

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Clifton Newman, Circuit Judge

Case No.: 2013-CP-10-5276

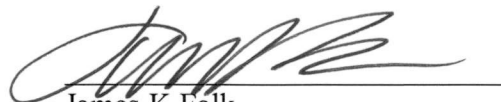
Herbert Smalls 258624.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Herbert Smalls appeals the Honorable Clifton Newman's July 13, 2022 Order of Dismissal, and the Honorable Roger M Young Sr.'s April 28, 2021 Amended Order Finding Plea Record Sufficiently Reconstructed. Undersigned counsel received notice of entry Judge Newman's Order of Dismissal on August 8, 2022. Copies of the orders on appeal are attached hereto.



James K Falk
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August 15, 2022

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Herbert Smalls,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Case No.: 2013-CP-10-5276

Order of Dismissal

BY

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CLERK OF COURT

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I. PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its December 2007 term, the Charleston County Grand Jury indicted Applicant for murder (2007-GS-10-13708). David M. Holton, Esquire, represented Applicant. The case was prosecuted by Assistant Solicitor Gregory Voigt of the Ninth Circuit Solicitor's Office prosecuted the case. On August 2, 2010, Applicant appeared in the Charleston County Court of General Sessions before the Honorable Roger M. Young, Sr., circuit court judge, where he pled guilty to murder as indicted. Judge Young sentenced him to forty years imprisonment.

Applicant filed a notice of appeal from his guilty plea. On appeal, Applicant argued his sentence of forty years imprisonment was improper because the statute in effect at the time of the shooting only allowed for a sentence of thirty years or life imprisonment. On October 14, 2010, the Court of Appeals dismissed Applicant's appeal. The Remittitur was issued on November 8, 2010.

On September 20, 2013, Applicant filed an application for post-conviction relief, alleging the sole allegation that trial counsel was ineffective for failing to file a direct appeal on his behalf.

Respondent moved to summarily dismiss the application for as filed beyond the statute of limitations as set forth in S.C. Code Ann. §17-27-45 and for failure to state a meritorious claim, as counsel did file an appeal on application's behalf. The Honorable Stephanie P. McDonald, acting in her capacity as chief administrative judge, signed a conditional order of dismissal on March 13, 2014, provisionally dismissing the application as untimely and for failure to state a claim, but allowing Applicant twenty days to provide a sufficient reason why the application should not be dismissed. Applicant responded to the conditional order of dismissal on March 25, 2014, alleging additional grounds for relief. On January 16, 2015, the Honorable R. Markley Dennis, Jr., acting in his capacity as chief administrative judge, signed a final order of dismissal dismissing the application in its entirety.

Thereafter, Applicant filed a notice of appeal challenging the summary dismissal, arguing for the first time that his mental health conditions preventing him from timely filing his application. On April 28, 2015, the South Carolina Supreme Court issued an order dismissing applicant's notice of appeal without prejudice and remanding the matter back to the circuit court for a hearing pursuant to Ferguson v. State, 382 SC 615, 677 S.E.2d 600 (2009). The Remittitur was issued on May 14, 2015.

A hearing pursuant to the Supreme Court's order was convened December 7, 2017, at the Charleston County Courthouse before the Honorable Michael G. Nettles, circuit court judge. Applicant was present at the hearing and represented by James K. Falk, Esquire. Senior Assistant Deputy Attorney General Megan Harrigan Jameson from the South Carolina Attorney General's Office appeared on behalf of the State. At the hearing, Applicant testified and presented testimony from Dr. Leonard William Mulbry, Jr., M.D. Following the hearing, Judge Nettles denied Respondent's motion to dismiss, holding Applicant's mental incapacity prevented him from timely

filing his application for post-conviction relief, and ordered this matter be set for an evidentiary hearing on the merits of Applicant's application for post-conviction relief. An order to this effect was filed on February 1, 2018.

Thereafter, on June 25, 2018, Applicant, through counsel Falk, filed an amended application for post-conviction relief, alleging "Applicant's guilty plea was not entered knowingly and voluntarily. Trial counsel was on notice that Applicant had diminished intellectual capabilities. Trial counsel provided ineffective assistance of counsel in failing to ensure that Defendant: fully understood the State's Rule 5 disclosures; fully understood his trial rights; fully understood the rights he would waive by pleading guilty; and, fully understood the consequences of his guilty plea. Trial counsel was on notice that Applicant had diminished intellectual capabilities." On the same day, Applicant, through counsel, also filed a "Motion to Reconstruct August 2, 2010, Guilty Plea Hearing on Indictment 2007-GS-10-3708," noting that the transcript of Applicant's plea proceeding is unavailable and is necessary for Applicant to proceed forward with his post-conviction relief action. An order granting the motion was signed by Chief Administrative Judge for Common Pleas Roger Young Sr. and was filed on July 6, 2018.

On February 9, 2021, the parties convened before the Honorable Roger Young Sr. for a reconstruction hearing. Former Assistant Solicitor Julie Cardillo who prosecuted the case and Alex Apostolou who represented Applicant on a related charge all testified regarding their recollection of the plea proceeding. Following their testimony, the Court put its own recollections about this specific plea proceeding and his standard plea colloquy on the record. Based on the records and the testimony presented, the Court found the plea record was sufficiently reconstructed for meaningful appellate and collateral review.

II. CURRENT APPLICATION

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

1. Ineffective Assistance of Counsel
2. Involuntary Guilty Plea
3. Failure to ensure Applicant fully understood the State's Rule 5 disclosures
4. Failure to ensure Applicant understood his trial rights, rights he would be waiving to plead guilty, and fully understood the consequences of pleading guilty

Applicant, through counsel then filed an amended application, stating:

For the relief sought, Applicant states he is seeking, "Reverse and Remand."

III. RELEVANT FACTS

On April 25, 2007 police responded to Rivers Avenue located in Charleston County, SC due to area residents hearing a gun shot and that a man was lying on the ground and had been shot. Upon police's arrival, they found James Stewart lying on his back on the ground with a gun-shot wound to his upper left chest. He died at the scene. James Stewart's ex-wife was with him at the time and told police that they were walking down Rivers Avenue with their bike and two black males approached them. James and his ex-wife tried to sell them their bike and then one of the men pulled out a gun and shot James in the chest at close range and then took off on the victim's bike.

It was later determined through police investigation that James Stewart and his ex-wife were trading the bike for drugs with the defendant and co-defendant in this case. Once police responded, they canvassed the area, spoke with local residents, spoke with the victim's ex-wife and obtained descriptions of the two defendants. The police were able to obtain a video of the defendants and their area of travel from Morning Side Elementary School. The police later located

a jacket, worn by one of the defendants and located the victim's bike (his fingerprints were lifted off of the bike to confirm it belonged to the victim) and the other bike that the defendants had with them prior to the incident.

The medical examiner conducted an autopsy and recovered the projectile from the victim and determined the victim died from a close contact single gunshot wound to the upper left chest that perforated his lung and he bleed out internally, approximately two liters of blood inside of his chest cavity.

The case came to a standstill until May of 2007 when an attempted armed robbery was reported in the city of Charleston. The co-defendant and defendant were arrested on June 8, 2007. The co-defendant requested to speak to the North Charleston Police to tell them about a murder that had happened on Rivers Avenue. Post Miranda, the co-defendant gave a written confession to the facts surrounding the death of James Stewart and implicated the defendant's involvement. The defendant gave a similar statement to police indicating his presence at the incident location.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the evidence presented at the evidentiary hearing, observed the witnesses, passed upon their credibility, and weighed the testimony and evidence accordingly in its discussion below. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, as well as the reconstructed plea transcript. This Court finds the combined record of the plea transcript and the testimony and evidence presented the evidentiary hearing establishes Applicant received effective assistance of counsel, and this application should be denied. Set forth below are the relevant findings of fact and conclusion of law as required by section 17-27-80 of the South Carolina Code of Laws.

Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his allegations, as addressed below. Further, this Court respects Judge Young's finding that the plea transcript was appropriately reconstructed. This Court does not have the authority to set aside the order of another. Circuit Court Rule 60; *Cook v. Taylor*, 272 S.C. 536, 252 S.E.2d 923 (1979). *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986). Accordingly, this is not an issue before the Court during this PCR proceeding.

Ineffective assistance of counsel and involuntary guilty plea

Applicant alleges plea counsel was generally ineffective and that his guilty plea was entered involuntarily. However, Applicant has wholly failed to produce any evidence of the alleged deficiency of plea counsel or that his plea was entered involuntarily.

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, *Hill v. Lockhart* extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. 52; *cf. Padilla*, 559 U.S. at 373 (recognizing the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that counsel's deficient performance prejudiced the defendant by causing him to plead guilty rather than go to trial. *Hill*, 474 U.S. 52.

The analysis of counsel's performance under the first prong of *Strickland* remains unchanged—the applicant must show counsel's representation fell below the objective standard of reasonableness demanded of attorneys in criminal cases. *Hill*, 474 U.S. at 58–59; *accord Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An applicant alleging his plea

was induced by ineffective assistance of counsel must prove counsel's advice to plead guilty was not "within the competence demanded of attorneys in criminal cases." *Hill*, 474 U.S. at 56.

The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* at 58–59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. This inquiry "focuses on a defendant's decision-making" and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. *Lee v. United States*, 582 U.S., 137 S. Ct. 1958, 1966 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. *Padilla*, 559 U.S. at 372. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—not whether counsel would have still advised him or her to plead guilty. *Turner v. State*, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

Surmounting *Strickland*'s high bar is never an easy task, and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." *Lee*, 582 U.S. 137 S. Ct. at 1967 (internal citations and quotation marks omitted); *cf. Hill*, 474 U.S. at 58 ("[R]equiring a 'prejudice' showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel 'will serve the fundamental interest in the finality of guilty pleas.'"). Reviewing "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. *Lee*, 582 U.S. 137 S. Ct. at 1967. Rather, judges should "look to contemporaneous

evidence to substantiate a defendant's expressed preferences. *Id.* In determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the plea and the evidence presented at the PCR hearing. *Harres*, 282 S.C. at 134, 318 S.E.2d at 361.

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." *Reed v. Becka*, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Accordingly, because a criminal defendant waives several constitutional rights by pleading guilty, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999).

To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him or her and the consequences of his or her plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). To be voluntary, a plea must be free of threats or other coercion that would impermissibly distort the defendant's choice. *Id.* at 755; *see also United States v. Smith*, 440

F.2d 521, 528–529 (7th Cir. 1971) (Stevens, J., dissenting) (explaining voluntariness relates to the trustworthiness of the admission of guilt and binding character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

Before a court can accept a guilty plea, the defendant must be advised of the constitutional rights he or she is waiving; the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. *Boykin*, 395 U.S. at 243. Additionally, in order to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea, including the nature and crucial elements of the offense(s); the maximum and any mandatory minimum penalty; and the nature of the constitutional rights being waived. *Pittman*, 337 S.C. at 599, 524 S.E.2d at 624.

However, it is "well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment." *United States v. Cox*, 464 F.2d 937, 942 (6th Cir. 1972) (citing *Brady*, 397 U.S. 742). The State may properly encourage guilty pleas either by being more lenient to those who enter such pleas, *Brady*, 397 U.S. at 750-753, or by increasing the risks of punishment on those who do not. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). The standard for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Id.* at 31.

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); *see also Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he

understood there were no promises and that no sentencing recommendations were binding on the judge). To ensure the defendant understands the consequences of his or her guilty plea, the trial judge “usually questions the defendant about the facts surrounding the crime and punishment that could be imposed.” *Dover v. State*, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991). However, the trial judge “does not have to direct the defendant’s attention to every consequence of his plea provided the record reveals affirmative awareness of the consequences of a guilty plea.” *Carter v. State*, 329 S.C. 355, 362, 495 S.E.2d 773, 776 (1998).

The voluntariness of a guilty plea, however, “is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.” *Harres*, 282 S.C. at 133, 318 S.E.2d at 361. In evaluating an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. *Wolfe*, 326 S.C. at 165, 485 S.E.2d at 370; *cf. Rayford v. State*, 314 S.C. 46, 443 S.E.2d 805 (1994) (finding that, where the transcript of the guilty plea proceeding refuted applicant’s claim that he did not understand the terms of a plea bargain, granting PCR was inappropriate notwithstanding applicant’s claim his lawyer misadvised him).

Nonetheless, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual . . . , a criminal inmate’s right to contest the validity of such a plea is usually, but not invariably, foreclosed.” *Dalton v. State*, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Blackledge v. Allison*, 431 U.S. 63, 74 (1977); *see also Jamison v. State*, 410 S.C. 456, 469–71, 765 S.E.2d 123, 129–30 (2014) (observing that “guilty plea[s] must be treated as final in the vast majority of cases” and instructing that caution must be exercised so as not to

“undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea”). Indeed, admissions made during a guilty plea should be considered conclusive unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements.” *Id.* at 137–38, 654 S.E.2d at 874 (internal citations and quotation marks omitted); *cf. Blackledge*, 431 U.S. at 73–74 (pointing out that representations made by a defendant, his lawyer, and the prosecutor at a guilty plea hearing, as well as any findings made by the judge accepting the plea, constitute a “formidable barrier in any subsequent collateral proceedings”).

An applicant who enters a plea on the advice of counsel may “only attack voluntary, knowing and intelligent character of the plea by showing that plea counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the [applicant] would not have pled guilty, but would have insisted on going to trial.” *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

In the present case, Applicant’s guilty pleas were entered knowingly, intelligently, and voluntarily with the advice of competent counsel. Applicant acknowledged his counsel discussed the case with him prior to the plea, he understood his Constitutional rights, Applicant acknowledged he understood the charges he was facing and that he could either plead guilty or not guilty. Applicant also pleaded guilty and agreed with the facts read by the trial court. Applicant acknowledged the Constitutional rights he would have if he proceeded to trial and that he would be surrendering those rights if he plead guilty. PCR Reconstruction Tr. p. 11. Further, Judge Young discussed his typical practice when accepting a guilty plea. Judge Young thoroughly elaborated on his practice: questions concerning mental health concerns, who the defendant is, what the charges were, if the defendant wanted to plead guilty, if the defendant understood what they were pleading to, making sure he got an affirmative response from the defendant (Smalls),

reviewing waiver of rights, informing the defendant they can change their mind, checks whether they are under the influence of drugs or alcohol, review any potential mental health concerns if there are any, would ask the defendant if any mental health issues hindered their ability to understand what is happening, ask if they need more time with their lawyer, ask if they were satisfied with their lawyer, review the charges and if there are any recommendations, ask if there were any threats or promises, ask general background information, would hear the recitation of facts, hear any mitigation from the defense, then would announce the sentence. This is not an exhaustive list, however, the above is but an indication of the formulaic process Judge Young follows in every guilty plea he accepts.

Furthermore, Applicant has not shown that he was prejudiced by plea counsel's alleged conduct. In exchange for Applicant's plea of guilty, the State no longer sought life without parole for the murder charge, and dismissed the attempted armed robbery charge, which could have led to another life sentence based on Applicant's prior charges.

Therefore, combined with his statements to the court during his guilty plea, this Court finds that Applicant entered his plea voluntarily and counsel was not constitutionally ineffective. This allegation is dismissed with prejudice.

Did not knowingly enter the plea due to mental incompetence

Applicant amended his application to include an allegation that he was mental incompetent at the time of the plea and therefore did not knowingly enter his guilty plea. However, the evidence Applicant ultimately presented of his medical records did not indicate any mental incompetence at the time of the plea and therefore Applicant has failed to meet his burden.

To sustain a claim of incompetency in fact at a plea, applicant in a PCR proceeding must show by the preponderance of the evidence he was incompetent at the time of plea. *Jeter v. State*,

308 S.C. 230, 417 S.E.2d 594 (1992). To sustain a claim counsel was ineffective for failing to request a competency hearing, an applicant must show a reasonable probability petitioner would have been found incompetent. *Id.* Counsel may reasonably rely on his own perceptions in deciding a client is competent to stand trial. *Id.* Applicant submitted medical records after the hearing for the Court's review. First, the records pre-date the date of Applicant's guilty plea by a number of years. The medical records date back to 2002 and his plea was on March 13, 2007. Nothing in the records address the state of Applicant's mental health at the time of his plea. Further, although the records to indicate that Applicant was experiencing mental health difficulty, nothing specifies what the difficulty was and to a reasonable degree of medical certainty explains if or how the prior difficulties prevented him from being able to knowingly and intelligently plead guilty on March 13, 2007. Secondly, counsel for Applicant in attempted murder charge who worked along with trial counsel, Mr. Apostolou testified at the reconstruction hearing that he never had any concerns regarding Mr. Small's competency and that he understood his the discussion of a plea offer that he conveyed to him with Mr. Holton. Therefore, Applicant has failed to meet his burden of proof required of him. This allegation is dismissed with prejudice.

V. CONCLUSION

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

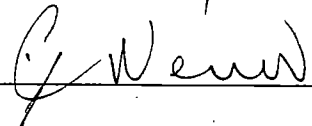
This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), Applicant has a right to appellate 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, post-conviction relief 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:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 13th day of July, 2022.



Presiding Judge
Ninth Judicial Circuit

Columbus 2, South Carolina

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Herbert Smalls,)
Applicant,)

v.)

State of South Carolina,)
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IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2013-CP-10-5276

**AMENDED ORDER FINDING PLEA
RECORD
SUFFICIENTLY RECONSTRUCTED**

This matter comes before the Court by way of an application for post-conviction relief filed September 20, 2013, by Herbert Smalls (Applicant). The matter is set for an evidentiary hearing on July 26, 2018. On June 24, 2018, Applicant, through counsel James K. Falk, Esquire, filed an amended application and a motion to reconstruct the record.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its December 2007 term, the Charleston County Grand Jury indicted Applicant for murder (2007-GS-10-13708). David M. Holton, Esquire, represented Applicant. The case was prosecuted by Assistant Solicitor Gregory Voigt of the Ninth Circuit Solicitor's Office prosecuted the case. On August 2, 2010, Applicant appeared in the Charleston County Court of General Sessions before the Honorable Roger M. Young, Sr., circuit court judge, where he pled guilty to murder as indicted. Judge Young sentenced him to forty years imprisonment.

Applicant filed a notice of appeal from his guilty plea. On appeal, Applicant argued his sentence of forty years imprisonment was improper because the statute in effect at the time of the shooting only allowed for a sentence of thirty years or life imprisonment. On October 14, 2010,

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Thereafter, Applicant filed a notice appeal challenging the summary dismissal, arguing for the first time that his mental health conditions preventing him from timely filing his application. On April 28, 2015, the South Carolina Supreme Court issued an order dismissing applicant's notice of appeal without prejudice and remanding the matter back to the circuit court for a hearing pursuant to Ferguson v. State, 382 SC 615, 677 S.E.2d 600 (2009). The Remittitur was issued on May 14, 2015.

A hearing pursuant to the Supreme Court's order was convened December 7, 2017, at the Charleston County Courthouse before the Honorable Michael G. Nettles, circuit court judge. Applicant was present at the hearing and represented by James K. Falk, Esquire. Senior Assistant

A handwritten signature in black ink, appearing to be the initials 'R' followed by a stylized flourish.

Deputy Attorney General Megan Harrigan Jameson from the South Carolina Attorney General's Office appeared on behalf of the State. At the hearing, Applicant testified and presented testimony from Dr. Leonard William Mulbry, Jr., M.D. Following the hearing, Judge Nettles denied Respondent's motion to dismiss, holding Applicant's mental incapacity prevented him from timely filing his application for post-conviction relief, and ordered this matter be set for an evidentiary hearing on the merits of Applicant's application for post-conviction relief. An order to this effect was filed on February 1, 2018.

Thereafter, on June 25, 2018, Applicant, through counsel Falk, filed an amended application for post-conviction relief, alleging "Applicant's guilty plea was not entered knowingly and voluntarily. Trial counsel was on notice that Applicant had diminished intellectual capabilities. Trial counsel provided ineffective assistance of counsel in failing to ensure that Defendant: fully understood the State's Rule 5 disclosures; fully understood his trial rights; fully understood the rights he would waive by pleading guilty; and, fully understood the consequences of his guilty plea. Trial counsel was on notice that Applicant had diminished intellectual capabilities." On the same day, Applicant, through counsel, also filed a "Motion to Reconstruct August 2, 2010, Guilty Plea Hearing on Indictment 2007-GS-10-3708," noting that the transcript of Applicant's plea proceeding is unavailable and is necessary for Applicant to proceed forward with his post-conviction relief action. An order granting the motion was signed by Chief Administrative Judge for Common Pleas Roger Young Sr. and was filed on July 6, 2018.

FINDING OF SUFFICIENT RECONSTRUCTION

On February 9, 2021, the parties convened before this Court for a reconstruction hearing. Former Assistant Solicitor Julie Cardillo who prosecuted the case and Alex Apostolou who represented Applicant on a related charge all testified regarding their recollection of the plea



proceeding. Following their testimony, this Court put its own recollections about this specific plea proceeding and his standard plea colloquy on the record. Based on the following, this Court finds the plea record was sufficiently reconstructed for meaningful appellate and collateral review.

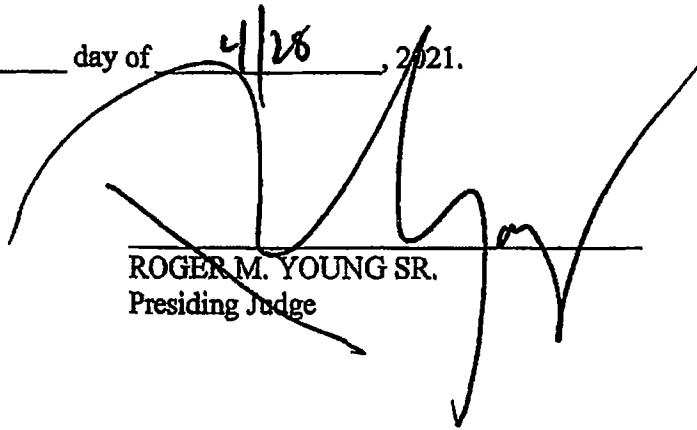
“South Carolina jurisprudence recognizes the trial court’s authority to set the record for appeal.” State v. Ladson, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (Ct. App. 2007). When all or a portion of a court reporter’s notes are lost, resulting in an inability to produce a full transcript, the appropriate procedure is to return the matter back to the trial court to attempt to reconstruct the record to allow for meaningful appellate or collateral review. See Ladson, 373 S.C. at 325, 644 S.E.2d at 273-74 (recognizing the authority to remand the proceeding back to the trial court to attempt to reconstruct a record for meaningful appellate review); Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004) (recognizing a court’s power to remand for a reconstruction hearing), overruled on other grounds by State v. Gentry, 363 S.C. 93, 105, 610 S.E.2d 494, 501 (2005); Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002) (finding that when a transcript has been lost or destroyed, an appellate court may remand to have the record reconstructed); Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct.App.1992) (holding trial court did not err in granting property owner’s request to reconstruct the record of zoning proceeding where portions of original tape of hearing were incapable of being transcribed)

A copy of the transcript from the reconstruction hearing is attached to this order and incorporated into this Court’s findings.

IT IS THEREFORE ORDERED that the transcript from Applicant’s plea proceeding has been sufficiently reconstructed to allow for meaningful appellate review.



AND IT IS SO ORDERED this _____ day of 4/28, 2021.



Handwritten signature of Roger M. Young Sr. in black ink, written over a horizontal line.

ROGER M. YOUNG SR.
Presiding Judge

Cherokee, South Carolina

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AUG 18 2022
S.C. SUPREME COURT