

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
D. Craig Brown, Circuit Court Judge

2019-CP-21-02136

Rusty Timmy Evans, # 336314,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RECEIVED

JUN 30 2020

S.C. SUPREME COURT

NOTICE OF APPEAL

Rusty Timmy Evans, # 336314, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed June 19, 2020, issued by the Honorable D. Craig Brown, Presiding Judge, Twelfth Judicial Circuit.



Jonathan D. Waller

Waller Law Group
SC Bar No.: 76290
1116 Blanding Street
Suite 2B
Columbia, SC 29201
803-520-7278 (phone)
jonathan@wallergroupsc.com
ATTORNEY FOR PETITIONER

June 29, 2020

Other Counsel of Record:

Samuel L. Key, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

12

FILED

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2019CP2102136

Rusty Timmy Evans	2020 JUN 19 AM 10:01	South Carolina State Of
	DORIS POULOS O'HARA	

PLAINTIFF(S)	CCCP & GS FLORENCE COUNTY, SC	DEFENDANT(S)
Submitted by:		Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	Judge Code	Date
		6/19/2020

For Clerk of Court Office Use Only

This judgment was entered on June 19, 2020, and a copy mailed first class or placed in the appropriate attorney's box on June 19, 2020, to attorneys of record or to parties (when appearing pro se) as follows:

CERTIFIED TRUE COPY
Doris Poulos O'Hara
 CLERK OF COURT C.P. & G.S.
 FLORENCE COUNTY, S.C.

Jonathan D Waller 1116 Blanding Street Suite 2B
Columbia, SC 29201

Samuel L. Key
Rembert C. Dennis Building
PO Box 11549
Columbia SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P. O'Hara

Court Reporter

Doris Poulos O'Hara - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCF.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
 COUNTY OF FLORENCE)
)
 Rusty T. Evans, #336314,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent,)

IN THE COURT OF COMMON PLEAS
 FOR THE TWELFTH JUDICIAL CIRCUIT

2019-CP-21-2136

ORDER OF DISMISSAL

2020 JUN 19 AM 9:26
 MORIS POULOS O'HARA
 C.C.P. & G.S.
 FLORENCE COUNTY, SC

FILED

The matter before the Court is Rusty Timmy Evans's (Applicant) action for post-conviction relief (PCR) commenced August 5, 2019. In his action, Applicant raised claims of ineffective assistance of counsel, subject matter jurisdiction, and illegal sentence. The State made its return on September 26, 2019, requesting an evidentiary hearing on the issue.

An evidentiary hearing into the matter convened on December 19, 2019, before the undersigned at the Florence County Courthouse. Applicant was present and represented by Jonathan D. Waller, Esquire. Assistant Attorney General Samuel L. Key represented the State. Applicant and Assistant Public Defender Elizabeth H. Neyle (Counsel) testified at the hearing. Also before the Court were the Florence County Clerk of Court records of the challenged conviction, Applicant's records from the South Carolina Department of Corrections, the plea transcript, and the records of this PCR action.

For the reasons stated below, this Court finds Counsel was not constitutionally ineffective. Counsel was not deficient in her representation of Applicant, and Applicant has failed to show he was prejudiced by Counsel's alleged deficiencies. As such, the Court denies relief and dismisses the action with prejudice.

DCB
1/10/10

CERTIFIED: A TRUE COPY
Donna Paula O'Hara
 CLERK OF COURT C.P. & G.S.
 FLORENCE COUNTY, S.C.

I. Procedural History

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. Applicant was indicted at the August 2018 term of the Florence County Grand Jury for petit larceny, third or subsequent offense (2018-GS-21-1449). Applicant was represented by Counsel. Assistant Solicitor Angel Isla Daniels prosecuted the case.

Applicant pleaded guilty on October 2, 2018, before Judge Thomas A. Russo to petit larceny, third or subsequent offense, as indicted.¹ In exchange for Applicant's guilty plea, the State recommended a sentencing cap of seven years.² Judge Russo accepted Applicant's guilty plea and sentenced him to serve seven years' imprisonment for petit larceny, third or subsequent offense. Applicant did not appeal his conviction or sentence.

Applicant timely commenced this PCR action on August 5, 2019.

II. Facts

Between January 11 and February 20, 2018, Applicant and his codefendants stole a four-wheeler from a residence. The owner of the residence deceased on December 25, 2017. The deceased owner's family members noticed the four-wheeler was missing and notified law enforcement. Applicant was in possession of the four-wheeler and admitted to taking it from the deceased's residence when he was arrested. (Plea Tr. 12).

¹ Applicant also pleaded guilty to grand larceny (2018-GS-21-01454), and third-degree burglary (2018-GS-21-01516). (Plea Tr. 7). However, Applicant does not challenge those convictions in this PCR action. Applicant received concurrent terms of five years on the unchallenged charges. (Plea Tr. 15).

² The State also dropped six other Florence County indictments, and two grand larceny charges from Marion County in exchange for Applicant's guilty plea. (Plea Tr. 11).

2
DLS
P-20110

2019-CP-21-2136

As for Applicant's prior property crimes, the State indicated Applicant had three convictions in 2007 for breach of trust with fraudulent intent, greater than \$1,000. (Plea Tr. 13). In mitigation, Counsel stated "All of these property offenses go back to [Applicant's] drug addiction." (Plea Tr. 14).

III. Current Application

Applicant alleges he is being held in custody unlawfully, alleging:

1. Ineffective assistance of counsel:
 - a. Counsel misinformed Applicant of exactly what he was charged for.
2. Subject matter jurisdiction:
 - a. Applicant has no prior convictions of property crimes.
3. Illegal Sentence:
 - a. The indictment claims Applicant has two or more prior convictions, which is untrue.

Applicant requests relief in the form of a sentence reduction.

IV. Discussion

The Court has reviewed the entire record in this matter. The Court has also observed the witnesses presented at the evidentiary hearing, judged their credibility, and weighed their testimony accordingly in its discussion below. Set forth below are the findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

Applicant alleges he received ineffective assistance of counsel, claiming Counsel misinformed him of what he was charged with, and that he has never been convicted of a property

3 DCF
f-3/10

crime.³ Applicant also alleges his sentence is illegal because he has never been convicted of a property crime. For the reasons discussed below, the Court finds Applicant has failed to prove either deficiency or prejudice. Therefore, the Court denies relief and dismisses the action with prejudice.

1. Ineffective Assistance of Counsel/Involuntary Guilty Plea

Applicant claims ineffective assistance of counsel for (a) misadvising him of what he was charged with, and (b) failure to investigate whether Applicant's charge was subject to enhancement. The Court disagrees.

An applicant who entered a plea on the advice of counsel may only attack the knowing and voluntary nature of the plea by showing ineffective assistance of counsel. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). "[A] defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To prove prejudice, the applicant must show a reasonable probability he would not have pleaded guilty and would have insisted on going to trial absent plea counsel's alleged deficiency. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

³ The Court interprets Applicant's second allegation as an allegation of ineffective assistance of counsel for failure to investigate whether Applicant was subject to enhancement.

4 DCB
P. 4 of 10

At the PCR hearing, Applicant testified Counsel did not really explain the charges against him. Applicant recalled being charged with petit larceny, receiving stolen goods, and third-degree burglary. Applicant stated that some of his charges were from Florence County and some were from Marion County. Applicant testified he was in jail for 130 days, and Counsel visited him once and spoke to him over the phone once during that time. Applicant recalled his charges were linked to the theft of a \$1,500 four-wheeler.

Applicant testified the only thing he and Counsel ever discussed was how much time he would be comfortable serving. Applicant stated he told Counsel to negotiate for five years' non-violent. However, when he came to court to plead guilty, Counsel informed him that, due to his criminal record, the State's best offer was for a five-to-eight year range.

Applicant testified Counsel told him his prior record was a big deal. However, Applicant claimed Counsel never discussed that his charge was statutorily enhanced. Applicant testified he thought the seven year sentencing cap was a good deal because the State was dismissing a few other charges. However, Applicant claimed that after he pleaded guilty, he did his own research and found out the value of the stolen property did not carry seven years.

Applicant testified this was his first property crime conviction. Applicant testified he has been arrested for property crimes before, but has never been convicted. However, on cross-examination, Applicant admitted to previously pleading guilty to breach of trust with fraudulent intent on two separate occasions—first, in Williamsburg County before Judge Clifton Newman, and second, in Georgetown County before Judge Barber.

Counsel testified she was appointed to represent Applicant in late-spring 2018. Counsel testified she visited Applicant in jail in August 2018 and also spoke to him on the phone a few times. Counsel testified she explained Applicant's charges to him and gave him a copy of the

5 DCB
p. 59/10

discovery. Counsel testified she explained to Applicant this was his third or subsequent property crime. Applicant could not recall if Applicant disputed having prior property offenses. Counsel recalled reviewing Applicant's NCIC report, and noted that he had multiple convictions off breach of trust with fraudulent intent. Counsel testified she explained the convictions and enhancement with Applicant, and she explained to Applicant that any future property crimes could also be enhanced. Counsel also believed she explained to Applicant that breach of trust with fraudulent intent is a property crime.

Counsel testified she took Applicant's five year plea offer to the State, but the State countered with a seven year sentencing cap due to Applicant's prior record. Counsel testified her notes reflected that Applicant always wanted to plead guilty as soon as possible.

The Court finds Applicant's allegation that Counsel misadvised him of what he was charged with is without merit. The Court makes this finding based on Counsel's credible testimony. Counsel credibly testified she explained the charges to Applicant and gave him copies of the discovery. Counsel also explained to Applicant this was a third or subsequent offense. Based on Counsel's credible testimony, the Court finds that Applicant has failed to prove Counsel deficiently advised him of the charges against him.

As for Counsel's alleged failure to investigate if Applicant's charge was subject to enhancement, the Court finds credible Counsel's testimony she reviewed the NCIC which indicated Applicant had prior property crime convictions. Based on Counsel's credible testimony that she explained the charges to Applicant, the Court finds that Applicant has failed to prove deficiency on this issue.

The Court also finds Applicant cannot show prejudice resulted from either of Counsel's alleged deficiencies in this case. First, Applicant testified he thought the seven-year sentencing cap

6 DCB
1-5-97/10

was a good deal at the time because the State was dropping his other charges. Additionally, Counsel testified that Applicant wanted to plead guilty as soon as possible, and she had notes that he left her voice-mails indicating he wanted to plead guilty as soon as possible. Based off this testimony the Court is not convinced Applicant would have chosen to go to trial rather than plead guilty; therefore, Applicant has failed to show prejudice.

2. Illegal Sentence

Applicant alleges he received an illegal sentence. However, Applicant's petit larceny charge was properly enhanced pursuant to section 16-1-57 of the South Carolina Code.

Section 16-1-57 provides:

A person convicted of an offense for which the term of imprisonment is contingent upon the value of the property involved must, upon conviction for a third or subsequent offense, be punished as prescribed for a Class E felony.

Section 16-1-20(A)(5) of the South Carolina Code provides a person convicted of a Class E felony must be imprisoned for "not more than ten years."

Subsection 16-13-230(A) of the South Carolina Code states, "A person committing a breach of trust with a fraudulent intention or a person who hires or counsels another person to commit a breach of trust with a fraudulent intention is guilty of larceny." The term of imprisonment for larceny is contingent upon the value of the property involved. See S.C. Code Ann. § 16-13-30 (stating petit larceny is larceny of goods worth less than \$2,000, and grand larceny is larceny of goods worth more than \$2,000). A person convicted of petit larceny "must be fined not more than one thousand dollars, or imprisoned not more than thirty days." S.C. Code Ann. § 16-13-30(A). A person convicted of grand larceny "must be fined in the discretion of the court or imprisoned not more than: (1) five years if the value of the personalty is more than two thousand

7 DCB
P-7610

dollars but less than ten thousand dollars; (2) ten years if the value of the personalty is ten thousand dollars or more.” S.C. Code Ann. § 16-13-30(B).

Here, the plea transcript reflects Applicant had three prior convictions for breach of trust with fraudulent intent, greater than \$1,000. Applicant admitted that he pleaded guilty to breach of trust with fraudulent intent on two separate occasions. Further, this Court asked PCR counsel if there was any evidence showing Applicant did not have two or more prior property crime convictions. PCR counsel informed the Court he had seen Applicant’s rap-sheet and it indicated Applicant had the prior property crime convictions. Based on the testimony, and PCR counsel’s and the State’s representations to the Court, this Court finds Applicant did have two, or more, breach of trust with fraudulent intent convictions.

Because Applicant had two or more breach of trust with fraudulent intent convictions, Applicant had two or more larceny convictions. *See* S.C. Code Ann. § 16-13-230(A) (“A person committing a breach of trust with a fraudulent intention or a person who hires or counsels another person to commit a breach of trust with a fraudulent intention is guilty of larceny.”). As reflected above, larceny is an offense for which the term of imprisonment is contingent upon the value of the property involved. *See* S.C. Code Ann. § 16-13-30(a) and (b) (providing the punishments for larceny is based on the value of the stolen property). Therefore, Applicant’s petit larceny charge was properly enhanced pursuant to section 16-1-57. Finally, Applicant was sentenced to seven years’ imprisonment which is within the sentencing range for a Class E felony. *See* S.C. Code Ann. § 16-1-20(A)(5) (providing a Class E felony is punishable by a term “not more than ten years”). Based on the foregoing, Applicant did not receive an illegal sentence. As such, the Court denies relief and dismisses this allegation with prejudice.

DCB
1-8-10

V. Conclusion

Based on the foregoing, Applicant did not receive ineffective assistance of Counsel. Counsel adequately advised Applicant of the charges he faced, and Counsel conducted a reasonable investigation into Applicant's prior convictions triggering the enhancement of his charge. Further, Applicant has failed to show prejudice, because, at the time, Applicant felt the seven year sentencing cap was a good deal because the State was dismissing other charges. Additionally, Applicant has failed to show that he did not have two or more prior property crime convictions. Indeed, Applicant's own testimony shows that he previously pleaded guilty to property crimes on two separate occasions. Finally, Applicant's sentence is not illegal because it falls within the sentencing range set by statute. Accordingly, this Court denies relief and dismisses the action with prejudice.

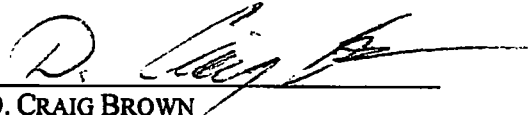
The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. 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 appropriate procedures for appeal.

DeB
P. 9/1/10

THEREFORE:

1. The Court denies relief and dismisses the action with prejudice; and
2. Applicant shall be remanded to the custody of the State.

AND IT IS SO ORDERED.



D. CRAIG BROWN
Presiding Judge
Twelfth Judicial Circuit

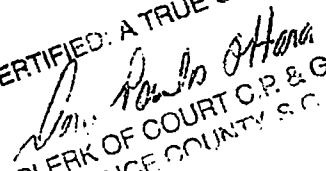
Florence, South Carolina

June 9, 2020.

FILED

2020 JUN 19 AM 9:26

DORIS POULGS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

CERTIFIED: A TRUE COPY

CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

10 DCB
F-10-2710

2019-CP-21-2136