

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

W. Jeffery Young, Circuit Court Judge

Case No.: 2013-CP-08-1847

RECEIVED

JUN 22 2015

S.C. SUPREME COURT

Brian M. Curtis,

Appellant,

v.

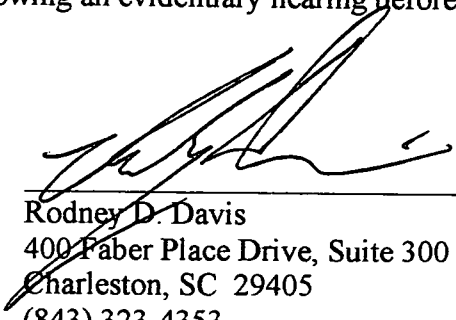
State of South Carolina,

Respondent.

NOTICE OF APPEAL

Richard Deas appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable W. Jeffery Young on April 20, 2015.

June 17, 2015



Rodney D. Davis
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Davis@LowcountryLawOffice.com
Attorney for Appellant

Other Counsel of Record:
J. Rutledge Johnson, Assistant Attorney General
Office of the Attorney General, State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

2015 JUN 18 AM 11:36

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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Brian Curtis,

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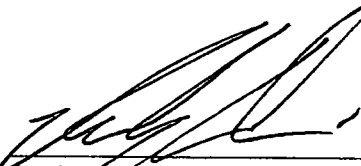
Respondent.

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MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy of it to the address of record, J. Rutledge Johnson, P.O. Box 11549, Columbia, South Carolina 29211-1549, on JUNE 18, 2015.

6/18, 2015



Rodney D. Davis
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Attorney for Appellant

Other Counsel of Record:
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P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Brian M. Curtis, #352072,)
Applicant,)

Case No. 2013-CP-08-1847

v.)

ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

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CLERK OF COURT
BERKELEY COUNTY, SC

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This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 15, 2013. Respondent made a timely Return on or about December 30, 2014. The Court convened an evidentiary hearing into the matter on April 20, 2015, at the Charleston County Courthouse. Applicant was present at the hearing and represented by Rodney D. Davis, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Christopher P. Biering, Esquire, also testified. The Court had before it a copy of the plea transcript, the records of the Berkeley County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the pleadings in this matter, and the exhibits introduced at the hearing. 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 Berkeley County Clerk of Court. In February 2012, the Berkeley County Grand Jury indicted Applicant for second degree criminal sexual conduct with a minor (2012-GS-08-0281). Christopher P. Biering, Esquire ("plea counsel") represented Applicant. On April 1, 2012, Applicant pled guilty as indicted. The Honorable Roger Young Sr. deferred sentencing to August 16,

2012, at which time he sentenced Applicant ten years imprisonment. Applicant did not appeal his plea or sentence.

II. ALLEGATIONS

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

1. "Ineffective Assistance of Counsel"
2. "Invalid and Conflicting Indictments"

At the evidentiary hearing, Applicant proceeded on only an allegation of ineffective assistance of plea counsel for waiting until after Applicant pled to have him evaluated and for presenting an unfavorable evaluation report at Applicant's sentencing hearing. Applicant seeks a new sentencing proceeding.

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. 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).

A. Summary of Testimony

Plea counsel testified Applicant was honest about his conduct that led to this charge and accepted responsibility for his actions. He testified the State never made any plea offers. Instead, he recalled Applicant agreeing to enter a plea early on. Plea counsel testified he discussed with Applicant the possibility of entering a plea and deferring sentencing to get an evaluation from Dr. Burke. Plea counsel testified Dr. Burke is well respected in the local legal community. He believed an evaluation from Dr. Burke indicating Applicant could safely remain in the community with supervision and treatment may persuade the judge to issue a probationary sentence instead of incarceration. However,

plea counsel testified he advised Applicant there was no guarantee the judge would not issue an active sentence. Plea counsel testified Dr. Burke's report contained several areas that reflected poorly on Applicant's suitability to remain in the community. However, he testified there were also several positive areas on the report. Plea counsel testified the important part of the report was the conclusion, which stated Applicant could be safely maintained in the community under conditions similar to those he has successfully completed while out on bond. Plea counsel also recalled presenting affidavits from Applicant's wife and friends to show he had community support.

Applicant testified he met with plea counsel several times before his plea. He testified he admitted responsibility and did not want a trial on the charge. He recalled formulating a strategy of entering the plea and deferring sentencing to get evaluated by Dr. Burke. Applicant testified the conditions of his bond were similar to the conditions recommended by Dr. Burke in the evaluation. Applicant testified he had several discussions with plea counsel about the possible sentence, and plea counsel advised him the judge could still give him an active sentence.

B. Ineffective Assistance of Plea 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 plea counsel as a ground for relief, Applicant must prove plea counsel's "conduct so undermined the proper functioning of the adversarial process" that the plea proceedings "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 plea 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 plea 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 plea counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove plea counsel's performance was deficient. Id. Under this prong, the Court measures plea counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea 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. Because Applicant pled guilty, he must show there is a reasonable probability that, but for plea counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

The Court finds Applicant failed to meet his burden to show plea counsel ineffective. Where plea counsel articulates an objectively strategic reason for employing certain strategy, the Court will not find plea counsel's performance deficient. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" Strickland, 466 U.S. at 690; see also Meyer v. Branker, 506 F.3d 358, 374 (4th Cir. 2007) ("[L]egal judgments based on thorough investigation are virtually unassailable on collateral review."). Here, the record reflects Applicant immediately accepted responsibility for his actions. Based on Applicant's admissions and desire for a resolution to his charges, plea counsel undertook a strategy of presenting mitigating evidence to the sentencing judge. The Court finds this strategy of conceding guilt and focusing on mitigation is a reasonable one. See Young v. Catoe, 205 F.3d 750, 760 (4th Cir. 2000) ("[O]n occasion, it is best to risk losing the battle in the hope of winning the war.").



Furthermore, plea counsel's implementation of this strategy was reasonable under the circumstances. Although Dr. Burke's report contains some negative evaluations of Applicant, it also contains several positive evaluations. Most importantly, the report demonstrates Applicant can be maintained in the community under conditions very similar to those he was successfully complying with while out on bond. Dr. Burke's report, coupled with the other evidence presented at the sentencing hearing, demonstrates plea counsel prepared a thorough and compelling mitigation presentation. Unfortunately for Applicant, the sentencing judge still chose to impose an active sentence. However, the sentencing judge's decision does not render plea counsel's performance deficient. Plea counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation. Because plea counsel's actions were within the wide range of acceptable professional norms, the Court finds Applicant failed to meet his burden under the first prong of the Strickland test.

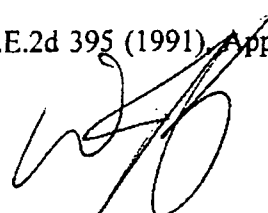
C. All Other Allegations

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.

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

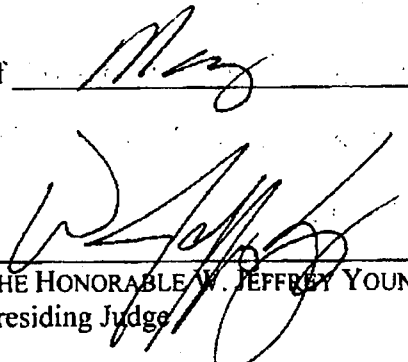


appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed 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 12 day of May, 2015.



THE HONORABLE W. JEFFREY YOUNG
Presiding Judge

Dumter

, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)
)
BRIAN M. CURTIS,)
)
Applicant.)
)
-versus-)
)
STATE OF SOUTH CAROLINA,)
)
Respondent.)

IN THE SUPREME COURT OF SOUTH CAROLINA

RECEIVED

Case No.: 2013-CP-08-19847

JUN 22 2015

S.C. SUPREME COURT

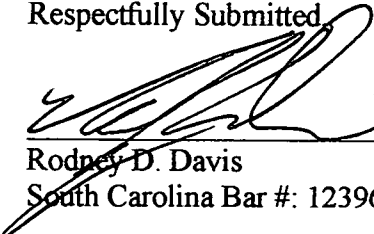
REQUEST FOR REPRESENTATION ON APPEAL

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;
2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;
3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;
4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;
5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting his appeal to the South Carolina Court of Appeals.

Respectfully Submitted


Rodney D. Davis
South Carolina Bar #: 12396

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

2015 JUN 18 AM 11:37

FILED

6/18, 2015
Charleston, South Carolina.



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June 17, 2015

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

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JUN 22 2015

RE: Brian Curtis v. State of South Carolina, Case No.: 2013-CP-08-1847 **S.C. SUPREME COURT**

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post Conviction Relief (PCR) case. Also enclosed are the following:

- (1) Proof of service of the Notice of Appeal on the respondent;
- (2) The Order of Dismissal &
- (3) A Request for Representation on Appeal.

The Applicant-Appellant was represented by me as an indigent pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR cases. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

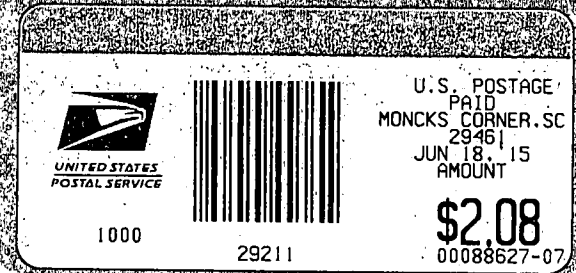
The Request for Representation on Appeal and the Affidavit in Support thereof are signed by me as attorney for Applicant-Appellant. If you need anything further, do not hesitate to contact me. Thank you for your time and attention to this matter.

Sincerely,

Rodney D. Davis
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4000 Faber Place Drive, Suite 300
Charleston, SC 29405
(843) 323-4353
Davis@LowcountryLawOffice.com

CC: J. Rutledge Johnson
Assistant Attorney General

Kimberly McCall
Appellate Division, SCCID



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