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SEP 21 2018

S.C. SUPREME COURT

September 19, 2018

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

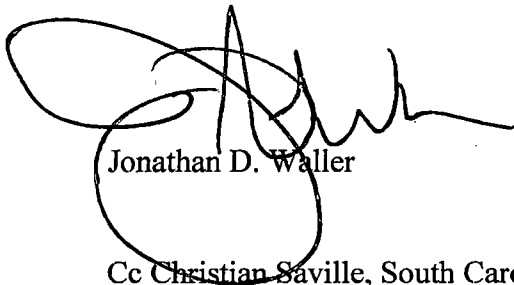
Re: Derrick L. Walker vs. State of South Carolina.
C/A No: 2016-CP-38-0099

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Walker in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,



Jonathan D. Waller

Cc Christian Saville, South Carolina Office of Attorney General

Enclosures

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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Maité Murphy, Circuit Court Judge

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2016-CP-38-0099

S.C. SUPREME COURT

Derrick L Walker, # 365914,

Appellant,

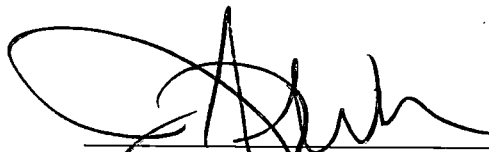
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Derrick L Walker, # 365914, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed May 11, 2018 and served on counsel by letter dated August 24, 2018, issued by the Honorable Maité Murphy, Presiding Judge, First Judicial Circuit.



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ATTORNEY FOR PETITIONER

September 19, 2018

Other Counsel of Record:
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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Maité Murphy, Circuit Court Judge

2016-CP-38-0099

RECEIVED

SEP 21 2018

S.C. SUPREME COURT

Derrick L Walker, # 365914,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Christian Saville, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to his office located at P.O. Box 11549, Columbia, SC 29211.


M. David Scott

September 19, 2018

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
IN THE FIRST JUDICIAL CIRCUIT

Derrick L. Walker,

2016-CP-38-0099

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

FILED
2017 NOV 11 AM 11:55
CLERK OF COURT
ORANGEBURG COUNTY
SOUTH CAROLINA

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on February 1, 2016. Respondent submitted its return on April 20, 2017, moving to dismiss all allegations other than ineffective assistance of counsel and the allegation that Applicant's guilty plea was involuntary. An evidentiary hearing into the matter was convened on March 1, 2018, at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by Jonathan D. Waller, Esquire. Respondent was represented by Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office.

Before this Court are the records of the Orangeburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the plea transcript, the State's Return, and the application.

I. PROCEDURAL HISTORY

The records before this Court indicate that Derrick L. Walker ("Applicant") is presently confined pursuant to orders of commitment of the Clerk of Court for Orangeburg County. The Orangeburg County Grand Jury first indicted Applicant at their January 2015 term for one count of attempted murder (2015-GS-38-0093). On October 26, 2015, Applicant pled guilty pursuant to Alford v. North Carolina, 400 U.S. 25 (1970), before the Honorable Edgar W. Dickson under

two waived indictments for assault and battery, first-degree (2015-GS-38-0093 and -1620). Minh Lee Wyman, Esquire ("Plea Counsel"), represented Applicant. Ashley Cornwell, Esquire, prosecuted the case. Judge Dickson sentenced Applicant to imprisonment for ten years for the first count of assault and battery, first-degree. For the second count of assault and battery, first-degree, Judge Dickson sentenced Applicant to a concurrent term of imprisonment for ten years, suspended upon the service of four years, with five years or probation. Applicant did not appeal from his guilty plea or sentence.

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. "Plea Counsel failed to investigate the witnesses' statements that conflicted with evidence."
2. "Double Jeopardy in Convictions/ Sentences/US Constitutional Violations/ State Constitution Violations"
 - a. "Plea Counsel did not object to Double Jeopardy in charges and in sentencing punishments."
 - b. "Applicant contends that S.C. Code § 17-25-50 constitutes the offense of assault and battery first degree to be treated as one offense since the applicant never left the scene and all his actions constitutes one offense of assaults and battery."
3. "Violation of Procedural Due Process/Due Process"
 - a. "See State v. Walsh, 388 S.E.2d 777 (1988)."
 - b. "Applicant claims he was erroneously held without arrest warrant served on him for 2015-GS-38-1620."
4. "The applicant contends that he unknowingly and involuntarily pled guilty to two counts of assault and battery in the first degree."

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

Applicant testified on his own behalf at the hearing. Applicant's Plea Counsel also testified at the hearing.

Applicant's testimony

At the PCR hearing, Applicant recalled that he was arrested for attempted murder, and the police alleged he shot the victim in the leg and beat him with the shotgun. Applicant testified he met with Plea Counsel three times before the plea, with the first meeting having taken place about one month after he was arrested. Applicant testified Plea Counsel discussed the charges and penalties with him as well as how "tough" the prosecutor was, but did not discuss defenses. Applicant believed he had a self-defense argument because he was being attacked. According to Applicant, he raised this issue to Plea Counsel. Applicant also claimed there were no witnesses to the incident.

Applicant testified his second charge of assault and battery, first-degree was brought several months after the first. Applicant did not believe the second charge was valid because he never left the room between shooting the victim and subsequently beating the victim. He recalled Plea Counsel advising him he would have to take the extra charge in order to get the "non-violent" charges of assault and battery, first-degree, as opposed to his original "violent" charge of attempted murder.

Applicant recalled he pled guilty because he did not want to serve the potential thirty year sentence for attempted murder. While Applicant conceded he waived presentment on both charges, he claimed he did not understand what that meant. Applicant also testified he did not believe Plea Counsel helped him, and he would not have pled guilty had he not been charged with the second charge. However, during cross-examination, Applicant conceded he told the plea judge he was satisfied with Plea Counsel's services. Moreover, Applicant recalled waiving his right to a jury trial, and telling the plea judge he knew exactly what he was doing.

Plea Counsel's testimony

Plea Counsel testified she met with Applicant nine times in eleven months. Plea Counsel also explained there were two witnesses in the house. Plea Counsel recalled the decision was made not to argue self-defense after speaking with the witnesses and the victim. Furthermore, Plea Counsel recalled Applicant gave a verbal statement to police in which he admitted to firing a shot at the victim and later another shot near but not at the victim.

Plea Counsel testified four of the meetings with Applicant took place after the agreement was reached for Applicant to plead guilty to two counts of assault and battery, first-degree, and Applicant understood what they were doing in order to receive a "non-violent" charge. Originally, the State agreed to reduce the charge of attempted murder to assault and battery of a high and aggravated nature ("ABHAN"), but Applicant did not want a "violent" charge, with the consequences such as housing which a "violent" conviction entails. According to Plea Counsel, Applicant strongly wished to avoid serving a "violent" sentence in prison. Therefore, the agreement to plead to two counts of assault and battery, first-degree was reached. Plea Counsel acknowledged that usually this would amount to a single charge because the actions were so closely connected, but explained this agreement was reached in order to procure Applicant the deal he wanted, a non-violent sentence. Plea Counsel explained one of the charges of assault and battery, first degree was for the shooting, and the second charge was for the beating, considered separately. Plea Counsel recalled Applicant never said he wanted to proceed to trial, nor did Applicant ever tell her he did not understand something. Plea Counsel also testified she believed Applicant would have been convicted of attempted murder had he proceeded to trial.

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 her 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 of ineffective assistance of counsel. Furthermore, after closely passing on the credibility of the testimony by both Applicant and Plea Counsel, this Court finds Plea Counsel's credibility to be credible and Applicant's testimony to be self-serving and not credible.

Failure to investigate

Applicant alleges Plea Counsel was ineffective for failure to investigate witness statements which conflicted with evidence. This Court finds this allegation to be meritless. At the PCR hearing, Plea Counsel recalled there were two witnesses at the house when Applicant shot

and beat the victim. Plea Counsel credibly testified she spoke with the witnesses and her investigator also spoke with the victim.¹ Based on these conversations, Plea Counsel decided not to pursue a defense of self-defense. Plea Counsel also testified Applicant gave an oral statement to police in which he admitted to firing at the victim once with a shotgun before later firing another shot not at but near the victim. This Court finds Applicant has failed to meet his burden of proving Plea Counsel's performance was deficient in this regard, and therefore this allegation fails to satisfy the first prong of Strickland. Notwithstanding, Applicant has also failed to meet his burden of proving prejudice from the alleged deficient performance. The record reveals Applicant voluntarily and knowingly waived any defenses when he pled guilty. Transcript p. 7, ll. 22-24. Applicant was originally charged with attempted murder for not only shooting the victim at close range with a shotgun, but also proceeding to beat the victim with the butt of the shotgun after he was already severely wounded. This Court finds Applicant has presented nothing to suggest that but for Plea Counsel's alleged failure to investigate he would have proceeded to trial, and further, has presented nothing to suggest a viable self-defense strategy would have even existed if he proceeded to trial. For these reasons, this allegation is denied and dismissed with prejudice.

"Double-jeopardy"

Applicant alleges Plea Counsel was ineffective for not objecting to "double-jeopardy" in his charges and sentence. This Court finds this allegation to be meritless. At the PCR hearing, Plea Counsel explained Applicant's offense would usually not result in two charges because his shooting of the victim occurred in close proximity to his beating of the victim. Applicant was therefore originally charged with one count of attempted murder. According to Plea Counsel's testimony, the State was willing to allow Applicant to plead guilty to ABHIAN, but Applicant

¹ The witnesses to the incident were not eye-witnesses to the shooting, but were able to overhear the incident.

really wanted to avoid a "violent" conviction and sentence. Therefore, Plea Counsel was able to secure a plea deal, to Applicant's benefit, allowing Applicant to instead plead guilty to two counts of assault and battery, first-degree, which are "non-violent" charges, for the shooting and the beating of the victim. Plea Counsel credibly testified she met with Applicant multiple times about this arrangement, and Applicant understood why he was pleading to the two charges. Therefore, this Court finds Applicant has failed to meet his burden of proving Plea Counsel's performance was deficient in this regard, and thus fails to satisfy the first prong of Strickland. Plea Counsel negotiated a favorable plea agreement for Applicant which satisfied his desire to avoid a "violent" conviction and sentence, and also allowed him to avoid a likely conviction of attempted murder, which carries a maximum sentence of thirty years. Likewise, Applicant has failed to prove any prejudice from the alleged deficient performance as this plea agreement was to his own benefit and met his wish of avoiding a "violent" conviction. Moreover, Applicant testified he pled guilty to avoid a thirty year sentence for attempted murder, which this plea allowed him to do. Plea Counsel testified she believed Applicant would have been convicted of attempted murder had he proceeded to trial. Plea Counsel interviewed witnesses to the shooting and beating who gave unfavorable accounts to Applicant, and Applicant himself admitted to shooting the victim. For these reasons, there is no reasonable probability Applicant would have chosen to proceed to trial but for Plea Counsel's alleged deficiency. For these reasons, this allegation is denied and dismissed with prejudice.

"VIOLATION OF PROCEDURAL DUE PROCESS"

Applicant alleged a violation of procedural due process as well in his original PCR application and claimed he was "erroneously held without an arrest warrant." Applicant did not proceed on the allegation regarding an arrest warrant, nor did he present any evidence or

testimony regarding the allegation. Accordingly, this Court finds this allegation to be abandoned and it is dismissed with prejudice.

INVOLUNTARY GUILTY PLEA

Applicant argues his plea to two counts of assault and battery, first-degree was entered unknowingly and involuntarily. This Court disagrees and finds the record and testimony establishes that his plea was free, knowingly entered, and voluntary. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant 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, 23 L.Ed.2d 274 (1969). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

In this case, Plea Counsel credibly testified at the PCR hearing that she met with Applicant multiple times to discuss the plea agreement, and Applicant understood why he was pleading to two charges of assault and battery, first-degree. This is corroborated by the guilty

plea transcript, which reveals Applicant testified he knew exactly what he was doing and was pleading guilty voluntarily. Transcript p. 8, ll. 19-22. Furthermore, Applicant's charges as well as the terms of the plea agreement were thoroughly explained multiple times at the plea hearing. Transcript p. 3, ll. 5-11; p. 5, ll. 16-23; p. 9, ll. 1-9; p. 13, ll. 16 – p. 14, ll. 1-4. The guilty plea transcript reveals a more than adequate plea colloquy. The transcript shows Applicant was fully advised of his rights and the consequences of pleading guilty pursuant to Alford, and voluntarily and knowingly pled guilty to a favorable plea deal. Applicant has failed to present any probative or credible evidence that he did not knowingly and voluntarily plead guilty. Furthermore, Applicant has failed to produce any evidence that but for any alleged conduct, he would have proceeded to trial. As stated above, Applicant significantly benefited from his plea deal which allowed him to avoid a substantially likely "violent" conviction and a potential sentence of thirty years at trial. Applicant has failed to meet his burden of proving this allegation, and this allegation is therefore denied and dismissed with prejudice.

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 1 day of May, 2018.

St. George, South Carolina

Maité Murphy
MAITÉ MURPHY
Chief Administrative Judge
First Judicial Circuit

W

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