THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM CHEROKEE COUNTY

Court of Common Pleas

HONORABLE WILLIAM A. MCKINNON

2021-CP-11-00413

JOHNNY DAVIS, SCDC# 315622

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Johnny Davis appeals the denial of his Post- Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable William A. McKinnon, Circuit Judge on June 6, 2022 Order issued on September 6, 2002 and filed on September 14, 2022. The Appellant received notice of the judgment on September 19, 2022.

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STATE OF SOUTH CAROLINA COUNTY OF CHEROKEE	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Johnny Davis, #315622, Applicant, v. State of South Carolina, Respondent.	Case No.: 2021-CP-11-0413 **ORDER OF DISMISSAL**

This matter comes before this Court by way of Applicant's post-conviction relief application filed June 28, 2021. Respondent made its return on December 30, 2021 and requested an evidentiary hearing. An evidentiary hearing was held on June 6, 2022, at the Spartanburg County Courthouse. Rodney Richey, Esquire, represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's fiancé Robin Cook and Counsel Fletcher Smith also testified. After reviewing all records and evidence before this Court, this Court finds Applicant did not meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined by the South Carolina Department of Corrections pursuant to orders of commitment from the Cherokee County Clerk of Court. During its July 2019 term, the Cherokee County Grand Jury indicted Applicant for attempted murder (count one) and possession of a weapon during the commission of a violent crime (count two) (2019-GS-11-01057). He waived presentment to the grand jury for pointing or presenting a firearm at another person (2019-GS-11-01184). Applicant was represented by Fletcher Smith, Esquire.

Assistant Solicitor Kimberly Leskanic of the Seventh Circuit Solicitor's Office prosecuted the case. On September 23-24, 2020, Applicant appeared before the Honorable Grace G. Knie, circuit court judge, and entered an *Alford* plea to the lesser included offense of assault and battery of a high and aggravated nature and possession of a weapon. He also pled guilty to pointing or presenting a firearm at another person. Judge Knie sentenced Applicant to ten years' imprisonment for assault and battery and five years' imprisonment for each of pointing or presenting a pistol and for possession of a weapon. The weapons-related sentences were ordered to run concurrently with each other but consecutively to the aggravated assault and battery sentence. Applicant did not pursue a direct appeal.

Summary of Relevant Facts

On March 13, 2019, the victim pulled up to an apartment complex and Applicant pulled beside him. (Tr. 23-24). Applicant got out of the driver's seat, went over to the victim while armed with a firearm, and demanded the victim empty his pockets. (Tr. 24). The victim refused to comply and tried to pull away. (Tr. 24). Applicant gave chase, the victim stopped, and Applicant pointed a firearm at his head. (Tr. 24). The victim tried to knock the gun away from his head and away from Applicant. (Tr. 24). The gun discharged and struck the victim in the hand. (Tr. 24). The victim drove straight to the police department to report the incident. (Tr. 24).

Applicant was caught on tape dropping the clip to the gun, picking it up, and running back to his vehicle. (Tr. 24-25). An unidentified person was in the car with Applicant. (Tr. 25). The second person was initially in the passenger seat but moved over to the driver's seat and drove Applicant from the scene. (Tr. 25).

Applicant gave a police statement in which he did not identify the second person. (Tr. 25). He told the police he hid the gun in Greenville County and he was the only one who could

get the gun. (Tr. 25). He did not disclose the exact location of the gun to the police. (Tr. 25). Applicant stated he fronted the victim some meth and the victim owed him $200. (Tr. 25). The victim stated he did not owe Applicant money, but that he had previously bought marijuana from him. (Tr. 25). The victim did not require surgery but did go to the hospital, has a permanent scar on his hand, and can no longer straighten his pinkie finger. (Tr. 26).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Ineffective Assistance of Counsel.
    a. Counsel was ineffective by failing to challenge the sufficiency of the evidence that charged that the Applicant committed the offense of attempted murder, whereas victim's statement indicated that due to him shoving the pistol away, causing it to discharge.
    b. Applicant was not advised of his right to appeal his sentence and plea by counsel.
2. Involuntary Guilty Plea.
    a. Applicant's guilty plea was unknowingly and involuntarily entered as a result of counsel's ineffective assistance of counsel, and thereby prejudicial to Applicant.

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective Assistance of Counsel:
    a. Brevity of time in consultation.
    b. Failure to move to suppress the ballistics.
    c. Failure to argue that Applicant did not intend to shoot the victim.
    d. Failure to obtain and review discovery with Applicant.
2. Involuntary plea:
    a. Afraid of receiving a harsher sentence at trial.
    b. Applicant stated he did not have a full understanding of the charges.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant stated he entered an open plea. He stated he was represented by Counsel. Applicant stated that he asked Counsel for a police investigator to obtain a gun. He stated he did not talk to Counsel at all, and Counsel primarily communicated with Applicant's fiancé instead. He stated he asked for another attorney either June 22 or 27 but stated that another attorney could not work with Counsel on the case. He stated that he wanted Counsel to suppress the ballistics, which he stated did not match. He stated he was not guilty of assault and battery and that he told Counsel that he did not shoot the victim. He stated the victim hit the gun, which caused it to fire.

Upon questioning from this Court, Applicant stated he pled because he was under duress. He stated that he thought he would have received thirty years' imprisonment if he did not plead. He stated that Counsel was never transparent with him.

On direct, Applicant stated that he would have gone to trial if he had his "evidence." He stated he gave Counsel $2500 in jail and that prior counsel, Joshua Schultz, gave him the discovery. He stated he gave this discovery to Counsel. He stated he took the twenty-year sentence because he did not want thirty.

On cross-examination, Applicant stated he had a gun in his hand for protection and that the victim shoved the gun. He stated that he reviewed the discovery with Schultz. He stated that he pled because he thought he would receive more time if he went to trial. He stated that he thought that the gun went off. He stated that a .40 caliber casing was found, not a Glock .45 caliber casing. Applicant stated that his gun discharged in the victim's hand. Applicant stated that his primary grievance against Counsel was that he was disrespectful toward him and his fiancé. Applicant stated that he would not have been found guilty at trial because the ballistics did not match his gun. He stated that his prior record included convictions for distribution of crack cocaine, driving under suspension, and ABHAN. He stated that the decision to plead was

ultimately Counsel's decision because his attorney was not transparent with him. He stated he had to take the plea provided to him. He stated he did not bring Counsel's deficiencies to the Court's attention because he was under duress. He stated that he never received a copy of his retainer agreement. He stated he did not have a full understanding of the charges pled to. He stated he understood the rights he was waiving by pleading.

Counsel Testimony

Counsel testified that he met with Applicant and reviewed the discovery. He stated that there was a clip inside the gun ready to kill the victim unless he was paid his debt to Applicant. He stated that Applicant pointed the gun at the victim, who shoved the gun away in self-defense. He stated that he thought this was sufficient to secure an attempted murder conviction. Counsel testified that Applicant had a criminal history and that he was a violent person. He stated that the victim's hand was injured in Applicant's attempt to collect on a drug deal. Counsel testified that Applicant admitted to holding the gun, the gun discharging, and that he shot the victim. Counsel testified that he was prepared to go to trial. He stated that Applicant told him what he would and would not take concerning plea deals. He stated that he was able to get a plea offer to a lesser-included offense.

On cross-examination, he stated that he told Applicant there was a high probability he would be convicted at trial. He stated that he never told Applicant he could not hire another attorney. Counsel testified that Applicant seemingly understood what he was pleading to and what rights he was waiving. He stated that process of obtaining the pleaoccurred over the course of two days.

Fiancé Testimony

Applicant's fiancé stated that she was aware of the incident and issues with Counsel prior

to the plea. She testified that Counsel's anger got the better of him sometimes. She stated she spoke with Counsel often. She stated she and Applicant were planning on proceeding to trial at first but pushed Counsel into getting the best deal possible. She stated Applicant was stressed at the time.

On cross-examination, she testified that she felt like Counsel was disrespectful and that Counsel could have done more for Applicant. She testified that she believed the plea was in Applicant's best interest when he entered it and still believed it would be in his best interest if he had to make the decision again on the date of the hearing.

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. Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the plea transcript, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the

Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington.*

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland,* 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result

must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Invalid Plea

Applicant claims the plea was entered involuntarily, unknowingly, and unintelligently. In the context of a guilty plea, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Applicant's right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the guilty plea process. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Absent valid reasons why the applicant is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

For a plea to be valid, the applicant must have been aware of the nature and crucial

elements of the offense, the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama,* 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29 (2000). A plea is not knowing or voluntary if a defendant "lacks knowledge of material evidence in the prosecution's possession." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

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 the court and defendant, between the court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray,* 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "'[T]he voluntariness of a guilty plea 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.'" *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, "guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea." *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

The record reflects that the plea was entered freely, knowingly, intelligently, and voluntarily. Applicant stated he understood he was pleading no contest to the charges as stated by the prosecutor, as opposed to having a jury trial. (Tr. 11-12). Applicant stated he understood he was waiving his right to a jury trial, where he could call and confront witnesses and had a right to remain silent. (Tr. 12). Applicant stated he understood that if he went to trial, the burden of proof would be on the State, and they would have to prove every element of every charge against him beyond a reasonable doubt and where he would be presumed innocent until proven guilty. (Tr. 12). Applicant stated he understood that if he went to trial, every single juror would

have to find him guilty for him to be found guilty. (Tr. 12). After this, Applicant confirmed he still wanted to plead. (Tr. 12-13). Applicant stated that no one coerced or promised him anything to get him to plead, that he was not under the influence of any substances that would impair his judgment, and that he has no mental or physical disability impacting his ability to understand what he is doing. (Tr. 13). Applicant stated that he was then taking medication for high blood pressure but that the medication did not impact his ability to think clearly. (Tr. 14).

Counsel stated that he thought Applicant understood what he was doing at the plea hearing, that he was accepting responsibility, and that he was able to assist in his representation. (Tr. 14-15). Applicant stated he was satisfied with Counsel's representation of him. (Tr. 15). Applicant stated he understood the charges he was pleading to and their potential penalties. (Tr. 15-17). He stated he understood the ABHAN charge was classified as violent and serious and stated he understood the ramifications of those classifications. (Tr. 16-17). Applicant confirmed he understood the plea was being entered without negotiation or recommendations. (Tr. 17-18). After taking a brief recess in which Counsel consulted with Applicant about the meaning of the term *Alford* plea, Applicant stated he understood he was pleading guilty to pointing or presenting a firearm and under *Alford* for the other two charges. (Tr. 18-21). Counsel stated he reviewed the evidence and discovery in the case with Applicant and discussed his options concerning pleading versus going to trial. (Tr. 21). Applicant stated he remembered discussing the discovery and evidence with Counsel and talking with Counsel about pleading versus going to trial. (Tr. 21-22). He stated that he thought if he went to trial on the charges he was pleading under *Alford* to, that it is more likely than not, given the evidence against him, that he would be found guilty. (Tr. 22). Applicant again stated he was pleading freely, knowingly, intelligently, and voluntarily. (Tr. 22). Applicant stated he understood he had ten days to appeal. (Tr. 22). After the State read the facts,

Applicant stated he was pleading guilty to pointing or presenting a firearm because he did, in fact, point a firearm. (Tr. 27).

At the evidentiary hearing, Applicant testified that he pled because he was afraid of a harsher sentence at trial and that he understood the rights he was waiving by pleading. Additionally, Counsel credibly testified that Applicant seemingly understood what he was pleading to and what rights he was waiving. Accordingly, this Court finds that the plea was entered freely, knowingly, intelligently, and voluntarily and cannot be withdrawn now.

Trial Tax

Applicant contends that he was essentially coerced into pleading because he was afraid of a harsher sentence if he went to trial. Being informed that if he went to trial, he would face more time in prison does not rise to the level of coercion and is not enough to render the plead invalid. Accordingly, relief is denied on this ground.

Lack of Understanding of the Charges

Applicant claims his plea was invalid because he did not fully understand the charges against him. However, this Court finds that this allegation is contradicted by Applicant's confirmation that he understood the charges when questioned by the plea court. (Tr. 15-17). Additionally, this Court finds Counsel credible in his assertion that Applicant seemingly understood what he was pleading to. The Court declines to find the plea involuntarily entered on this basis. Accordingly, relief is denied on this ground.

Brevity of Time

Applicant alleges that Counsel was ineffective for brevity of time spent in consultation. "[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must

show evidence indicating "how additional preparation or communication would have resulted in a different outcome." *Id. See Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); *Skeen v. State*, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

Applicant claims that Counsel did not speak with him about the case enough but failed to show how this brevity of time spent in consultation impacted Counsel's representation. There is also no indication that the results of the proceedings or the decision to plead would have been different had Counsel conferred with him more. Applicant has failed to establish ineffective assistance of counsel and this Court declines to grant relief accordingly.

Failure to Move to Suppress Ballistics

Applicant claims Counsel was ineffective for failure to move to suppress the ballistics. However, this was waived with the entry of an otherwise valid plea. Applicant elected to plead instead of going to trial out of fear he would receive more time at trial. Counsel was not ineffective for failing to pursue motions inaccessible to him due to Applicant's decision to plead. Thus, relief is denied on this ground.

Failure to Argue Mistake

Applicant claims Counsel was ineffective for failing to argue the gun was fired by mistake. However, this was waived when Applicant entered his plea and waived his right to a trial (Tr. 12). Counsel is not ineffective for failure to assert a defense when that right is

affirmatively waived by Applicant himself. Thus, relief is denied on this ground.

Failure to Obtain and Review Discovery

Applicant claims Counsel was ineffective for failure to obtain and review the discovery. However, Applicant testified he received his discovery from his prior attorney, Joshua Schultz, and that he provided this copy to Counsel. Additionally, Counsel credibly testified that he obtained the discovery in the case, met with Applicant, and reviewed the discovery with Applicant. Thus, this Court finds the claim without merit and denies relief accordingly.

Conclusion

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 6 day of September, 2022.

WILLIAM A. MCKINNON

Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina.

ALAN WILSON
ATTORNEY GENERAL

September 12, 2022

The Honorable Brandy W. McBee
Clerk of Court - Cherokee County
PO Drawer 2289
Gaffney, SC 29342-2289

Re: **Johnny Davis, #315622 v. State of South Carolina**
Case No: 2021-CP-0413

Dear Ms. McBee:

Enclosed for filing please find the Order of Dismissal for Johnny Davis signed by the Honorable Judge William A. McKinnon. Please let me know if anything additional is needed at this time.

Sincerely,

Chelsey F. Marto
Assistant Attorney General

CFM/jbh
Enclosure