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Oct 12 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Chester County  
Honorable Daniel D. Hall, Circuit Court Judge  
Appellate Case No. 2020-001579

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The State,

Respondent,

vs.

George Robert Leach, Jr.,

Appellant.

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**JOINT AGREEMENT TO VACATE GUILTY PLEAS AND SENTENCES  
AND REMAND FOR TRIAL OR OTHER DISPOSITION**

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Appellant and Respondent, through their undersigned counsel, would respectfully show unto this Court:

I.

On November 19, 2020, Appellant pled guilty before the Honorable Daniel D. Hall, circuit court judge, in York County to multiple charges originating out of both York County and Chester County. At the plea, he was represented by counsel on the York charges but appeared *pro se* on the Chester charges. Appellant waived venue to plead guilty in York County to the following indicted offenses from Chester County: failure to stop for a blue light (second or subsequent offense) (2019-GS-12-192); failure to stop for a blue light (second or subsequent offense) (2020-GS-12-406); and habitual traffic offender (2020-GS-12-407). Appellant also waived presentment to the York County Grand Jury and pled guilty to two counts of failure to stop for a blue light (2020-GS-46-02719, -06305) and possession of heroin (third or subsequent offense) (2020-GS-

46-6243). Pursuant to a global plea agreement to resolve these charges in both Chester and York Counties, Appellant was to plead guilty to all these charges in exchange for a sentence of eight years' imprisonment suspended upon the service of four years' imprisonment followed by two years of probation. In addition, as part of the global plea agreement, the State agreed to dismiss two related charges for possession of cocaine (third or subsequent offense) and leaving the scene of an accident arising out of York County, plus five related charges for domestic violence (second), use of a vehicle without permission, receiving stolen goods, shoplifting under \$2,000, and resisting arrest arising out of Chester County. This negotiated sentence was based on the mistaken belief, shared by the assistant solicitor and Appellant's plea counsel, that possession of heroin carried up to a ten-year sentence.

After the trial court accepted the factual basis and Appellant's plea, Judge Hall was informed the sentence on the York charges could not be structured the same as the negotiation. Appellant's convictions and sentences on the Chester charges were entered as originally expected and set concurrent to the sentences in York. However, the York sentences were altered to provide: 1) possession of heroin he received five years, suspended to the service of four years and probation for two years; and 2) failure to stop for a blue light he received four years, suspended to two years' probation to run consecutive to the possession of heroin York County sentence. Immediately thereafter, Appellant indicated his desire to withdraw his plea because he entered the plea with the false belief possession of heroin carried up to ten years in prison. The plea court denied Appellant's request.

## II.

Appellant served and filed a *pro se* Notice of Appeal related to his Chester convictions and sentences. His counsel served and filed a Notice of Appeal on the York charges. Ultimately, the

appeal of the York charges was dismissed on December 20, 2020, for failing to provide a sufficient guilty plea explanation under Rule 203(d)(1)(B)(iv), SCACR. However, by letter dated April 28, 2021, this Court allowed the direct appeal of the Chester charges and sentences to continue.

Subsequent to the dismissal of the appeal related to the York County charges, Appellant filed an application for Post-Conviction Relief on or about March 29, 2021. In his application he alleged ineffective assistance of counsel and asserted his plea was an involuntary guilty plea resulting from the failure to proceed with the negotiated sentence and the misunderstanding on the possession of heroin offense. The court granted relief and remanded for a new trial or other disposition of all the York County charges. (See Order attached as Exhibit A).

### III.

“[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 and the consequences of his plea. Brady v. United States, 397 U.S. 742, 748 (1970). Additionally, the defendant “must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived.” Pittman, 337 S.C. at 599.

The negotiated sentence offered by the State in exchange for Appellant’s guilty plea contemplated an eight-year prison term on the possession of heroin charge—an illegal sentence,

as possession of heroin, third offense, carries a maximum penalty of five years' imprisonment. Even though the circuit court attempted to craft a sentence within the spirit of the negotiations, it sentenced Appellant in a manner different than the negotiated plea. As a result, the parties agree Appellant's plea to the Chester charges was not knowingly and voluntarily made. Cf. Puckett v. United States, 556 U.S. 129, 137 (2009) ("When a defendant agrees to [a] plea bargain, the Government takes on certain obligations. If those obligations are not met, the defendant is entitled to seek a remedy which might in some cases be rescission of the agreement, allowing him to take back the consideration he has furnished, i.e., to withdraw his plea.").


Additionally, Appellant's motion to withdraw his plea should have been granted once the parties and the court learned the plea could not be completed consistent with the negotiations. See State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002) ("Once a defendant enters a plea of guilty, the decision whether to allow withdrawal of the plea is left to the [plea] court's sound discretion."); id. ("An abuse of discretion occurs when a [plea] court's decision is unsupported by the evidence or controlled by an error of law.").

Pursuant to Rule 261, SCACR, and the above, the parties have reached an agreement regarding the disposition of this appeal and jointly ask this Court to vacate Appellant's guilty pleas and sentences related to his Chester County charges which are the subject of this appeal. As a result, the parties agree and ask this Court to remand to the circuit court all of Appellant's Chester County charges referenced in this Agreement for a trial or other disposition.

WHEREFORE, the parties ask that the Court hold this matter in abeyance until accepting this agreement, accept this mutual agreement, vacate Appellant's Chester County guilty pleas and

sentences, and remand to the circuit court for a trial or other disposition on all referenced Chester County charges.

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ATTORNEY FOR APPELLANT

October 12, 2022

Respectfully submitted,

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Attorney General

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ATTORNEYS FOR RESPONDENT

# **EXHIBIT A**

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )  
 )  
GEORGE LEACH, S.C.D.C. # 271937, )  
 )  
Applicant, )  
 )  
v. )  
STATE OF SOUTH CAROLINA, )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE SIXTEENTH JUDICIAL CIRCUIT

Case No.: 2021-CP-46-001018

**ORDER GRANTING POST-  
CONVICTION RELIEF**

Applicant George Leach brought this post-conviction relief action on March 29, 2021, and Respondent, the State of South Carolina, made its return and partial motion to dismiss on June 7, 2021. An evidentiary hearing was held on September 1, 2022, at the Moss Justice Center in York County. Applicant was present at the hearing and was represented by Monier Abusafi, Esquire. Zachary W. Jones, of the South Carolina Attorney General’s Office, represented Respondent.

At the hearing, Respondent conceded Applicant was entitled to relief because the plea agreement he entered into with the State differed from the terms of his actual plea and sentence, therefore rendering his plea involuntary. Therefore, this Court now grants Applicant’s post-conviction relief application, vacates his York County pleas and sentences, and remands the matter back to the York County Court of General Sessions for a new trial.<sup>1</sup>

**I. Procedural History**

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections based on his guilty plea to charges from both York and

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<sup>1</sup> As discussed below, Applicant entered guilty pleas to charges arising out of both York County and Chester County at the same time in York County. However, as his direct appeal challenging his Chester County pleas and sentences is still pending before the South Carolina Court of Appeals, this PCR action concerns only the York County pleas and sentences. *See* Rule 71.1, SCRCP (stating an application for post-conviction relief cannot be made while an appeal from the conviction or sentence is pending or during the time in which an appeal may be perfected).

Chester Counties. On November 19, 2020, Applicant appeared in the York County Court of General Sessions before the Honorable Daniel D Hall, circuit court judge. He was represented by Assistant Public Defender Mark McKinnon on the York County charges and appeared *pro se* on the Chester County charges. At that time, Applicant waived venue to plead guilty in York County to the following indicted offenses from Chester County: failure to stop for a blue light (second or subsequent offense) (2019-GS-12-192); failure to stop for a blue light (second or subsequent offense) (2020-GS-12-406); and habitual traffic offender (2020-GS-12-407). Applicant also waived presentment to the York County Grand Jury and pled guilty to two counts of failure to stop for a blue light (2020-GS-46-02719, -06305) and possession of heroin (third or subsequent offense) (2020-GS-46-6243). Pursuant to a global plea agreement to resolve these charges in both Chester and York Counties, Applicant was to plead guilty to all of these charges in exchange for a sentence of eight years imprisonment suspended upon the service of four years imprisonment followed by two years of probation. In addition, as part of the global plea agreement, the State agreed to dismiss two related charges for possession of cocaine (third or subsequent offense) and leaving the scene of an accident arising out of York County, plus five related charges for domestic violence (second), use of a vehicle without permission, receiving stolen goods, shoplifting under \$2,000, and resisting arrest arising out of Chester County. This negotiated sentence was based on the mistaken belief, shared by the assistant solicitor and Applicant's counsel, that possession of heroin carried up to a ten-year sentence. (Plea Tr. p.13, line 24–p.14, line 6).<sup>2</sup>

At the plea proceeding, the court conducted a plea colloquy, and Applicant indicated his plea was being made freely and voluntarily. (Plea Tr. pp.4–8). The court began imposing sentence

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<sup>2</sup> S.C. Code Ann. § 44-53-370(d)(1) provides a maximum sentence of five years' imprisonment for a third or subsequent offense of possessing a Schedule I(C) narcotic, such as heroin.

as follows: eight years' imprisonment for possession of heroin, suspended on the service of four years to two years' probation; four years, concurrent, for failure to stop for a blue light (2020-GS-46-2719); time served for failure to stop for a blue light (2020-GS-46-6305); four years, concurrent, for failure to stop for a blue light (2020-GS-12-406); and time served for the habitual traffic offender charge and the remaining charge of failure to stop (2019-GS-12-192). (Plea Tr. p.14, line 17–p.15, line 21). At this point, the parties discovered that possession of heroin had a maximum sentence of five years' imprisonment; following a sidebar conference, the court attempted to adjust the sentence to carry out the intent of the negotiations. (Plea Tr. p.15, line 22–p.16, line 6). The court altered the sentence to impose five years for possession of heroin, suspended upon service of four years to two years' probation, plus a consecutive term of four years suspended to two years' probation on indictment number 2020-GS-46-2719. (Plea Tr. p.16, lines 7–21). At this point, Applicant stated he wished to withdraw his plea because he entered into the plea agreement with the understanding that possession of heroin carried up to ten years, not five. (Plea Tr. p.16, line 23–p.17, line 21). The court denied Applicant's request. (Plea Tr. p.16, line 24–p.18, line 8).

Upon Applicant's request, counsel filed a timely notice of appeal challenging the guilty pleas arising out of York County. Counsel also submitted an explanation pursuant to Rule 203(d)(1)(B)(iv), SCACR, stating that he did not see a good faith basis for the appeal but filed the notice of appeal at Applicant's request. By order dated December 30, 2020, the South Carolina Court of Appeals dismissed the appeal for failure to provide a sufficient guilty plea explanation. The Remittitur was issued on January 22, 2021.<sup>3</sup>

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<sup>3</sup> Applicant also filed a *pro se* notice of appeal challenging the Chester County pleas and sentences, including a *pro se* explanation pursuant to Rule 203(d)(1)(B)(iv), SCACR, in which he raised the issue of Judge Hall's denial of Applicant's request to withdraw his plea. By letter dated April 28,

## **II. Current Action before the Court**

In his application for post-conviction relief, Applicant alleges he is entitled to relief based on the following:

- “Ineffective assistance of counsel by Mark McKinnon: Mark McKinnon allowed me to plea to a charge to 8 years when it only carried 5 years.”
- “Judge Daniel Hall abuse of discretion: Judge Hall went against my negotiated plea deal and I asked to withdraw my plea and Judge Hall would not allow me to withdraw my plea.”

As requested relief, Applicant states he is seeking, “to be released and to give my probation back I fell my rights was violated and the sentence should be vacated.”

## **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Before the Court are the records of the York County and Chester County Clerk of Court regarding the subject convictions, the transcript from Applicant’s plea proceeding, the records from Applicant’s direct appeals of the York County and Chester County charges, and Applicant’s records from the South Carolina Department of Corrections. This Court has thoroughly reviewed the records submitted to it by the parties, the legal arguments made by the attorneys, and the pleadings. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented:

### **Involuntary Guilty Plea**

“[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

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2021, the Court of Appeals determined Applicant’s appeal on those Chester County charges could proceed.

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 and the consequences of his plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). Additionally, the defendant “must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived.” *Pittman*, 337 S.C. at 599.

It is clear from the transcript that the negotiated sentence offered by the State in exchange for Applicant’s guilty plea contemplated an eight-year prison term on the possession of heroin charge—an illegal sentence, as possession of heroin, third offense, carries a maximum penalty of five years’ imprisonment. Therefore, it is evident from the record that Applicant, at the time he professed to enter his guilty plea, did *not* understand the maximum penalty for the charge he was facing. The negotiated sentence for the heroin possession charge was the longest of the sentences in the plea agreement; therefore, Applicant’s understanding of the penalty for that charge likely affected his decision to accept the negotiated plea. For these reasons, the Court concludes that Applicant’s decision to plead guilty pursuant to the negotiated plea was not intelligently made. *Id.*

In addition, the court’s attempt to fashion a new sentence, different from the sentence Applicant had negotiated with the State, rendered Applicant’s plea involuntary. When Applicant began the plea colloquy, he was under the impression that he would receive the sentence he had negotiated with the State. The court, however, substituted a different sentence.<sup>4</sup> After the court

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<sup>4</sup> The court had the best of motives; it was trying to honor the original agreement between Applicant and the State by imposing a substantially similar aggregate sentence, after it learned that the negotiated sentence could not legally be imposed. The fact remains, however, that Applicant bargained for one thing and received something else. In addition, as Applicant’s assent to the

changed the sentence, Applicant immediately asked to withdraw his plea. This Court finds Applicant's guilty plea was not voluntarily or intelligently made; consequently, Applicant's conviction violated the Due Process Clause. *Boykin*, 395 U.S. 238.

### **Ineffective Assistance of Counsel**

In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (1999). Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Second, counsel's deficient performance must have prejudiced Applicant such 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, 386 S.E.2d at 625.

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty but

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original negotiated plea was not intelligently made, even an identical aggregate sentence would not have cured the constitutional defects in Applicant's plea.

would have insisted on going to trial.” *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing *Hill*, 474 U.S. at 59). This requires a showing of both error and prejudice. *Id.*

Here, the transcript of the guilty plea proceeding conclusively shows that both the solicitor and Applicant’s counsel believed the maximum penalty for possession of heroin, third offense, was ten years’ imprisonment. (Plea Tr. p.13, line 24–p.14, line 6). This erroneous belief is evident from the original negotiated sentence, which contemplated an eight-year term of imprisonment suspended upon the service of four years to probation; such a sentence would be illegal because the maximum penalty for possession of heroin, third offense, is five years. (Plea Tr. p.4, lines 4–7). The Court finds, therefore, that Applicant has met his burden of proving error.

In addition, the transcript reveals that Applicant immediately requested to withdraw his plea upon learning that possession of heroin, third offense, only carried a maximum penalty of five years. (Plea Tr. p.16, line 23). He explained that “the only reason I plead to it is because of the possession. If it don’t carry but five years, I don’t want to plead.” (Plea Tr. p.17, lines 14–16). Based on this record, the Court finds Applicant would not have pled guilty but for the erroneous advice of his counsel. Therefore, the Court finds Applicant has also met his burden of proving prejudice.

The Court finds that Applicant has proved both prongs of the *Hill v. Lockhart* test and that Applicant’s guilty plea was not knowingly, intelligently, and voluntarily made. In addition, the State has conceded that Applicant is entitled to relief. Accordingly, the Court finds Applicant is entitled to post-conviction relief.

#### **IV. CONCLUSION**

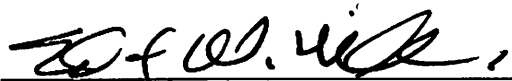
Based on all the foregoing, this Court finds that Applicant has proven that he is entitled to post-conviction relief. Applicant shall be remanded to the custody of the South Carolina


Department of Corrections pending retrial, or other disposition, of the York County<sup>5</sup> charges referenced in this order.

**IT IS THEREFORE ORDERED:**

1. This application for post-conviction relief is granted; and
2. Applicant shall be remanded to the South Carolina Department of Corrections pending retrial, or other disposition, of the York County charges referenced in this order; and
3. Applicant shall be treated as a pre-trial detainee as to those charges.

AND IT IS SO ORDERED this 4 day of October, 2022.

  
EDWARD W. MILLER  
Presiding Judge, Sixteenth Judicial Circuit

, South Carolina

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<sup>5</sup> As explained above, Applicant's direct appeal from his convictions on the Chester County charges is still pending and is not before the Court. Any issues relating to Applicant's Chester County charges will be resolved in Applicant's direct appeal.

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**Oct 12 2022**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Chester County  
Honorable Daniel D. Hall, Circuit Court Judge  
Appellate Case Tracking No. 2020-001579

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The State,

Respondent,

vs.

George Robert Leach, Jr.,

Appellant.

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**PROOF OF SERVICE**

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I, Caroline Collins, certify that I have served the Joint Agreement on Appellant by email to Appellant's counsel of record, Susan B. Hackett, at her primary email address provided by the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.

This 12<sup>th</sup> day of October, 2022.



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CAROLINE COLLINS  
Administrative Coordinator  
Office of Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3727

## Caroline Collins

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**From:** Caroline Collins  
**Sent:** Wednesday, October 12, 2022 2:05 PM  
**To:** Hackett, Susan  
**Cc:** William Blich; Stock, Chris  
**Subject:** The State v. George Robert Leach, Jr. (2020-001579)  
**Attachments:** LEACH George - Joint Agreement (Signed) - 2020-001579 (03125144xD2C78).PDF

Good Afternoon Ms. Hackett,

Attached please find the signed Joint Agreement to Vacate Guilty Pleas and Sentences and Remand for Trial or Other Disposition in The State v. George Robert Leach, Jr. (2020-001579). This agreement will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to confirm receipt of this email.

Thank you so much!

**CAROLINE COLLINS**, Administrative Coordinator  
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