

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

**APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Perry M. Buckner, Circuit Court Judge**

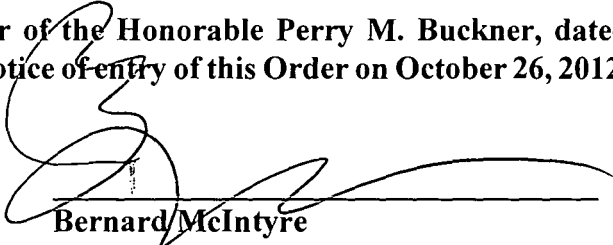
Case N. 2011-CP-07-4558

**Morris Stewart, #343460.....Appellant,
v.
State of South Carolina.....Respondent**

NOTICE OF APPEAL

Appellant Morris Stewart appeals the Order of the Honorable Perry M. Buckner, dated October 1, 2012. Appellant received written notice of entry of this Order on October 26, 2012.

November 16, 2012



**Bernard McIntyre
Law Office of Bernard McIntyre
Post Office Box 248/1606 King Street
Beaufort, SC 29901-0248
(843)524-9040
SC Bar No. 3083**

**Other Counsel of Record:
Asleigh R. Wilson
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803)734-3970**

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

**APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Perry M. Buckner, Circuit Court Judge**

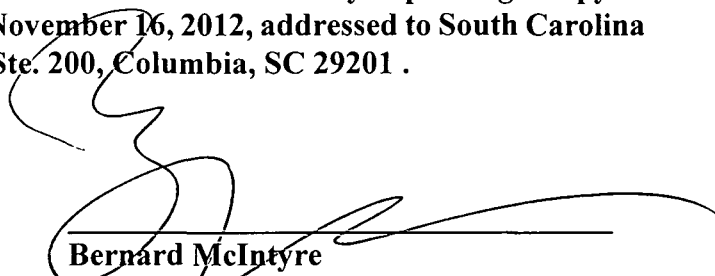
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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on November 16, 2012, addressed to its attorney of record, Asleigh R. Wilson, Office of the Attorney General, Post Office Box 11549, Columbia, SC 29211; and on South Carolina Court Administration by depositing a copy in the United States Mail, postage prepaid, on November 16, 2012, addressed to South Carolina Court Administration, 1015 Sumter Street, Ste. 200, Columbia, SC 29201 .

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S.C. Court Administration
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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
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 COUNTY OF BEAUFORT)
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 Morris Stewart, #343460)
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 Applicant,)
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 v.)
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 State of South Carolina,)
)
)
 Respondent.)
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IN THE COURT OF COMMON PLEAS
 2011-CP-07-4558

ORDER OF DISMISSAL

2012 OCT 15 PM 2:43
 BEAUFORT COUNTY, S.C.
 CLERK OF COURT

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This matter comes before the Court by way of an application for post-conviction relief (PCR) filed October 27, 2011. The Respondent made its Return on August 7, 2012. An evidentiary hearing into the matter was convened on September 4, 2012 at the Beaufort County Courthouse. The Applicant was present at the hearing and represented by Bernard McIntyre, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Applicant's plea counsel, Helen Roper Dovell, Esquire, also testified at the hearing. This Court had before it the guilty plea transcript, the records of the Beaufort County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the PCR application, and the Respondent's Return.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Beaufort County. The Applicant was indicted at the December 2009 term of the Beaufort County Grand Jury for five (5) counts of armed robbery (2009-GS-2581, -2582, -2584, -2585, -2614), two (2) counts of possession

of a weapon during a violent crime (2009-GS-07-2583, -2586), and one count of kidnapping (2009-GS-07-2611). He was also subsequently indicted for two (2) counts of forgery less than \$5000 (2010-GS-07-0676, -0677). Helen Roper Dovell, Esquire, represented the Applicant. The Applicant pled guilty as indicted. The Honorable Carmen T. Mullen sentenced the Applicant to confinement for fifteen (15) years for each armed robbery charge, five (5) years for each weapons charge, fifteen (15) years for kidnapping, and five (5) years for each forgery. The sentences were to run concurrently. The Applicant appealed his convictions and sentences. A timely notice of appeal was filed and the Court of Appeal dismissed the Applicant's appeal by order filed January 20, 2011. The Remittitur was sent on February 7, 2011.

#2
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ALLEGATIONS

The Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a. Failure to present a defense "Doyle Violation"
2. The State failed to produce the proof needed for a plea or conviction
3. Involuntary guilty plea
 - a. Pled under "duress, coercion, compel force, by threat"

At the hearing, Applicant waived all grounds for relief except ineffective assistance of counsel.

1. Ineffective assistance of counsel
 - a. Failed to discuss discovery with the Applicant
 - b. Failed to conduct an independent investigation
 - c. Failed to follow up with filing of appeal
2. Involuntary guilty plea
 - a. Coerced to plea because counsel advised him he would get life if he did not plead guilty.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the

opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

At the beginning of the evidentiary hearing, the Applicant moved for a continuance. The Applicant stated that he needed a continuance because the transcript of his guilty plea was incomplete. The Applicant said that a discussion with the Judge about the possibility of entering an Alford plea was missing from the record. The Applicant also stated that during a certain portion of the proceeding he recalls the judge referring to a kidnapping indictment, but the record reflects the judge referring to armed robbery indictment. The Applicant also stated that the case should be continued because someone transcribed the transcript other than the person who recorded it. The State opposed the Applicant's motion stating that the transcript was accurate and that the State was ready to proceed with the evidentiary hearing. The post-conviction relief court denied the Applicant's motion and proceeded with the evidentiary hearing.

At the evidentiary hearing, the Applicant testified that he was represented by counsel and that he consulted with her about ten times prior to his plea. He testified that trial counsel never reviewed his discovery with him prior to his plea. He testified that he never reviewed any video or witness statements from his discovery package. The Applicant testified that he never received a copy of his discovery until after his plea. The Applicant conceded that counsel did discuss the charges against him and the elements of the crimes that the State was required to prove at trial.

The Applicant also testified that counsel did not investigate his charges. He testified that he asked counsel about her investigation and that he was told by counsel that she did not do any written investigation. He testified that he told counsel to speak to a witness named Corina and

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that counsel never contacted Corina. He testified that if counsel had investigated further she would have found that he was not involved in the incidents and could not be identified by the victims. The Applicant testified further that Corina would have testified that he was not involved in the incidents.

The Applicant testified that his meetings with counsel were about taking a plea offer. He testified that he rejected two plea offers from the State. The Applicant also testified that counsel told him that the judge promised not to give him over fifteen years if he pled guilty, but that if he did not plead guilty he would get life without the possibility of parole. The Applicant testified that he felt forced to plea and that he did not want to plea. He testified that he pled because counsel told him he would get a life sentence. The Applicant testified further that he recalls the judge telling him that he was eligible for life without the possibility of parole if he proceeded to trial and that he would have proceeded to trial despite facing up to a 150 years sentence on all the armed robberies and the possibility of a life sentence.

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Lastly, the Applicant testified that he told his counsel to file an appeal of his guilty plea. He testified that he felt his guilty plea was appealable because he felt coerced to plead guilty and the State gave no factual basis for his plea. The Applicant testified that he later learned that he should have appealed the issue of counsel's failure to investigate. He testified that his appeal was later dismissed because no appealable issues were preserved for review. The Applicant testified further that he recalls telling the judge he was satisfied with counsel's representation and that he had no complaints with her service.

Plea counsel was present at the evidentiary hearing and testified that she was appointed to represent the Applicant. She testified that she has extensive experience in criminal law as a public defender and as a private attorney. Counsel testified that she met with the Applicant at

least thirteen times before his plea. She testified that she also spoke to the Applicant several times from the jail via phone. Counsel testified that she filed a Rule 5 motion in the Applicant's case. She testified that when she received the Applicant's discovery, she shared it with the Applicant. She testified further that around the end of April 2009, the Applicant requested a copy of his discovery and she sent him a copy. Counsel also testified that she sent the Applicant another copy of his discovery after his plea in May 2010.

Counsel testified that she discussed with the Applicant the charges against him and that she conducted an independent investigation of his charges. Counsel testified that she spoke with the victim of the Subway armed robbery and followed up with the solicitor on the case for more information. Counsel testified that she investigated the Subway armed robbery a little more thoroughly than the other charges because she was preparing for trial on that particular armed robbery.

Counsel testified further that she went over the incident reports and reviewed the statements from all the witnesses for all of the Applicant's charges. She testified that from reading the incident reports on the other charges she was in a good position to give the Applicant advice about the charges and to tell the Applicant what would likely happen if he proceeded to trial. Counsel testified that she reviewed all video footage from the incidents and if there was any surveillance footage she reviewed it. Counsel also testified that she did not recall the Applicant giving her the name of any potential witnesses to contact.

Plea counsel testified that she entered into plea negotiations on the Applicant's behalf. She testified that whenever offers were made by the State she conveyed the offers to the Applicant. She testified that the State offered the Applicant a fifteen (15) year maximum sentence to run concurrent in exchange for a plea to all pending charges. Counsel testified that

the State also offered the Applicant a plea to whichever charges he wanted to plea to in exchange for an eighteen (18) year sentence. She testified that counsel rejected the plea offer and was never given any new offers prior to trial. Counsel testified that the Applicant's case was first up for trial in October 2010 and they were prepared for trial, but the Applicant indicated he wanted to plead guilty.

Counsel testified further that she spoke to the judge prior to trial to gauge the judge's inclination as to a possible sentence if the Applicant were to plea. She testified that she discussed off the record with the judge whether or not the judge would accept an Alford plea from the Applicant. She testified that the plea judge said she would not accept an Alford plea. Counsel testified that he advised the Applicant that ^{As of} ~~he~~ he went to trial and was convicted or pled guilty to one armed robbery charge that he would be eligible for life without the possibility of parole. She testified that she never told the Applicant that if he did not plead guilty he would get life without the possibility of parole, but she did advise the Applicant to plea to avoid being eligible for life without the possibility of parole.

Counsel said that the Applicant seemed to be on the fence about pleading guilty and that they discussed his plea thoroughly. She testified that the Applicant eventually decided to plead guilty and was ready to plead guilty. She testified that she did not threaten the Applicant to get him to plead guilty and that it was the Applicant's decision to plead guilty. Counsel also testified that she told the Applicant that during the plea proceedings he would have to answer questions from the judge.

Counsel testified that the Applicant understood that he could become eligible for life without the possibility of parole and that when the Applicant hesitated during the plea proceeding she spoke with him again and he decided he still wanted to go forward with the plea.

Lastly, counsel testified that after the Applicant's plea he mentioned to her filing an appeal. She testified that she filed a timely notice of appeal on the Applicant behalf. She also testified that she filed an Anders brief because she saw no appealable issues. Counsel testified that she did not believe the Applicant did not understand the plea proceeding and that she felt his plea was entered voluntarily. She testified that she felt the appeal issues that the Applicant had were post-conviction relief issues and not direct appeal issues.

Ineffective Assistance of Counsel

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The Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (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. The applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624 (1988).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Id. at 625 (citing Strickland, 466 U.S. 668). 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.” Id. at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). When there has been a guilty plea, the applicant must prove that counsel’s representation was below the standard of reasonableness and that, but for counsel’s unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

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To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)). When a defendant pleads guilty on the advice of counsel, the plea may only be attacked through a claim of ineffective assistance of counsel. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2002) (citations omitted).

This Court finds that counsel is a criminal practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on numerous occasions. During conferences with the Applicant, counsel discussed the pending charges, the elements of the charges and what the State was required to prove, Applicant’s constitutional rights, Applicant’s version of the facts, and possible defenses or lack thereof. The record reflects that Applicant’s plea was entered freely, voluntarily, knowingly, and intelligently. Applicant

acknowledged that he was guilty of these offenses. Applicant told the plea court that he was satisfied with his attorney and that no one had threatened him or promised him anything to plead guilty. This Court finds that Applicant understood the terms of sentence and that if he was convicted of one of his armed robbery charges that he could face life without the possibility of parole.

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Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in her representation. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

This Court finds that the Applicant has failed to prove that trial counsel was ineffective for failing to review with the Applicant his discovery. This Court finds that plea counsel properly requested the Applicant's discovery by filing a Rule 5 motion. The Court finds that counsel gave credible testimony that she received the Applicant's discovery and thoroughly reviewed the contents of the discovery packet with the Applicant. This Court finds that this allegation is without merit and the Applicant has failed to carry his burden of proving that counsel was ineffective.

This Court finds that the Applicant has failed to prove that trial counsel was ineffective for failing to investigate the Applicant's charges. Our case law provides that defense counsel

must, at a minimum, interview potential witnesses. Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011). As long as a defendant's attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient. Id. 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." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998).

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This Court finds that counsel conducted a reasonable investigation of the Applicant's case prior to his plea. This Court finds that the Applicant interviewed all potential witnesses. This Court also finds that the Applicant has failed to show what would have resulted from further investigation by counsel. Counsel gave credible testimony that she investigated all the Applicant's charges and that she was never given the names of any potential witnesses by the Applicant. Counsel also gave credible testimony that she had investigated the Applicant's charges and reviewed his discovery enough so that she could advise the Applicant on the likely results if he were to proceed to trial. This Court finds that this allegation is without merit and the Applicant has failed to carry his burden of proving that counsel was deficient for failing to investigate the Applicant's case.

This Court finds that the Applicant has failed to prove that trial counsel was ineffective for failing to properly appeal the Applicant's case. This Court finds that this allegation is completely without merit. Counsel gave credible testimony that she filed a timely notice of appeal and Anders brief on the Applicant's behalf. The Applicant's appellate court records also reflect that counsel filed a timely notice of Appeal and Anders brief on the Applicant's behalf. The South Carolina Court of Appeals by order filed January 20, 2011 dismissed the Applicant's appeal. The Remittitur was sent February 7, 2011. This Court finds that this allegation is without

merit and the Applicant has failed to carry his burden of proving counsel was ineffective for failing to file an appeal.

This Court finds that the Applicant's guilty plea was entered freely and voluntarily. This Court finds that the Applicant was neither threatened nor coerced to plead guilty. The record reflects that during his plea colloquy, the Applicant told the judge that he had not been promised anything to make him plead guilty. (T. 22, ln. 13-16) The record also reflects that the Applicant told the judge that he had not been threatened or coerced into pleading guilty. (T. 22, ln.17-19). This Court finds that the Applicant had full understanding of the charges and the consequences of the plea. This Court finds that the Applicant was fully advised of all his constitutional rights. The record reflects that the Applicant was advised of the potential sentences for his charges (T.10, ln. 3-13), his right to a jury trial (T. 21, ln.1-4), the right to remain silent (T. 21), and the right to confront witnesses (T. 21). The record also reflects that the Applicant stated he was not under the influence of any drugs or alcohol at the time of his plea. (T. 6, ln.17-19). This Court finds further that the plea judge took all steps necessary to ensure that the Applicant's plea was entered freely and voluntarily, including allowing the Applicant to stand down when he seemed apprehensive about pleading guilty. (T. 7). This Court finds that the Applicant has failed to carry his burden of proving that his guilty plea was not entered freely and voluntarily.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test, specifically that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that counsel committed either errors or omissions in her representation of the Applicant. The Applicant failed to show that counsel's performance was deficient. Therefore, this Court need not address prejudice. Applicant's complaints concerning counsel's performance are without

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merit and are denied and dismissed.

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 the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION


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Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 15th day of October, 2022.



The Honorable Perry M. Buckner
Presiding Judge
14th Judicial Circuit

Walthers, South Carolina.