

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Circuit Court

The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2015-CP-42-1251

State of South Carolina,

Respondent,

v.

Harold Bernard Turner,
#345674,

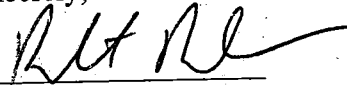
Appellant.

Notice of Appeal

Harold Bernard Turner appeals the order of the Honorable Larry B. Hyman, Jr., dated July 17, 2016. Appellant received written notice of entry of this order on July 27, 2016.

August 20, 2016

Sincerely,



Brandt Rucker
128 Millport Circle, Suite 200
Greenville, South Carolina 29607
(864) 271-9925
Attorney for Appellant

cc:

Other Counsel of Record:

Alicia A. Olive, Esq.
S.C. Attorney General's Office
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Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Circuit Court

AUG 29 2016

The Honorable Larry B. Hyman, Jr., Circuit Court Judge **S.C. SUPREME COURT**

Case No. 2015-CP-42-1251

State of South Carolina,

Respondent,

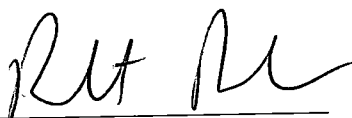
v.

Harold Bernard Turner,
#345674,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on August 20, 2016, addressed to Alicia A. Olive, S.C. Attorney General's Office, P.O. Box 11549, Columbia, SC 29211.


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Attorney for Appellant
April 28, 2016

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Harold Bernard Turner, #345674,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 IN THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2014-CP-42-1251

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 31, 2014. Respondent made its Return on or about October 3, 2014. The Court convened an evidentiary hearing into the matter on November 9, 2015, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by John Brandt Rucker, Esquire. Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Andrea Price, Esquire, also testified. The Court had before it a copy of the plea transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In August 2012, the Spartanburg County Grand Jury indicted Applicant for armed robbery and possession of a weapon during a violent crime (2012-GS-42-4608, count 1 and 2). Applicant was subsequently

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 SPARTANBURG COUNTY

indicted at the April 2013 term of the Spartanburg County Grand Jury for burglary, first degree (2013-GS-42-1471); and petit larceny (2013-GS-42-1470). Andrea Price, Esquire, ("Counsel") represented him. On July 8, 2013, Applicant pleaded guilty before the Honorable J. Mark Hayes, II, to the lesser included offenses of common law robbery and burglary, third degree, and to petit larceny as indicted. The charge of possession of a weapon during a violent crime was *nolle proessed*. The State recommended a cap of seven years, concurrent sentences, and restitution. Judge Hayes sentenced Applicant to fifteen years for common law robbery, suspended on the service of ten years of imprisonment to five years of probation; however, he ordered that upon the payment of all monetary obligations, any remaining probationary sentence was to be terminated. Judge Hayes also sentenced Applicant to five years for third degree burglary and thirty days for petit larceny. Judge Hayes ordered the sentences to run concurrently. Applicant did not appeal his convictions or sentences.

II. ALLEGATIONS

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel; specifically:
 - a. Counsel failed to inform Applicant of rights, including right to withdraw the plea, once the signed plea agreement was not held up.
2. Involuntary guilty plea; specifically:
 - a. Plea was made only after Applicant was promised by Counsel and the court and the sentence sheet that the sentence would not exceed a maximum of seven years;

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact

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and conclusions of law as required by S.C. Code Ann. § 17-27-80.

A. Ineffective Assistance of Plea Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court uses 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, the Court measures counsel'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

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counsel, Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Applicant alleges Counsel was ineffective in failing to inform him of his rights or that he could withdraw his plea. This Court finds Applicant has failed to satisfy his burden of proving that Counsel's performance fell below an objective standard of reasonableness. Counsel testified she met with Applicant at least twice prior to the plea. She testified that she reviewed discovery with Applicant and discussed the evidence that the State had against him. She testified that she received a plea offer from the State, which she discussed with Applicant. She stated she discussed his constitutional rights with him including those rights he would be waiving by pleading guilty. Counsel testified that there was a recommended cap of seven years by the State, but that she never promised Applicant that he would get a maximum of seven years. Counsel testified that as part of the agreement, the State dismissed count two of the armed robbery indictment. The plea judge also asked Applicant if he understood the judge was not bound by the recommendation and that he could sentence him up to five years on the burglary charge and fifteen years on the armed robbery charge. Applicant indicated his understanding and made no protest. See Crawford v. United States, 519 F.2d 347 (4th Cir.1975) (adopting rule that 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). Further, as to the burglary charge, a witness identified Applicant. Applicant was also identified by witnesses in a photo line-up. Based on the evidence against him and the charges for which he was indicted, Applicant received a tremendous benefit of the work of Counsel in obtaining a

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reduction in the charges. Accordingly, this Court finds Applicant has failed to satisfy his burden of proving any deficiency in Counsel's performance.

This Court likewise finds Applicant has failed to satisfy his burden of proving prejudice. Ordinarily, to show prejudice when seeking relief from a guilty plea, Applicant must do "more than simply . . . [assert] that but for counsel's deficient performance he would not have pled but would have gone to trial." Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009) (citing Hill v. Lockhart, 474 U.S. 52 (1985)). Rather, he must show "something that would have affected counsel's advice to [the applicant] to accept the plea bargain offered or that would have caused [the applicant] to decline to accept it." See Id. at 563, 681 S.E.2d at 594. Here, Applicant was indicted for armed robbery, which carries ten to thirty years upon conviction, and first degree burglary, which carries fifteen years to life upon conviction. S.C. Code Ann. §§ 16-11-311, and -330(A). In accepting the State's offer, Applicant benefited from a significant reduction in these charges. Applicant has produced no evidence to show that he believed the sentence was a negotiated seven year sentence. The State made its recommendation at the plea hearing, but the plea judge also informed Applicant that he did not have to accept the recommendation and could sentence Applicant up to an aggregate twenty year sentence. On the plea sheet for robbery, "(0-15yrs)" was written beside offense to indicate the sentencing range. In addition, the box for "Recommendation by the State" was checked on Applicant's plea sheets. Underneath that checked box is the handwritten statement "cap of 7 yrs." Applicant has alleged only that he thought he would be sentenced to a maximum of seven years but actually received fifteen suspended to ten. Applicant has failed to satisfy his burden of proving that but for Counsel's alleged error he would have insisted on going to trial. Accordingly, this Court finds Applicant

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has failed to show either deficiency of counsel or resulting prejudice, and this allegation is denied and dismissed.

C. Involuntary Guilty Plea

Respondent alleges his guilty plea was involuntary because he was promised he would receive a maximum sentence of seven years. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An Applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the Applicant would not have pleaded guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An Applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56; Bennett v. State, 371 S.C. 198, 204, 638 S.E.2d 673, 675 (2006).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238 (1969). Before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. Id. at 243. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. Moreover, a criminal defendant entering a guilty plea "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived."

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Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "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). When determining issues relating to guilty pleas, the Court will consider the entire record, including the transcript of the guilty plea and the evidence presented at the PCR hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000). 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. Blackledge v. Allison, 431 U.S. 63 (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, 519 F.2d 347; Edmonds v. Lewis, 546 F.2d 566 (4th Cir.1976).

This Court finds Applicant has failed to satisfy his burden of showing that his plea was involuntary. The plea judge asked Applicant if he understood he was not bound by the State's recommendation and that he could sentence Applicant up to a total of twenty years on his charges. Applicant indicated he understood and did not protest. Counsel testified she informed Applicant of the State's recommendation but never promised that he would not receive more than seven years. Further, the plea sheet indicated the sentencing range was zero to fifteen years, and that the plea was a recommendation by the State of a cap of seven years.

Applicant was advised of his constitutional rights by both Counsel and the plea judge. Counsel testified she reviewed the charges against him, including the elements the State would have to prove to satisfy its burden. She also reviewed with him his constitutional rights. The plea

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judge also informed Applicant of his right to a jury trial, his right to confront any witnesses against him, his right to present a defense, and his right to remain silent. The plea judge explained he was waiving those rights by pleading guilty and asked whether he still wished to give up those rights and plead guilty. Applicant indicated he understood his rights and wished to go forward. Applicant never indicated to the plea judge that he wished to withdraw his plea and has failed to show that he informed Counsel of any desire to withdraw his plea. Applicant has produced no evidence to show that he believed the sentence was a negotiated seven year sentence. Therefore, this Court finds the record establishes that Applicant entered his plea with the full understanding of the consequences and of the charges against him. For these reasons and the reasons provided above, this Court finds Applicant has failed to satisfy his burden of proving any deficiency in Counsel's performance.

Furthermore, Applicant has failed to satisfy his burden of proving prejudice as to this allegation. If Applicant had proceeded to trial instead of pleading guilty, he was facing a minimum of ten years and a maximum of thirty years on the armed robbery charge and up to life imprisonment on the first degree burglary charge. Applicant received a significant benefit in exchange for accepting the plea offer and has failed to show that but for Counsel's alleged error, he would not have pleaded guilty but would have insisted on going to trial. Accordingly, this Court finds Applicant has failed to satisfy his burden of showing either deficiency or prejudice. Therefore, this allegation is denied and dismissed.

D. 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

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such allegations.

IV. 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. 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), SCRCR, 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 must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 17 day of July, 2016.

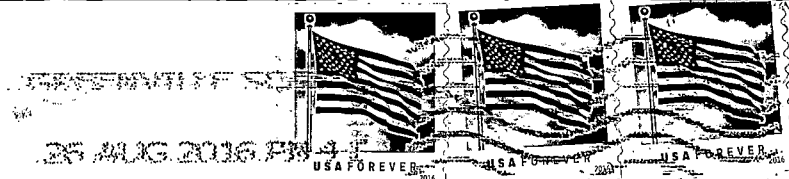


THE HONORABLE LARRY B. HYMAN, JR.
Presiding Judge, Seventh Judicial Circuit

Cassidy, South Carolina

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