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APR 13 2018

S.C. SUPREME COURT

April 10, 2018

The Honorable Daniel E. Shearouse
Clerk of Court
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Bernard Dewberry v. State of South Carolina
Case No: 2017-CP-42-0181

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

Rodney Richey

RWR/
enclosures

cc: Valerie Garcia Giovanoli, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

HONORABLE G. THOMAS COOPER, JR.

2017-CP-42-0181

RECEIVED
APR 13 2018
S.C. SUPREME COURT

BERNARD DEWBERRY, SCDC# 278949

APPELLANT,

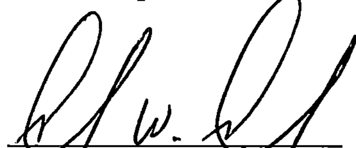
against

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Bernard Dewberry appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable G. Thomas Cooper, Jr, Circuit Judge on November 15, 2017 an Order issued on January 22, 2018 and filed on January 24, 2018. The Appellant received notice of the judgment on April 10, 2018.



Rodney W. Richey, Esquire
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Attorney for Applicant

Other Counsel of Record:
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Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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APPEAL FROM SPARTANBURG COUNTY
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HONORABLE G. THOMAS COOPER, JR.

2017-CP-42-0181

BERNARD DEWBERRY, SCDC# 278949

APPELLANT,

against

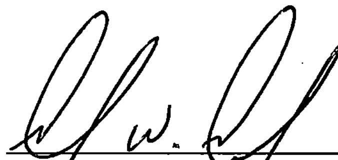
STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on April 10, 2018, addressed to their attorney of record, Valerie Garcia Giovanoli, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: April 10, 2018



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Attorney for Applicant

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Bernard Dewberry, #278949,

Applicant,

v.

State of South Carolina,

Respondent.

2017-CP-42-0181

ORDER OF DISMISSAL WITH PREJUDICE

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This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Bernard Dewberry (Applicant) on January 18, 2017. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on November 15, 2017 at the Spartanburg County Courthouse. Applicant was present and represented by Rodney W. Richey, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Andrea Price, Esquire, (Counsel) also testified. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the trial/plea transcript, Applicant's direct appeal records, the PCR application, and Respondent's return.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In August 2015, the Spartanburg County Grand Jury indicted Applicant for murder and possession of a firearm during the commission of a violent crime (2015-GS-42-3593, counts 1 & 2). Andrea L. Price and James Cheek, Esquires, represented Applicant. Assistant Solicitors Abel Gray and Allison

Mabbs prosecuted the case. On August 22, 2016, Applicant proceeded to a jury trial before the Honorable Roger L. Couch. However, the trial ceased when Applicant pleaded guilty pursuant to negotiations on August 24, 2016. Pursuant to the plea negotiations, Applicant pleaded guilty to the lesser included offense of voluntary manslaughter and the charge for possession of a firearm during the commission of a violent crime was nolle prossed in exchange for Applicant's guilty plea. Pursuant to a negotiated sentence range, Judge Couch sentenced Applicant to imprisonment for twenty-five years for voluntary manslaughter.

Applicant filed a timely notice of appeal pursuant to Weathers v. State[1] and State v. Thrift[2]. The South Carolina Court of Appeals dismissed Applicant's appeal by order on November 14, 2016, for failure to provide a sufficient explanation. State v. Dewberry, App. Case No. 2016-001808 (Ct. App. 2016). The remittitur was returned on February 9, 2017.

In his application for post conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
    a. "Failure to inform court of Defendant's mental health status at time of offense."
    b. "Failure to inform that [Applicant] was on prescribed mental health medication at the time of offense."
    c. "Failure to inform the court that both Defendant and victim were under the influence of drugs (methamphetamine) at the time of the offense."
    d. "Failure to subpoena victim's toxicology and medical records."
    e. "Failure to request mental health evaluation for Defendant."
    f. "Failure to properly do 'Stand Your Ground'/self-defense hearing."
    g. "Failure to interview Defendant's witnesses."
    h. "Failure to file motion for reconsideration."

[1] Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995).
[2] State v. Thrift, 378 S.C. 70, 661 S.E.2d 373 (2008).

2. Involuntary Guilty Plea
    a. "Failure to properly explain what a plea of guilty meant."

3. Newly Discovered Evidence

At the hearing, Respondent moved for summary dismissal of the newly discovered evidence claim and this Court granted the motion. Applicant did not proceed on his allegation of newly discovered evidence.

SUMMARY OF TESTIMONY AT PCR

I. <u>Applicant testified to the following:</u>

Applicant testified Counsel did not properly convey plea offers to him. He testified the original offer from the Solicitor was 15 years plus 5 years' probation, but he did not understand it because Counsel did not explain it. Applicant testified that had he understood the original offer, he would have accepted it and pled guilty. Applicant also testified Counsel advised him not to take the plea offer. Applicant testified he and Counsel had a big argument over it in which she called him a terrorist and had him returned to jail. Applicant claimed she called him a terrorist because he is Muslim.

Applicant also testified Counsel failed to have medical records that he requested subpoenaed. Applicant testified he only received and reviewed discovery after he pled guilty. He claimed that the victim's death occurred when the victim was approaching him with a knife and Applicant shot him in self-defense, but he contests the gunshot being the cause of death. According to Applicant, Applicant then tried to run and fell on his own knife, which caused his death. Applicant believes the autopsy report supports his theory because it indicates a wound to his chest. Applicant also denied the victim was shot in the back. Applicant tried to explain all of this to Counsel prior to trial, but it "went in one ear and out the other."

Applicant admitted Counsel pursued a stand your ground defense, but she told him there was no self-defense in South Carolina. Applicant testified he did all the legal work and Counsel did nothing. He wanted Counsel to request a toxicology report because he told law enforcement and Counsel he and the victim were high on methamphetamine at the time of the killing. He also believes Counsel should have used that fact as mitigation for sentencing. Applicant testified he pled guilty because he had no representation.

Applicant testified he's dealt with mental health issues since he was 15 years old. However, those issues did not affect his ability to testify. Applicant also testified he requested Counsel file a motion for reconsideration and she failed to do so. Applicant also testified had Counsel done everything he requested, he would have continued to trial instead of pleading guilty.

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II. <u>Counsel testified to the following:</u>

Counsel has been practicing criminal law exclusively for 11 years. Counsel is an Assistant Public Defender. She was appointed to represent Applicant. Counsel received all the discovery and reviewed all of it with Applicant. She arranged to meet with both Solicitor Gray and Solicitor Mabbs to negotiate a plea. The first offer was a plea to voluntary manslaughter for 15 years and 5 years' probation. She had a pre-filled sentencing sheet with the terms that she took to Applicant. She fully explained the plea offer. At that time, she advised him to accept the plea, but he was adamant about proceeding to trial. He never expressed a desire to plead guilty prior to the day of trial. Counsel denied having ever called Applicant, or anyone for that matter, a terrorist.

Counsel also denied ever telling Applicant that South Carolina did not recognize the defense of self-defense. She explained to him that the evidence in his case did not support a

defense of self-defense. Counsel explained that the evidence showed the victim was shot in the back, specifically, the lower flank. Counsel demonstrated to this Court where the autopsy indicated the bullet wound to be – the lower back. Counsel explained to him and encouraged pursuing a stand your ground defense. Applicant was fully on board with pursuing the immunity hearing based on the stand your ground defense.

Counsel had the discovery on a disc and took it to him to review the day before Thanksgiving. She sat down with him that day and went over everything. She also provided him a physical copy of all his discovery upon his request and prior to his trial.[3] Counsel testified she and his other defense counsel, James Cheek, both advised him to plead guilty because it was in his best interest. Counsel explained she did not request a toxicology report because she did not think Applicant's story of being high was one that would benefit him if presented to a jury. She did not think it would benefit him in sentencing either because Judge Couch has strong feelings against drugs. The intoxication was also not a defense to murder. Although Counsel conceded that generally intoxication can address the state of mind element of a self-defense claim, Counsel strongly believed Applicant's case was not a good case to pursue a defense of self-defense.

With regard to Applicant's mental health, Counsel testified Applicant was very helpful and hands-on with his defense. She never had problems communicating and found Applicant to be very smart. She never felt any reason to seek an evaluation or grounds to pursue mental health as a defense. Counsel agreed Applicant provided her a list of witnesses. She interviewed each one and subpoenaed each one to testify at trial. Counsel testified the people he requested were present the day of trial to testify. Counsel did not recall Applicant ever requesting her to file a motion for reconsideration. Had he requested that, she would have filed it.

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[3] The record further supports this testimony. (Tr. p. 272).

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 has weighed 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). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency. A Post-Conviction Relief application is not a venue for questioning each and every decision of trial counsel in hindsight. Rather, the Applicant must demonstrate by a preponderance of the evidence that trial counsel was deficient and that the deficiency prejudiced the outcome of his trial. Applicant has failed to do so.

I. Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged 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, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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 (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. 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 pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

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Mental Health Allegations

Applicant alleged Counsel was ineffective for failing to address Applicant's mental health at the time of the offense and for failing to request a mental evaluation prior to his trial/plea. Applicant vaguely referenced "mental health issues" he has dealt with since he was 15 years old, but failed to show what those issues were or how they affected him in either his commission of the crime or his ability to go forward with pre-trial hearings and his guilty plea. Additionally, this Court finds Counsel's testimony on the issue credible. She testified Applicant was very helpful and hands-on with his defense. She never had problems communicating and found Applicant to be very smart. She never felt any reason to seek an evaluation or grounds to pursue mental health as a defense. As such, Applicant has failed to meet his burden to prove Counsel was deficient or that he was prejudiced by any alleged deficiency with regard to his mental health allegations. Therefore, these allegations are denied and dismissed.

Toxicology Allegations

Applicant alleged Counsel was ineffective for failing to subpoena the victim's toxicology records and inform the court that both Applicant and the victim were under the influence of methamphetamine at the time of the killing. Counsel articulated reasons for not requesting a toxicology report and not presenting evidence of intoxication. First, she did not think Applicant's story of being high was one that would benefit him if presented to a jury. She did not think it would benefit him in sentencing either because Judge Couch has strong feelings against drugs. The intoxication was also not a defense to murder. Although Counsel conceded that generally intoxication can address the state of mind element of a self-defense claim, Counsel strongly believed Applicant's case was not a good case to pursue a defense of self-defense – because the medical reports showed the victim was shot *in the back*. This Court finds Counsel's decisions not to use intoxication as a defense or in mitigation to be a reasonable one based on professional judgment. Not only has Applicant failed to prove by a preponderance of the evidence that Counsel was deficient in this regard, he cannot show how he was prejudiced by the alleged deficiency. Therefore, these allegations are denied and dismissed.

Stand Your Ground/Self Defense

Applicant alleged Counsel did not properly defend him based on the stand your ground law and self-defense. However, the record is clear that Counsel made a commendable attempt to secure immunity for Applicant under the Protections of Persons and Property Act. In fact, a full hearing was held on the stand your ground defense. Immunity was denied through no fault of Counsel, but rather because the facts presented at the hearing did not warrant immunity. Additionally, Applicant has not presented any evidence to substantiate his claim Counsel did not properly handle the stand your ground defense and hearing.

With regard to self-defense, this Court agrees with Counsel's assessment of the case. The facts did not support a claim of self-defense. Although Applicant testified the victim came at him with a knife when he shot him, no knife was recovered at the crime scene and the victim was shot in the back. Therefore, Applicant has failed to persuade this Court that Counsel's decision not to pursue a claim of self-defense was not a reasonable one in light of the evidence against Applicant. Applicant has failed to prove either deficiency or prejudice in this regard. Therefore, these allegations are denied and dismissed.

Failure to interview witnesses

Applicant failed to present any evidence in support of this allegation. To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). Applicant did not present any witnesses that could help defend his murder charge that Counsel did not interview or investigate. In fact, this Court finds Counsel's testimony on the issue more credible. Counsel agreed Applicant provided her a list of witnesses. She interviewed each one and subpoenaed each one to testify at trial. Counsel testified the people he requested were present the day of trial to testify. Applicant has failed to show what other witnesses could have helped him that Counsel

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did not investigate. Therefore, having failed to meet his burden of proof, this allegation is denied and dismissed.

Failure to file motion for reconsideration

Applicant alleges Counsel failed to file a motion for reconsideration after he requested she do so. This Court finds Counsel's testimony more credible on this issue. Counsel testified she did not recall Applicant ever requesting her to file a motion for reconsideration. Had he requested that, she would have filed it. Furthermore, Applicant cannot prove he was prejudiced by any alleged failure to file a motion to reconsider because he has offered no basis for such a motion. Therefore, this allegation is denied and dismissed.

II. Involuntary Guilty Plea

Applicant also asserts his plea was involuntary because Counsel failed to explain what a plea of guilty meant. The record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton, 376 S.C. 138, 654 S.E.2d at 874 (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, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton, 376 S.C. 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)).

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 who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985). 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.

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The record fully supports the knowing and voluntary nature of Applicant's plea. Applicant has failed to give a sufficient reason to be allowed to depart from the truth of his statements

made during his guilty plea. Counsel testified she and co-counsel, James Cheek, discussed pleading guilty with Applicant at length. The Court also fully apprised Applicant of his rights and the implications of pleading guilty on the record.

To the extent Applicant is attacking his guilty plea based on ineffective assistance of counsel, this Court finds Counsel was in no way ineffective, as more fully addressed above. This Court further finds Counsel's advice to plead guilty was sound in light of the evidence the State had against him and the benefit he received by way of pleading to the lesser included offense of voluntary manslaughter and receiving five years less than the mandatory minimum for his original murder charge. Applicant has failed to meet his burden of proving his guilty plea was involuntary.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

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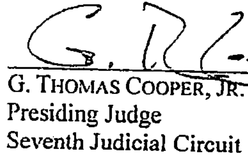
This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking 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. You must look at 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 22nd day of January, 2017.



G. THOMAS COOPER, JR.
Presiding Judge
Seventh Judicial Circuit

Clarendon, South Carolina

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The Honorable Daniel E. Shearouse
Clerk of Court
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