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

RECEIVED

OCT 24

S.C. SUPREME COURT

October 19, 2016

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 State of SC v. Ryan Darrell Irby
C.A. No.: 2015-CP-23-6218

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 George C. James, Jr.'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 Greenville 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 GREENVILLE COUNTY
Court of Common Pleas

RECEIVED
OCT 24 2016
S.C. SUPREME COURT

George C. James, Jr., Circuit Court Judge

Case No. 2015-CP-23-6218

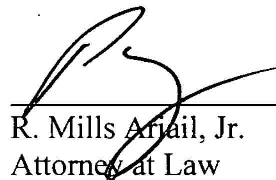
Ryan Darrell Irby,.. Appellant,

v.

State of South Carolina .... Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable George C. James, Jr.'s Order of Dismissal dismissing Appellant's application for post-conviction relief. On September 9, 2016, the Honorable George C. James, Jr. signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on October 6, 2016. A copy of the Honorable George C. James, Jr.'s Order of Dismissal is attached.



R. Mills Ariail, Jr.
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Greenville, SC 29601
Telephone (864) 232-9390
Facsimile (864) 232-9392
Attorney for Ryan Darrell Irby

Greenville, South Carolina
October 19, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
OCT 24 2016
S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Case No.2015-CP-23-6218

Ryan Darrell Irby,.. 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 October 19, 2016, 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:

Karen C. Ratigan, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

Ryan Darrell Irby SCDC# 298917
Lee Correctional Institute
990 Wisacky Highway
Bishopville, SC 29010

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

Denise Tanner LaBeck
Denise Tanner LaBeck

October 19, 2016

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2015CP2306218

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2016 SEP 26 PM 2 27

Ryan Irby *vs.* **South Carolina State Of**

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: ____________

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: ____________

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: ____________

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

____

PRESIDING JUDGE - **George C James Jr**

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

R. Mills Ariail Jr. 11 North Irvine Street, Suite 11 Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

Patrick Schmeckpeper PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

____

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)
	) 2015-CP-23-06218
Ryan Darrell Irby,	)
S.C.D.C. No. 298917	)
	) **ORDER OF DISMISSAL**
v.	)
	)
State of South Carolina	)
	)
Defendant.	)
	)

FILED CLERK OF COURT GREENVILLE CO. S.C. PAUL B. WICKENSIMER 2016 SEP 26 PM 4 47
ENTERED COMPUTER

This matter comes before the Court by way of an application for post-conviction relief by Ryan Darrell Irby ("Applicant") filed October 14, 2015 ("the Application"). Respondent made its return on or about January 29, 2016. An evidentiary hearing into the matter was convened on June 15, 2016 at the Greenville County Courthouse. Applicant was present at the hearing and represented by Mills Ariail, Esquire. Johnny E. James Jr., Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's counsel, Amanda L. Wicker, Esquire, ("Plea Counsel") also testified. Before the Court was a copy of the plea transcript, the records of the Greenville County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings. For the reasons set forth herein, the application is denied.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. On September 6, 2013, the Greenville County Sheriff's Office sought and obtained arrest warrants against Applicant for the crimes of murder (2012 A23 30207724), armed robbery (2013 A23 30207725), and possession of a weapon

during a violent crime (2013 A23 30207726). Applicant was thereafter indicted by the Greenville County Grand Jury during the April 2015 term for murder (2013-GS-23-11027, C.I), armed robbery (2013-GS-23-07725, C.I), and two counts of possession of a weapon during a violent crime, (2013-GS-23-11027, C.II; -07725, C.II). Amanda L. Wicker, Esquire represented Applicant on the charges. On August 21, 2015, Applicant entered a plea of guilty to murder, armed robbery, and one count of possession of a weapon during a violent crime. Consistent with the recommendation by the State, the Honorable Letitia H. Verdin sentenced Applicant to concurrent terms of thirty (30) years for murder, thirty (30) years for armed robbery, and five (5) years for possession of a weapon during the commission of a violent crime. Applicant did not appeal.

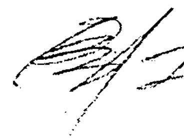
Present Allegations

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

1. "My Lawyer / counsel was ineffective Counselor in performing his duties"
   a. "I was Sentenced on 8-12-15 on indictment / case # 2013GS231107 on Sentencing Sheet weapons poss during a violent crime and MURDER under the same indictment # # 2013GS231107"
2. "My Counsel didn't fully Represented me 100% Best of His abilities"
3. "My Counsel Never Submitted my motions By filing them in clerk of court"

II. APPLICABLE LAW

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, 334 S.E.2d 813 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual, and an applicant's right to contest the validity of a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Therefore, statements made during a guilty plea should be considered conclusively, unless an applicant presents valid reasons why he should be allowed to depart from

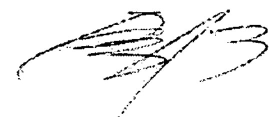


the truth of his statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975) (overruled on other grounds by U.S. v.Whitley, 759 F.2d 327 (4th Cir. 1985)).

An applicant "who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial 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); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993) (Applicant must show advice received from plea counsel was not within the range of competence demanded of attorneys in criminal cases). The applicant must prove that the "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, 334 S.E.2d 813.

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. 668. An 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).

A criminal defense attorney has a duty to investigate, but this duty is limited to a reasonable investigation, which includes, at a minimum, the interviewing of potential witnesses and an independent investigation of the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007). To establish counsel was inadequately prepared for trial due to a failure to investigate, an applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared.

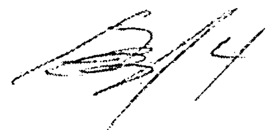


Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) ("failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result"); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (relief denied where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation could have had any possible effect on the result at trial).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

I have reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, I have reviewed the Clerk of Court's records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), I make the following findings of fact based upon all of the probative evidence presented.

Applicant testified that he met with Plea Counsel a couple of weeks before trial and 4-5 times in all. However, I find credible Plea Counsel's testimony that after Chief Public Defender John Mauldin met with Applicant on September 17, 2013, the day after he was arrested, she met with Applicant eight times at the detention center and that she discussed all of the issues in the case, including strengths and weaknesses. I conclude that Applicant also met with Public Defender's Office investigators Cam Jones and J.C. Starkes on September 19, 2013 and September 27, respectively. Plea Counsel's first meeting with Applicant was on January 27, 2014. She gave



detailed testimony of her dealings with the assistant solicitor, and I conclude that on Friday, July 31, 2015, she met with Applicant, at which time Applicant told her that if she could get an offer of 30 years, he would plead guilty. Plea Counsel met with the assistant solicitor on Wednesday, August 5, 2015 and relayed this offer to the assistant solicitor. The assistant solicitor told Plea Counsel that she (the assistant solicitor) would have to convince the victim's family this was a desirable outcome. Plea Counsel met with Applicant on August 7, 2015 and discussed with him at length the aspects of a trial versus a plea, the time he faced, and the fact that he was also on federal probation. Applicant signed the plea sheets. Plea Counsel then notified the solicitor that Applicant had signed the sheets and was ready to plead.

I find credible Plea Counsel's testimony that the big issue in the case was eyewitness identification and that until July 2015, she had been preparing for a trial. The witness closest to the shooter did not identify Applicant, but others did identify him as being in the store and running away after the murder. Until Applicant brought up the possibility of a plea deal, Plea Counsel had been preparing for trial.

Applicant testified he told Plea Counsel that video surveillance in the store could show that he was not the perpetrator and that he gave her this information after being in lockup for 2-3 months. Plea Counsel testified she did not recall Applicant telling her this, but stated that if he had, she would have investigated that possibility. I find credible Plea Counsel's testimony that she would have followed up on such a lead if Applicant had told her about the cameras. I further conclude that even if Applicant had told Plea Counsel about possible video, no information about video was presented at the hearing and this court cannot speculate as to what the video, if it existed, might have shown.

Applicant testified Plea Counsel did not explain the elements of the crime of murder to him. I find this testimony is not credible. I find credible Plea Counsel's testimony that she relayed to Applicant the strengths and weaknesses of the case, including the State's main weakness of eyewitness identification. Applicant testified he did not have a god understanding of the evidence against him, but I find credible Plea Counsel's testimony that she discussed in detail with Applicant all of the evidence in the case. She provided Applicant with discovery after it was produced by the State on February 3, 2014.

Applicant claims he would not have pled guilty (and admitted guilt) had he known more about the prospects of an Alford[1] plea. I find this testimony not credible for several reasons. First, the law is clear that even if Applicant had entered an Alford plea, he would have been sentenced just as if he had entered a "regular" plea. See State v. Herndon, 403 S.C. 84, 91, 742 S.E.2d 375, 379 (2013) ("The Alford plea is, in essence, a guilty plea and carries with it the same penalties and punishments."). The clear fact remains that had Applicant pled under Alford, the State would have made the same sentencing recommendation and Applicant would have been facing the same sentencing range. Second, there is no evidence that an Alford plea would have been applicable, since there was no real bargain in place, which is prerequisite for an Alford plea. Applicant was pleading to murder and armed robbery, under Alford or not, in exchange for the State recommending a sentence to the minimum term of 30 years in prison for murder, the maximum term of 30 years for armed robbery, and the maximum term of 5 years for possession of a weapon during commission of a violent crime, with the sentences to run concurrently.

Applicant also claims that he was under the impression that he would only have to serve 85% of the murder sentence and that had he known he would have to serve his sentence day-for-

[1] North Carolina v. Alford, 400 U.S. 25 (1970)

day, he would not have pled guilty. Plea Counsel testified that she does not recall telling Applicant he would only have to serve 85% of the murder sentence. The plea judge did not recite on the record that Applicant would have to serve the murder sentence day-for-day, nor did the plea judge state the murder sentence would be served day-for-day. This court had the opportunity to evaluate Applicant's testimony face-to-face at the PCR hearing. The court does not find credible Applicant's testimony that he thought he would only have to serve 85% of the murder sentence.

CONCLUSION

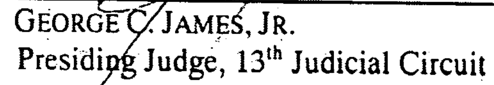
Based on all the foregoing, I find and conclude that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant entered his plea freely, voluntarily, knowingly, and intelligently. I conclude there has been no showing of any failure on Plea Counsel's part to act in accordance with established professional norms; even if there has been such a showing, I find Applicant has not established that but for such failure, he would not have pled guilty and instead gone to trial. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

Applicant is notified that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. His attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

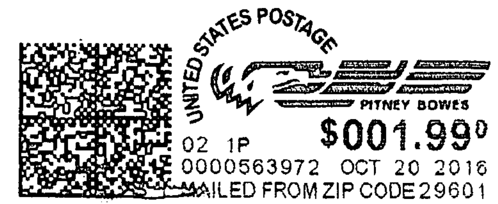
1. That the Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant is remanded to the custody of the South Carolina Department of Corrections.



SEPTEMBER 9, 2016

GEORGE C. JAMES, JR.
Presiding Judge, 13th Judicial Circuit



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