STATE OF SOUTH CAROLINA COUNTY OF JASPER	IN THE COURT OF COMMON PLEAS 2010-CP-27-0414
Abraham Kelty, #321472, Applicant, v. State of South Carolina, Respondent.	**ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 3, 2010. The Respondent made its Return on October 14, 2010. An evidentiary hearing into the matter was convened on April 2, 2013 at the Beaufort County Courthouse. The Applicant was present at the hearing and represented by John J. Pinckney, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

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Applicant's plea counsel, Dudley B. Ruffalo, Esquire, was present and 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 PCR application and amendments, and Respondent's Return thereto.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Jasper County. The Applicant was indicted at the May 2006 term of the Jasper County Grand Jury for failure to stop for a blue light (2006-GS-27-0205), possession of weapon during the commission of a violent crime (2006-GS-27-0303), and armed robbery (2006-GS-27-0302). Dudley B. Ruffalo, Esquire, represented the

Applicant. The Applicant pled guilty to armed robbery and the remaining charges were *nolle prossed.* On April 2, 2007, the Honorable Howard P. King sentenced the Applicant to confinement for 15 years. The Applicant did not appeal the plea or sentence.

ALLEGATIONS

In his original application for post-conviction relief, the Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
    a. Failure to move to enforce the 10 years plea agreement.
2. Involuntary guilty plea.

In his first amended application for post-conviction relief, the Applicant alleged the following:

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1. "Applicant asserts that he was denied the effective assistance of counsel when trial counsel failed to protect his rights as set forth in two (2) separate letters of the Applicant."

In his second amended application for post-conviction relief, the Applicant alleged the following:

1. "Applicant asserts that he was denied the effective assistance of counsel when trial counsel failed to specifically enforce Applicant's plea agreement of record based upon the *detrimental reliance* doctrine expressed by the South Carolina Supreme Court in *Custodio vs. South Carolina*, 644 S.E.2d 36 (S.C. 2007)."

At the hearing, the Applicant only pursued the allegation presented in his second amended application for post-conviction relief.

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).

Summary of Testimony[1]

Trial counsel, Dudley B. Ruffalo, was present and testified he has been practicing law for over 30 years. Counsel testified he was appointed to represent the Applicant. Counsel testified he met with the Applicant at least ten times prior to his plea. Counsel testified he filed Brady and Rule 5 motions on the Applicant's behalf. He testified he reviewed the discovery material he received with the Applicant and discussed with him the elements of the charge and what the State was required to prove.

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Counsel testified it was often difficult to engage with the applicant because his story about the incident would change. Counsel testified the Applicant frequently discussed a "6 year plea deal" that was never offered. Counsel testified the Applicant would also fake mental health issues and claim he was on medications. Counsel testified the Applicant provided no potential witnesses or leads for investigation. Counsel testified his investigation included a review of the file, visiting the location, and speaking with the Applicant's former attorney. Stephen T. Plexico.

Counsel testified further he entered into plea negotiations on the Applicant's behalf. Counsel testified that originally the State offered a plea to 15 years for the armed robbery with a dismissal of all the remaining charges. Counsel testified he was able to get the plea down to 10 years for the armed robbery with dismissal of all the remaining charges. Counsel testified he communicated the offer to the Applicant and informed him of the consequences of his plea.

Counsel testified that before the Applicant went before Judge Mullen to plead to the 10

[1] The Applicant was present, but did not testify on his own behalf at the evidentiary hearing.

year negotiated sentence, the Applicant indicated he would fake a mental illness during the plea. Counsel testified that during the plea, the Applicant started twitching and tried to convince the Court he was suffering from a mental illness. Counsel testified he was not aware the Applicant suffered from any mental illness and he believed the exaggerated symptoms during the plea were made up. Counsel also testified he did not stop the Applicant's plea, but Judge Mullen would not accept the Applicant's plea to the 10 year sentence.

Counsel testified that after the initial plea before Judge Mullen, he advised the Applicant that the State's plea offer to 10 years was only available that day. He testified that after everything broke down with the plea, he told the Applicant the offer was withdrawn by the State and no longer available. Counsel testified further that the Applicant wanted him to request the 10 year offer be reinstated by the State. Counsel testified that any attempt he made to enforce the 10 year plea offer would have been a fraud on the Court.

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Counsel testified that after the original plea offer of 10 years was withdrawn by the State, a second plea offer of 15 years for armed robbery and the remaining charges dismissed was made by the State. Counsel testified the Applicant wanted to accept the plea. He also testified that when the Applicant went before Judge King to plead guilty it was the Applicant's decision to plead guilty.

Lastly, counsel testified the Applicant gave no assistance to the State in exchange for a guilty plea. Counsel testified the Applicant's admission of guilt is a part of the guilty plea process and was not beneficial to the State because his admission was not used against him and the State already believed the Applicant was guilty. Counsel testified the evidence against the Applicant was overwhelming and it was ultimately the Applicant's desire to plead guilty.

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), SCRCP; 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.

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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, 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).

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This Court finds counsel is a trial 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 possible defenses or lack thereof. The record reflects that 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 Applicant understood the terms of the negotiated sentence.

This Court finds the Applicant has failed to carry his burden of proving plea counsel

should have tried to enforce the 10 year plea deal originally offered to the Applicant on the basis of detrimental reliance. A criminal defendant has "no right to be offered a plea... nor a federal right that the judge accept it." Lafler v. Cooper, 132 S. Ct. 1376, 1387, 182 L. Ed. 2d 398 (2012). The State may withdraw a plea bargain offer before a defendant pleads guilty, provided the defendant has not detrimentally relied on the offer. Reed v. Becka, 333 S.C. 676, 690, 511 S.E.2d 396, 404 (Ct. App. 1999). Absent an actual plea of guilty, a defendant may enforce an oral plea agreement only upon a showing of detrimental reliance on a prosecutorial promise in plea bargaining. Id. at 688, 511 S.E.2d at 402. A defendant relies upon a solicitor's plea offer by taking some substantial step or accepting serious risk of an adverse result following acceptance of the plea offer. Id. at 689, 511 S.E.2d at 403. For example, a defendant who provides beneficial information to law enforcement can be said to have relied to his detriment. Id.

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This Court finds counsel was not ineffective for failing to enforce the State's original 10 year plea offer. This Court finds and the record reflects that after the Applicant told Judge Mullen about his medications and began twitching as indicated by counsel, the Court refused to accept the Applicant's plea of guilty. (Mullen T. 8). The record also reflects that immediately after the Court rejected the Applicant's plea, the State put on the record their office policy to withdraw plea offers that are not accepted by the Court and that the Applicant's plea offer was withdrawn. (Mullen T. 9). Counsel gave credible testimony that he advised the Applicant that his 10 year plea offer was withdrawn and that in good conscious he could not ask the Court to enforce the 10 year plea offer when it's rejection was based upon the Applicant's fraudulent behavior before the Court. This Court finds the Applicant's plea was rejected due to the Applicant's behavior and feigned mental illness.

This Court finds further the State was within its discretion to withdraw the plea offer for 10 years after the Court refused to accept the Applicant's guilty plea due to his behavior. This Court finds further the Applicant has failed to show detrimental reliance. The record reflects and counsel's credible testimony confirms, the Applicant did not provide any benefit to the State in exchange for a plea offer of 10 years. During the Applicant's initial plea, the State indicated on the record the negotiations were for 10 years with any related warrants *nolle prossed.* (Mullen T. 5). Counsel also provided credible testimony that no assistance was given by the Applicant to help the State. The Applicant has failed to provide any evidence showing he provided beneficial information to law enforcement or took some substantial step or accepted a serious risk of an adverse result after accepting the State's plea offer.

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The Applicant argues he provided a benefit to the State for purposes of detrimental reliance during the initial plea before Judge Mullen when he admitted his guilt. Most pleas of guilty consist of a waiver of trial and an express admission of guilty. N. Carolina v. Alford, 400 U.S. 25, 37, 91 S. Ct. 160, 167 (1970). This Court finds the Applicant's admission of guilt at the initial plea proceeding was a standard part of the guilty plea proceeding. This Court finds further the Applicant's admission of guilty provided no benefit to law enforcement sufficient to establish detrimental reliance.

The Applicant also alleges the facts in Custodio v. State, are analogous to this case. 373 S.C. 4, 644 S.E.2d 36 (2007). This Court finds Custodio is distinguishable from this case. In Custodio the defendant provided beneficial information by helping law enforcement solve several burglary crimes and return over a half million dollars in stolen property. In this case, the Applicant has failed to prove he provided such substantial assistance to law enforcement. This

Court finds this allegation is without merit and counsel did not provide ineffective assistance of counsel.

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 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

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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 violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by 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 30 day of April, 2013

Perry M. Buckner
Presiding Judge
14th Judicial Circuit

Walterboro, South Carolina.