

ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

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MAR 12 2018

S.C. SUPREME COURT

March 9, 2018

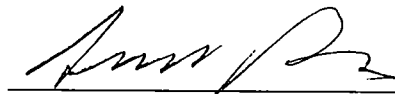
Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: James David Sherfield v. State
2016-CP-23-5314

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

330 E. COFFEE ST. • GREENVILLE/SC • 29601
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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MAR 12 2018

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Daniel D. Hall, Circuit Court Judge

2016-CP-23-5314

James David Sherfield, Appellant,

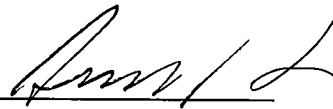
v.

The State, Respondent.

NOTICE OF APPEAL

James David Sherfield appeals the Honorable Daniel D. Hall's Order of Dismissal filed March 2, 2018.

This 9 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
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Attorney for Respondent

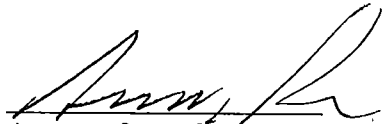
STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
JAMES DAVID SHERFIELD,)
)
APPELLANT,)
)
)
)
VS.)
)
)
)
THE STATE OF SOUTH CAROLINA,)
)
RESPONDANT.)
_____)

IN THE SUPREME COURT

CERTIFICATE OF SERVICE
BY MAIL

1. I am the attorney for the Applicant in the above-captioned matter.
2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Notice of Appeal** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

**Attorney General
Alan Wilson
P.O. Box 11549
Columbia, SC 29211**


Attorney for Defendant

This 9 day of March, 2018

RECEIVED
MAR 12 2018
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

James David Sherfield, #368150,

2016-CP-23-5314

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent

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This matter comes before the Court by way of an application for Post-Conviction Relief filed on September 14, 2016. Respondent made its Return on or about January 12, 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. 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 wife also testified on his behalf. Applicant's plea counsel, Randall L. Chambers, 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 for the Department of Corrections.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Greenville County. In 2015, Applicant was indicted in Greenville County for one of Unlawful Conduct Towards a Child (2015-GS-23-9182). Applicant was represented by Randall Lee Chambers, Esquire. On May 12, 2016,

Applicant waived presentment to Grand Jury and pled guilty at the recommendation of the State to Unlawful Conduct towards a Child. On May 12, 2016, the Honorable C. Victor Pyle, Jr., revoked Applicant's existing probation and ran it concurrent to ten years imprisonment with the balance suspended upon the service of seven years, and then probation for five years.

ALLEGATIONS

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

1. Sentencing Objections

- a. "Applicant contends that his sentence constitutes cruel and unusual punishment and disparity in sentencing ... [Applicant] and his wife were charged with the same crime [and received different sentences]"
- b. "Violation of plea agreement."

2. Ineffective Assistance of Counsel

- a. "Counsel failed to file notice of motion to appeal or to file a motion for reconsideration for an unreasonable sentence based on his disability.
- b. "Counsel failed to explain the circumstances for Applicant and wife's arrest that she received four years' probation for the same charge that defendant was promised the same deal."
- c. "Counsel failed to follow up and represent his client at the preliminary hearing.
- d. "Counsel failed to state on record that he had an agreement by the state to give Applicant four years' probation along with his wife for the plea."
- e. "Counsel failed to raise an affirmative defense of a plea of guilty but mentally ill."

3. Involuntary Guilty Plea

- a. "Applicant was incompetent at the time of his guilty plea and counsel failed to have an evaluation done.
- b. "Applicant was in an auto accident at the meeting they had before his next court date and

he was taking medication ... Applicant's auto accident, which occurred before charged offenses were committed, [caused] Applicant to suffer cerebral damage ... and psychiatrist testified that Applicant was incompetent and could not participate in his own defense."

4. Lack of Jurisdiction

a. "Because no preliminary hearing was held, the court lacked subject-matter jurisdiction to try Applicant ... An indictment returned before the preliminary hearing is anullity."

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). This Court finds the testimony of Counsel to be credible. This Court further finds that the testimony by Applicant is not credible.

Applicable Law

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)).

Ineffective Assistance of Counsel

Applicant testified that he was disabled. Applicant further testified that he had been in accident previously in which he was airlifted from the scene. He testified that as a result of the

accident he suffers from memory problems. Additionally, he testified that he only saw his attorney three times. He testified that he told the plea court that he would have failed a drug test if one would have been administered to him that day. He also testified that his wife was charged with the exact same crime but only received a sentence of four years' probation. However the guilty plea transcript indicated the Applicant had a criminal history. Applicant testified on cross-examination that he had no mental health issues. Applicant's wife testified that he suffered from memory problems.

Counsel testified that he has practiced law since 1992. He testified that he went over the discovery with the Applicant and the charges he was facing. He also testified that he was aware of the medical problems Applicant faced with respect to memory loss. However, Counsel testified that he never thought Applicant lacked the ability to comprehend or was incompetent. Additionally, Counsel testified that he did not appeal Applicant's guilty plea because the Applicant never asked him to do so.

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:

Allegation #1

Applicant first alleges that his sentence constitutes cruel and unusual punishment and a disparity in sentencing as he and his wife were charged with the same crime but received different sentences. This Court finds Applicant has failed to carry his burden regarding this

allegation. Initially, this court would note that while the Applicant and his wife were charged with the same crime and ultimately received different sentences, Applicant had a criminal history as evident by a review of the guilty plea transcript.

Applicant's discontent regarding his sentence is not grounds for collateral attack on his sentence. "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." Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997).

A trial court has broad discretion in imposing criminal sentences within the limits prescribed by law. State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976); Clark v. State, 259 S.C. 378, 192 S.E.2d 209 (1972). The courts normally have no discretion to correct a sentence given within statutory limits. To be entitled to relief, Applicant must prove that the alleged excessive sentence was the result of partiality, prejudice, oppression or corrupt motive; or that the sentence constitutes cruel and unusual punishment per se. Clark, Id.; State v. Cogdell, 272 S.C. 563, 257 S.E.2d 748 (1979). Applicant has failed to show his sentence was a result of any of these factors and Applicant's sentence was legal and in the authorized range of the charge he was facing. Accordingly, this Court dismisses this allegation as being without merit.

Allegation #2

Applicant alleges that Counsel provided ineffective assistance of counsel. Counsel testified that he advised Applicant of all the charges and the potential sentences the charges carried. Counsel also reviewed all of the discovery with Applicant. Counsel testified that it was ultimately Applicant's decision to plead guilty, based on their discussions. Counsel testified that he did not appeal Applicant's guilty plea because the Applicant never asked him to do so.

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. Therefore, this allegation is denied and dismissed.

Allegation #3

Applicant alleges that his guilty plea was involuntary because he was incompetent at the time of his plea. This Court finds Applicant has failed to carry his burden regarding this allegation. This Court notes that Counsel testified he never thought Applicant lacked the ability to comprehend or was incompetent. This Court finds Applicant has failed to provide any evidence that he was incompetent. "When a PCR applicant raises issues of competency in the context of a plea proceeding, the two-prong Strickland analysis still applies; however, because of the nature of the claim, proof of deficiency of counsel is intertwined with prejudice." Ramirez v. State, 419 S.C. 14, 21, 795 S.E.2d 841, 844-45 (2017). "Specifically, when establishing Strickland prejudice in the context of plea counsel's failure to request a mental competency evaluation, 'the [applicant] need only show a 'reasonable probability' that he was ... incompetent at the time of the plea.' " Id. (quoting Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992)); see also Matthews v. State, 358 S.C. 456, 458-60, 596 S.E.2d 49, 50-51 (2004) (expanding the reasonable probability standard as the burden for proving both the deficiency of counsel and the prejudice prongs). This Court finds Applicant has failed to meet his requisite burden of proof as to either deficiency of counsel or prejudice. Counsel testified there was no reasonable basis on which to have Applicant evaluated or doubt his competency. Applicant

testified he understood his proceedings. Therefore, this allegation is denied and dismissed.

Allegation #4

Applicant also alleges the trial court lack jurisdiction because no preliminary hearing was held. This Court finds Applicant has failed to carry his burden regarding this allegation. A circuit court has subject matter jurisdiction to convict a defendant of an offense if there is an indictment that sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. State v. Wilkes, 353 S.C. 462, 464-465, 578 S.E.2d 717, 719 (2003) (citing Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001)). In this case, the Applicant waived presentment. Accordingly, this Court dismisses this allegation as being without merit.

Therefore, Applicant having failed to prove any deficiency by Counsel as required by Strickland, his application is denied and dismissed with prejudice.

CONCLUSION

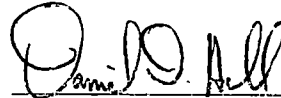
Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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), SCRCP. 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.

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