

ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

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December 10, 2018

JAN 16 2018

S.C. SUPREME COURT

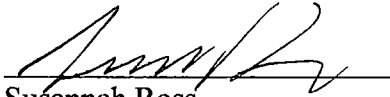
Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: John Michael Kirby v. State
2016-CP-42-3991

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,


Susannah Ross
Attorney at Law

enclosure

cc: Office of the Attorney General
Office of Appellate Defense
Spartanburg County Clerk of Court

330 E. COFFEE ST. • GREENVILLE/SC • 29601
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JAN 16 2018

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

G. Thomas Cooper, Circuit Court Judge

2016-CP-42-3991

John Michael Kirby, Appellant,

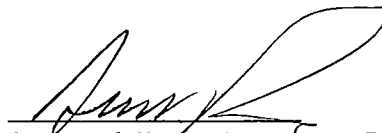
v.

The State, Respondent.

NOTICE OF APPEAL

John Michael Kirby appeals the Honorable G. Thomas Cooper's Order of Dismissal filed December 14, 2017.

This 10 day of January, 2017.


Susannah Ross, Attorney at Law
330 E. Coffee St.
Greenville, SC 29601
(864) 242-0029
Attorney for Appellant

Other Counsel of Record:
Valerie Giovanoli, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for Respondent

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

John Michael Kirby, #319119,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2016-CP-42-3991

**ORDER OF DISMISSAL
WITH PREJUDICE**

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by John Michael Kirby (Applicant) on November 7, 2016. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on November 14, 2017 at the Spartanburg County Courthouse. Applicant was present and represented by Susannah Ross, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Matthew W. Shealy, Esquire, (Counsel) also testified. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the plea transcript, the PCR application, Respondent's return, and Applicant's supplemental application.

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HOPE BECKLEY
CLERK OF COURT
SPARTANBURG COUNTY

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted by the March 2015 term of the Grand Jury for Spartanburg County for two counts of criminal sexual conduct ("CSC") with a minor, 2nd degree (2015-GS-42-0951, 0952). Applicant was represented by Matthew W. Shealy, Esquire. Assistant Solicitor, Lindsay H. Overby, prosecuted

the case. On May 26, 2016, Applicant pled *nolo contendere* to both charges pursuant to Alford.¹ The State made a recommendation of concurrent terms with a cap of 15 years and also dismissed two other charges for third degree CSC with a minor, in exchange for Applicant's guilty plea. The Honorable J. Mark Hayes, III, sentenced Applicant to imprisonment of fifteen years for both charges with credit for 845 days served. The sentences were to be served concurrently. Applicant was also ordered to register as a sex offender and to avoid contact with the victims or their family. Applicant did not appeal his conviction or plea.

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

1. Ineffective Assistance of Counsel / Involuntary Guilty Plea

- a. "Plea counsel coerced me to plea against my will."
- b. "Plea counsel failed to investigate my history of mental health illness."
- c. "Plea counsel failed to conduct pretrial investigation concerning the facts of the case."

At the start of the hearing, Counsel moved to have Applicant mentally evaluated. Counsel provided the Court with a mental evaluation conducted in 2013 requested by the United States Probation Office pursuant to his supervised release from his federal charges. The evaluation was admitted upon stipulation as Applicant's exhibit 1. The State opposed an evaluation and requested this Court engage in a colloquy with Applicant to further assess his ability to proceed with his PCR. This Court questioned Applicant and found he appeared to be aware of what was going on, the purpose of his PCR action, understood the questions asked of him and gave coherent and reasoned answers. Applicant was afforded further opportunity to discuss with his attorney whether or not he desired to proceed with his PCR hearing and

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

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SOUTHWESTERN DISTRICT OF NORTH CAROLINA
COURT

ultimately decided he wanted to proceed with the matter. Additionally, after witnessing Applicant's demeanor and engaging in conversation, this Court finds a mental evaluation is not warranted.

SUMMARY OF TESTIMONY AT PCR

I. Applicant testified to the following:

Applicant testified he pled guilty pursuant to Alford because Counsel told him he had no defense and the jury would hang him at trial. He reviewed the discovery several times with Counsel and attempted to comprehend all of it. He testified he believed there were inconsistencies that were overlooked by Counsel like the fact that the victims had also been placed in foster homes like he had been and suffered sexual assaults like he had. Applicant claimed the female victim in his case had been sexually abused while in DSS. He also testified that while he was living with his father, step-mother, and two half-siblings, he was "treated like a dog."

Applicant recalled Counsel telling him his statement to law enforcement was the strongest piece of evidence against him. Applicant now believes Counsel should have challenged the voluntariness of the statement because the statement never made sense to Applicant. Applicant did not recall if his statement was video or audio recorded. He did not recall ever giving a statement. He does not believe he would have ever said the things in the statement. Applicant believes that because there were other people living in the same home, he would have mentioned that in his statement to law enforcement.

With regard to his mental health at the time of his statement, he testified he felt tired, sluggish and unsure. His family was not present when he gave a statement and he was not sure how long he was there to give statement. He was seeing a doctor that was recommended after

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the 2013 mental evaluation, but was unsure of his diagnosis or what medications he was prescribed at that time. He mentioned his history of mental health to Counsel, but Counsel told him it didn't matter and gave him an example of another client on medication.

Applicant asked Counsel about challenging the evidence against him, but Counsel did not challenge anything. Applicant believes Counsel did not look into whether there were other perpetrators of the sexual abuse. Applicant testified he did not pursue a jury trial because he had emotional issues at the time. Counsel told him, "we can go to trial," but Applicant was scared to go to trial. He felt pressured. Applicant just followed Counsel's lead believing he was helping Applicant. Applicant testified his 2013 mental evaluation was not in discovery. Counsel never discussed with him a guilty but mentally ill plea and did not discuss anything about Applicant's mental health and functioning.

Applicant was concerned with his prior conviction for assault mentioned during his guilty plea. The conviction arose from an incident in which he was accused of having raped his girlfriend at the time. However, he denied he raped her and explained he did not plead guilty to rape, but rather a lesser offense of assault. He believed Counsel should have objected to any mention of this prior incident. Applicant further testifies he does not believe a jury would find him guilty. Applicant expressed dissatisfaction with the amount of time he received.

II. Counsel testified to the following:

Counsel has been practicing criminal law exclusively for eight years. Counsel was an Assistant Public Defender at the time he represented Applicant. Counsel received the discovery and reviewed all of it with Applicant. The half-siblings alleged Applicant had had sex with them. Counsel watched the CAC videos of the victims' interviews. There was also a detailed post-Miranda statement given to law enforcement by Applicant, which was admitted

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WASHINGTON COUNTY



during the guilty plea proceeding and during the PCR hearing, as State's exhibit 1. Counsel testified there were also letters that could be seen as threatening to the mother of the victims, asking her to drop the charges or he would not buy them a place to live. Counsel testified he certainly could have challenged the statements had Applicant wanted to pursue that, but Counsel believed they would not have been successful. Counsel did discuss with him the option, but again, he was not confident in a positive outcome based on Applicant not recalling giving the statement, but admitting it was his signature on the written statement.

Counsel testified he had some records regarding Applicant's mental health and discussed it with him. However, Counsel testified Applicant did not complain about his mental health. Counsel addressed his concerns regarding mental health on the record during the guilty plea, and specifically mentioned Applicant having been diagnosed with ADHD, bipolar disorder, and oppositional defiant disorder. He did not discuss or consider a guilty but mentally ill (GBMI) plea because Applicant denied the allegations. A GBMI would require Applicant to admit his guilt. Additionally, it would require Counsel to prove he could not conform his behavior or that he did not know the difference between right and wrong – and according to Counsel, that was just not the case.

Counsel did not interview the victims, but he did review the CAC interviews. Counsel testified he advised Applicant to plead guilty based on his view of the evidence, but assured Applicant if he wanted a trial, they would go to trial. There were two offers from the State, one of 12 years to plead to third degree CSC with a minor or 15 years for second degree CSC with a minor. Counsel testified they discussed the two options and opted for the second degree charge because the third degree charge carried with it lifetime GPS monitoring.

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HARRISBURG COUNTY

Counsel denied ever telling Applicant he had no chance at trial and testified he would never tell any client that. Counsel admitted that Applicant's statement was one of the biggest obstacles in the case and did not think there was a basis to get it suppressed.

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 at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency.

I. Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive

relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117 (citing Strickland). 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. With respect to guilty plea counsel, Applicant must show that 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, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Failure to investigate mental health

This Court notes Applicant's 2013 psychological evaluation, Applicant's exhibit 1 from the hearing, assessed Applicant as having a below average IQ within the range of 52-70. While below average, this Court observed Applicant testify and respond to questions posed by this Court, PCR Counsel, and the State and finds Applicant to be fully capable of giving reasoned answers and engaging in meaningful conversation. Furthermore, the report indicates Applicant to be free from any "apparent psychotic symptomatology," "his profile reflects immaturity and emotional lability," and that he is "emotionally dependent on others." The doctor who administered the evaluation did not recommend Applicant to be referred to a psychiatrist. This Court finds nothing compelling in the report that could lead to a finding of ineffective assistance of counsel for not having obtained and reviewed the report.

Counsel's testimony was very credible. Counsel testified he had other mental health records as part of his file for Applicant and he was sure to mention Applicant's mental health to the record during the plea hearing. Counsel did not believe that another psychological evaluation

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SARASOTA COUNTY

of Applicant was warranted or that any benefit could be derived from one. Also, Counsel never considered or discussed a GBMI plea because he found it inappropriate for the situation.

I find that not only was Counsel's assessment of Applicant and his case reasonable, but Applicant has entirely failed to prove how Counsel was deficient for failing to investigate Applicant's mental health. The record shows Counsel was aware of Applicant's mental health history and prior diagnoses. Additionally, none of the evidence presented during the hearing prove Applicant was prejudiced by any alleged deficiency. The record reflects Applicant made the decision to plead guilty pursuant to Alford and that decision was made based on sound advice from Counsel.

Failure to investigate

This Court finds Applicant has failed to prove by a preponderance of the evidence that Counsel was ineffective for failing to investigate. Counsel testified credibly that he reviewed all the discovery including the CAC videos of the children's interviews. He also reviewed the statement Applicant gave to law enforcement and saw no basis upon which he could successfully challenge its admissibility. This Court finds Counsel's investigation of the case reasonable in light of professional norms. This Court also notes Applicant told the plea judge, under oath, he had enough time to talk with Counsel about the facts of his case, the legal elements of the offenses, and any possible defenses. (Tr. p. 7, ll. 4-8). Applicant has failed to provide a sufficient reason to be allowed to depart from the truth of those statements made during his guilty plea proceeding. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975)).

II. Involuntary Guilty Plea

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SPARTANBURG COUNTY
CLERK OF COURT

Applicant also asserts his plea was involuntary. The record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton, 376 S.C. 138, 654 S.E.2d at 874 (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Further, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton, 376 S.C. at 137-38, 654 S.E.2d at 874 (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)). "In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." Id. at 138-39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

In PCR cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 522 S.E.2d 747 (2000) (citations omitted). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and

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would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985). Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann v. Richardson, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." Id. at 771.

The record fully supports the knowing and voluntary nature of Applicant's plea. Applicant has failed to give a sufficient reason to be allowed to depart from the truth of his statements made during his guilty plea. Specifically, Applicant told the plea judge, under oath, that no one had threatened him or promised him anything to enter his plea and that his decision to enter his plea was "free and voluntary." (Tr. p. 7, ll. 9-17). To the extent Applicant is attacking his guilty plea based on ineffective assistance of counsel, this Court finds Counsel was in no way ineffective, as more fully addressed above. This Court further finds Counsel's advice to plead guilty was sound in light of the evidence the State had against him and the benefit he received by way of the dismissal of two other third degree CSC with a minor charges and concurrent sentences. Applicant has failed to meet his burden of proving his guilty plea was involuntary.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant

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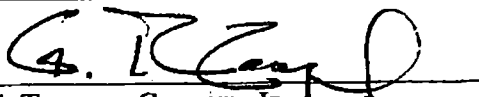
has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

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

AND IT IS SO ORDERED this 12th day of December, 2017.


G. THOMAS COOPER, JR.
Presiding Judge
Seventh Judicial Circuit

Clauson, South Carolina

CLERK OF COURT
SPARTANBURG COUNTY
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M. HOPE BLACKLEY

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M. Hope Blackley
Clerk of Court

January 9, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH JUDICIAL CIRCUIT

John Andrew Kirby
Applicant # 319119

CASE # 2016-CP-42-3991

VS
State
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Ord. of Dismissal w/ prejudice
In this action dated 12-12, 2017 on 1-9-18

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Valerie Liskowski
Hickey M & Coe
Suzanne Ross

1-9-18
(Date)

Christie Selby
(Signature)

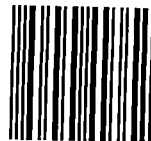


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