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November 11, 2019

RECEIVED
NOV 15 2019
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Derrick Lamont Wade (#371065) v. State of South Carolina | 2017-CP-29-1324

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal along with the accompanying Order for the above-referenced matter. By way of this letter I am copying the Office of Appellate of Defense, as I was appointed to represent Mr. Wade.

Best regards,

Donae A. Minor, Esq.
Attorney at Law

cc: Derrick Lamont Wade (#371065)
Samuel L. Key, Esq.
Lancaster County Clerk of Court
Office of Appellate Defense

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
NOV 15 2019
S.C. SUPREME COURT

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

Case No. 2017-CP-29-1324

Derrick Lamont Wade, #371065, ... Petitioner,

v.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

Applicant, Derrick Lamont Wade, appeals the order of the Honorable D. Craig Brown, dated November 4, 2019, filed November 8, 2019, and received November 11, 2019.

November 11, 2019

DONAE A. MINOR, ESQUIRE
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803-504-0971
SC Bar No. 102550
ATTORNEY FOR APPLICANT

Opposing Counsel:
Samuel L. Key
Post-Conviction Relief
6th and 13th Judicial Circuits
P.O. Box 11549
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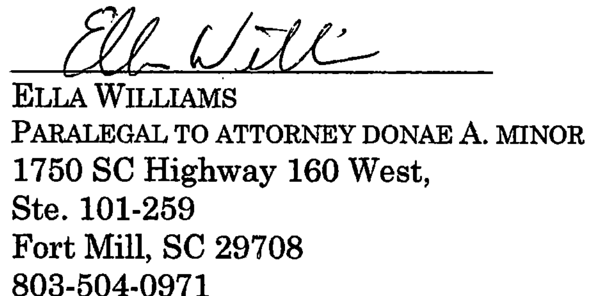
PROOF OF SERVICE

I, Ella Williams, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, on November 11, 2019, addressed as follows:

Samuel L. Key
Post-Conviction Relief
6th and 13th Judicial Circuits
P.O. Box 11549
Columbia, SC 29211-1549

I further certify that all parties required by Rule to be served have been served.

November 11, 2019



ELLA WILLIAMS
PARALEGAL TO ATTORNEY DONAE A. MINOR
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STATE OF SOUTH CAROLINA COUNTY OF LANCASTER	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT
Derrick Lamont Wade, #371065, Applicant, v. State of South Carolina, Respondent.	)	C.A. No. 2017-CP-29-1324 **ORDER OF DISMISSAL**

2019 NOV -8 AM 11:44
CLERK OF COURT
LANCASTER, SC
FILED
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COURT

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Derrick Lamont Wade (Applicant) on December 11, 2017. Respondent made its Return on November 29, 2018. An evidentiary hearing into the matter was convened on July 29, 2019, at the Lancaster County Courthouse before the undersigned. Donae A. Minor, Esquire, represented Applicant. Assistant Attorney General Lindsey A. McCallister represented Respondent.

Applicant testified on his own behalf, and his father, Joe Wade, also testified. Leah B. Moody, Esquire, Applicant's plea counsel, testified on behalf of Respondent. This Court had before it a copy of the records of the Lancaster County Clerk of Court, records from the South Carolina Department of Corrections, the PCR application, Respondent's Return, and the plea transcript. 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 for relief.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lancaster County Clerk of Court. In July of 2009, the Lancaster County Grand Jury indicted Applicant for murder (2009-GS-29-1113). Leah B. Moody (Counsel), Esquire, represented Applicant. Lisa Collins, Esquire, prosecuted the case. On October 31, 2016, Applicant pleaded guilty to second-degree lynching before the Honorable D. Garrison Hill. Applicant entered his guilty plea pursuant to Alford v. North Carolina, 400 US. 25 (1970). Sentencing was deferred until January 13, 2017, at which time Applicant again appeared before Judge Hill. Judge Hill sentenced Applicant to ten years' imprisonment for lynching. Applicant did not appeal his sentence or conviction.

ALLEGATIONS

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

1. Ineffective Counsel
   a. Attorney failed to present case properly
2. Breach of Plea Agreement
   a. Plea agreement is not what's in place in classification in the Department of Corrections.

Through PCR counsel, Applicant amended his application on July 8, 2019, to allege a single claim as follows:

> Applicant was advised by Leah Moody that his plea offer consisted of a non-violent offense, which is also indicated on his sentencing sheet. Upon starting his sentence, Applicant was informed the contrary. Applicant was informed that he pled to a violent offense, which requires him to complete at least 85% of his prison term due to the offense classification. Had Applicant known his plea was a violent offense, he would have opted for a trial instead of his plea.

To the extent the allegations in Applicant's original application can be construed as separate claims from those set forth in the amended application, this Court finds Applicant waived those claims, and they are hereby denied and dismissed with prejudice.

SUMMARY OF FACTS SUPPORTING GUILTY PLEA

On March 31, 2009, Applicant, along with four other co-defendants, lured the victim to an empty house with the intent to assault him. They savagely beat the victim, kicking him in the head after knocking him to the floor. Ultimately, one of Applicant's co-defendant's shot the victim, who died from the gunshot wound. Tr. pp. 8-10.

SUMMARY OF TESTIMONY AT EVIDENTIARY HEARING

Applicant testified he pleaded guilty to second-degree lynching, which was non-violent offense. Applicant further testified Counsel was appointed to represent him in this matter. Applicant testified he met with Counsel three or four times, and they discussed the State's plea offer, which Applicant understand would carry a non-violent sentence. Applicant stated the sentencing sheet is marked for a non-violent offense. Applicant testified he believed a non-violent sentence would require the service of sixty-five percent of the time before he became parole eligible, and he would be able to earn work and other credits as well. Applicant testified he is serving a violent sentence instead. Applicant stated if he had known he was pleading to a violent offense, he would have considered going to trial.

On cross-examination, Applicant indicated he understood he pleaded guilty to second-degree lynching, and he could have received a sentence up to twenty years absent the State's recommendation of a fifteen-year cap. After reviewing his records from SCDC, Applicant agreed

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he had received the opportunity to earn some work and education credits, but he testified he did not believe the documents showed everything he had earned. Applicant testified someone at SCDC told him he was not serving a non-violent sentence because a non-violent sentence is not classified as an eighty-five percent sentence. Applicant further testified Counsel never promised him he would only serve a specific amount of years or told him this sentence would be classified as parole eligible after the service of sixty-five percent of the time. Applicant also agreed no one indicated at the plea hearing that this was a sixty-five percent sentence, and instead, it was only referred to as a non-violent sentence.

Applicant's father, Joe Wade (Wade), also testified. Wade testified he advised Applicant to accept the State's plea offer and stated he never heard Counsel promise Applicant he would serve sixty-five percent.

Counsel testified she was appointed to Applicant's case and received a copy of the file from the Lancaster County Solicitor's Office. According to Counsel, Applicant originally wanted a trial, and she advised him he should plead guilty instead, but they had not received any offer from the State at that time. Counsel testified the State then noticed Applicant's case for trial and offered lynching instead of murder with a sentencing cap of three-to-fifteen years. Counsel explained this plea offer reduced Applicant's sentencing exposure down from thirty-years-to-life in prison.

Counsel testified she and Applicant discussed whether he should plead guilty or not, and they ultimately concluded the plea was the best course of action for him. Counsel testified she and Applicant discussed that his sentence would be non-violent and eighty-five percent. Counsel

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testified she knew from experience that most defendants get confused that non-violent means sixty-five percent, but any sentence of twenty years and above carries eighty-five percent. Counsel testified Applicant's concern, other than reducing his sentence exposure down from murder, was receiving a non-violent sentence. Counsel testified Applicant's family was in support of Applicant's decision to plead guilty. Counsel further testified Applicant was aware his sentence would require him to serve eighty-five percent of his time, even though it was a non-violent sentence. Counsel stated she and Applicant thoroughly reviewed the plea bargain.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record and heard the testimony at the PCR hearing. This Court has observed the evidence and witnesses presented at the evidentiary hearing, judged their credibility, and weighed their testimony accordingly in its discussion below. Set forth below are findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code.

Applicant alleges he received ineffective assistance of counsel. In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "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. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise

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of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688 (1984)). 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." Id. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

However, 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 petitioner 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. at 688.

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Involuntary Guilty Plea

Applicant asserts Counsel was constitutionally ineffective assistance because she allegedly advised him he was pleading to non-violent offense and would be require to serve only sixty-five percent of his sentence, rather than the eighty-five percent he is currently serving, and this incorrect advice led to Applicant entering an involuntary and unknowing guilty plea. This Court disagrees and finds the combined record from the plea hearing and the evidentiary hearing clearly establishes Counsel correctly advised Applicant, and Applicant pleaded guilty freely and voluntarily. Therefore, because Counsel was not deficient, this Court finds Applicant has failed to meet his burden of proof, denies relief, and dismisses these allegations with prejudice.

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). An applicant who pleads guilty with the advice of counsel may collaterally attack the plea only by showing (1) counsel was deficient and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994); Lockhart, 474 U.S. at 52). 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." Lockhart, 474 U.S. at 56.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him.

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Boykin v. Alabama, 395 U.S. 238 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). 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)). "[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. Harres, 282 S.C. at 133, 318 S.E.2d at 361. However, statements 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. Crawford v. United States, 519 F.2d 347 (4th Cir. 1975), overruled on other grounds by United States v. Whitley, 759 F.2d 327 (4th Cir. 1985).

The plea transcript reflects Applicant indicated he understood the charge he was pleading guilty to, the sentencing range, and the fact it would be considered a serious strike on his record. Tr. pp. 5-6. The plea court also explained the State's burden of proof beyond a reasonable doubt and Applicant's presumption of innocence at trial, Applicant's right to have a jury trial, and, specifically, Applicant's right to call witnesses and present a defense. Tr. pp. 5-8. Applicant indicated he understood those rights and wished to give them up in order to plead guilty. Tr. p. 8. Importantly, Applicant informed the plea court he had enough time to talk with his attorney, and he was satisfied with her representation. Tr. p. 6. Applicant then averred he was pleading guilty of

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his own free will and had not been threatened or promised anything to induce his plea. Tr. p. 5. Applicant did not ask the plea court how much of his sentence he would be required to serve before he became parole eligible, nor did the plea court, the assistant solicitor, or Counsel ever indicated Applicant's sentence would fall under the sixty-five percent parole eligibility classification.

Further, the Court finds credible Counsel's testimony she explained Applicant's sentence would be non-violent but still require the service of eighty-five percent of the sentence. The Court finds Counsel met with Applicant on several occasions and discussed Applicant's options for resolving the case. Counsel credibly testified she and Applicant engaged in an in-depth discussion about whether he should accept the State's plea offer, and specifically, she explained this was a non-violent sentence that still carried a requirement to serve eighty-five percent because the penalty is up to twenty years. This was the correct advice pursuant to statute, and therefore, this Court finds Counsel was not deficient. See S.C. Code Ann. § 16-3-220 (" (Any person found guilty of lynching in the second degree shall be confined at hard labor in the State Penitentiary for a term not exceeding twenty years nor less than three years, at the discretion of the presiding judge.") (2009); S.C. Code Ann. § 24-13-100 ("[A] 'no-parole' offense means a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more.") (2009).

In any event, at the evidentiary hearing, Applicant testified only that he would have *considered* proceeding to trial if he had known he would have to serve eighty-five percent of his sentence. This Court finds that testimony is insufficient to meet Applicant's burden of proving prejudice. Hill, 474 U.S. at 58-59 (holding the applicant must prove that, but for counsel's unprofessional errors, there is a reasonable probability he would not have pleaded guilty and would

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have insisted on going to trial). This Court finds Applicant ultimately chose to plead guilty in order to avail himself of a favorable plea offer which capped his sentencing exposure at fifteen years rather than life and gave him the benefits in SCDC of a non-violent sentence, and this decision was made freely and voluntarily.

Accordingly, based on the combined record of the plea transcript and the testimony presented at the evidentiary hearing, this Court finds Counsel's representation of Applicant was not deficient, nor was Applicant prejudiced by her representation. Counsel met with Applicant on multiple occasions and explained Applicant's constitutional rights and options for resolving the case. Further, the plea transcript reflects Applicant understood the proceedings, interacted intelligently with the plea court, and entered his guilty plea knowingly and voluntarily. Importantly, Applicant himself testified Counsel never told him he would only have to serve sixty-five percent of his sentence, but he made his own assumption because he pleaded to a non-violent charge. For all of these reasons, this Court finds Applicant's decision to enter the guilty plea was made freely and voluntarily. Therefore, this Court denies relief and dismisses this allegation with prejudice.

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 relief. Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. Therefore, this application for post-conviction relief is denied, and Applicant's claims are dismissed with prejudice.

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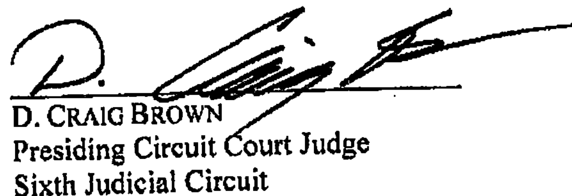
Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). Pursuant to Austin v. State, 305 S.C. 453, 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. Further, Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief is denied, and Applicant's claims are dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.



D. CRAIG BROWN
Presiding Circuit Court Judge
Sixth Judicial Circuit

11-4, 2019

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