STATE OF SOUTH CAROLINA COUNTY OF DILLON	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTH JUDICIAL CIRCUIT
Jerry Covington, #242818,	)	Case No.: 2023-CP-17-00098
Applicant,	)	
v.	)	**CONDITIONAL ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

FILED
GWEN T HYATT
2023 MAY -5 A 10:53
CLERK OF COURT
DILLON COUNTY

This matter comes before the court by way of application for post-conviction relief filed by Jerry Covington (Applicant) on February 28, 2023. Respondent made its return and motion to dismiss, asking this application be summarily dismissed pursuant to S.C. Code Ann. § 17-27-70 as barred by the statute of limitations.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dillon County Clerk of Court. During the August 2020 term, the Dillon County Grand Jury indicted Applicant for murder (2020-GS-417-0452). Nathan Scales, Esquire, represented Applicant. Shipp Daniel, Esquire, represented the State. On September 22, 2021, Applicant pled guilty but mentally ill to the lesser included offense of voluntary manslaughter before the Honorable R. Keith Kelly. Judge Kelly sentenced Applicant to seventeen years imprisonment on this charge, with credit for four hundred and seventy-seven days of time served. Applicant did not appeal this conviction or sentence.

Current Action Before the Court

In this PCR application, Applicant alleges he has been detained unlawfully for the following reason (excerpts verbatim):

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1. "Public defender Nathan Scales never in Court or bond".
   a. "No represent".

Before this Court are Applicant's Dillon County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the plea transcript, the post-conviction relief application and the State's return.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law:

This Court finds this application shall be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

> (A) An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.
>
> (B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.
>
> (C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45.

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The South Carolina Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consolidated School District of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

In the present case, Applicant pled guilty on September 22, 2021. Accordingly, he had until September 23, 2022, to timely pursue post-conviction relief pursuant to Section 17-27-45(A). Applicant instituted this current action on February 28, 2023, more than exceeding the statutory time period. He has failed to set forth any proper ground for equitable tolling of the statute of limitations, and notes no grounds for equitable tolling exist and his application is clearly untimely pursuant to Section 17-27-45. Therefore, this application shall be summarily dismissed.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "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 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove counsel's performance

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was deficient. *Id.*; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. 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." *Id.* at 117-18, 386 S.E.2d at 625.

Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. *Strickland*, 466 U.S. at 691. Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Moreover, a decision by counsel not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. *Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions...." *Strickland*, 466 U.S. at 691. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of

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the time of counsel's conduct." *Id.* at 690; *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014).

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, *Hill v. Lockhart* extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel. 474 U.S. 52 (1985); *cf. Padilla*, 559 U.S. at 373 (recognizing the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). When reviewing a guilty plea, the analysis of counsel's performance under the first prong of *Strickland* remains unchanged—the applicant must show counsel's representation fell below the objective standard of reasonableness demanded of attorneys in criminal cases. *Hill*, 474 U.S. at 58–59. The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* at 58–59.

Surmounting *Strickland*'s high bar is never an easy task, and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." *Lee*, 582 U.S. ___, 137 S. Ct. at 1967 (internal citations and quotation marks omitted); *cf. Hill*, 474 U.S. at 58 ("[R]equiring a 'prejudice' showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel 'will serve the fundamental interest in the finality of guilty pleas.'"). Reviewing "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Lee*, 582 U.S. ___, 137 S. Ct. at 1967. Rather, judges should "look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.* In determining whether a guilty plea was taken in accordance with constitutional standards, the

reviewing judge must analyze and consider the entire record, including the transcript of the plea and the evidence presented at the PCR hearing. *Harres*. 282 S.C. at 134, 318 S.E.2d at 361.

This Court finds Applicant can satisfy neither requirement of the *Strickland* test. The record completely refutes Applicant's allegation that Counsel was not present and did not represent him in Court. The September 22, 2021, plea transcript reflects Counsel's presence and advocacy on Applicant's behalf. Counsel's presence at the bond hearing is not required, and even if it were this is a moot point as Applicant pled guilty, was convicted and sentenced. Applicant fails to show any incurred prejudice therefrom. *Hinton v. Stein*, 278 F. Supp.2d 27 (2003) (the plaintiff failed to show that he suffered any injury because of the defendant's failure to represent him at the hearing) *See also Mccord v. Bailey*, 636 F.2d 606, 611 (D.C. cir. 1980), cert denied 451 U.S. 983, 101 S.Ct. 2314, L.Ed2d 839 (1981). Therefore, this allegation shall be dismissed.

CONCLUSION

Pursuant to S.C. Code Ann. §17-27-70(b), this Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. Applicant is granted twenty days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Dillon County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
PCR Division – 4th Circuit
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 3rd day of May, 2023.

PAUL M. BURCH

Chief Administrative Judge

Fourth Judicial Circuit

Chesterfield, South Carolina

FILED
GWEN T HYATT
2023 MAY -5 A 10:53
CLERK OF COURT
DILLON COUNTY

ALAN WILSON
ATTORNEY GENERAL

May 1, 2023

The Honorable Paul M. Burch
Fourth Circuit Chief Administrative Judge
Post Office Box 276
Pageland, SC 29728-0276

Re: **Jerry Covington, #242818 v. State of South Carolina**
2023-CP-17-00098

Dear Judge Burch:

Enclosed please find the proposed Conditional Order of Dismissal in the above-captioned case. Respondent's return and motion to dismiss has also been sent to your chambers for your consideration. If this proposed order meets your approval, please sign and forward to the Dillon County Clerk of Court for filing with the enclosed stamped envelope.

If you have any questions, please do not hesitate to contact me.

Sincerely,

C. Whitney O'Kelly
Assistant Attorney General

WOK/jbh
Enclosure(s)

cc: Jerry Covington, #242818