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March 14, 2016

Supreme Court
Post Office Box 11330
Columbia, SC 29201

Re: Cole v. State of South Carolina
Mejia v. State of South Carolina

Dear Clerk of Court,

Enclosed please find the original and a copy of the Notices of Appeal in the above-referenced cases. I have enclosed a self-addressed stamped envelope for the return of the file-stamped copy.

Sincerely,

Steve Fowler/KB

Steve Fowler, Esq.

SF/kb

Enclosures

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Case No. 2014-CR-26-2366

State of South Carolina,

Respondent,

v.

Dean Henry Cole, #081665,

Appellant.

NOTICE OF APPEAL

Dean Henry Cole appeals the order of the Honorable Thomas A. Russo dated January 7, 2016. Appellant received written notice of the entry of this order on February 9, 2016.

February 23, 2016

Steven W. Fowler, Esquire
1019 Highway 17 South #229
North Myrtle Beach, SC 29582
843-663-0006
Attorney for Appellant

Other Counsel of Record:
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Assistant Attorney General
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803-734-3970
Attorney for Respondent

STATE OF SOUTH CAROLINA	)	IN THE SUPREME COURT
	)	2014-CR-26-2366
STATE OF SOUTH CAROLINA, Respondent,	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
DEAN HENRY COLE, #081665, Appellant.	)	

1. I am an employee of the law firm representing the Appellant in the above-captioned action.
2. Regular communication by mail exists throughout the States of North and South Carolina and that this is proper circumstance of service by mail.
3. I have this day served a filed copy of the Notice of Appeal, in the above-captioned matter on the following people by depositing the same in the United States mail, postage prepaid:

Supreme Court
Post Office Box 11330
Columbia, SC 29201

Office of Appellate Defense
1330 Lady Street
Columbia, SC 29201

Jessica E. Kinard
Assistant Attorney General
Rembert C. Dennis Building
Post Office Box 11549
Columbia, SC 29211-1549

Dated this 14th day of March, 2016

Kathryn C.B. Bogle, Paralegal
for Appellant

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Dean Henry Cole, #081665, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2014-CP-26-2366 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 21, 2013. Respondent made a Return on or about December 17, 2014. The Court convened an evidentiary hearing into the matter on November 12, 2015, at the Horry County Courthouse. Applicant was present at the hearing and represented by Steven W. Fowler, Esquire. J. Croom Hunter, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Eric Fox, Esquire, also testified. The Court had before it a copy of the transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings in this matter. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In May 2013, the Horry County Grand Jury indicted Applicant for trafficking cocaine over four-hundred (400) grams (2013-GS-26-02010). Jonathan Eric Fox, Esquire, represented Applicant. On August 7, 2013, Applicant pled guilty to trafficking cocaine, 28-100 grams, in exchange for the State recommending a sentence range of ten

(10) to fifteen (15) years. The Honorable Larry B. Hyman accepted the recommendation and sentenced Applicant to ten (10) years imprisonment. Applicant did not appeal his plea or sentence.

II. ALLEGATIONS

At the PCR hearing, Applicant proceeded with the following allegations:

1. Involuntary Guilty Plea:
   a. Applicant wanted but was denied a different attorney.
   b. Counsel failed to thoroughly explain the trial and plea process with Applicant.
2. Ineffective Assistance of Counsel.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court finds Counsel's testimony credible and Applicant's testimony not credible. The 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). Furthermore, this Court finds that Applicant abandoned all allegations except for those specifically addressed below.

A. Involuntary Guilty Plea

In post-conviction relief 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)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the

defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. at 56. Furthermore, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). 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)).

1. Request for Another Attorney

Applicant testified at the PCR hearing that he requested another attorney prior to his guilty plea, but the plea judge denied his request. Applicant asserts this denial resulted in his guilty plea being involuntary. This Court finds that Applicant's claim that he should have been appointed another attorney is without merit. See State v. Graddick, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001) ("A motion to relieve counsel is addressed to the discretion of the [circuit court] and will not be disturbed absent an abuse of discretion."); State v. Childers, 373 S.C. 367, 372, 645 S.E.2d 233, 235 (2007) ("The movant bears the burden to show satisfactory cause for removal."); United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006) (holding the Sixth Amendment provides that all criminal defendants shall enjoy the right to have assistance of counsel for their defense); Wheat v. United States, 486 U.S. 153, 159 (1988) ("[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate

for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."); State v. Sanders, 341 S.C. 386, 389, 534 S.E.2d 696, 697 (2000) (recognizing that "the Sixth Amendment does not confer an absolute right to be represented by one's preferred attorney"); State v. Sims, 304 S.C. 409, 414, 405 S.E.2d 377, 380 (1991) ("In evaluating whether the [circuit court] abused [its] discretion in denying [the defendant's] motion for substitution of counsel, the [circuit court] may consider several factors: timeliness of the motion, adequacy of the [circuit court's] inquiry into the defendant's complaint, and whether the attorney-client conflict was so great that it resulted in a total lack of communication, thereby preventing an adequate defense."); United States v. Gallop, 838 F.2d 105, 109 (4th Cir.1988) (finding that once the circuit court has appropriately determined that a substitution of counsel is not warranted, the circuit court can insist that the defendant choose between continuing representation with his existing counsel or appearing pro se); Black v. State, No. 2013-UP-486, 2013 WL 8541663, at 1 (S.C. Ct. App. Dec. 23, 2013). This Court finds Applicant failed to meet the burdens necessary to show he should have been appointed another attorney prior to his plea. Furthermore, Applicant had sixteen months leading up to his plea in which he could have hired another attorney. This Court has no doubt Applicant waited to raise this issue until the day of the plea as a tactic to delay the inevitable. For the foregoing reasons, the allegation is without merit.

2. Failure to Thoroughly Explain the Criminal Process

Applicant testified at his PCR hearing that plea counsel did not thoroughly prepare him for his guilty plea. Specifically, Applicant alleged he did not understand what sentence he was potentially facing by pleading guilty. Applicant also alleged Counsel never explained his right to a jury trial, and the process by which a jury trial would take place. This Court finds Applicant's testimony to be not credible. The plea colloquy is clear; the plea judge went over Applicant's right to trial as well as

Applicant's potential exposure as a result of pleading guilty. Furthermore, Applicant told the plea judge he understood he was facing a sentencing range of ten to fifteen years by pleading guilty. Applicant specifically told the plea judge he did not wish to have a jury trial, and he wanted to give up that right and enter a plea of guilty. Additionally, plea counsel testified he went over all of those things with Applicant prior to his guilty plea. This Court has no reason to doubt plea counsel's testimony and finds it totally credible. Applicant is merely unhappy with the decision he made to plead guilty. The record and testimony before this Court leave no doubt Applicant was fully aware of his right to a jury trial and the consequences of his guilty plea. Applicant no doubt decided to plead guilty to the lesser included offense to avoid a potential minimum sentence of twenty-five years in prison if found guilty at trial. As this Court can find no evidence Applicant's plea was not entered freely, knowingly, and voluntarily, the allegation is without merit and must be denied.

B. 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 trial counsel as a ground for relief, Applicant must prove trial 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. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial 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 strongly presumes trial 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 applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's 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.

This Court finds Applicant has failed to show Counsel's performance fell below an objective standard of reasonableness. Counsel's testimony indicated he was extremely familiar with the facts of Applicant's case. This Court finds Counsel met with Applicant an adequate number of times and was familiar with the discovery materials. Counsel indicated he explained Applicant's constitutional rights, and he explained the differences between going to trial and entering a guilty plea. Counsel testified Applicant initially wanted to proceed to trial, but after his arraignment Applicant made the decision to take the State's plea offer. Counsel testified that he discussed with Applicant the fact he would be pleading to a lesser charge than that for which he was indicted. Counsel testified he explained the reason for the plea to the lesser charge was to limit Applicant's potential exposure at sentencing. Counsel indicated he never had trouble communicating with Applicant, and he never had any concern that Applicant did not fully understand their conversations. Counsel testified Applicant made a fully informed decision to plead guilty, and Counsel agreed with the decision. Counsel testified he did not believe there was any sort of conflict with the plea judge being Judge Hyman, and the solicitor also being named Hyman. Finally, counsel testified he explained Applicant's plea would be classified as

violent. As such, Counsel's testimony indicated his performance was well within the range required under the law. This Court finds no reason to believe Counsel's testimony was not credible. Accordingly, this Court finds Applicant's allegations are without merit.

C. 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.

D. Overwhelming Evidence of Guilt

This Court notes that Applicant can show no prejudice in regards to any of the alleged allegations as there is clear overwhelming evidence of guilt. See Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

IV. 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 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, her post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and her attorney are 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 7th day of January, 2016.

THOMAS A. RUSSO
Presiding Judge
Fifteenth Judicial Circuit

Florence, South Carolina

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