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S.C. SUPREME COURT

February 8, 2019

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

Re: Izell D. Hair vs. State of South Carolina
C/A No: 2017-CP-38-0032

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. Hair 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: Benjamin Limbaugh, South Carolina Office of Attorney General

Enclosures

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STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ORANGEBURG COUNTY
D. Craig Brown, Circuit Court Judge

S.C. SUPREME COURT

2017-CP-38-0032

Izell D. Hair, # 311486,

Appellant,

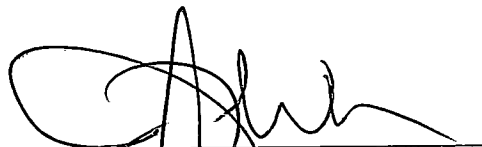
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Izell D. Hair, # 311486, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed December 12, 2018, and served on counsel by letter dated February 1, 2019, issued by the Honorable D. Craig Brown, Presiding Judge, Twelfth Judicial Circuit.



Jonathan D. Waller

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ATTORNEY FOR PETITIONER

February 11, 2019

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

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APPEAL FROM ORANGEBURG COUNTY
D. Craig Brown, Circuit Court Judge

S.C. SUPREME COURT

2017-CP-38-0032

Izell D. Hair, # 311486,

Appellant,

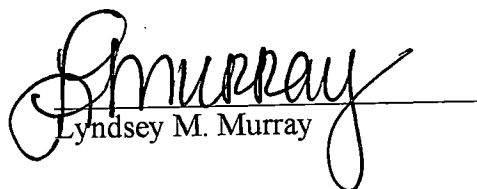
v.

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, Lindsey A. McCallister, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to her office located at P.O. Box 11549, Columbia, SC 29211.


Lyndsey M. Murray

February 11, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)
Izell D. Hair, #311486,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
IN THE FIRST JUDICIAL CIRCUIT

2017-CP-38-0032

ORDER OF DISMISS

ORANGEBURG, SC

2018 DEC 12 AM 11:29

FILED FOR RECORD
WINNIE D. CLARK

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on January 9, 2017. An evidentiary hearing into the matter was convened on October 3, 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 were 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, Applicant's appellate records, the State's return, and Applicant's PCR application. Based on these records and the testimony presented, the Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. On August 11, 2016, Applicant waived presentment to the grand jury and pled guilty to second-degree criminal sexual conduct with a minor (2015-GS-38-0370) before the Honorable Edgar W. Dickson. Applicant pled guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). Applicant was originally charged with first-degree criminal sexual conduct with a minor arising from incidents between

January 2014 and January 2015 in which Applicant was alleged to have sexually penetrated his daughter, under the age of eleven years old, anally and orally. The record also reflects the State was prepared to show Applicant also sexually penetrated another of his daughters, also under the age of eleven, anally and orally. GP Tr. p. 11, ll. 14-25 – p. 13, ll. 1-6. Belinda Davis-Branch, Esquire (“Plea Counsel”), represented Applicant. Assistant Solicitor Ashley Cornwell prosecuted the case. On August 11, 2016, Judge Dickson sentenced Applicant to imprisonment for eighteen years, required Applicant to register as a sex offender, and ordered GPS monitoring.

Applicant filed a notice of appeal from his guilty plea. The South Carolina Court of Appeals dismissed Applicant’s appeal for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR, by order filed October 26, 2016. The remittitur was returned to the circuit court on November 14, 2016.

II. ALLEGATIONS

In his PCR application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. “Lack of communication.”
 - b. “Failure to share or explain the evidence.”
 - c. “Failure to interview exculpatory witnesses.”
 - d. “Not following through with a trial.”
 - e. “The plea in this particular case was ignorant because of the admitted lack of communication and because Plea Counsel is telling [Applicant] what the evidence is in this case, but Plea Counsel is going on the interpretation by the State of what the evidence is and not analyzing it for herself.”

III. SUMMARY OF TESTIMONY PRESENTED

Plea Counsel testified at the PCR hearing, and Applicant testified on his own behalf.

Applicant

Applicant testified he was originally charged with criminal sexual conduct with a minor, first-degree. Applicant recalled he met with Plea Counsel numerous times prior to the plea. According to Applicant, he informed Plea Counsel he had alibi witnesses. Applicant testified Plea Counsel "did not do anything" with these witnesses. Applicant also recalled discussing his mental health with Plea Counsel, but the court ordered doctor found him to be competent.

Applicant also testified his arrest warrant stated the offense he was charged with occurred on December 13, 2014, but testified the State alleged the conduct occurred between January 2013 and January 2014.

According to Applicant, Plea Counsel did not review his constitutional rights prior to the plea. Applicant could not recall Plea Counsel going over the elements of his charge. Also, Applicant testified Plea Counsel did not go over the nature of an Alford plea with him.

According to Applicant, he pled guilty in part because Plea Counsel was not conducting an investigation.

Applicant conceded the plea transcript reflects he told the plea judge he was satisfied with Plea Counsel's representation. GP Tr. p. 9, l. 7. Applicant likewise acknowledged he told plea judge he knew exactly what he was doing and one reason he knew exactly what he was doing was because Plea Counsel had gone through all the evidence with him. GP. Tr. p. 7, l. 20. Applicant conceded he swore on the Bible to tell the truth at his guilty plea hearing. Furthermore, Applicant recalled telling the plea judge he was pleading guilty to spare his family the burden of trial and to enjoy the benefit of the State's plea offer. GP Tr. p. 8, l. 21.

Plea Counsel

Plea Counsel testified she met with Applicant approximately ten times prior to his guilty plea. Plea Counsel recalled Applicant's minor daughter alleged Applicant required her to have

anal sex over a period of time rather than an isolated date. Plea Counsel explained the date range for the allegations against Applicant shifted from a specific date to the entire year in advance of Applicant's guilty plea, and they discussed this as well as "everything" about Applicant's case to include his constitutional rights and the evidence against him.

Regarding the plea offer to CSC with a minor, second-degree, Plea Counsel testified she informed Applicant of the offer and told him to discuss it with his family. Plea Counsel felt it was in Applicant's best interest to take the plea deal, which is corroborated by her statement at the plea hearing that "there was just so much against" Applicant and she did not want him to take the risk. GP Tr. p. 20, l. 14. Plea Counsel opined the State would have brought Applicant's daughter to testify at trial and she would have been a good witness for the State.

Plea Counsel recalled Applicant gave her names of potential witnesses. Plea Counsel testified she spoke with everyone Applicant asked her to speak with, but there were no valid alibi defenses therefrom because the conduct was alleged to have taken place over the span of a year.

Plea Counsel also testified another daughter later came forward with allegations against Applicant prior to his plea. Plea Counsel testified she still agreed there was a substantial likelihood of conviction had this case 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), SCRCF; 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 that 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 (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 witness 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

This Court finds Applicant has failed to meet his burden of proving he is entitled to post-conviction relief on any of his allegations of ineffective assistance of counsel. Applicant has failed to prove both deficiency on the part of Plea Counsel and any prejudice therefrom.

Moreover, this Court notes the record reflects the knowing and voluntary nature of Applicant's Alford plea. Furthermore, after observing the witnesses and passing on their credibility, this Court finds Plea Counsel's testimony to be credible. By contrast, this Court finds Applicant's testimony to lack credibility.

"Lack of communication"

Applicant alleges Plea Counsel was ineffective for lack of communication. This Court finds this allegation to be meritless. Plea Counsel credibly testified to discussing the evidence, Applicant's plea, and other relevant issues with Applicant. This is corroborated by her representations at the guilty plea hearing, in Applicant's presence, that she had reviewed the evidence, law, and Applicant's constitutional rights with Applicant prior to the plea. GP Tr. p. 4. Furthermore, Applicant himself told the plea judge under oath he had understood everything Plea Counsel had told him and Plea Counsel had answered all of his questions. GP Tr. p. 9. Moreover, Applicant also told the plea judge he knew exactly what he was doing and felt it was in his best interest to plead guilty pursuant to Alford. For these reasons, this Court finds Applicant has failed to satisfy his burden of proving Plea Counsel was deficient as to her communication with Applicant. Furthermore, Applicant has failed to prove he would have proceeded to trial had Plea Counsel communicated any differently. Accordingly, this allegation is dismissed with prejudice.

"Failure to share or explain the evidence"

Applicant alleges Plea Counsel was ineffective for failing to share or explain the evidence in this case. This Court finds this allegation to be meritless. As Plea Counsel testified, the evidence presented at trial in this case would have been the testimony of at least one of Plea Counsel's victim daughters as well as a forensic interview. Trial Counsel opined she would have made a good witness for the State and felt Applicant faced a substantial likelihood of conviction

if he proceeded to trial. Plea Counsel credibly testified to reviewing all the pertinent materials in this case with Applicant to include discussions of the victim. This is corroborated by Plea Counsel's statement at the plea hearing that she had reviewed the evidence with Applicant. Furthermore, Applicant himself told the plea judge under oath that one reason he knew exactly what he was doing at his guilty plea was because Plea Counsel had gone through the evidence with him. GP Tr. p. 7, l. 20. Applicant even told the plea judge he believed there was a substantial likelihood of conviction given the evidence the State was prepared to present. GP Tr. p. 17, l. 24. The record reflects Plea Counsel did thoroughly review and explain the evidence in this case to Applicant. Therefore, Applicant has failed to establish deficiency as to this allegation as Plea Counsel did in fact adequately share and explain the evidence to him. Moreover, this Court finds Applicant has failed to satisfy his burden of proving he would have chosen to proceed to trial had Applicant better shared or explained the evidence to him. Accordingly, this allegation is dismissed with prejudice.

Failure to interview exculpatory witnesses

Applicant alleges Plea Counsel was ineffective for failing to interview exculpatory witnesses. This Court finds this allegation to be meritless. First, Applicant has failed to prove Plea Counsel was deficient as to this allegation because Plea Counsel credibly testified she spoke with all witnesses Applicant asked her to speak with. Plea Counsel credibly testified these witnesses would not have provided an alibi, as the allegations against Applicant were said to have taken place over the timespan of a year. To establish an alibi defense and thus be entitled to an instruction of alibi, a defendant must present some evidence that he was at another place at the time of the crime and could not therefore have committed the crime. State v. Diamond, 280 S.C. 296, 297, 312 S.E.2d 550 (1984). A simple denial of one's presence at the scene does not

constitute an alibi. Id. Plea Counsel was correct in her assertion these witnesses would not have provided an alibi for the timespan throughout which Applicant was alleged to have anally raped his daughter. Nevertheless, this Court finds Plea Counsel's testimony credible that she looked into all potential witnesses provided and therefore Applicant has failed to satisfy his burden of proving deficiency as to this allegation.

Notwithstanding, in order to show prejudice from the alleged failure to call a witness, the Applicant must provide competent evidence of the testimony the alleged alibi witness would provide. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992). Here, Applicant failed to present any testimony at the PCR hearing from an alibi witness, and no purported alibi witnesses were present at the PCR hearing. This Court can only speculate as to what these alleged alibi witnesses could have testified to. Applicant has therefore failed to establish prejudice from Plea Counsel's alleged deficiency as the witnesses she investigated would not have been exculpatory and Applicant failed to evidence what their testimony would have been and how their testimony would have changed the outcome of the proceedings. Accordingly, this allegation is dismissed with prejudice.

Not following through with a trial

Applicant alleges Plea Counsel was ineffective for not following through with a trial. This Court finds this allegation to be meritless. Plea Counsel credibly testified it was Applicant's decision to enter an Alford plea. This is corroborated by Applicant's own statements at the plea hearing that he was entering his plea freely and voluntarily and was not promised anything nor threatened in order to plead guilty. GP Tr. p. 10.

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an

individual, [an Applicant's] right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Statements made during a guilty plea should be considered conclusively, unless an [Applicant] presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975) overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4th Cir.1985). This Court finds that the Applicant presented no reasons to show that he should be allowed to depart from the truth of the statements he made during his guilty plea hearing.

Applicant informed the plea judge he did not want a jury trial but rather wanted to plead. GP Tr. p. 9, l. 14. In fact, Applicant explained at his plea hearing he wished to plead in order to spare his family the burden of a trial and also enjoy the benefit of the plea deal. GP Tr. p. 8, l. 21. Applicant expressly waived his rights to a trial at the plea hearing. GP Tr. p. 10, l. 1. The record and testimony reflects that while Plea Counsel adequately prepared and investigated this case, it was Applicant who decided to enter an Alford plea rather than proceed to trial. Applicant has failed to satisfy his burden of proving Plea Counsel was deficient regarding his entering of a plea rather than proceeding to trial. Moreover, Applicant has failed to satisfy his burden of proving he was prejudiced by Plea Counsel not following through with a trial, as evidenced by Applicant's own admission he believed there would be a substantial likelihood of conviction at trial given the State's evidence. GP Tr. 17, l. 24. Accordingly this allegation is dismissed with prejudice.

"The plea in this particular case was ignorant because of the admitted lack of communication and because Plea Counsel is telling [Applicant] what the evidence is in this case, but Plea Counsel is going on the interpretation by the State of what the evidence is and not analyzing it for herself."

Applicant alleges the plea he entered in this case was ignorant due to Plea Counsel's representation regarding her analysis of the evidence in this case and her explanation of the

evidence to Applicant. This Court finds this allegation to be meritless. Plea Counsel credibly testified she reviewed the evidence with Applicant in this case, and this testimony is corroborated by her representation at the plea hearing she had reviewed the evidence with Applicant. GP Tr. p. 4, l. 4. In fact, Applicant informed the plea judge he knew *exactly* what he was doing because, for one reason, Plea Counsel had gone through all the evidence with him. GP Tr. p. 7, l. 20. Applicant later reaffirmed to the plea judge that he knew exactly what he was doing and felt the plea was in his best interest. GP Tr. p. 10, l. 15. Applicant has presented no probative evidence to contradict this representations to the plea judge. Furthermore, Applicant has presented no evidence Plea Counsel failed to adequately analyze the evidence or failed to adequately represent this evidence to Applicant. As Plea Counsel testified, the evidence in this case essentially consisted of victim testimony and the forensic interview. Furthermore, Applicant has failed to satisfy his burden of proving that he would have instead proceeded to trial but for Plea Counsel's representation regarding the evidence in this case. Accordingly, this allegation is dismissed with prejudice.

[Conclusion and signature on following page]

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), SCRPC, 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 6 day of Dec, 2018.


D. CRAIG BROWN
Presiding Judge
First Judicial Circuit

, South Carolina