

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

11 NORTH IRVINE STREET, SUITE 11 • GREENVILLE, SC 29601
PHONE 864.232.9390 • FAX 864.232.9392 • E-MAIL MILLS@RMALAWOFFICE.COM

July 31, 2017

RECEIVED

AUG 03 2017

S.C. SUPREME COURT

Via US Mail

Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

***Re: Notice of Intent to Appeal from Kelvin Smith v. State of South Carolina
C.A. No.: 2015-CP-39-916***

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable John C. Hayes, III's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Pickens County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law



R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge
Case No. 2015-CP-39-916

RECEIVED

AUG 03 2017

S.C. SUPREME COURT

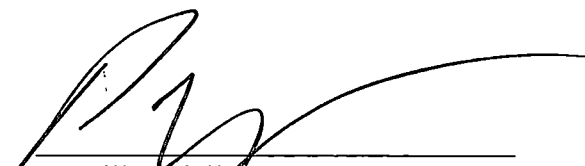
Kelvin Smith,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable John C. Hayes, III's Order of Dismissal dismissing Appellant's application for post-conviction relief. On December 22, 2016, the Honorable John C. Hayes, III's Order of Dismissal dismissing Appellant's application for post-conviction relief with prejudice was filed. Appellant, through counsel, received written notice of entry of this order on July 11, 2017. A copy of the Honorable John C. Hayes, III's Order of Dismissal is attached.



R. Mills Ariail, Jr.
Attorney at Law
11 North Irvine St., Suite 11
Greenville, SC 29601
Telephone (864) 232-9390
Facsimile (864) 232-9392
Attorney for Kelvin Smith

Greenville, South Carolina
July 31, 2017

2016 DEC 22 PM 2 46

STATE OF SOUTH CAROLINA)
CLERK OF COURT)
PICKENS COUNTY)
COUNTY OF PICKENS)
SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2015-CP-39-0916

Kelvin Bernard Smith,)
SCDC No. 268079,)

Applicant,)

vs.)

ORDER

State of South Carolina,)

Respondent.)

Applicant filed this application for Post-Conviction Relief July 28, 2015. This matter was heard December 9, 2016. Applicant was represented by R. Mills Ariail, Jr., Esquire. The State was represented by Patrick Schmeckpeper, Esquire.

Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Pickens County Clerk of Court's orders of commitment. Applicant was indicted by the September 2014 term of the Pickens County Grand Jury for Kidnapping (2014-GS-39-0659, First-Degree Criminal Sexual Conduct (2014-GS-39-0661), and First-Degree Burglary (2014-GS-39-0662). Teal Johnson, Esquire represented the Applicant.

On December 15, 2014, the Applicant pled guilty as indicted. The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of 20 years imprisonment for kidnapping, 20 years for first-degree criminal sexual conduct, and 20 years for first-degree burglary. The Applicant did not appeal.

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

1. Ineffective assistance of counsel.
 - a. Counsel failed to fully evaluate condition of the Applicant as to his understanding of the law and facts.
2. Involuntary guilty plea.
 - a. The Applicant was heavily medicated at the time of the plea.

In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. See *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant alleges ineffective assistance of counsel as a ground for relief. 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 on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065). 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*, 466 U.S. at 688, 104 S. Ct. 2052 (1984)).

Applicant also alleges that his guilty plea was given involuntarily. A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty, but would have insisted on going to trial. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). An Applicant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel’s advice was not within the range of competence demanded of attorneys in criminal cases. *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985); *Bennett v. State*, 371 S.C. 198, 204, 638 S.E.2d 673, 675 (2006).

To find a plea is voluntarily and knowingly entered into, the record must establish the Applicant had a full understanding of the consequences of his plea and the charges against him. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709 (1969); *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991). Specifically, the accused must be made aware of his right to a trial by jury, his right to remain silent, and his right to confront the witnesses against him. *Boykin*, 395 U.S. at 243, 89 S. Ct. at 1712. In addition to the requirements of *Boykin*, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999). A criminal defendant’s knowing and voluntary waiver of statutory rights in a guilty plea must be established by a complete record and may be evidenced by colloquy between the court and the defendant, between the court and defendant’s counsel, or

H*3
J*2

both. *Roddy v. State*, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented during the PCR hearing. *See Harris v. Leeke*, 282 S.C. 131, 318 S.E.2d 360 (1984).

Applicant testified at the post-conviction relief hearing that he met with counsel twice to discuss the case prior to trial. Applicant testified that he was shown discovery and evidence during these meetings. Applicant further testified that he knew what he was facing if he went to trial. Applicant also testified that he understood the maximum and minimum sentences that accompanied the charges against him.

Applicant testified that he never received a plea offer during the pendency of his trial. Applicant testified that his understand was that the Solicitor was not willing to offer anything and that, if he were to plead guilty, he would have to plead "straight-up." Applicant stated that he wanted to plead guilty, that he wanted his attorney to hold out to get a lesser plea, and that he believed his attorney could have gone to the Solicitor to get a lesser plea. Applicant also testified that he was not aware that the Solicitor's office, not his attorney, was in control of whether offers were made and what any offer would consist of. Applicant testified on cross exam that he was aware that he could have gotten more time than he received, but that he believes he could have gotten a better deal.

Trial counsel testified that she discussed the evidence in the case with Applicant numerous times and that Applicant knew what he was facing if he went to trial. Trial counsel testified that she discussed a plea with the Solicitor's office in an attempt to get a deal for her client. Trial counsel stated that the Solicitor was firm at a thirty year sentence, but that trial counsel was able to negotiate down to twenty years. Trial counsel stated that, were Applicant to plead straight up,

the best he could hope for was fifteen years. Additionally, trial counsel stated that a fifteen year sentence was unlikely in light of Applicant's prior record.

Trial counsel further testified that she took extra time to make sure Applicant understood what a negotiated plea was. Trial counsel testified that she sent Applicant for a competency evaluation and that Applicant was found mentally competent to stand trial and to understand his criminal culpability.

Applicant claims that his guilty plea was entered involuntarily. This argument is without merit. The transcript of Applicant's guilty plea clearly indicates that Applicant was advised of the nature of the charges he faced as well as the penalties associated with those charges. (Plea Record p. 8, l. 4 through p. 9, l. 2). The record also shows that Applicant was fully advised of his constitutional rights as required by *Boykin*. (Plea Record p. 12, l. 16 through p. 13, l. 3). Applicant's claim that he was heavily medicated during the guilty plea was not substantiated through evidence or testimony at the post-conviction relief hearing and, therefore, this Court cannot fully analyze the veracity of the claim. As the colloquy between the plea court and the defendant shows that Applicant was fully advised of the consequences of his plea, this court finds that his plea was knowingly, voluntarily, and intelligently given.

Applying the *Strickland* and *Cherry* standard to trial counsel's representation, I find that trial counsel provided to Applicant representation within the range of competence required in criminal cases. I find trial counsel's performance in his representation of Applicant reasonable under professional norms. Trial counsel met with Applicant multiple times to discuss the case with him and worked diligently to get the best deal she could for Applicant. Further, trial counsel stated that she had Applicant's competency evaluated and spent extra time explaining to him what a

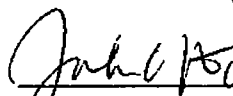
negotiated plea is. The fact that Applicant believes trial counsel could have gotten a better deal is not sufficient to find that trial counsel was ineffective. This claim is without merit.

I find Applicant has failed to carry his burden of proof and failed to prove trial counsel was ineffective or that his guilty plea was made involuntarily. Therefore, Applicant's Application for Post-Conviction Relief is denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. See Rules 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.

December 14th, 2016
Greenville, South Carolina


John C. Hayes, III
Presiding Judge

2016 DEC 22 PM 2 46
CLERK OF COURT
PICKEN COUNTY
SOUTH CAROLINA

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge
Case No.2015-CP-39-916

RECEIVED

AUG 03 2017

S.C. SUPREME COURT

Kelvin Smith,..... Appellant,

v.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this July 31, 2017, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

DeShawn Mitchell, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

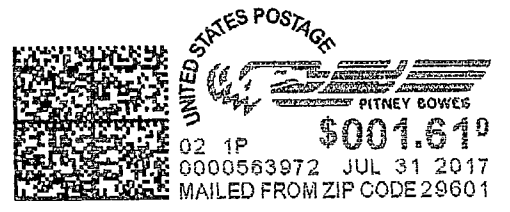
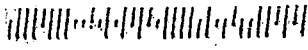
Pickens County Clerk's Office
Pickens County Courthouse
214 East Main Street
Pickens, SC 29671

Kelvin Smith SCDC# 268079
Perry Correctional Institution
430 Oaklawn Road
Pelzer, South Carolina 29669

SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

July 31, 2017



ARIAIL, JR.

E STREET, SUITE 11
LE, SC 29601

Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211