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November 29, 2016

VIA U.S. POSTAL

Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RECEIVED

DEC -2 2016

S.C. SUPREME COURT

Re: Victor Noe Ortiz-Delvalle vs. State of South Carolina
Case No.: 2015-CP-23-4723

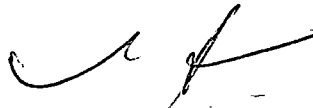
Dear Supreme Court Clerk:

I am writing to you regarding the above referenced case. Please find enclosed the Notice of Appeal, Proof of Service, and Order of Dismissal.

If you wish to discuss the foregoing or need additional information please contact me at 864-331-1630.

Thank you.

Sincerely,



Brian P. Johnson

BPJ/lf

cc: Patrick Schmeckpeper, Esquire
Victor Noe Ortiz-Delvalle

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE JOHN C. HAYES, III

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DEC -2 2016

S.C. SUPREME COURT

Case No.: 2015-CP-23-4723

VICTOR NOE ORTIZ-DELVALLE)

PETITIONER,)

vs.)

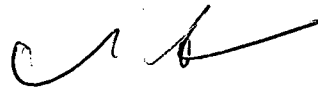
STATE OF SOUTH CAROLINA)

RESPONDENT.)

NOTICE OF APPEAL

The Petitioner, Victor Noe Ortiz-Delvalle, hereby appeals the Honorable John C. Hayes, III's October 31, 2016, order denying post-conviction relief to the Petitioner. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner
SC Bar: 73996

Date: November 29, 2016
Other counsel of record: Patrick Schmeckpeper
P.O. Box 11549/Columbia, SC 29211

STATE OF SOUTH CAROLINA
In The Supreme Court

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DEC -2 2016

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE JOHN C. HAYES, III

S.C. SUPREME COURT

Case No.: 2015-CP-23-4723

VICTOR NOE ORTIZ-DELVALLE,)
)
PETITIONER,)
)
vs.)
)
STATE OF SOUTH CAROLINA)
)
RESPONDENT.)

PROOF OF SERVICE

I, Brian P. Johnson, Esq., certify that I have today served the within notice of appeal upon the Respondent by depositing a copy in the United States Mail, postage prepaid, addressed to the attorney of record, Patrick Schmeckpeper, at P.O. Box 11549 Columbia, SC 29211.

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner
SC BAR: 73996

Greenville, SC
November 29, 2016

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Victor Noe Ortiz-Delvalle,)
 #362880,)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2015-CP-23-4723

ORDER

ENTERED COMPUTER

FILED-CIRCUIT OF COURT
 GREENVILLE CO. S.C.
 PAUL D. WICKENSIMMER
 2016 NOV 18 AM 11:52

Applicant filed this Post-Conviction Relief application July 30, 2015. The matter was heard October 25, 2016. Applicant was represented by Brian P. Johnson, Esq. The State was represented by Patrick Schmeckpeper, Esq.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the November 2013 term of General Sessions for First-Degree Criminal Sexual Conduct with a Minor (2013-GS-23-10605). Larry H. Cooke, Esquire and John K. Erwin, Jr., Esquire represented the Applicant.

On February 2, 2015, the Applicant pled guilty as indicted. The Honorable D. Garrison Hill sentenced the Applicant to life imprisonment. The Applicant did not appeal.

In his application for post-conviction relief, the Applicant alleged several reasons his present incarceration is unlawful. Those presented at the hearing are discussed below. Any "reason" set forth in Applicant's application and not presented at the hearing is deemed abandoned.

The Applicant's allegation is that trial counsel was ineffective as further discussed herein below.

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 on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. *See Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

With respect to guilty plea counsel, the Applicant must show that 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, 106 S.Ct. 366 (1985).

Applicant testified that his plea of guilt was involuntary and that he did not understand what he was doing. He testified that he signed (I assume he meant his sentencing sheet) because he was told he would receive a life sentence if he did not. He testified that he answered the trial judge's questions as he had been directed to do by trial counsel, answering yes or no if he did not understand the question.

Applicant testified he was slow in processing and needs help to process things (a fact supported by trial counsel's testimony). He testified he had a brain injury as a child, experienced blackouts, and had "mental issues." He testified he was medicated while in the county jail as he would try to kill himself and attack others. He testified he has been diagnosed as bi-polar and has been prescribed six or seven medications. Applicant testified he was on medication at the time he entered his plea and was "drugged." He testified the medication made it easier for him to accept what was being said to him rather than doing what he wants to do.

Applicant acknowledged he was evaluated for mental competency, but claimed the evaluation was done by two women who would keep repeating his answers until they got the answers they wanted.

Applicant testified he thought he was going to receive a twenty-five year sentence and did not know he would get a life sentence. He testified that trial counsel (Cooke) scared him and told Applicant he would receive a life sentence if he was convicted at trial.

Applicant testified he would have appealed his plea and sentence had he know he could do so.

The plea transcript reflects that Applicant told the trial judge he was on medication and, while not in the most affirmative way, acknowledged the medications did not “affect [his] ability to process information.” (Plea Trial Record p. 5, l. 23 through p. 6, l. 15). Immediately after this exchange with the trial court, trial counsel indicated they had no question about Applicant’s competency to enter a plea (Plea Trial Record p. 6, ll. 16-19). The transcript also reflects that he had been told by trial counsel the maximum sentence he faced and he understood the minimum and maximum sentence attached to the charge to which he was pleading (Plea Trial Record p. 2, l. 13 through p. 9, l. 6). At his plea, Applicant acknowledges he had not been promised anything in exchange for his plea at the time (Plea Trial Record p. 9, ll. 7-13). At his plea, Applicant acknowledged he understood his constitutional rights and wished to go forward with his plea (Plea Trial Record p. 11, ll. 7-11) and told the trial judge he had no questions for the court (Plea Trial Record p. 11, ll. 15-16).

Larry Cooke, one of Applicant’s trial counsel, testified that he did have Applicant evaluated for competence. He testified that the State also had applicant evaluated for competence. Mr. Cooke further testified that both evaluations found Applicant competent. Mr. Cook also testified that the private evaluation determined that Applicant was malingering and found no evidence that Applicant had multiple personalities as he claims.

Trial counsel Cooke testified that he never told Applicant that any sentence was guaranteed but that he though the trial judge would give Applicant some benefit based on his willingness to plead.

Trial counsel Cooke also testified that he knew applicant was on medication at the time of the plea, but testified that he, Cooke, never felt at any time he could not carry on a meaningful conversation.

Both of Applicant's trial counsel testified that they do not recall that Applicant requested that they file an appeal and would have done so if such a request had, in fact, been made.

Both of Applicant's trial counsel testified they did not coach Applicant as to how to answer the questions posed to him by the trial judge.

Trial Counsel Erwin testified he saw no appealable issues arising from the plea, that he knew that at the time of the plea Applicant had mental issues, and that Applicant was on medication at the time of the plea. Trial counsel testified that he saw no mental competence issues at the time of the plea and, had he felt mental competence was an issue, he would have requested a *Blair*¹ hearing.

Based on the above, the Court finds that trial counsel represented Applicant well within prevailing professional norms. Therefore, Applicant's application for Post-Conviction Relief is denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. See Rules 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.

¹ *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981).

PC
H
H5

October 31st, 2016
Greenville, South Carolina

John C. Hayes, III
John C. Hayes, III
Presiding Judge
#6

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF GREENVILLE

CASE NO: 2015CP2304723

IN THE COURT OF COMMON PLEAS

FILED IN COURT OF COMMON PLEAS GREENVILLE COUNTY S.C. PAUL B. WICKENSIMER 2016 NOV 18 AM 11 32

Victor Noe Ortiz Delvalle vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 - Affirmed;
 - Reversed;
 - Remanded;
 - Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - John C Hayes III

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

Brian P. Johnson 522 North Church Street
Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

