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JAN 16 2018

S.C. SUPREME COURT

January 11, 2018

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

RE: David Scott Mooney, #186128 v. State of South Carolina
2016-CP-24-1732

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal along with the accompanying Order for the above-referenced matter. By way of this letter I am copying the Office of Appellate of Defense, as I was appointed to represent Mr. Mooney.

Best regards,

Ashley A. McMahan
Attorney at Law

AAM

cc: David Scott Mooney
Justin J. Hunter, Asst. Attorney General
Greenwood County Clerk of Court
Office of Appellate Offense

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JAN 16 2018

APPEAL FROM GREENWOOD COUNTY S.C. SUPREME COURT
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Case No. 2016-CP-24-1732

David Scott Mooney, #186128, Petitioner,

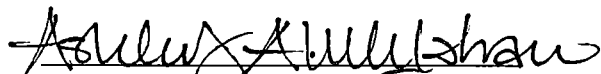
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant, David Scott Mooney, #186128, appeals the order of the Honorable R. Scott Sprouse, dated November 21, 2017, and filed December 5, 2017. Counsel for the Applicant did not receive this Order until January 8, 2018.

Jan. 11th, 2018



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Opposing Counsel:
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S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENWOOD COUNTY S.C. SUPREME COURT
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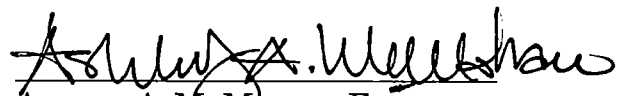
PROOF OF SERVICE

I, Ashley A. McMahan, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Justin J. Hunter, Asst, Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

I further certify that all parties required by Rule to be served have been served.

Jan 11th, 2018


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STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENWOOD)
)
 David Scott Mooney,)
 S.C.D.C. No. 186128,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 OF THE EIGHTH JUDICIAL CIRCUIT

2016-CP-24-1732

ORDER OF DISMISSAL

FILED COMMON PLEAS
 8TH JUDICIAL CIRCUIT
 GREENWOOD, S.C.
 2017 OCT 15 AM 10:50

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed November 1, 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. Thomas Adducci, Esquire, also testified. This Court also had before it a copy of Applicant's PCR application, the records of the Greenwood County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Respondent's Return, and the plea transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenwood County Clerk of Court. Applicant was indicted at the May 2015 term of the Greenwood County Grand Jury for trafficking in methamphetamine (2015-GS-24-0724). Applicant was represented by Thomas Adducci, Esquire. On August 13,

RSS

2015, Applicant appeared before the Honorable Frank R. Addy, Jr., and pled guilty to the lesser included offense of manufacturing methamphetamine. Applicant was sentenced to imprisonment for twelve years. Applicant subsequently filed a Motion to Reconsider on September 22, 2015. This motion was denied by an order filed July 5, 2016. 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

- a. "Counsel never moved to challenge the search warrant affidavit, and furthermore, Counsel never discussed or showed Applicant the search warrant affidavit."
- b. "Counsel failed to present to the judge as mitigation during sentencing that the amount of drugs the State asserts were at the house was not consistent with the amount that SLED verified as drugs, nor did Counsel present evidence about the amount of drugs in the house the Applicant actually knew about. Had Counsel done so, the outcome of the sentence would have been different."
- c. "But for Counsel's presentation to the Applicant regarding his strategy for a guilty plea, Applicant would not have pled guilty and would have insisted on going forward with a trial. The day the Applicant was in court for a bond hearing, Counsel presented the Applicant with his 'plan' for a guilty plea, which involved having the director of the Lighthouse there, along with the Applicant's family, and getting the Applicant into a drug treatment program as his sentencing."

2. Newly Discovered Evidence

- a. "Greenwood drug enforcement agents Officers Byrd and Strickland have since been arrested and indicted for Misconduct in Office Officers Byrd and Strickland resigned as part of an ongoing SLED probe in late October 2015. (They were placed on leave earlier in October 2015.) They have both since been arrested and indicted. See attached news articles from The Greenwood Index-Journal, Exhibits A-F. Applicant pled guilty in August of 2015. The veracity of statements made by Byrd and Strickland have come into question since their arrest and the interest of justice would require that the Applicant's guilty plea be vacated accordingly."

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

Failure to challenge and discuss the search warrant affidavit

Applicant alleged that Counsel was ineffective for failing to challenge the search warrant affidavit and for failing to discuss the search warrant affidavit with Applicant. Applicant testified that the State made it seem like the drugs found were part of a big operation, however everything they found was months old and Applicant only had drugs for his own personal use. He testified that he never got discovery and was told that his wife signed a statement against him. Applicant testified that he never saw the search warrant or the SLED drug analysis.

Counsel testified that he was appointed to represent Applicant on January 28, 2015 and met with him for the first time on February 9, 2015. Counsel testified that he received discovery and went over it with Applicant. He testified that he could not recall if he ever showed Applicant the search warrant. Counsel further testified that he had no concerns about the legality of the search warrant.

This Court finds that Applicant has failed to meet his burden of proving that Counsel was ineffective for failing to challenge the search warrant affidavit or discuss the search warrant

affidavit with Applicant. This Court finds that Counsel provided credible testimony that he reviewed all discovery with Applicant. Despite not recalling whether he showed the search warrant to Applicant, this Court finds that such conduct does not fall below the reasonable standard. This Court finds Counsel provided credible testimony that he did not have any concerns with the legality of the search warrant. This Court finds that Applicant has failed to show that there were any faults in the search warrant affidavit that would have necessitated Counsel to make a motion to challenge it. Without showing a reason why Counsel should have objected, this Court finds that Applicant has failed to show that Counsel was deficient.

This Court also finds that Applicant has failed to show that he was prejudiced by Counsel's actions. Applicant has failed to show that he would have proceeded to trial but for Counsel's failure to challenge the search warrant affidavit. Accordingly, Applicant has failed to meet his burden of proving that Counsel was ineffective in this regard and the allegation must be dismissed.

Failure to present to the judge as mitigation during sentencing that the amount of drugs the State asserts were at the house was not consistent with the amount that SLED verified as drugs, nor did Counsel present evidence about the amount of drugs in the house the Applicant actually knew about.

Applicant alleged that Counsel was ineffective for failing to present to the plea court that the amount of drugs the State asserted were at the house was inconsistent with the amount that SLED verified as drugs. He also alleged that Counsel did not present evidence about the amount of drugs in the house that Applicant actually knew about. Applicant testified that the drugs found at the house belonged to his wife. He testified that law enforcement improperly weighed all of the drugs found in the house together.

Counsel testified that he explained to Applicant the difference between trafficking and manufacturing methamphetamine. He testified that the solicitor told him they were using the

methamphetamine and the "sludge" mixture of methamphetamine in calculating the weight of drugs. Counsel testified that he told Applicant he disputed the State's weighing methods. Counsel testified that this issue was disputed across the state but the Court of Appeals eventually issued a ruling that weighing sludge was not improper. Counsel further testified that the weight of drugs ultimately did not matter because the manufacturing methamphetamine statute only criminalizes the action and does not consider any weight of drugs.

This Court finds that Applicant has failed to meet his burden of proving that Counsel's performance was deficient in this regard. This Court finds that Counsel was not deficient for failing to present during mitigation that the amount of the drugs differed between the State's assertion and the SLED weight and the amount of drugs that Applicant actually knew about. This Court finds that Applicant acknowledged during his guilty plea hearing that he was waiving all evidentiary challenges by pleading guilty. See Guilty Plea Transcript, p. 11, ll. 18-25. This Court finds that challenging such evidence during mitigation would not have changed the outcome of Applicant's plea and Counsel was not deficient. Furthermore, Counsel was not deficient in this regard as the crime of manufacturing methamphetamine does not require proof of a certain weight. See S.C. Code § 44-53-375(B). Thus, any argument during mitigation based on a discrepancy of the amount of drugs found, weighed by SLED, or actually known to Applicant would have no bearing on whether Applicant was guilty of manufacturing methamphetamine.

Applicant has failed to meet his burden of proving that he was prejudiced by Counsel's actions, as he has failed to show that he would have proceeded to trial but for Counsel's failure to challenge the drugs in mitigation. He has likewise failed to show that Counsel's actions had an impact on his sentence. Accordingly, he has failed to prove that Counsel was ineffective and this allegation must be dismissed.

But for Counsel's presentation to the Applicant regarding his strategy for a guilty plea, Applicant would not have pled guilty and would have insisted on going forward with a trial

Applicant alleged that Counsel was ineffective regarding his strategy at the guilty plea. Applicant alleged that the day he was in court for a bond hearing, Counsel presented the Applicant with his 'plan' for a guilty plea, which involved having the director of the Lighthouse there, along with Applicant's family, and getting Applicant into a drug treatment program as his sentencing. Applicant testified that the plan was for him to be admitted to the Lighthouse rehabilitation facility instead of jail time and testified that Counsel convinced him to plead guilty based on this plan.

Counsel testified that he discussed with Applicant asking the judge for no active time and instead sending Applicant to the Lighthouse rehabilitation facility. He testified that he had discussed this with the director of the Lighthouse and even had bed space ready and available for Applicant. He testified that his plan was to present this to the judge during the plea hearing and ask for a probationary sentence.

This Court finds that Applicant has failed to meet his burden of proving that Counsel was deficient in his mitigation plan during the guilty plea. This Court finds that Counsel's plan was reasonable under the circumstances and Counsel was not at fault for the plea judge choosing to impose an active time sentence. This Court finds that Applicant acknowledged during the plea hearing that the plea was a straight up plea with no recommendations or negotiations and that he could be sentenced anywhere between a probationary sentence and up to fifteen years. See Guilty Plea Transcript, p. 4, ll. 6-12. This Court finds that Applicant also informed the plea court that no one had made any promises or held out any other hope or reward to get him to plead guilty. See Guilty Plea Transcript, p. 12, ll. 16-19. This Court finds that Applicant's desire to receive a probationary sentence does not change the fact that he was well informed from Counsel

and the plea judge that he was pleading to a charge that carried up to fifteen years' imprisonment. 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).

Furthermore, this Court finds that Applicant has failed to show that he was prejudiced by Counsel's actions because Applicant has failed to provide credible evidence that he would have rather gone to trial on trafficking methamphetamine and expose himself to the twenty-five to thirty year sentence he would be facing under that charge and the five-year sentence he would face on the charge of possession of altered ephedrine or pseudoephedrine that was dismissed as part of the plea. Therefore he cannot prove any prejudice. Accordingly, this allegation is denied and dismissed with prejudice.

Newly Discovered Evidence

Applicant alleges newly discovered evidence in that two of the officers involved in Applicant's case, Robert Byrd and Brandon Strickland, were later arrested and indicted for Misconduct in Office and resigned as part of an ongoing SLED probe in late October 2015. Applicant attached to his PCR application news articles from *The Greenwood Index-Journal* that describe these offenses. Applicant alleges that veracity of statements made by Officers Byrd and Strickland have come into question since their arrest and the interest of justice would require that the Applicant's guilty plea be vacated accordingly.

Entered as a Court's Exhibit were the indictments for both Larry Robert Byrd and Brandon Richard Strickland. Indictment 2016-GS-24-1114 charges Larry Robert Byrd with misconduct in office, alleging that Byrd failed to properly account for and mishandled

government funds while serving as a Deputy in the Greenwood County Sheriff's Office from on or about April 1, 2015 to on or about October 14, 2015. Indictment 2016-GS-24-1115 charges Larry Robert Byrd with embezzlement, alleging that from on or about April 1, 2015 to on or about October 14, 2015, he withdrew and converted for his own use public funds designated for the use of the Sheriff's Office and Drug Enforcement Unit, resulting in a loss to the Greenwood County Sheriff's Office and Drug Enforcement Unit of an amount of less than ten thousand dollars. Indictment 2016-GS-24-1112 charges Brandon Richard Strickland with misconduct in office, alleging that Strickland mishandled evidence and public funds while serving as a Lieutenant in the Greenwood County Sheriff's Office from on or about April 1, 2015 to on or about October 12, 2015. Indictment 2016-GS-24-1113 charges Brandon Richard Strickland with embezzlement, alleging that from on or about April 1, 2015 to on or about October 12, 2015, he withdrew and converted for his own use public funds designated for the use of the Sheriff's Office and Drug Enforcement Unit, resulting in a loss to the Greenwood County Sheriff's Office and Drug Enforcement Unit of an amount of less than ten thousand dollars.

Under S.C. Code § 17-27-45(c), a newly-discovered evidence claim can be timely raised within one year of actual discovery or within one year of when, by the exercise of due diligence, such evidence *could have been* ascertained. When an applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only when the applicant presents evidence showing (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea and (2) the newly discovered evidence is of such weight and quality that, under the facts of circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea be vacated. Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d.

“[I]n South Carolina, a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights.” State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013) (citing Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal defendant’s right to contest the validity of such a plea is usually, but not definitely, foreclosed. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (2007). In Jamison, the South Carolina Supreme Court noted it would be a “rare case” where the interests of justice require the vacation of a knowing and voluntary guilty plea involving an admission of guilt and a waiver of trial. Jamison, 165 S.E.2d at 130.

This Court finds that these indictments are not of such weight and quality that the interest of justice requires Applicant’s plea to be vacated. These indictments do not allege any misconduct during the time that Applicant was arrested or the search warrant was executed. Law enforcement executed the search warrant on Applicant’s house and arrested Applicant on January 13, 2015 – almost three months before Officers Byrd and Strickland were alleged to have committed misconduct in office and embezzlement. These indictments would not constitute evidence that goes to Applicant’s guilt or innocence and are not of such a weight that it would overcome Applicant’s admission of guilt during the plea. This Court finds that Applicant has failed to meet his burden of proving that these indictments constitute newly discovered evidence that would warrant a new trial 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 Counsel’s performance was unreasonable under prevailing

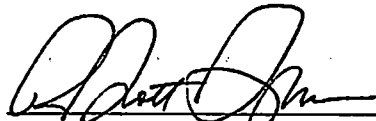
professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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.

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.

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



R. SCOTT SPROUSE
Presiding Judge
Eighth Judicial Circuit

Wallula, South Carolina



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