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April 15, 2017

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

Re: Keith Ager Smyth, SCDC# 363756 vs. State of South Carolina
Case No: 2015-CP-42-3427

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and a Proof of Service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please file the copies that I have enclosed and return the copies to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,


Rodney Richey

RWR/

enclosures

cc: Alicia A. Olive, Esquire

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APR 17 2017
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

HONORABLE FRANK R. ADDY, JR

2015-CP-42-3427

KEITH ADGER SMYTH, SCDC#: 363756

APPELLANT,

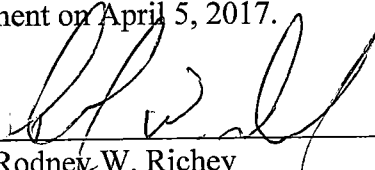
against

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Keith Adger Smyth appeals the denial of his Post- Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Frank R. Addy, Jr., Circuit Judge on November 8, 2016 and Order issued on March 9, 2017 and filed on March 17, 2017. The Appellant received notice of the judgment on April 5, 2017.



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Attorney for the Appellant
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Other Counsel of Record:
Alicia A. Olive, Esquire
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Post Office Box 11549
Columbia, SC 29211-1549

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
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HONORABLE FRANK R. ADDY, JR

2015-CP-42-3427

KEITH ADGER SMYTH, SCDC#:363756

APPELLANT,

against

STATE OF SOUTH CAROLINA,

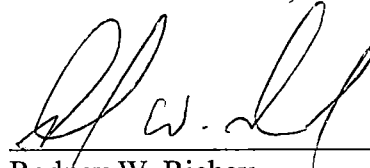
RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on April 15, 2017, addressed to their attorney of record, Alicia A. Olive, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: April 15, 2017

RICHEY & RICHEY, P.A.



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S.C. SUPREME COURT

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STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

Keith Adger Smyth, #363756,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No. 2015-CP-42-3427

ORDER OF DISMISSAL

APR 17 2017
SUPREME COURT

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M. IRENE BLACKLEY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 7, 2015, and Amended Application filed October 14, 2016. Respondent made a Return and Motion for More Definite Statement on February 12, 2016. The Court convened an evidentiary hearing into the matter on November 8, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Rodney Richey, Esquire. Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Timothy Ray, Esquire, also testified. The Court had before it a copy of the plea transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In February 2011, the Spartanburg County Grand Jury indicted Applicant for four (4) counts of criminal sexual conduct with a minor, first degree (2011-GS-42-0966, 2011-GS-42-0967, 2011-GS-42-0968, 2011-GS-

42-1251), and one count of criminal sexual conduct with a minor, second degree (2011-GS-42-0965). Timothy M. Ray, Esquire ("Counsel") represented Applicant. On April 21, 2015, Applicant pleaded guilty as indicted before the Honorable J. Derham Cole.¹ Pursuant to a negotiated sentence, Judge Cole sentenced Applicant to imprisonment for concurrent terms of twenty-five (25) years for each count of criminal sexual conduct with a minor, first degree, and a concurrent term of twenty (20) years for criminal sexual conduct with a minor, second degree. Applicant did not appeal his guilty plea or sentence.

II. ALLEGATIONS

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Unlawful sentence, in that:
 - a. "Not competent";
 - b. "disabilities";
 - c. "Medications [were prescribed] to [Applicant]"

In his Amended Application, Applicant asserts an additional thirty-one (31) claims. This document is incorporated by reference. At the evidentiary hearing, Applicant proceeded on only the allegation of involuntary guilty plea.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. The 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.

¹ A competency hearing was held prior to the plea on February 10, 2015. (Tr. at 1-51).

A. Summary of Testimony

Applicant testified that he was not competent to stand trial and stated that he was innocent. Applicant testified that when he pleaded guilty he was on Seroquel, which made him tired. He testified the State told him he would receive sixty (60) years to life imprisonment. Applicant testified Counsel did not investigate his case. He testified Counsel advised him to accept the plea offer. Applicant testified he did not want a new trial, but wants a lesser sentence.

Counsel testified he was retained to represent Applicant. He testified he represented Applicant over the course of four (4) years and that they met fairly often during that time. Counsel testified he discussed discovery with Applicant and that Applicant had received copies of the discovery multiple times. Counsel testified that competency was an issue from the beginning. Counsel testified that Applicant was initially found incompetent, and after a period of sixty (60) days in the Department of Mental Health, he was tested again and found competent. Counsel testified he was able to have Applicant declared indigent and to obtain funds to hire mental health experts to examine Applicant. He testified a State v. Blair, 275 S.C. 536, 273 S.E.2d 536 (1981) hearing was held after which Applicant was found competent.

Counsel testified that he and Applicant had lengthy discussions about the State's evidence and that Applicant understood the allegations against him. Counsel testified he discussed Applicant's rights with him and that it was Applicant's decision to plead guilty. Counsel testified that if Applicant had indicated he wished to proceed to trial, Counsel would have been prepared to try the case. Counsel testified he had discussions with the Solicitor's Office in an effort to obtain a more favorable plea offer, but the State was confident in its case and was not willing to reduce the agreed upon sentence any further. Counsel testified the State was also unwilling to try him as a juvenile.

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B. Guilty Plea

Prior to the guilty plea hearing, a competency hearing was held on February 10, 2015. (Tr. at 1-51). Doctors Tora Brawley and Amanda Salas testified at the competency hearing on behalf of Applicant. The State called Dr. Monica Wright with the Department of Disabilities and Special Needs. (Tr. at 34). Dr. Wright testified that Applicant was initially found incompetent to stand trial, but he was re-evaluated after sixty (60) days of hospitalization. (Tr. at 36-37). Dr. Wright testified that she ultimately determined he was competent to stand trial. (Tr. at 39:6-9). Following the competency hearing, the Court ruled that Applicant was competent to stand trial. (Tr. at 53:6-12).

The plea judge reviewed each charge and potential sentence at the plea hearing. (Tr. at 63-68). Applicant acknowledged he understood each charge and the potential penalty for each during the plea colloquy. (Tr. at 63-68). Applicant acknowledged that he signed a waiver-of-rights form and that Counsel went through it with him line by line. (Tr. at 56-57). Applicant stated he understood everything contained in the form. (Tr. at 57). At the plea, Applicant understood that a guilty plea meant he was giving up his constitutional right to remain silent, have a trial by jury, and confront the witnesses against him. (Tr. at 68-75). Applicant denied that anyone had promised him anything or forced him to plead guilty. (Tr. at 75-76).

Applicant informed Judge Cole that Applicant was on the prescription medication Seroquel at the time of his plea. (Tr. at 79:5). Applicant indicated that the medication helped him to function and understand when he was doing. (Tr. at 79:15-17). Counsel informed the plea judge that he knew of no legal defenses available to Applicant. (Tr. at 78). Applicant was given Miranda² warnings after which he gave a written statement confessing to the sexual battery of four (4) of the five (5) minor victims. (Tr. at 80:6-18). The State expressed that if Applicant

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were to proceed to trial, it was prepared to call witnesses who would testify to the facts in each of the indictments; in some instances, those witnesses would be eye witnesses. (Tr. at 92). Applicant stated repeatedly during the guilty plea hearing that he did not want to go to trial. (Tr. at 72, 85:10, 86:1-17, 89:3-5, 91:7, 94:21-22). Counsel stated that he and Applicant had discussed Applicant's case extensively and that, after viewing the evidence against Applicant and his discussions with Applicant about what he told Counsel happened, Applicant decided to enter his plea. (Tr. at 97:20-98:22). Counsel acknowledged that he explained to Applicant that he had a right to challenge the voluntariness of the statement at trial, but even if the statement was excluded, the jury would still be able to consider the testimony of each of the victims. (Tr. at 100:15-101:20). Applicant also acknowledged he understood this. (Tr. at 101:20-24).

C. Ineffective Assistance of Counsel

Applicant alleged at the evidentiary hearing that his guilty plea was made without the competent advice of counsel. After reviewing the transcript and considering the allegations raised in the application and at the evidentiary hearing, this Court finds plea counsel was not ineffective.

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was deficient, and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in

² Miranda v. Arizona, 384 U.S. 436 (1966).

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criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985). This Court must presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)). "[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (quoting Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)).

Clearly, Applicant suffers from diminished mental capacity. However, in advance of the guilty plea a full competency hearing was held, during which two experts testified on behalf of Applicant. Nevertheless, the court determined Applicant was competent to stand trial. Counsel testified that he met with Applicant many times over the course of four (4) years, and that during this time, he and Applicant had lengthy discussions about the State's evidence and that Applicant understood the allegations against him. Counsel testified he discussed Applicant's rights with him and that it was Applicant's decision to plead guilty. Counsel testified that if Applicant had indicated he wished to proceed to trial, Counsel would have been prepared to try the case. Counsel testified Applicant did not want to go to trial. Counsel testified he had discussions with



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M. J. O'CONNOR
CLERK

the Solicitor's Office to try to obtain a more favorable plea offer, but the State was confident in its case and was unwilling to reduce the negotiated sentence any further. Based on the record and the testimony presented at the evidentiary hearing, this Court finds Applicant has made no showing to overcome the presumption that Counsel rendered adequate assistance. Therefore, Applicant has failed to satisfy his burden of proving any deficiency in Counsel's performance.

In addition, Applicant testified at the evidentiary hearing that he does not want a trial; rather, he desires a lesser sentence. However, the sentence that Applicant received was a negotiated sentence and the minimum sentence available on the charges he faced. To prove prejudice resulting from the alleged deficient advice of counsel, Applicant was required to show that, but for the alleged deficiency, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 56 (1984). Here, because Applicant provided no evidence that he would have insisted on going to trial rather than pleading guilty, Applicant has made no showing of prejudice.

Therefore, having reviewed the pleadings, considered the applicable law, and reflected upon the record, the Court finds Applicant has failed to carry his burden. Accordingly, this Court finds Applicant's application for post-conviction relief must be denied and dismissed with prejudice.

C. 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, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

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IV. CONCLUSION

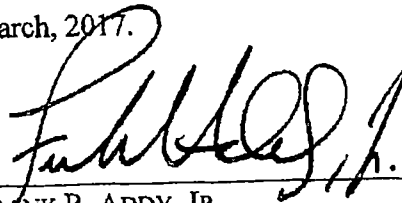
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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), SCRCR, 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 must be remanded to the custody of the Department of Corrections to complete service of his sentence.

IT IS SO ORDERED this 9th day of March, 2017.



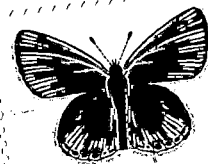
FRANK R. ADDY, JR.
Presiding Judge, Seventh Judicial Circuit

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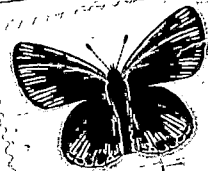
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The Honorable Daniel E. Shearouse
The Supreme Court of South Carolina
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