

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY

Court of Common Pleas

Honorable Diane S Goodstein Circuit Judge

Case No.: 2019-CP-45-0205

Roy Moore 294950.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Scott Welch appeals the Honorable Diane S Goodstein’s February 3, 2022 Order of Dismissal. Undersigned counsel received notice of entry of the order on May 9, 2022. A copy of the order on appeal is attached hereto.



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May 9, 2022

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S.C. SUPREME COURT

Solicitor's Office prosecuted the case. On February 26-27, 2018, Applicant proceeded to trial before the Honorable R. Farrell Cothran, Jr and a jury. At the conclusion of Applicant's trial, the jury found Applicant guilty as indicted. Judge Cothran sentenced Applicant to seven years' imprisonment for each charge, to run concurrent. Applicant did not appeal his conviction or sentence.

II. FACTS

Victim was leaving her home in Kingstree when she noticed a door to one of the utility buildings in her yard was open. Tr. p. 50. Upon further investigation, Victim realized one lock was completely torn off the door and another lock was hanging off the door. Tr. p. 50. Victim also noticed the door to her second utility building was damaged, indicating the perpetrator attempted to break into the second building as well. Tr. p. 50. The contents of the Victim's utility building were thrown around. Tr. p. 51. Victim testified no one had permission to be inside the utility buildings except for her and her husband. Tr. p. 51. Victim had surveillance systems, which captured the crime on video. Tr. p. 51.

The surveillance video shows Applicant used a cigarette light to look inside the utility buildings. Tr. p. 52. Applicant hid behind the building after seeing a car pass by Victim's house. Tr. p. 52. Thereafter, Applicant looked directly at the victim's camera, which startled him, and Applicant attempted to cover his face with his t-shirt. Tr. p. 52. - - -

III. PRESENT APPLICATION

In his application for post-conviction relief, Applicant alleges he is being held unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
 - a. "Failure to quash invalid indictment"
 - b. "Failure to file direct appeal"

At the start of Applicant's evidentiary hearing, Applicant, through Counsel indicated they will only be proceeding with Applicant's allegation that Counsel failed to file a direct appeal. This Court finds Applicant has abandoned his allegation Counsel was ineffective for failing to quash an invalid indictment, and this allegation is denied and dismissed with prejudice.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. Under this prong, the court measures an attorney's performance

by its “reasonableness under prevailing professional norms.” *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* (citing *Strickland*, 466 U.S. at 690). “When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109-10 (2011). “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough*, 540 U.S. at 6; *see also* *Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced 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. “This does not require a showing that counsel’s actions ‘more likely than not altered the outcome,’ but the difference between *Strickland*’s prejudice standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case.’” *Harrington*, 562 U.S. at 111-12 (quoting *Strickland*, 466 U.S. at 697). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112.

“The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury.” *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he/she would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (“Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.”). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

1. Failure to file direct appeal

Applicant alleges Counsel was ineffective for failing to file a direct appeal on Applicant's behalf.

This Court finds this allegation is without merit.

At his evidentiary hearing, Applicant testified he did not hire Counsel to represent him on these charges. Applicant testified he is unaware how Counsel began representing him for these charges. Applicant testified he received a call from Counsel one day wherein Counsel said Applicant had to be present in court for another matter. Applicant testified he went through a trial with Counsel, and Counsel told Applicant of his right to appeal after his jury trial. However, Applicant testified he told Counsel that Applicant never hired Counsel to represent him on these charges. Applicant testified he did want to appeal his conviction, but he did not want Counsel to represent him during his appeal. Applicant testified Counsel never argued Applicant's case or argued on Applicant's behalf. Applicant stated he wanted to appeal his conviction, but he wanted another attorney to handle his appeal. On cross-examination, Applicant testified he was indicted for second-degree burglary and attempted second-degree burglary, and Applicant had a jury trial on these charges. Applicant testified he did not hire Counsel to represent him on these charges. Applicant testified he told Counsel that Applicant did not want Counsel to file an appeal on Applicant's behalf because he did not want Counsel to represent him. Applicant insisted he never hired Counsel to represent him. Applicant clarified he wanted an appeal, but he told Counsel that he did not want Counsel to file a notice of appeal for him.

Counsel testified he has been practicing law for forty five years, and has a lot of experience in criminal courts. Counsel testified he was retained by Applicant to represent him on these charges. Counsel testified his retainer agreement indicated his representation would end at the conclusion of Applicant's trial, however Counsel would have filed a notice of appeal if Applicant requested he file one. Counsel testified he does not recall any discussion with Applicant where Applicant requested he file a notice of appeal. Counsel testified he ordinarily does not encourage

an inmate to appeal if they lose at trial. Counsel testified he has filed many notices of appeal for clients in the past and this would not have been difficult for him to do. Counsel testified if Applicant asked him to file a notice of appeal he would have been happy to do so. Counsel testified he does not recall discussing Applicant's right to appeal with Applicant after his trial.

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. *Turner v. State*, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (internal citations omitted). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967). *Id.* South Carolina's Appellate Courts have no jurisdiction to entertain appeals when the notice of appeal is not timely given and served. *White v. State*, 263 S.C. 110, 119, 208 S.E.2d 35, 40 (1974). Nevertheless, if a PCR court finds that an applicant has been denied his right to direct appeal from trial due to counsel's errors, his request for post-conviction relief may be denied, but he may be permitted to seek belated review of trial errors in conjunction with his appeal of the order dismissing his PCR application. *Id.*

This Court finds Applicant voluntarily waived his right to a direct appeal. Applicant testified he did not want Counsel to file a direct appeal on his behalf. Applicant testified he spoke with Counsel following his trial and he did not want Counsel representing him on appeal. When expressly asked, Applicant testified he told Counsel to not file an appeal on his behalf. Counsel testified he was willing to file an appeal for Applicant, but he was not asked to do so. We find that Applicant has failed to establish how Counsel was ineffective for following Applicant's wishes and not filing a notice of appeal. For these reasons, Applicant's allegation is denied and dismissed with prejudice.

III. CONCLUSION

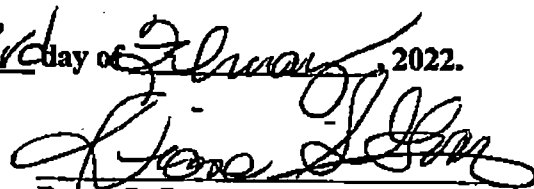
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the 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, 409 S.E.2d 395 (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.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice.

AND IT IS SO ORDERED this 3rd day of February, 2022.



DIANE S. GOODSTEIN
Presiding Judge
Third Judicial Circuit

Sumner South Carolina

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S.C. SUPREME COURT