

THE

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DEC -2 2016

S.C. SUPREME COURT

November 30, 2016

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

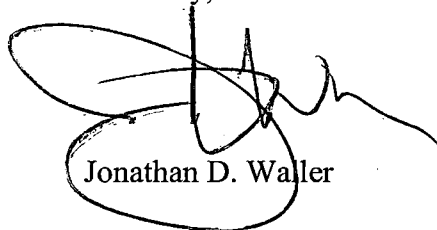
Re: Sean P. Smith vs. State of South Carolina
C/A No: 2015-CP-38-0910

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. Smith 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

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

2015-CP-38-0910

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DEC -2 2016

S.C. SUPREME COURT

Sean P. Smith, #347944,

Appellant,

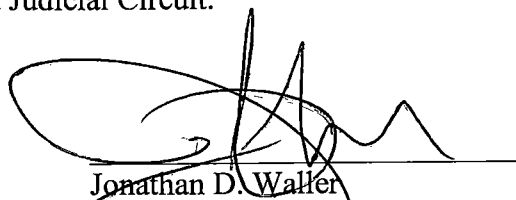
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Sean P. Smith, #347944, 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

SC Bar No.: 76290

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jonathanwallerlaw@gmail.com

ATTORNEY FOR PETITIONER

This 21 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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DEC -2 2016

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

S.C. SUPREME COURT

2015-CP-38-0910

Sean P. Smith, #347944,

Appellant,

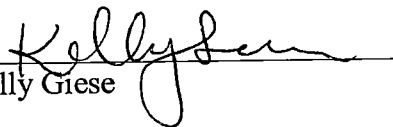
v.

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 30th 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

Sean P. Smith, #347944,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2015-CP-38-0910

ORDER OF DISMISSAL

FILED FOR RECORD
WINNIEA B. CLARK
2016 NOV -1 P 12:51
CLERK OF COURT
ORANGEBURG, S.C.

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed July 20, 2015. Respondent filed a Return and Motion for More Definite Statement. Jonathan D. Waller, Esquire, was appointed by the Orangeburg County Clerk of Court to represent Applicant. An evidentiary hearing was held on May 17, 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 were Applicant's plea counsel, E. Pete Kulmala, Esquire, and Nicholas G. Thomas, 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.

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 June 2011 term of the Orangeburg County Grand Jury for two counts of assault and battery, first degree (2011-GS-38-0872; -0873), and armed robbery (2011-GS-38-0869). Applicant was

indicted at the September 2011 term of the Charleston County Grand Jury for a second count of armed robbery (2011-GS-10-5388). Applicant was represented by Counsel Kulmala and Thomas. On September 19, 2011, Applicant pled guilty as indicted. The Honorable Edgar W. Dickson sentenced Applicant to ten (10) years' imprisonment for each count of assault and battery, to be served concurrently, and twenty five (25) years' imprisonment for each count of armed robbery, to be served concurrently.

Applicant filed a motion for reconsideration of the sentence on September 28, 2011.

Judge Dickson held a hearing on the motion on July 23, 2012. On August 2, 2012, Judge Dickson denied Applicant's motion for reconsideration. Applicant filed a notice of appeal and after, learning of a transcript of the reconsideration hearing, moved to reconstruct the record. The State did not oppose the reconstruction. The South Carolina Court of Appeals granted the petition and remanded the matter for reconstruction. However, the parties subsequently agreed to vacate the order denying the motion for reconsideration and held a new hearing on the motion.

On March 13, 2014, the parties convened before Judge Dickson. Judge Dickson denied the motion for reconsideration on August 22, 2014.

On December 9, 2014, Susan Barber Hackett, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of an Anders¹ brief. The South Carolina Court of Appeals dismissed Applicant's appeal after review on June 17, 2015. State v. Smith, Op. No. 2015-UP-294 (S.C. Ct. App. filed June 17, 2015). Remittitur was issued to the lower court on July 06, 2015.

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

¹ Anders v. California, 386 U.S. 738 (1967).

1. Ineffective assistance of counsel in advising Applicant to plead guilty to the Charleston charge;
 - a. Failing to present proper mitigation at the sentencing hearing;
 - b. Failure to move for recusal of Judge Dickson.

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.

Ineffective Assistance of Counsel

Advice Regarding Charleston Armed Robbery Charge

Applicant alleges Counsel Kulmala was ineffective in advising him to plead guilty to the Charleston County armed robbery charge. He argues there was not enough evidence to convict him that charge. 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).

Applicant testified that he was not provided a copy of discovery and that Counsel Kulmala did not discuss all of the charges in detail. This testimony is not credible. Counsel Kulmala credibly testified that he focused on the charges that the State was planning to try first. Counsel Kulmala explained that it was in Applicant's best interests to plead guilty to all of the charges even if Applicant believed some charges were weaker than others. Counsel Kulmala testified that Applicant would very likely be convicted of the Orangeburg armed robbery and assault and battery because he was apprehended after a pursuit. Counsel Kulmala was concerned that even if Applicant were to be acquitted after a trial on the first set of charges that there may be more to come. There were similar robberies that investigators believed Applicant was involved in. Counsel Kulmala testified that he advised Applicant of the possible life without parole consequences that could be presented. Further, Applicant cannot now claim that Counsel Kulmala did not review the evidence with him when at the plea he told Judge Dickson that Counsel Kulmala did review the evidence. This Court finds Applicant has failed to meet his

burden in proving Counsel Kulmala was ineffective in advising him to plead guilty to the Charleston charge. Applicant took advantage of a favorable plea deal and was able to wrap all of the cases against him up in one plea where the State would recommend the sentences be run concurrently. This Court finds Applicant pled with the full understanding that he could have taken the Charleston charge to trial but chose not to in order to take advantage of a plea deal and, therefore, finds the plea was made freely, voluntarily, and intelligently.

Failure to Properly Mitigate at Sentencing Phase

Next, Applicant alleges Counsel Kulmala failed to properly present mitigation at the sentencing phase of the hearing. Specifically, he argues that the sentence was longer than he had anticipated and believes that if a proper mitigation was done, then he would have received a more lenient sentence. At the sentencing phase, Counsel Kulmala told Judge Dickson that Applicant became addicted to pain killers after a back injury and that his addiction drove him to steal drugs from the pharmacies. (Plea Tr. p. 19-20). Counsel Kulmala emphasized that Applicant had a supportive family who was present at the plea. This Court finds this allegation is without merit. Counsel Kulmala presented the mitigating circumstances of the case in that Applicant suffered from and was drive by his addiction to drugs. This Court was not presented with any additional information or evidence that could have been presented in mitigation that would have likely influenced Judge Dickson's sentence. These facts are particularly egregious because Applicant blindly fired shots from the inside of a trunk of a car at officers in pursuit. This very likely effected Judge Dickson's decision to sentence Applicant to the maximum on the assault and battery charges. Further, this Court notes that two motion for reconsideration hearings were heard where Counsel Kulmala and Thomas presented their case for why the twenty-five year sentence was too harsh.

Failure to Move to Have Judge Dickson Recused

Applicant alleges counsel were ineffective in failing to move to have Judge Dickson recused. He argues that the victim of the assault was the husband of the clerk of court and that Judge Dickson could not be impartial due to his relationship with the court personnel. Applicant testified that Judge Dickson gave him a harsh sentence because he knew the victim's family. Counsel Thomas testified that he believed Judge Dickson was impartial and was a good judge to hear the case. He also testified that Judge Dickson did not and does not have a reputation for imposing harsher sentences on any particular crimes. This Court finds Applicant has failed to meet his burden. Evidence that Judge Dickson was bias or prejudiced was not presented. See State v. Jackson, 353 S.C. 625, 627, 578 S.E.2d 744, 745 (S.C. Ct. App. 2003) (holding that a party seeking disqualification must present evidence of bias or prejudice to require a judge to recuse himself.). This allegation is denied and dismissed.

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 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
Presiding Judge

Conway, South Carolina

THE

GIESE

LAW FIRM, LLC

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