

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
THE HONORABLE W. Jeffrey Young

CA No. 2011-CP-23-4082

KENYA EUGENE SPRY,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA

RESPONDENT.

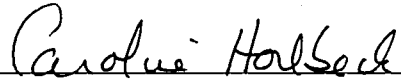
NOTICE OF APPEAL

Appellant KENYA EUGENE SPRY, appeals from the Order of the Honorable W. Jeffrey Young, Circuit Court Judge clocked April 2, 2013.

Respectfully submitted,

RECEIVED

APR 29 2013



Caroline M. Horlbeck, Esq.
101 Whitsett St
Greenville, SC 29601

S.C. SUPREME COURT

Date: April 9, 2013

Other Counsel of Record: Karen Ratigan, Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2013 APR 17 A 9:14

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE SUPREME COURT

Kenya Eugene Spry,)
)
Appellant,)

C.A. No. 2011-CP-23-4082

-vs-)

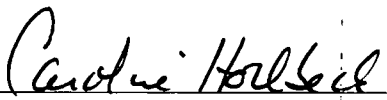
CERTIFICATE OF SERVICE

State of South Carolina,)
)
Respondent.)

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorney for Applicant, and that I have this day caused to be served upon the person(s) named below Applicant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Lorie French
S.C. Office of Appellate Defense
PO Box 11433
Columbia, SC 29201

Karen Ratigan, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211



Caroline M. Horlbeck

Greenville, South Carolina

April 24, 2013

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2011CP2304082

FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 APR - 2 P. 1:11

Kenya Eugene Spry vs. South Carolina State Of

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.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 12(b), SCRCP;
 - Rule 41(a), SCRCP (Vol. Nonsuit);
 - Rule 43(k), SCRCP (Settled);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRCP;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- 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; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this 2nd day of April, 2013.

Court Reporter:

PRESIDING JUDGE - W Jeffrey Young

This judgment was entered on the 2nd day of April, 2013, and a copy mailed first class this 2nd day of April, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Caroline M.W. Horlbeck 101 Whitsett Street
Greenville, SC 29601

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Kenya Eugene Spry,)
 S.C.D.C. No. 306964,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2011-CP-23-4082

ORDER OF DISMISSAL

2013 APR -2 P 1:5
 FILED CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL H. WICKENS

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 17, 2011. The Respondent made its return on November 1, 2011. An evidentiary hearing into the matter was convened on February 13, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, Larry H. Cooke, Esquire. The Court had before it the transcript of the guilty plea hearing, the records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the Respondent's return.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the May 2009 term of the Greenville County Grand Jury for assault on a correctional facility

employee (2009-GS-23-01437). He was represented by Larry H. Cooke, Esquire.

On June 17, 2010, the Applicant pled guilty.¹ The Honorable Edward W. Miller sentenced the Applicant to a five (5) years imprisonment to run consecutive to the sentence he was already serving. The Applicant did not appeal.

ALLEGATIONS

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

1. Ineffective assistance of counsel.
 - a. Failure to order a competency evaluation.

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).

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).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under

¹ A second count of assault on a correctional facility employee was dismissed.

prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The Applicant stated plea counsel obtained an order for a competency evaluation. The Applicant stated, however, that plea counsel did not tell him that he was going to have this evaluation so he fought with the officers when they came to transport him. The Applicant stated the officers used some sort of gas that got into his eyes and that, as a result, he did not cooperate with the actual evaluation process itself. The Applicant stated he and plea counsel did not discuss the fact that he was never actually evaluated. The Applicant stated he had witnesses in his case but plea counsel never gave him the opportunity to discuss this. The Applicant stated he had to plead guilty because plea counsel was not prepared for trial but said the State would drop one of the counts if he entered a guilty plea. The Applicant admitted he did not mention any of his concerns to the plea judge (and actually said he was satisfied with plea counsel's representation) because he had balked at plea before and was forced to go to trial. The Applicant stated he pled guilty just to get it over with.

Plea counsel testified he filed discovery motions after he was appointed in this case. Plea counsel testified that, based on the Applicant's actions in court on September 1, 2009, Judge Welmaker ordered a competency evaluation over the State's objection. Plea counsel testified, however, that he received a report that the Applicant did not cooperate with the evaluation or

answer any questions. Plea counsel testified he told the Applicant about the report when he was brought back from SuperMax to enter this guilty plea. Plea counsel testified there was overwhelming evidence against the Applicant, so the State's offer to dismiss one of the counts was a good one. Plea counsel testified he explained – on the day of the hearing – the advantages and disadvantages of pleading guilty and the Applicant chose to enter a guilty plea. Plea counsel testified the Applicant never mentioned that he wanted to go to trial.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds the Applicant's testimony is not credible, while also finding plea counsel's testimony is credible. This Court further finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

The Applicant admitted to the plea judge both that he was guilty and that the facts recited by the solicitor were true. (Plea transcript, p.8; p.12). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced in any way. (Plea transcript, pp.7-8).

This Court finds the Applicant failed to meet his burden of proving plea counsel was ineffective. Plea counsel testified he discussed with the Applicant the fact that there was no competency evaluation performed because he was uncooperative. Plea counsel testified he explained to the Applicant the advantages and disadvantages of entering a guilty plea in this case. This Court finds plea counsel's testimony is credible and that he properly reviewed both the case and plea offer with the Applicant. This Court finds the Applicant made a knowing and voluntary choice to enter a guilty plea. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969) (holding that, to be knowing and voluntary, a plea must be entered with a full

understanding of the charges and the consequences of the plea). The Applicant was informed of the sentence range for the charge, admitted he was guilty, and stated he had not been coerced into entering a plea. (App.pp.7-8). The Applicant did not avail himself of the opportunity to tell the plea judge about either his relationship with plea counsel or the circumstances behind the failed evaluation in this case.

This Court finds the Applicant failed to meet his burden of proving plea counsel was ineffective in failing to investigate potential witnesses. As these alleged witnesses did not testify at the evidentiary hearing, any discussion regarding what they would have testified about at trial is purely speculative. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court “has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.”) (emphasis in original).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea 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 plea counsel’s performance.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this

matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 13 day of March, 2013.


W. Jeffrey Young
Presiding Judge

Sumter, South Carolina.

CAROLINE M. HORLBECK

ATTORNEY AT LAW

101 WHITSETT ST.
GREENVILLE, SOUTH CAROLINA 29601
horlbecklawfirm@gmail.com

(864) 315-9919
Fax(864) 232-4756

April 24, 2013

Via Regular Mail

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: KENYA EUGENE SPRY v. State

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

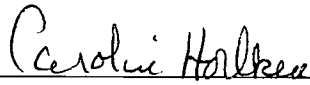
These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,

RECEIVED

APR 29 2013



Caroline M. Horlbeck, Esq.

S.C. SUPREME COURT

Enclosure

cc: Office of the Attorney General
Office of Appellate Defense

CAROLINE M. HORLBECK
Attorney At Law
101 WHITSETT ST.
GREENVILLE, SOUTH CAROLINA 29601

U.S. POSTAGE
PAID
GREENVILLE, SC
29604
APR 25, 13
AMOUNT
\$1.12
00092548-18



29211



1000

Via Regular Mail
Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211