

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Berkeley County

Honorable Michael G. Nettles, Circuit Court Judge

JERMAINE COBBS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002629

SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA)
 COUNTY OF BERKELEY)
)
 Jermaine L. Cobbs, #353719,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

2016-CP-08-0593

ORDER OF DISMISSAL

MAFV P. BROWN
 CLERK OF COURT
 BERKELEY COUNTY, S.C.

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FILED

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on March 9, 2016. Respondent submitted its return on March 29, 2017. An evidentiary hearing into the matter was convened on December 4, 2017, at the Berkeley County Courthouse. Applicant was present at the hearing and was represented by Eduardo Curry, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office. At the evidentiary hearing, Applicant testified on his own behalf. Applicant also presented testimony from Blondelle Jamison, Gentry Jamison, and William Thrower, Esquire.

Before this Court are the records of the Berkeley County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the plea transcript, the State's Return, the records of Applicant's previous PCR action, and the current application. Based on these records and the testimony presented, the Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to the orders of commitment of the Berkeley County Clerk of Court. Applicant was indicted at the October 2010 term of the Berkeley County Grand Jury for trafficking cocaine, 200-400 grams, first offense (2010-GS-08-1722), and distribution of cocaine, first offense (2010-GS-08-1724). Applicant was subsequently indicted in September 2012 for trafficking cocaine, 10-28 grams (2012-GS-08-1787). William Thrower, Esquire ("Plea Counsel") represented Applicant. Brian Alfaro, Esquire, represented the State. On December 20, 2012, Applicant pleaded guilty before the Honorable R. Markley Dennis, Jr. to the lesser included offenses of trafficking cocaine, 28-100 grams, first offense, and possession with intent to distribute cocaine, second offense, and as indicted to distribution of cocaine, first offense. Pursuant to a negotiated sentence, Judge Dennis sentenced Applicant to imprisonment for concurrent terms of eighteen years each for trafficking cocaine and possession with intent to distribute cocaine, and to time-served for distribution of cocaine.

Applicant filed a motion to reconsider on March 19, 2013. During the pendency of the motion to reconsider, Applicant filed an application for post-conviction relief (2013-CP-08-2751). Judge Dennis issued an order dismissing that application without prejudice on April 15, 2015. Judge Dennis thereafter denied the motion to reconsider on July 16, 2015. Applicant did not appeal his guilty plea or sentence.

II. ALLEGATIONS

In his current Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Plea counsel informed Applicant he could "negotiate a plea deal where [Applicant] would plead to only one charge and be sentenced to approximately seven years . . . with credit for time served.
 - b. Counsel informed Applicant that at that time Applicant "would be required to wear an ankle monitor which would be included in the time-served calculation."
 - c. Counsel told Applicant he would only be required to serve 65% of his sentence.
 - d. Applicant pleaded to three charges instead of one.
 - e. The time Applicant wore the ankle monitor was not included in the time-served calculations. Applicant was informed at the sentencing that he would be required to serve at least 85% of his sentence, as opposed to the 65% promised by plea counsel
 - f. Plea counsel never discussed with Applicant the evidence of the case and potential strategies to be used during his defense.
 - g. Plea counsel only met with or contacted Applicant three times in preparation of this case.
 - h. Plea counsel relied only on his contacts, and made no attempts to examine the evidence of the case.

Applicant filed an amended application on November 2, 2017, adding the following additional allegations:

"Attorney Thrower informed Plaintiff that he could negotiate a plea deal where Plaintiff would plead to only one (1) charge and be sentenced to approximately seven (7) years in the penitentiary with credit for time served. Furthermore, Attorney Thrower informed Plaintiff that at that time, Plaintiff would be required to wear an ankle monitor which would be included in the time served calculation. During a meeting, Attorney Thrower told Plaintiff that he would only be required to serve sixty-five percent (65%) of his sentence. At the plea hearing much to his surprise, Plaintiff pled to three charges (3), not to the one (1) charge Attorney Thrower initially suggested. Plaintiff was sentenced to eighteen years (18) for two (2) charges and twenty-seven (27) months for the final charge; to be served concurrently and credited with time served. Additionally, Plaintiff was informed at the sentencing that he would be required to serve at least eighty-five percent

(85%) of his sentence, as opposed to the sixty-five percent (65%) promised by Attorney Thrower.

Attorney Thrower only met with and/or contacted the Plaintiff three (3) times in preparation of this case. Attorney Thrower made no attempts to examine the evidence of the case.”

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

Applicant's testimony

At the evidentiary hearing, Applicant testified he pled guilty to these charges on December 20, 2012. He stated his parents retained Plea Counsel to represent him, and he met with Plea Counsel at least three times before his plea. Applicant testified that Plea Counsel wanted him to plead guilty to get an eighteen year sentence, but he would only have to serve a quarter of the sentence, which was four and half years. He stated that, after he got credit for time served, he was under the impression that he would only have to serve eighteen months in prison. He testified that Plea Counsel presented the decision to plea to him as a choice between an eighteen months sentence or the rest of his life in prison. He stated that, based on this advice, he chose to plead guilty. Applicant testified that if he had known the sentence he would actually get, he would not have pled guilty but would have gone to trial instead.

Applicant testified Plea Counsel misinformed him of the actual potential sentencing range of the crimes with which he was charged, and he never advised him of the minimum or maximum punishments. He testified that he did not know if Plea Counsel investigated the evidence or witnesses on his behalf. He stated they did not discuss the credibility of any of the State's witnesses or any defenses. Applicant stated Plea Counsel did not file any Brady motions or Rule 5 motions to get discovery. He testified that he did not ask Plea Counsel to file a motion to reconsider his sentence, but Plea Counsel filed one anyway, and it was filed well outside the ten day statute of limitations, which was ineffective.

Applicant testified that he had been represented by two attorneys before Plea Counsel took over his case, but he disagreed with those attorneys on trial strategy. Applicant stated he wanted to use his mother and father as witnesses at trial. Applicant stated he did not know what his defense would have been if he went to trial, but he did not sell any drugs, and he was innocent.

Blondelle Jamison's testimony

Blondelle Jamison testified that she is Applicant's mother, and she is married to Gentry Jamison. She stated that she hired Plea Counsel to represent her son on these criminal charges, and she met with him four or five times to discuss the case. She stated that all Plea Counsel told her is that he would get her son a four and a half year sentence, and he told her this more than one time. Ms. Jamison testified that when she asked Plea Counsel how the case was going, he told her the case was going good, and that is all he would tell her. She stated he did not ask her about witnesses, and she did not offer him any leads or alibi witnesses to investigate.

Gentry Jamison's testimony

Gentry Jamison testified that he is Applicant's father, and he is married to Blondelle Jamison. He testified that he met with Plea Counsel once at his office and once before the guilty plea. He stated Plea Counsel told him Applicant would only serve eighteen months in prison. Mr. Jamison testified he was surprised at the guilty plea when the judge sentenced Applicant to eighteen years in prison. He stated he asked Plea Counsel about this sentence during the plea, and Plea Counsel told him the sentence was not right, so he would have to get with the judge to fix it. He stated that he never heard from Plea Counsel again after the plea.

Plea Counsel's testimony

Plea Counsel testified that he was retained to represent Applicant four months prior to the guilty plea. He stated he felt bad for Applicant because he had already been through two lawyers, and one was suspended from the practice of law. He stated his first attorney was able to get Applicant on ankle monitoring before he was suspended, and his second attorney handled his case for his first and second arrests. Plea Counsel stated he felt that Applicant's first two attorneys had made unrealistic promises to Applicant about being able to get a probationary sentence or a very low sentence, which was very unlikely and placed him in a tough position by making his advice seem unfavorable.

Plea Counsel testified that when he was retained, he filed a motion of substitution and got a Rule 5 packet from the Solicitor, and he started working on the case right away. He stated he reviewed the discovery materials with Applicant and met with him at the detention center. Plea Counsel emphasized that he believed in was the State's intention to try the charges separately, starting with the 2010 case, and then trying the 2012 case separately, asking for two strikes and consecutive sentences. He testified that Applicant was facing up to fifty or sixty years in prison, depending on how the State tried the case. He stated Applicant already had a prior conviction on his record from 1999, so the 2010 case would be his second offense, and by the time the 2012 case was tried, it would have been a third offense, and Applicant would have faced a mandatory minimum sentence of twenty-five years.

Plea Counsel testified that he never told Applicant he would get a seven year sentence. He believed Applicant might have gotten that number from the sentencing range of the reduced charge he pled to, which was seven to twenty-five years. However, he stated as Applicant was indicted, he faced a mandatory minimum of twenty-five years. Plea Counsel testified he never

promised a sentence of four and a half years, or that Applicant would only have to serve eighteen months. Plea Counsel stated the evidence against Applicant was strong, and there was nothing he could do to challenge the existence of probable cause to obtain the search warrant. He stated he did not file a suppression motion because he had no reasonable basis to do so. He stated that he could have filed a suppression motion, but in order to argue the motion, Applicant would have had to reject the plea offer for eighteen years.

Plea Counsel testified that he did not feel it was his place to discuss the details of the case with Applicant's parents. He stated that, in his experience, most parents do not really want to know that their son had 300 grams of cocaine, and he felt the discussions needed to be between him and his client. Plea Counsel testified the plea deal was always to serve 85 percent of the sentence, never 65 percent. He stated he absolutely believes Applicant got the benefit of the bargain of his plea deal. He stated Applicant was offered 15-20 years after his first arrest, and now, even after his second arrest and new charges, he was able to plead to an 18 year sentence. He stated he was even able to get Applicant credit for time served for the time when he was on ankle monitoring, even though Applicant committed the second crime while he was on the ankle monitor.

Plea Counsel testified he filed the motion to reconsider because he always files them for his clients, even if they are outside the time limit, because it allows his clients an avenue to have their sentence reconsidered if they chose to cooperate with law enforcement after their plea. He stated he thought it could not hurt Applicant to file the motion to give him the opportunity to cooperate if he chose. Plea Counsel testified that Applicant understood all of their discussions and the proceedings. He stated Applicant was sharp, and there were no competency issues. He stated it was Applicant's decision to plead guilty.

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleges Plea Counsel was ineffective in his representation surrounding his guilty plea. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant 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) (citations omitted). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985).

In the present case, this Court finds Applicant has failed to meet his burden in proving Plea Counsel was ineffective in any regard. The guilty plea transcript shows Applicant was fully advised of the terms of the plea deal and was aware of the negotiated sentence of eighteen years. The plea court advised him that he would have to serve at least 85 percent of the sentence. Applicant indicated on the record that he was satisfied with Plea Counsel's representation at the time. The record shows there was good communication between them at the time, and he had no complaints. The facts of the offenses were placed on the record, and Applicant agreed that they were true. Applicant was given credit for time served at Plea Counsel's request, including the time he was on ankle monitoring.

Plea Counsel credibly testified he fully discussed the evidence and plea negotiations with Applicant, and Applicant understood their discussions and chose to plead guilty. This Court finds Plea Counsel represented Applicant well within the bounds of professional norms, and none of his actions or advice were ineffective. Furthermore, this Court finds Applicant has failed to prove his allegation that Plea Counsel was ineffective for failing to investigate his case. The testimony presented show Plea Counsel investigated and worked on the case thoroughly, and Applicant has failed to present a valid defense that could have been used at trial. This Court finds neither deficiency nor prejudice on this ground or any other, and these allegations are denied and dismissed with prejudice.

INVOLUNTARY GUILTY PLEA

To any extent that Applicant argues his plea was not given freely and voluntarily, this Court finds otherwise and concludes that Applicant's plea was entered freely and voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.

Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). 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 court and defendant, between 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)). 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, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

The guilty plea transcript shows Applicant was fully advised of his rights and the consequences of pleading guilty. Furthermore, Trial Counsel credibly testified Applicant fully understood what he was doing when he pled guilty. This Court finds that there was no coercion affecting Applicant's decision to plead guilty, the record reflects that Applicant was fully advised of the rights he was waiving by pleading guilty, and that his plea was entered into knowingly and intelligently. Applicant presented no credible evidence as to why he should be able to depart from his statements at the plea hearing. This Court finds very credible Plea Counsel's testimony that Applicant understood everything at the plea and that it was solely Applicant's decision to plead guilty. Applicant has failed to present any probative or credible evidence that he was coerced into pleading guilty. As a result, he has failed to meet his burden, and this allegation is denied and dismissed.

VI. CONCLUSION

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

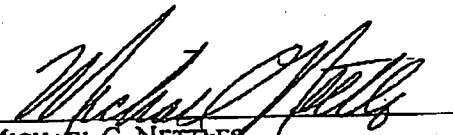
This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice in regard to all allegations; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 12 day of Dec, 2011

Florence, South Carolina


 MICHAEL G. NETTLES
 Presiding Judge
 Ninth Judicial Circuit