

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Honorable Frank R. Addy, Jr., Circuit Court Judge

Case No.: 2011-CP-32-2718

Thomas Outing #267522.....Petitioner,

v.

State of South Carolina.....Respondent.

NOTICE OF APPEAL

Petitioner, Thomas Outing, #267522, appeals the Honorable Frank R. Addy, Jr.'s June 23, 2013 order denying post-conviction relief to the Petitioner. Undersigned counsel received notice of entry of the order on June 28, 2013. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Michael H. May
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Columbia, SC 29201
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Facsimile: 803 252-6218
Email: close@ratchfordandmay.com
Attorney for the Applicant

July 1, 2013

Other Counsel of record:

SC Office of Attorney General
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Post Office Box 11549
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Office of Appellate Defense
Post Office Box 11433
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PROOF OF SERVICE

I, Michael H. May, certify that I have served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail. Postage prepaid, addressed to the attorney of record, J. Walt Whitmire, Post Office Box 11549, Columbia, SC 29211-1549, and the South Carolina Office of Appellate Defense, Post Office Box 11433, Columbia, SC 29201-1433. I further certify that all parties required to be served have been served this 1st day of July, 2013.



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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP3202718

Thomas A Outing

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

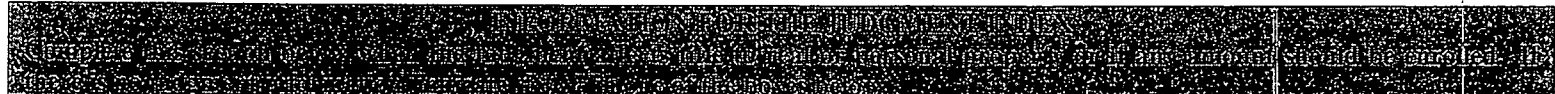
IT IS ORDERED AND ADJUDGED:

- See attached order; (formal order to follow)
- Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk:



Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

2159 6/26/2013

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on n/a, and a copy mailed first class or placed in the appropriate attorney's box on 26th day of June 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Michael Harvey May 2026 Assembly St. Ste. 104 Columbia, SC 29201

John Walter Whitmire 1301 Heidt St. Columbia, SC 29204

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/wh

Beth A. Carrigg - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

) IN THE COURT OF COMMON PLEAS
) ELEVENTH JUDICIAL CIRCUIT

) Case No: 2011-CP-32-2718

Thomas Outing,
S.C.D.C. No. 267522

) BETTIE A. GIBBGG
) CLERK OF COURT
) LEXINGTON, SC

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

This matter comes before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed July 18, 2011. Respondent made its Return and Motion to Dismiss on January 10, 2012. Applicant filed a response on January 30, 2012. Respondent filed an Amended Return on August 8, 2012. An evidentiary hearing into the matter was convened on April 16, 2013 at the Lexington County Courthouse. Applicant was present at the hearing and was represented by Michael H. May, Esquire. Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office.

At the PCR hearing, Applicant testified on his own behalf. David M. Mauldin, ("plea counsel") Esquire, testified. This Court also had before it the records of the Lexington County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections, and exhibits entered into evidence at the PCR hearing.

I. PROCEDURAL HISTORY

The Applicant is presently incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The



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Applicant was indicted at the July 2009 term of the Lexington County Grand Jury for Murder (2009-GS-32-1739) and Possession of a Weapon During Commission of a Violent Crime (2009-GS-32-1740). He was represented by David Mauldin, Esquire. On January 24, 2011, Applicant pled guilty to possession of weapon and the lesser included offense of voluntary manslaughter. The Honorable William P. Keesley sentenced the Applicant to confinement for a period of thirty (30) years. A Notice of Appeal was filed on Applicant's behalf, but dismissed shortly thereafter pursuant to Rule 203(d)(1)(B)(iv), SCACR.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. failure to interview witnesses and investigate Applicant's case;
 - b. failure to advise Applicant of the terms of solicitor's offer and the consequence of pleading guilty
 - c. failure to file a motion for a sentence reconsideration

II. SUMMARY OF TESTIMONY

At the PCR hearing, Applicant alleged plea counsel was ineffective for failing to investigate ballistics and move to suppress the State's evidence. Applicant stated he met with plea counsel on five occasions. Applicant stated he viewed discovery but never discussed it with plea counsel. Applicant stated plea counsel never discussed a jury trial with him. Applicant stated plea counsel failed to interview his co-defendants. Applicant stated plea counsel failed to challenge his co-defendant's alleged involuntary statement and plea agreement. Applicant stated plea counsel failed to challenge a suggestive identification procedure and forensic reports.

Applicant alleged plea counsel was ineffective for failing to advise Applicant that the solicitor's guilty plea offer was without recommendation or negotiation. However, Applicant admitted to writing plea counsel a letter prior to the guilty plea hearing where he informed

counsel that although he desired a recommended twenty year capped sentence, he would still accept the offer and "plead straight up." Applicant stated plea counsel failed to advise him of the elements of murder or voluntary manslaughter. Applicant stated he was unaware of the weapons possession charge. Applicant stated counsel failed to advise him of parole eligibility.

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CLERK OF COURT
LEWIS & CLARK COUNTY

Applicant alleged plea counsel was ineffective for failing to perfect an appeal. Applicant stated he wrote plea desiring a sentence reduction subsequent to pleading guilty. Applicant stated he was advised by plea counsel's paralegal that he had one year to file a notice of appeal.

At the PCR hearing, plea counsel testified. Plea counsel testified to the facts that led to Applicant's charges. Plea counsel filed for discovery and provided Applicant a copy of it. Plea counsel reviewed the eyewitness statements and forensic reports related to the offense. Plea counsel discussed potential defenses and the admissibility of the State's evidence. Plea counsel advised Applicant that the State had exceptionally strong evidence of guilt. Several eyewitnesses, including Applicant's co-defendants, placed Applicant at the scene of the offense committing an armed robbery and shooting and killing the victim. Thus, plea counsel advised Applicant that the State would most likely obtain a conviction had the case been taken to trial. Plea counsel pursued guilty plea negotiations with the solicitor. Plea counsel stated, at first, the solicitor would not "come off" of the murder charge. Eventually the solicitor offered to plead Applicant to the lesser included offense of voluntary manslaughter without negotiations or a recommendation. Plea counsel told Applicant the solicitor was unwilling to make a recommendation. Plea counsel conveyed the offer to Applicant and discussed the constitutional ramifications of pleading guilty with him. Plea counsel advised Applicant the judge had the discretion to sentence him up to thirty years imprisonment for voluntary manslaughter. Plea

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counsel also advised Applicant the guilty plea judge would most likely run the lesser weapons conviction concurrent to the voluntary manslaughter conviction.

Plea counsel stated he advised Applicant of his right to appeal. Applicant eventually learned Applicant desired a sentence reconsideration. Plea counsel received notice of Applicant's request weeks after the time limit for filing a motion for reconsideration had expired. Furthermore, plea counsel stated that a motion to reconsider would have lacked merit.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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, the Applicant must prove that "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, 104 S.Ct. 2052, 2064 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland,

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supra). Second, counsel's deficient performance must have prejudiced the 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. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

A.

This Court finds Applicant has failed to meet his burden to prove plea counsel was ineffective for failing to investigate Applicant's case. "Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (citing Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir.1986) (internal citations omitted). This Court finds plea counsel's testimony credible. Counsel thoroughly investigated Applicant's case and was clearly prepared. "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective

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standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001). This Court finds plea counsel properly investigated the viability of the State's evidence. This Court finds plea counsel conducted a reasonable investigation in light of the limited information provided to him by Applicant. At the PCR hearing, Applicant failed to produce forensic evidence or expert testimony that would have aided in his defense. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result.").

Furthermore, this Court finds Applicant knowingly and intelligently waived the right to confront his accusers and present a defense when he pled guilty. "Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). "Statements made during a guilty plea should be considered conclusively, unless an [applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975) overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4th Cir.1985). Therefore, these allegations are denied and dismissed.

B.

This Court finds Applicant has failed to meet his burden to prove plea counsel was ineffective for failing to advise Applicant of the consequences of pleading guilty and on the terms of the guilty plea offer. This Court finds plea counsel's testimony credible and Applicant's testimony not credible. This Court finds plea counsel properly advised Applicant on the terms of

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the guilty plea offer. Applicant's authenticated letter acknowledged Applicant knew of the precise terms of the offer. This Court finds plea counsel properly advised Applicant on the elements of the offenses and consequences of pleading guilty. Furthermore, the guilty plea transcript shows Applicant was aware of the elements of the offenses and the consequences of the sentence. This Court finds plea counsel did not fall below the standard required for defense attorneys in advising Applicant during the course of representation. Applicant's allegation that counsel failed to advise him of parole eligibility is without merit. Therefore, these allegations are denied and dismissed.

Last, this Court finds Applicant's allegation that plea counsel was ineffective for failing to file a motion to reconsider is without merit. Therefore, the allegation is denied and dismissed.

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

V. CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his

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application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.


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SOUTH CAROLINA

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

IT IS SO ORDERED this 14th day of June, 2013.



 FRANK R. ADDY, Jr.,
 Presiding Judge
 Eleventh Judicial Circuit

Laurens, South Carolina

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DAVID M. RATCHFORD*

MICHAEL H. MAY

ATTORNEYS AT LAW

* OF COUNSEL

July 1, 2013

The Supreme Court of South Carolina
Daniel E. Shearouse, Clerk of Court
Post Office Box 11330
Columbia, SC 29211

RE: Thomas Outing, SCDC No. 267522 v. State of South Carolina
Case No.: 2011-CP-32-2718

Dear Mr. Shearouse:

Enclosed herewith for filing please find the Notice of Appeal in the above matter, along with a copy of the Order being appealed, and Proof of Service. Once filed please send the stamped copy back to me in the enclosed envelope. Since I was appointed as counsel for Mr. Outing, the SC Office of Appellate Defense will be handling this appeal.

Thank you for your considerate attention to this.

Very Truly Yours,



Michael H. May
Attorney at Law

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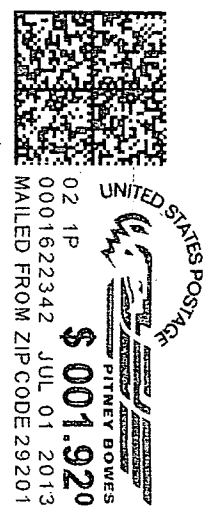
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S.C. SUPREME COURT

Enclosures: Notice of Appeal; Proof of service; Copies

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SC Supreme Court/Clerk of Court
P.O. Box 11330
Columbia, SC 29211



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