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RECEIVED

JAN 19 2018

January 15, 2018

S.C. SUPREME COURT

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

Re: Marcellous R. Clark v. State of South Carolina
Case No: 2017-CP-11-0114

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,



Rodney Richey

RWR/
enclosures

cc: Valerie Garcia Giovanoli, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

HONORABLE G. THOMAS COOPER, JR.

2017-CP-11-0114

RECEIVED

JAN 19 2018

S.C. SUPREME COURT

MARCELLOUS R. CLARK, SCDC# 278949

APPELLANT,

against

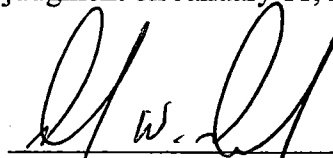
STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Marcellous R. Clark appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable G. Thomas Cooper, Jr, Circuit Judge on November 13, 2017 an Order issued on January 5, 2018 and filed on January 9, 2018.

The Appellant received notice of the judgment on January 11, 2018.



Rodney W. Richey, Esquire
Attorney for the Appellant
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(864) 467-0503
Attorney for Applicant

Other Counsel of Record:
Valerie Garcia Giovanoli, Esquire
Office of Attorney General State of SC
Post Office Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

HONORABLE G. THOMAS COOPER, JR.

2017-CP-11-0114

MARCELLOUS R. CLARK, SCDC# 278949

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

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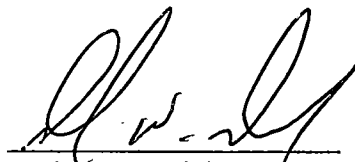
JAN 19 2018

S.C. SUPREME COURT

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on January 15, 2018, addressed to their attorney of record, Valerie Garcia Giovanoli, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: January 15, 2018



Rodney W. Richey, Esquire
Attorney for the Appellant
33 Market Point Drive
Post Office Box 10916
Greenville, South Carolina 29603
(864) 467-0503
Attorney for Applicant

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

Marcellous R. Clark, #278949,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2017-CP-41-0114

**ORDER OF DISMISSAL
WITH PREJUDICE**

BRANDY W. NOBEE

2018 JAN -9 PM 2:00

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Marcellous R. Clark (Applicant) on February 13, 2017. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on November 13, 2017 at the Spartanburg County Courthouse. Applicant was present and represented by Rodney W. Richey, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

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

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. In April 2016, the Cherokee County Grand Jury indicted Applicant for two counts of burglary, first degree (2016-GS-11-0398, -0399). Don A. Thompson, Esquire, represented Applicant. Assistant Solicitor, Kimberly Lesknic, represented the State. On October 11, 2016, Applicant pleaded guilty as indicted to

one count of burglary, first degree (-0398) and *nolo contendere* pursuant to Alford¹ as indicted to the second count of burglary, first degree (-0399) before the Honorable Roger L. Couch. Judge Couch sentenced Applicant to imprisonment for concurrent terms of twenty years for one count of burglary, first degree and twenty-five years, suspended upon the service of twenty years and probation for five years for the second count of burglary, first degree. Applicant did not appeal his conviction or sentence.

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

1. Ineffective Assistance of Counsel, in that:
 - a. "Counsel failed to properly advise me;"
 - b. "Counsel was ineffective for unprofessional errors;"
 - c. "Counsel was ineffective for not investigating the case;"
 - d. "Counsel failed to inform me that I could conclude to a lesser offense under the Alford plea;"
 - e. "Counsel prejudice to case."

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).

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



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).

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 properly advise

Applicant alleged in his PCR application that Counsel failed to properly advise him. However, Applicant presented no evidence to support this allegation or show how Counsel's advice was improper. Applicant testified law enforcement told him if he cooperated with them, he could plead to a lesser charge. Counsel's testimony on the issue was credible. Counsel



testified he talked to the Solicitor about reducing the charges and he discussed the alleged conversation Applicant had with law enforcement. It was in the Solicitor's discretion to decide to reduce the charges and he would not. Applicant admitted guilt to one burglary, but the evidence tying him to both was very strong. Based on the evidence, and the potential of receiving a life without parole sentence, Counsel advised Applicant to plead guilty to both burglaries. This Court fails to see how this advice was improper and finds the advice to be sound. Therefore, Applicant's has failed to prove by a preponderance of the evidence that Counsel was deficient in this regard or that Applicant was prejudiced by any such deficiency, such that he would have insisted on trial rather than pleading guilty. This allegation is denied and dismissed.

Failure to investigate

Applicant failed to present any evidence in support of this allegation, other than self-serving testimony that he believe Counsel should have investigated the burglary to which he pled pursuant to Alford more. To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). The record shows Counsel discussed the case with Applicant. (Tr. p. 7, ll. 1-3; p. 11, ll. 3-8). Counsel also testified credibly that he reviewed the State's evidence against



Applicant and he reviewed it with Applicant. He recalled meeting Applicant approximately 5 or 6 times to discuss the case. Applicant has failed to show how further investigation would have benefitted him. This Court notes, Applicant admitted guilt to one burglary and was sentenced to concurrent time for the burglary for which he did not admit guilt. Because Applicant admitted guilt to one burglary and decided to plead guilty, it would be a great risk to try the other burglary with plenty of damning evidence against Applicant and face a life without parole sentence, instead of disposing of the charge with the other for concurrent sentences. Therefore, having failed to meet his burden of proof, this allegation is denied and dismissed.

Failure inform Applicant he could plead to lesser offense

Applicant alleges Counsel failed to inform him he could plead to a lesser offense. This Court finds Counsel's testimony more credible on this issue. Counsel testified he requested a reduction in the charge, but the Solicitor would not agree to reduce the charge. The decision to reduce charges is in the sound discretion of the Solicitor. The record supports Counsel's testimony with regard to serious thought and consideration given to the burglary Applicant denied. However, risking a life without parole sentence going to trial on that burglary was not reasonable in light of the fact he was pleading guilty to the other burglary and could most likely (and did) receive concurrent time. As such, counsel was not deficient in this regard nor was Applicant prejudiced by any alleged deficiency. Therefore, this allegation is denied and dismissed.

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 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 5th day of January, 2018.



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

CAUDEN, South Carolina

RICHEY AND RICHEY, P.A.
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GREENVILLE, SC 29603



USA

NON-MACHINEABLE SURCHARGE 2016

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

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