THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2018-CP-02-01800

Raymond E.A. Burns,
#373437, Appellant

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Raymond E.A. Burns appeals the Order of the Honorable J. Cordell Maddox, Jr., dated June 12, 2019, a copy of which is attached. Appellant received written notice of entry of this Order on June 17, 2019.

July 10, 2019

Nancy C. Fennell
Post Office Box 2176
Irmo, South Carolina 29063
(803) 553-1772
Attorney for Appellant

Other Counsel of Record:
Janell H. Gregory
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549
Attorney for Respondent
(803) 734-3970

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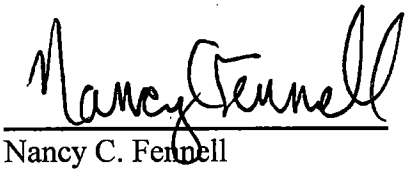
PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on July 10, 2019, addressed to Respondent's attorney of record, Janell H. Gregory, Assistant Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549.

July 10, 2019



Nancy C. Fennell
Post Office Box 2176
Irmo, South Carolina 29063
(803) 553-1772
Attorney for Appellant

LAW OFFICE OF NANCY C. FENNELL, LLC
P.O. Box 2176
Irmo, SC 29063
nancyfennell1@gmail.com **(803) 553-1772**

July 10, 2019

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Raymond E.A. Burns, #373437 v. State of South Carolina
Case No. 2018-CP-02-01800

Dear Ms. Kitchings:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

(1) Proof of service of the notice of appeal on the respondent.

(2) A copy of the order which is to be challenged on appeal.

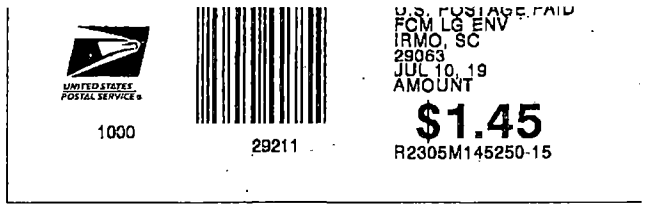
Sincerely,

Nancy C. Fennell

cc: Janell H. Gregory
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Raymond Edward Alan Burns

Law Office of Nancy C. Fennell, LLC
P.O. Box 2176
Irmo, South Carolina 29063



The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Law Office of Nancy C. Parnell, LLC
P.O. Box 2176
Irmo, South Carolina 29063

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Columbia, South Carolina 29211

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SC COURT OF APPEALS

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT
	)	
	)	2018-CP-02-1800
Raymond E.A. Burns, #373437,	)	
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

FILED 10-17 2019 12:30 SP
C.C.C.P. & G.S.
Deputy Clerk

This matter comes before the Court by way of an application for post-conviction relief filed on July 31, 2018, by Raymond Burns (Applicant) and was amended on January 17, 2019. The State (Respondent) filed a Return on October 31, 2018, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on May 13, 2019, at the Aiken County Courthouse. Applicant was present at the hearing and represented by Nancy Fennell, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf. Assistant Public Defender Suzanne H. Hayes of the Second Circuit Public Defender's Office (Counsel) also testified. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application.

PROCEDURAL HISTORY

The records before this Court establish Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Aiken County Clerk of Court's order of commitment. During its November 2016 term, the Laurens County Grand Jury indicted Applicant for failure to stop and render aid at the scene of an accident resulting in death (2016-GS-02-02113). Additionally, in August 2017, Applicant waived presentment to the grand jury on an indictment

for reckless homicide (2017-GS-02-1590). Counsel represented Applicant on the charges. Assistant Solicitor Samuel B. Grimes of the Second Circuit Solicitor's Office prosecuted the case. On August 8, 2017, Applicant pled guilty as indicted to both charges before the Honorable Doyet A. Early, III. Judge Early sentenced Applicant to imprisonment for fifteen years for the hit and run that resulted in a death and a concurrent ten years for reckless homicide. Applicant did not appeal his conviction or sentence.

SUMMARY OF FACTS

On January 3, 2016, David Crutchfield (Victim) was walking west facing oncoming traffic on North Street in New Ellington. (GP Tr. 11.) Applicant was driving westbound on North Street at the same time. (GP Tr. 11.) Applicant was driving on the wrong side of the road when he struck Victim from behind. (GP Tr. 12.) Victim was pronounced dead at the scene. (GP Tr. 14.) Applicant continued to drive to his friend's house after hitting Victim. (GP Tr. 12.) Applicant left his damaged vehicle at his friend's house and had his friend drive him home. (GP Tr. 13.) According to Applicant, when he drove past the area where he struck Victim, he observed police officers at the scene and that is when he realized he hit a person. (GP Tr. 13.) Applicant went home and called several people before calling police. (GP Tr. 13.) Officers responded to Applicant's residence and arrested Applicant. (GP Tr. 13.) Applicant told officers he had smoked a blunt and took a Xanax just before they arrived to his residence. (GP Tr. 14.)

SLED test results of Applicant's blood indicated that he tested positive for both marijuana and Xanax. (GP Tr. 15.) The blood test results did not provide any conclusive information as to whether Applicant was intoxicated at the time of the collision. (GP Tr. 15.) According to Applicant's friend, he and Applicant smoked a blunt at noon the day of the collision. (GP Tr. 15.) However, his friend did not observe Applicant smoke any marijuana or take any pills after the collision, which is not what Applicant told law enforcement. (GP Tr. 16.) The State consulted

with an expert to see if the blood results showed Applicant had an impairing amount of marijuana or drugs in his system. (GP Tr. 18.) According to the State's expert, marijuana metabolizes quickly, so the results would be unusual if Applicant had only consumed marijuana around noon on the day of the collision. (GP Tr. 18.) Based on research and their expert, the State believed Applicant's statement that he consumed some amount of marijuana after the collision occurred. (GP Tr. 18.) This information led the State to negotiate a plea deal with Counsel for Applicant to plead to reckless homicide rather than felony driving under the influence. (GP Tr. 20.) However, during the guilty plea hearing, Applicant admitted to the court that he had only smoked marijuana at noon on the date of the collision, but told officers he smoked it after the collision because he knew he would test positive for marijuana. (GP Tr. 31.) Applicant admitted to being a "heavy smoker" of marijuana prior to the collision and stated he smoked "every day." (GP Tr. 31.) Applicant told the court his heavy use is probably why his levels were higher than the State's expert expected for someone who only smoked at noon on the date of the collision. (GP Tr. 31.) Counsel researched the blood test results and explained to the court that chronic marijuana users have THC stored in their fat cells and it would take a long time for THC to get out of their system. (GP Tr. 35.) Counsel went on to state she doubts it affected Applicant's ability to operate his vehicle and stated it is probably akin to an alcohol issue if one was an alcoholic. (GP Tr. 35.)

During the guilty plea hearing, Judge Early stated, "Society should be protected from people driving and heavily using marijuana." (GP Tr. 36.) Judge Early also commented on Applicant's confession that he had not smoked marijuana after the collision and noted that Applicant would not have been provided his current plea offer had he been truthful with law enforcement prior to the plea hearing. (GP Tr. 57-58.) Judge Early ultimately sentenced Applicant to fifteen years for leaving the scene of an accident involving death and a concurrent ten years for reckless homicide. (GP Tr. 59.)

ALLEGATIONS RAISED

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

1. Failure to file a direct appeal
2. Failure to inform Applicant of the details of his plea, including classification of the crime and parole eligibility.
3. Persuaded Applicant to make a plea deal by advising him he would get the maximum sentence at trial.
4. Failure to mitigate sentencing.

On January 17, 2019, Applicant, through counsel, amended his application to allege the following:

5. Counsel made prejudicial statements during sentencing comparing Applicant's actions to driving under the influence of alcohol.

On May 13, 2019, an evidentiary hearing was convened. Applicant proceeded with the hearing on all of the allegations set forth in his application and amended application.

APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order 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. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 300 S.C. 115. With respect to guilty plea counsel, 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, 59 (1985).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, and Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

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 Counsel and any prejudice therefrom.

Counsel failed to file a direct appeal.

Applicant alleges Counsel was ineffective for failing to file a direct appeal. Applicant testified after the guilty plea that he and Counsel were both emotional. Applicant testified he told Counsel he would like to appeal. Applicant testified he wrote a letter to Counsel about his appeal because he thought an appeal had been filed.

Counsel testified she directly asked Applicant if he wanted to appeal and Applicant told her that he did not because it would not do any good. Counsel testified she did not see any meritorious grounds to appeal Applicant's case. Counsel testified if Applicant had wanted to appeal, she would have filed an appeal. On cross-examination, Counsel testified she received a letter from Applicant in April of 2018 stating he did not belong in prison and felt the sentence was too harsh. Counsel testified she told him he could file a post-conviction relief application. Counsel testified Applicant did not ask him to appeal his case in the letter.

Counsel has a constitutionally-imposed duty to consult with defendant about appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470 (2000). "[A] defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently." Id, 528 U.S. at 477.

This Court finds Counsel's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. This Court finds Applicant has failed to establish how Counsel was deficient for failing to file an appeal after Applicant specifically instructed Counsel not to file an appeal. Additionally, Counsel testified she did not see any meritorious grounds for Applicant to raise on appeal. Based on the forgoing, Applicant has failed to meet his burden set forth in Strickland and this allegation must be denied and dismissed with prejudice.

Failure to inform Applicant of the details of his plea, including classification of the crime and parole eligibility. Counsel persuaded Applicant to make a plea deal by advising him he would get the maximum sentence at trial.

Applicant alleges Counsel was constitutionally ineffective for failing to explain to him the terms of his plea, the classification of his crime, and parole eligibility. Applicant further alleges Counsel advised Applicant he would get the maximum sentence at trial, therefore forcing him to make a plea deal with the State. Applicant testified Counsel was appointed to represent him and he met with her three to five times during her representation. Applicant testified Counsel talked to him about potential outcomes of his case and told him he could possibly get up to fifty years. Applicant testified he talked to Counsel about a guilty plea and that she did not think he would get more than ten years. Applicant testified Counsel was surprised at the sentence he received because she did not believe he would get that much time. Applicant testified he believed he would get five to ten years and he would have gone to trial had he known he was going to get fifteen years. Applicant testified he did not have an understanding of parole, but the judge told him about his parole eligibility.

Counsel testified she met with Applicant nine times in person and explained his charges, potential sentences, and what concurrent and consecutive sentences could be in his case. Counsel testified she did not tell Applicant he would get the maximum sentence, but she did advise him of what the maximum sentence was that he faced for his charges. Counsel testified she informed Applicant the classification of his charges and that he would have to serve 85% of his sentence. Counsel also testified she believed it was in Applicant's best interest to plead guilty. Counsel testified she prepped Applicant's case for trial and would have taken the case to trial had he wanted to pursue a jury trial. Counsel testified it was Applicant's choice whether to accept the plea offer from the State. Counsel testified she never told Applicant that he would get probation, but she did ask the plea court for probation on Applicant's behalf. (GP Tr. 43.) Counsel testified there was

no doubt in her mind that the State would have been able to prove the hit and run charge at trial and Applicant would have gotten more time had he proceeded to trial.

Additionally, during the plea hearing, Counsel informed the plea court she had reviewed Applicant's charges with him, the classification, potential sentences, that he was not parole eligible, and that Applicant would have to serve 85% of the sentence imposed by the court. (GP Tr. 3-4.) The plea court also reviewed with Applicant his charges, sentences, parole implications, and that he would have to serve 85% of his sentence. (GP Tr. 6.)

This Court finds Counsel's testimony with respect to these allegations very credible whereas Applicant's testimony is not credible. This Court finds Applicant has failed to establish how Counsel was deficient as Counsel reviewed Applicant's plea and charges with him prior to the plea hearing. Counsel also appropriately informed Applicant of the sentences he faced on his charges and properly counseled him on the plea offer from the State. Additionally, the plea judge also reviewed with Applicant the terms of his plea, his charges, and parole implications prior to Applicant proceeding with his guilty plea. This Court finds Applicant was aware of the terms of his guilty plea, the classification of his charges and parole eligibility of those charges prior to entering his guilty plea. Based on the forgoing, Applicant has failed to establish any deficiency with respect to Counsel's representation or any resulting prejudice from the alleged deficiency. Therefore, Applicant has failed to meet his burden set forth in Strickland and these allegations must be denied and dismissed with prejudice.

Counsel failed to mitigate sentencing

Applicant alleges Counsel was constitutionally ineffective for failing to present mitigation to the plea court prior to Applicant being sentenced. However, Counsel testified she presented letters from Applicant's family to the plea court and had Applicant's uncle, Robert Green, and Applicant's boss from Amick Farms testify on Applicant's behalf. Counsel also testified she

believed Applicant calling law enforcement to turn himself in after the collision was good mitigation. Counsel testified Applicant's own admission to the plea judge stating he did not smoke marijuana after the incident like he told law enforcement hurt Applicant.

This Court finds Counsel's testimony with respect to this allegation very credible. This Court finds Applicant has failed to establish how Counsel was deficient because she presented mitigation on Applicant's behalf including testimony from his uncle and boss. Counsel also provided letters from Applicant's family to the plea court as well. Applicant failed to show this Court what else Counsel could have or should have provided to the plea judge during the plea hearing that would have impacted the sentence imposed by the plea court. Based on the forgoing, Applicant has failed to meet his burden set forth in Strickland and this allegation must be denied and dismissed with prejudice.

Counsel made prejudicial statements during sentencing comparing Applicant's actions to driving under the influence of alcohol.

Applicant alleges Counsel was ineffective for comparing Applicant's THC levels to driving under the influence of alcohol during the plea hearing. Applicant specifically alleges the following exchange between Counsel and the plea judge impacted his sentence:

> Counsel: . . . And I have done some research in regards to the marijuana. Based on the chronic users from what I've looked into, your body, your fat cells, always store marijuana in your - - the THC in your system and it takes a long time to get that out. When you're chronically using that –
>
> Court: While it's in your system, does it affect your ability to operate a vehicle if it takes such a long time for it to get out?
>
> Counsel: I would - - I doubt that, but I - -
>
> Court: Huh?
>
> Counsel: - - I did not look into that. I'm assuming it's kind of like an alcohol issue if you're an alcoholic.

Court: You can have alcohol in you and it affects your ability to operate a vehicle notwithstanding you're letting it ease out over period of time.

Counsel: It does, Your Honor. It would be really nice if they could get studies to give us those numbers.

(GP Tr. 35.)

After reviewing the record, it is clear Counsel's statement was made in an attempt to explain to the plea judge why Applicant's THC levels were so high after the collision since Applicant had just admitted to the plea judge that he had lied to law enforcement and had *not* smoked marijuana after the collision. The State had already presented information that their expert believed it was unlikely Applicant's THC levels would be as high as they were if Applicant had not smoked marijuana within four hours of his blood test, which corroborated Applicant's initial statement to law enforcement and ultimately led to a favorable plea offer. However, after Applicant admitted in court that his initial statement to law enforcement was a lie, Counsel attempted to provide an explanation to the plea judge as to how his blood test could have come back with high THC levels when he had admittedly only smoked marijuana at noon on the date of the collision. Counsel's explanation was based on her research that THC is stored in the fat cells of chronic marijuana users, which could explain the abnormally high results. This Court does not read Counsel's explanation to mean that Applicant was under the influence at the time of the collision or that he was impaired at the time of the collision.

Further, Applicant admitted to being a "heavy smoker" prior to the collision and stated he smoked "every day." (GP Tr. 31.) It is clear from the record that Applicant's admission was impactful on the plea court's sentencing of Applicant. (GP Tr. 57-59.) Judge Early stated, "My position demands that I chastise people who heavily use marijuana from driving and killing people." (GP Tr. 59.)

Counsel testified she did not believe her statement had an effect on Applicant's sentence. Counsel testified she researched Applicant's blood results and looked up experts on marijuana usage when investigating Applicant's case. Counsel testified there is no number for intoxication of marijuana like there is in alcohol for DUI related events. Counsel also testified Applicant looked impaired in his booking photo and acted impaired in his interview with law enforcement.

This Court finds Counsel's testimony with respect to this allegation very credible. This Court finds Applicant has failed to establish how Counsel was deficient as Applicant admitted to the plea court that he was a heavy user of marijuana and had smoked marijuana at noon on the date of the collision. Further this Court finds, Applicant has failed to show any resulting prejudice from the alleged deficiency as Counsel's attempt to explain Applicant's high THC levels hours after the collision did not prejudice Applicant in any way. Based on the forgoing, Applicant has failed to meet his burden set forth in Strickland and this allegation must be denied and dismissed with prejudice.

CONCLUSION

Based on the foregoing, the 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.

The Court notes Applicant must file and serve a notice of appeal within thirty days from post-conviction relief counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on

Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 12th day of June, 2019.

J. CORDELL MADDOX, JR.
Presiding Judge
Second Judicial Circuit

Anderson, South Carolina