

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

HONORABLE G.D. MORGAN, JR.

2020-CP-42-03528

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S.C. SUPREME COURT

RAYSHON SMITH, SCDC# 335793

APPELLANT,

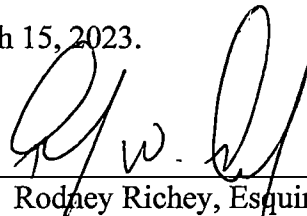
vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Rayshon Smith appeals the denial of his Post-Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable G.D. Morgan, Jr., Circuit Judge on April 19, 2022 an Order issued on February 27, 2023 and filed on March 6, 2023. The Appellant received notice of the judgment on March 15, 2023.



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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS)
FOR THE SEVENTH JUDICIAL CIRCUIT) SUPREME COURT

Rayshon Smith, #336807,)
Applicant,)

Case No.: 2020-CP-42-03528

v.)

ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

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This matter comes before this Court by way of Applicant's post-conviction relief application filed October 13, 2020. Respondent made its return on March 10, 2021, requesting an evidentiary hearing be convened. An evidentiary hearing was held at the Spartanburg County Courthouse. Rodney W. Richey, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Robin File also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot 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 in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In June 2017, the Spartanburg County Grand Jury indicted Applicant for murder (2017-GS-42-3108), first degree burglary (2017-GS-42-3109), two counts of kidnapping (2017-GS-42-3110 and -3111), and possession of firearm or knife during commission of or attempt to commit a violent crime (2017-GS-42-3112). In October 2017, the Spartanburg County Grand Jury indicted Applicant under an

amended indictment on the first degree burglary charge (-3109). In August 2018, the Spartanburg County Grand Jury indicted Applicant under an amended indictment on the murder indictment (-3108), which included a second count of possession of a weapon during the commission of a violent crime. Robin File, Esquire represented Applicant. On August 27, 2018, and after exhausting pre-trial motions, Applicant pled guilty before the Honorable J. Derham Cole, circuit court judge. Judge Cole sentenced Applicant to thirty years' imprisonment for murder, five years' imprisonment for possession of a firearm, thirty years' imprisonment for first degree burglary, ten years' imprisonment for each kidnapping charge, and five years' imprisonment for filing a false police report, sentences running concurrently. Applicant did not appeal his conviction or sentence.

Summary of Relevant Facts

On February 11, 2017, the Officers were informed by two witnesses, Dixie Wright and Simon Spicer, that two black men entered the residence and shot Victim Francisco Javier Villar. (Tr. 132). The house was cleared and Victim was found in a puddle of his own blood; evidently deceased. (Tr. 132-33). Victim was pronounced dead at the hospital. (Tr. 133). Meanwhile, Applicant appeared at the hospital as a walk-in, claiming he had been shot in the ear. (Tr. 133).

Applicant gave a statement to the investigator, who did not believe him because the story did not line up given faulty descriptions and the direction of the shooting and travel not making sense. (Tr. 133). Applicant ultimately admitted this story was false. (Tr. 137).

Applicant entered the home with a semiautomatic handgun who, along with his co-defendants, told everyone to get on the ground and demanded to know where the money and safe were. (Tr. 135). Victim refused to get on the ground, saying he did not have anything and asked them to leave. (Tr. 136). Victim picked up a gun and fired the first shot. (Tr. 136).

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presumably the co-defendant Jarvis Stripling, fired the shots that killed Victim. (Tr. 136). When they were in the house they pointed their handguns at witnesses of the murder, Dixie Wright and Simon Spicer, kidnapping them while the robbery and shooting took place. (Tr. 136-37).

In some statements given, Applicant admits he knew the plan was to rob Victim. (Tr. 136). Victim's girlfriend identified Applicant as one of the individuals that entered the home at the time of the shooting. (Tr. 134). This was also documented on video footage. (Tr. 134-35).

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. "Counsel was ineffective for advising client that he would face potential life sentence if he goes to trial. Based on plea counsel erroneous advise client ple[d] guilty."
2. "Counsel was ineffective for failing to investigate facts of the case."
3. "Counsel was ineffective for deni[al of] due process of law – 6th, 14th amendments."
4. "New[ly] Discovered Evidence after plea [of] guilty."
5. "Counsel was ineffective for not challenging invalid indictments. The indictments [] lack specific day, time finding by the grand jury which is [an] essential element of the charged. S.C. Code Ann. 17-19-90 (2003)."
6. "Collaterally attack *Castro v. United State[s]*, 272 F.Supp.3d 268. A prisoner can collaterally attach his sentence on the ground his guilty plea was not knowing or voluntary if his claim is based on evidence not available to him at the time of the plea."

Respondent made their return and motion to dismiss for untimeliness and failure to establish a *prima facie* case of newly discovered evidence. Respondent's motion to dismiss was denied by the Honorable Brian M. Gibbons, circuit court judge, on June 3, 2021. Judge Gibbons ordered a full evidentiary hearing be held. At the evidentiary hearing, Applicant proceeded forward on the following allegations:

1. Involuntary guilty plea:
 - a. Applicant only pled because Counsel told him to plead.
 - i. Counsel told Applicant that if he did not plead and, instead, proceeded to trial, he would likely receive a life sentence for murder before Judge Cole.

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2. Ineffective assistance of counsel:
- a. Failure to use Applicant's history of depression in mitigation.
 - b. Failure to challenge the sufficiency of the indictments.

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 testified that he was shot as soon as he entered the home in which the incident took place. Applicant stated the incident was a robbery gone wrong. Applicant stated that he went to the hospital after he was shot.

Applicant stated that he pled guilty because Counsel told him that if he went to trial, he would likely receive a life sentence. Applicant stated that they talked about the case a couple of times, and he was told that the only charge he could receive time for was the burglary. Applicant stated he wanted a jury trial. Applicant was unsure why Counsel was so adamant that he was guilty and should plead. Applicant stated he pled guilty to all charges because his attorney told him to. He stated he had a history of depression and told Counsel this before the plea.

On cross-examination, Applicant stated that he gave a statement to the police. He stated he decided to plead guilty based upon the advice of Counsel, but now thinks the advice given was faulty. Applicant stated that there were other witnesses that saw him at the crime scene.

Counsel Testimony

Counsel testified that he was appointed to represent Applicant due to a conflict of interest with the public defender's office. Counsel testified that Applicant's case was most prosecutable because he gave a statement. Counsel testified that he investigated the incident. He stated that Applicant would have been found guilty at trial under the hand of one hand of all the evidence.

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Counsel stated that the robbery aspect of the crime was covered in Applicant's statement. He testified that he did not believe the indictments in the case were defective in any way.

On cross-examination, Counsel testified that they pursued pre-trial motions concerning the voluntariness of Applicant's statement and a motion concerning the identification of Applicant by someone at city hall. He stated that the likelihood of success at trial after the pre-trial motions were denied were "slim to none." Counsel testified that Applicant received the mandatory minimum for murder, likely would have received a life sentence at trial, and pleading guilty was in his best interest.

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, 688 (1984). *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the

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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. See 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 694. Realistically, this matters "only in the rarest case" because "[t]he likelihood of a different result

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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.

Involuntary Guilty Plea

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 elements of the offense the maximum and minimum penalties, and the rights he is giving

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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).

This Court finds the plea was entered freely, knowingly, intelligently, and voluntarily. Applicant stated that he understood the charges, elements, and potential sentences. (Tr. 117-20). Applicant stated that he had plenty of time to talk to Counsel, that Counsel explained everything to him, and that he had no defense to the charges. (Tr. 120-21). Applicant waived his right to remain silent, right to a jury trial, right to call and confront witnesses, and right to present evidence. (Tr. 121-27). Applicant stated that no promises or threats were made to get him to plead, and that he was pleading freely and voluntarily. (Tr. 127). Applicant stated that he understood murder, first degree burglary, kidnapping, and attempted armed robbery are all classified as violent and most serious. (Tr. 128). Applicant stated he struggled with depression

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and post-traumatic stress disorder, but that this did not impact his ability to understand the plea process. (Tr. 130-31). Applicant stated he was satisfied with Counsel. (Tr. 131). After the State recited the facts of the case, Applicant agreed. (Tr. 132-38). This Court finds the plea was freely, knowingly, intelligently, and voluntarily entered. Further, this Court finds that Applicant's acceptance of Counsel's advice to plead and the fear of receiving more time if he proceeded to trial were not sufficient to undermine the plea's validity. Accordingly, relief is denied on this ground.

Indictments

Applicant is alleging he is entitled to PCR relief because there were "flaws in the indictment process." Challenges to the indictment must be raised before a jury is sworn in. S.C. Code Ann. § 17-19-90 (2003). If non-jurisdictional defects apparent on the face of the document are not raised before then, they are waived. *Hooks v. State*, 353 S.C. 48, 577 S.E.2d 211, (2003), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *State v. Young*, 243 S.C. 187, 133 S.E.2d 210 (1963). Sufficiency of indictment is found when the offense is stated with enough specificity that the court knows what judgement to announce and the defendant knows what he has to answer to and whether he can plead acquittal or conviction upon it and whether it apprises defendant of offense that is intended to be charged. *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) *citing State v. Wilkes*, 353 S.C. 462, 465, 578 S.E.2d 717, 19 (2003).

Here, there is no indication Applicant was asserting indictment flaws prior to resolution of the case through the plea process. If he did not assert these claims prior to the resolution of the case, he waived his right to assert this claim and cannot be granted relief upon assertion of flaws now. At the PCR hearing, Counsel credibly testified that he did not see anything wrong about the

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indictments that should have been challenged. Further, upon this Court's review of the indictments, the Court fails to find anything insufficient about them. Accordingly, this Court finds this allegation is without merit and denies relief on this ground.

Mitigation

Applicant claims Counsel was ineffective for failing to mitigate the sentence. Counsel may be found deficient for failing to sufficiently investigate and present mitigating evidence. See *Council v. State*, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008) (finding it unreasonable for counsel not to further investigate the defendant's background and present even minimal mitigating evidence obtained); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (finding it unreasonable when Counsel failed to investigate mitigating evidence beyond a couple retained records, including the presentence investigation report and social service records); *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (finding that Counsel was unreasonable for failing to evaluate the totality of available mitigation evidence). An applicant is prejudiced by this deficiency if there is a reasonable probability that a different sentence would have been imposed but for Counsel's failure to investigate and present mitigating evidence. *Council v. State*, 380 S.C. 159, 171, 670 S.E.2d 356, 362 (2008).

Applicant pled to murder and received the mandatory minimum sentence. Any mitigation strategy addressing Applicant's depression could not have resulted in a lesser sentence. Further, this Court finds Counsel's chosen mitigation strategy, namely highlighting his age, education, and career aspirations, was seemingly successful and no other approach could have lessened the sentence even further. Even so, Applicant himself informed the Court he struggled with depression and post-traumatic stress disorder. (Tr. 130-31). Thus, this Court declines to find a deficiency or prejudice. Accordingly, relief is denied on this ground.

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Conclusion

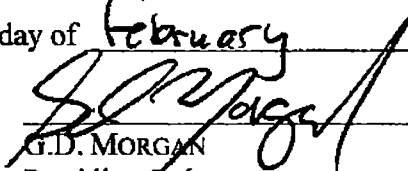
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

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), SCRCR 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 27th day of February, ~~2022~~ 2023



G.D. MORGAN
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina.

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