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RECEIVED

July 2, 2015

JUL 06 2015

Via Regular Mail

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

S.C. SUPREME COURT

Re: MARSHALL DEWITT MCGAHA v. State

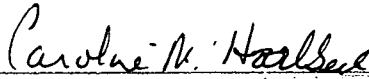
Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,


Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General
Office of Appellate Defense

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
THE HONORABLE EDWARD W. MILLER

RECEIVED

JUL 06 2015

CA No. 2014-CP-23-2476

S.C. SUPREME COURT

MARSHALL DEWITT MCGAHA,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA

RESPONDENT.

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2015 JUL 2 PM 12 15

NOTICE OF APPEAL

Appellant MARSHALL DEWITT MCGAHA, appeals from the Order of the Honorable Edward W. Miller, Circuit Court Judge clocked June 8, 2015.

Respectfully submitted,

Caroline M. Horlbeck
Caroline M. Horlbeck, Esq.
101 Whitsett St
Greenville, SC 29601

Date: July 2, 2015

Other Counsel of Record: Karen Ratigan, Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE SUPREME COURT

Marshall Dewitt McGaha,)
)
)
Appellant,)

C.A. No. 2014-CP-23-2476

-vs-)

CERTIFICATE OF SERVICE

State of South Carolina,)
)
)
Respondent.)

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorneys for Applicant, and that I have this day caused to be served upon the person(s) named below Applicant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Lorie French
S.C. Office of Appellate Defense
P.O. Box 11433
Columbia, SC 29211

Karen Ratigan, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Caroline M. Horlbeck
Caroline M. Horlbeck

Greenville, South Carolina

July 2, 2015

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Marshall Dewitt McGaha,)
 S.C.D.C. No. 250923,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2014-CP-23-2476

FILED - CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WIGGERSHIMEN
 2015 JUN 8 PM 2 15

ORDER OF DISMISSAL

ENTERED COMPUTER

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 2, 2014. The Respondent made its return on October 30, 2014. An evidentiary hearing was held on April 21, 2015 at the Greenville County Courthouse. The Applicant was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was assistant solicitor, Bryna Seay. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, the return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the March 2011 term of the Greenville County Grand Jury for two counts each of lewd act upon a child (2010-GS-23-7403, -7405) and first-degree criminal sexual conduct (CSC) with a

minor (2010-GS-23-7404, -7406). He was represented by Thomas Hoskinson, Esquire.¹

After the State called the case to trial, the Applicant was found guilty. On August 10, 2011, the Honorable D. Garrison Hill sentenced the Applicant to concurrent terms of life imprisonment for each count of first-degree CSC with a minor and 15 years for one count of lewd act upon a child (2010-GS-23-7403). Judge Hill levied a consecutive 15-year sentence for the second count of lewd act upon a child.

A notice of appeal was filed at the South Carolina Court of Appeals. Susan B. Hackett, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences on June 26, 2013. State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (Ct. App. 2013). The Remittitur was sent on July 17, 2013.

ALLEGATIONS

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

1. Ineffective assistance of counsel.
2. "I am innocence of said alleged crimes."
3. "Charges was brought for revenge for me having DSS drug test family (Chastain's) Califf."

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant

¹ Counsel for Respondent informed the Court at the start of the PCR hearing that trial counsel was unavailable as a witness because he now lives in Brazil.

findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The 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).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he never reviewed discovery materials with trial counsel and never saw the video. The Applicant stated trial counsel would not give him discovery materials because he did not want that information in the jail. The Applicant stated trial counsel did not discuss trial strategy with him. The Applicant stated he asked trial counsel to obtain a medical expert and a psychiatrist in order to address children's suggestibility. The Applicant stated plea counsel conveyed a 20-year plea offer (which he rejected) and a 12-year plea offer and that he would have accepted the 12-year plea offer if he had seen it in writing. The Applicant stated trial counsel should have contacted several witnesses (Buddy Todd, Terry Medlin, Ruby Califf,

James Valentine).

Assistant solicitor Bryna Seay testified she was the prosecutor in this case. Seay testified there were plea offers in this case for 20, 15, and, 12 years. Seay testified they were in negotiations in June 2011 regarding the 15-year offer. Seay testified that, once the 15-year offer was rejected, the negotiations were verbal and resulted in a 12-year offer. Seay testified she had a note in her file on July 5, 2011 about the 12-year plea offer. Seay testified a plea hearing was never set in this case and that trial counsel said the Applicant wanted a trial.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not adequately meet with him and review discovery materials. This Court finds the Applicant's testimony on this matter is not credible. This Court notes that, prior to the Applicant's trial, trial counsel told the trial judge that he had provided the bulk of the discovery materials to the Applicant prior to trial and the trial judge commented it was "an inch to an inch and a quarter of paper." (Trial transcript, pp.16-17). Further, the Applicant failed to articulate what further discussion about the discovery materials could have had upon his case. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly convey the 12-year plea offer. By the Applicant's own admission – both at the start of trial and at the PCR hearing – trial counsel conveyed a 12-year plea offer. (Trial transcript, pp.6-8). While the 12-year offer was not reduced to writing, the assistant solicitor confirmed this was an offer that she made (and that she would have made a written offer if it had been requested). This Court finds trial counsel fulfilled his responsibilities regarding the conveyance of the plea

offer. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance). However, it is axiomatic that an attorney cannot force his client to accept a plea offer and that the decision whether to accept or reject such an offer rests solely with the client. See Rule 1.2(a), RPC, Rule 407, SCACR. This Court finds the Applicant was aware of the 12-year plea offer and chose to reject it. While the Applicant states he would have accepted this offer if it had been written, this Court does not find this testimony is credible based upon the Applicant's testimony that he rejected the 20-year plea offer because he would not plead guilty to something he did not do.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have contacted witnesses to use at trial. As these witnesses did not testify at the PCR hearing, however, this Court cannot speculate as to what impact their testimony would have had upon the Applicant's trial. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis in original). Similarly, this Court finds the Applicant failed to meet his burden of proving trial counsel should have retained expert witnesses. As the Applicant did not present any expert witness testimony at the PCR hearing, this Court cannot speculate as to whether such testimony would have resulted in a different outcome at trial. See Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 777 (2008) (finding that, as the applicant failed to present any expert testimony at the PCR hearing, "it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense"); Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary

hearing, “any finding of prejudice is merely speculative”).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

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

CONCLUSION

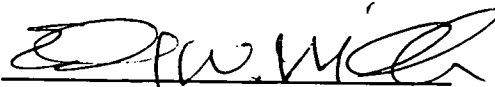
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel’s representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 4 day of June, 2015.



Edward W. Miller
Presiding Judge
Thirteenth Judicial Circuit

Gills, South Carolina.

CAROLINE M. HORLBECK

Attorney At Law

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GREENVILLE, SOUTH CAROLINA 29601



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