

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

AUG 30 2017

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
Post-Conviction Relief

S.C. SUPREME COURT

R. Scott Sprouse, Circuit Court Judge

Case No.: 2014-CP-37-0399

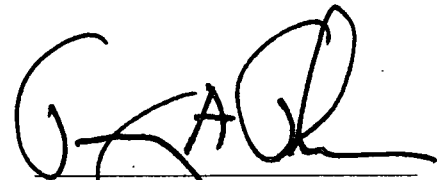
John Oglesby #194567,..... Appellant,

vs.

State of South Carolina,Respondent.

NOTICE OF APPEAL

John Oglesby #194567 appeals the order of the Honorable R. Scott Sprouse, dated and filed on July 27, 2017. Appellant received written notice of entry of this order on July 31, 2017.



TOMMY A. THOMAS
Attorney for Appellant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

Other Counsel of Record:

Lindsey McCallister, Esq.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent

Irmo, South Carolina
August 29, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

AUG 30 2017

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
Post-Conviction Relief

S.C. SUPREME COURT

R. Scott Sprouse, Circuit Court Judge

Case No.: 2014-CP-37-0399

John Oglesby #194567,..... Appellant,

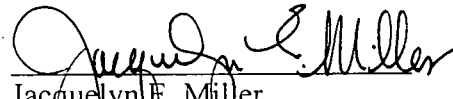
vs.

State of South Carolina,Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant, hereby certify that I placed in the United States Mail, a copy of an Notice of Appeal, with postage prepaid and the return address clearly shown on said envelope to the Attorney General's Office, at:

Lindsey McCallister, Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549


Jacquelyn E. Miller
Secretary to Tommy A. Thomas
Attorney for Applicant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

August 29, 2017

STATE OF SOUTH CAROLINA)
 COUNTY OF OCONEE)
)
 John Oglesby, #194567,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 OF THE TENTH JUDICIAL CIRCUIT

Case No.: 2014-CP-37-0399

ORDER OF DISMISSAL

FILED OCONEE COUNTY, SC
 BEVERLY H. WHITFIELD
 CLERK OF COURT
 2017 JUL 27 P 3:29

Presiding Judge: R. Scott Sprouse
 Applicant's Attorney: Tommy Thomas, Esquire
 Respondent's Attorney: Lindsey A. McCallister, Esquire
 Trial Counsel: R. Daniel Day, Jr., Esquire
 Date of Hearing: March 1, 2017
 Court Reporter: Diane L. Marcengill

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed July 17, 2014. The Respondent made its Return, seeking dismissal on the grounds that this application was successive to previous PCR applications and outside the statute of limitations. A Conditional Order of Dismissal (COD) was issued by the Honorable Cordell Maddox, Jr., on March 12, 2015, and Applicant subsequently filed a motion to vacate that order. A hearing on that issue was convened on June 6, 2016, and the COD was vacated. An evidentiary hearing into the matter was convened on March 1, 2017, at the Oconee County Courthouse. Tommy Thomas, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Mary Oglesby, Applicant's sister, also testified on his behalf. Daniel Day, Esquire, also testified. Applicant, through counsel,

submitted Applicant's "Pre-Trial Brief" on March 1, 2017. Respondent submitted a response on March 24, 2017.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Oconee County. Applicant was indicted at the November 1992 term of the Oconee County Grand Jury for Murder (92-GS-37-889). Applicant proceeded with a jury trial from May 2, 1994 to May 4, 1994, at the Oconee County Courthouse in front of the Honorable Don S. Rushing. He was represented by R. Daniel Day, Esquire. Applicant was found guilty of murder and sentenced to life imprisonment.

Applicant timely filed a Notice of Appeal on May 19, 1994, but the appeal was never perfected. On August 18, 1994, the South Carolina Supreme Court dismissed Applicant's Appeal. On September 6, 1994, the Supreme Court issued a Remittitur.

1994-CP-37-00434

On November 17, 1994, Applicant filed an application seeking post-conviction relief alleging:

1. "Ineffective assistance of counsel. My case was poorly investigated and the evidence was circumstantial. Counsel failed to object."
2. "Denial of right to appeal. Counsel failed to perfect the appeal after timely filing of the notice. He failed to file the case and exceptions and the appeal was dismissed."

In response, the State filed a return on March 14, 1995. On October 25, 1996, Applicant filed an Amended Application pursuing the following grounds for relief:

1. Counsel was ineffective for failing to request the trial court to charge lesser charges of voluntary manslaughter and accessory after the fact to Murder.
2. Counsel was ineffective for failing to request an alibi charge.

3. Counsel was ineffective for failing to preserve his objection to Michael Wright being declared a hostile witness.
4. Counsel was ineffective for failing to object to the testimony of Kali Lee on the grounds of hearsay.
5. Counsel was ineffective for failing to object when the solicitor stated during his closing that the Applicant had taken Russell Wright to see the victim's body two times.
6. Counsel was ineffective for failing to renew his directed verdict motion.
7. Counsel was ineffective for failing to call exculpatory witnesses.
8. Applicant did not knowingly and voluntarily waive his right to direct appeal.

An evidentiary hearing into the matter was convened on October 29, 1996, at the Anderson County Courthouse. Petitioner was present at the hearing and was represented by Charles Hughes, Esquire. Petitioner and his trial counsel testified at the hearing. On December 17, 1996, the Honorable Alexander S. Macaulay issued an order denying the application for PCR but finding that Applicant did not knowingly and voluntarily waive his right to direct appeal and was entitled to review under White v. State, 263 SC 100, 208 S.E.2d 35 (1974) and Davis v. State, 288 SC 290, 342 S.E.2d 60 (1986).

On December 29, 1996, Applicant served a Notice of Appeal from Judge Macaulay's Order. On September 15, 1997, a Petition for Writ of Certiorari was submitted raising five Questions Presented:

1. Did the post-conviction relief judge err in granting petitioner's request for a belated direct appeal in this case?
2. Was trial counsel ineffective in failing to request manslaughter jury charges in the case?
3. Was trial counsel ineffective in failing to request a jury charge on accessory after the fact to a felony in the case?
4. Was trial counsel ineffective in failing to call favorable witnesses in the case?
5. Was trial counsel ineffective in failing to request a jury charge on the defense of alibi in the case?

On the same date, Applicant also submitted a Brief of Appellant Pursuant to White v. State, in which he raised the following ground for relief:

1. The lower court erred in declaring state's witness Michael Wright a hostile witness in the case.

On December 12, 1997, Respondent submitted its Return to Applicant's Petition for Writ of Certiorari and to the Brief of Appellant Pursuant to White v. State.

In June 18, 1998 order, the South Carolina Supreme Court granted certiorari on Question 1, proceeded with a review of the direct appeal issue, and affirmed Applicant's conviction pursuant to Rule 220(b)(1) SCACR. The South Carolina Supreme Court also granted certiorari on Question 4 and ordered the parties to serve and file briefs. On July 20, 1998, Applicant filed his Brief alleging "trial counsel was ineffective in failing to call favorable witnesses in the case."

The South Carolina Supreme Court, in an unpublished order filed on December 10, 1998, dismissed the appeal finding that certiorari was improvidently granted. During the collateral appellate proceedings before the South Carolina Supreme Court, Applicant was represented by Wanda H. Carter.

2:99-3857-10AJ

On November 11, 1999, Applicant filed a petition to the United States District Court seeking federal habeas relief under 28 U.S.C. § 2254. Applicant raised the following issues:

1. Conviction was obtained through improper use of codefendant's testimony after being declared a hostile witness
2. Conviction was obtained because my attorney did not request an alibi charge
3. Conviction was obtained because my favorable witness was not called.
4. Conviction obtained because my attorney did not request any lesser included charges. My co-defendant was convicted of Manslaughter. Because my attorney did not request a lesser-included charge, the jury convicted me of Murder.

5. Conviction was obtained by denial of effective assistance of counsel because my attorney did not renew his directed verdict motion at the close of the case. Malice, as an element in this case, was very weak. My attorney did not argue this in a directed verdict motion at the close of the trial. I think the state failed to prove malice and I think my attorney should have asked the judge to dismiss the case.

On January 13, 2000, Respondent filed its Motion for Summary Judgment. On January 27, 2000, Applicant through his counsel Richard Warder, Esquire, filed an opposition to the motion. The Honorable Robert Carr, United States Magistrate Judge, issued a Report and Recommendation on February 23, 2000, recommending that Respondent's motion for summary judgment be granted and Applicant's petition be summarily dismissed without an evidentiary hearing. No objections were filed in response to the Report and Recommendation. On May 16, 2000, the Honorable Matthew J. Perry, Jr. issued an Order adopting the Report and Recommendation and granting Respondent's Motion for Summary Judgment.

2003-CP-37-1194

On November 24, 2003, Applicant filed an application seeking post-conviction relief alleging:

1. Trial Court Lacked Subject Matter Jurisdiction
 - a. "The Applicant contends that the Trial Court lacked Subject Matter Jurisdiction to try and convict applicant, as to where the indictment returned by the Grand Jury was invalid, for the reason, the Courts has ruled that the Solicitor cannot be the sole witness before the Grand Jury, in order for the Grand Jury to return a valid indictment. See State v. Anderson, 439 S.E.2d 835."
2. The Trial Court Lacked Jurisdiction To Impose Sentence
 - a. "The Applicant contend that the combined effect of S.C. Code § Ann. 22-3-540 (1962), S.C. Code § Ann. 23-3-710 (1962), and that 1993 statute S.C. Code Ann. § 17-30-50 (Supp. 1993), was to deprive the Court of General Sessions of jurisdiction to try him. See State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972)."

In response, Respondent filed its return on June 21, 2004, and amended its return on January 20, 2006. A Conditional Order of Dismissal was issued on February 6, 2006, and a Final Order was issued on November 6, 2006. However, due to the fact that the Final Order was issued prior to Applicant's receipt of the Conditional Order, the court filed an Order Granting Motion to Vacate Conditional and Final Orders of Dismissal on December 29, 2006. An evidentiary hearing was convened on February 26, 2007, at the Oconee County Courthouse before the Honorable Alexander S. Macaulay. Applicant was present at the hearing and was represented by Karen Ballenger, Esquire. On March 20, 2007, an Order of Dismissal was issued, denying the application and dismissing it with prejudice.

On April 4, 2007, Applicant, through his counsel, filed a Notice of Appeal to the South Carolina Court of Appeals. On April 27, 2007, the South Carolina Supreme Court issued an Order of Dismissal, dismissing the appeal because Applicant failed to provide a written explanation as to why the lower court's determination was improper. The Remittitur was issued on May 15, 2007.

ALLEGATIONS

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

1. Newly Discovered Evidence
 - a. "On February 19, 2014 Applicant received a letter from Probation and Parole indicating that he was not eligible for parole because he was a subsequent violent offender. The Applicant had been informed and believed that he was eligible for parole since his incarceration in 1993."

At the hearing, Applicant framed this allegation as one of ineffective assistance of counsel, contending in the alternative that Counsel gave erroneous advice to Petitioner that he would be

parole eligible after service of twenty years or that Counsel should have informed Applicant that he would be ineligible for parole due to his status as a subsequent violent offender (SVO).

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 conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

In a post-conviction relief action, the 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). Where the application alleges ineffective assistance of counsel 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 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. 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 reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 625. First, the applicant must prove that counsel’s performance was deficient. Id. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Id. (quoting Strickland v. Washington, 466

U.S. 668, 688 (1984)). 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.

It is well settled that parole eligibility, or ineligibility is a collateral consequence of sentencing about which a defendant need not be specifically informed. See Brown v. State, 306 S.C. 381, 382, 412 S.E.2d 399, 401 (1991) ("Parole eligibility ... is a collateral consequence of sentencing about which a defendant need not be specifically advised before entering a guilty plea."). See also Jackson v. State, 349 S.C. 62, 64, 562 S.E.2d 475, 475-476 (2002) ("It is well settled that parole eligibility is a collateral consequence of sentencing, and that trial counsel need not advise a client of his parole eligibility, or ineligibility, in order to render effective assistance."). The classification of a crime as violent, and the attendant consequences of that classification, are also collateral issues, and defendants need not be informed about them. Smith v. State, 329 S.C. 280, 286, 494 S.E.2d 626, 629 (1997). In order to prevail on a claim of ineffective assistance of counsel regarding erroneous advice as to parole eligibility, an applicant must prove counsel's advice induced his decision to plead guilty or proceed to trial. See Griffin v. Martin, 278 S.C. 620, 621, 300 S.E.2d 482, 482 (1983) (upholding PCR Court's decision denying relief because the applicant "failed to prove his attorney's erroneous advice concerning parole eligibility induced his guilty plea...."); Frasier v. State, 351 S.C. 385, 388, 570 S.E.2d 172, 174 (2002) (upholding PCR Court's decision denying relief because Applicant "was not induced to plead guilty based on parole advice prior to the plea.").

Ineffective Assistance of Counsel

Applicant testified that he is currently incarcerated on a life sentence for murder, having served twenty-five years so far. He stated that he went to trial on that charge in 1994, and prior to trial he was offered a deal to plead guilty to the lesser-included charge of manslaughter and receive a sentence of thirty years suspended to six years of active time and five years of probation. Applicant stated that this would have been a recommendation from the state, and it would have been an Alford¹ plea, wherein he was not required to admit guilt. Applicant stated he rejected the plea offer because he did not know he was facing a natural life sentence if convicted at trial. Applicant testified that he thought he would be eligible for parole after the service of twenty years.

Applicant also testified that after being confined in SCDC, he was given a parole eligibility date of February 25, 2013. However, in February 2014, Applicant received a letter from DPPPS stating that he was not considered eligible for parole because he was classified as a subsequent violent offender. Applicant stated he has a prior conviction for CSC 2nd with a minor, for which he was on probation at the time he was convicted and sentenced on the murder charge. Applicant testified that the CSC was committed in 1992, and he was sentenced on that charge in 1993. He stated that he had a probation revocation for the CSC charge and was served with a citation that stated he would be incarcerated for a lengthy period of time and then released to parole "until day of death." He stated that he was given that citation on or about May 5, 1994, after the murder trial concluded. Applicant further stated that he received no other notice regarding his parole eligibility until he received the February 2014 letter from DPPPS.

¹ 400 U.S. 25 (1970).

Applicant testified that he retained Daniel Day as Counsel on the murder charge, and Applicant relied solely on Counsel's advice during the course of that proceeding. Applicant repeatedly testified that he and Counsel did not discuss his parole eligibility before proceeding to trial. Applicant stated that after the jury found him guilty and the judge pronounced his sentence, there was an off-the-record discussion between Counsel, the solicitor, and the judge, after which Counsel informed Applicant that he would serve twenty years and then be up for parole. Applicant testified that this conversation after the trial was the only conversation he and Counsel had regarding parole eligibility. Applicant testified that he would not have gone to trial if he had known he was facing a true life sentence and instead would have accepted the plea offer and would now be out of jail. Applicant stated the reason he did not accept the plea offer is because he was not aware that he was facing a natural life sentence otherwise.

Applicant's sister, Mary Oglesby, testified she was also present for the conversation that occurred between Applicant and Counsel after the conclusion of the trial. Ms. Oglesby testified that Counsel, the solicitor, and the judge had a conversation, after which Counsel informed the family that Applicant would serve twenty years and then be eligible for parole.

Counsel testified he has been practicing law for approximately thirty-eight years, and at the time of trial, he had been practicing fourteen or fifteen years, with a significant portion of that time in criminal law. Counsel testified he no longer has the file for this matter, but he remembered Applicant's case and his representation of Applicant. Counsel stated he met with Applicant multiple times before trial, as well as with Applicant's family. Counsel testified he worked with the solicitor to negotiate a plea offer, and they were still negotiating into trial. Counsel testified he discussed the plea offer with Applicant on several occasions, and Applicant

always rejected the offer, even when the Alford² plea was conveyed, because he maintained his innocence. Counsel testified he told Applicant he would be facing a life sentence at trial, and Applicant understood. Counsel stated that the laws were changing frequently at that time, with a move towards the idea that “life means life.” Counsel stated he kept up with changes in the law by reading articles, advance sheets, and attending Continuing Legal Education seminars.

Counsel testified he did not remember any conversation regarding parole eligibility taking place after the trial. Counsel stated he did not remember advising Applicant about the issue at all, and he did not believe he would have done so. Counsel further testified it is his general practice not to discuss parole eligibility with clients because that is a matter within SCDC’s control, and there is no way to know what will happen with earning time credits or disciplinary issues once a person is actually incarcerated. Counsel stated his clients, particularly ones who have previous involvement in the criminal justice system, often have an awareness of how parole works, and if clients ask, he will discuss it with them. Counsel testified Applicant never asked about his parole eligibility.

Regarding Applicant’s claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet his burden of proof. This Court finds Applicant’s testimony regarding Counsel’s ineffectiveness is not credible, while also finding Counsel’s testimony is credible. This Court finds Counsel provided effective assistance in this case. Counsel is a trial practitioner who has extensive experience in the trial of criminal offenses. Counsel conferred with Applicant on multiple occasions, during which Counsel discussed the pending charges, Applicant’s constitutional rights, the State’s evidence, possible defenses, and answered all of

² 400 U.S. 25 (1970).

Applicant's questions. Additionally, Counsel conveyed all plea offers to Applicant, who rejected them in favor of maintaining his innocence.

This Court finds Applicant is not entitled to relief as parole eligibility or ineligibility is a collateral consequence of sentencing of which Applicant need not be specifically informed. This Court is not persuaded by Applicant's argument that his status as a subsequent violent offender is distinguishable from parole eligibility in general. The Court declines to find SVO status akin to life without parole and the attendant notice requirements when the State seeks such a sentence. This Court finds SVO status is a collateral consequence, and Counsel was not under a duty to advise Applicant specifically regarding this status. Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court finds Applicant was not induced to plead guilty based on advice given prior to the trial. Because Applicant has offered no evidence that Counsel discussed parole eligibility with him prior to trial, and Applicant's own testimony was that no conversation regarding parole eligibility took place until after the trial, Applicant could not have relied upon that advice in making his decision to reject the plea offers and proceed to trial. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing

proceedings. Counsel was not deficient, nor was Applicant prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice. This Court also finds, as to all other allegations, that Applicant failed to present evidence of such claims and thus, this Court deems them abandoned.

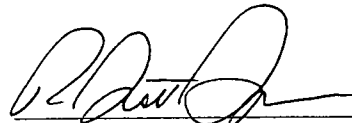
The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State; 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right 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:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

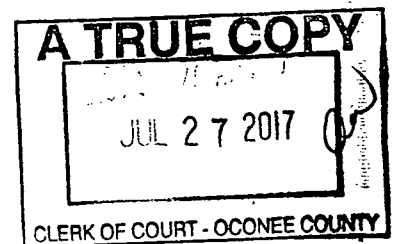
AND IT IS SO ORDERED this 27 day of July, 2017.

Walhalla, South Carolina.



R. Scott Sprouse
Presiding Judge
Tenth Judicial Circuit

FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2017 JUL 27 P 3:29



Tommy A. Thomas, P.C.
ATTORNEY AND COUNSELOR AT LAW
HARRINGTON BUILDING
POST OFFICE BOX 88
IRMO, SOUTH CAROLINA 29063

COLUMBIA SC 290



1000

29211

U.S. POSTAGE
PAID
IRMO, SC
29083
AUG 29 17
METRO

\$0.91

R2303S101323-07

The South Carolina Supreme Court
Daniel E. Shearouse, Clerk of Court
P.O. Box 11330
Columbia, SC 29211

29211-133090

