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RECEIVED

May 1, 2013

MAY 06 2013

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

S.C. SUPREME COURT

Re: *Antrown Irby v. State of South Carolina*
In the Court of Common Pleas for Spartanburg County
C.A. No.: 2012-CP-42-348

Dear Mr. Shearouse,

Enclosed for filing is a Notice for Appeal in the above case. Also enclosed are the following:

- (1) Proof of service of the Notice of Appeal on the Respondent.
- (2) A copy of the Order which is to be challenged on appeal.

Because this is an appeal on a post-conviction relief matter, I understand that no filing fee is required in this matter.

Very truly yours,



D. Alan Lazenby

DAL:jeh
Enclosure
cc: Suzanne H. White, Esquire

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2012-CP-42-0348

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MAY 06 2013

S.C. SUPREME COURT

Antrown A. Irby, #~~233398~~

233308

Appellant,

v.

State of South Carolina

Respondent.

NOTICE OF APPEAL

Antrown Irby appeals the Order of the Honorable J. Derham Cole, dated April 2, 2013. Appellant received written notice of entry of this Order on April 18, 2013.

May 1, 2013


D. Alan Lazenby

LAZENBY LAW FIRM LLC
PO Box 6099
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Phone: (864) 804-5050
Attorney for Appellant

Other Counsel of Record:
Suzanne H. White, Esquire
S.C. Attorney General's Office
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Columbia, SC 29211
Attorney for Respondent
(803) 734-4127

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2012-CP-42-0348

Antrown A. Irby, #233398

Appellant,

v.

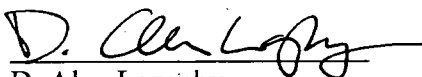
State of South Carolina

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Suzanne H. White by depositing a copy of it in the United States Mail, postage prepaid, on May 1, 2013, addressed to its attorney of record, Suzanne H. White, PO Box 11549, Columbia, South Carolina 29211

May 1, 2013


D. Alan Lazenby

LAZENBY LAW FIRM LLC
PO Box 6099
Spartanburg, SC 29304
Phone: (864) 804-5050
Attorney for Appellant

BM

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Antrown A. Irby, #~~233398~~, 233308)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2012-CP-42-0348

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 25, 2012. The Respondent made its Return on or about September 25, 2012. An evidentiary hearing into the matter was convened on January 9, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by R. Patrick Martin, 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. Richard H. Whelchel, 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.

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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 July and August 2009 terms of General Sessions for armed robbery (09-GS-42-3515), assault and battery with intent to kill (ABWIK) (09-GS-42-3514), and possession of methamphetamine or crack cocaine (09-GS-42-4471). The Applicant

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was represented by Richard H. Whelchel, Esquire. On February 24, 2011, the Applicant pled guilty as indicted. The Honorable J. Mark Hayes II sentenced the Applicant, pursuant to a negotiated sentence, to confinement for a period of fifteen (15) years each for ABWIK and armed robbery, and three (3) years for possession of methamphetamine or crack cocaine, 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 object to the Applicant's former attorney, Mike Morin, acting as solicitor to prosecute the Applicant, when the attorney-client relationship was fraught with allegations of violations of professional ethics and ineffective assistance of counsel. Mike Morin relied upon information gained through attorney client privilege in order to make the decision as to how to prosecute Applicant, knowing he would be susceptible to a plea if LWOP was threatened. Mike Morin would have not been allowed to prosecute had counsel entered proper objections."
2. Prosecutorial Misconduct; and
3. Violation of Due Process of Law.

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

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evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). 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, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that the Solicitor's office originally offered a ten year sentence and the Applicant had agreed to that deal, but the Solicitor handling the case was changed to Michael Morin. Applicant testified that Morin had previously represented Applicant in his prior position as a public defender. Applicant testified that he shared that information with Counsel and was

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relying on Counsel to assist him with the negotiations. Applicant testified that approximately twenty days prior to court, the Solicitor's office pulled the ten year offer and suddenly informed Applicant that they might seek a sentence of life without parole because Applicant already had two strikes on his record. However, Applicant acknowledged that he was aware that he was pleading guilty to a negotiated sentence of fifteen years on the day of the plea and was aware that the ten year deal had been taken off the table.

Counsel testified that his understanding of the original ten year offer was that the offer did not include either the armed robbery or the ABWIK charge. Counsel testified that he explained the difference between negotiated and recommended sentences to Applicant prior to the plea. Counsel testified that the Notice of intent to seek life without parole was filed and served in February 2011. Counsel testified that he informed the Applicant that the ten year offer had been revoked, but the Applicant was insistent on a concrete sentence. Counsel testified that he was informed of Morin's previous representation of Applicant and discussed the matter with the Chief Public Defender, but neither of them saw any conflict of interest.

This Court finds that the Applicant has failed to meet his burden of proof as to his claim. This Court, after a review of the record and testimony presented, is confident that the Applicant was aware that the ten year offer had been revoked and he faced a potential sentence of life without parole if he was found guilty at trial. The Applicant failed to demonstrate any deficient behavior on behalf of Counsel and failed to point to any specific matters Counsel failed to discover, or any defenses that could have been pursued had Counsel prepared more. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate preparation or representation. Accordingly, this allegation is dismissed.

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Prosecutorial Misconduct

This Court finds that the Applicant has failed to meet his burden of proof as to this claim. The Applicant claimed that his prior plea offer was revoked based upon prosecutorial misconduct or vindictiveness; however, this Court finds that the Applicant failed to present any evidence or testimony to support this claim. Where there is no presumption of prosecutorial vindictiveness the burden is on the defendant to prove actual vindictiveness. State v. Fletcher, 322 S.C. 256, 471 S.E.2d 702 (Ct. App. 1996). Furthermore, although the Applicant believed that he had accepted a plea offer of ten years, it is established that "a defendant may only enforce an oral plea agreement upon a showing of detrimental reliance." Reed v. Becka, 333 S.C. 676, 688, 511 S.E.2d 396, 402 (Ct. App. 1999). The Applicant failed to demonstrate that he had suffered from any detrimental reliance on the State's prior offer. Therefore, this claim is denied and dismissed.

Due Process Violations

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

Summary

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

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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.

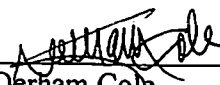
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S. C. 453 (1991), an Applicant has 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 attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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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 3rd day of April, 2013.



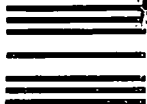
J. Derham Cole
Presiding Judge

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SPARTANBURG SC 29304-6099



THE HONORABLE DANIEL E. SHEARHOUSE
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