

ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

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MAY 31 2018

May 29, 2018

S.C. SUPREME COURT

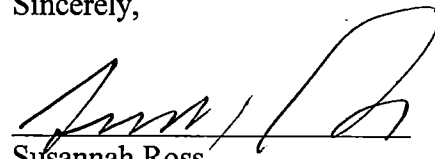
Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Eddie Ballanger v. State
2017-CP-23-0093

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

330 E. COFFEE ST. • GREENVILLE/SC • 29601
PHONE: (864) 242-0029
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RECEIVED

MAY 31 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

2017-CP-23-0093

Eddie Ballanger , Appellant,

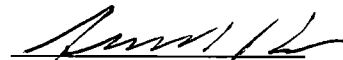
v.

The State, Respondent.

NOTICE OF APPEAL

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

This 29 day of May, 2018.


Susannah Ross, Attorney at Law
330 E. Coffee St.
Greenville, SC 29601
(864) 242-0029
Attorney for Appellant

Other Counsel of Record:
DeShawn Mitchell, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for Respondent

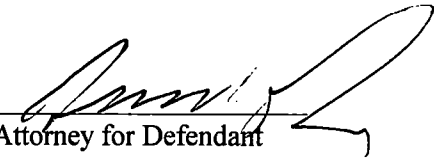
STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
EDDIE BALLANGER,)
)
APPELLANT,)
)
)
VS.)
)
)
THE STATE OF SOUTH CAROLINA,)
)
RESPONDANT.)
_____)

IN THE SUPREME COURT

CERTIFICATE OF SERVICE
BY MAIL

1. I am the attorney for the Applicant in the above-captioned matter.
2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Notice of Appeal** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

Mr. DeShawn Mitchell
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Attorney for Defendant

This 29 day of May, 2018

RECEIVED
MAY 31 2018
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
Eddie Ballenger, 283547)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

2017-CP-23-0093

ORDER OF DISMISSAL

ENTERED COMPUTER

18 MAY 17 PM 3:04
Paul Wickensimer DDC GUL SC

This matter comes before the Court by way of an application for post-conviction relief filed on January 9, 2017 by Eddie Ballenger (Applicant). Respondent made its Return on or about June 23, 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 Scott D. Robinson, Esquire also testified as did Travis Ballenger, Applicant’s brother. 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 November 2014, the Greenville County Grand Jury indicted Applicant for four counts of attempted murder and four

counts of possession of a weapon during a violent crime (2014-GS-23-9952, -9953, -9954, -9958). Scott D. Robinson, Esquire represented Applicant. Assistant Solicitor R. Asher Watson, Esquire prosecuted the case. On October 3, 2016, Applicant pleaded guilty as indicted to all charges before the Honorable D. Garrison Hill. Judge Hill sentenced Applicant to imprisonment for concurrent terms of ten years suspended provided upon the service of five years for each count of attempted murder and five years for each count of possession of a weapon during a violent crime. Applicant did not appeal his conviction or sentence.

FACTUAL HISTORY

On August 16, 2014, within the Greer city limits in the county of Greenville, Applicant was the front seat passenger in a vehicle driven by Tony Bruton. Applicant shot from inside the vehicle several times at a number of victims. This was witnessed by a Greer Police Department officer who saw the muzzle flash at nighttime of this occurring. A vehicle chase ensued where this officer chased the vehicle and the driver. Mr. Bruton stopped the car in the middle of the road and fled the scene but was apprehended. He told the police Applicant fired shots for unknown reasons. Applicant was also detained and informed the police that the driver, Mr. Bruton, who is his cousin, had been engaged in an earlier altercation and that Mr. Bruton told him to shoot the victims. The gun was recovered and Applicant admitted to shooting at the victims. Applicant also claimed that Mr. Bruton provided the gun to him to shoot at the victims. The first set of victims were walking their two kids, one of which was in a stroller. They informed law enforcement that the driver was driving erratically by himself during the first encounter. There was some words exchanged at that point and later on the driver picked up Applicant and circled back around to where the victims were walking down another and fired several shots at the victims. The victims were on the sidewalk in front of another set of victims

who were on their porch when the shots were fired. At least one shot came between two of the victims that were sitting on the porch. They had nothing to do with this incident and were just on the porch when this occurred. (GP. Tr. p.7-8).

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. "Misrepresentation by attorney"
 - b. "Not counseling"

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

1. Ineffective Assistance of Counsel
 - a. Failure to advise effectively by pushing a guilty plea when co-defendant was not convicted at trial
 - b. Failure to research mental health history of depression and borderline of intellectual function for mitigation
 - c. Failure to investigate facts and adequately prepare for trial
 - d. Failure to communicate and explain discovery and plea offers

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Applicant's Testimony

Applicant testified he was in special education classes in school and only made it to the ninth grade. He testified he had been evaluated before and was found to be competent. Applicant testified he was found to have some borderline intellectual functioning and it takes him a little longer to understand things. He testified he did not feel like Plea Counsel explained everything to him so they he could understand it. Applicant testified Plea Counsel did not try to help him or represent him the right way. He testified regarding his charges the allegations where he shot out

of a car but no one got shot. Applicant testified he got out of the car and ran after the shooting because his co-defendant got out. He testified he cooperated with police and gave a statement. Applicant testified his co-defendant told him to get in the car with him that day and he did not feel like he could tell his co-defendant no. He testified when he cooperated with the police they told him they thought he did not need to go to jail. Applicant testified he testified at his co-defendant's trial and that his co-defendant had conflicts with the victims but he did not have any conflicts with them. He testified he had pled guilty prior to testifying at his co-defendant's trial. Applicant then testified he did not understand the gun charge he pled guilty to had a mandatory minimum of five years. He testified his lawyer did not have him evaluated or present a mental health history to the plea judge. Applicant testified he has always had some mental health issues. He testified his lawyer did not have his mom, pastor or brother testify at his sentencing hearing.

Travis Ballenger's Testimony

Mr. Ballenger testified he did not believe Applicant, his brother, had a strong grip of what he was doing at the time of the incident he was charged with. He testified some family members and himself called the Greer Police Department where Applicant was and talked to police. Mr. Ballenger testified the police told them they wanted Applicant to assist them on the case. He testified he got the impression the police were after Applicant and wanted him to go to jail. Mr. Ballenger testified the police would continuously harass Applicant. He testified that he thought Plea Counsel wanted Applicant to plead guilty instead of going to trial because of a money issue. He testified they had trouble contacting Plea Counsel but when it was time for a potential trial Plea Counsel would reach out looking for money.

On cross-examination, Mr. Ballenger testified he was not saying Applicant was not involved in the crime and in fact Applicant was in the car but he did not think Applicant got a

fair deal. He testified Applicant gave a confession.

Plea Counsel's Testimony

Plea Counsel testified he had practiced law for twenty years and was retained to represent Applicant on his charges. He testified the facts surrounding this case were Applicant got into a car with his cousin, Mr. Bruton, and Applicant shot out of the window of the car at several different houses and so forth. Plea Counsel testified no one was injured, but one of the statements from one of the victims was that a bullet just missed a kid. He testified Applicant gave a confession in which he basically said he shot the gun and Mr. Bruton told him that if he did not do this, that he would hurt him. Plea Counsel testified Mr. Bruton gave a statement as well saying Applicant shot out of the window. He testified Applicant came to his office a good bit to discuss his charges. He testified Applicant along with himself met with Officer Bash from the police department in Greer to cooperate on other criminal matters that would help Applicant out on his charges. Plea Counsel testified Applicant had been evaluated before and he got records from Greenville Mental Health and that Applicant did not have any issues with competency to stand trial. He testified Applicant understood the conversations they had regarding his charges. Plea Counsel testified there is was no question that Applicant had a gun and that he shot out the window because he admitted it and it constituted attempted murder. He testified if Applicant had gone to trial in this case he could have been convicted on each charge of attempted murder and each carried up to thirty years each. Plea Counsel testified Applicant's potential exposure was over a combined one hundred years and the fact that his cousin told him he was going to threaten him if he did not shot out of the car was not a credible defense strategy to present to a jury. He testified that Applicant did not want to go to trial and turned down plea deals he had for ten, fifteen and twenty years. Plea Counsel further testified this was not Applicant's first interaction

with the criminal justice system and that he had a pretty significant record. He testified that he explained everything to Applicant very carefully and slowly to make sure he understood what was going on. Plea Counsel testified it was tragic that Applicant's own cousin made a statement against him and took advantage of him. He testified Applicant was a nice person who was very impressionable and was taken advantage of by his cousin and by the Greer Police Department many times in the past. Plea Counsel testified he regretted Applicant had to do time in prison but he thought Applicant's sentence was a good resolution to his case because at the end of the day Applicant shot the gun and only received five years. He testified Applicant pled guilty and his sentencing was deferred so he could testify against his co-defendant. Plea Counsel testified Applicant cooperated and received a much lighter sentence because of that.

On cross-examination, Plea Counsel testified he did not mention to the plea judge about Applicant's mental health records. He testified he informed the plea judge that Applicant was competent but not specifically about his mental health history or that he had been diagnosed with borderline intellectual functioning. Plea Counsel testified he did not have Applicant's mother speak during Applicant's guilty plea. He testified the state was not willing to drop the possession of a weapon charge because Applicant had confessed to shooting the gun. Plea Counsel testified Applicant testified for the state in hopes of getting a reduced sentence or recommendation.

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 Advise

Applicant alleges Plea Counsel was ineffective in failing to advise effectively by pushing a guilty plea when co-defendant was not convicted at trial. Plea Counsel testified Applicant pled guilty and his sentencing was deferred so he could testify against his co-defendant. He testified Applicant gave a confession in which he basically confessed he shot the gun out of the window. He testified if Applicant had gone to trial in this case he could have been convicted on each charge of attempted murder and each carried up to thirty years each. Plea Counsel testified Applicant's potential exposure was over a combined one hundred years and the fact that his cousin told him he was going to threaten him if he did not shot out of the car was not a credible defense strategy to present to a jury. Plea Counsel testified Applicant cooperated by testifying against his cousin and received a much lighter sentence because of it. This Court finds Plea Counsel was not deficient. This Court finds Plea Counsel worked out a good plea deal for Applicant significantly lowering his exposure notwithstanding the fact Applicant confessed to the crime. Furthermore, this Court finds Applicant has failed to show prejudice as Plea Counsel testified Applicant did not want to go the trial. Therefore, Applicant has failed to meet his burden to prove Plea Counsel was ineffective. This allegation is denied and dismissed with prejudice.

Failure to research mental health history

Applicant alleges Plea Counsel was ineffective in failing to research mental health history of depression and borderline of intellectual function for mitigation. Plea Counsel testified Applicant had been evaluated before and he got records from Greenville Mental Health and that Applicant did not have any issues with competency to stand trial. He testified Applicant understood the conversations they had regarding his charges. Plea Counsel also testified the state was not willing to drop the possession of a weapon charge because Applicant had confessed to

shooting the gun. Upon a review of the record, this Court finds Applicant received the lowest sentence possible considering the weapons charge that Plea Counsel testified the state was unwilling to drop. Plea Counsel testified he regretted Applicant had to do time in prison but he thought Applicant's sentence was a good resolution to his case because at the end of the day Applicant shot the gun and only received five years. This Court concurs with that assessment. This Court further finds that no additional mitigation presented would have changed Applicant's sentence considering the weapons charge. Additionally, this Court find Applicant presented no information to show he was incompetent at the time of the plea. Therefore, Applicant has failed to meet his burden to prove Plea Counsel was ineffective. This allegation is denied and dismissed with prejudice.

Failure to investigate facts and prepare for trial

Applicant alleges Plea Counsel was ineffective in failing to investigate facts and adequately prepare for trial. Applicant failed to present any evidence in support of this allegation other 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 he reviewed all of the discovery with Applicant. Plea Counsel testified Applicant's potential exposure was over a combined one hundred years and the fact that his cousin told him he was going to threaten him if he did not shot out of the car was not a credible defense strategy to present to a jury. He testified that Applicant did not want to go to trial. This Court finds Counsel's investigation was reasonable as was his preparation. Therefore, Applicant has failed to meet his burden to prove Plea Counsel was ineffective. This allegation is denied and dismissed with prejudice.

Failure to communicate and explain discovery and plea offers

Applicant alleges Plea Counsel was ineffective in failing to communicate and explain discovery and plea offers. Plea Counsel testified Applicant came to his office a good bit to discuss his charges and evidence. He testified Applicant along with himself met with Officer Bash from the police department in Greer to cooperate on other criminal matters that would help Applicant out on his charges. Plea Counsel also testified Applicant turned down several plea offers and that Applicant understood their conversations. This Court finds Plea Counsel's communication with Applicant was reasonable. 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.

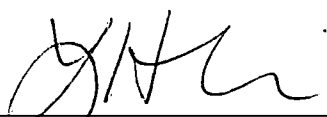
This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate

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), SCRCP. Reffer 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.

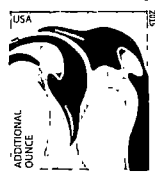


LETITIA H. VERDIN
Presiding Judge
Thirteenth Judicial Circuit

Greenville South Carolina

SUSANNAH ROSS ESQ.

330 EAST COFFEE ST.
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Mr. Daniel E. Shearouse
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