

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

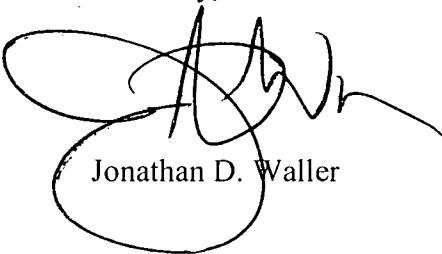
Re: Joshua David Shaw Crosby vs. State of South Carolina
C/A No: 2045-CP-38-0647

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. Crosby 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

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC 01 2016

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

S.C. SUPREME COURT

2014-CP-38-0647

Joshua David Shaw Crosby, #264678,

362588

Appellant,

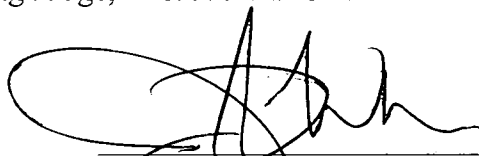
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Joshua David Shaw Crosby, #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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S.C. SUPREME COURT

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

2014-CP-38-0647

Joshua David Shaw Crosby, #264678,

362568

Appellant,

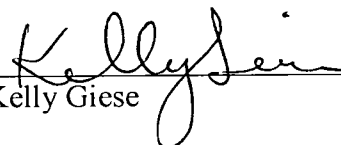
v.

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

362588

Joshua David Shaw Crosby, #264678,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2014-CP-38-0647

ORDER OF DISMISSAL

CLERK OF COURT
ORANGEBURG, SC

2016 NOV -7 P 12:58

FILED FOR RECORD
WINNIFAB. CLARK

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed May 18, 2015. Respondent filed a Return and Partial Motion to Dismiss requesting that a hearing be held only on Applicant's allegations of ineffective assistance of counsel. Applicant filed a second application on November 12, 2015 (2015-CP-38-1426). On March 15, 2016, the Court issued an Order dismissing the second application, treating it as an amendment, and merging it into the initial action. Jonathan D. Waller, Esquire, was appointed by the Orangeburg County Clerk of Court to represent Applicant. An evidentiary hearing was held on May 18, 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, Breen R. Stevens, Esquire. This Court had before it the Orangeburg County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the appellate records, the PCR application, the Return, and the guilty plea transcript.

CLERK OF COURT
ORANGEBURG COUNTY, SC

Handwritten signature/initials

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. In May 2014, the Orangeburg County Grand Jury indicted Applicant for criminal sexual conduct, first degree (2014-GS-38-0524). Counsel Stevens represented Applicant. On January 5, 2015, pursuant to negotiations, Applicant pleaded guilty to criminal sexual conduct, second degree. The Honorable Edgar M. Dickson accepted the negotiations and sentenced Applicant to fifteen (15) years' imprisonment, provided upon the service of eight (8) years', the balance is to be suspended with probation for five (5) years.

Applicant filed a timely notice of appeal. The South Carolina Court of Appeals dismissed Applicant's appeal on March 31, 2015¹. The remittitur was returned to the circuit court on May 06, 2015.

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

1. Plea not knowingly and voluntarily entered because Counsel failed to fully review discovery and failed to give proper advice.

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.

¹ Applicant failed to provide a sufficient explanation required by Rule 203(d)(1)(B)(iv), thus, the matter was dismissed.

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.

Unintelligent and Involuntary Guilty Plea

Applicant alleges he did not plead guilty knowingly and voluntarily. Specifically, Applicant argues that Counsel failed to review with him the State's evidence, which included the DNA report that concluded Applicant was a major contributor to the saliva found on the victim. This Court finds Applicant's guilty plea was entered freely and voluntarily entered. 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).

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Applicant claims he did not plead guilty voluntarily because Counsel did not review with him the evidence the State planned to present if the case were to go to trial. Applicant also makes a general allegation of ineffective assistance of counsel in that Counsel failed to properly investigate the facts and circumstances of the case thus rendering his plea involuntary and unintelligent. This Court finds these contentions meritless. This Court finds the record reflects Applicant was fully advised of the State's evidence. The plea court's thorough colloquy with Applicant demonstrates that he understood the charges, penalties, and the waiver of his rights. The record further reflects Applicant fully admitted his guilt to the plea court.

Applicant testified that Counsel did not adequately review the discovery materials with him. This Court finds Applicant's testimony not credible. Applicant presented no credible evidence as to why he should be able to depart from his statements at the plea hearing that he had reviewed the evidence and did not need more time to discuss matters with Counsel. (Plea Tr. p. 5; 8; 9). This Court finds very credible Counsel's testimony regarding his preparation and advice concerning the case, specifically that he reviewed the evidence with Applicant and discussed with him that it would be in his best interests to accept the negotiated plea offer. Counsel gave Applicant a copy of discovery that Applicant signed for to acknowledge his receipt. An investigator was hired to interview potential witnesses that Applicant thought would be helpful to his defense. In addition, Counsel discussed the forensic interview conducted with the victim and advised him that the interview itself would likely not be admissible. Applicant also claims he was not adequately advised of the DNA testing results. Counsel explained that although he received the results from the State the day of the plea, he felt that he adequately advised Applicant that the DNA was a match to the saliva found on the victim. Counsel also noted the State would likely be able to introduce Applicant's statement that no DNA would be found

because he used protection and would likely introduce evidence of prior allegations made by the victim. Considering this all, Counsel acted reasonably and within the professional norms in advising Applicant to plead guilty to a negotiated plea deal. Therefore, this Court finds Applicant's plea was freely, voluntary, and intelligently made.

All Other Allegations

As to any and all allegations that were raised in the application 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.

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 counsel's 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
Presiding Judge

Conway, South Carolina