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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	2009-CP-10-6837
	)	
	)	
Travis Ford, #285740,	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

FILED
2010 AUG 10 AM 9:25
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Presiding Judge:	Deadra L. Jefferson
Applicant's Attorney:	Molly Hughes Cherry, Esq.
Respondent's Attorney:	Matthew J. Friedman, Esq.
Plea Counsel:	Mark A. Peper, Esq.
Date of Hearing:	July 20, 2010
Court Reporter:	Anne Meyer

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed October 29, 2009. The Respondent made its Return on January 25, 2010. An evidentiary hearing into the matter was convened on July 20, 2010 at the Charleston County Courthouse.[1] The Applicant was present at the hearing and represented by Molly Hughes Cherry, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Applicant's plea counsel,

[1] Counsel for the Applicant filed a Motion for Continuance on July 22, 2010 on the basis that the Applicant had expressed a desire to hire a different attorney. This Court heard the Motion for Continuance before the PCR hearing commenced. The Applicant filed his PCR Application on October 29, 2009 and Counsel for the Applicant was appointed on November 12, 2009. The State filed its Return on January 27, 2010. In regards to the Motion for Continuance, Counsel for the Applicant communicated to the Court that she was prepared for the hearing and ready to proceed. The Applicant filed his application ten months prior to this hearing and had more than adequate time to obtain alternate counsel if he desired to do so. However, at the time of the hearing, the Applicant had not hired alternate counsel and, therefore, the Court found that there was no basis for the request for a continuance and that the request for a continuance was simply a delay tactic. As such, the Court denied the Motion on the record.

Mark A. Peper, Esquire, also testified at the hearing. This Court had before it the records of the Charleston County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the guilty plea transcript, the PCR application, the State's Return thereto, and Applicant's Memorandum in Support of Application for Post-Conviction Relief dated July 20, 2010.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the October 2008 term of the Charleston County Grand Jury for trafficking cocaine (2008-GS-10-7516) and possession with intent to distribute (PWID) cocaine within proximity of a school (2008-GS-10-7517). Mark A. Peper, Esquire, represented the Applicant. On July 10, 2009, the Applicant pled guilty as indicted to the proximity charge and to a lesser-included offense of trafficking cocaine – 2nd offense. Pursuant to a negotiated plea agreement, the Honorable Roger M. Young, Sr. sentenced him to confinement for sixteen (16) years for trafficking cocaine and ten (10) years for the proximity charge. The sentences were to run concurrently. The Applicant did not appeal the conviction or sentence.

ALLEGATIONS

The Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel in that counsel
   a. Did not have Applicant's best interest in mind.
   b. Gave erroneous advice.
   c. Failed to do any pretrial investigation.
   d. Did not properly consult with Applicant about his desire to plead guilty.
   e. Did not properly investigate potential Fourth Amendment violation relating to Applicant's search and seizure and did not adequately advise Applicant that proceeding to a hearing presented a strong possibility of evidence suppression.

f. Did not properly advise Applicant of the sentencing range for his charges.

2. Involuntary guilty plea.

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 his or her 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).

The Applicant testified that he met with counsel about three times. He asserted that counsel was not prepared to try the case. Applicant testified that counsel advised him that he would not win a suppression hearing on the drugs because the police had several signed statements that indicated that the drugs belonged to the Applicant. He testified that he asked counsel to delay the hearing, but counsel told him the Solicitor would begin the trial of the case during the following week if the Applicant decided not to plead guilty on the scheduled day of the plea. Applicant asserted that counsel did not investigate all possible defenses. He also testified that he could have taken an open plea rather than a negotiated plea, but he did not have enough time to discuss his options with his attorney.

Plea counsel testified that he or a member of his office met with Applicant at least four times between February 2009 and July 2009. He asserted that he did not file a motion to suppress the drugs because he waits until after the jury is sworn to make motions so jeopardy will attach. Counsel testified that the case came down to the testimony of Cooley Jenkins, who owned the apartment where the drugs were found. Counsel testified that Mr. Jenkins had

previously stated that he saw the Applicant bring the drugs in the apartment and cut up cocaine lines. Counsel testified that he met with Mr. Jenkins nine days before the plea hearing and Mr. Jenkins indicated that he did not lie when he gave his previous statement and he would not change his statement. Counsel also testified that he spoke with Applicant's family before the plea. Additionally, counsel testified that his law clerks met with the Applicant, informed him that Mr. Jenkins would testify against him at trial, and showed him photos that had been taken at the apartment.

Counsel further testified that the Solicitor never offered the Applicant an open plea. Rather, the Solicitor offered a negotiated sentence of sixteen (16) years. Counsel testified that the Solicitor informed him that if the Applicant did not accept the negotiated plea, then the Solicitor would notice him for life without parole (LWOP) and put the case on the next trial docket. Counsel testified that he communicated this information to the Applicant. Counsel also testified that the Applicant did not have a strong case for trial, especially if the motion to suppress was denied. Counsel testified that he did not pressure Applicant to plead guilty, but he highly advised that Applicant accept sixteen (16) years rather than risk a LWOP sentence. Counsel testified that he did not have any money to hire an investigator, but he used his two law clerks to take pictures of the apartment to determine whether the officers had broken the door to gain entry to the apartment.

Ineffective Assistance of Counsel / Involuntary Guilty Plea

The Applicant alleges that he received ineffective assistance of counsel and that his guilty plea was not freely and voluntarily entered. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. S.C. R. Civ. P. Rule 71.1(e); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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." Id. at 442, 334 S.E.2d at 814 (quoting Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-90, 104 S.Ct. at 2064-66. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. The applicant must overcome this presumption in order to receive relief. Id.; Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. 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, 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." Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

In regards to a claim of ineffective assistance of counsel on a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct.

366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining post conviction relief issues relating to guilty pleas, the court shall "consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing." Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 650 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)). When a defendant pleads guilty on the advice of counsel, the voluntary and intelligent character of a plea may only be attacked through a claim of ineffective assistance of counsel. Roscoe, 345 S.C. at 20, 546 S.E.2d at 419.

This Court finds that counsel's testimony is credible. This Court finds that counsel is a trial practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on numerous occasions. During conferences with the Applicant, counsel discussed the pending charges, the elements of the charges, what the State was required to prove, Applicant's constitutional rights, Applicant's version of the facts, and Applicant's possible defenses or lack thereof. (Tr. 3:14-19; 6:2-7:2.) This Court finds that the record reflects that Applicant's plea was entered freely, voluntarily, knowingly, and intelligently. (Tr. 5:13-19; 7:3-7; 7:21-8:1; 8:9-21; 17:8-10.) Applicant acknowledged that he understood the nature of the charges, the enhancement of the charges, the possible punishments, and his Constitutional rights, including the right to a jury trial. (Tr. 3:8-5:8; 7:8-20.) Applicant told the plea court that no one threatened him or promised him anything to plead guilty. (Tr. 7:3-7.) He indicated that he was satisfied with his attorney and did not need any more time to speak with him. (Tr. 5:20-6:1; 6:25-7:2; 8:2-7.) Applicant also admitted guilt at the hearing. (Tr. 5:9-12.) He told the court that he

understood the terms of the negotiated sentence and thanked the Court for accepting the negotiated plea. (Tr. 7:8-20; 15:15-16:9.) Additionally, Counsel for the Applicant offered mitigation on behalf of the Applicant. (Tr. 12:6-13:16.) This Court finds that Applicant understood the possible sentencing range for these offenses and the terms of the negotiated sentence. This Court finds that it was Applicant's decision to plead guilty and that his plea was entered freely, voluntarily, knowingly, and intelligently.

Regarding all of the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. See State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668, 104 S.Ct. at 2065; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with the Applicant, gave accurate advice to the Applicant, conducted a proper investigation, had the Applicant's best interest in mind when he advised him to take the negotiated plea, and was thoroughly competent in his representation. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

This Court finds it immaterial whether or not counsel filed a motion to suppress. Counsel testified that he would have filed the motion or made the motion orally after jury selection so that jeopardy would attach. Here, counsel had a reasonable trial strategy in determining when to file the motion to suppress. Applicant had a choice between going to trial and making the suppression motion after jury selection or accepting the negotiated plea agreement. This Court finds that there is no indication that Applicant could have pled straight-up to second offenses. The Solicitor allowed the Applicant to either accept the negotiated plea agreement or be served

with LWOP notice and proceed to trial.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test, specifically 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. The Applicant failed to show that counsel's performance was deficient. This Court also finds the Applicant has failed to prove the second prong of Strickland, specifically that he was prejudiced by plea counsel's performance. Applicant's complaints concerning counsel's performance are without merit and are denied and dismissed.

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, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate

review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and

2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 6th day of August, 2010.

D.L. Jefferson

Deadra L. Jefferson
Presiding Judge
9th Judicial Circuit

Charleston, South Carolina.