STATE OF SOUTH CAROLINA COUNTY OF DARLINGTON	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTH JUDICIAL CIRCUIT
Timothy M. Farris, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2012-CP-16-814 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed September 24, 2012. The Court convened an evidentiary hearing into the matter on July 24, 2014, at the Darlington County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsels, Tonya Copeland Little, Esquire, and Matthew S. Swilley, Esquire, also testified. The Court had before it a copy of the plea transcript, the probation termination transcript, the records of the Horry County Clerk of Court regarding the subject conviction, the filings in this case, and the exhibits introduced at the hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is not presently confined in the South Carolina Department of Corrections. In December 2008, the Darlington County Grand Jury indicted Applicant for criminal solicitation of a minor (2008-GS-16-1555). Tonya Copeland Little, Esquire, and Matthew S. Swilley, Esquire, represented Applicant. On March 9, 2011, Applicant pled guilty as indicted. In

exchange for the plea, the State dismissed two (2) other pending solicitation charges. The Honorable Paul M. Burch sentenced Applicant to five (5) years of incarceration, suspended upon the service of time served and four (4) years of probation. Applicant did not appeal his plea or sentence. On January 23, 2013, the Honorable J. Michael Baxley terminated Applicant's probationary sentence.

Applicant filed the current application for post-conviction relief on September 24, 2012. Respondent made a timely return and motion to dismiss on or about January 15, 2013, asking the application be dismissed as untimely. By order dated January 28, 2013, Judge Baxley conditionally dismissed the action as untimely. Applicant filed a timely response to the conditional order, and Judge Baxley rescinded the conditional order by written order dated January 10, 2014.

II. ALLEGATIONS

In his application, Applicant alleged he is entitled to relief for the following reasons:

1. "Ineffective Assistance of Counsel"
    a. "Did not show when asked, full discovery, did not object to evidence"
2. "Newly Discovered Evidence"
    a. "Received full discovery after asking 3 times on June 5th, 2012"

At the evidentiary hearing, Applicant proceeded on the following allegations of ineffective assistance of counsel:

1. Failure to object to an invalid arrest and search warrant.
2. Failure to object to an improper extradition.
3. Failure to advise Applicant the State had no evidence the alleged victim was thirteen (13) years old.
4. Failure of Mr. Swilley to properly prepare based on the length of his representation.
5. Failure to investigate witnesses.
6. Failure to share discovery.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court also reviewed Applicant's pro se filings. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Specifically, the Court finds Ms. Little's and Mr. Swilley's testimony very credible and gives it great weight. Correspondingly, the Court finds Applicant's testimony not credible. Set forth below are the other relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

A. Summary of Testimony

Applicant testified he was living in North Carolina at the time he was arrested. He recalled Ms. Little was his first attorney, but could not recall his first meeting with her. Applicant testified he never received a copy of his discovery. He alleged he never saw a video or received a transcript of the internet chats that led to his charges. Applicant testified he told Ms. Little he was thinking about a trial, but admitted he never specifically told her he wanted a trial instead of a plea. Applicant also admitted he pled guilty to avoid a harsher sentence if convicted.

Applicant testified he only met with Mr. Swilley one time. He testified Mr. Swilley provided him copies of some of the State's evidence, but did not give him copies of everything in his file. He recalled Mr. Swilley advised him the State would be successful at trial. Applicant testified Mr. Swilley told him how to answer questions at the plea colloquy. Applicant also admitted he lied at the colloquy. Applicant denied his guilt to the crime, and averred he had an

alibi witness to establish he was at band practice during the times the chats allegedly occurred. However, he admitted he did not give the name of this witness to Ms. Little or Mr. Swilley.

Ms. Little testified she was an assistant public defender when appointed to represent Applicant. She recalled meeting with Applicant four (4) times during her representation. At the first meeting, Applicant admitted to sending the messages to the undercover officer, but said he was struggling with a pill addiction at the time. Ms. Little testified Applicant never told her he had an alibi witness. Ms. Little testified she did not hire an expert to review the computer records, but did research similar cases and discuss the issues with other attorneys. However, she testified she would have explored the possibility of expert testimony if Applicant requested a trial. Ms. Little recalled discussing bench and jury trials with Applicant. She testified Applicant had difficulty deciding to plea, but she never anticipated the case would go to trial. Ms. Little recalled attempting to negotiate an offer to plea to a lesser charge and stay off the sex offender registry, but the State did not make any such offer. Ms. Little recalled reviewing the arrest and search warrants and finding nothing objectionable about them.

Mr. Swilley testified he became involved in Applicant's case when he became a public defender. He recalled thorough discussions with Ms. Little about the case. He testified the case was difficult to defend because Applicant's actions met the definition of solicitation. However, he believed he could argue to a jury that Applicant never intended to follow through on his statements and should not be convicted. Mr. Swilley recalled reviewing the chat logs and discussed the case with Applicant. He recalled Applicant admitting he sent the chats, but he would have sought an expert if Applicant had said it was not him. He also recalled Applicant did not claim to have an alibi or any other defense. Mr. Swilley testified he explained Applicant's

exposure if convicted at trial, and it was of utmost importance to Applicant to avoid jail time. He testified he only told Applicant to be truthful with the plea judge. Mr. Swilley testified it was Applicant's decision to enter the plea, but he would have been prepared if Applicant requested a trial.

B. Ineffective Assistance of Plea Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its

"reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

1. Failure to challenge the arrest and search warrants.

The Court finds Applicant has not met his burden of proving plea counsel ineffective in failing to challenge the search and arrest warrants in this case. Specifically, the Court finds there are no facial deficiencies in the arrest warrant. The warrant is sworn by affiant Mica Griggs, and conveys information relayed from Sergeant John Specht of the Harstville Police Department. The fact Sergeant Specht did not personally appear before the magistrate is not fatal to the validity of the warrant. State v. Dunbar, 361 S.C. 240, 249, 603 S.E.2d 615, 620 (Ct. App. 2004) ("Probable cause for a search warrant can be supported by information given to the affiant by other officers." (citing U.S. v. Ventresca, 380 U.S. 102, 108 (1965))). Furthermore, the warrant alleges sufficient facts to show Applicant committed each element of the crime of criminal solicitation of a minor. See S.C. Code Ann. § 16-15-342(a). Finally, the magistrate properly issued the arrest warrant where the crime was committed in Darlington County, even though Applicant resided in North Carolina. See Spiker v. Com., 711 S.E.2d 228, 230-31 (Va. Ct. App. 2011) (discussing other jurisdiction that have determined venue for internet crimes is proper in the location to which the defendant directed his internet communications).

Accordingly, Applicant has not demonstrated plea counsel would have any proper grounds to object to the issuance of the arrest warrant. See Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 67 (1999) (no deficiency where "it would have been futile for Attorney to have made such arguments"). Thus, the Court finds credible Ms. Little's testimony that she had no reason to challenge the arrest warrant. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). Regardless, an unlawful arrest does not preclude the court from exercising jurisdiction over Applicant where he was later indicted by the grand jury. See State v. Holliday, 255 S.C. 142, 146, 177 S.E.2d 541, 543 (1970) (citing State v. Waitus, 226 S.C. 44, 83 S.E.2d 629; State v. Swilling, 246 S.C. 144, 142 S.E.2d 864; Thompson v. State, 251 S.C. 593, 164 S.E.2d 760). Thus, the State could have properly secured a conviction at trial even if counsel had successfully challenged the arrest warrant.

The Court notes Applicant conceded at the evidentiary hearing that the search warrant was subject to the same probable cause analysis as the arrest warrant. Assuming the contents of the search warrant affidavit were similar to the arrest affidavit, the Court would also find plea counsel was not deficient in failing to challenge the validity of the search warrant. However, no copy of the search warrant was presented at the evidentiary hearing, nor was one included in Applicant's filings. Accordingly, the Court finds Applicant has not demonstrated he was prejudiced by the lack of a challenge to the search warrant. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (finding of prejudice cannot be based on "pure conjecture"). Furthermore, a knowing and voluntary guilty plea waives any non-jurisdictional defects and

defenses, including challenges to the sufficiency of the evidence. See Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (citing Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975); State v. Fuller, 254 S.C. 260, 174 S.E.2d 774 (1970)). Because Applicant knowingly and voluntarily pled guilty, he cannot now challenge the sufficient of these warrants. Thus, Applicant has not demonstrated plea counsel was ineffective for not challenging the arrest and search warrants.

2. Failure to challenge an improper extradition.

The Court finds Applicant failed to demonstrate plea counsel was ineffective in failing to challenge Applicant's extradition to South Carolina. Applicant raises various allegations about the documentation supporting South Carolina's demand for extradition. However, the extradition waiver indicates Applicant voluntarily waived extradition to South Carolina. Any flaws in the content of the extradition warrant were waived by his consent to be extradited. Furthermore, Applicant willfully and voluntarily appeared for all of his scheduled court dates. These appearances waived any complaints he may have had about his extradition to South Carolina. State v. Adams, 354 S.C. 361, 374-75, 580 S.E.2d 785, 792 (Ct. App. 2003) ("A defendant may waive any complaints he may have regarding personal jurisdiction by failing to object to the lack of personal jurisdiction and by appearing to defend his case." (citations omitted)). Again, Applicant's plea also waived any challenge he may have to the extradition procedures. Whetsell, 276 S.C. at 297, 277 S.E.2d at 892. Thus, Applicant has not demonstrated plea counsel was ineffective in any way for failing to challenge the validity of the extradition waiver.

3. Failure to advise Applicant the State had no evidence the alleged victim was thirteen (13) years old.

The Court finds Applicant failed to demonstrate plea counsel failed to advise Applicant regarding the State's evidence. Regarding this allegation, the Court finds especially credible Ms. Little and Mr. Swilley's testimony that they each independently reviewed the chat logs and other evidence with Applicant. The Court finds neither credible nor believable Applicant's testimony neither attorney every discussed the State's evidence with him. Ms. Little and Mr. Swilley both understood the chat logs indicated Applicant believed he was chatting with a thirteen (13) year old girl. Although Applicant alleged the actual video of the chats did not include the undercover officer's age, that video was not presented to the Court. Clark, 315 S.C. at 388, 434 S.E.2d at 267. However, the chat logs indicate Applicant understood the age of the person he believed he was soliciting. At one point, Applicant states he is seven (7) years older than the officer, and then describes himself as twenty (20) years old. (Resp.'s Ex. 1, p. 5). Accordingly, the record contains evidence the State could prove Applicant believed he was soliciting a thirteen (13) year old victim. See Arnette v. State, 306 S.C. 556, 557, 413 S.E.2d 803, 804 (1992) (counsel not ineffective for failing to advise of potential defense where no evidence exists to support the defense).

In addition, Applicant thoroughly discussed this evidence with plea counsel. Accordingly, his plea acted as a waiver of any challenge to the validity of this evidence. Whetsell, 276 S.C. at 297, 277 S.E.2d at 892; see also Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) ("A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a

plea is usually, but not invariably, foreclosed. (citing Blackledge v. Allison, 431 U.S. 63 (1977))). Therefore, the Court finds plea counsel was not ineffective in this regard.

4. Failure of Mr. Swilley to properly prepare based on the length of his representation.

The Court finds Applicant failed to meet his burden of showing Mr. Swilley failed to adequately prepare for his plea. Applicant alleges the limited amount of time Mr. Swilley spent on the case indicates he was presumptively prejudiced by Mr. Swilley's performance. However, Applicant's reliance on United States v. Cronic, 466 U.S. 648 (1984), is misplaced. This case presents none of the three (3) scenarios giving rise to presumed prejudice under Cronic. Applicant was not denied counsel at a critical stage of prosecution. Cronic, 466 U.S. at 659. Nor did plea counsel "entirely fail[] to subject the prosecution's case to meaningful adversarial testing[.]" Id. Finally, this not an instance where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. (citing Powell v. Alabama, 287 U.S. 45 (1932)). Instead, the record reflects Mr. Swilley reviewed the file, discussed the case with Applicant, and considered all possible outcomes to the proceedings. The Court finds very credible Mr. Swilley's testimony he would have sought expert testimony and prepared for trial had Applicant requested one. However, the record reflects Applicant accepted the State's plea offer and declined a trial to avoid a harsher sentence See Bennett v. State, 371 S.C. 198, 204-05, 638 S.E.2d 673, 676 (2006) (counsel not deficient for advising client to plea to avoid maximum penalty if convicted).

Furthermore, brevity of consultation is not *per se* grounds for relief. See Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) ("Therefore, it is not enough to merely show that

counsel only met with Easter twice before trial as long as counsel devoted sufficient time to insure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case."); cf. Avery v. Alabama, 308 U.S. 444 (1940) (no denial of constitutional right to assistance of counsel where counsel appointed three days before capital trial). Here, Mr. Swilley discussed the case thoroughly with Ms. Little. He also reviewed the discovery and spoke with the investigating officer. Again, Mr. Swilley credibly testified he would have been prepared for trial had Applicant wanted one. Under the circumstances, the Court finds Mr. Swilley conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation. Applicant has failed to demonstrate what further preparation or investigation could have been accomplished had Mr. Swilley represented Applicant for a longer period of time. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information). Furthermore, in light of the overwhelming evidence of Applicant's guilt, he has not demonstrated plea counsel improperly advised him to enter a guilty plea. See Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009) (applicant must show "something that would have affected counsel's advice to [the applicant] to accept the plea bargain offered or that would have caused [the applicant] to decline to accept it"). Therefore, Applicant has not demonstrated Mr. Swilley was ineffective in any way.

5. Failure to investigate witnesses.

The Court finds Applicant failed to meet his burden of proof to show plea counsel was ineffective in failing to investigate an alibi witness. Here, the Court finds very credible the

testimony of Ms. Little and Mr. Swilley that Applicant admitted to sending the internet chats with the alleged minor. The Court also finds credible their testimony that Applicant never gave them any information concerning potential alibi witnesses. The Court finds Applicant's testimony on this issue wholly not credible. Because Applicant admitted his guilt to plea counsel and never provided any potential alibi witnesses, he has not demonstrated plea counsel was deficient in failing to investigate in this regard. See Rodriguez v. State, 74 S.W.3d 563, 568 (Tex. App. 2002) ("Moreover, we opt not to fault trial counsel for the intentional withholding of vital information by his client." (citations omitted)).

Furthermore, Applicant presented no testimony from alleged alibi witnesses at the evidentiary hearing. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (applicant must present testimony of a favorable witness at evidentiary hearing in order to establish prejudice (citations omitted)). Even assuming such a witness would have testified Applicant was at church at the time some of the chats were sent, such testimony would not have provided an alibi for all of the chats. State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) ("[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." (quoting 21 Am. Jur. 2d Criminal Law § 136)). Thus, Applicant also failed to demonstrate how he was prejudiced by plea counsel failing to investigate alibi witnesses.

6. Failure to share discovery.

The Court finds Applicant failed to demonstrate plea counsel ineffective for failing to share discovery. Again, the Court finds the testimony of Ms. Little and Mr. Swilley very

credible on this issue, while finding Applicant's testimony not credible. Ms. Little and Mr. Swilley shared the State's discovery response with Applicant. Even assuming plea counsel did not provide Applicant a copy of the entire file, he was fully aware of the evidence against him when he made the decision to enter his plea. Accordingly, Applicant has not shown a deficiency in plea counsel's performance. Cf. Hyman v. State, 397 S.C. 35, 46, 723 S.E.2d 375, 381 (2012) (court unwilling to "assume that the Constitution requires disclosure of Brady evidence to a criminal defendant *personally*" (emphasis in original)). He also has not shown he was prejudiced by not receiving a copy of the evidence. Id. at 49, 723 S.E.2d at 382 (applicant failed to demonstrate possibility of different outcome had he personally received discovery where he "was fully aware of the inculpatory nature of the [evidence] throughout the negotiations and the guilty plea proceedings"). Therefore, Ms. Little and Mr. Swilley were not ineffective for failing to give Applicant a physical copy of their entire file.

C. 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, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsel's performance was unreasonable under prevailing professional norms or that the outcome of his plea would have been different had counsel

performed differently. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk, 383 S.C. at 563, 681 S.E.2d at 594. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 24 day of Nov, 2014.

THE HONORABLE THOMAS A. RUSSO
Presiding Judge 2141

Lexington, South Carolina

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SCOTT B. SUGGS
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