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February 14, 2018

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

FEB 20 2018

S.C. SUPREME COURT

Re: David Reagan 365028 v. State of South Carolina

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Charleston County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc: Megan Jameson Esq. David Reagan 365028

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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FEB 20 2018

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Michael G. Nettles, Circuit Judge

Case No.: 2016-CP-10-2768

David Reagan 365028PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner David Reagan appeals the Honorable Michael G. Nettles' January 23, 2018 Order of Dismissal. Undersigned counsel received notice of entry of the order on February 14, 2018. A copy of the order on appeal is attached hereto.



James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

February 14, 2018

Megan Harrigan Jameson, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Honorable Michael G. Nettles, Circuit Judge

Case No.: 2016-CP-10-2768


David Reagan 365028.....PETITIONER

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CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Megan Jameson, Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this February 14, 2018.



James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

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AG
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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
)
David Reagan, SCDC # 365028,)
Applicant,)
)
v.)
)
State of South Carolina,)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2016-CP-10-2768

ORDER OF DISMISSAL

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This matter comes before the Court by way of an application for post-conviction relief filed May 26, 2016, by David Reagan (Applicant). The State (Respondent) made its Return on May 15, 2017, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened December 7, 2017, at the Charleston County Courthouse. Applicant was present at the hearing and represented by James K. Falk, Esquire. Senior Assistant Deputy Attorney General Megan Harrigan Jameson from the South Carolina Attorney General's Office appeared on behalf of the State. Following the evidentiary hearing, this Court denied the application from the bench. This order follows.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its April 2014 term, the Charleston County Grand Jury indicted Applicant for murder (2014-GS-10-2316) following the strangulation death of Applicant's long-term girlfriend. Applicant was represented by Luke J. Malloy, III, of the Charleston County Public Defender's Office. The case was prosecuted by Chief Deputy Solicitor D. Bruce DuRant of the Ninth Circuit Solicitor's Office prosecuted the case. On August 11, 2015, Applicant appeared in

the Charleston County Court of General Sessions before the Honorable R. Markley Dennis, Jr., circuit court judge, where he pled guilty to the lesser-included offense of voluntary manslaughter. Pursuant to negotiations between Applicant and the State, Judge Dennis sentenced Applicant to the negotiated term of twenty-five years imprisonment. The State also dismissed a related indictment for first-degree criminal sexual conduct and unrelated indictments for hit and run and criminal domestic violence against the same victim. Applicant did not pursue a direct appeal challenging his plea or sentence.

FACTUAL SUMMARY

On August 22, 2013, law enforcement officers with the Charleston Police Department responded to the Palms Apartment for a welfare check based on complaints from a neighbor that the victim's dog was running freely outside. (Plea Tr. 9). When officers entered the victim's apartment, they found her nude and lifeless body on the living room floor. (Plea Tr. 9). An autopsy revealed her cause of death was strangulation. (Plea Tr. 10). The autopsy also found contusions her to rectal and vaginal areas that were consistent with sexual assault. (Plea Tr. 10). Fingerprints and DNA, including under the victim's fingernails, linked Applicant to the scene. (Plea Tr. 11). Additionally, Applicant was seen driving the victim's vehicle and using her credit cards to purchase beer and liquor following her death. (Plea Tr. 10-11). Applicant, who had a pending criminal domestic violence charge involving this same victim, was brought in for questioning. (Plea Tr. 10-11). Applicant originally denied seeing the victim for the past twelve days but eventually admitted to being present when she passed away, although he denied knowing what caused her death. (Plea Tr. 11).

ALLEGATIONS RAISED

Applicant alleged counsel was ineffective based on numerous allegations that counsel was ineffective for failing to thoroughly research and discuss a defense of erotic asphyxiation with him and for failing to discuss a defense of consent to the criminal sexual conduct charge.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant called plea counsel to testify first. Counsel testified he was appointed to represent Applicant while he was employed at the Charleston County Public Defender's Office. He testified he was already representing Applicant on a criminal domestic violence charge against the same victim when Applicant was arrested for the charges subject to this application and assumed representation of Applicant on the new charges, including murder and first-degree criminal sexual conduct. He testified he met with Applicant at least eleven times on these charges. Counsel testified he reviewed all discovery materials with Applicant and also gave Applicant a copy of the discovery. He testified Applicant's DNA and fingerprints were found at the scene, and that Applicant's statements also linked him to the scene.

Counsel testified he used an investigator, Harry Long of the Charleston County Public Defender's Office, who investigated the case as well as accompanied him on visits with Applicant and met with Applicant individually, and came to meeting with potential expert witnesses. Counsel testified he retained and consulted with forensic pathologist Dr. Kimberly Collins, who confirmed the cause of death was strangulation. Counsel elaborated he retained Dr. Collins because the victim was in poor health due to the effects of decades of alcohol abuse and wanted to conclusively determine the victim died from strangulation rather than some other cause. Counsel testified he canvassed the apartment complex where Applicant and the victim

lived and spoke with numerous acquaintances of the couple while investigating the case. Counsel also had Applicant evaluated by a forensic psychiatrist, Dr. Mulbry, to ensure Applicant was competent and to potentially use during an attempt to suppress the statements Applicant gave to law enforcement, such as, 'I've killed the love of my life.'

Counsel testified Applicant and the victim were romantically involved and often engaged in extreme sexual activities, including inserting wine bottles into various body cavities. Based on this history, Counsel testified he thought that Applicant and the victim had possibly been engaged in erotic asphyxiation and that could have led to the victim's death. Counsel testified he discussed this possibility with Applicant, who adamantly denied that he and the victim had engaged in erotic asphyxiation or any type of strangulation.

Counsel testified Applicant and the victim had been on a "five-day bender" at the time of her death and based on all of the alcohol he had consumed, Applicant was unable to clearly recall what had happened to the victim. Counsel testified Applicant told him he recalled using a wine bottle to penetrate the victim as part of their routine sexual activity, but he could not recall anything further or how she was strangled. Counsel testified he had a defense of consent to the criminal sexual conduct charge, but based on his investigation, consultation with Dr. Collins, and conversations with Applicant, there was no apparent defense to the murder charge.

Counsel testified Applicant consistently told him wanted to plead guilty to these charges and did not want to proceed to trial. Based on these conversations, Counsel entered into plea negotiations with the State and was eventually able to secure a plea deal to the lesser-included offense of voluntary manslaughter for a determinate term of twenty-five years imprisonment and the dismissal of all other pending charges. He testified he discussed the plea offer with

Applicant, the anticipated time he should expect to serve within the department of corrections, and the likely age he would be when released. Counsel testified it was ultimately Applicant's decision to accept the State's plea offer. Counsel testified he never threatened or coerced Applicant to plead guilty. He similarly testified he never told Applicant that the State would seek the death penalty if he did not enter a guilty plea.

Following Counsel's testimony, Applicant testified on his own behalf. Applicant testified helped guilty because he had "no defense whatsoever" and that he would have been convicted if he had proceeded to trial. Applicant testified Counsel did everything he could to help him. He testified he is ashamed of himself for pleading guilty to the victim's death. He testified he and the victim, his longtime girlfriend, had previously engaged in erotic asphyxiation twice but that he did not like the practice. He testified that he did not recall discussing erotic asphyxiation with Counsel, but trusts Counsel's memory and that they did discuss it if Counsel said they did. Applicant testified the details of what happened the when the victim died are hazy, but he recalled strangling her and inserting wine bottles into her during sexual intercourse, then both of them being alert afterwards. Applicant testified he went to lie down and when he woke up, the victim was motionless on the floor. He testified he again went to sleep and when he woke up, she was still motionless on the floor and was cold to the touch. Applicant testified he has previous convictions for domestic violence with the same victim and other victims. He also testified he has long stretches of memory loss.

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 hearings. This Court has further had the opportunity to

observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption 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. 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, 385 S.E.2d at 625 (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, 386 S.E.2d at 625. With respect to guilty plea counsel, the 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 (1985).

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action in regards to his allegations that counsel was ineffective for failing to thoroughly research and discuss a defense of erotic asphyxiation with him and for failing to discuss a defense of consent to the criminal sexual conduct charge.

Initially, this Court finds there is no reasonable probability Applicant would have proceeded to trial but for counsel's alleged deficiencies, as the uncontroverted evidence before this Court established Applicant never wanted to proceed to trial. See Hill, 474 U.S. 52 (finding an 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). Moreover, this Court notes Applicant cannot establish any deficiency of counsel in his representation of Applicant. Applicant readily admitted to strangling the victim and conceded Counsel did everything he possibly could have to assist Applicant. This Court agrees with Applicant and finds that Counsel did an excellent job representing Applicant. Counsel thoroughly investigated every possible defense, including erotic asphyxiation to the murder charge and the defense of consent to the criminal sexual conduct charge that was ultimately dismissed. Counsel retained and consulted with a forensic pathologist who ultimately confirmed the victim died as a result of strangulation. Counsel also had Applicant evaluated by a forensic psychiatrist. Counsel was able to negotiate a favorable plea deal with the State to a lesser-included offense and the dismissal of numerous charges, a significant benefit to Applicant. This Court finds Applicant has failed to

meet his requisite burden of establishing any deficiency of counsel. Therefore, this application must be denied and dismissed with prejudice.

CONCLUSION


Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief must be denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 23 day of Jan, 2018.



MICHAEL G. NETTLES
Presiding Judge
Ninth Judicial Circuit

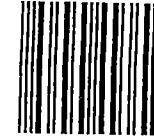
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