ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

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MAR 14 2019
S.C. SUPREME COURT

March 12, 2018

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

Re: Kelvin Eugene Cohen v. State
2017-CP-42-4118

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,

Susannah Ross
Attorney at Law

enclosure

cc: Office of the Attorney General
Office of Appellate Defense
Spartanburg County Clerk of Court

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAR 14 2019
S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Michael G. Nettles , Circuit Court Judge

2017-CP-42-4118

Kelvin Eugene Cohen, ... Appellant,
v.
The State, ... Respondent.

NOTICE OF APPEAL

Kelvin Eugene Cohen appeals the Honorable Michael G. Nettles 's Order of Dismissal filed February 8, 2019.

This 12 day of March, 2019.

Susannah Ross, Attorney at Law
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Greenville, SC 29601
(864) 242-0029
Attorney for Appellant

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

STATE OF SOUTH CAROLINA	**IN THE SUPREME COURT**
COUNTY OF GREENVILLE	
KELVIN EUGENE COHEN, APPELLANT,	
VS.	**CERTIFICATE OF SERVICE BY MAIL**
THE STATE OF SOUTH CAROLINA, RESPONDANT.	

1. I am the attorney for the Applicant in the above-captioned matter.

2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Notice of Appeal** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

Office of the Attorney General
Assistant AG Johnny James, Jr.
P.O. Box 11549
Columbia, SC 29211

Attorney for Defendant

This 12 **day of** March **, 2019**

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Kelvin Eugene Cohen, #314256, Applicant, v. State of South Carolina, Respondent.	2017-CP-42-4118 **ORDER OF DISMISSAL WITH PREJUDICE**

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Kelvin Eugene Cohen (Applicant) on November 7, 2017. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on February 22, 2018 at the Spartanburg County Courthouse. Applicant was present and represented by Susannah Ross, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Matthew Shealy, Esquire, (Counsel) also testified. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the plea transcript, the PCR application, and Respondent's return.

PROCEDURAL HISTORY

Applicant is presently incarcerated pursuant to orders of commitment of the Spartanburg County Clerk of Court. In August 2015, the Spartanburg County Grand Jury indicted Applicant for hit and run causing death (2015-GS-42-3501), habitual traffic offender ("HTO") causing death (2015-GS-42-3502)[1], and failure to stop motor vehicle when signaled by officer (2015-GS-42-3503).

1 He was later re-indicted for the same offense in December 2015.

The charges resulted from an incident on June 8, 2015, in which Applicant was robbed of drugs and money by two men, Campbell and Burris. As the men fled in a white Cadillac, Applicant chased them in a Ford 500. A bystander witnessed the Cadillac being chased at around 95 miles per hour and shots being fired from the Cadillac back toward Applicant's vehicle as Applicant's is ramming his vehicle into the back of the Cadillac. Applicant's vehicle hit the Cadillac causing it to careen off the road and slam into a tree. Campbell died on the scene.

A law enforcement officer saw Applicant's vehicle as Applicant tried to regain control of his vehicle and believed the vehicle was being operated by an impaired driver. The officer activated his blue lights and sirens in order to stop Applicant's vehicle, however, Applicant did not stop for 5.6 miles, traveling in excess of 70 miles per hour at times. The officer's in-dash camera recorded the chase. After the collision with the Cadillac, a guardrail, and a tree, Applicant's vehicle broke down and officers took him into custody. (Tr. pp. 21-25).

Matthew W. Shealy, Esquire, represented Applicant. Assistant Solicitor Jennifer A.J. Jordan represented the State. On December 13, 2016, Applicant pled guilty as indicted to HTO and failure to stop and pled *nolo contendere* pursuant to N.C. v. Alford to the hit and run charge before the Honorable J. Derham Cole. Pursuant to a negotiation between Applicant and the State, Judge Cole sentenced Applicant to imprisonment for concurrent terms of ten years for the hit and run, twenty years suspended upon the service of ten years and five years' probation for HTO and five years for failure to stop. Applicant did not appeal his convictions or sentences.

ALLEGATIONS

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
   a. Counsel "failed to enforce the whole "negotiated" promised plea

agreement for all charges to be non-violent and 65%, which I had detrimentally relied on all charges being non-violent and 65%."

b. "Counsel further failed to properly research and investigate facts, the laws surrounding the State's case."

c. Counsel failed to "hire his own Dr. to review the med. reports per 17-3-50 or 17-27-60."

2. Involuntary guilty plea

a. "My plea was not voluntarily nor intelligently made, due to my agreements. Thus, I should be allowed to enforce the whole negotiated promised plea agreement and or allowed to depart from the alleged truth of my statements I made during my plea because I would nhot have pled if it was not for counsel's ... unprofessional errors."

SUMMARY OF PCR HEARING

At the start of the hearing, Applicant delineated the allegations he would be pursuing at the hearing. Those allegations include: Applicant was misadvised regarding whether his charges were parole eligible; Counsel failed to investigate and call an expert doctor to testify as to the cause of death of the victim; and that part of Applicant's sentence was not part of his plea agreement.

I. Applicant testified to the following:

Applicant testified the victims robbed him at gunpoint of drugs and money while in the back seat of their car. He was able to run away from the car behind a trailer where they caught up with him, stripped off his clothes, and robbed him again. After the victims took off in their car, Applicant chased them in another vehicle. Applicant claimed the victims also robbed his friend, Smith, and he thought they kidnapped him, which is why he chased them. During the chase, the victims began shooting from their car at him, so he hit the back of their vehicle with his. He did not know victim Campbell died, but did not stop because the victims had been shooting at him.

Applicant testified his plea agreement included a twenty year sentence, suspended to ten years and probation for five for both the hit and run charge and the HTO charge. The agreement also included a concurrent five year sentence for failing to stop. However, Applicant testified he was sentenced to only a straight ten years on the hit and run and Counsel did not object to this

discrepancy. Additionally, Applicant testified he believed he was pleading to all non-violent offenses. Applicant also believed all of his charges were parole eligible charges. Applicant testified Counsel did not advise him regarding parole, but did advise him he was pleading to non-violent crimes. Applicant testified he received a letter from Counsel regarding his mis-advice. Counsel also explained to Applicant that if he violated his probation, the State would put the twenty years back on the table.

II. Counsel testified to the following:

Counsel was an Assistant Public Defender with Spartanburg County at the time he represented Applicant. Counsel is now in private practice. He has been practicing criminal law for approximately ten years. Counsel testified he discussed parole eligibility with Applicant. He explained to him he was pleading to a no-parole offense which would require him to serve eighty-five percent of his sentence before being eligible for supervised release. Applicant also discussed violent versus non-violent categorizations. Counsel explained the two issues, parole and violent classification, are separate and unrelated. Counsel admitted he misadvised Applicant that the hit and run offense was non-violent, and the sentencing sheet was erroneous as well. Counsel admitted he sent a letter to Applicant informing him of this mistake. However, the mistake had no bearing on whether Applicant was parole-eligible or not nor did it affect if Applicant could be released after sixty-five or eighty-five percent service.

Counsel testified he reviewed all of the discovery with Applicant. Counsel also drove to the scene and re-routed the chase. Counsel was prepared for trial and intended to make non-legal arguments to the jury in Applicant's defense. Counsel believed the jury would understand that Applicant did not stop after the accident because the victims had robbed and then shot at Applicant and also that the jury would have some sympathy for Applicant. However, because he did not

believe there was a defense to the HTO charge, he believed a plea was in Applicant's best interest. Counsel testified he realized during the plea that Applicant was being sentenced to ten straight years as opposed to the negotiated sentence of twenty years suspended to ten years, but did not object because the error was to the benefit of Applicant. Counsel explained a straight ten year sentence would be better than risking violating probation and having a suspended twenty year sentence over his head.

Counsel testified Applicant had never told him about the kidnapping theory regarding Smith. Counsel testified that story was contrary to the story Applicant told him prior to trial. Applicant told Counsel Smith had set him up in the robbery. Based on that information, Counsel does not believe Applicant would have been chasing the victims in an effort to rescue Smith. Counsel testified that had Applicant told him that, it would have helped them at trial. Counsel felt one of the weaknesses in their case was how far Applicant drove chasing the victims and the distance from where they started to where the car was hit was pretty far. Counsel also explained Applicant was originally charged with carjacking, but after Counsel investigated that situation and found out he had permission to take the car, he got the State to dismiss that charge. Counsel reviewed the discovery, drove the route of the chase, and had spoken to witnesses.

After the conclusion of the testimony, Applicant's PCR counsel informed the Court that Applicant wanted his sentencing to be amended to reflect his negotiated sentence, however PCR counsel believed that would not be in Applicant's best interest. She believes his straight ten year sentence is more beneficial than the bargained-for suspended twenty year sentence. This Court informed Applicant's PCR counsel it believes the only relief available is a new trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency.

I. Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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 (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. 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 pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Misadvice regarding parole eligibility & violent crime categorization

Applicant alleges Counsel misadvised him regarding whether he was pleading to a violent or non-violent offense and because his offense was violent, he will be required to serve at least eighty-five percent of his sentence, rather than sixty-five percent. Classification of crime as violent or non-violent is also a collateral consequence of sentencing and a guilty plea is not rendered involuntary due to counsel's failure to inform defendant of consequences of a violent crime conviction. Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997). "Normally, parole eligibility is a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea." Griffin v. Martin, 278 S.C. 620, 621, 300 S.E.2d 482, 482-83 (1983) (citing Bell v. North Carolina, 576 F.2d 564 (4th Cir.1978)). However, where an applicant contends that he was "actively misinformed about his parole eligibility," such a claim may be raised in an action for PCR. Id.; Coats v. State, 352 S.C. 500, 503, 575 S.E.2d 557, 558 (2003). Furthermore, while erroneous parole advice from a judge (or counsel) could conceivably mislead a defendant to his detriment, it would be "wholly impractical" to require the automatic reversal of the guilty plea without "something more." Hunter v. State, 316 S.C. 105, 109, 447 S.E.2d 203, 205 (1994) *abrogated on unrelated grounds by* Simpson v. State, 329 S.C. 43, 495 S.E.2d 429 (1998).

Counsel testified credibly that he gave the correct advice regarding parole eligibility. His testimony that he misadvised Applicant regarding the violent classification of the hit and run charge is also credible. This Court believes Applicant has confused the two issues. Parole eligibility and violent classification are two separate issues. Despite Counsel's error in advising the hit and run

offense was non-violent, Applicant has not proven he has suffered any prejudice as a result of that mis-advice and this Court does not find it reasonably likely that had Counsel given the correct advice, Applicant would not have pled guilty. This Court finds Applicant has failed to prove the "something more" required by Hunter. Applicant did not testify the violent categorization induced him to plead guilty, nor is it reasonable to believe it was the factor that induced his plea, in light of the evidence against him and the circumstances of his case. It is worth noting, a violent classification has no effect on the whether an inmate must serve sixty-five or eighty-five percent of his sentence before early release, as that is determined by parole eligibility. Here, Counsel did not give incorrect advice regarding parole eligibility. This Court finds Counsel was not deficient. This allegation is denied and dismissed.

Failure to investigate and hire expert witness

Applicant failed to present any evidence in support of this allegation. To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). Applicant has failed to show what beneficial information could have been discovered had Counsel done more investigation. Even so, Counsel testified credibly that not only did her review all of the discovery, he also drove the route, went to the scene, and spoke to witnesses. This Court finds Counsel's investigation was beyond reasonable.

Applicant also alleges Counsel was ineffective for not getting an expert doctor to testify as to the cause of death of the victim. First, this Court notes any claims surrounding the failure to present a witness assumes the testimony from the witness would have been favorable to the defense and therefore affected the outcome of the trial. However, this contention is based on pure conjecture and speculation. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Because Applicant failed to produce the testimony of an expert doctor, any prejudiced derived from any of Counsel's actions leading to her not testifying is purely speculative. Therefore, Applicant has failed to meet his burden to prove Counsel was ineffective.

II. Involuntary Guilty Plea

Applicant also asserts his plea was involuntary because his sentence was not in accordance with his plea agreement with the State. The record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton, 376 S.C. 138, 654 S.E.2d at 874 (citing Boykin v. Alabama, 395 U.S. 238, 242 (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 the court and defendant, between the 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)). Further, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton, 376 S.C. at 137–38, 654 S.E.2d at 874 (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)). "In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." Id. at 138–39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

In PCR cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citations omitted). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant 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). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985). Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann v. Richardson, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent.

... depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." Id. at 771.

The record fully supports the knowing and voluntary nature of Applicant's plea. Applicant has failed to give a sufficient reason to be allowed to depart from the truth of his statements made during his guilty plea.

To the extent Applicant asserts his sentence is not in accordance with the sentence he negotiated with the State, this Court fails to understand why Applicant believes his actual sentence is not more favorable to him than that which he negotiated. Even Counsel testified he did not bring the discrepancy to the Court's attention because the error was beneficial to his client. Upon review of the record and the testimony presented, this Court agrees with Counsel's assertion that the ten year sentence was better than the suspended twenty and it was in Applicant's best interest not to object during the guilty plea to this mistake.

Lastly, although this Court expressed concern with regard the type of relief it can grant during the hearing, this Court is aware that if an error affects only an applicant's sentence and not his plea or trial, remanding for re-sentencing is an acceptable form of relief this Court has the authority to grant. However, this Court does not believe this case warrants a remand for re-sentencing. If the negotiated plea were followed to the letter, it would adversely affect Applicant. Therefore, this Court finds the record reflects Applicant's plea was voluntary.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove

prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 4 day of February, 2019.

MICHAEL G. NETTLES
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

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