

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS
BROOKS P. GOLDSMITH, CIRCUIT COURT JUDGE

RECEIVED

SEP 29 2016

S.C. SUPREME COURT

2013-CP-32-0487

Sammy Wiggins,.....Petitioner.

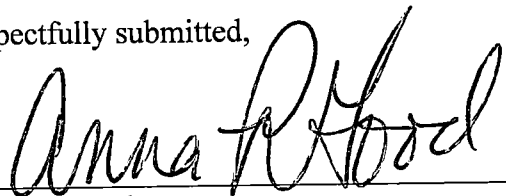
vs

The State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Sammy Wiggins appeals the Honorable Brooks P. Goldsmith's September 11, 2016 Order of Dismissal. Undersigned counsel received notice of entry of the order on September 26, 2016. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Anna R. Good
Law Office of Anna Good, LLC
PO Box 7284
Columbia, South Carolina 29202
Telephone: (803) 661-6758
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Attorney for the Petitioner.

September 29, 2016.

OTHER COUNSEL OF RECORD:
Patrick Schmeckpepper, Esquire
South Carolina Attorney General's Office
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Columbia, SC 29211-1549

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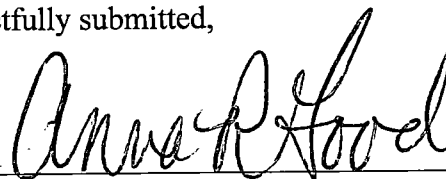
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PROOF OF SERVICE

I, Anna Good, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record, Patrick Schmeckpepper, P.O. Box 11549, Columbia, South Carolina 29211-1549. I further certify that all parties required by Rule to be served have been served this 29th day of September 2016.

Respectfully submitted,



Anna R. Good, Esquire
Law Office of Anna Good, LLC
PO Box 7284
Columbia, South Carolina 29202

ORIGINAL

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON)

ELEVENTH JUDICIAL CIRCUIT

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Sammy Wiggins,
S.C.D.C. No. 334667

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

C.A. No. 2013-CP-32-0487

Applicant,)

v.)

**ORDER OF DISMISSAL
(with prejudice)**

State of South Carolina,)

Respondent.)

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed February 12, 2013. Respondent made its Return on July 23, 2013. An evidentiary hearing into the matter was convened on April 15, 2014, at the Lexington County Courthouse, before the Honorable William P. Keesley. Following that hearing, Judge Keesley issued an order dated and filed April 18, 2014, recusing himself after discovering that he had been involved in the Applicant's underlying criminal case. Thereafter, a second evidentiary hearing was convened at the Lexington County Courthouse on April 23, 2015. The Applicant was present and was represented by Anna Good, Esquire. Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office.

The Applicant testified on his own behalf at the evidentiary hearing. The Applicant's trial counsel, Robert Mills, Esquire, also testified. The Applicant stipulated that the testimony of Angela Garrick¹ would be the same as in the previous hearing. This Court has before it a copy of Applicant's trial transcript, the records of the Lexington County Clerk of Court regarding the

¹ Ms. Garrick was the solicitor that originally prosecuted the Applicant on these charges. She testified at the original 2014 PCR hearing in front of Judge Keesley.

subject convictions, appellate records, the Applicant's records from the South Carolina Department of Corrections, and the pleadings. This Court has also reviewed the transcript from the 2014 PCR hearing in front of Judge Keesley. The Court finds as follows:

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. The Applicant was indicted at the December term of the Lexington County grand jury for armed robbery while armed with a deadly weapon (2010-GS-32-6387), burglary, first-degree (2010-GS-32-2283), kidnapping (2010-GS-32-3555). He was represented by Robert W. Mills, Esquire. On October 15, 2012, the Applicant proceeded to trial before the Honorable Howard P. King. Following voir dire and a Neil v. Biggers² hearing, the Applicant pled guilty as indicted. On October 17, 2010, Judge King sentenced the Applicant to concurrent terms of twenty-five years imprisonment for burglary, first-degree, twenty-five years imprisonment for armed robbery, and twenty-five years imprisonment for kidnapping. Applicant did not appeal his sentence or conviction.

Allegations

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

1. Ineffective Assistance of Trial Counsel:
 - a. failure to convey a guilty plea offer.
 - b. failure to investigate Applicant's case.
2. Prosecutorial Misconduct:
3. Brady violation for non-disclosure of co-defendant's inconsistent statements

At the evidentiary hearing, the Applicant proceeded on the allegation that counsel was ineffective in failing to show him the video, rather than the video stills, of the crime before the

² 409 U.S. 188 (1972).

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BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC



expiration of an earlier plea offer; or, in the alternative, prosecutorial misconduct for failure to disclose the video.

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 plea, 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 legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court makes the following findings of fact based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

Applicant has alleged counsel was ineffective in failing to show him the actual video of his offense, rather than merely the still frames of that video, prior to the expiration of a plea offer from the solicitor's office. The solicitor's office provided counsel with a CD that contained a video from the victim's home surveillance system of the offense, as well as the stills from that video as part of their discovery disclosures. Counsel was unable to view the video, and thought the CD consisted only of the video stills. Applicant testified at the evidentiary hearing that if he had seen the video prior to the expiration of a previous plea offer, then he would have accepted that offer rather than a subsequent, less favorable offer.

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 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.

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. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The Supreme Court of the United States has held that an attorney's advice on whether to reject a plea offer is subject to a Strickland-type ineffective assistance claim. Lafler v. Cooper, 132 S.Ct. 1376, 1383, 182 L.Ed.2d 398 (2012). In order to show prejudice on such a claim, an applicant must show that there is a "reasonable probability that the plea offer would have been presented to the court (i.e., that the [applicant] would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Id. at 1385.³

³ The proper remedy, where an applicant has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea, is to order the State to reoffer the

Prejudice

Applicant has failed to establish prejudice resulting from counsel's alleged deficient performance. Specifically, this Court does not believe from the evidence presented that counsel's failure to provide the Applicant with the actual video footage of the armed robbery – rather than only the stills – induced his decision to reject the previous plea offer. Crucially, Applicant's self-serving testimony is not credible. See Merzbacher v. Shearin, 706 F.3d 356 (4th Cir. 2013) (to demonstrate a reasonable probability that he would have accepted a plea, a petitioner's testimony that he would have done so must be credible). Applicant's statement that he would have taken the favorable plea deal had he seen the video instead of the stills is "the type of testimony ... subject to heavy skepticism." Id., citing United State v. Day, 969 F.2d 39, 46 n. 9 (3d Cir. 1992) ("[C]ourts should be wary of this sort of claim because defendants will always want the best of both worlds: the chance at acquittal at trial, yet the chance to plead guilty if the trial defense fails.").

This Court has taken into account the qualitative differences between still frames from a video and the actual video itself⁴ – keeping in mind that they depict the same material. However, in light of the substantial evidence of Applicant's guilt in this case – the rest of which was available to him when he rejected the previous offer – his testimony that seeing the video rather than the stills would have prompted him to plead earlier is not credible. The Applicant was identified by the victim of the home invasion, who knew him. (Plea Tr., p. 72-80). The Applicant's co-defendant was also planning on testifying against him. (Plea Tr., p. 116-17). Moreover, as explained by the solicitor during the sentencing hearing, the video stills captured

plea agreement, and then, if petitioner accepted the offer, the state trial court could exercise its discretion regarding whether to resentence. Id. at 1391.

⁴ Counsel testified at the evidentiary hearing that the video was more revealing than the stills because "it showed action which changes the way you look at something." (Apr. 23, 2015 PCR Tr., p. 23).



screen images in consecutive orders, and showed the same thing that the full video would have shown. (Plea Tr., p. 156). Far more likely and, in this Court's mind, compelling an explanation is that the Applicant – an experienced criminal defendant – was holding out for a more favorable, non-violent plea offer until he was ultimately faced with the prospect of going to trial on a very unfavorable set of facts. Indeed, Ms. Garrick testified that this was her impression from her discussions with the Applicant's attorneys. Apr. 15, 2014 PCR Tr., p. 39).⁵ Having failed to provide any credible testimony as to how counsel's purported deficiency prejudiced him, or even submit the video at the evidentiary hearing, this Court finds that the Applicant has not met his burden to prove ineffective assistance of counsel. This allegation is therefore denied and dismissed with prejudice.

Deficient Performance

The Applicant has also failed to meet his burden to show deficient performance. Judicial scrutiny of counsel's performance is highly deferential and the court must “indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” Butler v. State, 286 S.C. 441, 445, 334 S.E.2d 813, 816 (1985) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). Though hindsight may provide a different view of counsel's actions, the Applicant is not entitled to a new trial for the sole purpose of presenting a “fancier” case. Jones v. State, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998).

To the extent counsel's failure was the result of an oversight or miscommunication, this Court finds the oversight was not unreasonable given the circumstances. Counsel could very well have reasonably determined the stills – which he described at the evidentiary hearing as

⁵ Ms. Garrick also raised this issue during the sentencing hearing, saying that her experience with this case was that the Applicant “wanted to plead to nonviolent offenses. He wanted to plead for ten years nonviolent . . . and that was never something that was going to be offered.” (Plea Tr., p. 157).

simply a “choppy version” of a full video⁶ – were all that came from the home surveillance system. Applicant has not met his burden to overcome the high level of deference required in post-conviction relief proceedings. This allegation therefore denied and dismissed.

Prosecutorial Misconduct

The Applicant alternatively alleges prosecutorial misconduct for failure to disclose the video during discovery. Angela Garrick, the solicitor who prosecuted the Applicant’s charges, testified that she disclosed the entire video. She further testified that she had an open file policy, and defense attorneys are welcome to come in and look through her discovery page-by-page, as well as review discs. (Apr. 15, 2014 PCR Tr., p. 38). Her testimony is corroborated by counsel, who – as discussed above – acknowledged that he received the disc with the video but did not realize it contained anything more than the stills. As there is no evidence of any nondisclosure in this case, this allegation is denied and dismissed with prejudice.

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]

⁶ (Apr. 23, 2015 PCR Tr., p. 16).



CONCLUSION

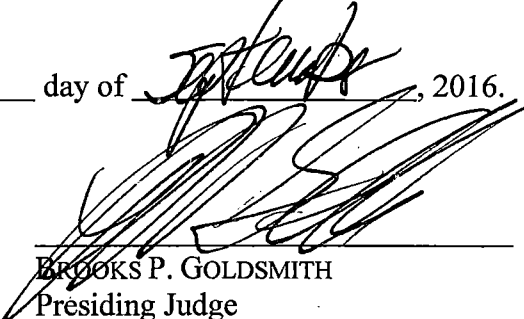
Based on the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

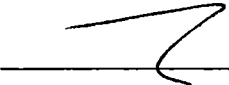
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State; 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's 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 Respondent

AND IT IS SO ORDERED this 11 day of September, 2016.


BROOKS P. GOLDSMITH
Presiding Judge
Eleventh Judicial Circuit

 _____, South Carolina

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BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC