

ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

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April 26, 2017

APR 28 2017

S.C. SUPREME COURT

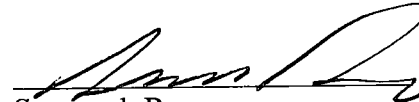
Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Robert Osbey 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

330 E. COFFEE ST. • GREENVILLE/SC • 29601

PHONE: (864) 242-0029

E-MAIL: SUSANNAH@ROSSENDERLIN.COM

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

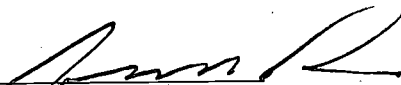
2016-CP-42-0729

Robert Osbey, Appellant,
v.
The State, Respondent.

NOTICE OF APPEAL

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

This 26 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
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for Respondent

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APR 28 2017

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
ROBERT OSBEY,)
)
APPELLANT,)
)
)
VS.)
)
)
THE STATE OF SOUTH CAROLINA,)
)
RESPONDANT.)
_____)

IN THE SUPREME COURT

CERTIFICATE OF SERVICE
BY MAIL

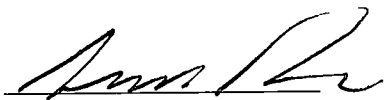
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APR 28 2017

S.C. SUPREME COURT

1. I am the attorney for the Applicant in the above-captioned matter.
2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Notice of Appeal** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

Attorney General
Alan Wilson
P.O. Box 11549
Columbia, SC 29211


Attorney for Defendant

This 26 day of April, 2017

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
OF THE SEVENTH JUDICIAL CIRCUIT

Robert Osbey,)
S.C.D.C. No. 299910,)

2016-CP-42-0729

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

2017 MAR 27 PM 1:03
N. HOPE BLACKLEY

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed February 23, 2016. Respondent made its Return and Motion for a More Definite Statement 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 testified 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 December 2014 term of the Spartanburg County Grand Jury for two counts of trafficking in cocaine base, 10-28g, first offense (2014-GS-42-6239, and -6240) and one count of possession with intent to distribute cocaine base, first offense (2014-GS-42-6241). On April 1, 2015, Applicant appeared *pro se* and pleaded guilty before the Honorable J. Derham Cole to all charges

as indicted. Pursuant to the State's recommendation, Judge Cole sentenced Applicant to imprisonment for concurrent terms of eight years for each count of trafficking in cocaine base, and to a consecutive term of five years suspended to three years of probation for possession with intent to distribute cocaine base.

ALLEGATIONS

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

1. "Involuntary Guilty Plea. Solicitor forced me to plead"
 - a. "I didn't get to witness the evidence in the case"
2. "I received a plea for 3 to 10 and for all my charges" [sic]
 - a. "I would like to be sentenced in the ground of my [plea agreement]"

On December 29, 2016, Applicant amended his PCR application to include the following:

3. "Fifth, Sixth, Eighth and Fourteenth Amendment violations of the Constitution of the United States & Art. I, Sec. 3, 10, & 14 of the South Carolina Constitution because Mr. Osbey did not knowingly and voluntarily waive his right to counsel."

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 evidentiary hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon his 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).

Involuntary Guilty Plea

Applicant asserts that his guilty plea was entered involuntarily and unknowingly because Applicant did not knowingly waive his Sixth Amendment right to counsel and the Solicitor forced him to enter a plea. In PCR cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)). However, two exceptions to this rule exist: (1) the applicant was not represented by counsel at the guilty plea hearing; or (2) the plea was rendered involuntary based on the State's failure to disclose exculpatory evidence as enumerated in Brady v. Maryland, 373 U.S. 83 (1963).

“The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel.” Carnley v. Cochran, 369 U.S. 506, 514-15 (1962). A trial judge bears the responsibility to determine whether there is “an intelligent and competent waiver by the accused.” Id. “While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.” Id. “Presuming a waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer.” Carnley, 369 U.S. at 516.

Additionally, the record must establish the accused had a full understanding of the consequences of his plea and the charges against him. Dalton v. State, 376 S.C. 130, 138, 654

S.E.2d 870, 874 (Ct. App. 2007) (citing Boykin v. Alabama, 395 U.S. 238, 242 (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)). "[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, 376 S.C. at 138, 654 S.E.2d at 874 (quoting Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). 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." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

Having reviewed the pleadings, considered the applicable law, and reflected upon the plea transcript and testimony provided at the evidentiary hearing, the Court denies Applicant's request for post-conviction relief. From a review of the entire record, this Court finds Applicant has failed to meet his burden of proving his guilty plea was unintelligently and involuntarily made. Further, this Court finds that the plea judge was correct in finding Applicant knowingly and voluntarily waived his right to counsel. Tr. pp. 5-6. At the beginning of the plea hearing, the plea judge asked Applicant if the magistrate had informed him of his right to counsel at his arraignment. Tr. p. 3. Applicant admitted that the magistrate had, indeed, done so, informing Applicant that he could be appointed counsel by contacting the public defender's office. Id. The plea judge further inquired as to whether Applicant was repeatedly informed of his right to

counsel at his first and second court appearances. Tr. p. 4. Applicant again admitted that he was so informed and that if he wanted to have counsel appointed he needed to submit an application to the public defender's office. Id. Applicant further testified that he did not file an application for appointed counsel with the public defender's office. He testified that he "was trying to get one. Just didn't have the money." Id. Applicant also admitted to the plea judge that he had been in custody for about a year and still had not filed an application with the public defender's office nor retained private counsel. Id.

The following conversation took place at the plea hearing:

DEFENDANT: Well, I tried to talk over there yesterday. They told me I waited too long. They said I –

COURT: Okay. Well, in other words, you waited until this week when you were put on the trial docket to talk with the public defender's office?

DEFENDANT: No, sir. I called last week, but they told me I had to have two weeks just to have one appointed to me.

COURT: Well, in any event, you waited about a year before you made contact with them?

DEFENDANT: Yes, sir.

COURT: All right. I find based upon that conduct that you have knowingly waived your right to counsel by your conduct, having known and been advised that you could have an appointed lawyer but you needed to contact the public defender's office so that they could accept your application. And in a year's time you have – or virtually a year's time you failed to do that. So you've waived your right to counsel in my view.

Tr. pp. 5-6.

Additionally at the plea hearing, the plea judge discussed the constitutional rights Applicant would waive by entering a guilty plea. Tr. pp. 6-8. Applicant testified that he understood this waiver of his right and still wished to plead guilty. Id. Further, the plea judge

discussed the charges and potential punishments applicant was facing. Tr. pp. 8-9. Applicant also testified that he was not promised anything nor coerced to enter his plea. Tr. p. 10.

At the PCR hearing, Applicant testified that he had been advised at all of his prior court proceedings of his right to retain or obtain appointed counsel through the public defender's office. Further, Applicant testified that he did not make any attempts to file an application with the public defender's office until a week before his plea hearing.

Accordingly, this Court finds that Applicant knowingly and voluntarily waived his right to counsel and pleaded guilty to the charges knowingly and freely. Therefore, this Court finds Applicant has failed to satisfy his burden of proof. Thus, this allegation is denied and dismissed with prejudice.

Prosecutorial Misconduct

In his application, Applicant alleged there was prosecutorial misconduct. However, no testimony or evidence supporting this allegation was presented at the evidentiary hearing. 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.

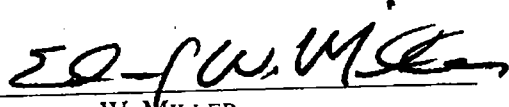
Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

A. G. Hill, South Carolina

2017 MAR 27 PM 1:03
M. HOPE BLACKLEY

Spartanburg County

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M. Hope Blackley
Clerk of Court

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH JUDICIAL CIRCUIT

Robert Drake
Applicant # 299510

CASE # 2016CP42 729

CERTIFICATE OF SERVICE

VS
State
Respondent

I certify that, on this date, I served a copy of the Order Dismissal
In this action dated 3-21 2017 on 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:

Johnny Hammett

Debra Olee

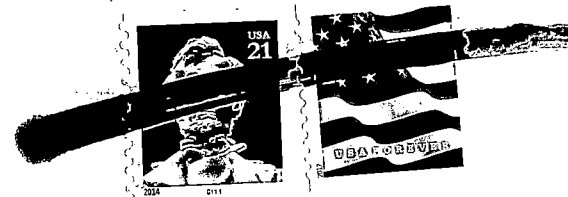
Susan Rose

3-28-17
(Date)

[Signature]
(Signature)

SUSANNAH ROSS

330 EAST COFFEE ST.
GREENVILLE SC 29601



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