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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No. 2022-CP-42-01066

Calvin L. Phillips, III,

Appellant,

v.

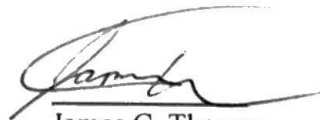
The State,

Respondent.

NOTICE OF APPEAL

Calvin L. Phillips, III appeals the order of the Honorable Brian M. Gibbons denying post-conviction relief dated March 31, 2023. Appellant received written notice of entry of this order on March 31, 2023.

April 24, 2023



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III, Esquire. Assistant Solicitor Spenser H. Smith of the Seventh Circuit Solicitor's Office prosecuted the case. On May 16, 2018, Applicant appeared before the Honorable J. Mark Hayes, II, circuit court judge, and pled guilty to an overall recommended sentencing range of five to twenty years' imprisonment, to the lesser-included offenses of attempted armed robbery and second-degree burglary, violent, and as indicted on the remaining charges. Judge Hayes sentenced Applicant to twenty years' imprisonment on kidnapping and attempted armed robbery, fifteen years' imprisonment for second-degree burglary, ten years' imprisonment for first degree assault and battery, and five years' imprisonment for weapons possession, sentences running concurrently.

Applicant filed a timely notice of appeal on May 29, 2018, that was perfected by William G. Yarborough, III, and Lauren C. Hobbis, Esquires, through filing a brief raising the following issue:

Did the plea judge err in accepting Appellant's guilty plea when before entering his plea, Appellant was neither advised of the elements the State would need to prove beyond a reasonable doubt at trial for each charge nor on the implications of his guilty plea on his suspended sentence as it related to sentencing for the charges for which he was pleading guilty, thereby rendering his guilty plea not knowingly, intelligently, or voluntarily entered?

Briefing concluded on May 17, 2019. The South Carolina Court of Appeals affirmed the convictions by unpublished opinion. *State v. Phillips*, 2021-UP-078 (S.C. Ct. App. filed Mar. 10, 2021). The remittitur was issued on March 31, 2021.

Summary of Relevant Facts

On April 24, 2017, Victim was sitting in his car listening to the radio. Victim said that a vehicle pulled up and basically blocked his driveway. Victim backed up in his car to shine his headlights towards the driveway. (Tr. 19). Applicant jumped out of the car blocking Victim's driveway and started coming towards him. Victim asked Applicant what he needed, and



Applicant responded that he wanted to speak to Scott, Victim's brother, who was asleep in the house at the time. Victim told Applicant to leave, which led to Victim and Applicant getting into a verbal altercation. Applicant then motioned for codefendant Destiney Matheny to get out of the vehicle. Matheny then produced a handgun and Applicant robs Victim of his wallet. (Tr. 19-20).

Applicant and Matheny told Victim they were going inside the house. Victim entered the house first, followed by Matheny and Applicant. Matheny entered the house with the gun visible. Victim slammed the door on the gun and knocked the gun from Matheny's hand. Applicant, Matheny, and Victim got into a struggle in the house. The house was in the process of being painted and the involved parties got covered in paint. During the struggle over the gun, Applicant got on top on Victim and assaulted him. (Tr. 20-21).

Scott woke up during the struggle over the gun and went downstairs. Scott witnessed his brother being assaulted and got a shotgun, came back to the living room/kitchen area, and shot Matheny. Scott then told Applicant to get off his brother. Applicant did not get off and Scott shot him in the back. Applicant and Matheny left the house and went to the hospital. (Tr. 21). Applicant was unable to speak to law enforcement because of his condition. He went straight into surgery and stayed in the hospital until he was arrested on May 2, 2017.

Matheny was not as badly injured from her gunshot wound compared to Applicant. She proved a statement to law enforcement soon after the incident. (Tr. 22). Matheny told law enforcement that she and Applicant "had been fighting, that they're not allowed to fight at the house, so they went out just riding around so they can figure out whatever their disagreement was, and then they decided to stop on the side of the road somewhere and smoke a cigarette and have an argument." (Tr. 22). She explained, "out of nowhere a car drives by and shot at her." (Tr. 22). Matheny stated that she and Applicant ran into a field and there was a construction site

where they got covered in paint. Law enforcement followed up on Matheny's story and found a construction site consistent with Matheny's story, but that the paint color used on the construction site did not match the color paint found on her following the incident. Scott later identified Applicant and Matheny from a lineup. Applicant agreed the facts as stated by the prosecutor were "substantially correct." (Tr. 24).

Current Action Before this Court

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

1. Ineffective assistance of counsel:
 - a. Failure to adequately convey a plea offer, one that would have exposed Applicant to a more favorable sentence, which lapsed and/or expired before Applicant had an opportunity to meaningfully consider and accept it.
 - b. Failure to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense.
 - c. Failure to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial.
 - d. Failure to advise Applicant of the nature of the rights that would be forfeited upon entering a guilty plea, to an extent that rendered the plea involuntary under *Boykin v. Alabama*, 395 U.S. 238 (1969).

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

1. Ineffective assistance of Counsel.
 - a. Failure to convey all plea offers.
 - b. Failure to explain potential defenses.
 - i. Failure to pursue the defense that the ordeal was a drug deal gone wrong.
 - c. Failure to show and review all discovery with Applicant.
 - d. Failure to investigate the case.
 - e. Failure to tell Applicant he could testify.
 - f. Failure to call Applicant's witnesses.
 - g. Failure to explain burden of proof.
 - h. Failure to explain gun charge.
 - i. Failure to explain difference between negotiated and recommended sentence.
 - j. For letting the original plea offer lapse.
 - k. For failure to present mitigation evidence.
 - l. Failure to prepare for trial.



2. Invalid plea.
 - a. Trial tax.
 - b. Applicant did not know the rights he was waiving by pleading.
 - c. Counsel told him he would lose at trial because he is black and the victims were white.

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

Prosecutor Testimony

Prosecutor testified that Applicant was located at the incident location where the victims lived at 3:30 in the morning. He stated Applicant was listening to Alex Jones when he approached the victim. He stated that a female victim produced a handgun. He stated that Applicant had four warrants on him, and the co-defendant had five. He stated discovery was presented to the defense early on. He stated that he only talked to Counsel and people affiliated with his office about the case. He stated that plea offers were conveyed through email, which is Prosecutor's standard practice. He stated that he offered a negotiated range between ten- and twenty-years' imprisonment. He stated that a negotiated fifteen years' imprisonment was also offered. He stated there was another offer of between five- and twenty-years' imprisonment. He stated Applicant pled in May. He stated Applicant accepted the final offer conveyed. He stated that Counsel never conveyed any formal rejections of plea offers and an offer rejection was never memorialized. He stated that Applicant seemingly understood the plea and the offers. He stated that the plea offers were the only ones shot. He stated that the expected story at trial was that this was a plea deal gone wrong.

Applicant Testimony

Applicant testified that he was arrested while in the hospital after being shot. He stated



Counsel was his only attorney leading up to the plea. He stated his family contacted Counsel. He stated he was incarcerated the entire time leading up to the plea. He stated Counsel paid him five visits. He stated that they discussed motions and discovery. He stated that Counsel never explained the fee, scope, or defenses. He stated he was not given police reports or shown audio or video evidence. He stated that Counsel told him not to go to trial because he would be found guilty. He stated Counsel told him he could pick his jury. He stated that he was not told he could testify. He stated he told Counsel he wanted to call witnesses, but Counsel stated they were frivolous. He stated Counsel did not investigate the case. He stated that the jury would find him guilty because of his race and dreadlocks. He stated that the victims were white. He stated that Counsel did not explain the burden of proof. He stated that he received an initial crop of charges, and the gun charge was added later. He said his co-defendant pled the week before he did. He stated Counsel did not explain the gun charge. He stated Counsel did not explain his right to assert a defense, but he did tell Counsel that it was a drug deal gone wrong. He said he was only shown the five- to twenty-year plea offer. He stated he was facing additional time due to the gun charge. He stated he was not told the difference between a recommended and negotiated sentence. He stated they did not discuss the sentencing sheet. He stated they never discussed the fifteen-year plea offer. He stated they never discussed when a plea offer would lapse. He stated that he was given a weekend to think about the plea offer. He stated he did not stand a legitimate chance of winning at trial. He stated the thought he would win at trial if Counsel presented his chosen defense. He stated he wanted the fifteen-year plea offer back on the table.

Counsel Testimony

Counsel stated that Applicant told him that the ordeal was rooted in a drug deal gone wrong. He stated he tried to get Applicant as little time as possible. He stated he did not talk to



the victims. He stated that Applicant was worried about the co-defendants. He stated that the victim's wallet was found on Applicant. He stated that Applicant was in jail and his family was actively involved in his representation. He stated he tried to get the best plea deal available. He stated he typically does not make it a habit to talk to victims. He stated that he thought he had an investigator look at the discovery. He stated he talked to the prosecutor about the victim's prior history of selling weed. He stated he did not investigate the defense that it was a drug deal gone wrong. He stated he met with Applicant more than five times and that they were in constant contact. He stated he saw the police reports and took notes concerning his meetings with Applicant. He stated the notes were not preserved. He stated he did not initially provide PCR Counsel with information about plea offers. He stated he did not recall audio or video evidence. He stated he did not arrange for visits with Applicant to review the audio and video evidence. He stated that he did not write and send letters. He stated he took numerous plea offers to Applicant and his family. He stated that he now wishes they brought the case to trial, in retrospect. He stated that he was in constant contact with Applicant's co-defendant's attorney, Robert Hall, Esquire. He stated he discussed the fifteen-year plea offer with Applicant but thought the offer of a range between five- and twenty-years' imprisonment was better.

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, the direct appeal records, 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

C. J. Hall



are the relevant finding 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). Effective assistance of counsel does not mean perfect or mistake-free representation. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) (“[A] defendant has a right to effective representation, not a right to an attorney who performs his duties ‘mistake-free.’” (citation omitted)); *Burt v. Titlow*, 571 U.S. 12, 24 (2013) (“[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]”); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-688.

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

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professional norms.” *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRPC (“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); see *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting counsel’s strategic decisions are to be afforded “‘strong presumption’ of reasonableness that the defendant must overcome); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). 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. Importantly, “[t]he likelihood of a different result must be *substantial*, not just conceivable.”

Harrington v. Richter, 562 U.S. 86, 112 (2011).

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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

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).

This Court finds that the plea was seemingly entered freely, knowingly, intelligently, and voluntarily. Applicant was sworn at the start of the plea. (Tr. 8). He confirmed that he did not consume any substances impacting his understanding within the past twenty-four hours. (Tr. 8). Applicant indicated he did not have a prior or current substance abuse problem requiring treatment. (Tr. 8-13). Applicant confirmed that he was satisfied with Counsel and that no one threatened, coerced, or promised him into pleading. (Tr. 13-14). He indicated the plea was free and voluntary. (Tr. 14). Applicant confirmed he understood he was presumed innocent and entitled to a jury trial, where they would unanimously have to find him guilty beyond a reasonable doubt. (Tr. 14-15). Applicant then waived this right. (Tr. 15). Applicant confirmed he understood he was waiving his right to call and confront witnesses, to present evidence, to establish a defense, to subpoena, and to remain silent. (Tr. 15-16). After the State called

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Applicant's case and read out the charges and negotiations, Applicant stated he intended to enter the plea as announced. (Tr. 16-17). Applicant agreed to the facts as stated by the prosecutor. (Tr. 19-24). Applicant confirmed he understood that he was not bound to any recommendations made by the State. (Tr. 24). He stated he understood the maximum sentences that could be imposed on the charges pled to. (Tr. 24-26). He stated he understood the consequences of the violent, serious, and most serious distinctions on charges, as applicable. (Tr. 24-26). Applicant stated he understood that entering the plea is a violation of his present probation case. (Tr. 26). Applicant stated he was, in fact, guilty of the offenses charged and pled to. (Tr. 27). Applicant stated his answers at the plea were truthful and honest. (Tr. 27). Thus, this Court finds that Applicant seemingly understood the plea proceedings and that the plea was entered freely, knowingly, intelligently, and voluntarily and cannot be withdrawn now.

Failure to Convey Offer

Applicant alleges ineffective assistance of counsel because Counsel failed to present a favorable plea to Applicant before the offer expired. "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 134, 145 (2012). Further, ineffective assistance is given "[w]hen defense counsel allow the [plea] offer to expire without advising the defendant or allowing him to consider [the plea]." *Id.* at 145.

When determining prejudice for failure to convey a plea, a case-by-case determination is made "assessing whether but for counsels deficient performance a defendant would have accepted the State's proposed plea bargain and that he would have benefited from the offer." *Bell v. State*, 410 S.C. 436, 443, 765 S.E.2d 4, 7 (2014). Prejudice is found if applicant "would have taken the plea offer had [he] been afforded effective assistance of counsel", if "the plea



would have been entered without prosecution canceling it or the trial court refusing to accept it”, and “the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.” *Collins v. State*, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (quoting *Frye*, 566 U.S. 147) (quotations omitted). Presumed prejudice is reserved to limited situations. *Bell*, 410 S.C. at 443, 765 S.E.2d at 7.

Counsel credibly testified that several plea offers were extended and all were communicated to Applicant. Thus, this claim is without merit and relief is denied.

Trial Tax

Applicant claims he was coerced into pleading because he was afraid of facing more time at 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.

Failure to Explain Defenses

Applicant claims Counsel was ineffective for failure to explain his defenses to him. The right to assert a defense was waived by entry of an otherwise valid plea and relief is denied accordingly.

Failure to Pursue Applicant's Chosen Defense

Applicant claims Counsel was ineffective for failure to present the defense that it was a drug deal gone wrong. Counsel was seemingly aware of this defense and still encouraged him to plead. Applicant waived his right to assert this defense by entry of an otherwise valid plea. Accordingly, relief is denied.

Failure to Investigate

Applicant claims Counsel was ineffective for failure to investigate the case. *Strickland*

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makes clear that defense counsel “has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” 466 U.S. at 691. When highlighting failure to investigate as a ground for a larger ineffective assistance of counsel claim, judicial determination of this claim’s validity is evaluated for “reasonableness [under] all the circumstances” with “a heavy measure of deference to counsel’s judgments” applied. *Id.* At the PCR hearing, Applicant is required to present evidence or witnesses he alleges Counsel did not properly investigate. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Additionally, whether Applicant was prejudiced by Counsel’s failure to investigate is contingent on whether the evidence presented would have led Counsel to change his recommendation regarding the plea. *Stalk v. State*, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009).

Applicant has failed to highlight anything specific he wanted investigated or how it would have impacted Counsel’s recommendation concerning the plea. Accordingly, relief is denied.

Failure to Share and Review Discovery

Applicant claims Counsel was ineffective for failure to share and review discovery. Counsel credibly testified that he reviewed all paper discovery with Applicant. Applicant has failed to show anything existed in the discovery not shown to him that would have caused him to proceed to trial instead. Accordingly, relief is denied.

Burden of Proof

Applicant claims that Counsel was ineffective and the plea invalid because he did not know the burden of proof. However, at the plea hearing, Applicant confirmed he understood he was presumed innocent and entitled to a jury trial, where they would unanimously have to find him guilty beyond a reasonable doubt, (Tr. 14-15). Thus, this allegation is refuted by the record

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and relief denied accordingly.

Right to Testify

Applicant claims Counsel was ineffective because he did not inform him of his right to testify. Applicant acknowledged he was waiving his right to remain silent at the plea hearing. His right to testify was waived by entry of an otherwise valid plea and relief is denied accordingly.

Failure to Call Witnesses

Applicant claims Counsel was ineffective for failing to call witnesses. This was waived by entry of an otherwise valid plea and relief denied accordingly.

Failure to Explain Gun Charge

Applicant claims Counsel was ineffective for failure to explain the gun charge. This Court finds Applicant's testimony about his alleged confusion regarding the charge not credible. Additionally, this Court declines to find that but for further explanation, he would have proceeded to trial. Accordingly, relief is denied.

Negotiated v. Recommended Sentence

Applicant claims that Counsel was ineffective and the plea invalid because he did not know the difference between a negotiated and recommended sentence. At the plea hearing, Applicant confirmed he understood that he was not bound to any recommendations made by the State. (Tr. 24). He entered a plea to a recommended sentence. Thus, this plea was entered freely, knowingly, and voluntarily, and relief is denied accordingly.

Letting Plea Offer Lapse

Applicant claims Counsel was ineffective for letting the plea offer lapse. Counsel credibly testified he communicated all offers to Applicant and Applicant accepted the last offer given. Accordingly, this claim is without merit and relief denied.



Failure to Present Mitigation Evidence

Applicant claims Counsel was ineffective for failing to present mitigation evidence. 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 has failed to identify anything specific that Applicant did not raise in mitigation. Additionally, Applicant has failed to show how presentation of this evidence would have resulted in a different sentence. Accordingly, relief is denied.

Failure to Prepare for Trial

Applicant claims Counsel was ineffective for failure to prepare for trial. This was waived by entry of an otherwise valid plea and relief is denied accordingly.

Failure to Explain Rights

Applicant claims Counsel was ineffective for failure to explain his rights to him. This is clearly refuted by the plea transcript. Accordingly, relief is denied.

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Racial Implications

Applicant claims his plea was coerced because Counsel told him he would be found guilty because the victims were white, and he is black. This Court finds this incredible but, even if it was said, it was not enough to undermine an otherwise valid plea. Accordingly, relief is denied.

Conclusion

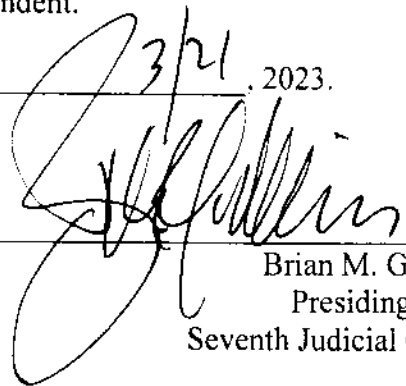
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve notice of appeal within thirty days of receipt by counsel of the judgement 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, PCR must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina 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 _____ day of _____, 2023.



Brian M. Gibbons
Presiding Judge
Seventh Judicial Circuit

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