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September 1, 2016

RECEIVED

SEP 07 2016

S.C. SUPREME COURT

The Honorable Daniel E. Shearhouse
Clerk of South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

Re: *David I. Smith, # 360603 v. State of South Carolina*
Civil Action No.: 2015-CP-10-1855

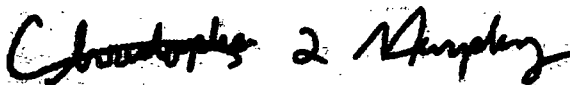
Dear Mr. Shearhouse:

Enclosed for filing, please find an original and two copies of Appellant's Notice of Appeal of the denial of his application for Post-Conviction Relief, and a Proof of Service regarding same. If you find everything in order, please file the original and return the clocked-in copies in the enclosed self-addressed envelope.

Please note, I was appointed to this and case and have copied the Office of Appellate Defense on this who will handle the appeal. Please call if you have any questions.

With kindest regards, I am

Sincerely,



Christopher L. Murphy

CLM/jh

Enclosures

cc (w/ encls.): Mr. David I. Smith
J. Rutledge Johnson, Esq.
Robert M. Dudek, Esq.
The Honorable John C. Hays, III
The Honorable Julie J. Armstrong, Clerk, 9th Jud. Cir.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

John C. Hays, III, Circuit Court Judge

Case No.: 2015-CP-10-1855

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S.C. SUPREME COURT

David I. Smith, #360603 Appellant
v.
State of South Carolina Respondent

NOTICE OF APPEAL

Appellant appeals the Court's denial of his application for post-conviction relief.
Attached is the order from the court dated August 3, 2016 and received August 10, 2016.

September 1, 2016


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CC
AT
AG

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

David I. Smith, #360603,

Applicant,

vs.

State of South Carolina,

Respondent,

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

C.A. No.: 2015-CP-10-1855

ORDER

2016 AUG -4 AM 11:53
JULIE J. ADAMS/ROJMS
CLERK OF COURT

FILED

Applicant filed this Post-Conviction Relief application on March 23, 2015. The Court heard this matter on August 1, 2016. Applicant was represented by Christopher Murphy, Esquire; the State was represented by J. Rutledge Johnson, Esquire.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the May 2012 term of the Charleston County Grand Jury for attempted murder (2012-GS-10-2533). Luke Malloy, Esquire, represented him.¹ On July 10, 2014, the Applicant pled guilty to the lesser included offense of assault and battery of a high and aggravated nature (ABHAN).² The Honorable Roger M. Young, Sr. sentenced the Applicant to confinement for twenty (20) years. The Applicant did not appeal his sentence or plea.

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

1. "Misadvised in guilty plea"
2. "Not indicted within timely manner"
3. "Ineffective Assistance of Counsel"
 - a. "Counsel was not prepared for this case"

¹ Applicant had two other attorneys prior to his representation by Luke Malloy, Esq.

² Which carries a potential penalty of up to twenty (20) years incarceration. SC. Code Ann. § 16-03-600(B)(1).

Je...

- b. "Counsel misadvised me to accept a plea offer"
- c. "Counsel was not on case long enough to prepare a defense"
- 4. "Forgery of indictment"

Applicant's first and third claims are allegations of ineffective assistance of plea counsel. In a Post-Conviction Relief action, the Applicant bears the burden of proving the allegations in their 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, 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, 334 S.E.2d 813.³

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. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. 117, 386 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

³ The same standard applies to pleas of guilt.

counsel's alleged errors, she 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).

The Court interprets the Applicant's second and fourth claims as allegations of due process violations. The Applicant's allegations claim infringement of his rights under certain amendments to the United States Constitution. Applicant presented absolutely no evidence in support of these grounds. Upon request by the Court at the conclusion of the presentation of evidence, Applicant's counsel stated Applicant had two grounds. First, his plea was coerced due to his not being aware of the consequences. Second, Applicant wanted counsel to file an appeal. The Court will therefore address only these two asserted grounds, although it is noted there is no evidence in the record in support of grounds 2 and 4.

Taking the second stated ground first, trial counsel is not ineffective for not filing an appeal for a plea of guilt unless the client requests or where a reasonable attorney would conclude that one entering a plea desires an appeal. See Roe v. Flores-Ortega, 528 US 470 (2000). Applicant has not carried his burden of proof as to either of these exceptions.

Perhaps more significantly, and on its own dispositive of this second ground is that it is not alleged as a ground in Applicant's application for Post-Conviction Relief. Therefore, his second ground is not before the Court for consideration.

As to the first ground, Applicant has not carried his burden of proof. Applicant has not proven neither that he was coerced into entering his plea, nor that he did not understand the consequences of entering a plea. The credible testimony is that of trial counsel. Trial counsel testified that he advised Applicant that Applicant could receive a sentence of up to twenty (20)

years incarceration. Trial counsel testified he never advised Applicant that Applicant could receive forty years as Applicant testified.⁴

Applicant presented a wide range of testimony encompassing his belief that he would not be convicted, that he had a defense of self-defense, he was told by trial counsel that after his plea he could within ten days "revoke" his plea, and that he wanted to appeal. None of these established proof of coercion in his choice to enter his plea of guilty. As to the latter two of his beliefs, they would address post plea issues.

Trial counsel's advice to Applicant that he should enter a plea of guilt is not a coercive event. Rather, it is within the province and responsibility of trial counsel to so advise his or her client to enter a plea when trial counsel is of that belief. Here, counsel understood a plea of guilty by Applicant was in his client's best interest and so advised Applicant. The decision to plea is ultimately in every case, and in this case the record reflects the entry of the plea, was Applicant's free and voluntary choice. See Plea Tr. p. 2, LL 4-11; p. 3, LL 10-12; p. 3, L 25-p.4, LL 13-25.

Applicant also testified he wanted to talk to his family before he decided to plea or not. He apparently had plenty of opportunity to do so as there was a two year lapse of time between indictment and plea. None of Applicant's family testified and Applicant did not testify as to what, if any, value discussions with his family would have on his decision to plead guilty. In any event, the fact that he chose to plea at the time he plead was a choice he made knowing he could go to trial if he desired based on his own testimony at his post-conviction relief hearing, and based on notice from the plea judge. (Plea Tr. p. 2, L 18-p. 3, L 4).

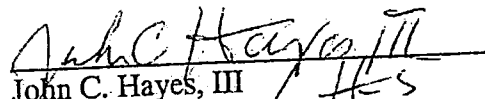
Wherefore, I find Applicant has not carried his burden of proof as to elements of his stated grounds for relief, and has not proven trial counsel was ineffective.

⁴ The plea judge, Roger M. Young, Sr., told Applicant on the record at the time of his plea that attempted murder "carried a sentence of up to 30 years." (Plea Tr. p 2, LL 4-9).

Therefore, Applicant's application for Post-Conviction Relief is denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. See Rules 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.


John C. Hayes, III
Presiding Judge

August 3rd, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SEP 07 2016

John C. Hays, III, Circuit Court Judge

S.C. SUPREME COURT

Case No.: 2015-CP-10-1855

David I. Smith, #360603 Appellant
v.
State of South Carolina Respondent

PROOF OF SERVICE

I certify that I have served APPELLANT'S NOTICE OF APPEAL by delivering a copy via U.S. Mail First-Class postage prepaid on the 1st day of September, 2016, on the following:

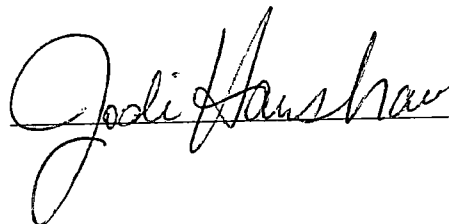
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Assistant Attorney General
SC Office of the Attorney General
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The Honorable John C. Hayes, III
Moss Justice Center, 2nd Floor
1675-1H York Highway
York, SC 29475-7434

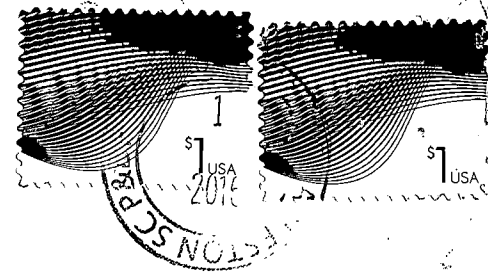
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