

ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

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March 9, 2018

S.C. SUPREME COURT

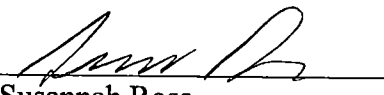
Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Anthony B. Lay v. State
2016-CP-23-4950

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
Greenville County Clerk of Court

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MAR 12 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

2016-CP-23-4950

Anthony B. Lay, Appellant,


v.

The State, Respondent.

NOTICE OF APPEAL

Anthony B. Lay appeals the Honorable Daniel D. Hall's Order of Dismissal filed March 2, 2018.

This 10 day of March, 2018.


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 GREENVILLE)
)
)
 Anthony B. Lay, #367845,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT

2016-CP-23-4950

ORDER OF DISMISSAL

ENTERED COMPUTER

FILED
 PAUL H. GIBSON
 CLERK
 2018 MAR 23 10:00 AM
 JW

This matter comes before the Court by way of an application for Post-Conviction Relief filed on August 23, 2016. Respondent made its Return on or about March 30, 2017. An evidentiary hearing into the matter was convened on June 29, 2017 at the Greenville County Courthouse in Greenville, SC at which time the Applicant was present in court and represented by Susannah C. Ross, Esquire. The Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's plea counsel, Symmes W. Culbertson, Sr., Esquire also testified. This Court had before it a copy of the records of the Greenville County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's guilty plea, the PCR application, Respondent's Return, and Applicant's records from the Department of Corrections.

PROCEDURAL HISTORY

Applicant is presently confined with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. Applicant was indicted by the April 2014 term of the Greenville County Grand Jury for one (1) count of unlawful conduct towards a child (2014-GS-23-000309). Applicant was subsequently indicted by

the September 2014 term of the Greenville County Grand Jury for one (1) count of attempted murder (2014-GS-23-006789) and one (1) count of possession of a weapon during the commission of a violent crime (2014-GS-23-006789). Symmes Culbertson, Esquire, represented him. On April 14, 2016, Applicant pled guilty as indicted to all charges. The Honorable Perry H. Gravely sentenced Applicant to ten (10) years for unlawful conduct towards a child, seventeen (17) years for attempted murder, and five (5) years for possession of a weapon during the commission of a violent crime. The sentences are set to run concurrently.

ALLEGATIONS

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

1. "Ineffective Assistance of Counsel"
 - a. "The Applicant received Ineffective of Counsel prior and during his plea in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution."
 - b. "Counsel failed to provide effective assistance of counsel prior to and during his guilty pleas proceeding. The Applicant's plea of guilt were coerced by counsel's failure to provide adequate representation. The Applicant's plea of guilty were not voluntary and intelligently entered. The judgment and sentence against the Applicant were entered in violation of his rights to due process of law and effective assistance of counsel."

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Applicant's Testimony

Applicant testified he received a fifteen year plea from the solicitor's office through Counsel and Counsel denied the plea because he told Applicant he would not have wanted to take that plea because he could get him a better deal. Applicant testified that Counsel told him he was going to get him a plea offer of seven years when he went to court. He further testified that it was a joint decision between him and his lawyer to plea straight up as oppose to taking the

fifteen year offer.

Counsel's Testimony

Counsel testified he had practiced law twenty-five plus years going on thirty in South Carolina in which almost all of those years had been dedicated to criminal defense. Counsel testified he recalled the facts of the case and that he met with Applicant eight times. Additionally, Counsel testified he had a couple of telephone conversations with members of Applicant's family regarding Applicant's case as well. Counsel testified he discussed the potential charges and potential sentences for the crimes the Applicant was charged with. Counsel testified on January 26, 2016, he met with Applicant at the Greenville Detention Center and discussed the plea offer that was out there from the solicitor's office. Counsel testified that Applicant indicated to him that he wanted to plea but he wanted to enter a plea without a recommendation from the solicitor's office. Counsel further testified that he probably explained to Applicant at that time that was not necessarily the best decision to make since he thought there would be a forthcoming plea offer that would be worth thinking about. However, Counsel testified that his notes indicated Applicant wanted to enter a plea without recommendation. Counsel then testified that he met Applicant on February 19, 2016 at the Greenville Detention Center. Counsel testified Applicant signed a plea agreement for a recommendation of fifteen years for pleading guilty to all of the charges that Applicant was indicted for. However, during the day of the plea Counsel testified that Applicant ultimately decided to plea without a recommendation.

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 can weigh 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).

Involuntary Guilty Plea

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (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 (1984); *Butler*, 286 S.C. at 443, 334 S.E.2d at 814. 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. at 689. Applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. *Id.* at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel’s performance was deficient. *Id.* Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” *Id.* (quoting *Strickland v. Washington*, 466 at 688). 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, Applicant must show that there is a reasonable

probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 (1985).

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, 527 S.E.2d 742, 747 (2000) (citations omitted). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." *Lockhart*, 474 U.S. at 56. 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 must establish the defendant had a full understanding of the consequences of his plea and the charges against him. *Dalton v. State*, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (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, an applicant's right to contest the validity of such a plea is usually foreclosed. *Dalton*, 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)).

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel. Applicant also failed to prove he was prejudiced by the alleged deficiencies. Below are this Court’s specific finding regarding each of Applicant’s allegations of ineffective assistance of counsel:

This Court finds Counsel provided effective assistance in this case. Counsel testified that he advised Applicant of all the charges and the potential sentences the charges carried. Counsel testified that it was ultimately Applicant’s decision to plead guilty, based on their discussions. Counsel testified he met with Applicant on eight different occasions. This Court also notes that after a review of the transcript of the Guilty Plea and the colloquy between Judge Perry H. Gravely and the Applicant, Judge Gravely clarified with the Applicant that the sentencing sheets on all of the charges indicated that there was a recommendation but Applicant ultimately decided to plead straight up. This Court finds that Applicant accomplished this by verbally telling Judge

Gravely he intended to plead straight up and by also initialing the sentencing sheets indicating a plea without a recommendation.

This Court further finds the record reflects Applicant's plea was entered freely, voluntarily, knowingly, and intelligently. The plea judge explained the charges to Applicant, including the maximum penalties for each. The plea judge also went through Applicant's constitutional rights and questioned Applicant as to whether he understood those rights and wished to give them up to plead guilty. Applicant agreed that he did. Applicant admitted he was guilty of these offenses and did not challenge the facts presented by the State at the plea. Applicant told the plea judge that he was satisfied with his attorney, that Counsel had done everything Applicant had asked of him, and he did not need any more time to discuss this matter with Counsel. Applicant further told the plea judge no one had threatened him or made him any promises to get him to plead guilty, and he was doing so of his own accord. Additionally, Applicant told the plea judge he did not have any physical or mental issues which would prevent him from understanding the proceeding, and Applicant indicated he understood all of the plea judge's questions and had answered them honestly. This Court therefore finds that Applicant understood the terms of the plea and the possible sentences he could receive.

Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court also finds that the record fully supports the knowing and voluntary nature of Applicant's guilty plea. See Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (holding defendant's

knowing and voluntary waiver of statutory or constitutional rights in a guilty plea “must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant’s counsel, or both.”). In addition, Applicant has presented no evidence or valid reasons why he should be allowed to depart from the truth of his statements made at the plea. See Dalton, 376 S.C. at 137, 654 S.E.2d at 874 (“[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.”). This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegations are denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies Applicant that 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), SCRCR. Refer to 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 13th day of February, 2018.



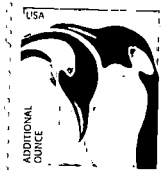
DANIEL D. HALL
Presiding Judge
Thirteenth Judicial Circuit

York, South Carolina



SUSANNAH ROSS ESQ.

330 EAST COFFEE ST.
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Mr. Daniel E. Shearouse
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