

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

J. DURHAM COLE, Circuit Court Judge

Civil Action Number: 2013-CP-46-3646

RECEIVED

SEP 29 2016

S.C. SUPREME COURT

BRANDON DAVIS #348800,

Petitioner,

v.

STATE OF SOUTH
CAROLINA,

Respondent.

NOTICE OF APPEAL

The Petitioner above appeals the order of the Honorable J. Durham Cole, dated August 23, 2016, received by me on August 29, 2016 denying his application for Post-Conviction Relief.

September 27, 2016



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

J. Durham Cole., Circuit Court Judge

Civil Action Number: 2013-CP-46-03646

Brandon A. Davis,

Petitioner,

v.

State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal in the above captioned case on the following individuals by depositing a copy of it in the United States Mail, postage prepaid, on September 28, 2016, addressed to:

David Hamilton, Clerk of Court
York County Court of Common Pleas
Post Office Box 649
York, South Carolina 29745

Justin James Hunter, Esq.
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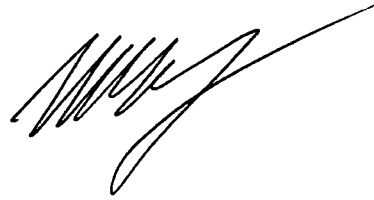
Brandon A. Davis #348800
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SEP 29 2016

S.C. SUPREME COURT

September 28, 2016

A handwritten signature in black ink, appearing to read 'W. Michael Hemlepp, Jr.', written in a cursive style.

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STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
)
Brandon Alexander Davis,)
S.C.D.C. No. 348800,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
OF THE SIXTEENTH JUDICIAL CIRCUIT

2013-CP-46-3646

ORDER OF DISMISSAL

FILED-RECEIVED
2016 AUG 24 PM 4:18
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed December 2, 2013. Respondent made its Return on or about July 8, 2014. An evidentiary hearing into the matter was convened on January 21, 2015, at the Moss Justice Center in York, South Carolina. Applicant was present at the hearing and represented by Michael Hemlepp, Jr., Esquire. Justin J. Hunter, Esquire, of the South Carolina Attorney General's Office represented the Respondent. At the hearing, Applicant testified on his own behalf. Deon O'Neil, Esquire, also testified. This Court also had before it a copy of the records of the York County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, and the plea transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the August 2011 term of the York County Grand Jury for Murder (2011-GS-46-2600), three counts of Possession of a Firearm during the Commission of a Violent Crime (2011-GS-46-2600A, -2601A, -2608A), three counts of Attempted Murder (2011-GS-46-2601, -2608, -2609), two

counts of Armed Robbery (2011-GS-46-2603, -2610) and Criminal Conspiracy (2011-GS-46-2612). Deon O'Neil, Esquire, represented him.

On November 30, 2011, Applicant pled guilty before the Honorable Lee S. Alford to Voluntary Manslaughter as lesser included offense of Murder and to all other charges as indicted. He was sentenced, pursuant to a negotiated sentence, to thirty (30) years imprisonment for Voluntary Manslaughter; five (5) years, consecutive, for one count of Attempted Murder (-2601); thirty (30) years, concurrent, for each count of Armed Robbery; five (5) years, concurrent, for other counts of Attempted Murder and Criminal Conspiracy; and five (5) years, concurrent, for Possession of a Firearm during the Commission of a Violent Crime.

A notice of appeal was filed on Applicant's behalf and an appeal was perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed his convictions and sentences. State v. Davis, Op. No. 2013-UP-344 (filed Sept. 4, 2013). The Remittitur was issued on September 23, 2013).

Allegations

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

1. Ineffective Assistance of Counsel
 - a. "Counsel failed to properly investigate before advising me to plead guilty, erroneous advice."
2. Involuntary Guilty Plea
3. "No juvenile waiver hearing/No personal jurisdiction of applicant"
 - a. "The Court failed to conduct a waiver hearing; Due Process violation"

II. SUMMARY OF EVIDENCE PRESENTED AT PCR HEARING

Applicant's Testimony

Applicant testified that he met with Counsel a couple of times prior to his plea. He testified that he spoke with Counsel about his arrest but did not know about his case or give a statement. Applicant testified that he did not go to Family Court after his arrest. He testified that he did not speak about his pending charges to the trial judge or Counsel. He further testified that he did not learn of the elements of voluntary manslaughter.

Applicant testified that he agreed with the facts on the record and told the court that he was pleading by his own free will.

Counsel Deon O'Neil's Testimony

Counsel testified that he devotes about seventy-five percent of his practice to criminal law and was retained because he is a family friend of Applicant. He testified that he received discovery from the State and reviewed it with Applicant, including the co-defendant's statements. He testified that he explained the charges and potential sentences to Applicant, and that Applicant assisted in his defense. Counsel testified that Applicant initially denied his involvement and gave his version of the facts to Counsel. He testified that Applicant did not give a statement but other witnesses gave statements and the victim's identified Applicant.

Counsel testified that the State offered a thirty year plea offer to murder which Applicant rejected. He testified that Applicant wanted a one to ten year plea offer and later accepted an offer to plead to the State's twenty-five to forty year recommendation.

Counsel testified that the charges originated in Family Court but he did not have the discretion to keep Applicant's case in Family Court because of the nature of the charges. He testified that Applicant initially wanted a trial but that it was ultimately Applicant's decision to

plead guilty after being presented with the State's offer. He testified that Applicant was not threatened to plead guilty.

Counsel testified that he did not question the trial court's jurisdiction and would have brought it to the court's attention had there been an issue.

III. APPLICABLE LAW

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, 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, the applicant must prove counsel's performance was 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 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. 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 on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Ineffective Assistance of Counsel

Applicant alleges Counsel was ineffective in failing to investigate and for providing erroneous advice prior to Applicant's guilty plea. 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 pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). 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 v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). 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).

This Court also finds that Applicant has failed to show that Counsel's investigation was deficient and has also failed to show what any further investigation would have revealed. To establish counsel was inadequately prepared for trial, 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); 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); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (relief denied where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). This Court finds that Applicant has failed to meet his burden of showing Counsel was ineffective regarding his investigation and has also failed to show how the result of the trial would have been different had he pursued further investigation.

Additionally, this Court finds that Applicant has failed to meet his burden of proving that Counsel provided erroneous advice that induced Applicant to plead guilty. Counsel properly advised Applicant of the elements of the crime, reviewed discovery with Applicant, and relayed the plea negotiations that allowed Applicant to plead guilty. Applicant has failed to show that he otherwise would have elected to go to trial and has not shown any error in Counsel's assistance that led him to plead guilty instead. Therefore he cannot prove any prejudice. Applicant made the decision to accept the State's offer to plead guilty. Accordingly, this allegation is denied and dismissed with prejudice.

Involuntary Guilty Plea

Applicant further argues his plea was not given freely and voluntarily. This Court finds otherwise and concludes that Applicant's plea was entered freely and voluntarily. 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).

This Court finds, and the record reflects, Applicant was fully advised that he was pleading guilty and therefore waiving any challenges to the evidence against him. The plea court's thorough colloquy with Applicant demonstrates that he understood the consequences of pleading guilty. 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 his preparation and advice concerning the case. The record reflects Applicant fully admitted his guilt to the plea court. "A guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 129 (2014) (citing State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013); Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Notably the South Carolina Supreme Court has held "[a] guilty plea represents a break in the chain of events which has preceded it in the criminal process." Id. (citations omitted). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Id. (citing Rice, 401 S.C. at 332, 737 S.E.2d at 486). After a full review of the record, this Court finds the plea judge correctly found Applicant's plea was freely, voluntary, and intelligently made.

Plea Court's Lack of Jurisdiction

Applicant alleges that the plea court did not have jurisdiction to hear his guilty plea because there was no waiver hearing from Family Court. This Court finds this allegation is wholly without merit. The transfer of jurisdiction from Family Court to General Sessions Court

in cases where juveniles are charged with crimes is governed by S.C. Code § 63-19-1210 (1976).

The applicable code section in this case is § 63-19-20, which states:

When used in this chapter and unless otherwise defined or the specific context indicates otherwise:

(1) "Child" or "juvenile" means a person less than seventeen years of age. "Child" or "juvenile" does not mean a person sixteen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more. However, a person sixteen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor. An additional or accompanying charge associated with the charges contained in this item must be heard by the court with jurisdiction over the offenses contained in this item.

This Court finds this allegation is without merit since pursuant to § 63-19-20, the Applicant's case was not governed by the transfer of jurisdiction provisions in § 63-19-1210. Applicant was sixteen at the time of the events and charged with Murder, Attempted Murder, and Armed Robbery, which put his charges within the jurisdiction of the Circuit Court unless the solicitor chose to remand it to the Family Court. This Court finds Applicant has presented no evidence to support this allegation and finds it without merit. This Court also finds that Applicant's charges were properly under the jurisdiction of the Court of General Sessions.

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, this Court finds Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this 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 counsels' 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 will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 23rd day of August, 2016.



J. DERHAM COLE
Presiding Judge
Sixteenth Judicial Circuit

York, South Carolina