

AIKEN & HIGHTOWER, PA

Attorneys at Law

2231 Devine Street, Suite 201

Columbia, SC 29205

Phone: 803-799-5205

Fax: 803-799-5206

Arthur K. Aiken

A. Bea Hightower

June 21, 2018

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RECEIVED

JUN 25 2018

Re: Stephen B. Wilhite v. State of South Carolina
Civil Action No.: 2015-CP-02-2223

S.C. SUPREME COURT

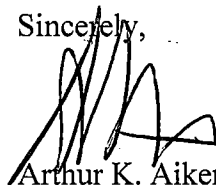
Dear Mr. Shearouse:

I am appointed counsel for the Applicant, Stephen B. Wilhite, in the above captioned post-conviction relief case. I have enclosed, for filing in your office, a Notice of Appeal and Motion to Proceed in Forma Pauperis for this case. Please return file stamped copies to me.

By copy of this letter with the filings enclosed, I have filed these filings with the Clerk of the Aiken County Court of Common Pleas and have served these filings on the Office of the Attorney General for South Carolina. Please call with any questions.

Thank you for your help

Sincerely,



Arthur K. Aiken

art@aikenandhightower.com

Enclosures as stated

cc: Clerk, Aiken County Court of Common Pleas (w/enclosures)
Office of the Attorney General for South Carolina (w/enclosures)
Stephen B. Wilhite (w/enclosures)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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JUN 25 2018

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

S.C. SUPREME COURT

William P. Keesley, Circuit Court Judge

Case No. 2015-CP-02-2223

Stephen B. Wilhite..... Applicant/Appellant

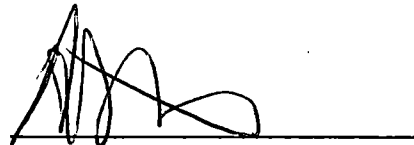
v.

State of South Carolina.....Respondent/Respondent

NOTICE OF APPEAL

This is a post-conviction relief case. Appellant appeals from the Order of Dismissal signed on May 22, 2018 in this case. Appellant's counsel received written notice of the attached Order of Dismissal by email on May 22, 2018.

June 21, 2018



Arthur K. Aiken
Aiken & Hightower, PA
2231 Devine Street, Suite 201
Columbia, SC 29205
Telephone: 803-799-5205
Fax: 803-799-5206
Email: art@aikenandhightower.com
ATTORNEYS FOR APPELLANT

OTHER COUNSEL OF RECORD:

Office of the Attorney General of the State of South Carolina
PO Box 11549
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

Honorable R. Keith Kelly sentenced Applicant to imprisonment for five years, suspended to two years, with probation for three years. Applicant did not appeal from his guilty plea or sentence.

The Aiken County Grand Jury later indicted Applicant at their April 2015 term for temporary use of a vehicle without permission. (2015-GS-02-000591). Charles David Hayes, Esquire, represented Applicant again. David W. Miller, Esquire, prosecuted the case. On April 23, 2015, Applicant pleaded guilty as indicted before the Honorable Doyet A. Early, III. Judge Early sentenced Applicant to imprisonment for one year, revoked his probation in full, and ran his one year sentence concurrent with the probation revocation. Applicant received credit for one hundred and twenty-nine days served on this charge. Applicant did not appeal from his guilty plea, sentence, or probation revocation.

II. ALLEGATIONS

In his Application, Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel

- a. "If I would have known my probation was going to be revoked again, I would have never pleaded guilty to that charge. I was told I would receive time served for the charge, but I was sentenced to one year."
- b. "[Plea Counsel] came to see me in the jail and showed me a text message from [Solicitor] that if I pleaded guilty to temporary use of a vehicle then he would dismiss the kidnapping, and Plea Counsel told me I would get sentenced to time served. Instead I was sentenced to one year, then probation stepped up and [revoked] my probation and I was sentenced to three years."

Applicant also orally amended his application at his PCR hearing to include an allegation that Plea Counsel was ineffective for advising him to plead guilty when he owned the motorcycle he was charged with temporarily using without permission.

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

Applicant testified on his own behalf at the hearing, along with his father. Applicant's Plea Counsel also testified.

Applicant's testimony

Applicant testified a kidnapping charge was dismissed pursuant to his guilty plea, but he still wished to pursue a new trial understanding he would face the temporary use of a vehicle without permission charge as well as kidnapping. Applicant testified he was supposed to be housed in Aiken County Detention Center until space in a rehabilitation center became available as part of his plea deal. He claimed he would not have pleaded guilty if he knew he would get a one year sentence.

Applicant testified he met with Plea Counsel at the detention center once before his guilty plea. Applicant acknowledged that, at the time of this hearing, Plea Counsel was presently representing him on unrelated charges pursuant to Applicant's wishes. Applicant recalled telling the plea judge he was satisfied with Plea Counsel's services. Furthermore, Applicant conceded he told the plea judge he understood his probation would be revoked as a result of his guilty plea as well as his possible sentencing consequences. Applicant also recalled telling the plea judge that no promises had been made to him in exchange for his plea.

Applicant's father's testimony

Applicant's father testified Applicant actually owned the motorcycle in question. When questioned whether he had any documents proving Applicant's ownership of the motorcycle, Applicant's father conceded that he did not.

Plea Counsel's testimony

Plea Counsel testified he advised Applicant the guilty plea would be a violation of his

probation. Plea Counsel further testified Applicant had told him that Applicant's girlfriend, who called the police, was the record owner of the motorcycle as Applicant had "issues" with insurance and the Department of Motor Vehicles. Plea Counsel testified he discussed the issue of ownership of the motorcycle with Applicant at length before the plea. Plea Counsel testified Applicant understood he could plead to the temporary use of a vehicle without permission charge or he could proceed to trial and face the kidnapping charge as well, but he chose the plea. Plea Counsel asserted it was Applicant's decision to plead guilty.

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, (1984); Butler, 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 counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption 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. First, the 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). 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 pleas, the Applicant must show 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).

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 alleges Plea Counsel was ineffective in his representation surrounding his guilty plea. 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)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal

cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). In the present case, this Court finds Applicant has failed to prove that he is entitled to post-conviction relief on any of his allegations.

Applicant alleges Plea Counsel was deficient because Applicant owned the motorcycle in question but nevertheless pleaded guilty to temporary use of a vehicle without permission. This allegation is without merit and the record reveals Applicant was fully aware of the issues related to ownership of the motorcycle. While the term "owner" is not defined in the criminal code section under which Applicant was charged, the term is defined under S.C. Code § 56-3-20(21) as follows:

"Owner" means a person, other than a lienholder, having the property in or title to a vehicle. The term includes a person entitled to the use and possession of a vehicle subject to a security interest in another person but excludes a lessee under a lease not intended as security.

Plea Counsel credibly testified he discussed the issue of ownership with Applicant at length. Plea Counsel also credibly testified Applicant told him that the motorcycle was titled in the name of Applicant's girlfriend because Applicant had difficulty getting title placed in his name. Applicant's testimony at his plea hearing as well as Plea Counsel's credible testimony at the PCR hearing reveal Applicant understood what he was pleading to when he pled to temporary use of a vehicle without permission, understood the consequences of his plea, and chose to plead guilty on his own accord. For these reasons, Applicant has failed to prove Trial Counsel was deficient for allowing him or advising him to plead guilty to temporary ownership of a vehicle without permission.

Applicant also alleges he was promised a different sentence such as time served and would not have pleaded guilty if he knew his probation was going to be revoked. This Court

finds Applicant's claims to be self-serving and not credible. By contrast, this Court finds Plea Counsel credibly testified he discussed the issue of probation revocation with Applicant. Moreover, the record refutes Applicant's allegation as he testified at his plea hearing he understood the guilty plea would result in a probation revocation and he would be facing three years of incarceration. Applicant also told the plea judge under oath that he was not promised anything in exchange for pleading guilty. Therefore, Applicant has failed to Plea Counsel was deficient based on any of his allegations.

Notwithstanding, Applicant's failure to present any evidence of alleged deficiency of Plea Counsel, Applicant has also failed to satisfy his burden of proving he was prejudiced by any of Plea Counsel's alleged deficiencies under the second prong of Strickland v. Washington, 466 U.S. 668 (1984). In this case, a plea bargain was reached whereby very serious charges were dismissed in exchange for Applicant's plea to temporary use of a vehicle without permission. Had Applicant proceeded to trial on his original charges, he would have faced a potential sentence of thirty years for kidnapping. The record clearly reflects the voluntary and informed nature of Applicant's guilty plea. The record reveals Applicant was advised of and understood his sentencing exposure as well as the nature of his charges. Furthermore, Plea Counsel's credible testimony reveals he fully discussed the relevant issues with Applicant, and Applicant chose to plead guilty on his own free will. This Court finds there is no reasonable probability that, but for Plea Counsel's alleged deficiencies, Applicant would not have pleaded guilty and would have proceeded to trial.

VI. CONCLUSION

Based on all the foregoing, this Court finds and concludes 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 the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the 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 in regard to all allegations; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 22nd day of May, 2018.

Edgefield, South Carolina

William P. Keesley
WILLIAM P. KEESLEY
Chief Administrative Judge
Second Judicial Circuit

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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JUN 25 2018

S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2015-CP-02-2223

Stephen B. Wilhite Applicant/Appellant

v.

State of South Carolina.....Respondent/Respondent

PROOF OF SERVICE AND FILING

I certify that, on June 21, 2018, I served and filed the Notice of Appeal and Motion to Proceed in Forma Pauperis in the above appeal by mailing copies of those filings to the following:

Julia Coleman
Office of the Attorney General for South Carolina
PO Box 11549
Columbia, SC 29201

and

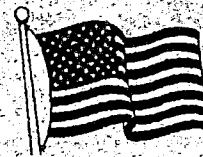
Office of the Aiken County Clerk of Court
PO Box 583
Aiken, SC 29802


SIGNATURE ON THE FOLLOWING PAGE



Arthur K. Aiken
Aiken & Hightower, PA
2231 Devine Street, Suite 201
Columbia, SC 29205
Telephone: 803-799-5205
Fax: 803-799-5206
Email: art@aikenandhightower.com
ATTORNEYS FOR APPELLANT

Columbia, SC
June 21, 2017



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Aiken & Hightower, P.A.
2231 Devine Street, Suite 201
Columbia, SC 29205

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330
Columbia SC 29211