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STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS)
FOR THE FIFTEENTH JUDICIAL CIRCUIT)

Kristy Meritt Rich, #352864,)

Case No. 2013-CP-26-6669)

Applicant,)

v,)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

HORRY COUNTY
2015 MAR 25 11:25 AM
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 4, 2013. Respondent made a timely Return on or about June 2, 2014. The Court convened an evidentiary hearing into the matter on February 3, 2015, at the Horry County Courthouse. Applicant was present at the hearing and represented by Kenneth Blaine Massey, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on her own behalf at the evidentiary hearing. Applicant's plea counsel, Laura L. Hiller, Esquire, also testified. The Court had before it a copy of the plea transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings in this case. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In May 2012, the Horry County Grand Jury indicted Applicant for first degree burglary (2012-GS-26-2217) and kidnapping

(2012-GS-26-2215). Laura L. Hiller, Esquire ("plea counsel"), represented Applicant. On September 13, 2012, Applicant pled guilty as indicted. The Honorable W. Jeffrey Young deferred sentencing to October 12, 2012, at which time he sentenced Applicant to concurrent terms of twenty-five years (25) on each charge. Applicant did not appeal her plea or sentence.

II. ALLEGATIONS

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

1. "I am not guilty of the crime charged and convicted of."
2. "I had ineffective assistance of counsel. I met with my attorney four times prior to my plea for a total of an hour of time."
3. "My attorney was not and is not a criminal attorney."
4. "All of the co-defendants are doing dramatically less time than I am."
5. "I had no prior criminal record. My attorney knew all of the above but yet failed to zealously represent me."
6. "There was no trial preparation done by the attorney, no going over all of the criminal discovery with my attorney, so I had no preparation, no legal help except to get me to plea."
7. "She never told me if she had any meetings with the solicitor other than she had received the plea offer."
8. "I only met with her for my plea the day of my plea."

At the evidentiary hearing, Applicant proceeded on the following grounds:

1. Ineffective assistance of counsel for failing to investigate.
2. Ineffective assistance of counsel for failing to adequately prepare for trial.
3. Ineffective assistance of counsel for failing to secure a plea offer in line with Applicant's co-defendants.
4. Ineffective assistance of counsel for failing to file a notice of appeal.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The



Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

A. Summary of Testimony

Plea counsel testified she has been a practicing attorney since 2008. She recalled becoming involved in Applicant's case in March 2012. Plea counsel testified she met with Applicant at least seven (7) times. She recalled reviewing the State's discovery response with Applicant. Plea counsel recalled Applicant denied she went to the victim's house with the intent to rob him. Accordingly, plea counsel prepared to take the case to trial. She recalled speaking to the co-defendants' attorneys, who indicated some of the co-defendants were prepared to testify against Applicant at trial. She also recalled some of the co-defendants receiving ten (10) and twelve (12) year plea offers. Plea counsel testified she discussed the co-defendants' plea deals with Applicant. She also testified she discussed the process of a jury trial with Applicant, including her right to testify.

Plea counsel also recalled ongoing plea negotiations with the State. She testified the State initially offered to allow Applicant plead guilty to lesser charges in exchange for an aggregate twenty (20) year sentence. Plea counsel testified the State's second offer was for an aggregate sentence of eighteen (18) years. Plea counsel testified she discussed both of these plea offers with Applicant, and Applicant rejected them both. Plea counsel recalled attempting to negotiate a sentence in line with the co-defendant's ten (10) and twelve (12) year sentences. Plea counsel also testified she did not recalled telling the State Applicant would only accept an offer of ten (10) years, but she attributed the State's failure to make a twelve (12) year offer to her efforts to secure a lesser sentence for Applicant.

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Plea counsel testified she met with Applicant a week before the plea, at which time Applicant indicated she would proceed to trial. Plea counsel indicated her notes did not reflect much time spent on the case between this meeting and the plea. However, she denied telling Applicant she was not prepared for trial. Instead, plea counsel advised Applicant the chance of success at trial was small. Plea counsel testified Applicant made the ultimate decision to enter a guilty plea. Plea counsel also testified she advised Applicant the judge could issue a sentence between fifteen (15) years and life. Plea counsel denied promising Applicant a specific sentence, but did advise Applicant she would argue for a lower sentence based on Applicant's lack of a criminal record. Plea counsel testified she spoke with Applicant's family after the plea, and they were upset with the sentence. She recalled advising the family they could file a post-conviction relief application. However, she did not recall them asking her to file an appeal. She also had no communications with Applicant about filing an appeal. Plea counsel admitted there were no viable appellate issues stemming from the plea.

Applicant testified she had four (4) co-defendants. She testified two (2) co-defendants received twelve (12) year sentences, the third received an eight (8) year sentence, and the fourth had his charges dropped. She recalled discussing these sentences with plea counsel. Applicant testified she told plea counsel to investigate the co-defendants and her relationship with the victim. She recalled reviewing some discovery with plea counsel. She also recalled discussing the charges and potential sentences with plea counsel. Applicant testified she informed plea counsel she wanted a trial because she did not go to the victim's house with the intent to rob him.

Applicant admitted she rejected the State's initial offers of twenty (20) and eighteen (18) years. Applicant testified she wanted to go to trial, but plea counsel scared her by saying she was

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not prepared for trial. Applicant alleged she wanted to relieve plea counsel before the plea. However, she admitted she entered the plea because she did not believe she would be successful at trial. Applicant alleged plea counsel advised her she would receive a sentence of fifteen (15) years for her plea. Applicant recalled the judge advising her he could give her a life sentence, but she did not recall him asking her if she was satisfied with her attorney. Applicant testified she asked for an appeal of her sentence, but one was never filed.

B. Ineffective Assistance of Plea Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of plea counsel as a ground for relief, Applicant must prove plea counsel's "conduct so undermined the proper functioning of the adversarial process" that the plea proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether plea counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes plea counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). 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).

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The Court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove plea counsel's performance was deficient. Id. Under this prong, the Court measures plea counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. IN the context of a guilty plea, Applicant must show there is a reasonable probability that, but for plea counsel's alleged errors, she would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

1. Failure to Investigate

The Court finds Applicant failed to meet her burden to show plea counsel ineffective for failing to investigate. Plea counsel reviewed the discovery provided by the State, which included statements and a video of the crime. She spoke with the attorneys representing the co-defendants. Plea counsel appeared to be deeply familiar with the facts of Applicant's case. The Court finds plea counsel's investigation was reasonable under the circumstances. See Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011) (citing Daniels v. State, 676 S.E.2d 13 (Ga. 2009)). Furthermore, failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). The only fact of the case Applicant disputes is her intent at the time of the burglary. She has presented no evidence how a further investigation would have yielded information relevant to that issue.

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The Court also notes Applicant had an intimate relationship with the victim in this case. The victim recognized Applicant from the surveillance video of the crime. In light of the facts of this case, Applicant has failed to show how a further investigation would have caused her to proceed to trial. See Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009) (applicant must show “something that would have affected counsel's advice to [the applicant] to accept the plea bargain offered or that would have caused [the applicant] to decline to accept it”). Accordingly, the Court finds Applicant has not met her burden to show plea counsel’s investigation was deficient or that she was prejudiced by the extent of plea counsel’s investigation.

2. Failure to Adequately Prepare for Trial

The Court finds Applicant failed to meet her burden to proving plea counsel ineffective for failing to prepare for trial. Plea counsel was clearly familiar with the facts of the case. She was also familiar with the State’s evidence, including the victim’s identification of Applicant from a surveillance video and the co-defendants’ statements. Plea counsel also indicated she understood Applicant’s version of events and would have presented a defense that Applicant did not go to the victim’s house with the intent to rob him. The Court gives no credit to plea counsel’s attempts to cast herself as unprepared for trial.¹ Furthermore, to the extent Applicant alleges plea counsel failed to adequately consult with her prior to the anticipated trial date, the Court notes brevity of consultation is not *per se* grounds for relief. See Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) (“Therefore, it is not enough to merely show that counsel only met

¹ The Court notes plea counsel demonstrated at the evidentiary hearing that she has a strong desire to see Applicant receive a new trial or a reduced sentence. Unfortunately for Applicant, plea counsel also demonstrated she is a competent attorney who thoroughly and professionally represented Applicant in light of the overwhelming evidence of Applicant’s guilt.

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with Easter twice before trial as long as counsel devoted sufficient time to insure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case.”); cf. Avery v. Alabama, 308 U.S. 444 (1940) (no denial of constitutional right to assistance of counsel where counsel appointed three days before capital trial). Although plea counsel indicated her notes do not reflect much trial preparation in the week leading up to the plea, her testimony otherwise indicates she adequately prepared and conferred with Applicant, and was thoroughly competent in her representation.

Furthermore, Applicant has presented no evidence of how further trial preparation would have affected her decision to enter a guilty plea. See Harris v. State, 377 S.C. 66, 76, 659 S.E.2d 140, 145 (2008) (applicant must show how counsel’s alleged lack of preparation would have changed outcome of the proceedings) (citing Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997))). The Court finds not credible Applicant’s testimony she pled guilty because plea counsel was unprepared. Applicant was given an opportunity to voice any displeasure she had with plea counsel at her plea. At that time, she indicated to the judge she was satisfied with counsel’s performance and needed no further time to consult with her. (Sep. 13, 2013 Plea Tr. p. 11, lines 3-16). In light of her sworn testimony at her plea, Applicant cannot now be heard to complain that she needed more time with plea counsel or that she wanted a new attorney. See Kolle v. State, 386 S.C. 578, 597 n.7, 690 S.E.2d 73, 83 n.7 (2010) (Kittredge, J., dissenting) (an inmate should not be able to collaterally attack a plea where counsel’s alleged deficiency was known at the time of the plea and the inmate lied about counsel’s performance at the plea); Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007)

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("[S]tatements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements." (citations omitted)). Instead, the Court finds credible plea counsel's testimony she advised Applicant they were unlikely to be successful at trial because of the overwhelming evidence against Applicant. The Court agrees with this assessment and finds counsel's advice was reasonable under the circumstances. Stalk, 383 S.C. at 563, 681 S.E.2d at 594. Accordingly, the Court finds Applicant has not met her burden to demonstrate counsel was ineffective in preparing for trial.

3. Failure to Secure a Plea Offer of a Lesser Sentence

The Court finds Applicant failed to meet her burden of proof to show plea counsel ineffective for failing to secure a plea offer to a lesser sentence. Trial counsel has no affirmative duty to request certain plea offers from the State. Van Wart v. United States, CRIM. RWT-07-0492, 2013 WL 3788535, at *3 (D. Md. July 18, 2013) (quoting United States v. Pender, 514 Fed. Appx. 359 (4th Cir. 2013) (unpublished)). Instead, the State has the discretion to offer a defendant the opportunity to enter a plea as opposed to calling a case for trial. State v. Blakely, 402 S.C. 650, 658, 742 S.E.2d 29, 33 (Ct. App. 2013) (quoting State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012)). However, a defendant cannot force the State to accept the terms of her proposed plea offer. See, e.g. State v. Miller, 375 S.C. 370, 389, 652 S.E.2d 444, 454 (Ct. App. 2007) ("The State is not bound to accept a defendant's terms simply because a defendant reveals otherwise undiscoverable facts in the hope of securing a favorable plea agreement." (citing State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996))).

Plea counsel attempted to negotiate a suitable plea offer for Applicant. The State only



offered Applicant pleas of twenty (20) and eighteen (18) years. Applicant admitted she made the decision to reject these offers. The State made no further plea offers. Plea counsel cannot be held at fault for the State refusing to make an offer to Applicant similar to its offers to the co-defendants.² Accordingly, the Court finds Applicant has not demonstrated plea counsel was ineffective for failing to secure a plea offer similar to the co-defendants' offers.

The Court further finds Applicant has not demonstrated plea counsel mis-advised her about the potential sentence she would receive for her plea. On this issue, the Court finds plea counsel's testimony credible and Applicant's testimony not credible. Plea counsel advised Applicant she was entering her plea without negotiations or recommendations. Although plea counsel told Applicant she hoped the judge would issue a minimum sentence, she also advised Applicant the judge would ultimately decide the sentence. Furthermore, the transcript clearly indicates the judge explained the possible sentence to Applicant. (Sept. 13, 2013 Plea Tr. p. 8, lines 10-18). Applicant also admitted she had not been promised a lesser sentence. (Sept. 13, 2013 Plea Tr. p. 10, lines 14-18). Therefore, Applicant cannot now claim she expected to receive a fifteen (15) year sentence. Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997) ("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."); see also Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011) (alleged mis-advice regarding sentence length

² Again, the Court gives no credit to plea counsel's attempts to shoulder blame for the State not extending an offer acceptable to Applicant. There is simply no evidentiary support in the record to show plea counsel's negotiations affected the State's decision to not offer a ten (10) or twelve (12) year plea.



cured by plea colloquy). Accordingly, the Court finds Applicant has not demonstrated plea counsel was ineffective in failing to secure a lower sentence.

4. Failure to File a Notice of Appeal

The Court finds Applicant failed to meet her burden of proving she did not knowingly and voluntarily waive her right to a direct appeal from her guilty pleas. Trial counsel normally must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). However, “[a]bsent extraordinary circumstances ... there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.” Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (citing Roe v. Flores-Ortega, 528 U.S. 470 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995)). Extraordinary circumstances arise where “there are nonfrivolous grounds for appeal” or the applicant “reasonably demonstrated an interest in appealing.” Id. Furthermore, a defendant may waive a direct appeal by making a “knowing and intelligent decision not to pursue the appeal.” Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739-40 (2010) (quoting Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004)).

The Court finds credible plea counsel’s testimony that Applicant never requested an appeal be filed. The Court also finds credible plea counsel’s testimony she saw no viable appellate grounds. Accordingly, the Court finds Applicant has not demonstrated the existence of extraordinary circumstances that would require plea counsel to even consult with Applicant regarding a right to an appeal. Furthermore, the judge advised Applicant of the right to appeal her plea. (Sept. 13, 2013 Plea Tr. p. 12, lines 4-7). Her failure to request plea counsel file an appeal constitutes a waiver of any right to an appeal. Bonnette v. State, 277 S.C. 17, 18, 282

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S.E.2d 597, 598 (1981) (“Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver.” (citing 92 C.J.S. Waiver, p. 1063 (1955))). Therefore, the Court finds Applicant has not demonstrated she did not knowingly and voluntarily waive her right to a direct appeal from her plea.

C. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

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

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from his attorney’s receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel’s assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, her attorney must serve and file a notice of appeal on Applicant’s behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 17 day of MARCH, 2015.



THE HONORABLE G. THOMAS COOPER, JR.
Presiding Judge

CHARLESTON, South Carolina