

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**Mar 13 2023**

S.C. SUPREME COURT

APPEAL FROM LANCASTER COUNTY  
Court of Common Pleas

The Honorable Daniel Hall, Circuit Court Judge

Case No. 2019-CP-29-0975

Michael Brent Gay,

Petitioner,

vs.

The State of South Carolina,

Respondent.

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**NOTICE OF APPEAL**

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Michael Brent Gay appeals the final order of dismissal of the Honorable Daniel Hall, filed on March 1, 2023 and which counsel became aware of on March 10, 2023. Attached is a copy of the order counsel obtained from the public index. Counsel is retained on this case.

Respectfully submitted,

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March 13, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	)	FOR THE SIXTH JUDICIAL CIRCUIT
	)	
MICHAEL BRENT GAY,	)	CASE NO. 2019-CP-29-0975A
	)	
Applicant,	)	
	)	<b>ORDER OF DISMISSAL</b>
v.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Michael Brent Gay (Applicant) on August 6, 2019. On September 2, 2022, an evidentiary hearing convened before the Honorable Daniel Dewitt Hall. Applicant was present and represented by Elizabeth Franklin-Best, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. Following a thorough review of the trial transcript and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

**Procedural History**

Applicant is presently confined in the South Carolina Department of Corrections serving a thirty-year sentence. In March 2016, the Lancaster County Grand Jury indicted Applicant for murder and possession of a weapon during the commission of a violent crime (2016-GS-29-377).

On December 10, 2018, a jury trial convened before the Honorable Brian M. Gibbons. John Delgado and Dayne Phillips, Esquires, represented Applicant. Solicitor Randy Newman and Deputy Solicitor Lisa Collins prosecuted the case. During the fourth day of trial, after the jury left for lunch, Applicant pled guilty to the weapon charge and, as to the murder indictment, the lesser-included offense of voluntary manslaughter. Judge Gibbons sentenced Applicant to

concurrent terms of thirty years for voluntary manslaughter and five years for the weapon charge.

Applicant timely filed a direct appeal. On February 28, 2019, the Court of Appeals dismissed the appeal for failure to provide an explanation for appealing from a guilty plea. The remittitur was sent March 18, 2019.

### **Underlying Facts**

Applicant's charges stem from the fatal shooting of Joshua Flint McManus (Victim) on December 5, 2015. During trial, the State presented evidence that Victim was watching a football game at Applicant's home along with Raymond Robinson and Stefan Perry on the day of the shooting. Robinson and Perry testified Applicant unexpectedly shot Victim in the head while they were watching the game. (Tr. 197, 201-03, 395-97). Both witnesses testified no one was arguing prior to the shooting. (Tr. 206, 397).

### **Current Application**

Applicant timely filed this PCR application on August 6, 2019, generally alleging he was being held in custody unlawfully due to ineffective assistance of counsel, violation of the 6<sup>th</sup> Amendment, Violation of the 14<sup>th</sup> Amendment, and Violation of the 5<sup>th</sup> Amendment. Thereafter, Applicant amended his application to allege the following:

- a. Ineffective assistance of counsel:
  - i. Trial counsel failed to develop and present evidence that the victim's death was the result of an accident and was not voluntary manslaughter or murder.
  - ii. Trial counsel led Applicant to believe he would receive a 12-year sentence and Applicant pled guilty based on those assurances.
  - iii. Trial counsel failed to offer mitigating evidence regarding how Applicant came to have his debilitating opioid addiction, which would have decreased his sentence had it been presented to the court.

- iv. Trial counsel failed to object when the State asked the judge to sentence Applicant to the maximum possible sentence allowed.
  - v. Trial counsel failed to object when the Solicitor handed the judge State's Exhibit 15.
  - vi. Trial counsel failed to explain the elements of voluntary manslaughter.
- b. Involuntary guilty plea: Applicant's guilty plea was not knowingly and voluntarily entered.
  - c. Applicant's 5<sup>th</sup> Amendment right to a fair trial and 14<sup>th</sup> Amendment right to due process have been violated.

At the PCR hearing, Applicant proceeded on the allegations in his amended application.

### **Findings of Fact and Conclusions of Law**

This Court has had the opportunity to review the plea transcript in its entirety and has heard the testimony at the PCR hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly.<sup>1</sup> After a careful review based on the Strickland standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

#### ***Ineffective Assistance of Counsel***

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(c), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove "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, 286 S.C. at 441, 334 S.E.2d at 813. "The test for effective assistance of counsel is whether the representation was within the range of competence

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<sup>1</sup> This Court will reference the PCR testimony where relevant below.

demanding of attorneys in criminal cases.” Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel’s deficient performance. Strickland, 466 U.S. at 687–88; Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. “A PCR applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel’s errors, the applicant would not have pled guilty and would have insisted on going to trial.” Dalton v. State, 376 S.C. 130, 136, 654 S.E.2d 870, 873 (Ct. App. 2007). To prove prejudice following a guilty plea, the applicant “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Hill v. Lockhart, 474 U.S. 52, 59 (1985).

*Failed to develop accident defense*

At the PCR hearing, Applicant testified he accidentally shot and killed Victim. (PCR Tr. 6). He explained he had “taken an extremely large amount of opioids,” smoked marijuana, and taken methamphetamine that day and was “heavily intoxicated” at the time of the shooting. (PCR Tr. 7). Applicant acknowledged he did not have any disagreements with Victim prior to the shooting; he averred, “No one had any disagreements about anything.” (PCR Tr. 11). Notwithstanding this, Applicant testified he armed himself with a gun that had previously discharged accidentally; he claimed he armed himself because he (1) discovered his grandfather’s watch was missing from his

closet and (2) saw Victim holding a pocketknife. (PCR Tr. 11-13, 16). Applicant stated he walked through his bedroom and tripped; when he fell, the “gun accidentally discharged and . . . hit [Victim] in the neck.” (PCR Tr. 13). Applicant testified he told trial counsel “[f]rom the very beginning” that he accidently shot Victim. (Tr. 16-17).

In contrast, John Delgado testified Applicant did not mention anything about the shooting being an accident “until possibly a week to ten days before trial.” (PCR Tr. 41-42). He testified during the 911 call, Applicant indicated he shot Victim because Victim “pulled out a blade” and “come at [him] with a knife.” (PCR Tr. 42-43). However, Delgado stated Applicant’s claim of self-defense was refuted by a picture of Victim’s deceased body, which depicted Victim “leaning back in his chair . . . [with] his feet crossed at his ankles” in “a very relaxed position.” (PCR Tr. 41). He testified Applicant’s claim of self-defense was also refuted by the two eyewitnesses who testified for the State. (PCR Tr. 44).

Delgado testified he contacted the pathologist within a day or two of Applicant telling him the shooting was an accident to determine if the evidence supported an accident defense. (PCR Tr. 42). However, the pathologist indicated “the shot was absolutely horizontal, right to left, there was nothing that would indicate that there was an upward trajectory of the shot.” (PCR Tr. 42). As a result of the pathologist’s findings, Delgado testified he concluded the facts did not support Applicant’s story that the shooting was an accident. (PCR Tr. 42).

Dayne Phillips testified Applicant’s memory was “fluid” and much more “clear and specific” during the PCR hearing than during the time he represented Applicant. (PCR Tr. 76). He acknowledged Applicant had raised a defense of accident prior to trial but explained Applicant had also claimed self-defense. (PCR Tr. 77). Phillips testified, “Any good defense lawyer knows that you can’t go to trial and give a jury two defense theories because there’s only one truth and

they would know that you're probably lying. So you had to have one theory." (PCR Tr. 77).

This Court finds **credible** the foregoing testimony by both Delgado and Phillips. In contrast, this Court finds **not credible** Applicant's testimony that he told trial counsel from the beginning that the shooting was an accident. Further, this Court finds counsel articulated a valid reason for not further pursuing a defense of accident in that (1) Applicant initially claimed self-defense but later changed his story to accident, (2) the trajectory of the bullet as reported by the pathologist did not support Applicant's story that the gun accidentally discharged after Applicant tripped and was falling, and (3) a jury will not typically believe a defendant who presents multiple defense theories. Based on the foregoing, counsel has articulated a valid reason for not further pursuing a defense of accident, and Applicant has not shown counsel was deficient in this regard.

Likewise, Applicant has not shown prejudice. This Court finds **not credible** Applicant's testimony that the shooting was an accident. Based on the trajectory of the bullet ("absolutely horizontal, right to left, . . . nothing that would indicate that there was an upward trajectory"); the 911 call wherein Applicant initially claimed he acted in self-defense; the fact the Victim's body was leaning back in a non-confrontational manner at the time of the shooting; and the testimony of the State's two eyewitnesses, this Court finds it is not reasonably likely a jury would have accepted a defense of accident. (Tr. 201-03, 395-97; PCR Tr. 41-42). Thus, Applicant has not shown a reasonable likelihood the outcome of his trial would have been different if counsel had further developed a defense of accident and has not shown prejudice.

*Advised Applicant he would receive 12-year sentence*

At the PCR hearing, Applicant testified he only pled guilty because he was promised a twelve-year sentence. (PCR Tr. 19). In contrast, Delgado and Phillips both testified they never promised Applicant a twelve-year sentence. (PCR Tr. 48, 62-63, 74). Delgado stated "there was

absolutely no guarantee or promise of the sentence.” (PCR Tr. 74).

This Court finds Delgado and Phillips’s testimony in this regard **credible**, and Applicant’s testimony in this regard **not credible**. Thus, Applicant has not shown deficiency. Further, a review of the plea transcript itself shows Applicant was aware of the sentence he faced when he pled guilty. At the beginning of the plea, the solicitor stated the pleas were “straight up” and Applicant was “exposed to the max on each of those two charges.” (Pl. Tr. 2). Thereafter, the plea court advised Applicant that voluntary manslaughter carried up to thirty years, and the weapon charge carried up to five years; Applicant indicated he understood. (Pl. Tr. 3-4). Critically, Applicant relayed to the plea court that no one had promised him anything for the plea. (Pl. Tr. 4). Based on the foregoing, this Court finds Applicant was fully aware of the sentence he faced when he pled; thus, Applicant has not shown prejudice. See Hill, 474 U.S. at 59 (providing a PCR applicant must show “a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial” to prove prejudice following a guilty plea).

*Failed to offer mitigating evidence of Applicant’s opioid addiction*

During the PCR hearing, Applicant averred the outcome of his trial would have been different if counsel had presented the expert witnesses he hired to defend him at trial and as mitigating evidence. (PCR Tr. 22). Delgado explained he had Applicant evaluated by both a neuropsychologist and a neurologist to see if there was evidence of an organic brain dysfunction. (PCR Tr. 48). He testified the reports indicated Applicant had a mild to moderate frontal lobe dysfunction, but it did not rise to the level of incompetency or a guilty but mentally ill standard. (PCR Tr. 49). Delgado testified he provided the reports to the plea court at sentencing as part of mitigation. (PCR Tr. 49, 68).

This Court finds the foregoing testimony by Delgado is **credible**. Delgado provided the

mitigation information that he had to the plea court during sentencing and thus was not deficient in this manner. Further, the plea transcript indicates Delgado provided this information to the plea court and discussed Applicant's childhood and background as mitigation. (Pl. Tr. 15-19). Because counsel provided this information to the plea court, and the plea court had this information prior to sentencing, Applicant has not shown any deficiency or resulting prejudice in this regard.

*Failed to object when the State requested the maximum sentence*

During the PCR hearing, Delgado testified Applicant was entering an open plea, and there were no negotiations with it. (PCR Tr. 48). He averred that because it was an open plea, the State could ask for whatever they wanted. (PCR Tr. 51). Likewise, Phillips testified it was an open plea with no promises, and Applicant knew he was facing thirty years. (PCR Tr. 75).

This Court finds the foregoing testimony by Delgado and Phillips **credible**. Further, because this was an open plea, counsel was not deficient for not objecting when the State requested the maximum sentence. Finally, the plea transcript supports Delgado and Phillips's testimony: at the beginning of the plea, the State indicated Applicant was pleading "straight-up" and was exposed to the maximum sentences. (Pl. Tr. 2). The plea court advised Applicant he faced up to thirty years for voluntary manslaughter and five years for the weapon charge, and Applicant indicated he understood. (Pl. Tr. 3-4). This Court finds Applicant was advised and aware that he faced the maximum sentence of these charges and knew what those sentences could be. (Pl. Tr. 2-4). Knowing this, Applicant chose to plead guilty. (Pl. Tr. 4). Thus, Applicant has not shown prejudice. See Hill, 474 U.S. at 59 (providing a PCR applicant must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" to prove prejudice following a guilty plea).

*Failed to object to Exhibit 15*

Applicant contends counsel was ineffective for failing to object when the State presented Exhibit 15 to the plea court during sentencing. Although Applicant did not enter this exhibit into evidence, based on the solicitor's statement at the plea hearing, Exhibit 15 was a picture "showing the condition of the body immediately after the incident and as found by law enforcement." (Pl. Tr. 8). According to Delgado, Victim's body was "leaning back in his chair . . . [with] his feet crossed at his ankles" in "a very relaxed position." (PCR Tr. 41). Delgado testified he did not see any basis to object when the State handed the picture to the plea court. (PCR Tr. 51). He noted Applicant had already pled guilty, the jury was no longer involved, and the State had the right to ask for whatever sentence they wanted in an open plea. (PCR Tr. 51).

This Court finds Delgado articulated a valid basis for not objecting to the picture. Specifically, because it was an open plea, the State could use the picture in sentencing—just as Applicant could use his medical reports as mitigation during sentencing. Applicant has not set forth a valid basis for counsel to object and thus has not shown deficiency. Further, Applicant did not enter this picture into evidence at the PCR hearing—leaving this court to speculate about the picture itself. Thus, Applicant has not shown prejudice. *Cf. Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (providing an applicant must produce witnesses at a PCR hearing to support a claim that counsel was ineffective for failing to interview or call potential witnesses).

*Failed to explain the elements of voluntary manslaughter*

During the PCR hearing, Delgado testified he and Phillips explained the elements of murder and voluntary manslaughter to Applicant. (PCR Tr. 50, 53-54, 69). Phillips testified generally that they left "no stone unturned" in their conversations with Applicant. This Court finds the foregoing testimony by Delgado and Phillips is **credible**. Based on this testimony, this Court

finds trial counsel explained the elements of voluntary manslaughter with Applicant and thus were not deficient in this regard. Likewise, Applicant has not shown any resulting prejudice.

### *Involuntary Guilty Plea*

“To be knowing and voluntary, a plea must be entered with an awareness of its consequences.” Holland v. State, 322 S.C. 111, 113, 470 S.E.2d 378, 379 (1996). “To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.” Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007). “

During the PCR hearing, Delgado testified he met with Applicant twelve to fifteen times over the course of his representation. (PCR Tr. 40). He stated prior to the guilty plea, he and Phillips met with Applicant “a good hour and-a-half.” (PCR Tr. 47). Delgado testified they explained to Applicant the sentences he faced, the risk of proceeding with the jury trial, and the constitutional rights Applicant would waive by pleading guilty. (PCR Tr. 47). Delgado explained they were in the fourth day of trial, and Applicant was very aware of his rights to have a jury decide his guilt, cross-examine witnesses, and testify because they had been exercising those rights. (PCR Tr. 47-48). He stated they also explained to Applicant the elements of voluntary manslaughter and murder. (PCR Tr. 50). Delgado stated he believed Applicant was competent and understood their conversations. (PCR Tr. 60).

Likewise, Phillips testified they left “no stone unturned” in their conversations with Applicant. (PCR Tr. 72). He stated Applicant understood that by pleading guilty, he was waiving his right to raise on appeal issues that may have been preserved during trial. (PCR Tr. 71). Phillips stated they explained to Applicant “all of his rights, collateral consequences that come with a plea, [and] full sentencing ranges,” and Applicant entered the plea with “eyes wide open.” (PCR Tr.

72). He testified they reviewed with Applicant all the rights he would be waiving by pleading guilty. (PCR Tr. 74). Phillips averred Applicant was competent and understood their conversations. (PCR Tr. 72-73).

This Court finds the foregoing testimony by Delgado and Phillips is **credible**. Based on the foregoing, Applicant was fully aware of the charges he faced and consequences of pleading guilty. The plea transcript further supports a finding that Applicant was fully aware of the consequences of pleading guilty. During the plea, the Court advised Applicant of the sentence he faced and Applicant stated he understood. (Pl. Tr. 3-4). Likewise, Applicant told the Court he understood the constitutional rights he was waiving by pleading guilty. (Pl. Tr. 5). C.f. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (“[S]tatements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements.”). Based on the testimony of Delgado and Phillips as well as the plea transcript, this Court finds Applicant entered his plea **knowingly, voluntarily, freely, and intelligently**.

#### ***Constitutional Violations***

Applicant has not set forth any evidence to support a finding that his 5<sup>th</sup> Amendment right to a fair trial and his 14<sup>th</sup> Amendment right to due process was violated. Rather, this Court finds Applicant was represented by counsel who provided effective assistance, and Applicant ultimately pled guilty knowingly, voluntarily, freely, and intelligently. Thus, this claim is denied.

#### **Conclusion**

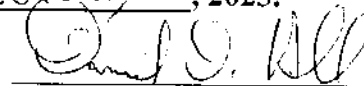
Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. 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 an appellate counsel's assistance in seeking review of the denial of PCR. Pursuant to Rule 71.1(g), SCRCR, if an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant must be remanded to and remain in the custody of the State.

**AND IT IS SO ORDERED THIS** 10<sup>th</sup> **day of** February, **2023.**



DANIEL DEWITT HALL,  
Presiding Judge  
Sixth Judicial Circuit



, South Carolina