMahon
Presiding Judge
Thirteenth Judicial Circuit


_____, South Carolina

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