

ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

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April 21, 2017

APR 24 2017

S.C. SUPREME COURT

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Mark Stephen Wingo v. State

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,



Susannah Ross
Attorney at Law

enclosure

cc: Office of the Attorney General
Office of Appellate Defense

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APR 24 2017

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Edward W. Miller, Circuit Court Judge

2016-CP-42-0607

Mark Stephen Wingo, Appellant,

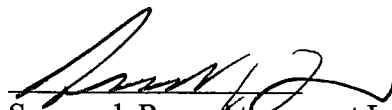
v.

The State, Respondent.

NOTICE OF APPEAL

Mark Stephen Wingo appeals the Honorable Edward W. Miller's Order filed on March 27, 2017 denying the Applicant post-conviction relief.

This 21 day of April, 2017.


Susannah Ross, Attorney at Law
330 E. Coffee St.
Greenville, SC 29601
(864) 242-0029
Attorney for Appellant

Other Counsel of Record:
Alicia Olive, Assistant Attorney General
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Columbia, SC 29211
(803) 734-3970
Attorney for Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
OF THE SEVENTH JUDICIAL CIRCUIT

Mark Stephen Wingo,)
S.C.D.C. No. 269107,)

2016-CP-42-0607

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

2017 MAR 27 PM 1:03
N. JUDGE C. JACKSON

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed February 18, 2016. Respondent made its return on October 13, 2016. An evidentiary hearing was held on February 1, 2017, at the Spartanburg County Courthouse. Applicant was present and represented by Susannah C. Ross, Esquire. Assistant Attorney General Caitlin B. Hastings represented Respondent.

Applicant and his plea counsel Michael D. Brown, Esquire were present at the hearing. The Court had before it Applicant's plea transcript, the Spartanburg County Clerk of Court records, the South Carolina Department of Corrections records, and the records of this action.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted at the March 2015 term of the Spartanburg County Grand Jury for shoplifting (2015-GS-42-0826) and two counts of possession of contraband by a prisoner (2015-GS-42-1460, and -1466). Applicant waived presentment on one of the charges of possession of contraband by a prisoner (2015-GS-42-1460). Michael D. Brown, Esquire, represented Applicant. On March 27, 2015,

Applicant pleaded guilty before the Honorable J. Mark Hayes, II. At the time of the plea hearing, Applicant was also on probation for prior charges. Judge Hayes sentenced Applicant to imprisonment for concurrent terms of 10 years for each count of possession of contraband by a prisoner charge and to a *consecutive* term of 10 years for shoplifting, the balance suspended to five years' probation upon time served. Judge Hayes also revoked Applicant's probation in full and ordered that the revocation be served concurrently. Applicant did not appeal his conviction or sentence.

ALLEGATIONS

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

1. "Prosecutor Violated Plea Agreement" (sic)
 - a. "Prosecutor's Team/Victim, County jail requested maximum sentence. This was not part of Plea Bargained. So said Plea is not knowingly or willingly entered...in the context of a claim that counsel failed to conduct an adequate investigation prior to the entry of a Guilty Plea, prejudice is demonstrated by showing that the defendant would have insisted on going to Trial instead of pleading guilty."
2. "Failure to Move to Withdraw Guilty Plea, Unkept Plea Bargains"
 - a. "Counsel may be ineffective for failure to move for withdrawal of a Guilty Plea where the government fails to fulfill it's promise's under the Guilty Plea..."

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 their credibility. This Court has weighed the testimony accordingly. As a matter of general impression, this Court finds Applicant's testimony to be neither credible nor legally relevant. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code

Ann. § 17-27-80 (2003).

Ineffective Assistance of Plea Counsel

At the PCR hearing, Applicant proceeded on the allegations that his plea counsel was ineffective for failing to ensure the court sentenced him pursuant to an alleged plea agreement. Applicant has failed to satisfy his burden of proving he received ineffective assistance of counsel.

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)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court presumes 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).

The Court uses 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, the Court measures counsel'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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 688. An Applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel’s errors, the Applicant would not have pleaded guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001); Hill v. Lockhart, 474 U.S. 52, 56 (1985). 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).

Failure to Ensure “Plea Agreement” was Upheld

Applicant asserts that plea counsel’s performance was deficient for failure to ensure that alleged plea agreement was upheld. Applicant has failed to show any deficiency or resulting prejudice from this allegation.

At Applicant’s guilty plea hearing, the Solicitor told the judge that the State was making no recommendation on any of the aforementioned charges. Tr. p. 2. Additionally, Applicant did not enter a plea to a negotiated sentence. The plea judge also informed him that he could be sentenced up to 10 years on each charge. Tr. p. 9 -10. Applicant stated that he was very satisfied with the services of his counsel and that his decision to plead guilty was being made freely and voluntarily.

At the PCR hearing, Applicant testified that he agreed to plead guilty with the impression

that he would not receive the maximum sentences on his charges. However, Applicant testified that he did not plead guilty to a recommended sentence nor a negotiated sentence. Applicant further testified that he remembered Judge Hayes reviewing the potential sentences he could receive at his plea hearing Tr. p. 9-10. At his plea hearing, Judge Hayes also advised Applicant that by entering his guilty plea, he would be found in violation of his current probation, and therefore, his probation would be consequently revoked. Tr. p. 11.

From a review of the plea transcript, this Court finds that Applicant did not enter a guilty plea pursuant to a recommended sentence nor a negotiated sentence. This Court further finds that Judge Hayes appropriately and adequately advised Applicant of the potential sentences he was facing by entering his guilty plea as well as the rights he was waiving.

This Court further finds Applicant has failed to establish he was prejudiced by any alleged deficiency of his plea counsel. First, Applicant testified at his plea hearing that he was very satisfied with his counsel's representation. Second, Applicant testified at the PCR hearing that it was his decision to plead guilty and that he did not plead guilty pursuant to a negotiated or recommendation from the State. Therefore, Applicant was vulnerable to the full extent of the law by entering his plea and even admitted so through his testimony at the PCR hearing. Accordingly, Applicant has failed to meet his burden of proving ineffective assistance of plea counsel. Thus, this allegation is denied and dismissed with prejudice.

Prosecutorial Misconduct

Applicant testified at the PCR hearing that the Solicitor asked the sentencing judge for the maximum sentence which violated his alleged plea agreement. From a review of the plea transcript, this Court finds Applicant has failed to prove any prosecutorial misconduct. Accordingly, this allegation is denied and dismissed with prejudice.

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.

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.

[Remainder of this page left intentionally blank]

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

AND IT IS SO ORDERED this 21 day of March, 2017.



EDWARD W. MILLER
Presiding Judge
Seventh Judicial Circuit

G'ville, South Carolina

2017 MAR 27 PM 1:03
M. HOPE BLACKLEY

Spartanburg County

Spartanburg County Court House
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M. Hope Blackley
Clerk of Court

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Mark Stephen Wingo
269107
Applicant

7TH JUDICIAL CIRCUIT

CASE # 2016CP42-1007

CERTIFICATE OF SERVICE

vs
State
Respondent

I certify that, on this date, I served a copy of the
In this action dated 3-21, on

Adrian Desmissal
3-28-17

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Ashley Hawthorth
Alvin Olegie
Suzanne Ross

3-28-17

(Date)

Carin Guff

(Signature)

SUSANNAH ROSS
330 EAST COFFEE ST.
GREENVILLE SC 29601



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