

STATE OF SOUTH CAROLINA
In The Supreme Court

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

S.C. SUPREME COURT

2017-CP-40-0943

Michael D. Thomas, # 329390,

Appellant,

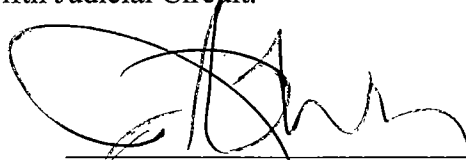
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Michael Thomas, # 329390, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed October 26, 2020 issued by the Honorable D. Craig Brown, Presiding Judge, Fifth Judicial Circuit.



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November 5, 2020

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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Michael Darnell Thomas, #329390,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No.: 2017-CP-40-0943

ORDER OF DISMISSAL

The matter before the Court is Michael D. Thomas's (Applicant) action for post-conviction relief (PCR) commenced on February 22, 2017. In his PCR application, Applicant alleged ineffective assistance of counsel and involuntary guilty plea. The State submitted its return requesting an evidentiary hearing on November 30, 2017. On June 14, 2019, Applicant, through PCR counsel, amended his application alleging ineffective assistance of counsel for failure to investigate Applicant's mental health and have Applicant evaluated for competency and/or criminal responsibility.

An evidentiary hearing into the matter convened before the undersigned on February 21, 2020. Applicant was present and represented by Jonathan D. Waller. Assistant Attorney General Samuel L. Key represented the State. Applicant and Assistant Public Defender Robert L. Bank, Jr. (Counsel) testified at the PCR hearing. Also before the Court were the Richland County Clerk of Court's records of the underlying charges, Applicant's records from the South Carolina Department of Corrections (SCDC), the plea transcript, and the records of this PCR action. After observing the testimony presented at the PCR hearing and a review of the entire record before the Court, the Court finds Counsel was not constitutionally ineffective and Applicant knowingly and voluntarily pleaded guilty. Therefore, for the reasons discussed below, this action is denied and dismissed with prejudice.

I. FACTS AND PROCEDURAL HISTORY

Applicant is presently confined in SCDC pursuant to orders of commitment from the Richland County Clerk of Court. Applicant was indicted at the July 2014 term of the Richland County Grand Jury for kidnapping (2014-GS-40-4537); first-degree criminal sexual conduct (2014-GS-40-4538); and first-degree burglary (2014-GS-40-4539). Assistant Public Defender Robert L. Bank, Jr. (Counsel) represented Applicant. Assistant Solicitor Margaret Fent Bodman prosecuted the case.

Applicant's charges stem from an incident on March 15, 2014. That night, Applicant broke into the victim's apartment, forced the victim from the bedroom into the bathroom, and then vaginally and anally raped her. Plea Tr. 6-13. The victim was a Chinese exchange-student working towards her graduate degree at the University of South Carolina. Plea Tr. 6. The victim could not identify Applicant; however, Applicant was identified by a CODIS hit of a partial DNA profile taken from the victim's clothing. Plea Tr. 12. Applicant, under oath, agreed with the facts presented by the State at the plea hearing. Plea Tr. 13.

On April 26, 2016, Applicant pleaded guilty as indicted to all charges before Judge DeAndrea G. Benjamin. Applicant pleaded guilty with negotiated concurrent thirty year sentences on all charges. Judge Benjamin accepted Applicant's guilty plea and sentenced him as negotiated. Applicant did not appeal.

Applicant timely commenced this PCR action on February 22, 2017, alleging ineffective assistance of Counsel and involuntary guilty plea. The State submitted its return requesting an evidentiary hearing into the matter on November 30, 2017. Thereafter, on November 30, 2018, Applicant, through PCR counsel, moved for discovery and funding. On March 5, 2019, Judge Jocelyn Newman issued an order granting limited discovery.

Thereafter, Applicant moved to be evaluated for competency and/or criminal responsibility on June 12, 2019, and subsequently amended his application alleging ineffective assistance of Counsel for failure to investigate Applicant's mental health and have Applicant evaluated for competency and/or criminal responsibility on June 14, 2019. On August 20, 2019, Judge Diane Schafer Goodstein ordered for Applicant to be evaluated pursuant to *M'Naghten*¹ for criminal responsibility and capacity to conform.

II. Allegations

In his original PCR application, Applicant alleged he is unlawfully in custody due to:

1. Ineffective assistance of Counsel:
 - a. Counsel failed to adequately represent Applicant under the Sixth Amendment; and
2. Involuntary guilty plea:
 - a. Counsel coerced Applicant into pleading guilty when Applicant wanted a jury trial.

On June 14, 2019, Applicant, through PCR counsel, amended his application alleging:

1. Ineffective assistance of Counsel:
 - a. Counsel was ineffective for failing to properly investigate Applicant's mental health and have Applicant evaluated for competency and/or criminal responsibility, thus depriving Applicant of potential defenses afforded to those defendants found incompetent or not able to conform their actions to the law of the State of South Carolina.

Applicant requested relief in the form of a new trial.

At the outset of the PCR hearing, Applicant, through PCR counsel, indicated he was not going forward on the amended allegation regarding his competency and/or criminal responsibility. Therefore, the Court finds Applicant waived his amended allegation and dismisses it with prejudice. Accordingly, the only issues before the Court are those pleaded in Applicant's original application.

¹ *M'Naghten's Case*, 8 Eng.Rep. 718 (1843). See also *State v. Lewis*, 328 S.C. 273, 277, 494 S.E.2d 115, 117 (1997) ("South Carolina has adopted the M'Naghten test to determine insanity.").

III. DISCUSSION

This Court has reviewed the entire record and evidence introduced at the hearing, and the Court has observed the witnesses' testimony, 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 (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). "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).

Applicant alleged his guilty plea was unknowing and involuntary due to ineffective assistance of Counsel alleging Counsel coerced Applicant into pleading guilty when he wanted a jury trial. For the reasons discussed below, this Court finds Applicant knowingly and voluntarily pleaded guilty. The Court finds Counsel did not coerce Applicant into pleading guilty, and Counsel's performance was reasonable. Further, Applicant has failed to show prejudice resulted as the Court is not convinced Applicant would have chosen to go to trial rather than plead guilty despite Counsel's allegedly deficient advice.

Involuntary Guilty Plea

Applicant alleged Counsel was constitutionally ineffective because Counsel coerced Applicant into pleading guilty when Applicant wanted to go to trial. For the reasons discussed below, the Court disagrees.

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). Plea counsel is not deficient for advising a defendant to plead guilty based on what counsel believes the sentence would be if the defendant were convicted at trial. *Bennett v. State*, 371 S.C. 198, 204–05, 638 S.E.2d 673, 676 (2006).

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).

Applicant testified at the PCR hearing and recalled Counsel being his second attorney on the case. Applicant stated Counsel did go over the discovery with him in their meetings including the DNA evidence, cellphone GPS, CODIS database; however, Applicant claimed he did not get a copy of his discovery while awaiting trial. Applicant also testified he and Counsel only spoke about pleading guilty and did not discuss any defenses. Applicant gave Counsel witnesses to investigate, but could only provide nicknames or first names of the witnesses, and only gave a general location to find the witnesses.

Applicant asserted he was at a party when the incident occurred and gave Counsel information to corroborate his alibi. Applicant testified Counsel was aware of his prior mental health issues. Further, Applicant testified he was taking Zyprexa, but Applicant recalled telling the plea court the medication did not affect his ability to know what was happening.

Applicant recalled the trial on these charges had started, but he decided to plead guilty when he heard the court speaking about life imprisonment which he did not want. Applicant

testified Counsel did not advise him of the State's burden of proof, but Counsel did explain the individual elements of each charge. Also, Applicant knew of his right to a jury trial. Applicant felt as though the defense was not ready for trial because the defense attorneys were trying to get him to plead guilty. Applicant also testified he did not have a full understanding of the DNA evidence in the case; however, Applicant testified Counsel did discuss the DNA, and other evidence, against him.

Finally, Applicant testified he pleaded guilty because he did not want to receive a life sentence, and he did not think he could win at trial. Applicant knew his right to a jury trial and what he was charged with, but did not know about the State's burden of proof.

Counsel testified he was assigned Applicant's case when Applicant's previous attorney left the Public Defender's office. Counsel recalled meeting with Applicant at Alvin S. Glenn about fifteen-to-twenty times to review the discovery with Applicant and prepare for trial. Counsel knew of Applicant's mental health history, but felt comfortable working with Applicant. Further, Counsel moved for Applicant to be evaluated and Applicant was found competent to stand trial.

Counsel testified he discussed with Applicant that Applicant's DNA was found in the rape kit and the DNA was the State's significant evidence against him. Counsel recalled hiring an expert to review the DNA and he charted the report on a legal pad, which is what Applicant testified to. Counsel recalled there were two DNA hits, a YSTR hit that was a lower probability of the DNA being Applicant's, but the partial profile DNA hit had a much higher probability of being Applicant. Counsel recalled Applicant could not be excluded from either DNA hit.

Counsel testified he advised Applicant of his constitutional rights, including: his right to a jury trial, right to remain silent, and the State's burden of proof. Additionally, Counsel recalled advising Applicant of the charges he was facing and the elements of the charges. Counsel

recalled the entire defense team, three Public Defenders, suggested Applicant take the plea offer. Counsel recalled advising Applicant of the sentencing exposure he faced, and what the plea offer meant. Further, Counsel testified the offer Applicant received was the best plea offer.

Counsel testified he was ready for trial, and the defense strategy was to say the DNA was not his but possibly a cousins. Counsel stated he had an investigator search for the alibi witnesses Applicant provided, but the investigator was unable to locate the witnesses. Counsel testified generally he advises against defendants having their discovery in the detention center while awaiting trial because other inmates could taint the case. Counsel stated that when a client insists on having the discovery, he provides it to them, but requires them to sign an acknowledgement that he advised them against it. Counsel testified that if Applicant really wanted his discovery, he would have given it to him.

Applicant alleged Counsel coerced him into pleading guilty. This Court finds this allegation is without merit based on Applicant's credible PCR testimony as to this issue and the guilty plea transcript. The Court finds credible Applicant's testimony that he decided to plead guilty when he heard the court talking about the possibility of Applicant receiving a life sentence, and that Applicant pleaded guilty because he did not want to receive a life sentence. Additionally, Applicant, under oath, advised the plea court no one had forced him into pleading guilty, he was satisfied with Counsel's representation, did not need any more time to speak to Counsel, and Counsel had discussed everything in the case. Plea Tr. 16-18. The Court finds Counsel did not coerce Applicant into pleading guilty based on Applicant's credible testimony that he pleaded guilty to avoid a potential life-sentence, and his indication to the plea court no one forced him into pleading guilty.

At the PCR hearing, there was testimony regarding Applicant not getting a copy of the discovery while he was in the detention center. The Court finds this allegation is without merit

based on Counsel's credible testimony. The Court finds credible Counsel's testimony that he advises his clients against having their discovery in the detention center, but if Applicant wanted the discovery he would have provided it to him and made him sign an acknowledgment that Counsel informed him of the risks with having the discovery. Based on Counsel's credible testimony, the Court finds Counsel did not provide the discovery to Applicant because Applicant did not want the discovery after being advised of the dangers of having it. Therefore, Counsel reasonably did not give Applicant a copy of the discovery while Applicant was in the detention center. Accordingly, this allegation is denied and dismissed with prejudice.

Further, the Court finds Counsel reasonably reviewed the discovery with Applicant in preparation for trial. The Court finds credible Counsel's testimony that he visited Applicant numerous times to discuss the discovery and he explained all of the discovery to Applicant. The Court finds Counsel reasonably investigated the case by hiring a DNA expert to review the DNA results, discussed the results with Applicant, and also reasonably investigated Applicant's alibi witnesses by having an investigator search for the witnesses. However, Applicant could not provide full names of the witnesses and could only provide first names or nicknames and a general location to find them. Based on these findings of fact, the Court finds Counsel was not deficient in any respect in his investigation of the case or in reviewing the discovery with Applicant. Therefore, this allegation is denied and dismissed with prejudice.

As discussed above, Applicant waived and abandoned his allegation regarding Counsel's failure to have him evaluated for criminal responsibility. Further, Counsel did have Applicant evaluated for competency, and Applicant was deemed competent to stand trial. Therefore, the allegations of ineffective assistance of Counsel relating to Applicant's mental health are denied and dismissed with prejudice.

The Court finds Applicant knowingly and voluntarily pleaded guilty. The Court finds credible Applicant and Counsel's testimony that Counsel advised Applicant of the charges against Applicant and the elements of the charges he faced. It is also clear from Applicant's testimony that he was aware of the sentencing exposure he faced at trial or in pleading guilty to the charges. The Court also finds Applicant knew the nature of the constitutional rights he waived by pleading guilty. Applicant testified he was aware of his right to a jury trial and the right to remain silent, but Counsel failed to explain the State's burden of proof at trial. The Court finds not credible Applicant's testimony that Counsel never explained to him the State's burden of proof at trial. The Court finds credible Counsel's testimony he explained Applicant's constitutional rights, including the State's burden of proof. Therefore, the Court finds Applicant knowingly and voluntarily pleaded guilty with a negotiated sentence.

Finally, the Court finds Applicant has failed to show prejudice resulted from any of Counsel's alleged deficiencies. The Court is not convinced Applicant would have chosen to continue the trial instead of pleading guilty as negotiated. The Court finds credible Applicant's testimony he pleaded guilty to avoid a potential life sentence. Therefore, Applicant cannot show prejudice and all of Applicant's allegations are denied and dismissed with prejudice.

IV. CONCLUSION

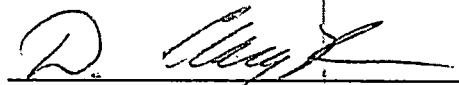
Based on all the foregoing, the Court finds Counsel was not constitutionally ineffective and Applicant knowingly and voluntarily pleaded guilty. The Court finds Counsel was not deficient in his investigation, his review of the discovery with Applicant, his failure to have Applicant evaluated, and his advice to Applicant on whether to plead guilty. Further, the Court finds Applicant has failed to show prejudice because the Court is not convinced Applicant would have proceeded to trial despite Counsel's alleged deficiencies. Therefore, the Court denies relief on all allegations and dismisses them 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.

THEREFORE:

1. The Court denies relief on all allegations 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
Fifth Judicial Circuit



, South Carolina

10-14, 2020.