

RICHEY AND RICHEY

ATTORNEYS AT LAW

A Professional Association

Rodney W. Richey
Lola S. Richey

24 Vardry Street, Suite 301
Greenville, South Carolina 29601

Mailing Address:
Post Office Box 10916
Greenville, South Carolina 29603

(864) 467-0503
(864) 467-0646 (Fax)

Offices:
Greenville/Spartanburg

Website:
www.richeyandrichey.com

April 24, 2013

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

Re: Rashad Allen, SCDC # 344004 vs. The State of South Carolina
Case No: 2011-CP-42-5652

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and a Proof of Service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,


Rodney Richey

RWR/tlg
enclosures

cc: Suzanne White, Esquire

RECEIVED

APR 29 2013

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

HONORABLE J. DERHAM COLE

2011-CP-42-5652

RASHAD T. ALLEN, SCDC#: 344004,

APPELLANT,


against

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Rashad Allen appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable J. Derham Cole, Circuit Judge on January 8, 2013 and Order issued on April 2, 2013 and filed on April 12, 2013. The Appellant received notice of the judgment on April 24, 2013.



Rodney W. Richey
Attorney for the Appellant
Post Office Box 10916
Greenville, South Carolina 29603
(864) 467-0503

Other Counsel of Record:
Suzanne White, Esquire
Office of Attorney General State of SC
Post Office Box 11549
Columbia, SC 29211-1549

RECEIVED

APR 29 2013

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

HONORABLE J. DERHAM COLE

2011-CP-42-5652

RASHAD T. ALLEN, SCDC#: 344004,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on April 25, 2013, addressed to their attorney of record, Suzanne White, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: April 25, 2013

RICHEY & RICHEY, P.A.



Rodney W. Richey
Attorney for the Appellant
Post Office Box 10916
Greenville, South Carolina 29603
(864) 467-0503

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
Rashad T. Allen, #344004,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2011-CP-42-5652

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 20, 2011. The Respondent made its Return on or about September 11, 2012. An evidentiary hearing into the matter was convened on January 8, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Rodney W. Richey, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. James A. Cheek, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, and the plea transcript.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the October 2010 term of General Sessions for burglary, first degree (10-GS-42-5880), armed robbery (10-GS-42-5881), and kidnapping (10-GS-42-5882). The Applicant was represented by James A. Cheek, Esquire. The Applicant pled

SCANNED

COMPUTER

Handwritten initials in the top right corner.

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2013 APR 2 2 14 18
 M. HERR

guilty to the lesser included offenses of burglary, second degree, and strong arm robbery. He pled guilty as indicted to kidnapping. On June 6, 2011, the Honorable Roger L. Couch sentenced the Applicant, to confinement for a period of twenty (20) years suspended upon the service of fifteen (15) years to three (3) years of probation for kidnapping, and fifteen (15) years each for the other two charges, sentences to run concurrent. The Applicant did not appeal his guilty plea or sentence.

ALLEGATIONS

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

1. Ineffective assistance of counsel; in that,
 - a. Counsel failed to investigate the case,
2. Excessive sentence; in that,
 - b. Sentence imposed is excessive in violation of State and Federal law, and
3. Malicious Prosecution, Prosecutorial misconduct.

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 APR 2 04 4:48
MIDP. BLONNEY

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that Counsel had a conflict of interest because Counsel represented both the Applicant and his co-defendant at their guilty pleas. Applicant testified that he never signed a waiver of conflict of interest. Applicant also testified that Counsel was ineffective for failing to investigate the case. Applicant testified that Counsel would not review the discovery materials with the Applicant.

Counsel testified that he did represent both the Applicant and his co-defendant at their

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 APR 12 PM 4:48
MICHOE B. MCQUEEN

7

separate guilty pleas. Counsel testified that both defendants were telling the same story and their interests were the same, so he did not believe that there was a conflict of interest. Counsel testified that there were witnesses outside of the home Applicant and his co-defendant were accused of breaking in, who were willing to testify that they saw Applicant and the co-defendant enter the home with masks on, but then take the masks off when they were in front of the home. Counsel also testified that he met with the Applicant approximately five times and reviewed the discovery materials with the Applicant several times.

This Court finds the testimony of Counsel to be more credible than the testimony of the Applicant. The Applicant's allegations that Counsel did not conduct an adequate pre-trial investigation or review discovery with Applicant without merit. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). The Applicant failed to point to any specific matters Counsel failed to discover, or any defenses that could have been pursued had Counsel completed additional investigation. Accordingly, this allegation is dismissed.

The mere possibility of a conflict of interest is insufficient to challenge a criminal conviction. Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993). "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809 (1984). The Applicant must show that his attorney actually owed duties to a party whose interests were adverse to the Applicant. Id; Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001). This Court finds that there was no conflict of interest as a result of Counsel representing both the Applicant and his co-defendant, when each was pleading

FILED
CLERK OF COURT
SPRINTABURGH COUNTY
2013 APR 12 PM 4:48
D. HOPE B. ANDREY

guilty to their part in the crime and neither was pointing the finger at the other. This Court also finds that the Applicant failed to meet his burden of proof as to this claim. Therefore, the claim is denied.

Excessive Sentence

The Applicant alleged that his sentence was excessive. This Court finds that the allegation lacks merit. The court has broad discretion in imposing criminal sentences. State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976). Absent a showing of partiality, prejudice, oppression or corrupt motive by the sentencing court, or absent a showing that the statutory punishment in and of itself constitutes cruel and unusual punishment, the post-conviction relief court has no authority or jurisdiction to review or change a sentence falling within statutory limits. State v. Cogdell, 273 S.C. 563, 257 S.E.2d 748 (1979). The Applicant did not object to the sentence handed down by the trial court. The Applicant's failure to object has waived any allegation that his sentence was excessive or otherwise improper. Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981).

Furthermore, the Applicant failed to present any testimony or support of his claim. Therefore, this Court finds that the Applicant has failed to meet his burden of proof as to claim and it is denied and dismissed.

Malicious Prosecution

The Applicant failed to provide any testimony or evidence in support of this claim. Therefore, this Court finds that the Applicant failed to meet his burden of proof and this claim is denied and dismissed.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, the

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 APR 12 PM 4:48
M. JOPELSON/ACNLEY

Applicant's testimony is not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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 cautions Applicant that he must file and serve a notice of appeal within thirty (30) 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 PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your


FILED
CLERK OF COURT
PACIFIC ANDERSON COUNTY
2018 APR 12 PM 4:18
MADRID BLAOKLEY

attention 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 must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 2nd day of April, 2013.



J. Derham Cole
Presiding Judge

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 APR 12 PM 4:48
H. HOPE BLACKLEY

Richey & Richey, PA
Attorneys at Law
Post Office Box 10916
Greenville, South Carolina 29603

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



2921131300 6089

