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WALLER LAW GROUP

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JAN 08 2018

S.C. SUPREME COURT

December 3, 2018

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Kelvin O'Neal vs. State of South Carolina
C/A No: 2014-CP-21-3100

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. O'Neal in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,



Jonathan D. Waller

Cc: Lindsey A. McCallister, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Paul M. Burch, Circuit Court Judge

2014-CP-21-3100

RECEIVED

JAN 08 2018

S.C. SUPREME COURT

Kelvin O'Neal, #360657,

Appellant,

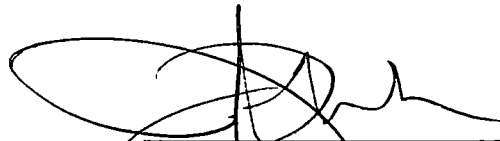
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Kelvin O'Neal, #360657, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed December 18, 2017, issued by the Honorable Paul M. Burch, Presiding Judge, Twelfth Judicial Circuit.



Jonathan D. Waller

Waller Law Group
SC Bar No.: 76290
1116 Blanding Street
Suite 2B
Columbia, SC 29201
803-520-7278 (phone)
jonathan@wallergroupsc.com
ATTORNEY FOR PETITIONER

This 3 day of January, 2018.

Other Counsel of Record:
Lindsey A. McCallister, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Paul M. Burch, Circuit Court Judge

2014-CP-21-3100

RECEIVED

JAN 08 2018

S.C. SUPREME COURT

Kelvin O'Neal, #360657,

Appellant,

v.

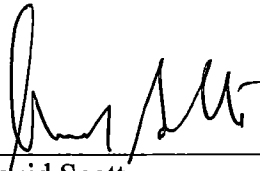
STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Lindsey A.

McCallister, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 3rd day of January 2018, to her office located at P.O. Box 11549, Columbia, SC 29211.



M. David Scott

FILED

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP2103100

Kelvin Danier Oneal

2017 DEC 19 PM 3:30

South Carolina State Of

DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (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. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY**
- 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 THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

12/19/2017

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on **December 18, 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **December 20, 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

CERTIFIED: A TRUE COPY
Doris Poulos O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

Jonathan D Waller 1116 Blanding Street Suite 2B
Columbia, SC 29201

Justin James Hunter PO Box 11549 Columbia, SC
29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P. O'Hara

Court Reporter

Doris Poulos O'Hara - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
 COUNTY OF FLORENCE)
)
 Kelvin O'Neal, #360657,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 OF THE TWELFTH JUDICIAL CIRCUIT

Case No.: 2014-CP-21-3100

ORDER OF DISMISSAL

2017 DEC 18 PM 3:33
 DORIS POULOS O'HARA
 C.C.P. & G.S.
 FLORENCE COUNTY, SC

FILED

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed November 3, 2014. Respondent made its Return on September 16, 2016. An evidentiary hearing into the matter was convened on March 14, 2017, at the Florence County Courthouse. Jonathan Waller, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Applicant testified on his own behalf. Cheveron T. Scott, Esquire (Counsel), and Solicitor Ed Clements, who prosecuted the case, also testified. This Court had before it a copy of the records of the Florence County Clerk of Court, records from the South Carolina Department of Corrections, the application, the State's Return, and the plea transcript.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Florence County Clerk of Court's orders of commitment. Applicant was indicted at the April 2010 term of the Florence County Grand Jury for one count of possession with intent to distribute (PWID) cocaine base and resisting arrest (2010-GS-21-0467). Applicant was also indicted at the July 2012 term for one count of accessory after the fact of murder and conspiracy (2012-GS-21-0899). Applicant was represented on these charges by Chevron Scott, Esquire. On

CERTIFIED: A TRUE COPY
Doris Poulos O'Hara
 CLERK OF COURT C.P. & G.S.
 FLORENCE COUNTY, S.C.

July 16, 2014, Applicant pleaded guilty before the Honorable Michael G. Nettles to the PWID and accessory charges. The remaining charges were dismissed. Judge Nettles sentenced Applicant to concurrent terms of twelve years' imprisonment for PWID cocaine base and accessory after the fact of murder. Applicant did not file an appeal.

ALLEGATIONS

In his current application and the subsequent amendments thereto, Applicant alleges that he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel, in that:
 - a. Counsel did not correctly prepare Applicant for sentencing; and
 - b. Counsel failed to investigate.

At the call of the case, Applicant's attorney informed the Court Applicant had narrowed the issues in his application. Applicant abandoned all issues except the claim Applicant did not fully understand the potential sentence he was facing when he agreed to plead guilty, either because Counsel failed to inform the plea court of the State's offer correctly on the record, or alternatively, because Applicant was induced to reject the offer due to Counsel's ineffective assistance.

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 their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

Ineffective Assistance of Counsel

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, 442, 334 S.E.2d 813, 814 (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 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. 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. at 689. 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 reviewing 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, the applicant must prove that counsel’s performance was deficient. Id. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Id. (quoting Strickland v. Washington, 466 at 688). 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.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, 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).

Applicant testified he was charged with four crimes – accessory after the fact of murder, conspiracy, resisting arrest, and PWID cocaine base – as a result of two separate incidents. Applicant stated he hired Counsel to defend him and acknowledged he met with Counsel “more

than enough” times to discuss the State’s evidence and weigh the options between a trial and a plea. Applicant testified any time he wanted to talk with Counsel, Counsel was able. Applicant further testified he decided he did not want to go to trial but wished to plead guilty instead. Applicant testified the State first extended a plea offer for ten years, which he rejected because a co-defendant, whom he felt was more culpable than himself, had received only probation. Applicant also testified the State then extended an offer of seven years, which he discussed with Counsel. Applicant testified he told Counsel seven years was “an okay number” but inquired as to whether he could receive probation since he had no other. Applicant testified he also asked Counsel if he could receive credit for the three years he spent on electronic monitoring while out on bond. Applicant further testified Counsel discussed the offer with the Solicitor, Ed Clements, who told Counsel Applicant could get probation if Applicant pleaded guilty without a recommendation from the State. On cross examination, Applicant stated he did not understand what the Solicitor meant when he informed the judge the plea was without negotiation or recommendation, and Applicant believed the seven-year offer could still be available. Applicant acknowledged he never informed the judge at any point during the plea of his belief he would only receive up to seven years. Applicant also testified Counsel did discuss the possible sentencing range with him, and he was aware he could receive anywhere from zero to fifteen years, but he believed if he pleaded guilty, he would not get more than seven years. Applicant further testified he would not have gone to trial even if no plea offer had been made, and Applicant further stated Counsel did not promise or guarantee Applicant would receive a sentence of seven years or less.

Counsel testified he has practiced law since 2001, with about 80% of his practice in criminal defense. Counsel testified he met Applicant through a family friend, and Applicant

eventually hired Counsel to defend him on multiple sets of charges, which Applicant was trying to resolve at the same time. Counsel testified Applicant made the decision to plead later in the case, after first rejecting an offer of ten years. Counsel stated he was preparing for trial when he received the State's offer of seven years. Counsel further testified he felt strongly that Applicant was a good candidate for probation because he had stayed out of trouble, was working, and had been volunteering in the community. Counsel testified he sent Solicitor Clements a letter arguing for probation, and the Solicitor offered to let Applicant plead without a recommendation so Counsel could make those arguments to the judge. Counsel further testified he believed if the State recommended seven years, that is what the judge would impose because judges often accept whatever the State asks for. Counsel testified he felt the best way to get Applicant a lower sentence was to plead without recommendation, and he made that recommendation to Applicant. Counsel also testified he explained to Applicant that Applicant could receive anywhere between zero and fifteen years, but Counsel believed Applicant expected to get less than seven years, even though he knew, logically, he could receive more. Counsel testified he loses sleep at night over this case because he feels he did not properly prepare Applicant for a sentence of twelve years, and he was taken aback by it himself. However, Counsel also testified he did not promise Applicant a specific term of years because he did not believe it would have been ethical for him to do so. Counsel further testified he prepared a lengthy argument in mitigation and, while he believed the Solicitor presented the facts of the case fairly, either he or the Solicitor should have informed the judge that one codefendant received probation for similar charges.

Solicitor Clements testified he prosecuted Applicant's case for the State, along with the cases of Applicant's codefendants. The Solicitor testified this case arose out of the murder of a

confidential informant who was preparing to testify against Applicant's cousin in a drug case. The Solicitor further testified Applicant's codefendant, who was the actual shooter, was wearing an electronic monitoring device at the time, and the State was able to track him using that device and cell phone calls to other codefendants. Solicitor Clements testified he approached counsel for both Applicant and his codefendant, Anthony Wingate (Wingate), about cooperating with the State, but only Wingate chose to do so. The Solicitor testified Wingate lead investigators to physical evidence, but Applicant did not wish to cooperate because he was scared. The Solicitor further testified he did not consider Applicant and Wingate to be similarly situated because of Wingate's full cooperation with the State. Solicitor Clements testified he did not believe the State made a recommendation in Wingate's case, but he explained the extent of Wingate's cooperation at Wingate's plea, and the judge sentenced Wingate to probation. Solicitor Clements further testified Counsel was extremely passionate in his defense of Applicant and in his negotiation with the State. However, the Solicitor testified, because of the feelings of the victim's families, the seven years was the lowest offer he could make. The Solicitor further testified this was a high-profile case in Florence County at the time, and all codefendants' pleas and sentences were reported in the newspaper. Solicitor Clements testified he agreed to just recite the facts of the case and allow Counsel to see if he could convince a judge to give Applicant a lower sentence.

Regarding Applicant's claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet his burden of proof. This Court finds Counsel provided effective assistance in this case. Counsel is a trial practitioner who has extensive experience in the trial of criminal offenses. Counsel conferred with Applicant on multiple occasions, during which Counsel discussed the pending charges, the State's evidence, possible defenses and courses of

action, and answered all of Applicant's questions. Additionally, Counsel conveyed all plea offers to Applicant, who rejected them because he felt he deserved a lesser sentence than what the State offered. Both Counsel and Applicant testified Counsel explained the potential sentencing range to Applicant, and Counsel made no promises as to the sentence Applicant would receive. Applicant further testified he would not have gone to trial even if no plea offer had been made.

The Court finds this case to be similar to the situation in Griffin v. State, 361 S.C. 173, 604 S.E.2d 394 (2004). There, the South Carolina Supreme Court explained:

[C]ounsel told [Applicant] the plea court had indicated he would likely give [Applicant] a sentence comparable to [the codefendant's] twenty-two year sentence, counsel made no promises. He also informed [Applicant] there were no plea negotiations and informed him of the possible range of sentences. Further, the plea court informed [Applicant] of the maximum sentences he could receive for the charges prior to [the] plea being entered. The plea court also asked [Applicant] whether he understood there were no promises made regarding his guilty plea. [Applicant's] answers to those questions reflect an awareness of the potential range of sentences and an understanding that he had not been promised anything in return for his guilty plea. Accordingly, counsel's performance was not deficient even though he related his belief to [Applicant] that the court would give a twenty-two year sentence instead of the thirty years respondent received.

Id. at 177, 604 S.E.2d at 396. Furthermore, "[w]ishful 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." Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997). While this Court acknowledges Counsel's candid assessment of his performance and his obvious distress at the sentence his client received, the Court is mindful of the United States Supreme Court's admonishment in Strickland "that 'every effort be made to eliminate the distorting effects of hindsight' and evaluate counsel's decisions at the time they were made. 466 U.S. at 689. Accordingly, the Court must be wary of second-guessing plea counsel's tactics. Edwards v.

State, 392 S.C. 449, 456–57, 710 S.E.2d 60, 64 (2011) (citing Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)). Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant.

This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel’s performance. Specifically, this Court credits Applicant’s own testimony and finds Applicant would not have proceeded to trial, even if the State had not made any plea offer. “A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing (1) that counsel’s representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that but for counsel’s errors, the defendant would not have pleaded guilty but would have insisted on going to trial.” Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997) (quoting Hill v. Lockhart, 474 U.S. 52, 56-57 (1985)). Therefore, Applicant was not prejudiced by any alleged deficiency in Counsel’s performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

CONCLUSION


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

The Court notes Applicant must file and serve a notice of appeal within thirty 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, Applicant must serve and file a notice of appeal on his own behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

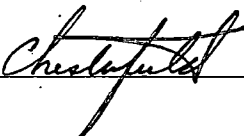
IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 11th day of December, 2017.

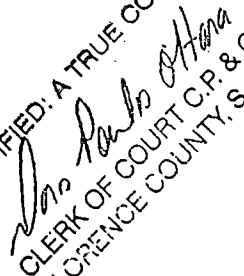


THE HONORABLE PAUL M. BURCH
Presiding Judge
Twelfth Judicial Circuit


_____, South Carolina.

2017 DEC 18 PM 3:33
DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

FILED

CERTIFIED: A TRUE COPY

CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

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