

STATE OF SOUTH CAROLINA)
COUNTY OF LAURENS)
Kirk Willis,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
OF THE EIGHTH JUDICIAL CIRCUIT

2016-CP-30-757

ORDER OF DISMISSAL

LYNN W. LANCASTER
2017 NOV 27 AM 11:13
LAURENS COUNTY
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed September 9, 2016. An evidentiary hearing into the matter was convened on Wednesday, October 11, 2017, at the Laurens County Courthouse in Laurens, South Carolina before the Honorable R. Scott Sprouse. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Bryan Able and Aaron Taylor, Esquires, also testified. This Court also had before it a copy of Applicant's PCR application and amendment, the records of the Laurens County Clerk of Court regarding the subject convictions, Respondent's Return, and the plea transcript.

I. PROCEDURAL HISTORY

Applicant was previously confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Laurens County Clerk of Court. Applicant was indicted

Taylor, Esquire. On November 3, 2015, Applicant appeared before the Honorable Frank R. Addy, Jr., and pled guilty to first degree assault and battery (non-violent) as a lesser included offense of attempted murder. Indictments 2015-CP-30-1734, -1737, -1738, -1739 were dismissed as part of Applicant's plea. Applicant was sentenced pursuant to a recommendation to imprisonment for five years. Applicant did not file a direct appeal.

Allegations

In his current application for post-conviction relief, and the amendment filed thereto, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel as to Bryan C. Able, Esquire:
 - a. "Failed to file a motion for a speedy trial, and if he did he also failed to have that motion addressed by the Court."
 - b. "Failed to secure preliminary hearing. When Mr. Able was asked when the preliminary hearing would be held he indicated the Applicant was already indicted, when in fact, the Applicant was not. Applicant was not indicted until over a year later."
 - c. "Failed to have bond reduction motion brought before the Court."
 - d. "Failed to discuss possible defense and challenges to the evidence with the Applicant."
 - e. "Failed to challenge the Solicitor's incorrect statements made at the bond hearing regarding the fact. Had he done so the Applicant would most likely have gotten a lower bond, PR bond, or ultimately the charges would have been dismissed."
2. Ineffective Assistance of Counsel as to Aaron Taylor, Esquire:
 - a. "Failed to address that Applicant's probation was revoked before he pled guilty."
 - b. "Failed to address possible double jeopardy issues. There were multiple indictments for the same charges. Failed to also secure an arraignment on the charges that were directly indicted."
 - c. "Failed to have Mr. Able's motions brought before the Court."
 - d. "Failed to discuss challenges to the evidence with the Applicant. Counsel only went over the paperwork with the Applicant and never discussed a trial strategy."

- e. “Failed to discuss with Applicant that he could challenge the inconsistent statements made by the witnesses and didn’t make a motion in limine to have those statements addressed by the Court prior to a guilty plea.”
- f. “Applicant was represented by Counsel for only two weeks prior to the guilty plea. Because counsel failed to offer any substantive representation regarding defenses to the charges, Applicant felt he had no choice but to accept the State’s plea offer because he did not trust counsel to handle his trial in an effective manner.”
- g. Mr. Taylor promised Applicant that if he pled guilty, he would only have to serve six months in prison before being paroled.

II. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (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, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (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. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel’s performance was deficient. Id. Under this prong, courts measure an attorney’s performance by its “reasonableness under prevailing professional norms.” Id. (citing Strickland, 466 U.S. at 688). Second, any 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.* at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for 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).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has 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, this Court has reviewed the Clerk of Court records regarding the subject convictions, the plea transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief and amendment, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

Ineffective Assistance of Counsel as to Bryan Able, Esquire

Failed to file a motion for a speedy trial, and if he did he also failed to have that motion addressed by the Court.

Applicant alleged that Mr. Able was ineffective for failing to file a speedy trial motion and failing to have that motion addressed by the court if it was filed. Applicant testified that he was arrested August 8, 2014 and was initially represented by Assistant Public Defender Chelsea McNeil. He testified that he relieved Ms. McNeil and hired Mr. Able after a few months. Applicant testified that he relieved Mr. Able in August 2015. Applicant testified that he had not been indicted on the charges, so Mr. Able should have filed a motion for a speedy trial to get the charges dismissed by law.

Mr. Able testified that he was appointed to represent Applicant on October 1, 2014. He testified that he met with Applicant and went over his version of the facts, the discovery, and the charges. He testified that he did not anticipate indictments early in the process. Mr. Able testified that he filed a Motion for a Speedy Trial and Motion to Dismiss on July 9, 2015. He testified that these motions were never heard by the court because he was preparing for a two-week long trial in late August and early September, his mother passed away, Applicant filed a motion to relieve him as counsel shortly thereafter, and the plea was ultimately heard in early November.

This Court finds that Mr. Able was not ineffective for failing to have his speedy trial motion brought before the court. This Court finds that Mr. Able acted reasonably by filing a speedy trial motion, and finds Mr. Able was not at fault for the motion's failure to be heard before the court where Mr. Able was preparing for a two week trial, had a death in the family, and was relieved as counsel by Applicant.

This Court further finds that Applicant has failed to show that he was prejudiced by Mr. Able's failure to have his speedy trial motion heard in court. He has failed to show resulting prejudice to his case and has failed to show that a speedy trial motion would have been successful had it been heard before the court. Accordingly, this allegation must be dismissed.

Failed to secure preliminary hearing. When Mr. Able was asked when the preliminary hearing would be held he indicated the Applicant was already indicted, when in fact, the Applicant was not. Applicant was not indicted until over a year later.

Applicant testified that Mr. Able was ineffective for failing to secure a preliminary hearing on Applicant's charges. Applicant testified that he requested a preliminary hearing and wanted to meet with the solicitor. He testified that he wrote letters to Mr. Able asking why he had not had a preliminary hearing, and Mr. Able told him that he asked for a hearing. Applicant further testified that he was indicted on October 30, 2014.

Mr. Able testified that he wrote the magistrate judge on October 1, 2014 asking for a preliminary hearing. He testified that he wrote the judge a second time asking for a preliminary hearing on February 6, 2015. He testified that he never heard a response and personally called magistrate Judge Whitsell. Mr. Able testified that he filed a Rule 5/Brady motion and received the State's discovery.

This Court finds that Applicant has failed to meet his burden of proving that Mr. Able was deficient for failing to secure a preliminary hearing. This Court finds that Mr. Able was very active in trying to secure a preliminary hearing, writing two letters to the magistrate and personally calling the magistrate on the phone to arrange a hearing. This Court finds that Mr. Able's actions constituted due diligence and he was not at fault for the lack of a preliminary hearing. This Court further finds that Applicant has failed to show that he was prejudiced by Mr. Able's failure to secure a preliminary hearing. This Court finds that Applicant has failed to provide evidence that a preliminary hearing would have affected the outcome of his case. Accordingly, this allegation must be dismissed.

Failed to have bond reduction motion brought before the Court.

Applicant testified that Mr. Able was ineffective for failing to have a bond reduction motion brought before the court. He testified that Mr. Able sent him a letter on November 24, 2014 saying he filed a motion for bond and adding that Applicant would probably not get a personal recognizance bond. Applicant testified that he had a bond hearing on December 5, 2014. Applicant testified that Mr. Able filed a Motion for a Bond Reduction on February 10, 2015, and Mr. Able sent him a letter on February 15, 2015 indicating that he did not think Applicant would get a bond reduction or a personal recognizance bond. He testified that Mr. Able never took him to a bond reduction hearing.

Mr. Able testified that he filed for an initial bond on December 1, 2014, and the hearing took place December 5, 2014. He testified that the bond was set at \$35,000, which he thought was reasonable, but Applicant immediately asked for a reduction. Mr. Able testified that he filed a Motion for a Bond Reduction on February 10, 2015. He testified that Applicant told him that he could not make any monetary bond so it would have to be reduced to personal recognizance. Mr. Able testified that a personal recognizance bond was not going to be an option in Applicant's case given his criminal history and the fact that he was charged with attempted murder and criminal domestic violence.

This Court finds that Applicant has failed to meet his burden of proving that Mr. Able was deficient for failing to have his bond reduction motion brought before the court. This Court finds that Mr. Able was able to get Applicant a bond at the hearing on December 5, 2014. Based on the testimony, it is apparent that Applicant moved for a bond reduction to attempt to obtain a personal recognizance bond, as he told Mr. Able that he was unable to make any monetary bond. This Court finds that Mr. Able filed the Motion for a Bond Reduction. This Court finds that Mr. Able was not deficient for failing to get the motion brought before a judge as he made the motion and is not responsible for court scheduling.

Furthermore, this Court finds that Applicant has failed to show that he was prejudiced by Mr. Able's actions. This Court finds that Applicant has failed to show that such a motion would have been successful and agrees with Mr. Able that a personal recognizance bond would not be a likely result for someone charged with attempted murder and criminal domestic violence while also on probation for criminal domestic violence. As Applicant has failed to show that the outcome of his case would have been different had a bond reduction motion been brought before the court, he has failed to prove prejudice. Accordingly, this allegation must be dismissed.

Failed to discuss possible defenses and challenges to the evidence with the Applicant.

Applicant testified that Mr. Able was ineffective for failing to discuss possible defenses and evidentiary challenges. He testified that Mr. Able got a statement from Applicant's wife, Barbara Willis, and got an affidavit from her. He testified that Mr. Able said he did not file the affidavit because he did not prepare it. Applicant testified Mr. Able discussed Applicant's theory of self-defense and told him that the witness would say otherwise. He also testified that the victim made inconsistent statements. Applicant testified that he wanted an evidentiary hearing on the inconsistent statements but Mr. Able told him that they would have to wait until trial. Applicant further testified that Mr. Able did not discuss defenses with him because they never got that far.

Mr. Able testified that he met with Applicant for the first time in late October or early November and went over Applicant's version of the facts, the discovery, and the charges. Mr. Able testified that he discussed potential trial issues with Applicant but they were not at a trial preparation mode at that point during his representation. Mr. Able testified that Applicant assumed he would have his charges dismissed based on the victims' inconsistent statements. Mr. Able testified that he did challenge these inconsistencies at the bond hearing. He testified that Applicant wanted a mini-evidentiary trial to address the evidence but Mr. Able told him that it would have to be addressed at trial.

This Court finds that Applicant has failed to prove that Mr. Able was deficient for failing to discuss possible defenses and challenges to the State's evidence. This Court finds Mr. Able provided credible testimony that he and Applicant discussed Applicant's version of the facts, the discovery materials, the charges, and potential trial issues. Applicant also provided testimony that Mr. Able discussed the self-defense theory. This Court also finds that Mr. Able was not

deficient for failing to completely discuss possible defenses because, as Applicant and Mr. Able testified, Applicant moved to relieve Mr. Able as counsel before they were in a trial preparation posture.

Applicant has failed to prove that he was prejudiced by Mr. Able's actions as he moved to relieve Mr. Able over two months before he pled guilty and as he has failed to show that he would not have pled guilty but would have proceeded to trial but for Mr. Able's failure to discuss defenses and challenges to the evidence. Accordingly, Applicant has failed to meet his burden of proving Mr. Able was ineffective in this regard, and this allegation must be dismissed.

Failed to challenge the Solicitor's incorrect statements made at the bond hearing regarding the fact. Had he done so the Applicant would most likely have gotten a lower bond, PR bond, or ultimately the charges would have been dismissed.

Applicant alleged that Mr. Able was ineffective for failing to challenge the solicitor's incorrect statements made at the bond hearing. Applicant alleged that he would have received a lower bond, personal recognizance bond, or dismissal of his charges if Mr. Able disputed the inconsistent statements. Mr. Able testified that he did challenge the witnesses' inconsistencies at the bond hearing.

This Court finds that Applicant has failed to meet his burden of proving that Mr. Able was deficient for failing to challenge the solicitor's incorrect statements. Applicant has failed to show what these incorrect statements were and how they affected the outcome of his case. To the extent that Applicant alleges the incorrect statements made were inconsistencies in the witnesses' version of events, this Court finds that Mr. Able provided credible testimony that he challenged the witnesses' inconsistent statements at the bond hearing. As Mr. Able did challenge these statements, he was not deficient. Furthermore, Applicant has failed to meet his burden of proving that he was prejudiced by Mr. Able's actions as he has failed to show that the outcome of his

bond hearing would have been different had Mr. Able acted differently. Accordingly, this allegation must be dismissed.

Ineffective Assistance of Counsel as to Aaron Taylor, Esquire

Failed to address that Applicant's probation was revoked before he pled guilty.

Applicant alleged that Mr. Taylor was ineffective for failing to address that his probation was revoked prior to him pleading guilty. He testified that Mr. Taylor told the probation officer to violate his probation. He testified that he was served with a probation violation warrant on June 10, 2015 for case 2014-GS-30-636. Applicant testified that he discussed the warrant with Mr. Taylor and asked how his probation could be revoked if he was found not guilty on the current charges.

The guilty plea transcript reflects that the plea judge informed Applicant that the plea would constitute a violation of his probation, and Applicant acknowledged that he understood. See Guilty Plea Transcript, p. 6, ll. 13-16.

Mr. Taylor testified that he was appointed to represent Applicant on October 14, 2015, and the probation violation warrant was served months before he undertook representation.

This Court finds that Applicant has failed to meet his burden of proving that Mr. Taylor was deficient for failing to address that Applicant's probation was revoked before he pled guilty. This Court finds that Applicant was served with a probation violation warrant several months prior to the guilty plea, but the actual revocation did not occur until he pled guilty. This Court finds that he was fully informed by the plea judge that a guilty plea would constitute a violation of his probation, and Mr. Taylor was not deficient for failing to address this issue.

This Court further finds that Applicant has failed to prove that he was prejudiced by Mr. Taylor's actions, as he has failed to show that he would not have pled guilty but would have gone to trial but for Mr. Taylor's failure to address the probation issue. This Court finds that

Applicant's probation revocation on a prior criminal domestic violence charge did not affect the knowing and voluntary nature of his guilty plea to assault and battery. As Applicant has failed to prove deficiency or resulting prejudice, this allegation must be dismissed.

Failed to address possible double jeopardy issues. There were multiple indictments for the same charges. Failed to also secure an arraignment on the charges that were directly indicted.

Applicant alleged that Mr. Taylor was ineffective for failing to address double jeopardy issues. He testified that Mr. Taylor should have challenged the fact that Applicant had two indictments the same crime – two indictments for attempted murder and two indictments for criminal domestic violence. He testified that the indictments had different arrest dates and one was ultimately dismissed. Applicant testified that one indictment was directly indicted.

Mr. Taylor testified that he thought there were duplicate indictments, and thought that Applicant would not go to trial on all. He testified that he discussed this with the assistant solicitor and the charges were ultimately dismissed when Applicant pled guilty to a lesser included offense on one attempted murder charge.

This Court finds that Applicant has failed to meet his burden of proving that Mr. Taylor was deficient for failing to address double jeopardy issues. This Court finds that Mr. Taylor provided credible testimony that he discussed the duplicate indictments to the solicitor prior to the plea. This Court finds that although Applicant was charged with two counts of attempted murder and two counts of criminal domestic violence, one attempted murder charge was nolle prossed and both counts of criminal domestic violence were nolle prossed. As Applicant only pled guilty to one charge, no double jeopardy issues exist. Furthermore, none of Applicant's indictments were directly indicted, all were true-billed and dated October 31, 2015. This Court finds Mr. Taylor was not deficient in this regard and Applicant suffered no prejudice as a result. Accordingly, this allegation must be dismissed.

Failed to have Mr. Able's motions brought before the Court.

Applicant alleged that Mr. Taylor was ineffective for failing to bring Mr. Able's motions before the court. Mr. Able filed a speedy trial motion, motion to reduce bond, and motion to dismiss the charges. He testified that he wanted Mr. Taylor to move to challenge the victims' inconsistent statements pre-trial but Mr. Taylor told him that the solicitor would take the case to trial.

Mr. Taylor testified that he did not bring Mr. Able's motions before the court because the case was already on the trial docket. Mr. Taylor testified that he was appointed to represent Applicant on October 14, 2015 and Applicant pled guilty on November 3, 2015.

This Court finds that Applicant has failed to meet his burden of proving that Mr. Taylor was deficient for failing to have Mr. Able's motions brought before the court. This Court finds that Mr. Taylor provided credible testimony that he did not bring Mr. Able's motions before the court because Applicant's case was already on the trial docket. Applicant's plea took place less than one month after Mr. Taylor was appointed to represent him, and this Court finds he was not deficient for failing to bring the speedy trial motion, motion to reduce bond, and motion to dismiss the charges to the court. Furthermore, Applicant has failed to show that he was prejudiced by Mr. Taylor's actions in this regard as he has failed to show that any of the three motions would have been successful or that he would have rather proceeded to trial but for Mr. Taylor's conduct. Accordingly, this allegation must be dismissed.

Failed to discuss challenges to the evidence with the Applicant. Counsel only went over the paperwork with the Applicant and never discussed a trial strategy.

Applicant alleged that Mr. Taylor was ineffective for failing to discuss challenges to the evidence with Applicant, such as the inconsistent statements. He testified that Mr. Taylor never discussed a trial strategy. Mr. Taylor testified that he discussed trial strategy with Applicant and

what evidence he would be able to challenge at trial. He testified that he discussed with Applicant his potential defenses, including challenging the convoluted facts and the statements from witnesses.

This Court finds that Applicant has failed to meet his burden of proving that Mr. Taylor was deficient for failing to discuss challenges to the evidence or a trial strategy. This Court finds that Mr. Taylor provided credible testimony that he and Applicant did discuss trial strategy and the evidence that they would be able to challenge at trial. This Court also finds that Mr. Taylor provided credible testimony that he discussed the potential defenses and challenges to inconsistent statements. Given Mr. Taylor's testimony concerning his discussions with Applicant, this Court finds that he was not deficient. Furthermore, this Court finds that Applicant has failed to show that he was prejudiced by Mr. Taylor's actions as he has failed to show that he would not have pled guilty but would have gone to trial but for Mr. Taylor's actions. Accordingly, this allegation must be dismissed.

Failed to discuss with Applicant that he could challenge the inconsistent statements made by the witnesses and didn't make a motion in limine to have those statements addressed by the Court prior to a guilty plea.

Applicant alleged that Mr. Taylor was ineffective for failing to discuss with Applicant that he could challenge the witnesses' inconsistent statements and made a motion in limine to challenge the statements prior to a guilty plea. Applicant testified that he wanted to address the witnesses' statements pre-trial. Mr. Taylor testified that he did not bring any pre-trial motions before the court because the case was already on the trial docket.

This Court finds that Applicant has failed to meet his burden of proving that Mr. Taylor was deficient for failing to inform Applicant that he could challenge the inconsistent statements and for failing to make a motion *in limine* to have those statements addressed by the court before the guilty plea. This Court finds that it was not unreasonable for Mr. Taylor to not bring a motion

to have the witnesses' statements examined before the court when the case was already on the trial docket and Mr. Taylor worked out a plea deal for Applicant to plead guilty to a five-year sentence for a non-violent lesser-included offense while also having four other charges dismissed. This Court finds that Applicant has failed to show that he was prejudiced by Mr. Taylor's actions as he has failed to show that he would not have pled guilty but would have proceeded to trial had Mr. Taylor made the motions *in limine*. Applicant has failed to show that the motions *in limine* would have been successful and by pleading guilty, he waived his right to challenge the evidence. Applicant has failed to show that Mr. Taylor was ineffective in this regard and this allegation must be dismissed.

Applicant was represented by Counsel for only two weeks prior to the guilty plea. Because counsel failed to offer any substantive representation regarding defenses to the charges, Applicant felt he had no choice but to accept the State's plea offer because he did not trust counsel to handle his trial in an effective manner.

Applicant alleged that Mr. Taylor was ineffective for failing to sufficiently represent him because he only represented Applicant for two weeks prior to the plea. He alleged that Mr. Taylor did not offer substantive representation regarding the defenses and Applicant did not trust Mr. Taylor to handle his trial. Applicant testified that he pled guilty because he did not think Mr. Taylor would do well at trial because Mr. Taylor had not done the proper legal research for his case. He testified that he would have proceeded to trial if he had more time and if his attorneys had done their jobs properly.

Mr. Taylor testified that after he was appointed to represent Applicant, he filed a discovery motion and received full discovery from the State. He testified that he discussed with Applicant his potential defenses, including challenging the convoluted facts and the statements from witnesses. He testified that he negotiated plea offers with the State and engaged in discussions with Applicant, the victims, and the assistant solicitor. He testified that he ultimately

negotiated a plea to a non-violent, lesser-included offense for a five year sentence. Mr. Taylor testified that he pushed for a time-served sentence but Applicant's prior criminal record prevented the State from offering time-served. He testified that he did not force Applicant to plead guilty, and he believed that it was in Applicant's best interest to plead guilty. Mr. Taylor testified that he did not think Applicant's case was negatively affected by the short amount of time of his representation because he had the all of the discovery and helped Applicant get a good plea deal from the State.

This Court finds that Applicant has failed to show that Mr. Taylor was deficient in his representation. Applicant testified that Mr. Taylor had not done the proper legal research and that he only pled guilty because he did not think Mr. Taylor would do well at trial. The guilty plea record reflects that Applicant raised none of these concerns to the plea court, and reflects that Applicant reviewed discovery, was satisfied with Mr. Taylor's services, and acknowledged that Mr. Taylor did everything that Applicant wanted him to do. See Guilty Plea Transcript, p. 8, l. 16 – p. 9, l. 2. This Court finds Mr. Taylor provided credible testimony that he went over the facts, statements, and defenses with Applicant and also negotiated a plea offer that was greatly beneficial to Applicant. Applicant has failed to show what how Mr. Taylor was deficient and how his representation suffered due to representing Applicant for a short period of time.

Applicant has failed to show that he was prejudiced as he has failed to provide evidence that he would have gone to trial but for Mr. Taylor's representation and has failed to point out specific deficiencies in Mr. Taylor's performance. This Court finds that Applicant has failed to meet his burden of proving that Mr. Taylor was ineffective, and this allegation is dismissed.

Mr. Taylor promised Applicant that if he pled guilty, he would only have to serve six months in prison before being paroled.

Applicant testified that Mr. Taylor promised Applicant that if he pled guilty, he would only have to serve six months in prison before being paroled. Applicant testified that he actually served over a year in prison. Mr. Taylor testified that he could not recall if he told Applicant how much prison time he would have to serve.

This Court finds Applicant has failed to prove that Counsel was deficient. This Court finds Applicant acknowledged during the plea hearing that he understood the charge carried up to ten years and the State was making a recommendation of five years. See Guilty Plea Transcript, p. 4, ll. 8-15. Applicant also acknowledged that no one had promised him anything in order to plead guilty other than the State's five year recommendation. See Guilty Plea Transcript, p. 9, ll. 7-9. The record reflects that the plea was made freely, voluntarily, knowingly, and intelligently. See Guilty Plea Transcript, p. 10, ll. 1-5. This Court finds that Counsel was not deficient. Applicant told the plea judge that no promises had been made to him to get him to plead guilty and raised no concerns to the plea judge. This Court finds that Applicant was well informed of the amount of time he was facing and the recommendation made from the State. See Wolfe v. State, 485 S.E.2d 367, 371, 326 S.C. 158, 165 (1997) (Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made).

This Court further finds that Applicant has failed to show that he suffered prejudice. Even if Mr. Taylor did give Applicant a prediction of when Applicant would be eligible for parole, the plea judge conducted a proper colloquy concerning the amount of time Applicant was facing and

Applicant has failed to show that he would have rather gone to trial. Accordingly, Applicant has failed to show that Counsel was ineffective in this regard and this allegation must be dismissed.

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. Applicant failed to demonstrate that Mr. Able's and Mr. Taylor's performances were unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). 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 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.

RSS

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. ~~Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.~~ *ress*

AND IT IS SO ORDERED this 21 day of November, 2017.



R. SCOTT SPROUSE
Presiding Judge
Eighth Judicial Circuit

Waltham, South Carolina