

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Stephanie P. McDonald, Circuit Court Judge

Case No: 2011-CP-10-6129

Jerry Jerome Smith.....Appellant
S.C.D.C. 332155
v.
The State..... Respondent

NOTICE OF APPEAL

Jerry Jerome Smith, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable Stephanie P. McDonald, April 29, 2013, which I, Charles T. Brooks, III, received on May 6, 2013.

RECEIVED

MAY 08 2013

S.C. SUPREME COURT

Charles T. Brooks, III
309 Broad Street
Post Office Box 3512
Sumter, South Carolina, 29151
(803) 418-5708
Attorney for Appellant

Other Counsel on Record:
Ashleigh R. Wilson, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3970

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v.

The State.....Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 7th day of May, 2013, I served the foregoing **Notice of Appeal, Order of Dismissal**, as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on May 7, 2013, addressed to the following as indicated below:

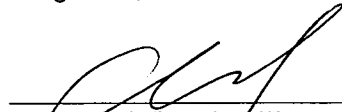
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

South Carolina Office of Appellate Defense
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29211-1589

Office of Attorney's General
Attn: Ashleigh R. Wilson, Esquire
Post Office Box 11549
Columbia, South Carolina 29211-1549

Jerry Smith, 332155
Lieber Correctional Institution
Post Office Box 205
Ridgeville, S. C. 29472

Dated: May 7, 2013


Charles T. Brooks, III
Attorney for the Appellant
309 Broad Street
Sumter, South Carolina 29150
(803) 418-5708

AB
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SOL
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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Jerry J. Smith, #332155)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
2011-CP-10-6129

ORDER OF DISMISSAL

FILED
2013 APR 30 AM 10:07
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 29, 2011. The Respondent made its Return on December 12, 2011. An evidentiary hearing into the matter was convened on July 24, 2012, at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Charles T. Brooks, III, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Applicant's plea counsel, John Knobloch, Esquire, also testified at the hearing. This Court had before it the guilty plea transcript, the records of the Charleston County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the Applicant's Record on Appeal, the PCR application, and Respondent's Return thereto.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Applicant was indicted at the March 2007 term of the Charleston County Grand Jury for grand larceny (\$1000-\$5000) (2007-GS-10-4266), murder (2007-GS-10-4268), and first degree burglary (2007-GS-10-4267). John Knobloch, Esquire,

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represented Applicant. On December 5, 2008, the Applicant pled guilty to the lesser-included offense of involuntary manslaughter and as indicted to grand larceny and first degree burglary. The Honorable R. Markley Dennis, Jr. sentenced him to confinement for twenty-three (23) years for first degree burglary, five (5) years for involuntary manslaughter, and five (5) years for grand larceny. The sentences were to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal. State v. Smith, Op. No. 2010-UP-389 (S.C. Ct. App. filed August 25, 2010). The Remittitur was issued on September 10, 2010.

ALLEGATIONS

The Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of plea counsel in that:
 - a. Applicant's initial attorney recused herself. Laura Knobloch went to work as a Solicitor two weeks prior to trial. Her husband, John Knobloch, took over the case. John Knobloch advised Applicant to plea to the prosecutor's recommended 15 year sentence because he otherwise had no strategy to proceed to trial. Applicant received 23 years instead of agreed upon 15 years. Applicant argues that counsel should have motioned for enough time to adequately represent Applicant. Counsel's failure to motion for a continuance rendered him inadequate and ineffective.
 - b. Counsel failed to adequately investigate the facts and circumstances surrounding the victim. Failure to conduct such investigation denied Applicant of relevant information which could have established his innocence.
 - c. Counsel failed to strategize with Applicant by not discussing discovery package which supplied an incredible witness's statement implicating Applicant. Counsel grossly erred by not questioning the truth of State's witness.
 - d. Counsel failed to weigh the pros and cons of going to trial. Counsel erred by coercing Applicant to plea by threatening a life's sentence if he did not accept prosecutor's offered plea.
 - e. Counsel's ineffective assistance of said case is enhanced by clearly violating the rules of due process.

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- f. Counsel failed to explain to Applicant that Applicant has the right to withdraw plea if trial judge rejected prosecutor's recommendation.
- g. Counsel's failure to submit, develop, and present all relevant and mitigating evidence which would have caused an entirely different resulting outcome grossly violates the federally granted right to due process.
- h. Counsel failed to question the irrelevant evidence presented by the prosecution.

At the hearing, Applicant waived all grounds for relief except ineffective assistance of counsel.

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 his or her 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).

At the evidentiary hearing, the Applicant testified that his plea was entered involuntarily because he pled guilty with the understanding that he would receive a fifteen year sentence for his first degree burglary charge. He testified that he felt tricked into pleading guilty and that he did not know that he was sentenced to twenty-three years until he reached the Department of Corrections. He testified that he recalled being told the maximum sentence for first degree burglary was life, but did not recall the plea judge telling him that he would not be sentenced to the fifteen year minimum sentence. The Applicant further testified that he did not recall hearing the plea judge say that he was being sentenced to twenty-three years for first degree burglary. The Applicant stated that plea counsel told him to answer "yes" to all of the judge's questions. Lastly, the Applicant testified that he would have gone to trial had he known we was not getting a fifteen year sentence.

At the evidentiary hearing, plea counsel testified that he was appointed to represent the Applicant. He testified that he discussed the elements of each charge with the Applicant, the differences

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between the charges he was indicted for and the charges he was pleading guilty to, and the strength of the State's case. Plea counsel also testified that during plea discussions with the State, the Applicant was offered a plea to involuntary manslaughter instead of murder. He testified that there were no specific sentences discussed with the State and that he does not recall receiving a fifteen year plea offer from the State. He also testified that the State was not willing to make any sentence recommendation. Lastly, plea counsel testified that it was the Applicant's decision to plead guilty, and that he believed the plea was entered freely and voluntarily. The Applicant never indicated to plea counsel that he did not understand the plea proceeding or the sentence given by the plea judge.

INEFFECTIVE ASSISTANCE OF COUNSEL

The Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 (1984); Butler, 334 S.E.2d 813.

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. 668. The applicant must overcome this presumption in order to receive relief. Cherry, 386 S.E.2d 624.

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Id. at 625 (citing Strickland,

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466 U.S. 668). 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." Id. at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

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).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)). When a defendant pleads guilty on the advice of counsel, the plea may only be attacked through a claim of ineffective assistance of counsel. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2002) (citations omitted).

This Court finds that plea counsel is a practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on numerous occasions. During conferences with the Applicant, counsel discussed the pending charges, the elements of the charges and what the State was required to prove, Applicant's constitutional rights, Applicant's version of the facts, and

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possible defenses or lack thereof. The record reflects that the Applicant's plea was entered freely, voluntarily, knowingly, and intelligently. Applicant acknowledged that he was guilty of these offenses. Applicant told the plea court that he was satisfied with his attorney and that no one had threatened him or promised him anything to plead guilty. This Court finds that the Applicant understood his sentence.

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 that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation. This Court finds that plea counsel's representation did not fall below an objective standard of reasonableness.

The Applicant alleges his guilty plea was involuntary because he thought that he would receive a fifteen year sentence for first degree burglary. This Court finds that the Applicant's plea was entered freely, knowingly, and intelligently. This Court further finds that the Applicant was thoroughly advised of his constitutional rights and the potential sentences for all of his charges prior to pleading guilty. The South Carolina Supreme Court has held that any misconceptions that a defendant may have about the terms of his guilty plea or sentence may be cleared up by the Judge's colloquy. Knox v. State, 340 S.C. 81, 530 S.E.2d 827 (2000).

Here, the Applicant was not only advised of all his constitutional rights and the potential sentences he was facing, but the judge stated on the record why he would not sentence the Applicant to fifteen years. The plea judge stated to all the co-defendants "your records tell me that fifteen is warranted...but I can't in good conscience bring myself to do that because something happened during

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that burglary.” (T. 86). In addition, the plea judge clearly stated at the end of the plea proceeding that the Applicant’s sentence for first degree burglary would be twenty-three years.

The Applicant stated at the plea proceeding that he was explained the charges and that he understood the possible punishments. (T.13-17). The Applicant also stated during the plea proceeding that he understood the plea agreement to be “no negotiations other than allowing him to plead to the involuntary.” (T. 16-17). The Applicant also testified that he was satisfied with his attorney. (T. 16). The Applicant’s response to the judge’s questioning during the plea colloquy further demonstrated his understanding that there were no sentencing recommendations from the State.

This Court finds further that the Applicant’s claim, that he was told to answer “yes” to all of the plea judge’s questions, does not affect the voluntariness of the Applicant guilty plea. In Moorehead, the Court stated that the Applicant’s explanation that he answered the trial judge in the affirmative on counsel’s alleged advice that the questions were meaningless does not support the granting of PCR. Moorehead v. State, 329 S.C. 329, 333, 496 S.E.2d 415, 417 (1997). A statement that questions are “routine” is not an invitation to answer then untruthfully, nor does it constitute reason to believe the questions and statement of the judge during the guilty plea mean nothing. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997). Despite any discussion regarding the plea proceeding with plea counsel, the Applicant had a duty to answer the questions truthfully. His claim that plea counsel told him to answer “yes” at the plea proceeding does not affect the nature of the plea and does not warrant granting of his post-conviction relief application.

This Court also finds that plea counsel’s testimony was credible, and that the Applicant testimony was not credible. Plea counsel testified that the Applicant was never offered a plea of fifteen years and that he reviewed the potential sentences with the Applicant prior to the plea. This Court finds that the Applicant’s allegations are without merit, that the Applicant failed to carry his burden of

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proving that plea counsel was ineffective, and that but for plea counsel's performance he would have proceeded to trial instead of pleading guilty.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test, specifically 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 her representation of the Applicant. The Applicant failed to show that plea counsel's performance was deficient. Therefore, this Court need not address prejudice. Applicant's complaints concerning counsel's performance are without merit and are denied and dismissed.

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 violation or deprivation before or during his guilty plea and sentencing proceedings. Plea counsel was not deficient in any manner, nor was the Applicant prejudiced by plea counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

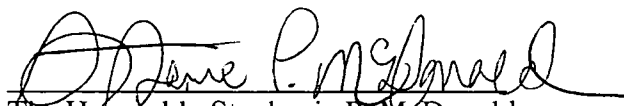
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and 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 29th day of April, 2013


The Honorable Stephanie P. McDonald
Presiding Judge, 9th Judicial Circuit

Charleston, South Carolina.

The Brooks Law Office, LLC

CHARLES T. BROOKS, III, ATTORNEY AT LAW

IRMA R. BROOKS, ATTORNEY AT LAW

309 BROAD STREET ~ SUMTER, SOUTH CAROLINA 29150
POST OFFICE BOX 3512 ~ SUMTER, SOUTH CAROLINA 29151
(803) 418-5708

FAX: (803) 934-9618 TOLL FREE: (877) 770-8792

Email: cbrooks@ctbrooks.com

May 6, 2013

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: Jerry Jerome Smith v State of S. C.
Case No. 2011-CP-10-6129

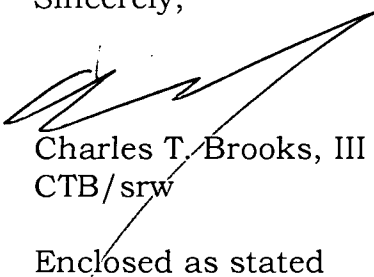
Dear Sir or Madam:

Enclosed herewith you will find the **Notice of Appeal, Order of Dismissal**, along with a **Proof of Service** in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,


Charles T. Brooks, III
CTB/srw

Enclosed as stated

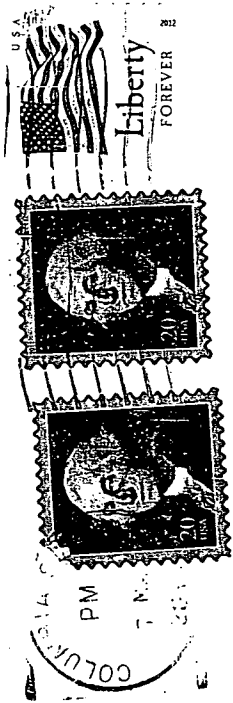
Cc: Ashleigh R. Wilson, Office of Attorney's General
South Carolina Office of Appellate Defense
Jerry Jerome Smith, 332155

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S.C. SUPREME COURT

THE BROOKS LAW OFFICES, LLC
309 BROAD STREET
P.O. BOX 3512
SUMTER, S.C. 29151



South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

