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March 5 2018

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

RECEIVED

MAR 09 2018

S.C. SUPREME COURT

Re: Devoun Bennett v State, 2015-CP-10-1130

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, Devoun Bennett 355219.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAR 09 2018

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

S.C. SUPREME COURT

Honorable Michael G Nettles. Circuit Judge

Case No.: 2015-CP-10-01130

Devoun Bennett 355219.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Devoun Bennett appeals the Honorable Michael G. Nettles' January 16, 2018 Order of Dismissal. Undersigned counsel received notice of entry of the order on February 5, 2018. A copy of the order on appeal is attached hereto.



James K Falk
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Charleston, SC 29402

March 5, 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

RECEIVED

MAR 09 2018

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Michael G Nettles, Circuit Judge

Case No.: 2015-CP-10-1130

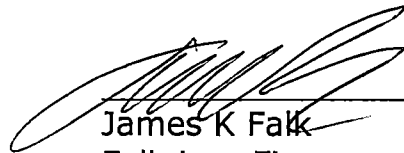
Devoun Bennett 355219.....PETITIONER

V.

State of South Carolina.....RESPONDENT

PROOF 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 March 5 2018.



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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Devoun Bennett, SCDC # 355219,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-10-1130

ORDER OF DISMISSAL

FILED
2018 JAN 24 AM 10:13
JULIE HARRIGAN JAMESON
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed February 23, 2015, by Devoun Bennett (Applicant). Respondent made its Return on July 28, 2015, 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 March 2012 term, the Charleston County Grand Jury indicted Applicant for first-degree burglary (2012-GS-10-1304), armed robbery (2013-GS-10-1312), and possession of a firearm during the commission of a violent crime (2013-GS-10-1320) stemming from a home invasion in which five armed men forced their way into the victim’s home and

robbed him at gunpoint. Leslie Sarji, Esquire, represented him. Chief Deputy Solicitor D. Bruce DuRant of the Ninth Circuit Solicitor's Office prosecuted the case. On April 24, 2013, Applicant appeared in the Charleston County Court of General Sessions before the Honorable Roger M. Young, Sr., circuit court judge, where he pled guilty to armed robbery as indicted and second-degree burglary as a lesser-included offense. Judge Young sentenced him to twenty years imprisonment for twenty years for armed robbery and to fifteen years imprisonment for second-degree burglary, with both sentences to be served concurrently. Pursuant to the plea agreement, the State dismissed the accompanying weapons indictment.

Thereafter, on May 3, 2013, Applicant filed a motion to reconsider his sentence. On May 22, 2013, the State filed its response to this motion. On October 11, 2013, while the motion to reconsider the sentence was still pending, Applicant filed an initial application for post-conviction relief. Respondent moved to dismiss this application, arguing his convictions had not become final based on the pending General Sessions motion. On May 22, 2014, the Honorable Deadra L. Jefferson, circuit court judge, acting in her capacity as Chief Administrative Judge, dismissed the application without prejudice with leave for Applicant to file another application for post-conviction relief once his General Sessions motion was ruled upon. Thereafter, Judge Young denied Applicant's motion to reconsider his sentence. Applicant filed his current post-conviction relief application on February 23, 2015.

FACTS GIVING RISE TO THE CONVICTIONS

On October 22, 2011, Applicant and four other men armed with handguns and a sawed-off shotgun entered an apartment complex in West Ashley and robbed a victim a gunpoint. (Plea Tr. 8). The five men took cash and electronic equipment. (Plea Tr. 8). The victim recognized

Applicant, whom he had previously bought an iPod and knew from West Ashley High School as “Voun.” (Plea Tr. 9-10). Law enforcement questioned Applicant, who confessed to setting up the entire robbery; however, he denied entering the home with a firearm. (Plea Tr. 10).

After initially cooperating with law enforcement and implicating two of his co-defendants as accomplices, Applicant recanted his statement and refused to assist. (Plea Tr. 11). Applicant then wrote letters to the co-defendants’ attorneys stating the co-defendants were not involved and that he would refuse to cooperate with the State’s case. (Plea Tr. 11).

ALLEGATIONS RAISED

In his application, Applicant alleged counsel was ineffective based on “evidentiary matters” and “involuntary statements.” At the evidentiary hearing, Applicant’s sole allegation was counsel was ineffective for failing to object to prejudicial comments made by the prosecutor during the plea proceeding pertaining to an unrelated homicide of a five-year-old child killed in a similar home invasion in the same area three days after the crime. See Plea Tr. 8-9.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant called plea counsel to testify first. Counsel testified she has been practicing law for nineteen years and approximately half of her practice is criminal defense work. She testified she was appointed to represent Applicant and met with him an ample amount of times. She testified she received discovery materials from the State and reviewed this material with Applicant. She testified the discovery included Applicant’s statement to law enforcement and the victim’s identification of Applicant. She testified the State’s theory of the case was that Applicant knew the victim and used their prior relationship to gain access into the

victim's home with his co-defendants. She testified she explained the elements of the charges offense with Applicant, as well as the potential sentences.

She testified she did not do a lot of investigation because one was not necessary, as Applicant had confessed to the crime, did not dispute the allegations against him, and wanted to pursue a plea deal. She elaborated Applicant had confessed to law enforcement shortly after his arrest and implicated several of his co-defendants. She testified she could have challenged the statement in a pre-trial Jackson v. Denno hearing, but there was no indication Applicant did not understand his rights or voluntarily waive his rights. She testified the victim identified Applicant by name and previously knew him.

She testified Applicant consistently stated he wanted her to secure a favorable plea on his behalf during their numerous meetings. Counsel testified was in plea negotiations with the Solicitor's office in an attempt to secure a plea offer for Applicant, but these efforts were thwarted by Applicant sending letters to co-defendants' counsels recanting his statement and cooperation with law enforcement. Counsel testified Applicant's actions significantly hampered the State's ability to prosecute the co-defendants. She testified the best offer was for Applicant to plead to the lesser-included offense of second-degree burglary rather than first-degree burglary and the dismissal of the accompanying weapons charge. She testified she communicated this offer to Applicant and it was his decision to accept this offer and enter a guilty plea.

Counsel testified that during the plea proceeding, Chief Deputy Solicitor DuRant brought up the unrelated and unsolved murder of a five-year-old girl during a home invasion that took place in the same general area of this crime and informed the plea court that at least one of Applicant's co-defendants was likely involved in this homicide. Counsel testified Chief Deputy

Solicitor DuRant brought this up because he believed Applicant likely had information about this homicide and was refusing to cooperate with law enforcement. She testified she probably should have objected to these comments by Chief Deputy Solicitor DuRant. She acknowledged Chief Deputy Solicitor DuRant informed the plea court that the State did not believe Applicant was involved in the homicide and she hoped the plea court realized Applicant was not involved in the unrelated homicide.

Counsel testified she filed a motion to reconsider Applicant's sentence following the plea, which was ultimately denied by the plea court. She testified she filed this motion because she thought the plea court's sentence was too harsh. However, she acknowledged Applicant pled guilty without any negotiation or recommendation to a violent home invasion in which he was the alleged mastermind and later recanted, significantly impairing the State's ability to prosecute his co-defendants.

Applicant testified next on his own behalf. He testified counsel was appointed to represent him and they met more than five times. He testified he reviewed discovery with counsel, including his statements implicating himself and his co-defendants and the victim's identification of him. He testified he had talked the victim before. He testified he wanted to plead guilty based on the evidence the State had, including his statement to law enforcement. He testified he was involved in the crime because he brought his co-defendants to the victim's house, but that his sentence was too harsh because he did not enter the house. He testified he ultimately wants a reduction in his sentence.

Applicant testified he discussed the elements of the offense and potential sentences with counsel. He testified he asked plea counsel to secure a favorable plea offer for him and it was his

decision to plead guilty. He testified he told the plea court he was satisfied with counsel's performance, that she had reviewed all discovery with him, and he did not want the opportunity to present witnesses and a defense in a trial. He acknowledged he did not want to proceed to trial.

Applicant testified he initially cooperated with law enforcement, but then wrote letters to his co-defendants' attorneys recanting his prior statements. He testified he ended up cooperating with law enforcement in the end. He testified the unsolved homicide of the five-year-old girl was not related to his case and his attorney should have objected to these comments made by Chief Deputy Solicitor DuRant. He testified these comments made him look bad to the plea court. He testified he has been questioned about this homicide both before and after his plea, but he has consistently told law enforcement that he has no knowledge about the homicide. He testified his only allegation is that counsel should have objected to these comments by Chief Deputy Solicitor DuRant because he thinks he would have received a more lenient sentence.

Chief Deputy Solicitor DuRant testified next. He testified he only mentioned the homicide during Applicant's guilty plea to explain why the victim did not come forward immediately and why he ultimately did—because his home invasion was factually similar to the home invasion in which the five-year-old girl was killed. He elaborated he had reason to believe Applicant's co-defendant was involved in the homicide, but did not believe Applicant was involved. He testified he made this clear to the plea court. He testified this homicide got a lot of media attention but still remains unsolved. He testified Applicant initially cooperate with law enforcement, but later recanted and assisted his co-defendants, therefore diminishing any value he might have had as a State's witnesses. He testified Applicant's actions significantly hampered

his ability to prosecute the co-defendants. He testified Applicant was questioned by law enforcement about the homicide but did not provide any information on it.

He testified the victim reported Applicant had entered his home armed with a gun along with four other men. Her testified Applicant was the mastermind who planned the entire home invasion. He testified Applicant and the other invaders threatened to kill the victim. He testified these are the reasons Applicant got the sentence he did and Applicant easily could have received a harsher sentence. He testified he filed a written response to Applicant's motion for reconsideration, which was introduced as Respondent's Exhibit No. 1.

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 allegation that counsel was ineffective for failing to object to comments about the unrelated homicide by Chief Deputy Solicitor DuRant.

Initially, this Court finds there is no reasonable probability Applicant would have proceeded to trial but for counsel's alleged deficiency for failing to object to these comments, as Applicant testified numerous times that he 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).

Applicant testified he was involved with this violent home invasion and merely wanted a reduced sentence. This Court finds Applicant's sentence was reasonable based on the severity of the crime—a violent home invasion that Applicant planned against a victim whom he knew. Applicant testified at the plea hearing and the evidentiary hearing that he understood the potential sentences he could have received, including up to a life sentence for first-degree burglary had the State not allowed him to plead to the lesser-included offense of second-degree burglary. Therefore, this Court finds Applicant cannot establish any requisite prejudice from counsel's action or inaction.

Moreover, this Court also finds Applicant cannot establish any deficiency of counsel. Chief Deputy Solicitor DuRant testified and the record reveals that the plea court was informed Applicant was not involved in the homicide of the minor and the comment was made merely to explain the victim's delay and hesitancy to report the crime. Although counsel testified she likely should have objected to this testimony, this Court finds these comments are unrelated to the sentence given by the plea court. Additionally, Counsel timely filed a motion for reconsideration of Applicant's sentence, which was ultimately denied by the plea court. This Court finds Applicant has failed to meet his requisite burden of establishing any deficiency of counsel. Therefore, this allegation must be denied and dismissed with prejudice.

CONCLUSION

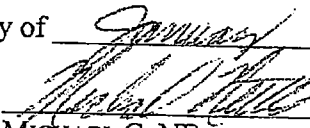
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for is denied and dismissed with prejudice.

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), SCRCR, 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:

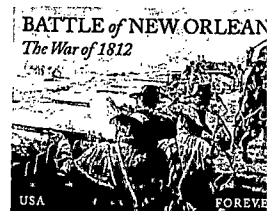
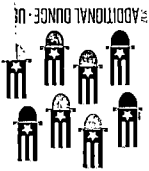
1. This application for post-conviction relief must be denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 16 day of January, 2018.


MICHAEL G. NETTLES
Presiding Judge
Ninth Judicial Circuit


_____, South Carolina

POSTNET barcode



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