

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No. 2014-CP-38-1158

RECEIVED

AUG 19 2016

SC Court of Appeals

Carlos J. Kemp,

Respondent,

RECEIVED

AUG 24 2016

SC SUPREME COURT

v.

The State of South Carolina,

Appellant.

NOTICE OF APPEAL

Carlos J. Kemp appeals the orders of the Honorable Maite Murphy dated May 23, 2016 and August 01, 2016. Appellant received written notice of entry of the Order denying Motion to Reconsider on August 02, 2016.

August 17, 2016



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THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina, Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on August 17, 2016, addressed to its attorney of record, J. Croom Hunter, Esquire, Assistant Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549

August 17, 2016



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STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Carlos J. Kemp, #305605,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2014-CP-38-1158

RECEIVED

AUG 19 2016

ATTEST: TRUE COPY
ORDER OF DISMISSAL

Winnaja B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

SC Court of Appeals

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed September 16, 2014. Respondent made its Return on September 21, 2015, requesting an evidentiary hearing be convened. Glenn Walters, Sr., Esquire, represented Applicant. An evidentiary hearing was held on February 25, 2016, at the Dorchester County Courthouse. Applicant was present. 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, and Applicant's mother, Linda Kemp. 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 Clerk of Court for Orangeburg County. Applicant was indicted at the April 2014 term of the Court of General Sessions for Orangeburg County for Murder (2012-GS-38-1819). Applicant was represented by Margaret Hinds, Esq. On January 13, 2014,

Applicant pled guilty as indicted. The Honorable Edgar W. Dickson sentenced Applicant to thirty (30) years' imprisonment. Applicant did not appeal his conviction or sentence.

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

1. Involuntary and unintelligent guilty plea;
2. Ineffective assistance of counsel in:
 - a. Failing to investigate potential witnesses and the victim's cause of death
 - b. Failing to request a competency evaluation,
 - c. Failing to craft a defense strategy,
 - d. Failing to obtain all information pursuant to Rule 5¹/Brady²,
 - e. Failing to file a notice of appeal.

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

¹ Rule 5, SCRCrimP.

² Brady v. Maryland, 373 U.S. 83 (1963).

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

Involuntary and Unintelligent Guilty Plea

Applicant alleges he did not plead guilty knowingly and voluntarily. Applicant argues he did not understand the advice given to him by Counsel. This Court finds Applicant's guilty plea

was ~~entered~~^{MM} freely and voluntarily entered. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

Applicant claims he did not plead guilty voluntarily because he did not understand the charges and procedure of his case. He testified Counsel did not advise him correctly and that their meetings were very brief. He explained that he was only told that he was charged with murder and was facing a sentence of thirty years to life imprisonment. This Court finds these contentions meritless. This Court finds the record reflects Applicant was fully advised that he was pleading guilty and waived all challenges to the evidence against him. The plea court's thorough colloquy with Applicant demonstrates that he understood the consequences of pleading guilty. This Court finds Applicant's testimony not credible. Applicant presented no credible evidence as to why he should be able to depart from his statements at the plea hearing. This

Court finds very credible Counsel's testimony regarding her preparation and advice concerning the case. Counsel detailed numerous meetings where she reviewed his statements and the other evidence the State planned to use against him. Counsel's testimony that she did not have any difficulty communicating with Applicant is also persuasive. The record further reflects Applicant fully admitted his guilt to the plea court. Applicant also told Judge Dickson that he understood the charges and the consequences of pleading guilty. (Plea Tr. p. 6, lines 16-21). Therefore, this Court finds the plea judge correctly found Applicant's plea was freely, voluntarily^{MM} and intelligently made.

Ineffective Assistance of Counsel

Applicant also makes a number of allegations of ineffective assistance of counsel. The Court will discuss each in turn.

Failing to Investigate Potential Witnesses and Victim's Cause of Death

Applicant claims that Counsel was ineffective for failing to investigate potential witnesses for his defense and in failing to retain an expert to challenge the victim's cause of death. Applicant testified he wanted Counsel to talk to Barbara and her boyfriend, Irvin. Applicant did not know their last names. Applicant testified that he had an altercation with his child's mother (the victim) and struck her. He testified that they both went to bed and when they woke up the next morning she was dead.

"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).

This Court finds Applicant failed to meet his burden of proof. Applicant was unable to even give last names for the witnesses he wanted Counsel to investigate. Counsel credibly testified that there were no viable defenses to the murder charge, ^{MM} which made a further investigation of witnesses unnecessary. Counsel also testified that the cause of death was not in dispute. Statements were given to investigators that Applicant threatened to kill the victim previously. Applicant also gave multiple statements and eventually gave a long and detailed confession. The State was going to be able to use that statement to show that Applicant buried the victim's body in the woods. Counsel was not ineffective in failing to investigate and challenge the cause of death or for not investigating potential witnesses.

Further, Applicant has failed to present the Court with any testimony from any potential witnesses. Applicant has also failed to present any evidence challenging the victim's cause of death. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."). The allegation rests entirely on speculation. Applicant is therefore unable to show any prejudice. This allegation is denied and dismissed with prejudice.

Failure to Request Competency Evaluation

Next, Applicant alleges Counsel was ineffective for failing to request that a competency evaluation be done. In light of Counsel's credible testimony that Applicant was able to effectively communicate with her, Applicant has produced no reliable testimony that would diminish his culpability on the charges. Counsel noted that Applicant sent her a letter discussing various issues in the case that demonstrated his understanding of the facts and charges. Applicant's testimony regarding his competency and understanding is not credible as it is refuted

by the testimony given at the hearing and by the guilty plea transcript. Also, Applicant failed to show how he was prejudiced because no credible records were presented to the Court. This allegation is denied and dismissed.

Failing to Craft Defense Strategy

Applicant alleges Counsel was ineffective for failing to form a defense strategy to the murder charge. Applicant testified that Counsel did not offer any type of strategy to the charges and only told him that he was facing thirty years to life. To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). This Court finds Applicant has failed to meet his burden in proving prejudice. The evidence against Applicant was very strong which made Counsel's job much more difficult. Counsel testified that if the case did go to trial that she would assert that Applicant lacked the requisite intent and argue that the incident was an accident. Counsel qualified this and noted that his confession was inconsistent with that strategy, which would make it likely he would be convicted. This was certainly reasonable under the circumstances of the case. Applicant has not presented any alternative defense or strategy that would have been stronger. Counsel cannot be held ineffective just because the State had a very strong case against Applicant. Furthermore, Applicant pleaded guilty and cannot now assert new defenses to the charge. This allegation is denied and dismissed.

Failure to Obtain Information Pursuant to Rule 5 and Brady

Applicant further alleges Counsel was ineffective in failing to obtain all information pursuant to Rule 5, SCRCrimP, and Brady. Applicant vaguely testified that certain files were missing from the State's disclosures. Counsel testified that she did not believe there to be any

issues with discovery. Counsel's testimony is much more credible than Applicant's on the issue. Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). Applicant has failed to present the Court with any evidence to show that any documents or information was withheld from him by the State. This Court finds that this allegation must be denied and dismissed with prejudice.

Failure to File a Notice of Appeal

Finally, Applicant alleges Counsel was ineffective for failing to file a notice of appeal. Applicant testified he was not advised that he could appeal from his guilty plea. This testimony is not credible. Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029 (2000). This Court finds Applicant failed to present any evidence that he demonstrated to counsel his desire to appeal. Notably Judge Dickson advised Applicant that he would have ten (10) days to file an appeal, so he was certainly aware of his right to appeal. (Plea Tr. p. 11, lines 7-8). Furthermore, upon a full review of the record, the Court finds that no grounds existed for an appeal, so any appeal would have been futile. This allegation is denied and dismissed with prejudice.

All Other Allegations

As to any and all allegations that were raised in the application 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.

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 MM} ~~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 23 day of May, 2016.


MAITE MURPHY
Presiding Judge

St. George, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP3801158

Carlos J Kemp State of South Carolina

PLAINTIFF(S) DEFENDANT(S)
Submitted by: Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy; Other: _____
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other: _____

FILED FOR RECORD
W/INFORMAL
JUL 16 - 1 A
CLERK OF COURT
ORANGEBURG COUNTY

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

Motion to reconsider is respectfully denied.
ORDER INFORMATION
This order ~~ends~~ does not end the case.

Additional Information for the Clerk: Motion for Reconsideration denied.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Kate Kemp 2166 8/1/2016
Circuit Court Judge Judge Code Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

ATTEST: TRUE COPY
Winnifia B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

Carlos J Kemp ,
Glenn Walters Sr. PO Box 1346 Orangeburg, SC
29116-1346

State of South Carolina ,

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Winnifa Clark - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG
IN THE COURT OF COMMON PLEAS

Case No.: 2014-CP-38-1158

CARLOS J. KEMP,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

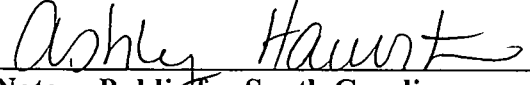
The undersigned hereby certifies that a true copy of the **Order of Dismissal** (2014-CP-38-1158) has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Mr. Glenn Walters, Sr., Esquire
Glenn Walters & Associates, PA
PO Box 1346
Orangeburg, SC 29116-1346

This 8th day of June, 2016.


J. Croom Hunter
Attorney for Respondent

SWORN to before me this 8th day of June, 2016.


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

**GLENN WALTERS
ATTORNEY AT LAW, P. A.**

1910 RUSSELL STREET, POST OFFICE BOX 1346 • ORANGEBURG, S.C. 29116
TELEPHONE: (803) 531-8844 • FACSIMILE: (803) 531-3628 • Toll Free: (888)966-8844
Email: glennwalterspa@gmail.com

Glenn Walters, Sr., Esquire
R. Bentz Kirby, Esquire, Retired, Of Counsel

VIA FACSIMILE and U. S. MAIL

August 17, 2016

Attn: Clerk
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

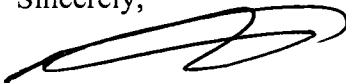
RE: The State v. Carlos J. Kemp
Docket No.: 2014-CP-38-1158

Dear Sir or Madam:

Please find enclosed with this letter, the original and six (6) copies of the Notice of Appeal for the above-mentioned action. Please forward the filed copies back to our office in the self-addressed envelope that is enclosed for your convenience.

Please feel free to contact our office to address any concerns.

Sincerely,



Glenn Walters

GW/hby
Enclosures

RECEIVED

AUG 24 2016

SC SUPREME COURT

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AUG 19 2016

SC Court of Appeals

CERTIFICATE OF SERVICE

I certify on this date a copy of the foregoing was served on each party or counsel of record by U.S. Mail, emailing, facsimile, or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure

This 17th day of August, 2016.

LAW OFFICE OF GLENN WALTERS, PA

BY: 



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US POSTAGE PAID
\$6.80

Origin: 29115
Destination: 29211
1 Lb 0.90 Oz
Aug 17, 18
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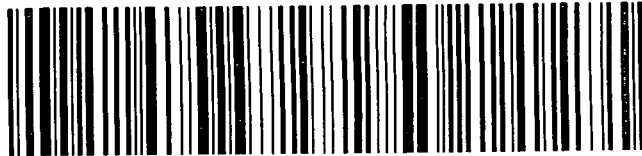
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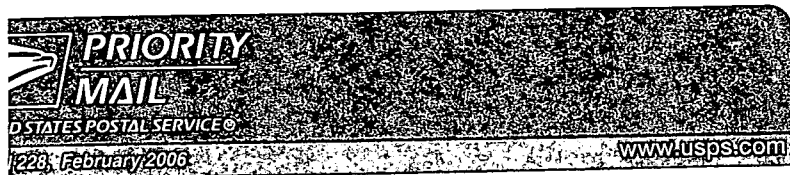
Expected Delivery Day: 08/18/2016

B012

USPS TRACKING NUMBER



9505 5104 2782 6230 0146 13



Glenn Walters, PA
PO Box 1346
Orangeburg, SC 29116
TO
Attorney Clerk
SC Court of Appeals
PO Box 1629
Columbia, SC 29217

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AUG 19 2016

SC Court of Appeals