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April 20, 2018

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

RE: Kenneth Evans III v. State of South Carolina: 2016-CP-02-1894
Notice of Appeal

Dear Mr. Shearouse,

Please see the enclosed Notice of Appeal in the above case. Also enclosed are:

1. Proof of Service on respondent;

2. A copy of the Order of Dismissal and Order Denying Motion to Reconsider;

3. Pursuant to Rule 240, SCACR, no filing fee is required.

4. This appeal is being filed in the Supreme Court because it is an appeal of a post conviction relief action.

Sincerely,

Robert R. Thuss, Esq.
Thuss Law Office LLC
7001 St. Andrews Rd. #193
Columbia, SC 29212
(803) 640-1000
Attorney for Appellant

cc: Julie A. Coleman, Esq.
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for respondent

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APR 23 2018

S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Diane Goodstein, Circuit Court Judge

Case No. 2016-CP-02-1894

Kenneth Bryant Evans II, #308918, Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Kenneth Bryant Evans appeals the judgment of the Honorable Diane Goodstein dated March 8, 2018. Appellant received written notice of entry of this judgment on March 16, 2018.

April 6, 2018

Robert R. Thuss, Esq.
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Attorney for the Appellant

Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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Diane Goodstein, Circuit Court Judge

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v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on April 6th, 2018, address to its attorney of record, Julie A. Coleman, Esq., Assistant Attorney General, P. O. Box 11549, Columbia, SC 29211, on April 6th, 2018.

April 6, 2018

Robert R. Thuss, Esq.
Thuss Law Office LLC
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Attorney for the Appellant

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
Kenneth Bryant Evans II, #308918, Applicant, v. State of South Carolina, Respondent.	)	2016-CP-02-1894 **ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on August 22, 2016. Respondent submitted its Return on December 16, 2016. An evidentiary hearing was convened on May 26, 2017, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Robert Thuss, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Michael Bradley McMillian, Esquire ("Plea Counsel") also testified. The Court had before it a copy of the plea transcript, the records of the Aiken County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings. 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 Aiken County Clerk of Court. Applicant was indicted by the January 2016 term of the Aiken County Grand Jury for Possession of a Weapon During Commission of a Violent Crime (2016-GS-02-00017), Trafficking Methamphetamine (2016-GS-

02-00018), Possession of a Pistol with an Obliterated Serial Number (2016-GS-02-00019), Unlawful Carrying of a Pistol (2016-GS-02-0020), and Harassment, first degree (2016-GS-02-0021). Applicant was represented on these charges by Michael Bradley McMillian, Esquire. On April 14, 2016, Applicant pled guilty to Harassment, second degree, Trafficking Methamphetamine, 28-100 grams second offense, and Possession of a Pistol with an Obliterated Serial Number. The remaining charges were *nolle prossed* in exchange for his guilty plea. Applicant was sentenced by the Honorable Doyet A. Early, III, without negotiations or recommendations, to sixteen years' imprisonment for trafficking methamphetamine, five years' imprisonment for possession of a pistol with an obliterated serial number, and thirty days' imprisonment for harassment, to run concurrently.

Applicant filed a timely notice of appeal. The South Carolina Court of Appeals dismissed the appeal for Applicant's failure to provide a sufficient explanation for appealing a guilty plea as required by Rule 203(d)(1)(B)(iv) SCACR. The Remittitur was issued on July 20, 2016.

II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

1. Ineffective Assistance of Counsel
    a. Attorney advised Applicant to take plea based on informal meeting with solicitor and judge indicating that he would receive a sentence of more than seven but less than fifteen years. Attorney failed to object to sixteen year sentence.
    b. Attorney did not properly prepare a defense and spent little time with Applicant.
    c. Attorney failed to file a motion to suppress evidence after Applicant requested he do so.

III. APPLICABLE LAW

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, 334 S.E.2d 813 (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, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, the 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 (1985).

IV. SUMMARY OF RELEVANT TESTIMONY

At the evidentiary hearing, Applicant testified that he was arrested for these crimes on June 3, 2015. He stated that he got out on bond and was on house arrest, and he met Plea Counsel for the first time on the day he went to court to get off house arrest, August 17, 2015. He stated that he had some disputes with his wife in the family court during this time, and he did not have any contact with Plea Counsel between August and November of 2015.

Applicant testified that the Solicitor offered him a plea offer of a fifteen year sentence, but he rejected it because he would have rather risked the 25-30 years at trial than plead to fifteen years. He stated that he decided to plead guilty based on Plea Counsel's informal meeting in chambers with the plea judge and the Solicitor where the plea judge indicated that he would probably sentence Applicant more than seven years, but significantly less than fifteen years. He stated that he was actually sentenced to sixteen years, and his attorney did not object to the sentence. He stated that he did not know that the victim or law enforcement officers were going to speak at his guilty plea, and he did not think they were going to be there. He stated that if he had known he was going to get more than fifteen years, he would have gone to trial instead.

Applicant testified that immediately after he was sentenced, he asked Plea Counsel to file a motion to reconsider, and Plea Counsel did not do so. He stated that he sent a letter to the Aiken County Clerk of Court asking for reconsideration of his sentence, and it was filed on April 19, 2016, five days after the guilty plea. This letter was admitted into evidence as Applicant's Exhibit One. He stated that he asked Plea Counsel to make a motion to suppress the evidence against him, but he did not have time to file it.

Plea Counsel testified that Applicant was assisting law enforcement with other investigations after he was charged with these crimes. He stated that Applicant wanted him to

move to suppress the evidence found in his vehicle, including the pistol with an obliterated serial number, but Applicant was later arrested for Driving Under the Influence, so he explained to Applicant that the evidence was going to come in regardless of his motion because of the DUI arrest and subsequent search.

Plea Counsel testified that he negotiated a plea offer with the Solicitor of a fifteen year sentence, but Applicant did not accept it. He stated that Applicant pled guilty without recommendations or negotiations. He testified that on April 13, 2016, he spoke in chambers with the plea judge and the Solicitor, and the judge indicated that he would likely give more than seven years but less than fifteen years. He stated that this indication was based on the information that Plea Counsel conveyed to the plea judge in chambers, which did not include the information that the narcotics officers and Applicant's wife, the victim, were going to testify at the plea. Plea Counsel stated that he believes the plea judge gave Applicant a higher sentence after he heard the victim and the narcotics officers speak at the plea. Plea Counsel stated that there was no reason to object to the plea court's sentence because it was within the statutory sentencing range and it was in the plea judge's discretion.

Plea Counsel testified that he did not promise Applicant any sentence, including the 7-15 year estimate the judge had indicated in chambers. He said he explained to Applicant what the judge told him in chambers, but he explained the minimum and maximum sentence and did not promise any particular sentence would be imposed. Plea Counsel stated that Applicant did not ask him to file a motion to reconsider. He stated that Applicant asked him immediately after the guilty plea to file an appeal, and he filed a notice of intent to appeal shortly after. Plea Counsel testified that he was prepared to go to trial, although there was no defense they could use. He

stated that he did not believe they would have been successful if he had made a motion to suppress the evidence.

V. 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 further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant raises several allegations arguing that Plea Counsel was ineffective in his representation surrounding his trial. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). This Court finds that the testimony presented at the PCR hearing satisfies neither prong of the Strickland test; Applicant can show neither ineffectiveness nor prejudice, thus these allegations should be denied and dismissed with prejudice.

Promise of 7-15 year sentence

Applicant alleges that Plea Counsel was ineffective for advising him to plead guilty based on an in-chambers discussion where the plea judge indicated that he would sentence Applicant for a term of imprisonment between seven and fifteen years, and for failing to object when the plea judge actually sentenced him to sixteen years. This allegation is meritless.

Plea Counsel credibly testified that, although the plea judge did indicate that his sentence would be between seven and fifteen years, he explained to Applicant the minimum and

maximum sentence possibilities and did not promise him that he would get any certain sentence. This Court finds Plea Counsel's testimony very credible. The plea court advised Applicant of the potential risks of pleading guilty on the record at the guilty plea. Tr. 7, line 5-9 ("THE COURT: Do you understand that I have to incarcerate you for a minimum of seven years? The law gives me the discretion to sentence you up to 30 years and a $50,000 fine. THE DEFENDANT: Yes, sir."). The victim of the harassment charge and the narcotics officers who testified at the plea had a legal right to appear at the guilty plea and be heard. The fact that they changed the plea judge's position on sentencing was out of Plea Counsel's control, and he cannot be deficient for the plea judge's decision.

Furthermore, Plea Counsel cannot be ineffective for failing to object to the sixteen year sentence because there was no legal reason to object, and his objection likely would not have been successful. The sentence was within the statutory sentencing range, which was up to thirty years imprisonment. The sentence is within the plea judge's discretion, and the risk of a higher sentence was something Applicant was advised of before he entered his plea. Therefore, because Applicant has failed to prove that Plea Counsel was deficient or that he was prejudiced, this allegation is denied and dismissed with prejudice.

Failure to prepare a defense and meet with Applicant

Applicant alleges that Plea Counsel was ineffective for failing to prepare a defense for trial and spending little time with Applicant before his guilty plea. This allegation is meritless.

Plea Counsel credibly testified that he met with Applicant at least two or three times in person before his plea, possibly more. He further testified that he did not meet with Applicant for a period of time because Applicant was represented by another attorney in the family court, and he was waiting until those issues were resolved before they could proceed with the criminal

harassment charge pressed by his wife. Plea Counsel also credibly testified that he was prepared for trial, but there was no successful defense for them to use, which factored into his advice to Applicant to plead guilty. Based on this testimony, this Court finds that Plea Counsel was not ineffective in this regard, and this allegation is denied and dismissed with prejudice.

Failure to file a motion to suppress

Applicant alleges that Plea Counsel is ineffective for failing to file a motion to suppress the evidence against him after he asked him to do so. This allegation is meritless.

Plea Counsel credibly testified that a motion to suppress would not have been successful in this case, and that he explained exactly why to Applicant. He stated that the pistol with an obliterated serial number that Applicant wanted to suppress was going to come into evidence regardless of his motion because it was discovered in a search conducted during Applicant's arrest for an unrelated charge of driving under the influence. This Court finds that Plea Counsel was not deficient in choosing not to file this motion, regardless of whether Applicant wanted him to. Furthermore, Applicant can show no prejudice resulting from the failure to file this motion because he has not proven that the motion would have been successful or that he would have gone to trial rather than plead guilty if this motion had been filed. Therefore, this allegation is denied and dismissed with prejudice.

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, this Court finds Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.

VI. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations 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 notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel 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 (1991), an applicant has a right to an 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, post-conviction relief counsel 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.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. That Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 22 day of June, 2017.

DIANE S. GOODSTEIN
Presiding Judge
Second Judicial Circuit

Aiken, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN)	
)	Case No. 2016-CP-02-01894
Kenneth Bryant Evans II,)	
)	
Applicant,)	**ORDER DENYING MOTION TO**
vs.)	**RECONSIDER**
)	
State of South Carolina,)	
)	
Respondent.)	
)	

This matter came before this Court by way of Plaintiff's Motion to reconsider an Order from this Court denying and dismissing Applicant's application for post-conviction relief (PCR) with prejudice. The application for PCR was filed August 22, 2016, and an Order of Dismissal was filed and served June 30, 2017. Applicant filed a Motion to Reconsider on July 10, 2017, and this Motion is denied for the reasons stated herein:

Applicant's Motion to Reconsider and accompanying memorandum in support of that Motion do not present any new, compelling arguments. Applicant's Motion was brought pursuant to SCRCP Rule 59(e), which permits a moving party to request that the Court alter or amend a judgment after it has been filed. Applicant failed to raise any new issues or reasons supporting alteration or amendment of the Order of Dismissal. Instead, Applicant simply asked the Court to reconsider the allegations contained in his application for PCR, specifically those related to his claims of an involuntary guilty plea and ineffective assistance of counsel. All evidence before the Court was considered when deciding the application for post-conviction

relief, and that evidence was weighed in the discretion of the Court. In sum, Applicant has not presented any valid reasons for the Court to alter its Order of Dismissal.

Therefore, the Plaintiff's Motion to Reconsider is Denied.

IT IS SO ORDERED!

Judge Diane S. Goodstein
Circuit Court Judge

March 8, 2018

St. George, South Carolina