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Shaheen Cabbagestalk
(without prejudice UCC 1-207)

V,

State

CA No: 2016-cp-17-00013

Notice of

Appeal

Intent

Now Cometh the (Sovereign) to the courts in Regards of the following: (1) I do Intend to Appeal this case to the next level (2) A Rule 59(e) was filed in this case as well a Rule 60(B) and has yet to be heard. (3) Under Austin v State, S.C. 409 S.E.2d 395 (1991): ~~I'm Entitled~~ Review (4) I have yet to Received full Bite of the Apple As Cherry v State Allows, there for I bring to the Courts the: 2016-cp-17-00013 Application. (5) I represent myself and County An Attorney or officer of this courts. (6) I strives with this Application Iam Appealing shows up In ~~the~~ Rule 59(e) and Rule 60(B) Which a Request for a hearing is Enclosed

By: Shaheen Cabbagestalk
(without prejudice UCC 1-207)
(4/16/18)

S.C. Attorney General

(CC) Gwen T. Hyatt
Clerk of Dillon
Courts

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GWEN T. HYATT
CLERK OF COURT
DILLON COUNTY
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S.C. SUPREME COURT

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CLERK OF COURT
DILLON COUNTY

(a)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2010-CP-17-91
COUNTY OF DILLON	)	
	)	
Shaheen Cabbagestalk, 295567	)	
	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER DENYING**
	)	**POST-CONVICTION RELIEF**
State of South Carolina,	)	
	)	
Respondent.	)	

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DILLON COUNTY

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DILLON COUNTY

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed March 9, 2010. Respondent made its Return on May 21, 2010. The Court convened an evidentiary hearing into the matter on May 15, 2012, at the Darlington County Courthouse. The Applicant was present at the hearing and was represented by Heather M. Cannon, Esquire. Tyson Andrew Johnson, Sr., Esquire, of the South Carolina Attorney General's Office represented Respondent.

JWB

↓ Proof I'm not James Cabbagestalk

At the hearing, the Applicant testified on his own behalf. Also testifying was Applicant's uncle, James Cabbagestalk, and Applicant's trial attorney Glenn B. Manning, Esquire. This Court also had before it the records of the Dillon County Clerk of Court, the guilty plea transcript, and Applicant's records from the South Carolina Department of Corrections.

↑ plea of involuntary plea

Subsequent to the PCR hearing, after the Court had issued a temporary Order denying this PCR claim and requesting a proposed final Order from the Attorney General, Applicant sent an ex-parte letter to this Court demanding that the Court recuse and vacate the temporary order denying PCR based upon the fact that this Court is now a Defendant in what appears to be a recently filed

civil federal lawsuit by Applicant. The Court declines to respond to this missive for several reasons. First, the motion is not properly filed with the Clerk; second, hybrid representation is not permitted and Applicant is represented by counsel for PCR purposes, Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010) ; third, the Court is not aware of this federal lawsuit and has not been served any process related thereto; fourth, the existence of this lawsuit, if such does currently exist, does not impact the Court's ability to be fair and impartial in the PCR case that has already been heard; fifth, to grant this relief would defeat notions of judicial economy; and, sixth and foremost, the motion has no merit and is interposed solely for delay and vexation. ← How if suppose to be fair and Impartial proof of prejudice

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Dillon County Clerk of Court's orders of commitment. The Dillon County Grand Jury indicted the Applicant at the March 2007 term of General Sessions for armed robbery (2007-GS-17-0364). James Cabbagestalk — James not me

Glenn B. Manning, Esquire represented Applicant.

The State called the case to trial on August 27, 2007. On August 28, 2007, however, during the course of the trial, Applicant pled guilty as indicted. The Honorable Howard P. King sentenced Applicant to eighteen years imprisonment. Alice

James to 18 not me

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire, of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders[1] brief. The Court of Appeals dismissed the appeal. State v. Cabbagestalk, Op. No. 2009-UP-528 (S.C. Ct. App. filed November 19, 2009). The Court of Appeals denied the petition for rehearing on January 21, 2010 and the Remittitur was issued February 25, 2010.

Alice Friedan Dropped Indictment

[1] Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

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

1. Ineffective assistance of plea counsel.
2. Ineffective assistance of appellate counsel.
3. Involuntary guilty plea.
4. Prosecutorial misconduct.
5. Judicial misconduct.
6. Illegal grand jury proceedings.
7. Brady issue.
8. Lack of a preliminary hearing.
9. Lack of subject matter jurisdiction.
10. Not indicted within ninety (90) days.
11. Sentencing judge does not determine parole eligibility.
12. Erroneous judgment.
13. Numerous constitutional rights violated.

In an amendment filed on April 29, 2010, Applicant makes the following additional allegations:

1. Double jeopardy.
2. Violation of Fifth Amendment.
3. Not the defendant listed in the indictment (James Cabbagestalk).

JwB 3

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 PCR 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.

Ineffective Assistance of Plea 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, 80 L.Ed.2d 674, 692 (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. Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, 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, 385 S.E.2d at 625 (citing Strickland, supra). Second, 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "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). 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 [or continuing with] trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v . State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence put forth at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). An Applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to [or continuing with] trial, Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993).

Given Applicant's burden of proof and the analysis to be applied to this claim, the Applicant's alternative claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it will be treated as such.

Applicant testified his counsel was ineffective because he only met "two or three times" with his counsel and he felt he did not have enough time to prepare. Attorney Manning testified that he met "numerous times" with Applicant, and that he felt he had spent adequate time in preparing the case. Counsel also testified that his role in defending Applicant was made more difficult because he "felt [Applicant] wasn't telling him the truth."

Applicant testified that he did not have a copy of his Rule 5 material before the plea. Applicant admitted on cross examination that he and counsel did discuss potential alibi defenses and other defenses. Counsel indicated he went over the Brady material, in that "I went over everything I

had" and that he was "confident the state turned over everything they had." Counsel indicated that Applicant never gave him the names or addresses of potential alibi witnesses.

Applicant complained that his counsel was ineffective for failing to have a preliminary hearing set for him, but counsel testified that by the time he was involved in the case, Applicant had already been indicted.

Applicant claimed his plea was given involuntarily, and that he was just following the advice of counsel. He went on to testify that he was forced and coerced into entering his plea. On this point, Counsel testified that Applicant did not express an interest in a plea, and maintained his innocence, until that point in the trial where an eyewitness to the crime identified Applicant as the perpetrator and that he know Applicant as "Woody." Tr. 89, Line 9. With this eyewitness identification in evidence, Applicant then indicated to his counsel he wished to enter a plea. The Court finds this evidence is pivotal because Applicant has maintained throughout this PCR claim that his conviction was a case of mistaken identity; that he has never gone by the name "James"; that he didn't commit the crime and knows nothing of it; and, consequently, he has never been properly indicted, and the Court lacks jurisdiction over him. These issues were all appropriately resolved by the trial judge.

Upon review, this Court finds that Applicant found himself in a difficult situation and chose to plead guilty, admitting his guilt to change the direction of his case and perhaps in the hope to receive leniency, and the Court is not moved by any of his present complaints. This Court finds that none of Applicant's allegations of ineffective assistance of counsel entitle him to relief. Counsel spent adequate time preparing Applicant's case, discussed discovery with Applicant, and could not get a preliminary hearing for Applicant as it was too late. *See* State v. Hawkins, 310 S.C. 50, 425

S.E.2d 50 (1992). The Court further finds that Applicant decided to plead guilty of his own decision, and counsel did not coerce or unduly influence Applicant in making this decision.

The Court finds that counsel's performance was not deficient under these circumstances. Further, Applicant refused to cooperate with his counsel. Applicant has failed to prove that his counsel's conduct fell below the standard of care or that he was prejudiced by counsel's performance. Applicant has also failed to prove his plea was not knowing or voluntary. The Court further finds that Applicant has failed to produce any credible evidence that would have affected his decision to plead guilty. Therefore, this Court finds the Applicant's claims to be without merit, and they are therefore dismissed.

Ineffective Assistance of Appellate Counsel

Applicant claims he received a "bogus appeal" on the assault and battery with intent to kill charge, as it was a "dropped charge." Appellate counsel clearly and correctly detailed in her statement of the case that the State agreed to dismiss the assault and battery with intent to kill. *See* Final Anders Brief of Appellant, page 4. This Court finds that the Applicant's testimony does not entitle him to relief on this ground, and therefore is dismissed.

Breach of Contract

Applicant testified that counsel told him if he pled that he would get "no more than ten years –if that." Applicant felt he should have been sentenced to a term of imprisonment somewhere on the lower end of the possible spectrum. Applicant has failed to prove there was any plea agreement in this case whatsoever. Counsel indicated that although there had been other discussions before the trial began, the mandatory minimum time under Applicant's plea was ten years imprisonment. The court indicated a sentence on the lower end of the range was indeed a possibility, but because

Applicant had shown no remorse, nor offered any apology, that possibility of a sentence at the lower end of the range would not be available to Applicant. Tr. 115, Lines 1-3. Applicant failed to prove a factual scenario where contract principles would apply and failed to prove there was any type of a plea deal. Thus, the Court finds his "breach of contract" PCR claim is without merit and is therefore dismissed.

Venue Improper

Applicant claimed his trial should not have occurred in Dillon in that he could not have gotten a fair trial. Applicant fails to explain why this would have been necessary. Counsel testified that Applicant never asked him to change venue, nor did counsel believe in his experience that such a request would have been warranted under the circumstances, or even successful. Counsel discussed his past experience with motions to change venue and in comparison this case would not have been appropriate for such a request. These reasons, plus Applicant's ultimate guilty plea, confirm that Applicant failed to show prejudice to his case from venue in Dillon County. Therefore this claim must be dismissed.

Constitutional Rights Violations

Applicant alleged his warrants were improper under a "fruit of the poisonous tree" theory but failed to provide competent evidence or applicable testimony to further develop or even explain this claim. Applicant has failed to meet his burden of proof or to establish a cognizable claim for a constitutional rights violation, and therefore this claim is dismissed.

Prosecutorial Misconduct

Applicant alleges the Solicitor committed perjury by saying he "never negotiated anything." The Court finds no misconduct and concludes that this claim must be dismissed. The reference

Applicant makes is to that point in Applicant's trial where counsel for Applicant had completed jury selection and the first witness had been called, at which time Applicant decided to enter a plea of guilty, presumably after the first witness identified him as "Woody." Tr. 89, Line 9. Applicant then indicated to his counsel he wished to enter a plea.

Upon inquiry by the trial court, Solicitor Redmond indicated, "That the State does not oppose a lower-end sentence in this regard. Um, we have not negotiated a specific time, and, of course, I've made sure to make it clear that the court has the final say in any sentence but that the State would not oppose a sentence on the lower end of that spectrum." Tr. 99, Lines 16-20. In addition, Solicitor Redmond *nol prossed* the remaining assault and battery with intent to kill charge, which he was not obligated to do, as there was no agreement to do so. Tr. 99, Lines 22-24.

In this case, the Solicitor, instead of insisting on a higher-end sentence, did not object to a lower-end sentence and agreed to dismiss the remaining charge. Applicant's conjured version of the facts is not supported by the transcript. Applicant's decision to enter a plea was not based on any negotiations and was not based on any offers made by the State. Applicant decided to plead guilty based on his own personal assessment of his poor chances of success had he moved forward with his trial.

Applicant's allegation of perjury is further misplaced as the Solicitor was not in the position of a sworn witness against whom the allegation of perjury would potentially apply. Applicant was actually placed in a better position because the Solicitor did not object to a sentence on the lower end of the spectrum, but the sentence was less than favorable due to Applicant's lack of remorse or apology. For the above reasons, this Court finds that this claim is meritless and should be dismissed.

Judicial Misconduct

Applicant testified "certain things are required" but did not otherwise explain the nature of his judicial misconduct claim, other than to say he had a cousin apparently on the Grand Jury Panel, Juror 9, Kenneth Brown. Applicant did not call Brown as a witness in his PCR hearing, or explain how that may have prejudiced his case. Even if he had called Brown, it is unclear how this could have possibly prejudiced Applicant. More importantly, he did not bring his complaint to the attention of his trial counsel or the court at any point in the proceedings leading up to his guilty plea, so neither the court nor counsel could have taken action at that time. This Court finds that this claim is without merit and should be dismissed.

Errors in the Indictment

Applicant claims he has never been indicted, as previously mentioned. The essence of his claim goes to the name which appears on the face of the indictment, "James Cabbagestalk." Applicant claims his legal name is "Shaheen Ramel Cabbagestalk" and that this error in the indictment creates a fatal flaw that entitles him to relief. An individual named "James Cabbagestalk" appeared at the PCR hearing and testified he had nothing to do with this crime. The court finds Applicant's claim on this point to be without merit for the following reasons.

JMB 10

First, if the indictment has been signed by the Grand Jury foreperson and indicates that it is "true-billed," any challenges to the sufficiency of the indictment must be made before a jury is sworn. See Gentry, 363 S.C. at 101, 610 S.E.2d at 499. S.C. Code Ann § 17-19-90 (2003). Even if there are defects in the indictment, they do not affect the jurisdiction of the court as the indictment is a notice document. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

In this case, counsel believed Applicant would not have an objection to the indictment being

amended, and so advised the court in the presence of Applicant, without objection from Applicant. Tr. 107 Lines 16-18. Counsel testified that subject matter jurisdiction was not an issue and that he and Applicant did not discuss it.

Applicant pled guilty, admitting he was the person described in the indictment and that he committed the acts described in the indictment. Applicant waited until well into his plea to object to amending to correct his name on the indictment, after the court had already announced it would accept his plea. Tr. 104, L 12. Counsel testified that Applicant waited until trial to raise the name issue. "I rely on my client...he did not make this an issue with me." It was only after the acceptance of the plea, and after silently observing his counsel indicate approval of the amendment to the indictment, that Applicant indicated he did not agree with the amendment. Tr. 108 L 22; Tr. 108, L 25-109, L 10.

> THE COURT: Well, I'm putting your real name on the indictment. I'm trying to give you what you say your real name is. The State – The State shows that it is James Cabbagestalk. You're saying that it is Shaheem Ramel Cabbagestalk. I'm willing to put that down there as the two names that you have been known by. ...Doesn't that solve the problem?
> MR. CABBAGESTALK: No. I mean, I don't - - I don't - - I don't agree.

Id. After Gentry, the primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, i.e., to apprise him of the elements of the offense to allow him to decide whether to plead guilty or stand trial, and to allow the circuit court to know what judgment to pronounce if the defendant is convicted. Gentry at 44-45. *See also* Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005).

Applicant called as a witness a relative named James Cabbagestalk, who testified that his first name is James, and that Applicant's first name is Shaheen. It was not alleged either in the court below, or in the PCR hearing, that the relative named James engaged in wrongdoing or had criminal

culpability, or that Applicant was blamed for something his relative actually did.

Applicant indicated that he understood the allegations in the indictment. Tr. 95, Lines 11-12. The trial court made a specific finding: "I find that the indictment in this case does apprise this defendant of the charges against him." Tr. 113, Lines 7-8. At the PCR hearing of this matter, upon cross examination by counsel for the State, Applicant was asked if he knew what crimes were on the indictments he was presented with, to which he testified that he did. Applicant failed to show a valid claim for relief. Accordingly this Court finds that this claim is without merit and is hereby dismissed.

Other Allegations

No other allegations were raised or testified to at the PCR hearing. Therefore, any additional allegations raised in the PCR Application or amendment are deemed waived because no evidence was presented.

CONCLUSION

Based on the foregoing, this Court finds and concludes that the 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 is denied and dismissed with prejudice.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief is DENIED AND DISMISSED WITH PREJUDICE; and
2. The Applicant must remain in the custody of Respondent for the completion of his sentence.

AND IT IS SO ORDERED this 4th day of June, 2012.

J. MICHAEL BAXLEY
Presiding Judge
Fourth Judicial Circuit

Hartsville, South Carolina

[redacted] #29557

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