

Rodney D. Davis

101 Meeting Street, 5th Floor

Charleston, SC 29401

Phone: 843-882-50653 Fax: 843-958-1860

E-Mail: Davis@LowcountryLawOffice.com

March 7, 2019

The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

MAR 12 2019

RE: Harold Jones v. State of South Carolina, Case No.: 2015-CP-10-6405

S.C. SUPREME COURT

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post Conviction Relief (PCR) case. Also enclosed are the following:

- (1) Proof of service of the Notice of Appeal on the respondent;
- (2) The Order of Dismissal &
- (3) A Request for Representation on Appeal.

The Applicant-Appellant was represented by me as an indigent pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR cases. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support thereof are signed by me as attorney for Applicant-Appellant. If you need anything further, do not hesitate to contact me. Thank you for your time and attention to this matter.

Sincerely,

Rodney D. Davis

South Carolina Bar #: 12396

101 Meeting Street, 5th Floor

Charleston, SC 29401

(843) 882-5065

Davis@LowcountryLawOffice.com

CC: Megan Harrigan Jameson
Senior Assistant Deputy Attorney General

Paula Murdoch
Appellate Division, SCCID

RECEIVED

MAR 12 2019

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No.: 2015-CP-10-6405

Harold Jones,

Appellant,

v.

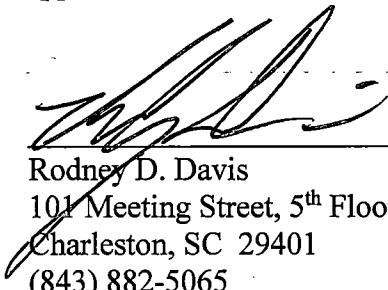
State of South Carolina,

Respondent.

NOTICE OF APPEAL

Domoneik Washington appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable G. Thomas Cooper on December 4, 2018. Applicant's attorney received a copy of the Order of Dismissal on or about March 4, 2019.

3/12, 2019


Rodney D. Davis
101 Meeting Street, 5th Floor
Charleston, SC 29401
(843) 882-5065
Davis@LowcountryLawOffice.com
Attorney for Appellant

Other Counsel of Record:
Megan Harrigan Jameson, Senior Assistant Deputy Attorney General
Office of the Attorney General, State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No.: 2015-CP-10-6405

FILED
2019 MAR -7 PM 1:50
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Harold Jones,

Appellant,

v.

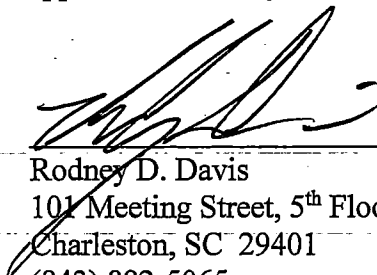
State of South Carolina,

Respondent.

NOTICE OF APPEAL

Domoneik Washington appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable G. Thomas Cooper on December 4, 2018. Applicant's attorney received a copy of the Order of Dismissal on or about March 4, 2019.

3/7, 2019


Rodney D. Davis
101 Meeting Street, 5th Floor
Charleston, SC 29401
(843) 882-5065
Davis@LowcountryLawOffice.com
Attorney for Appellant

Other Counsel of Record:
Megan Harrigan Jameson, Senior Assistant Deputy Attorney General
Office of the Attorney General, State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No.: 2015-CP-10-6405

Harold Jones,

Appellant,

v.

State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy of it to the address of record, Megan Harrigan Jameson, P.O. Box 11549, Columbia, South Carolina 29211-1549, on 3/7, 2019.

3/7, 2019


Rodney D. Davis

101 Meeting Street, 5th Floor

Charleston, SC 29401

(843) 882-5065

Davis@LowcountryLawOffice.com

Attorney for Appellant

Other Counsel of Record:

Megan Harrigan Jameson, Senior Assistant Deputy Attorney General

Office of the Attorney General, State of South Carolina

P.O. Box 11549

Columbia, SC 29211-1549

Attorney for Respondent

FILED
2019 MAR -7 PM 1:50
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

RECEIVED
MAR 12 2019
S.C. SUPREME COURT

CC
AT
AG
SOL
ES

2015-CP-10-6405

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Harold Jones, Jr., SCDC No. 363980,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2015-CP-10-6405

ORDER OF DISMISSAL

FILED
2019 FEB 27 PM 12:30
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before this Court by way of an application for post-conviction relief filed on November 25, 2015, by Harold Jones, Jr. (Applicant), alleging he was entitled to post-conviction relief based on constitutionally ineffective counsel for failing to advise him of a plea offer. An evidentiary hearing was held on December 4, 2018, before this Court at the Charleston County Courthouse. Applicant was present and was represented by counsel Rodney D. Davis. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. At the hearing, testimony was taken from plea counsel John Joseph Kozelski, III, Applicant, and prosecutor Deputy Solicitor Bruce DuRant.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional violations and denies this application with prejudice.

PROCEDURAL HISTORY

The records before this court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its August 2013 term of court, the Charleston County Grand Jury indicted Applicant for murder (2013-GS-10-04470) and possession of a weapon during the commission

of a violent crime (2013-GS-10-04469) following the fatal shooting and stabbing of Applicant's great-uncle. Assistant Public Defender John K. Kozelski, III, of the Charleston County Public Defender's Office, represented Applicant. The case was prosecuted by Deputy Solicitor Bruce DuRant of the Ninth Circuit Solicitor's Office.

On May 12, 2015, Applicant appeared before the Honorable J.C. Nicholson, Jr., circuit court judge, for pre-trial motions, including his motion to enforce a withdrawn plea offer for twenty-two-and-a-half years that had previously been extended by the State. The following day, May 13, 2015, Applicant again appeared before Judge Nicholson, who denied the motion to enforce the twenty-two-and-a-half year offer, finding:

All right. As far as the Lafler issue, before we get to the plea, I'm going to put on the record that I'm going to deny that motion, and the reason I'm going to deny that motion is it's this Court's opinion this case is distinguishable from Lafler in that Lafler the attorney's ineffective assistance of counsel that was so egregious that the Supreme Court felt like the only remedy in that situation was to order the State to put the original agreement for plea and time back on the table to be accepted by the defendant.

In this particular case, I find no evidence whatsoever of any ineffective assistance of counsel on behalf of the public defender's office by any attorneys; therefore, the Court is of the opinion that Lafler does not apply, and I deny that motion.

(May 13, 2015 Tr. p. 4). Following the denial of the motion, Applicant entered into a plea agreement with the State to plead guilty to the lesser-included offense of voluntary manslaughter and possession of a firearm during the commission of a violent crime for a term of thirty years for voluntary manslaughter and a consecutive five years for possession of a firearm during the commission of a violent crime. As part of his plea agreement with the State, Applicant expressly waived his right to challenge his guilty plea or sentences through post-conviction relief. (Ct's Ex. No. 8). Judge Nicholson questioned Applicant regarding this waiver at the guilty plea hearing and determined the waiver was knowingly, freely, and voluntarily made. Judge Nicholson accepted Applicant's plea and sentenced Applicant according to the terms of the negotiated plea



agreement to an aggregate thirty-five years' imprisonment.

On June 9, 2015, all parties appeared for a subsequent hearing before Judge Nicholson, where the weapons plea was vacated and Applicant waived presentment to the grand jury to possession of a stolen handgun. Judge Nicholson sentenced him to a consecutive five years pursuant to the plea agreement. Applicant did not file a direct appeal.

SUMMARY OF FACTS GIVING RISE TO THE CONVICTION

At the May 13, 2015, pleas proceeding, Deputy Solicitor placed the following factual summary on the record:

The victim in this case, who was James Butler, he was a 67-year-old-gentleman and Mr. Jones' great-uncle. They lived together at 611 Brandon Road, lot number one, which is part of the Burbage mobile home park.

There is some evidence that Mr. Jones had, shortly before this incident, been put out of the house. Mr. Butler's body was found on April the 5th, 2013, about 12:00 in the morning. He suffered from some superficial stab wounds to the back, a gunshot wound to the left temple, and what appeared to be a shotgun wound to the back of his head.

Mr. Jones was pretty quickly developed as a suspect because several people had seen him driving around in a gray Chevrolet pickup truck, which was Mr. Butler's company truck, and they had seen him driving around in this truck on Thursday, the day before Mr. Butler's body was found, but this was odd because Mr. Butler never allowed anybody to drive his company truck. And Harold had never been seen driving that truck, but had been seen driving by a couple of people, so he became a suspect.

The same date that Mr. Butler's body was found, April the 5th, about 5:00 that afternoon, they received a tip that Mr. [Jones] was at a barbershop in Hollywood, South Carolina, so the detectives from the sheriff's office went to that location and found Mr. Jones in the barbershop, getting his haircut.

They asked him his name and date of birth. He provided them false information. They had a DMV photo e-mailed to him, found out it was, in fact, Harold Jones and took him into custody at that point. When he was being searched to subsequent his arrest, they located a .32 caliber revolver in his pocket.

He was wearing some blue overalls, and underneath the blue overalls were some jeans that were bleach stained and apparently had bloodstains on them as well.

In addition to the pistol, he also had a pocket watch on him that belonged to the

deceased, Mr. Butler. He had the keys to Mr. Butler's personal vehicle, a Mercury Sable, and almost \$800 in cash, which we believe came from Mr. Butler as well because his daughter had just given him \$900 to pay his bills with.

He was arrested on that, arrested at that time for murder. The bullet removed from the victim's head at the autopsy along with the pistol that were retrieved from Mr. Jones was sent to the GBI lab in Atlanta, Georgia for reasons I explained to Court yesterday.

Yesterday, it turned out that the .32 caliber revolver was the murder weapon, at least the weapon used to shoot Mr. Butler in the temple. It also had the jeans he was wearing with maybe six cuttings from six different locations on the jeans. There was DNA matched to the victim on all six locations on the jeans he was wearing.

In addition, there was fingerprints. His fingerprints were found inside the truck on the rear-view mirror and the passenger door to the truck. The truck had obviously been used to move the victim's body from 611 Brandon Road where the murder occurred, or the killing occurred, across the highway to 6021 River Run Extension, where the body was dumped out behind an abandoned mobile home there.

Mr. Jones did provide the initial statement and admitted having shot Mr. Butler based on an altercation had he been involved in, and that's all we would have.

(May 13, 2015 Tr. p. 21-23). Applicant agreed with these facts and told the plea court he did not disagree with any of them. (May 13, 2015 Tr. p. 24).

CURRENT PROCEEDING

On November 25, 2015, Applicant filed an application for post-conviction relief, alleging counsel was ineffective for failing to advise him of a ten year plea offer.¹ This original application only challenged his voluntary manslaughter conviction. The State served its return on May 9, 2016. Thereafter, on July 25, 2017, Applicant, through counsel Rodney D. Davis, filed an amended application to include his weapons conviction. On November 3, 2017, Respondent served an amended return and partial motion to dismiss all allegations beyond whether counsel

¹ Nothing in the record before this Court, including testimony and exhibits presented at the evidentiary hearing, supports that the State ever extended a ten year plea offer to Applicant. Applicant seemingly acknowledges this, as he did not go forward on this ground at the hearing, but rather, asserted that counsel failed to convey a twenty-three year offer made by the State.

was ineffective in advising him to enter into the plea agreement waiving his right to post-conviction relief pursuant to his plea agreement and waiver.

A hearing on Respondent's partial motion to dismiss was held on December 5, 2017, at the Charleston County Courthouse before the Honorable Michael G. Nettles, circuit court judge. Following the hearing, Judge Nettles denied Respondent's motion to dismiss and granted Applicant a full evidentiary hearing. An order to this effect was filed on March 6, 2018.

Thereafter, an evidentiary hearing was held on July 24, 2018, at the Charleston County Courthouse before the Honorable Deadra L. Jefferson, circuit court judge. Following testimony from Applicant and his plea counsel, Applicant elected to withdraw his application with prejudice after a colloquy with Judge Jefferson. An order withdrawing the application with prejudice was filed on July 25, 2018.

On August 3, 2018, Applicant filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRPC, seeking to rescind his withdraw of his application. Judge Jefferson granted his motion and vacated his order of dismissal by written order filed October 1, 2018.

An evidentiary hearing was held on December 4, 2018, before this Court at the Charleston County Courthouse. At the hearing, Applicant proceeded forward on the sole allegation that plea counsel was ineffective for failing to convey a twenty-three year plea offer from the State and asked for specific performance of this plea offer as relief. Testimony was taken from plea counsel Kozelski, Applicant, and Deputy Solicitor DuRant. Additionally, the exhibits for the plea court's May 12, 2015, hearing were jointly moved into evidence and were referenced at the hearing by the exhibit number used at the May 12, 2015, hearing. Following the hearing, this Court took the matter under advisement and requested proposed orders from both parties.



FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented at the evidentiary hearing, which allowed the Court to scrutinize the credibility of all witnesses presented. 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).

As his sole allegation for relief, Applicant alleges plea counsel, John J. Kozelski, III, was constitutionally ineffective for failing to convey a twenty-three year plea offer from the State and asked for specific performance of this plea offer as relief.

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). “A defendant has the right to effective assistance of counsel during the plea bargaining process.” Bell v. State, 410 S.C. 436, 440–41, 765 S.E.2d 4, 6 (Ct. App. 2014) (internal citations omitted); Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the

attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced 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 (1985).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 697. Therefore, the function of the post-conviction relief court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney.” Id. at 690.

CE 7

“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, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). “Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea.” Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that “guilty plea[s] must be treated as final in the vast majority of cases” and instructing that caution must be exercised so as not to “undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea”).

“[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” Missouri v. Frye, 566 U.S. 134, 145(2012); see also Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009) (adopting “rule that counsel’s failure to convey a plea offer constitutes deficient performance”). When alleging plea counsel was deficient in his or her handling of a plea offer, an applicant “must demonstrate a reasonable probability that: (1) he ‘would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;’ (2) ‘the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;’ and (3) ‘the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.’” Collins v. State, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (citing Missouri v. Frye, 566 U.S. 134, 147 (2012)); see Lafler v. Cooper, 566 U.S. 156, 164 (2012) (stating “a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have

accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed"). If an applicant is able to meet the requirements set forth above, the appropriate relief is to require the State to re-extend the previous plea offer to Applicant. Lafler, 566 U.S. at 174. ("The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement.")

In the present case, the uncontroverted testimony establishes a twenty-three year plea offer was extended by the State and counsel did not convey this offer to Applicant. However, the events before and after the extension of this offer and the terms of the offer itself that are in dispute, particularly whether the offer had certain conditions for acceptance and whether it would have been accepted by the plea court before it expired. Below is a summary of the testimony from plea counsel, Applicant, and the prosecutor about the plea offers extended and how the case progressed to its ultimate disposition.

Plea Counsel's testimony

Plea counsel John K Kozelski, III testified the State first extended a plea offer of thirty years imprisonment to the lesser-included offense of voluntary manslaughter, which Applicant rejected because he did not want to serve that much time. Kozelski continued to negotiate with Deputy Solicitor DuRant and informed him Applicant would be willing to accept a twenty year plea offer. The State then offered twenty-five years, but eventually, Kozelski and Deputy Solicitor DuRant were able to reach an agreement for a plea offer of twenty-two-and-a-half years, essentially "splitting the baby" between the twenty and twenty-five year offers. Kozelski presented this offer to Applicant, and on the evening of February 10, 2015, Kozelski informed Deputy Solicitor DuRant by email that Applicant had signed the sentencing sheets but had serious reservations about proceeding forward with the plea the following day because Applicant did not want to serve more than twenty years. See Court's Ex. No. 2 from May 12, 2015 ("I just

got back from the jail after visiting with Harold and I want you to be aware that this plea might not go forward tomorrow. While our conversation picked up where we left off regarding his plea, Harold continued to have doubts about pleading to 22.5 years. He did actually sign the sentencing sheets, but when I started to go over the plea colloquy he became more reserved. Eventually, our two-hour conversation ended with him saying he thinks he wants a trial now because he doesn't believe he should have to do more than 20 years for this crime. He sounds pretty firm despite me telling him a sentence that he would likely get if he were to be convicted at trial."). Despite expressing his doubt that the plea would go forward to the prosecutor, Kozelski testified he believed Applicant had accepted the State's plea offer as evidenced by the signed sentencing sheets (See Court's Ex. Nos. 3 & 4 from May 12, 2015) and expected the plea to go forward the following day.

Kozelski testified when he arrived for the plea the next day, he met with Applicant and Applicant was ready to enter the pleas, informing him, "Let's do it." He then entered the courtroom, where he was "mobbed" by members of Applicant's family (different than those he had previously met and interacted with) who claimed that Applicant was "retarded" and did not know what he was doing. According to Kozelski, these family members insisted Applicant needed to be evaluated. Kozelski testified he was aware Applicant had a low IQ, but that he had no previous concerns about Applicant's competency and believed Applicant understood what he was doing and was always interested in securing the best plea offer possible. However, based on this interaction with these members of Applicant's family, he became concerned and decided he needed to have Applicant evaluated prior to entering any plea. He immediately informed Deputy Solicitor DuRant that he could not go forward with the plea until Applicant was evaluated. He insisted it was his decision to delay the plea to have Applicant evaluated, not Applicant rejecting the plea offer. He immediately contacted Dr. Susan Knight, who had previously evaluated

Applicant for mitigation purposes, to see if she could evaluate Applicant for competency. Kozelski testified Dr. Knight informed him that she could likely do the evaluation quickly, perhaps within two to three weeks, because she had already met with Applicant.

Thereafter, on February 17, 2015, Applicant had still not been evaluated when Kozelski received a plea offer from the State for twenty-three years. See Court's Ex. No. 5 from May 12, 2015 ("John, If Dr. Knight is of the opinion that Mr. Jones is competent to stand trial I would appreciate you providing at least a letter to that effect so this will not be an issue in the future. Also, I have been thinking about this over the weekend and just see no reason why Mr. Jones should receive the benefit of the same offer he turned down last week. I really don't care if it is his fault, his families' fault or your fault. That is the whole point of making plea offers and setting time limits. Not much sense in doing it if you make an offer, the defendant doesn't accept and then you go back and give him the same offer. At this point I will allow your client to plead to Voluntary Manslaughter and the Weapons charge for a negotiated sentence of 23 years. If we are going to do this it will need to be done next Tuesday at the status conference, assuming that Judge Harrington has a court reporter available. Let me know what your client wants to do. I will need to know something by the end of this week so I can arrange to get the victim's family here again. Thanks.") Kozelski testified Applicant had not been evaluated at that time and accordingly, he did not have anything indicating Applicant was competent and was not in a position to proceed forward with this plea offer. He testified an evaluation had been scheduled for March 13, 2015, with Dr. Knight, which ultimately was not conducted because Applicant refused to cooperate. Kozelski did not convey this twenty-three year offer to Applicant. When asked why, Kozelski testified it was because he thought it was vindictive for the State to add a six month penalty to the previous offer based on his decision to have Applicant evaluated. He also testified Applicant still needed to be evaluated and therefore could not have accepted the

offer at that time because his competency had not been confirmed. He elaborated that he always thought he would be able to enforce the twenty-two-and-a-half year offer once Applicant was deemed competent because it was his position that Applicant had previously accepted that offer. He conceded that Applicant would not have been able to accept the new twenty-three year plea offer at the time because it was conditioned on his competency (which had not been established at the time) and would not have been established within the one week time parameters established by the State. He acknowledged that a plea court also would likely not accept a plea offer that that time with the present competency concerns.

Kozelski testified he and Deputy Solicitor DuRant continued to communicate about the case while waiting for an evaluation. See Court's Ex. No. 6 from May 12, 2015. Eventually, the State moved for Applicant to be evaluated by state agencies and an evaluation of Applicant was completed by the Department of Disabilities and Special Needs (DDSN). A report was submitted to the court on May 6, 2015. See Court's Ex. No 7 from May 12, 2015. Kozelski acknowledged that the report indicated Applicant was malingering. See id. ("Mr. Jones' scores on the M-FAST suggest a high probability that he was feigning or exaggerating symptoms of mental illness, including extreme symptomatology, rare combinations of symptoms, and unusual hallucinations.").

Kozelski testified that by this time, the case was approaching the top of the trial docket and Deputy Solicitor DuRant wanted to try the case the week of May 11th. He testified the State had a very strong case and Applicant did not want to proceed to trial. He acknowledged the State's evidence got stronger during the delay, including a match in bloody clothing Applicant was wearing to the victim's blood, but stressed that it was always a very strong case against Applicant from the beginning. He testified he attempted to revive the twenty-two-and-a-half year plea offer with Deputy Solicitor DuRant without success, and when that failed, he filed a motion

 12

asking the court to enforce the prior plea agreement based on Lafler. He testified a hearing was held on this on May 12, 2015, but ultimately denied by Judge Nicholson. He testified the State then extended a plea offer for thirty years for voluntary manslaughter and a consecutive five years for the weapons charge, which was the best offer the State would make. He testified he conveyed this offer to Applicant, who accepted it. The plea was entered the following day, May 13, 2015, before Judge Nicholson. He testified the parties reconvened on June 9, 2015, to vacate Applicant's plea to the weapons charge and allow him to plead to a similar weapons crime due to unforeseen consequences in how his sentence would be calculated.

Applicant's Testimony

Applicant testified Kozelski and he never discussed a trial and he never wanted a trial. Applicant testified he met with Kozelski regarding the twenty-two-and-a-half year plea offer from the State and he accepted it "immediately and without hesitation." He testified he signed the sentencing sheets for the twenty-two-and-a-half year plea offer and told Kozelski he wanted to go forward with the plea. He testified he ultimately accepted the State's plea offer for an aggregate thirty-five years because he did not want to go to trial and it was the best deal he was going to receive from the State at that point. He testified Kozelski never conveyed the twenty-three year plea offer to him and he would have accepted it if it was conveyed.

Deputy Solicitor DuRant's Testimony

Deputy Solicitor DuRant testified this was a very strong case for the State, including two inculpatory statements from Applicant. He testified his first offer was for thirty years imprisonment for the lesser-included offense of voluntary manslaughter, which Applicant rejected. He testified Applicant rejected this offer and Kozelski countered with an offer of twenty years. He testified he countered that offer with an offer of twenty-five years, and the two eventually negotiated to a twenty-two-and-a-half year plea offer. He testified he received an



email on the evening of February 10, 2015, from Kozelski indicating that Applicant had signed the sentencing sheets indicating acceptance of the plea but also expressing doubt that the plea would go forward because Applicant did not want to accept an offer requiring him to serve more than twenty years imprisonment. See Court's Ex. No. 2 from May 12, 2015. He testified the plea was supposed to be entered the next morning, but before going on the record, Kozelski insisted he needed to have Applicant evaluated based on his family's concerns. He testified this was the first time Kozelski had raised any issue regarding competency. He testified he unequivocally told Kozelski the plea offer of twenty-two-and-a-half years was rescinded if not accepted that day.

Deputy Solicitor DuRant testified approximately a week later, he had not heard from Kozelski regarding Applicant's competency and he sent him an email with a new plea offer of twenty-three years conditioned on Kozelski providing an opinion that Applicant was competent and acceptance by the end of the week. See Court's Ex. No. 5 from May 12, 2015. Deputy Solicitor DuRant stressed that this offer was conditioned on a finding of competency and must be accepted by the end of the week, which he conveyed to Kozelski. He testified he did not believe that there were any competency concerns with Applicant and this was a negotiation tactic to delay and secure a more favorable plea offer. He testified he did not hear back from Kozelski until the following Monday, when Kozelski emailed him and told him Dr. Knight had been unable to evaluate Applicant yet and once competency was addressed, "we should be much closer to a plea date." See Court's Ex. No. 5 from May 12, 2015. Deputy Solicitor DuRant testified the plea offer was rescinded at this time because neither conditions had been met: a proof of a competency finding and the timeline of within the week.

Deputy Solicitor DuRant testified he resumed preparing the case for trial, including sending additional items to an out-of-state laboratory for DNA testing. He testified this additional testing strengthened the State's case, as it confirmed through DNA analysis that the



blood all over the clothing Applicant was wearing when arrested belonged to the victim. He testified he eventually moved for Applicant to be evaluated by the state due to delays in the defense having him evaluated, which resulted in a report from DDSN finding Applicant was malingering.

He testified the final plea offer he made was for thirty years for the lesser-included offense of voluntary manslaughter and a consecutive five years for the weapons charge. He testified this offer was accepted after Judge Nicholson denied his motion to enforce the expired twenty-two-and-a-half year plea offer from February.

Applicant argues he established Kozelski failed to convey the twenty-three year plea offer and that he would have accepted the plea offer. Based on this, he argues he is entitled to specific performance of that twenty-three year plea offer based on Bell v. State, 410 S.C. 436, 765 S.E.2d 4 (Ct. App. 2014).

Respondent argues while Applicant has shown there was a more favorable plea offer that was not conveyed and he would have accepted it, he has failed to establish that the prosecution would not have cancelled the offer and the court would have accepted it, both of which are required for relief pursuant to Collins, 422 S.C. at 262, 810 S.E.2d at 877 (when alleging plea counsel was deficient in his or her handling of a plea offer, an applicant “must demonstrate a reasonable probability that: (1) he ‘would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;’ (2) ‘the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;’ and (3) ‘the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.’”). Respondent argues the plea offer was expressly conditioned on Applicant providing proof of his competency by the end of the week, and since these conditions

could not have been met because Applicant had not been evaluated (through his own actions in delaying evaluation by refusing to cooperate), the plea could not have gone forward. Additionally, Respondent argues a plea court would not have accepted the plea during the time it was extended because there were unresolved competency concerns during the time period of the offer.

Based on this Court's review of the standard set forth above and the evidence presented, this Court finds Applicant has failed to meet his requisite burden of establishing counsel was constitutionally ineffective in failing to convey the twenty-three year plea offer from the State. While it is undisputed that Kozelski failed to convey the twenty-three year plea offer, it is also undisputed that Applicant had not been evaluated or otherwise declared competent as required under the conditions of the State's plea offer and would not have been within the one-week timeline given by the State. Accordingly, Applicant cannot show that the plea offer would have been entered without being cancelled by the prosecution, and therefore, has not met his requisite burden of proof as set forth in Collins, 422 S.C. at 262, 810 S.E.2d at 877. Additionally, Applicant cannot establish the plea offer would have been accepted by the court during the duration of the offer, as there were competency concerns raised by defense counsel that more likely than not would have precluded a plea court from accepting the plea. See Garren v. State, 423 S.C. 1, 14, 813 S.E.2d 704, 711 (2018) (internal citations omitted) ("Before a defendant may plead guilty, it must be established that the defendant is competent and that the defendant's decision to plead guilty is a knowing and voluntary one.").

In conclusion, because Applicant is unable to establish the twenty-three year plea offer would have been timely accepted without being cancelled by the prosecution or rejected by the plea court, he has failed to meet his requisite burden of proof. Accordingly, this application is denied and dismissed with prejudice.

 16

CONCLUSION


Based on all the foregoing, this Court finds Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203 and 243, 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 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. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 22 day of February, 2019.



G. THOMAS COOPER, JR.
Presiding Judge
Ninth Judicial Circuit

CAUDEN, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
HAROLD JONES,)
)
Applicant.)
)
-versus-)
)
STATE OF SOUTH CAROLINA,)
)
Respondent.)

IN THE SUPREME COURT OF SOUTH CAROLINA

Case No.: 2015-CP-10-6405

FILED
2019 MAR -7 PM 1:50
JULIE J. ARMSTRONG
CLERK OF COURT
RY

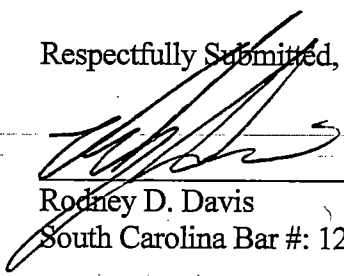
REQUEST FOR REPRESENTATION ON APPEAL

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;
2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;
3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;
4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;
5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting his appeal to the South Carolina Court of Appeals.

Respectfully Submitted,

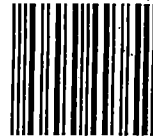


Rodney D. Davis
South Carolina Bar #: 12396

3/7, 2019
Charleston, South Carolina.



1024



29211

U.S. POSTAGE PAID
PM 2-Day
CHARLESTON, SC
29401
MAR 07, 19

AMOUNT
\$7.35
R2305K141335-16

TY PUBLIC DEFENDER
JNTY OFFICE BLDG.
REET, 5TH FLOOR
, SC 29401-2214

The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211