

ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

May 30, 2018

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JUN 01 2018

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

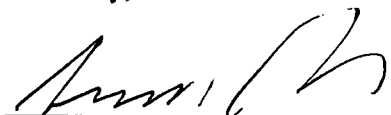
S.C. SUPREME COURT

Re: Andy Brock v. State
2016-CP-23-7619

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,



Susannah Ross
Attorney at Law

enclosure

cc: Office of the Attorney General
Office of Appellate Defense
Greenville County Clerk of Court

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

2016-CP-23-7619

Andy Brock, Appellant,
v.
The State, Respondent.

NOTICE OF APPEAL

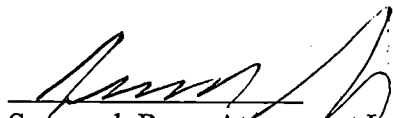
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JUN 01 2018

S.C. SUPREME COURT

Andy Brock appeals the Honorable Letitia H. Verdin's Order of Dismissal filed May 17, 2018.

This 30 day of May, 2018.


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Attorney for Appellant

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Attorney for Respondent

STATE OF SOUTH CAROLINA)
 COUNTY OF GREENVILLE)
)
 Andy Brock, 317746)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT

2016-CP-23-7619

ORDER OF DISMISSAL

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This matter comes before the Court by way of an application for post-conviction relief filed on December 28, 2016 by Andy Brock (Applicant). Respondent made its Return on or about June 22, 2017. An evidentiary hearing into the matter was convened on October 27, 2017, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by Susannah C. Ross, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General’s Office.

At the hearing, Applicant testified on his own behalf. Applicant’s Plea Counsel Dorothy Manigault, Esquire also testified as did Shawn Snow, a friend of Applicant. This Court had before it a copy of the records of the Greenville County Clerk of Court regarding the Applicant’s convictions, the transcript from Applicant’s guilty plea, the PCR application, Respondent’s Return and Applicant’s records from the Department of Corrections. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In September 2014, the Greenville County Grand Jury indicted Applicant for kidnapping (2014-GS-23-0101), criminal

sexual misconduct, first degree, and possession of a weapon during the commission of a violent crime (2014-GS-23-0102). Assistant Public Defender Dorothy Manigault, Esquire represented Applicant. Assistant Solicitor Lisa Bentley, Esquire prosecuted the case. On August 8, 2016, Applicant pleaded guilty as indicted to all charges before the Honorable Edward Miller. Judge Miller sentenced Applicant to imprisonment for concurrent terms of thirty years for kidnapping, thirty years for criminal sexual conduct, first degree, and five years for possession of a weapon during the commission of a violent crime. Applicant did not appeal his conviction or sentence.

FACTUAL HISTORY

On September 10, 2013, Applicant picked up his girlfriend from her house early in the morning. They spent the day together walking all over the Lake Robinson area of Greenville County, while Applicant was trying to avoid arrest. Late that evening, they ended up at the home of one of Applicant's friends. Applicant cut the lock off of his friend's bedroom door because it was the only room in the trailer with air conditioning, and both Applicant and the victim entered that room. The victim would testify that by this point in the day, she was exhausted, dehydrated, and hungry as they had walked all day in the sun without food or water. (GP. Tr. pg.8-10)

The couple began bickering, at which time Applicant punched the victim in her face and told her to lay down. When the victim resisted, Applicant pulled out a barber-style switchblade and held it to her throat. He then held her down while he cut and ripped her shirt off. Applicant proceeded to sexually assault the victim vaginally, orally, and sodomized her in between, all while hitting her on the face and head. Applicant took her phone at one point and tried to prove she was cheating on him, ultimately breaking part of the phone. At one point, Applicant grew tired of the victim's crying and begging to leave, so he tied her to the bed with straps and a cell phone cord. During the assault, Applicant told her hateful things, including that if she told police

he would go to her daughter's school and rape her and that nobody would believe her. Several hours later, the homeowner and a witness, came home and called police thinking the home was being burglarized. (GP. Tr. pg.8-10)

At this point, the victim was able to break free and run for help. She grabbed a blanket and reached the home of a neighbor, wearing only that blanket that she grabbed from the home. She still had a cell phone cord tied to her wrist when she was treated by EMS and emergency room personnel. DNA was recovered from a rectal swab taken by the same nurses at the hospital. That was the only location sperm was found and was directly contradictory with the Applicant's story about what happened that night. (GP. Tr. pg.8-10)

ALLEGATIONS

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

1. "Ineffective Assistance of Counsel"
 - a. Counsel "failed to provide witness"
 - b. Counsel "failed to investigate case properly"

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Applicant's Testimony

Applicant testified Plea Counsel did not talk to any of his witnesses or his family while representing him. He testified the victim had made similar allegations of sexual abuse and assault by him in the past and it was proven that she lied about those incidents. Applicant testified in his case he had consensual sex with the victim but when he told her did not want to be with her anymore, she became irate and said to him she would get him back. He testified he had been in a relationship with the victim for a year and a half almost two and that the relationship had been off and on since the late 1990's. Applicant testified he did not remember receiving a plea offer in

his case. He testified he pled guilty to a drug charge prior to pleading guilty to kidnapping, criminal sexual conduct, first degree, and possession of a weapon during the commission of a violent crime. Applicant testified he was sentenced to seven years for the drug charges. He testified Plea Counsel did not tell him the conviction for the drug charge would be a part of his criminal record if he went to trial over pleading guilty to the other charges. He testified there was a fifteen year plea offer that was never communicated to him and had it been he would have taken it.

On cross-examination, Applicant testified he met with Plea Counsel twice prior to pleading guilty. He testified Plea Counsel did not go over the discovery with him in his case but she sent him a copy of it. Applicant testified Plea Counsel did not go over any possible defenses with him but he provided her with possible witnesses to talk to concerning his cases. He testified there was a plea offer in his case that had his signature on it but he did not remember signing it.

Shawn Snow's Testimony

Mr. Snow testified he had known Applicant for about twenty years since he moved in the same neighborhood when he was 16 or 17. He testified he had never known Applicant to be violent. Mr. Snow testified he knew the victim in this case and that she and Applicant had been together for over a year maybe two. He testified he dropped both of them off the day of the incident and the victim seemed to be fine during that time. Mr. Snow testified he asked the victim if she wanted him to drop her off at her mother's house because the house they were going to did not have any power. He testified she said no. Mr. Snow testified during this time the victim did not appear to be exhausted, tired or forced in any way by Applicant. He testified he did not know Applicant to carry a knife.

On cross-examination, Mr. Snow testified he was not present during the time of the

assault of the victim by Applicant and that he did not see anything.

Plea Counsel's Testimony

Plea Counsel testified she has practiced law for over thirty-five years. She testified she was appointed to represent Applicant. Plea Counsel testified Applicant was accused of raping the victim in this case both vaginally, orally and anally. She testified she met with Applicant and discussed his charges with him and he understood what was going on in his case. Plea Counsel testified she also discussed the potential sentences Applicant would be facing. She testified she talked with Applicant and he mentioned someone dropped him and the victim off at the home but no one beyond them were at the home when the incident took place. Plea Counsel testified if the case had went to trial it would have been potentially a swearing contest. She testified in her conversations with Applicant, he kept denying that anything happened. Plea Counsel testified she sent him a full copy of discovery and went over the discovery with him at the jail. She testified she pointed out to Applicant that a DNA test was taken and they did find sperm in the victim's rectal area that was matched to him. Plea Counsel testified she pointed that out to Applicant because he kept saying that nothing happened. She testified Applicant then changed his story to say it was consensual.

Plea Counsel testified she went to see Applicant several times. She testified she received a letter from Applicant on June 10, 2016 that had been postmarked June 1, 2016, from Columbia where Applicant was serving the sentence for the drug case in which he said that he wanted to go ahead and plead guilty to his other charges. Plea Counsel testified prior to Applicant pleading guilty to the drug charge she received a plea offer dated January 8, 2014, from the Solicitor's Office for Applicant to plead guilty to manufacturing or distribution of meth second, criminal sexual conduct first degree, possession of a weapon during a violent crime, and the offer was

fifteen years. She testified the State would have dismissed two counts of possession of a controlled substance and would also have dismissed the kidnapping charge. Plea Counsel testified she presented the plea offer to Applicant and he indicated he did not want to take the offer. She testified Applicant continued to tell her nothing happened in spite of the discovery they had reviewed. Plea Counsel testified Applicant told her he would only plead guilty to the drug charge. She testified after the plea offer had expired and Applicant had pled guilty to the drug charge, she tried to get the fifteen year offer back but the solicitor would not reinstate the offer. Plea Counsel testified it was Applicant's decision to reject the combined plea offer.

On cross-examination, Plea Counsel testified she did not have anything in her files that Applicant signed rejecting the plea offer. She testified her file indicated she met with Applicant seven times but she thought she may have met with him more times than that. Plea Counsel testified in terms of mitigation evidence, she did not have anything to present that would have mitigated Applicant's case because there was nobody there during the time of the incident. She testified the owner of the home came back after the incident had occurred and that's when the victim jumped up, grabbed a blanket and ran out of the house to a neighbor's house with no clothing. Plea Counsel testified when the police got to the neighbor's house, the victim was naked sitting on the neighbor's couch with a blanket wrapped around her. She testified she did not talk to the neighbor concerning Applicant's case. Plea Counsel testified she advised Applicant when he pled guilty to the drug charge it would be a part of his record if he ever pled to other charges. She testified she advised him that it would make him more impeachable if he went to trial. Plea Counsel testified generally she tries to make sure that all the cases or charges stay together so she will have something to negotiate with and deal with but that was pleading guilty to the drug charge was something Applicant wanted to do.

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 can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (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 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. 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. at 689. 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).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 at 688). 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, 386 S.E.2d at 625. 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 pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 (1985).

Failure to Investigate or Prepare

Applicant failed to present any evidence in support of this allegation or than the testimony of a witness who was not present during the incident. 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 has failed to show what beneficial information could have been discovered had Counsel done more investigation. Even so, Counsel testified credibly that she reviewed all of the discovery with Applicant. This Court finds Counsel’s investigation was beyond reasonable. Therefore, Applicant has failed to meet his burden to prove Plea Counsel was ineffective. This allegation is denied and dismissed with prejudice.

Failure to convey plea offer

Applicant further alleges Plea Counsel was ineffective in failing to convey a plea offer. This Court finds Applicant has failed to prove Plea Counsel was ineffective in any regard. To be successful on an allegation of an un-conveyed plea offer, Petitioner must prove: (1) trial counsel's failure to communicate the State's initial plea offer constituted deficient performance, and (2) Petitioner was prejudiced by the deficient performance, or there was a reasonable probability that but for this deficient performance, he would have accepted he original plea offer. Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009). Generally, failure to convey a plea offer constitutes deficient performance, although the existence of prejudice needs to be evaluated on a case-by-case basis. Id. at 613, 675 S.E.2d at 422. To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. Missouri v. Frye 566 U.S. 133 (2012).

Here, Plea Counsel's testimony is persuasive on all issues. Plea Counsel testified prior to Applicant pleading guilty to the drug charge she received a plea offer dated January 8, 2014, from the Solicitor's Office for Applicant to plead guilty to manufacturing or distribution of meth second, criminal sexual conduct first degree, possession of a weapon during a violent crime, and the offer was fifteen years. She testified the State would have dismissed two counts of possession of a controlled substance and would also have dismissed the kidnapping charge. Plea Counsel testified she presented the plea offer to Applicant and he indicated he did not want to take the

offer. She testified Applicant continued to tell her nothing happened in spite of the discovery they had reviewed. This Court finds Plea Counsel properly conveyed the plea offer to Applicant. Applicant had the opportunity to accept the plea and chose to decline the offer. This Court sees no need to reach a prejudice analysis because it is clear that Plea Counsel not only communicated the offer to Applicant, but fully advised him of the offer. Therefore, Applicant has failed to meet his burden to prove Plea Counsel was ineffective. This allegation is denied and dismissed with prejudice.

Failure to present mitigation evidence

Applicant alleges Plea Counsel was ineffective for failing to present mitigation evidence. Plea Counsel testified in terms of mitigation evidence, she did not have anything to present that would have mitigated Applicant's case because there was nobody there during the time of the incident. "Strickland does not require counsel investigate every conceivable line of mitigating evidence or require the submission of such evidence in every case." Wiggins v. Smith, 539 U.S. 510, 533 (2003). This Court finds Applicant failed to present any information that could have been offered as mitigation to reduce his sentence issued by the plea judge. Therefore, Applicant has failed to meet his burden to prove Plea Counsel was ineffective. This allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations 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 notifies Applicant that 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), SCRCR. Refer to 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 15 day of May, 2018.

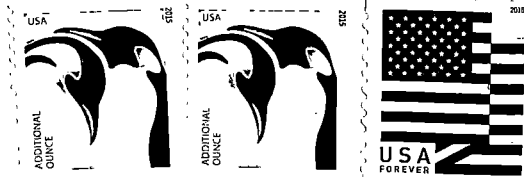


LETITIA H. VERDIN
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

SUSANNAH ROSS ESQ.

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GREENVILLE SC 29601



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