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August 12, 2019

RECEIVED

AUG 14 2019

S.C. SUPREME COURT

Via US Mail

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

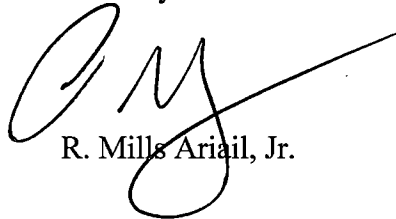
***Re: Notice of Intent to Appeal from John A. Duckett vs. State of South Carolina
C.A. No.: 2018-CP-23-4596***

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable Brian M. Gibbons' Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law



R. Mills Ariail, Jr.

RMajr/dl
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

AUG 14 2019

Brian M. Gibbons, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2018-CP-23-4596

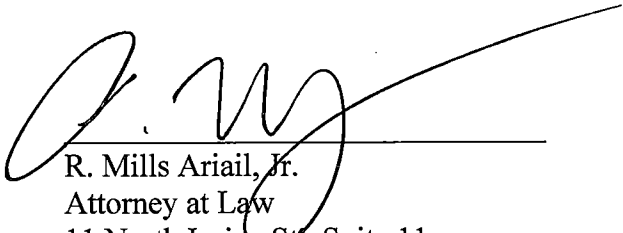
John A. Duckett,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable Brian M. Gibbons' Order of Dismissal dismissing Appellant's application for post-conviction relief. On July 19, 2019, the Honorable Brian M. Gibbons signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on August 1, 2109. A copy of the Honorable Brian M. Gibbons' Order of Dismissal is attached.



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Attorney for John A. Duckett

Greenville, South Carolina
August 12, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No.2018-CP-23-4596

John A. Duckett,..... Appellant,

v.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this August 12, 2019, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Taylor Z. Smith, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

John A. Duckett #00270743
Wateree River Correctional Institution
8200 State Farm Road,
Rembert, SC 29128

SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

August 12, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

John A. Duckett, #270743,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

Case No.: 2018-CP-23-4596

ORDER OF DISMISSAL

FILED-CLERK OF COURT
PAUL B. BRIDGES, CLERK

2019 JUL 29 PM 3:36

This matter comes before the Court by way of an Application for Post-Conviction Relief filed on September 5, 2018, by John Anthony Duckett (Applicant). The State (Respondent) filed a Return and Motion for More Definite Statement on May 5, 2019. An evidentiary hearing into the matter was convened before the Honorable Brian M. Gibbons on June 3, 2019, at the Greenville County Courthouse. Applicant was present at the hearing and represented by R. Mills Ariail, Jr., Esquire. Assistant Attorney General Taylor Z. Smith of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf, and Dorothy A. Manigault (Counsel), Esquire, testified on behalf of Respondent. 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 AND FACTUAL HISTORY

Applicant is presently incarcerated in the South Carolina Department of Corrections pursuant to orders of the Greenville County Clerk of Court. During its April of 2016 term, the Greenville County Grand Jury indicted Applicant for possession of cocaine (2015-GS-23-00637). During its July of 2016 term, the Greenville County Grand Jury indicted Applicant for distribution of cocaine (2016-GS-23-05728) and two counts of distribution of heroin (2016-GS-23-05726 and



2016-GS-23-05727). Applicant was also indicted by the Greenville County Grand Jury for distribution of heroin (2016-GS-23-05729). Applicant was represented by Counsel, and Assistant Solicitor Howard L. Steinberg of the Thirteenth Circuit Solicitor's Office prosecuted the cases.¹

On October 12, 2017, Applicant appeared before the Honorable Letitia H. Verdin and pleaded guilty to possession of cocaine, third offense (2015-GS-23-00637), and distribution of heroin, third offense (2016-GS-23-05726). Judge Verdin sentenced Applicant, in accordance with Mr. Steinberg's recommendation, to ten years for possession of cocaine, third offense, and ten years for distribution of heroin, third offense, with credit for time served, and with both sentences running concurrent with the two sentences imposed by the Honorable G. Thomas Cooper, Jr., after Applicant's trial earlier that same week. On October 13, 2017, Mr. Steinberg dismissed a remaining charge of distribution of heroin (2016-GS-23-05729) pursuant to the plea agreement with Applicant. Applicant did not appeal his guilty pleas and sentences.

CURRENT PROCEEDING

An evidentiary hearing was held on June 3, 2019. At the start of the hearing, Applicant indicated through counsel that he wished to withdraw his Application. Applicant was sworn, and then the Court explained that this would be his "one bite at the apple", that any subsequent PCR action he filed would likely be dismissed due to successiveness, and that Applicant could be exposed to a greater sentence if he were to be successful in his PCR action. Applicant affirmed

¹ On October 9-10, 2017, Applicant appeared before the Honorable G. Thomas Cooper, Jr., and a jury, and was convicted after a jury trial on the charges of distribution of cocaine, third offense (2016-GS-23-05728), and distribution of heroin, third offense (2016-GS-23-05727). Judge Cooper sentenced Applicant to ten years for distribution of heroin, third offense, and ten years for distribution of cocaine, third offense, with credit for time served, and with both sentences running concurrently. Counsel filed a Notice of Appeal on October 19, 2017, for Applicant's two trial convictions: distribution of heroin, third offense (2016-GS-23-5727), and distribution of cocaine, third offense (2016-GS-23-5728). On August 1, 2018, Appellate Defender Lanelle Cantey Durant filed an Anders Brief and Petition to be Relieved as Counsel with the South Carolina Court of Appeals. The Court dismissed the appeal and affirmed in State v. Duckett, 2019-UP-244 (July 3, 2019). The Remittitur has not yet been issued.



that he understood and then decided that he wanted to move forward with the case rather than withdrawing.

In his Application for Post-Conviction Relief, , which was filed by Applicant before he was represented by Mr. Mills, Applicant raised the allegation of ineffective assistance of counsel based on counsel's failure to investigate and also alleged that his rights under the Fourth and Sixth Amendments had been violated. Respondent requested at the start of the evidentiary hearing on June 3, 2019, that Applicant specify for the record the grounds upon which Applicant would move forward at the hearing in light of the lack of supporting details in the Application for Post-Conviction Relief. Applicant specified that he was moving forward only upon the allegations that Counsel was constitutionally ineffective for (1) failing to explain to him the charges that he was facing and (2) failing to explain to him the range of time to which he would be exposed for each charge upon pleading guilty, which have also been identified above, and waived those other allegations made in the Application.

FINDINGS OF FACTS 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).

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). Applicant has the burden of proving the allegations in his post-conviction relief action,

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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 Petitioner 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 pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985). The “prejudice prong ordinarily requires more than simply a defendant’s assertion that but for counsel’s deficient performance he would not have pled but would have gone to trial.” Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009).

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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.

"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").

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Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations. The allegations are addressed fully below:

Counsel failed to explain the charges that Applicant was facing. Counsel failed to explain to Applicant the range of time to which he was exposed for each charge.

The basis of these allegations is that Applicant claimed at the evidentiary hearing that he did not understand that he was pleading guilty to third offenses for possession of cocaine and distribution of heroin. Applicant claimed that, because he did not understand that he was pleading guilty to third offenses rather than a first offense on each of these charges, he did not understand that he would be exposed to greater time than he would have been without the enhancements.

Applicant testified that Counsel did not explain the charges that he was facing. He testified that he did not know that he was pleading to subsequent offenses. He testified that Counsel did not go over sentencing enhancements with him prior to his plea hearing. He testified that Counsel did go over the charges and the elements with him "somewhat." He testified that Counsel discussed some case law with him. He testified that, at his plea hearing, he believed that he was only pleading guilty to one charge, possession, and that he would be sentenced only to ten years. He testified that he did not agree to plead guilty to distribution of heroin, third offense.

Counsel testified that she has been practicing law for forty-five years, and works with the Greenville County Public Defender's Office. She testified that she met with Applicant at least fourteen times during his case, not including their meetings during court appearances. Counsel also represented Applicant during his trial before Judge Cooper, which had only recently concluded in two guilty verdicts days before Applicant's plea hearing before Judge Verdin. Counsel testified that she would have taken the case to trial if Applicant had not pleaded guilty, and that she would have been prepared to do so. Counsel testified that she discussed the elements

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of the charged offenses with Applicant and that he understood the substance of their conversations. She testified that she had explained to Applicant that his past criminal record would result in sentencing enhancements. She testified that she went over all aspects of his charges and potential sentencing ranges, and that Applicant understood that he was facing third offenses on all charges. She testified that she reviewed the discovery and evidence with Applicant. She testified that Applicant wanted to be sentenced in drug court, but that Mr. Steinberg refused to that request. She testified that the solicitor originally offered a fifteen-year plea agreement, but that Applicant rejected that offer. She testified that the solicitor then offered a five-year sentencing recommendation right before Applicant's trial before Judge Cooper, and that Applicant rejected that offer.

This Court finds that Counsel did adequately explain to Applicant the elements of the offenses with which Applicant was charged and the potential sentences to which he could be exposed for the charges. Applicant's own testimony indicates that he and Counsel met in preparation during his case. Applicant's assertions that he did not understand the charges to which he was pleading guilty at his plea hearing before Judge Verdin are contradicted from the transcript of that hearing, which shows that the charges were verbally presented to him at the plea hearing and that he affirmed at the time that he understand the charges, the potential sentences that he could face for each in light of applicable sentencing enhancements, and the consequences of pleading guilty. Notably, Judge Verdin told Applicant at the plea hearing that both charges were third offenses, and Applicant affirmed that that was his understanding. The plea hearing transcript also shows that Applicant affirmed to Judge Verdin, while under oath, that he had discussed the matter with Counsel and was happy with her representation of him. Furthermore, Applicant's

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allegations are contradicted by the more credible testimony provided by Counsel at the evidentiary hearing. On all of his allegations, Applicant's testimony is less credible than Counsel's.

Applicant has failed to meet his burden in establishing the constitutional ineffectiveness of counsel as to these allegations since he has not shown either deficiency or prejudice in Counsel's performance. As such, these allegations are 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), SCRCR, 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.

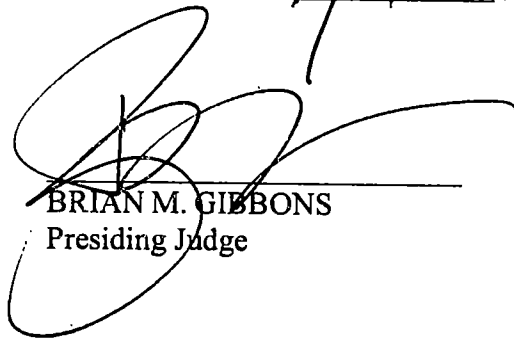
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IT IS THEREFORE ORDERED THAT:

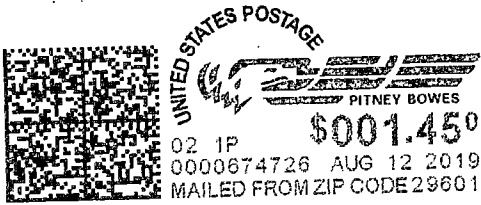
1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this _____ day of 7/19, 2019.

2, South Carolina


BRIAN M. GIBBONS
Presiding Judge

Copy mailed to
Attorney General / Anzai
on 7 / 29 / 2019



Daniel Shearouse
Clerk of Court
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