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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
The Honorable Bentley Price, Post-Conviction Relief Judge

Case No. 2018-CP-10-01129

Anthony McClain, SCDC # 186047 ..... Respondent,

v.

State of South Carolina, ... Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Bentley Price's order granting post-conviction relief filed November 10, 2021. The State filed a timely motion to reconsider, alter, or amend pursuant to Rule 59(e), SCRCP, which was denied by Judge Price by written order filed on December 16, 2021, and received by the State on December 17, 2021. Copies of the order granting post-conviction relief and the order denying the State's motion to reconsider, alter, or amend are attached hereto.

January 11, 2022

Respectfully submitted,

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Anthony McClain, #290065 Applicant, vs. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2018-CP-10-01129 **ORDER DENYING RESPONDENT'S MOTION TO RECONSIDER**

The Respondent State of South Carolina filed a motion asking this Court to reconsider its September 19, 2021 Order.

STANDARD OF REVIEW

Motions for reconsideration will not be granted absent "highly unusual circumstances." U.S. ex rel. Becker v. Washington Savanah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (stating that simple disagreements with the court's ruling will not support Rule 59(e) relief).[1] Courts have recognized three circumstances in which a court should grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Hutchinston v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Importantly, a motion for reconsideration is not a vehicle to re-litigate previously raised issues or "to raise argument or present evidence that could have been presented prior to the entry of judgment." Dash v. Mayweather, C/A No. 3:10-1036-JFA, 2010 U.S. Dist. LEXIS 95277, *2 (D.S.C. Sept. 13, 2010) (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471, n.5 (2008)). In other words, "[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." Stevens & Wilkinson

[1] Rule 59 is substantially the same as the Federal Rule. *See* Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21, 602 S.E. 2d 772, 779 (2004) ("Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.").

of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Nor does "[a] party's mere disagreement with the court's ruling . . . warrant a Rule 59(e) motion." In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods. Liab. Litig., 269 F.Supp. 3d 685, 691 (D.S.C. 2017); *see also* Lyons v. Fid. Nat'l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015).

After consideration of the issues raised in Respondent's motion, the Court hereby DENIES Respondent State of South Carolina's Motion for Reconsideration.

AND IT IS SO ORDERED.

12.9.21

~~ELECTRONIC SIGNATURE PAGE TO FOLLOW~~

2766 Bentley Price

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	OF THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
Anthony McClain,	)	
Applicant,	)	**ORDER GRANTING**
	)	**POST-CONVICTION RELIEF**
Vs.	)	
	)	
State of South Carolina,	)	
Respondent.	)	Case No.: 2018-CP-10-01129

The above-captioned matter comes before the court via an application for post-conviction relief filed by Anthony McClain on March 1, 2018. This court convened an evidentiary hearing into the matter on July 1, 2021 by way of a virtual courtroom before the Honorable Bentley Price. Applicant was present at the hearing and represented by Tommy A. Thomas, Esquire, and Benjamin H. Limbaugh, Esquire of the South Carolina Attorney General's Office represented Respondent.

The court had the opportunity to listen to testimony and rule on the witnesses' credibility. This court also had before it a copy of the trial transcript, the record on appeal, the records of the Charleston County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings in this matter.

PROCEDURAL HISTORY

Applicant was indicted at the November 2015 term of the Charleston County Grand Jury for kidnapping, possession of a weapon during the commission of a violent crime, armed robbery, and two counts of pointing and presenting a firearm. He was represented on these charges by Aaron Mayer, Esquire, and Assistant Solicitor David O. Osborne prosecuted the case. Trial was commenced before the Honorable Clifton Newman, but Applicant pleaded guilty before the case went to the jury. On March 25, 2017, Applicant pleaded guilty as indicted on all charges without

negotiations or recommendations. He was sentenced to 22 years for armed robbery, 22 years for kidnapping, and five years each for the pointing and presenting charges and five years for possession of a weapon during the commission of a violent crime. The sentences were set to run concurrently, and Applicant received credit for 652 days' time served. Applicant did not appeal his convictions or sentences.

ALLEGATIONS

Applicant alleged the following grounds at the PCR hearing:

1. Ineffective Assistance of Counsel
    a. Failure to adequately prepare for trial
    b. Failure to review and explain discovery with Applicant
    c. Failure to discuss Applicant's mental health issues with him
    d. Failure to appropriately argue and present pre-trial motions
    e. Failure to object to certain evidence being introduced at trial, including Lyles evidence
    f. Failure to provide advice regarding life without parole (LWOP)
    g. Failure to effectively argue against joinder of cases
    h. Failure to properly handle motion for mistrial
    i. Failure to adequately point out inconsistencies with victim's previous statements and testimony at trial
    j. Failure to adequately advise Applicant regarding right not to testify
    k. Failure to hire a private expert to review telephone requires and failure to subpoena a custodian from AT&T
2. Involuntary Guilty Plea

TESTIMONY ADDUCED AT TRIAL

Applicant, Anthony McClain

Applicant, Anthony McClain, was the first witness, and began by testifying that he always intended to go to trial because he was innocent of the charges. He could not afford his bond, so he spent 652 days in the county detention center, during which time trial counsel only visited twice. This prevented him from reviewing his discovery with trial counsel or developing a theory of defense.

Applicant further testified that he informed trial counsel he had an anxiety disorder; however, he believed trial counsel did not appreciate and allow for how this affected him, including that Applicant was under the influence of medication at trial and at this hearing.

Factually, the charges arose from an incident where he had a verbal altercation with College of Charleston students. There was also a second incident when Applicant was said to have pointed a firearm at a college student. Applicant testified that there were supposed to be written statements from the victim, but she and other witnesses could not identify him. Applicant maintained that he never had a firearm.

Applicant could not recall if he was present for pre-trial motions, though he testified he remembered a motion for suppression was discussed with trial counsel. He also testified that he was aware of a motion to sever the two cases because of lack of evidence. He further testified regarding his understanding of his eligibility for a sentence of LWOP. Approximately two hours after meeting with trial counsel one day, during which trial counsel asked how Applicant would feel about getting ten years, Applicant was notified of the State's intention to seek LWOP. At this point, Applicant felt that he had to make the legal decisions in his case because trial counsel was not assisting him. He further testified that trial counsel advised Applicant's fiancé and sister to get Applicant to stop the trial and plead because he was going to lose. Applicant thought he would get ten years if he took the plea, and that seemed like a reasonable amount rather than risking LWOP. He later learned that the State was attempting to use a federal felony charge for aiding and abetting (rather than the crime itself) to qualify for LWOP and the trial judge was uncertain if that would work.

Even though Applicant took a guilty plea, he testified that he did not enter into it freely and voluntarily. He felt like he was forced because of threat of the LWOP. Before pleading, Applicant

asked trial counsel to work out a deal, especially as trial counsel reported the solicitor was still talking about ten years. Applicant informed trial counsel he would take that offer, but otherwise he wanted to fight for his life against the charges. However, he ultimately felt that he should not have taken the plea because he was not guilty – he was willing to take a set, lower sentence in order to get it over with.

During trial, trial counsel failed to subpoena the cashiers from the convenience stores involved, both of whom said they did not see a crime occur. In fact, the statements reflect that the kidnapping victim invited Applicant to get in her car rather than him forcibly taking her. Applicant did not testify to this at trial because trial counsel told him not to testify on his own behalf. Applicant also did not recall trial counsel's motion for a directed verdict when he attempted to have the incident with the college students thrown out because they could not identify him.

At the end of direct examination, the court questioned Applicant what his most serious offense was to make him eligible for LWOP. He testified that he did not have a most serious offense – the worst state offense was assault and battery of a high and aggravated nature. Further, at the end of redirect examination, the court questioned Applicant about the circumstances of his plea, during which he stated he plead straight up with no offers, negotiations, or dismissed charges.

Aaron Mayer, Trial Counsel

Mr. Mayer, who called in late to the virtual hearing, was questioned first by Mr. Thomas on behalf of Applicant. He began by testifying that he did not hire an investigator to research the facts and charges because it was not his practice at the time. After reviewing the evidence himself, he felt that the College of Charleston case was a little bit stronger because it had multiple witnesses in the State's favor, along with a photograph in which it appeared Applicant was holding a gun.

Trial counsel testified he typically filed an omnibus pretrial motion, but "there many have been a couple of other specific ones as well to the case." He recalled that there may have been a motion for suppression of the statement on the victim's video from the convenience store, which was denied by the court. There was also a motion to sever the two cases, which trial counsel felt showed an opportunity to weaken the cases by having them tried separately and keeping the evidence separately. Trial counsel was questioned about the potential for having the burden shifted against Applicant because, by trying the two cases together, the court essentially required Applicant to be found not guilty of the College of Charleston case to be able to even get a shot at a not guilty verdict on the kidnapping. He stated that he saw how that could be possible, but was not aware of it at the time.

When questioned about the possibility of LWOP, trial counsel testified that Applicant was eligible and the solicitor said all along he would serve the notice, which he felt raised the stakes. He testified that he did not have much experience in assessing whether a defendant was eligible for LWOP. He stated that it was not a slam dunk issue for him and he was unsure whether the argument would be successful. On cross-examination, trial counsel testified that he was unaware if he could have challenged the LWOP notice at the time of Applicant's plea. He thought he had challenged it at every stage, otherwise.

Trial counsel further testified he had very little experience in picking a jury, which led Applicant to lose faith in the jury and decide to throw himself at the mercy of the court. Trial counsel then testified that he felt awful for cross-examining the witness and insinuating that she made up or got wrong the facts of her allegations, which caused him to lose credibility with the jury.

Trial counsel was unclear whether he had a Biggers hearing before trial but believed that he did.[1] Regarding plea offers, trial counsel recalled a 15-year offer, but was not positive on the number. He felt sure that he would have conveyed the offer to Applicant.

As for Applicant's decision to plead, trial counsel stated he was surprised but wanted to be supportive and thought it was hard for him to know how the trial was going. He did not recall providing specific advice about taking the plea but could have because there was a lot on the line. He also did not recall speaking with Ms. Tisdale or any other family members about anything in specific. When asked about his thoughts regarding Judge Newman sentencing Applicant to the age of the victim, he felt like there was not much that he could do because of the entry of the guilty plea.

Trial counsel testified on cross-examination that he was hampered by trying the case alone when most attorneys would have had a second chair or assistant. He admitted that it probably was not sufficient, as it was a two-person job, "and it certainly wasn't sufficient to give me much time during the trial to talk to the client." This came up in relation to whether he had spoken with Applicant about taking a plea, to which he also testified that he was surprised when it came up, but also "felt like it might be the right thing because I felt like we had a lot of haters on the jury and I felt like I hadn't done much of a good job of sorting through their biases and trying to get them off for cause." Otherwise, he did not recall specific conversations with Applicant or his family members.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the

[1] There was no Biggers hearing because trial counsel stated there was no reason to refute the identification because it was recorded, and Defendant/Applicant admitted to his presence at the scene. Pre-trial Tr. p. 20.

witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). Where an application for post-conviction relief alleges ineffective assistance of counsel 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." Id. 466 U.S. at 686; see Butler v. State, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. Bell v. State, 321 S.C. 238 (1996); see also Cherry v. State, 300 S.C. 238 (1989); Rule 71.1(e), SCRCP.

The reviewing court applies 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, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117 (citing Strickland, 466 U.S. at 688). 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.

Failure to appropriately review and challenge the State's notification of LWOP

The court finds that trial counsel provided ineffective assistance to Applicant regarding the issue of Applicant's notification that he faced a sentence of LWOP if convicted. Though trial counsel filed a motion to challenge the validity of an LWOP notification, he failed to inform himself in order to appropriately argue the motion. Further, he failed to argue the issue at every appropriate opportunity. When it was initially considered pre-trial, trial counsel did not even speak on his own motion, instead allowing the trial court and the solicitor discuss the classification of Applicant's prior charges. Pretrial Tr. p. 13, line 15 – p.20, line 5.

If a defendant is actively misinformed about parole eligibility, he must prove he relied on this information in order to receive post-conviction relief. Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983); *see* Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989) (relief granted on this ground). Most case law in this realm considers whether a trial judge gave incorrect sentencing information that a defendant relied upon, which is not at issue here. Instead, Applicant has only to prove that he relied on active misinformation, as normally parole eligibility is a collateral consequence of sentencing of which a defendant need not be specifically advised. Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004).

In the current case, trial counsel was clearly aware that the LWOP notice was based on a charge that may not rise to the level of a "most serious" charge needed to trigger LWOP. He was concerned enough about this to file a pre-trial motion to have the notice set aside. However, as stated above, he did not argue his own motion, nor did he challenge the LWOP notice at any other point in the trial. Instead, the idea of LWOP hung over Applicant's head as the trial proceeded. Further, on pages 526-7 of the trial transcript, both the State and trial court admitted that, if Applicant had proceeded with trial rather than pleading, they "might have run into some issues"

in construing Applicant's prior charges to fit the criteria for enhancement to LWOP. Tr. p. 527, line 7.

Trial counsel's failure to argue this issue appropriately is ineffective assistance of counsel. His performance was deficient under the first prong of Strickland because he failed to provide Applicant with accurate information regarding whether he qualified for a LWOP sentence, as well as failed to argue that issue on Applicant's behalf. This clearly caused Applicant prejudice under Strickland's second prong as it caused him to plead guilty without negotiations in order to avoid risking the receipt of an LWOP sentence at trial. If trial counsel had performed his duties effectively, Applicant may have finished out his trial and received a shorter sentence than he did by pleading. Therefore, because of Applicant's showing of prejudice due to erroneous advice and ineffective assistance of counsel, relief on this allegation is **granted** and Applicant's sentence is **vacated**.

Involuntary Guilty Plea

Applicant entered an involuntary guilty plea because he was misinformed and inadequately represented regarding whether the notification of an LWOP sentence was appropriate under the law. Applicant underwent several days at trial laboring under the delayed ruling by the trial court as to whether his LWOP notification was appropriate based on his prior convictions. Ultimately, Applicant pleaded guilty because trial counsel could not satisfactorily inform him or receive a ruling that LWOP would not be on the table. As such, despite the fact that he maintained his innocence, he elected to plead guilty without negotiations for a sentence that would be lower than life in prison.

A general idea in this state has been that, in order to reverse a guilty plea, an applicant must prove "something more" because "it would be wholly impractical to maintain a rule which requires

the automatic reversal of a guilty plea without something more." Hunter v. State, 316 S.C. 105, 109, 447 S.E.2d 203, 205 (1994). Hunter and the "something more" idea have been repeatedly cited in challenges of guilty pleas when it comes to satisfying the second prong of Hill, being that Applicant would have proceeded to trial but for counsel's errors. Hill, 474 U.S. at 595. This was expressly adopted by South Carolina in Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). It is abundantly clear that, in this matter, the erroneous advice of counsel induced Applicant to plead guilty. Therefore, because of Applicant's showing of prejudice due to erroneous advice and ineffective assistance of counsel, relief on this allegation is **granted** and Applicant's sentence is **vacated**.

CONCLUSION

Based on the totality of information and evidence before this court, it is clear that Mr. Mayer's level of representation fell below that required by prevailing professional norms and that he provided ineffective assistance of counsel to Applicant. As such, Applicant was induced to enter an involuntary guilty plea because he could not make it in a knowing, voluntary, intelligent, or free manner. Therefore, this court grants relief on both counts, vacates the conviction and sentence of the plea court, and remands Applicant and this charge to Charleston County for further proceedings.

IT IS THEREFORE ORDERED:

1. This court grants relief on the allegations of ineffective assistance of counsel and involuntary guilty plea;
2. Applicant's conviction and sentence are vacated; and
3. Applicant and these charges are remanded to Charleston County for further proceedings.

AND IT IS SO ORDERED this 7th day of November, 2021.

THE HONORABLE BENTLEY PRICE
Presiding Circuit Court Judge
Ninth Judicial Circuit

Charleston, South Carolina