

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

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March 16, 2018

Via US Mail

Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED

MAR 20 2018

S.C. SUPREME COURT

***Re: Notice of Intent to Appeal from Michael Browning v. State of SC
C.A. No.: 2015-CP-39-1101***

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable Daniel D. Hall's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Pickens County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law


R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge
Case No. 2015-CP-39-1101

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S.C. SUPREME COURT

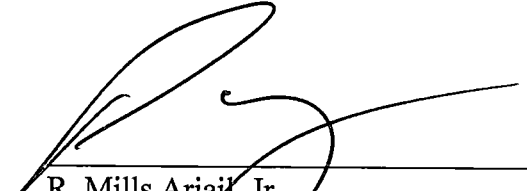
Michael Browning,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable Daniel D. Hall's Order of Dismissal dismissing Appellant's application for post-conviction relief. On February 13, 2018, the Honorable Daniel D. Hall signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on March 2, 2018. A copy of the Honorable Daniel D. Hall's Order of Dismissal is attached.



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Attorney for John Ziegler

Greenville, South Carolina
March 16, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

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MAR 20 2018

Daniel D. Hall, Circuit Court Judge S.C. SUPREME COURT

Case No. 2015-CP-39-1101

Michael Browning..... Appellant,

v.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this March 16, 2018, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

DeShawn Mitchell, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

Pickens County Clerk's Office
Pickens County Courthouse
214 East Main Street
Pickens, SC 29671

Michael Browning #266329
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

March 16, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF PICKENS)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

2018 MAR -6 A 9:50)

Michael Browning, #364266,)

2015-CP-39-1101

CLERK OF COURT)
Applicant)
SOUTH CAROLINA)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

FILED IN THE CLERK'S OFFICE
GREENVILLE, SOUTH CAROLINA
Date Filed: 3/6/18
Init: SW
CLERK IN TIME CANCELLED

This matter comes before the Court by way of an application for Post-Conviction Relief filed on September 10, 2015¹. Respondent made its Return on or about January 12, 2017. An evidentiary hearing into the matter was convened on June 28, 2017 at the Greenville County Courthouse in Greenville, SC at which time the Applicant was present in court and represented by R. Mills Ariail Jr., 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, Dorothy A. Manigault, 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 with the South Carolina Department of Corrections pursuant to the Pickens County Clerk of Court's orders of commitment. Applicant was indicted by the April 2014 term of the Pickens County Grand Jury for possession of methamphetamine

¹ Respondent did not receive a copy of the application until September 21, 2016.

(2013-GS-39-2581). He was subsequently indicted in December of 2014 for Petit Larceny (2014-GS-39-0773); and burglary, 2nd degree (2014-GS-39-1263). Dorothy Manigault, Esquire, represented him. On June 18, 2015, Applicant pled guilty to the charges as indicted. The Honorable Edward W. Miller sentenced Applicant to a sentence of ten years for burglary, provided that upon the service of six years, the balance to be suspended with three years' probation; ten years suspended for petit larceny and five years concurrent for possession of methamphetamine.

ALLEGATIONS

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

1. Ineffective assistance of counsel;
2. I accepted first plea deal;
3. Counsel should have objected to judge denying withdrawal of plea;
4. I signed negotiated plea before appearing before the court.

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).

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).

Applicant testified he was represented by Counsel for these charges. He testified he discussed the case with Counsel but, however Counsel did not go over the discovery with him. Applicant testified he was not guilty and believed he should have been able to withdraw his guilty plea. Applicant also testified Counsel did not advise him about his plea recommendation.

Counsel testified she has been a licensed attorney for more than thirty years. She testified she advised Applicant of all the charges and the potential sentences the charges carried. Counsel

also testified she reviewed all of the discovery with Applicant. Counsel advised Applicant of all of his Constitutional rights, including his right to a jury trial, to remain silent, to confront accusers, and so forth. Counsel testified that it was ultimately Applicant's decision to plead guilty, based on their discussions. Counsel testified she met with Applicant on four occasions which included March 3, 2015, April 17, 2015, April 23, 2015 and May 1, 2015. Counsel testified she explained to the Applicant the differences between the levels of burglary.

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 allegation 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 Applicant's allegation of ineffective assistance of counsel:

As an initial matter this Court finds the testimony of Counsel to be credible. This Court further finds the testimony by Applicant to not be credible. This Court finds Counsel provided effective assistance in this case. Counsel is a trial practitioner who has extensive experience in the trial of criminal offenses. Counsel conferred with Applicant on multiple occasions, during which Counsel discussed the pending charges, the State's evidence, possible defenses and courses of action, and answered all of Applicant's questions. It is evident from the record that the questions asked by the plea court and the responses given by Applicant that he made the decision to plead guilty freely and voluntarily. This Court further finds that Applicant was fully aware of his rights and those rights that he was waiving. Additionally, the guilty plea transcript and the signed sentencing sheets indicate the guilty plea was with a recommendation and not negotiated. Moreover, this court finds that Counsel was not deficient in failing to object to the withdrawal of the guilty plea as the plea judge would not allow the Applicant to do so. "The

withdrawal of a guilty plea is generally within the sound discretion of the trial judge. An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." State v. Bickham 381 S.C. 143,147 672 S.E. 2d 105,107 (2009).

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 concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

CONCLUSION

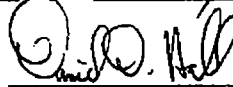
Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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), 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.

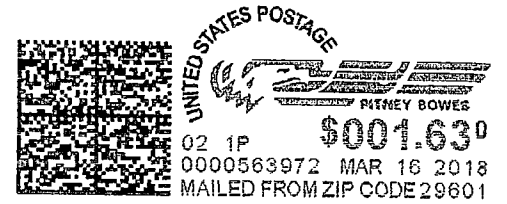
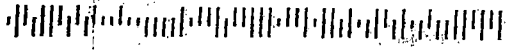


DANIEL D. HALL
Presiding Judge
Thirteenth Judicial Circuit

York, South Carolina

CLERK OF COURT
SOUTH CAROLINA
COURT REPORTER

2018 MAR -6 A 9:50



[REDACTED]
MILLS ARIAIL, JR.

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