
APPENDICES

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 28th day of November, 2017.

Darren M. Rowe,

Appellant,

against

Record No. 161525

Circuit Court No. CL16000114-00

Harold W. Clarke, Director of the V.D.O.C.,

Appellee.

From the Circuit Court of Louisa County

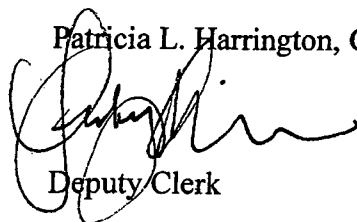
Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By:


Deputy Clerk

APPENDIX: A

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF LOUISA

DARREN MATTHEW ROWE,

Petitioner,

v.

Case No. CL16000114-00

**HAROLD CLARKE, DIRECTOR,
DEPARTMENT OF CORRECTIONS,**

Respondent.

FINAL ORDER

The Court has considered the petition of Darren Matthew Rowe for a writ of habeas corpus and the motion to dismiss of the respondent, the authorities cited therein, and the exhibits attached thereto. The Court has reviewed the record in the criminal case of Commonwealth v. Darren Matthew Rowe, Nos. CR13000143-01 and CR13000143-02, which record is hereby made a part of the record in this matter.

The Court finds that the petitioner is not entitled to the relief sought.

The petitioner has raised the following allegations in his habeas petition:

1. Counsel was ineffective for failing to consult with Rowe concerning an appeal following his conviction and sentence in this Court.
2. Rowe's guilty plea was not knowingly, voluntarily, and intelligently entered due to ineffective assistance of counsel.
3. Counsel rendered ineffective assistance in failing to conduct an adequate pre-trial investigation.
4. Counsel provided ineffective assistance in that she failed to adequately prepare a viable defense in order to properly advise Rowe on whether to accept the Commonwealth's plea offer or go to trial.

APPENDIX: B

5. Counsel failed to communicate new information to the petitioner, specifically, that the discretionary sentencing guidelines for his offenses had changed effective July 1, 2014, until moments before the sentencing hearing on July 2, 2014.
6. Counsel failed to object to, challenge, or refute inflammatory statements made by the prosecutor at the sentencing hearing.
7. Counsel failed to raise the issue of prosecutorial misconduct.
8. Counsel provided ineffective assistance in that she failed to move to strike the evidence as insufficient or move to set aside the verdict.

Claims of ineffective assistance of counsel are determined based on the standard set forth for such claims in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, the petitioner has the burden to show both that his attorney's performance was deficient and that he was prejudiced as a result. See Strickland, 466 U.S. at 687. The Strickland test applies to challenges to guilty pleas based on ineffective assistance of counsel. See Hill v. Lockhart, 474 U.S. 52, 58 (1985); Lewis v. Warden of the Fluvanna Correctional Center, 274 Va. 93, 118, 645 S.E.2d 492, 506 (2007).

The first prong of the Strickland test, the "performance" inquiry, "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. The petitioner "must show that 'counsel's representation fell below an objective standard of reasonableness.'" Shaikh v. Johnson, 276 Va. 537, 544, 666 S.E.2d 325, 328 (2008) (quoting Strickland, 466 U.S. at 687-88).

The second prong of the Strickland test, the "prejudice" inquiry, requires showing that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. Where a petitioner has pled guilty at trial, he must, in order to satisfy the "prejudice" requirement for a claim of ineffective trial counsel, show that "there is a reasonable probability that, but for counsel's errors, he would

not have pleaded guilty and would have insisted on going to trial.” Hill v. Lockhart, 474 U.S. at 59. The issue of prejudice in such cases requires an objective analysis. See United States v. Fugit, 703 F.3d 248, 260 (4th Cir. 2012), cert. denied, 134 S. Ct. 999 (2014).

An ineffective counsel claim may be disposed of on either prong of the Strickland test. Shaikh, 276 Va. at 544, 666 S.E.2d at 328.

Claim 1

Rowe contends that counsel rendered ineffective assistance by not consulting with him about an appeal after his conviction and sentence in this case. Applying the factors in Roe v. Flores-Ortega, 528 U.S. 470 (2000), the Court rejects this claim as without merit. In determining whether counsel was ineffective for not consulting with a convicted defendant about an appeal, the Supreme Court looked to whether “a rational defendant would want to appeal,” or whether “this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” Id. at 480. In United States v. Cooper, 617 F.3d 307 (4th Cir. 2010), the Fourth Circuit affirmed the district court’s finding that Cooper had not established ineffective assistance of counsel in failing to consult regarding an appeal. Id. at 314-15. The court held:

In determining whether a rational defendant would have wanted to appeal, we consider important the facts concerning whether the defendant’s conviction followed a trial or a guilty plea; whether the defendant received the sentence bargained for as part of the plea; and whether the plea expressly reserved or waived some or all appeal rights.

Id. at 313.

The Court credits the affidavit of retained trial counsel, Amy Harper, and finds that she advised Rowe early in the representation that she represented him in the circuit court proceedings, but should there be an appeal, the firm would not handle his case in the appellate courts. The Court finds that Rowe did not ask counsel about any potential appeal or “options” after the Court imposed

sentence. The Court further finds that the written plea agreement itself provided that Rowe waived any appeal from the decision of the Court. The agreement called for a maximum sentence of 50 years, with a cap at 20 years for active time and the Court sentenced Rowe to a total of 43 years, with 30 years suspended, for an active term of 13 years; the active sentence was 7 years below what the Court could have imposed pursuant to the agreement. The Court concludes that under the facts and circumstances of this case, a decision not to consult with Rowe about an appeal was a reasonable one.

The Court further finds that Rowe has not demonstrated Strickland prejudice. He has not suggested meritorious claims to support his failure to consult allegation.

He offers as an appellate claim, his unsubstantiated allegation that the victim in the case was not permanently paralyzed. The Court finds, however, that permanent paralysis is not necessary to satisfy the aggravated malicious wounding statute. Permanent scarring, even scarring from surgery, satisfies the statute. The Court further finds that any challenge to the continuance of the sentencing date or the change in sentencing guidelines would not constitute a meritorious appellate claim. See Va. Code § 19.2-298.01. Finally, the Court finds that a challenge by one who has pled guilty to the sufficiency of the evidence is not a meritorious appellate claim. By pleading guilty, Rowe waived his challenge to the sufficiency of the evidence.

The Court thus concludes, applying the Flores-Ortega factors, that Rowe has failed to satisfy either of the prongs of the Strickland test. This claim is denied and dismissed.

Claim 2

Rowe alleges that counsel advised him to take the plea offer from the Commonwealth and he needed to decide quickly before the prosecutor withdrew the offer. He contends that he took the offer because he believed counsel had thoroughly investigated the case but alleges that now, after

reviewing her case file following his conviction, he believes counsel “had done absolutely no investigating to form her opinion in order to inform the petitioner with competent advice.” The Court rejects this claim.

The Court finds that Rowe advised the Court during the hearing colloquy, in the guilty plea questionnaire, and in the plea agreement itself, that he was entirely satisfied with the services of his counsel. He has not offered the Court a valid reason to allow him to disavow his statements regarding his satisfaction with counsel or the voluntariness of his plea. See Anderson v. Warden, 222 Va. 511, 516, 281 S.E.2d 885, 888 (1981). Rowe explicitly advised the Court that he understood the charges, had discussed potential defenses with counsel, had decided for himself to plead guilty, had entered the pleas of guilty voluntarily, and had no complaints about counsel’s representation.

The Court further finds that Rowe has not proffered what helpful evidence would have been uncovered had counsel conducted some different or additional investigation and therefore, he has failed to satisfy the performance prong of the Strickland test for his claim of inadequate investigation. See Anderson v. Collins, 18 F.3d 1208, 1221 (5th Cir. 1994).

The Court credits the affidavit of trial counsel Ms. Harper, in which she states that she reviewed the preliminary hearing transcript, and her colleague Mr. Bowman had interviewed Amanda Fitzgerald. During discovery, Ms. Harper reviewed the prosecution’s file, including police reports, police witness interviews, and the medical and rehabilitation records of the victim that were in the Commonwealth’s possession. Thus, counsel was familiar with the potential testimony of Fitzgerald, Alan Taylor, and Bruce Ragland. Counsel reviewed with Rowe what she had learned in discovery. And, while Rowe gave counsel the name of Kenyon Johnson, he then did not provide contact information for him. He also failed to provide documents to counsel.

The Court further finds, based on counsel's affidavit, that counsel advised Rowe that the decision whether to accept the prosecution's plea offer was his to make. She advised Rowe that she believed it was in his best interest to take it. She states that Rowe considered the offer for several days and ultimately decided to accept it. The Court finds that counsel's preparation in the case and her extensive knowledge of criminal law, particularly the law concerning aggravated malicious wounding, combined to provide Rowe with effective assistance in facing the charges filed against him. The Court concludes that Rowe has not satisfied the performance prong of Strickland.

The Court further finds that Rowe has not satisfied the prejudice prong of Strickland. The test in Hill requires an objective analysis. See Fugit, 703 F.3d at 260. Objectively viewed, the evidence in the case established that Rowe responded to damage to his vehicle by confronting the victim. Rowe introduced a .45 caliber firearm into the fray, fired the gun, seriously and permanently injuring the victim, and then fled the scene. Based on counsel's affidavit, the Court finds that she advised Rowe correctly that a jury's sentencing options in the case would begin at 23 years. The Court finds that a jury would be authorized by statute to fix Rowe's punishment at life plus 3 years in prison. As the Court noted at the sentencing hearing, this was not a case of self-defense. There was no legal provocation.

The Court concludes that an objectively reasonable criminal defendant in Rowe's position would not have insisted on going to trial. Rowe has failed to demonstrate Strickland prejudice. Claim 2 is denied and dismissed.

Claim 3

Rowe alleges that counsel failed to conduct an adequate pre-trial investigation. The Court rejects this allegation of ineffective counsel. The Court finds that Rowe is bound by his sworn and solemn statements to the Court during his colloquy that he was pleading guilty because he was

guilty of the charges and that he was satisfied with the services of his counsel. At the time he made those representations, counsel's pre-trial investigations were concluded. Rowe has not provided sufficient reasons for the Court to ignore his stated satisfaction during the colloquy, in the plea questionnaire, and the plea agreement See Anderson v. Warden, 222 Va. at 516, 281 S.E.2d at 888.

The Court further finds that Rowe has not adequately proffered, as he must, what additional evidence would have been uncovered that would have significantly helped his case. See Moawad v. Anderson, 143 F.3d 942, 948 (5th Cir. 1998)

(a) *Damage to Rowe's car*: The Court finds that irrespective of what kind of damage Johnson may have inflicted on Rowe's car, it would not provide a legal excuse for the aggravated malicious wounding charge which was based on Rowe's shooting of an unarmed victim, resulting in serious and permanent injury.

(b) *Material witnesses*: The Court finds that Rowe's claim that counsel should have interviewed witnesses fails because Rowe has failed to provide affidavits or other sworn statements from such witnesses, setting forth what helpful testimony the witnesses would have given at a trial. See Muhammad v. Warden, 274 Va. 3, 19, 646 S.E.2d 182, 195 (2007). The Court further finds, based on the affidavit of Ms. Harper, that Mr. Bowman of her firm had interviewed Amanda Fitzgerald and Ms. Harper was aware of the potential testimony of Alan Taylor and Bruce Ragland, based on her review of materials in discovery. Counsel further stated in the affidavit that while Rowe provided the name Kenyon Johnson, he failed to provide any contact information for him.

(c) *Documents Subpoena*: The Court finds that while Rowe contends counsel should have subpoenaed certain documents, counsel reviewed documents in the prosecutor's file. Rowe has not demonstrated that counsel failed to acquaint herself with necessary records.

(d) *Telephone records*: The Court finds that Rowe has not proffered records which would be helpful to him and, according to counsel's affidavit, Rowe failed to provide records to her, despite assurances that he would. The Court further finds that, as the Court noted at the sentencing hearing, the task for the Court was to balance the horrific nature of the crime with the Rowe's good prior history. Those were the important issues for the Court at sentencing.

(e) *Verifying Text Messages*: The Court further finds that while Rowe alleges counsel should have verified his claims that he received threatening texts from Johnson, this was not a case of self-defense. There was no legal provocation. The Court finds that at a time when evidence of past disputes with the victim could help in mitigating sentence, *i.e.* at the sentencing hearing, Fitzgerald and Rowe were permitted to testify about the past threats.

The Court concludes that Rowe has failed to satisfy either prong of the Strickland test for Claim 3, and it is denied and dismissed.

Claim 4

Rowe alleges that counsel's lack of preparation of a defense undermined her ability to correctly advise him on whether to plead guilty to the charges and thus she pressured him to plead guilty. The Court rejects this claim of ineffective counsel.

The Court finds that Rowe advised the Court during the colloquy, under oath, that no one, including his lawyer, had pressured him to plead guilty. The Court finds that Rowe is bound by those representations. He advised the Court that he had had adequate time to, and did in fact discuss potential defenses with counsel, but subsequently decided to plead guilty. He told the Court he was pleading guilty because he was guilty. The Court finds that Rowe is bound by his sworn representations. See Anderson v. Warden, 222 Va. at 516, 281 S.E.2d at 888. The Court relies on Ms. Harper's affidavit, in which she states that she and Mr. Bowman met with Rowe and discussed

self-defense, but the facts and the law did not support such a defense in this case. The Court finds that the victim's actions, including damaging Rowe's car, did not provide a defense to the charges and, those actions, and any questions regarding the victim's character were matters properly presented at sentencing. The Court concludes that Rowe has failed to satisfy either prong of Strickland, and this claim is denied and dismissed.

Claim 5

Rowe alleges counsel failed to adequately communicate information to him regarding new sentencing guidelines until the date of his sentencing hearing, July 2, 2014. The Court rejects this claim.

The Court finds that Rowe's sentencing hearing was initially scheduled for May 15, 2014, but due to the unexpected addition of a day to the Judicial Conference, the Court was required to continue the case. The new date was July 2, 2014. New guidelines went into effect on July 1, 2014. The Court credits the assertions in Ms. Harper's affidavit that she discussed both sets of discretionary guidelines with Rowe on June 21, 2014, explained to Rowe that she would argue for the Court to consider the earlier, more favorable guidelines, and that the guidelines were not binding on the Court.

The Court finds that counsel made the only motion she could when the sentencing date fell on July 2, 2014, and the Court agreed to consider both sets of guidelines. The Court further finds that the sentencing guidelines are discretionary only, see Code § 19.2-298.01(F), and that, pursuant to the plea agreement, the Court could impose 20 years of active time, irrespective of what any guidelines provided. The Court in fact imposed an active term 7 years below the 20-year cap in the plea agreement. The Court concludes that Rowe has not satisfied either prong of Strickland for this claim and it is denied and dismissed.

Claim 6

Rowe alleges that counsel was ineffective for failing to object to purported misrepresentations of the prosecutor, leading questions from the prosecutor, the testimony of Detective Stanton, and the Court's consideration of two sets of guidelines. The Court concludes that Rowe's allegations are without merit.

The Court finds that Rowe asserts, without any proffer of evidence, that the prosecutor misrepresented Johnson's permanent paralysis. The Court finds that in addition to Rowe's lack of evidence to support his contention that Johnson was not permanently paralyzed, Johnson suffered significant and permanent physical impairment irrespective of whether he had permanent paralysis. Rowe next argues that implications in certain comments from the prosecutor were improper and counsel should have objected when the prosecutor asked leading questions at the sentencing hearing. The Court finds that counsel's trial tactics need only be reasonable, which they were in this case. A habeas court begins with the premise that counsel's challenged actions might be sound trial strategy and the court "entertain[s] the range of possible reasons . . . counsel may have had for proceeding as they did." Elmore v. Sinclair, 799 F.3d 1238, 1248-49 (9th Cir. 2015) (citation omitted).

Next, Rowe alleges that counsel should have objected to the testimony of Detective Stanton at the sentencing hearing regarding the telephone records, and should have objected to statements made in the prosecutor's argument to the Court at that hearing. The Court finds that Rowe has failed to satisfy either prong of Strickland for these contentions. "[C]ounsel's tactical decisions at trial, such as refraining from cross-examining a particular witness or from asking a particular line of questions, are given great deference and must similarly meet only objectively reasonable standards." Elmore, 799 F.3d at 1250 (citation omitted). The Court rejects Rowe's allegation that counsel

should have objected to the Court's consideration of the two sets of sentencing guidelines as violative of the Ex Post Facto Clause. The guidelines are discretionary only. See Code § 19.2-298.01.

The Court finds that here, where the issue of guilt had been established at the plea hearing held several months earlier, all that remained was for the Court to determine an appropriate sentence, which in this case required the Court to fashion an appropriate sentence after weighing the gravity of the offense against Rowe's good prior record. Counsel's task was to highlight the latter and bring the mitigating factors of the prior relationship between the parties and Fitzgerald to the Court's attention.

The Court rejects Rowe's suggestion that the Court assess the prejudice of counsel's purported errors collectively. Cumulative claims of ineffective counsel have been rejected by the Supreme Court of Virginia and the United States Court of Appeals for the Fourth Circuit. See Lenz v. Warden, 267 Va. 318, 340, 593 S.E.2d 292, 305 (2004); Mueller v. Angelone, 181 F.3d 557, 586 n.22 (4th Cir. 1999); Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998). Claim 6 is denied and dismissed.

Claim 7

Rowe alleges counsel should have raised issues of prosecutorial misconduct, specifically that the prosecutor tried to have witnesses present false testimony at the preliminary hearing; made misrepresentations at the sentencing hearing; asked leading questions at that hearing; and made every effort to encourage the Court to render a harsher penalty. The Court rejects this claim as without merit.

The Court finds that Rowe alleges that the Commonwealth's Attorney acted improperly at his preliminary hearing, before Rowe pled guilty and told the Court that he was voluntarily pleading

guilty and was guilty of the crimes to which he entered those pleas. Rowe again alleges that the prosecutor made misstatements, inappropriate comments and implications, and asked leading questions at the sentencing hearing. Finally, he asserts that the prosecutor committed misconduct by seeking a harsh sentence for a violent crime – a sentence to which Rowe had agreed in the plea agreement. The Court finds that counsel had no duty to make meritless objections. See Moody v. Polk, 408 F.3d 141, 151 (4th Cir. 2005). Rowe, moreover, has not satisfied Strickland's prejudice prong for this claim. The claim is denied and dismissed.

Claim 8

Rowe alleges that counsel erred in failing to file a motion to strike or motion to set aside the verdict. The Court rejects this claim. The instant case was resolved in a guilty plea, which is a self-supplied conviction. The Court had determined that the plea was voluntarily entered. A voluntary guilty plea "is, in reality, a self-supplied conviction authorizing imposition of the punishment fixed by law. It is a waiver of all defenses other than those jurisdictional." Peyton v. King, 210 Va. 194, 196, 169 S.E.2d 569, 571 (1969).

The Court concludes that motions to strike or set aside the verdict are not appropriate motions in the context of a guilty plea and counsel was not ineffective for failing to make such motions.

Motion for Appointment of Counsel

Rowe has moved this Court to appoint counsel to assist him in his habeas corpus case. The Court finds, however, that he is not entitled to the assistance of appointed counsel to assist him with his petition. Howard v. Warden, 232 Va. 16, 19, 348 S.E.2d 211, 213 (1986); see also Darnell v. Peyton, 208 Va. 675, 160 S.E.2d 749 (1968). Accordingly, the Court denies the request.

The Court finds that the claims in the habeas corpus petition can be fully determined on the basis of recorded matters, without the need for an evidentiary hearing. See Code § 8.01-654(B)(4).

The Court is of the opinion that the petition for a writ of habeas corpus should be denied and dismissed; it is, therefore,

ADJUDGED and **ORDERED** that the petition for a writ of habeas corpus be, and is hereby, denied and dismissed.

It is further **ORDERED** that the petitioner's endorsement on this Order is dispensed with pursuant to Rule 1:13 of the Supreme Court of Virginia.

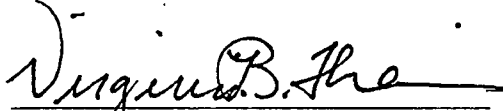
The Clerk is directed to forward a certified copy of this Order to the petitioner and to Virginia B. Theisen, Senior Assistant Attorney General, counsel for the respondent.

Entered this 17th day of August, 2016.



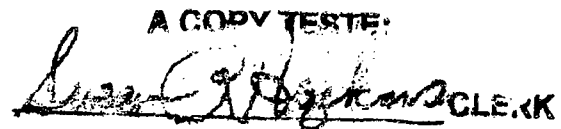
Judge

I ask for this:



Virginia B. Theisen

Senior Assistant Attorney General
Virginia State Bar No. 23782
Office of the Attorney General
202 North 9th Street
Richmond, VA 23219
(804) 786-2071 (telephone)
(804) 371-0151 (facsimile)
Counsel for Respondent

A COPY TESTE:


CLERK
LOUISA COUNTY

VIRGINIA:

IN THE CIRCUIT COURT OF LOUISA COUNTY

COMMONWEALTH OF VIRGINIA

V

Felony Nos. CR13000143-01 & CR13000143-02

DARREN MATTHEW ROWE, Defendant

Social Security Number: 225-37-3064

DOB: 07-24-1985

Hearing Date: September 16, 2013

Judge: Sanner

Hearing Type: Arraignment

Attorney for the Commonwealth: Russell E. McGuire

Attorney for the Defendant: Amy M. Harper/Charles Bowman

Statute/Ordinance Violated: 18.2-51.2/VCC ASL-1336-F2, 18.2-53.1/VCC ASL-1319-F9

Charge Description: Aggravated Malicious Wounding & Use Firearm in commission of Felony

Commencing Status of Defendant: (X) on bond

ORDER

On the above date came the Attorney for the Commonwealth, Russell E. McGuire, and the defendant, Darren Matthew Rowe, with his retained counsel, Charles Bowman. Mr. Bowman advised the Court that he was appearing this day for Ms. Harper.

The defendant was arraigned on the above-described felony indictment in case no. CR13000143-01 and entered a plea of not guilty. The Attorney for the Commonwealth made a motion to amend the indictment in case no. CR13000143-01 by striking the words "a household member". The attorney for the defendant did not oppose the motion of Commonwealth and advised the Court that the defendant's plea remains not guilty. Thereupon the Court granted the motion and amended the indictment. The defendant was arraigned on the above-described felony indictment in case no. CR13000143-02 and entered a plea of not guilty. The pleas were tendered by the defendant in person, and after being first advised by his counsel and by the Court of his right to trial by jury, the defendant in person, demanded trial by jury.

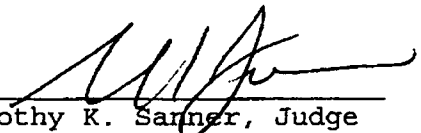
The attorney for the defendant advised the Court that the defendant waives his right to speedy trial.

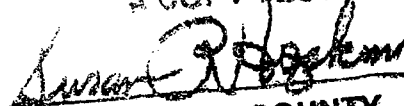
Thereupon the Court continues these cases to be tried by a jury on February 26 and 27, 2014 at 9:30 a.m.

The Court recognized the defendant, Darren Matthew Rowe to appear in this Court on February 26 and 27, 2014 at 9:30 a.m. and directed the defendant to stay in contact with Ms. Harper.

Concluding Status of Defendant: (X) on bond
Caption of this Order is made a part of the Order of this Court.
Endorsement of counsel is dispensed with in accordance with Rule 1:13.

10-16-13
Date of Order

Enter 
Timothy K. Sanner, Judge

A COPY TESTE:
 CLERK
LOUISA COUNTY