

THE

GIESE

LAW FIRM, LLC

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DEC 01 2016

S.C. SUPREME COURT

November 29, 2016

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

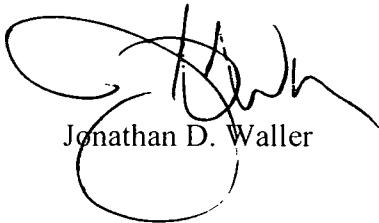
Re: Dequan S. Anderson vs. State of South Carolina
C/A No: 2014-CP-38-1605

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Anderson in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-708-6767.

Sincerely,



Jonathan D. Waller

Cc: J. Clayton Mitchell, South Carolina Office of Attorney General

Enclosures

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DEC 01 2016
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Benjamin H. Culbertson, Circuit Court Judge

2014-CP-38-1605

Dequan S. Anderson, #264678,

Appellant,


v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Dequan S. Anderson, #264678, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed November 7, 2016 issued by the Honorable Benjamin H. Culbertson, Presiding Judge, First Judicial Circuit.



Jonathan D. Waller

Giese Law Firm
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jonathanwallerlaw@gmail.com
ATTORNEY FOR PETITIONER

This 29 day of November, 2016.

Other Counsel of Record:
J. Clayton Mitchell, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ORANGEBURG COUNTY
Benjamin H. Culbertson, Circuit Court Judge

S.C. SUPREME COURT

2014-CP-38-1605

Dequan S. Anderson, #264678,

Appellant,

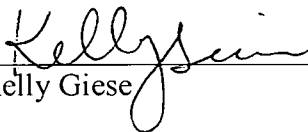
v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Clayton Mitchell, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 29th day of November, 2016, to his office located at P.O. Box 11549, Columbia, SC 29211.



Kelly Giese

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Dequan S. Anderson, #264678,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2014-CP-38-1605

ORDER OF DISMISSAL

FILED FOR RECORD
WINNIFRA B. CLARK
2016 NOV - 1 P 1:5
CLERK OF COURT
ORANGEBURG, SC

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed September 29, 2014. Respondent made its Return on August 21, 2015, requesting an evidentiary hearing be convened. Jonathan D. Waller, Esquire, was appointed by the Orangeburg County Clerk of Court to represent Applicant. An evidentiary hearing was held on May 16, 2016, at the Dorchester County Courthouse. Applicant was present and represented by Counsel Waller. J. Clayton Mitchell, 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, R. Douglas Mellard, Esquire. 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 October 2013 term of the Court of General Sessions for Orangeburg County for burglary, first degree (2013-GS-38-1124) and at the March 2014 term for attempted murder (2014-GS-38-0410). Applicant was represented by Counsel Mellard. On April 17, 2014, Applicant pled guilty

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Wynnifra B. Clark
CLERK OF COURT

to the lesser included offenses of assault and battery of a high and aggravated nature (ABHAN) and burglary, second degree. The Honorable Clifton Newman sentenced Applicant to ten (10) years' imprisonment for ABHAN and ten (10) years' for burglary, second degree. The sentences were to be served concurrently

A timely Notice of Appeal was filed on Applicant's behalf. By Order filed June 26, 2014, the South Carolina Court of Appeals dismissed the appeal for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. The Remittitur was issued on July 14, 2014.

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

1. Involuntary and unintelligent guilty plea due to Counsel's failure to challenge the admissibility of Applicant's statement and Counsel's failure to investigate and obtain the video of the statement.

II. 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 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).

III. 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.

Applicant's Statement to Law Enforcement

Applicant alleges Counsel was ineffective for failing to challenge the admissibility of his confession. Applicant further alleges Counsel was ineffective in failing to investigate and obtain the video recording of his statement. He testified that the video would have helped support his argument that the statement was not given voluntarily. He argues his statement would have been suppressed had a challenge been raised. Applicant acknowledged that he pled guilty to take advantage of the favorable plea deal and that he understood he would be able to challenge the statement if offered at trial by the prosecution. He further testified that the video recording should have existed. He testified that he believed his statement would be admitted because the officers would lie. He was advised by Counsel that the likelihood of having the statement suppressed was low. Counsel testified that he explained to Applicant how the statement could be suppressed after a pre-trial hearing. Counsel emphasized that the prosecution had a strong case and believed Applicant would be convicted if he proceeded to trial.

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).

Post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(b); see also Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."). Applicant's allegations regarding the charges against him are an inappropriate challenge to the sufficiency of the evidence. Simmons, 264 S.C. at 423, 215 S.E.2d at 885 ("[T]he Uniform Post-conviction Procedure Act 'shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.'" (citing Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973))). "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)).

This Court finds allegations challenging the evidence are not proper for this forum. Applicant must have taken this case to trial and argued for suppression of the statement and dismissal of the charges at that stage. Instead, he admitted to the truth of the allegations set forth in the indictments at the plea hearing. Applicant may not now challenge the sufficiency of the evidence.

It was certainly reasonable for Counsel to advise Applicant to plead guilty to a negotiated plea arrangement where he would be sentenced between ten to twelve years. This Court finds Applicant took advantage of a favorable plea deal and, by doing so, waived any evidentiary challenges to the evidence. This Court also finds it is not likely Applicant's statement would have been suppressed. Applicant has not presented any credible evidence showing that law enforcement did not follow proper procedures when interrogating Applicant.

To the extent Applicant argued his plea was not entering freely, knowingly, and voluntarily, this Court finds the record fully supports the contrary. The Court finds the record reflects Applicant was fully advised of his rights. The plea court's thorough colloquy with Applicant demonstrates that he understood the charges, penalties, and waiver of rights. Applicant did not present any credible evidence to show that he did not plead guilty knowingly, voluntarily, and intelligently. The Court finds credible Counsel's testimony regarding his preparation and advice regarding the case. This allegation is denied and dismissed.

Applicant has also alleged Counsel was ineffective in failing to investigate and obtain the video recording of Applicant's statement. Despite PCR Counsel's efforts, Applicant was not able to obtain the video of his statement for this Court's review.¹ 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 Court will not speculate as to the substance of the video, so this allegation must be denied and dismissed for Applicant's failure to produce the video.

All Other Allegations

As to any and all allegations that were raised in the application and not specifically

¹ The Court granted discovery to allow Applicant to subpoena the Orangeburg County Sheriff's to see if the recording was still available.

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.

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. 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 shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 27 day of October, 2016.

Benjamin H. Culbertson

BENJAMIN H. CULBERTSON

Presiding Judge

Conway, South Carolina

THE

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