

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHEROKEE)
)
 James Dawkins, #345172,)
 Applicant,)
)
)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2013-CP-11-0547

**CONSENT ORDER GRANTING
 AN APPEAL PURSUANT
 TO AUSTIN V. STATE**

FILED IN OFFICE OF
 CLERK OF COURT
 CHEROKEE COUNTY, S.C.
 2015 APR 29 10 59
 BRANDY N. JOBE

This matter comes before the Court by way of an application for post-conviction relief filed August 29, 2013. The Respondent made its Return on March 18, 2014, requesting an evidentiary hearing solely on the issue of whether Applicant was entitled to an appellate review of his first post-conviction relief action pursuant to Austin. An evidentiary hearing on the matter was convened on March 26, 2015, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Leah B. Moody, Esquire. Suzanne H. White, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. The Applicant was indicted at the June 2010 term of the Cherokee County Grand Jury for assault and battery with intent to kill (2010-GS-11-0465). Sean Giovanetti, Esquire, represented him on the charges. On March 14, 2011, Applicant pled guilty as indicted. The Honorable J. Mark Hayes II sentenced the Applicant to confinement for twenty years. The Applicant did not appeal his guilty plea or sentence.

¹ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

The Applicant subsequently filed an application for post-conviction relief (PCR) on October 27, 2011. The State filed its Return on July 17, 2012. An evidentiary hearing was convened on January 9, 2013, at the Spartanburg County Courthouse, at which the Applicant was present and represented by R. Patrick Martin, Esquire. The Applicant raised the following issues in his first PCR:

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to investigate, challenge arrest warrant, and “look at law as they apply to facts of the case;”
 - b. Arrest warrants in violation of Fourth Amendment.

The Honorable J. Derham Cole denied and dismissed Applicant’s application by written Order on April 2, 2013. The Applicant did not appeal the denial of his PCR application.

ALLEGATIONS

In his current application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of PCR Counsel, in that;
 - a. Counsel failed to appeal the denial of Applicant’s prior PCR application as instructed to by Applicant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his prior application. Prior to the start of the evidentiary hearing, the State indicated to this Court that they would be consenting to the grant of an Austin appeal. The State informed this Court that they were consenting based off of their discussion with prior PCR Counsel, who indicated that subsequent to Applicant’s hearing, he left his firm and never received a copy of the signed and filed Order of Dismissal and discussion with Applicant’s current PCR Counsel.



After review of the facts and circumstances surrounding the waiver of the Applicant's right to appeal the denial of his post-conviction relief application, this Court finds that the Applicant is entitled to appeal the denial of his first post-conviction relief application (2011-CP-11-0724). Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. This Court finds that Applicant did not voluntarily waive his right to appeal the post-conviction relief court's denial and dismissal of his prior post-conviction relief action.

Based upon the foregoing, this Court finds that the granting of an appeal of the Applicant's first post-conviction relief action (2011-CP-11-0724) pursuant to Austin v. State is warranted.


IT IS THEREFORE ORDERED:

1. That the Applicant be granted an appeal of case 2011-CP-11-0724 pursuant to Austin v. State; and
2. That the Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 20th day of April, 2015.



ROGER L. COUCH
Presiding Judge


_____, South Carolina.

FILED IN OFFICE OF
CLERK OF COURT
JULY 2, 2015
S.C.
CHEROKEE COUNTY
2015 APR 23 PM 10 59
BRANDY W. MCBEE

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF CHEROKEE
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2013CP1100547

James Dawkins #345172	State Of South Carolina
-----------------------	-------------------------

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (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. See Page 2 for additional information.
- 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; Other: _____
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

BRADY W. MOORE
 CLERK OF COURT
 2:55 PM '15
 S.C.

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; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

Consent Order Granting an Appeal Pursuant to Austin v. State

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

s/ Roger L. Couch
 Circuit Court Judge

2135
 Judge Code

4/23/2015
 Date

740

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE
IN THE COURT OF COMMON PLEAS

FILED IN OFFICE OF JUDGMENT IN A CIVIL CASE
CLERK OF COURT
CHEROKEE COUNTY, S.C. CASE NO: 2011CP1100724

2013 APR 9 AM 11 36

James Dawkins #345172 vs State Of South Carolina

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:

Order of Dismissal

Dated at Gaffney, South Carolina, this the 8th day of April, 2013.

Court Reporter:

s/ J. Derham Cole

PRESIDING JUDGE - J. Derham Cole

This judgment was entered on the the 2nd day of April, 2013, and a copy mailed first class this the 9th day of April, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Duane Alan Lazenby PO Box 6099 Spartanburg, SC 29304

ATTORNEY(S) FOR THE PLAINTIFF(S)

Office of Attorney General, PO Box 11549 Columbia, SC 292111549

ATTORNEY(S) FOR THE DEFENDANT(S)

Brandy W. McBee

Brandy W. McBee - Clerk of Court

STATE OF SOUTH CAROLINA)
 COUNTY OF CHEROKEE)
James Dawkins, #345172,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2011-CP-11-0724

FILED IN OFFICE OF
 CLERK OF COURT
 CHEROKEE COUNTY, S.C.
 2013 APR 8 AM 8 54
 BRANDY W. MCBEE

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 27, 2011. The Respondent made its Return on or about July 17, 2012. An evidentiary hearing into the matter was convened on January 9, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by R. Patrick Martin, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Sean Giovanetti, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, and the plea transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. The Applicant was indicted at the June 2010 term of the Cherokee County Grand Jury for assault and battery with intent to kill (ABWIK) (10-GS-11-0465). He was represented by Sean Giovanetti, Esquire. On March 14, 2011, the Applicant pled guilty as indicted. He was sentenced by the Honorable J.

Mark Hayes, II to confinement for a period of twenty (20) years. The Applicant did not appeal his guilty plea or sentence.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel, in that;
 - a. Counsel failed to investigate, challenge arrest warrants, and "look at law as they apply to facts of the case;"
 - b. Arrest warrants in violation of Fourth Amendment.

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. 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 Counsel

The Applicant alleges he received ineffective assistance of counsel, specifically, that Counsel failed to object to the arrest warrant and because of Counsel's miscommunication regarding the plea. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692

(1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. 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).

Applicant testified that he believed the arrest warrant was invalid because there was no judge code and Applicant was in the county jail five days before he even saw the arrest warrant. However, the Applicant also testified that he never talked with Counsel about the issue. Applicant testified that he wanted a trial, so that he could share his story. Applicant testified that he had mental issues and Counsel never reviewed any discovery materials with him. Applicant testified that Counsel told him that Counsel would request leniency at the plea and Counsel believed Applicant would receive a sentence of ten to fifteen years.

Counsel testified that his first meeting with the Applicant was a bond reduction hearing. At that time, Counsel testified that he discussed the options of trial versus plea with Applicant.

Counsel testified that the Applicant told him that he was robbed, but there was an issue because of the time lapse from the robbery and shooting. Counsel testified that the Applicant never raised any issue with the arrest warrants and Counsel saw no deficiency. Furthermore, Counsel testified that the Applicant never raised any issues about his mental status to Counsel. Counsel testified that he did discuss the possible sentence with Applicant, but never promised anything. Additionally, Counsel testified that the Applicant never indicated that he wanted to proceed to trial; rather, the Applicant was overwhelmed with the enormity of the facts. Counsel testified that the Applicant shot a boy who was close friends with Applicant's brother, and the victim ended up paralyzed.

This Court finds the testimony of Counsel to be more credible than the testimony of the Applicant. The Applicant's allegation that Counsel did not conduct an adequate pre-trial investigation is without merit. Following testimony and review of the transcript, it is clear that Counsel had reviewed the facts and evidence, as well as the options that Applicant faced. The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). The Applicant failed to point to any specific matters Counsel failed to discover, or any defenses that could have been pursued had Counsel been more fully prepared. Furthermore, the

Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate preparation. Accordingly, this allegation is dismissed.

Regarding Applicant's allegations that Counsel failed to object to the arrest warrant, this Court finds that this allegation lacks merit. This Court reviewed the arrest warrant and found no deficiency that would have provided a basis for any objection. Therefore, this Court finds that the Applicant has failed to meet his burden of proof as to this claim. This Court also finds that the Applicant failed to show that Counsel should have investigated his mental status or that Counsel provided incorrect advice as to the potential sentence that Applicant faced. In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court held that the two-part standard adopted in Strickland v. Washington, *supra*, for evaluating claims of ineffective assistance of counsel applies, as well, to guilty plea challenges based on ineffective assistance of counsel. To meet the Court's "prejudice" requirement, a criminal defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill at 59. Not only did the Applicant fail to establish that Counsel offered incorrect advice or that Applicant had mental illness which should have been investigated, but the Applicant has failed to establish that he would have proceeded to trial, but for, these alleged deficiencies of Counsel. Therefore, this claim is denied and dismissed.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, the Applicant's testimony is not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – 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 his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel’s performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

CONCLUSION

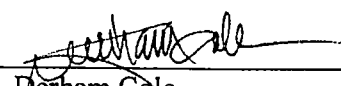
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel’s assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant’s behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 2nd day of April, 2013.



J. Derham Cole
Presiding Judge

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2013 APR 8 PM 8 54
BRANDY W. MCBEE