STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
David James Lamont Brice, SCDC #298937 Applicant, v. State of South Carolina, Respondent.	Case No. 2019-CP-46-00405 **ORDER OF DISMISSAL**

INTRODUCTION

This matter is before the Court upon an action for post-conviction relief (PCR) commenced by David James Lamont Brice (Applicant) on February 4, 2019. On December 9, 2022, a hearing into the matter was convened before this Court, undersigned Judge Walton J. McLeod, at the Moss Justice Center. Applicant was present and represented by Michael Lifsey, Esquire. Assistant Attorney General T. Cruise Mitchell represented the State.

After hearing the testimony at the PCR hearing and upon full review of the record, this Court finds Applicant's allegations regarding ineffective assistance of counsel are without merit. For the reasons discussed below, this Court hereby **DENIES** relief and **DISMISSES** the above captioned Application for Post Conviction Relief with prejudice.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections. Applicant was charged with first degree burglary (2018-GS-46-05384). Applicant waived his right to presentment to a grand jury for that charge. Applicant was represented by Assistant Public Defenders Phillip Lee Smith and Raia Jane Hirsch; and Chief Deputy Assistant Public Defender Mark McKinnon.

The case was prosecuted by Assistant Solicitor Ryan Robert Newkirk of the Sixteenth Circuit Solicitor's Office.

On July 9, 2018, Applicant pleaded guilty before the Honorable Roger L. Couch. Pursuant to a negotiated sentence range of fifteen (15) to forty (40) years, Judge Couch sentenced Applicant to twenty-five (25) years for first degree burglary. Applicant did not file a direct appeal.

STATEMENT OF FACTS

On June 20, 2016, in the early hours of the morning, officers responded to the home of Ms. Blondell Boozer (Victim) in response to a burglary. (Gp. Tr. p. 22). Upon arrival, officers spoke with Victim, who told the officers that Applicant, her ex-boyfriend, entered her home by breaking her window and threatening her with a knife.[1] (Gp. Tr. p. 22). Subsequently, Victim fled from her home while Applicant damaged her property by throwing food out of her refrigerator and destroying her cellular phone. (Gp. Tr. p. 22). Although officers were unable to locate Applicant at the scene, officers eventually located Applicant. (Gp. Tr. p. 22). Applicant was taken to Piedmont Medical Center for care because he was acting suicidal. (Gp. Tr. p. 22). After receiving medical care, Applicant was interviewed by Detective Smith. (Gp. Tr. p. 22). Applicant stated to Detective Smith that he entered Victim's home and was involved in an altercation with Victim. (Gp. Tr. p. 22).

CURRENT APPLICATION

Applicant timely commenced this PCR application on February 4, 2019. In his *pro se* application Applicant alleged he was entitled to relief based on the following grounds:

1. Ineffective Assistance of Counsel
    a. "Co-Counsel told me 1 thing while my other attorney told me a different story."
    b. "...my lawyer fail[ed] to investigate or contact my mental health [doctor] to see what kind of problems I was suffering from."

[1] Applicant stated that he agreed with the Solicitor's factual summary, with the exception of Solicitor's statement that Applicant threatened Victim with a knife. (Gp. Tr. pp.23–24).

c. "My co-counsel told me that she had talked to the judge an[d] he said that he was go[ing] to give me 15 years but when I got in front of the judge he gave me 25 years."
d. "Victim had brought my clothe[s] to my lawyer['s] office to let him know that I had clothe[s] there an[d] was staying with her off an[d] on my lawyer fail[ed] to challenge that."
e. "I did not waive my presentment to the Grand Jury. My lawyer told me that I was already indicted by the Grand Jury an[d] Solicitor Ryan Newkirk told the Judge that I was ready to go to trial that same day. I was misled on many of things by my lawyer that I did not understand."
f. "Phil Smith didn't come an[d] see me like he was suppose[d] to when he knew that I was up for trial trying to fight a life sentence."
g. "Lawyer failed to investigate facts of the case."
h. "Failure to challenge prior conviction."
i. Failure to file direct appeal.

Pursuant to Rule 71.1, SCRCP, Applicant, through his first PCR counsel, Overture Walker, amended his application to include the following allegations:

1. Ineffective Assistance of Counsel on the grounds that:
   a. "... trial/plea counsel failed to adequately investigate the criminal charge(s) for which Applicant was convicted and prepare a defense for trial. Further, trial/plea counsel deprived Applicant of an opportunity to review the State's evidence and assist in the preparation of his defense."
   b. "... trial/plea counsel failed to call or contact material witnesses whose testimony would have been favorable to Applicant."
   c. "...trial/plea counsel advised him to enter a guilty plea that was not knowingly and/or intelligently made."
   d. "... trial/plea counsel pressured and improperly induced him to enter an involuntary guilty plea based on statements and representations made by counsel."
   e. "... trial/plea counsel failed to inform him of his right to appeal his guilty plea and sentence, and/or failed to initiate an appeal of the same on his behalf notwithstanding Applicant's request."
   f. "...trial/plea counsel failed to file a motion for reconsideration of his sentence."
   g. "... trial/plea counsel failed to make timely objections to and/or move to quash a defective indictment."

At the outset of the PCR evidentiary hearing, Applicant, through counsel, Mike Lifsey, raised additional allegations of:

1. "Whether or not [Applicant] actually admitted guilt during the plea colloquy."
2. Issues related to the waiver or non-waiver of the indictment.

At the hearing, Applicant proceeded only on the following allegations:

1. Counsel failed to adequately investigate the criminal charge for which Applicant was convicted and prepare a defense for trial. Further, trial/plea counsel deprived Applicant of an opportunity to review the State's evidence and assist in the preparation of his defense.
2. Whether or not Applicant actually admitted guilt during the plea colloquy. Counsel failed to inform Applicant that intent to commit a crime is an element of first degree burglary.
3. Issues related to the waiver or non-waiver of the indictment.
4. Counsel erroneously advised Applicant he would be sentenced to fifteen years if he pleaded guilty.

STANDARD OF REVIEW

An applicant may seek PCR upon the following types of allegations:

> 1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
>
> 2. That the court was without jurisdiction to impose sentence;
>
> 3. That the sentence exceeds the maximum authorized by law;
>
> 4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
>
> 5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
>
> 6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises

a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

The reviewing court applies the two-part test outlined in *Strickland v. Washington* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, 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. *Id.* at 687–88; *accord. Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The applicant has the burden of establishing both deficiency and prejudice in order to be entitled to relief. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRCP. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of "were outside the wide range of competence" demanded of attorneys in criminal cases. *Strickland*, 466 U.S. at 688. To prove prejudice, the applicant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696.

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, *Hill v. Lockhart*, 474 U.S. 52 (1985), extended the two-part *Strickland* test to challenge guilty pleas based on ineffective assistance of counsel. *See Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (recognizing that the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). The analysis of counsel's performance under the first prong of *Strickland* remains unchanged—the applicant must show that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases. *Hill*, 474 U.S. at 58–59; *accord Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice to plead guilty was not "within the competence demanded of attorneys in criminal cases." *Hill*, 474 U.S. at 56.

The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. The applicant must further convince the court that a decision to reject the plea bargain would have been rational under the circumstances. *Padilla*, 559 U.S. at 372.

This inquiry "focuses on a defendant's decisionmaking" and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. *Lee v. United States*, 582 U.S. 357, 137 S. Ct. 1958, 1966 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. *Padilla*, 559 U.S. at 372. The question here is whether the applicant, if

correctly informed of circumstances surrounding the plea, would have pleaded guilty—*not* whether counsel would have still advised him or her to plead guilty. *Turner v. State*, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

FINDINGS OF FACT & CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in this action incorporated by way of the State's return, this Court finds Applicant's claims to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

Counsel Failed to Investigate and Deprived Applicant of Assisting in His Defense

Applicant contends Counsel was ineffective for failing to adequately investigate the criminal charges for which Applicant was convicted and prepare a defense for trial. Applicant further contends Counsel deprived Applicant of an opportunity to review the State's evidence and assist in the preparation of his defense. This Court disagrees and finds Counsel adequately investigated the charges and prepared a defense. This Court further finds Counsel reviewed discovery with Applicant and allowed Applicant the opportunity to assist in his own defense. This Court finds credible and persuasive the testimony of Counsel, who presented well-recollected testimony of the conversations he had with Applicant, including properly informing Applicant of all aspects of his case.

1. PCR Testimony

Applicant testified he was represented by three attorneys: first, Mark McKinnon, then Phillip Smith (Counsel Smith) and Raia Hirsch (Counsel Hirsch). Applicant testified he was charged with

burglary in the first degree. Applicant testified none of his attorneys explained to him the elements of the crime of the burglary in the first degree. Applicant testified Counsel Smith told him it did not matter if he was staying at residence of victim, it is still burglary because Applicant's name was not on the lease. Applicant testified he informed Counsel Smith of his version of events; however, Counsel Smith said it was still burglary. Applicant testified that if he was properly informed of the elements of burglary in the first degree he would not have pleaded guilty, but would have insisted on a jury trial. Applicant testified none of his attorneys reviewed discovery or gave him copies of the discovery in this case. Applicant testified he was originally represented by Mark McKinnon; however, Applicant requested Mr. McKinnon be relieved due to lack of communication. Applicant testified the judge would not relieve Mr. McKinnon so he wrote a letter to the disciplinary counsel requesting him to be relieved. Mr. McKinnon was relieved, and Phillip Smith began representing Applicant along with Raia Hirsch. Applicant testified Counsel Smith met with him maybe five times. Applicant reiterated he was never informed of the elements of burglary in the first degree, and the only information provided to him regarding his charge was that Applicant would be unsuccessful at trial because he did not sign the lease.

Counsel Smith testified he was appointed to represent Applicant following a disagreement between Applicant and Counsel McKinnon. Counsel Smith testified he did not know for certain how many times he met with Applicant, but five times seems correct. Counsel Smith testified that Counsel Hirsch made most of the contact with Applicant. Counsel Smith testified his primary responsibility was investigating the facts of the case, whereas Counsel Hirsch investigated Applicant's possible mental health issues. Counsel Smith testified that in the course of his investigation he visited with the victim, Ms. Boozer. Counsel Smith testified that initially Ms. Boozer was reluctant to talk to him, but eventually she allowed Counsel Smith to inspect the

apartment. Counsel Smith testified he spoke with Ms. Boozer several times during his investigation; at some point, Ms. Boozer brought Counsel Smith some belongings of Applicant that were left in her apartment.

Counsel Smith testified he acquired a basic understanding of all the facts of the case through his investigation. Counsel Smith testified Applicant insisted he had a right to enter Ms. Boozer's apartment. Counsel Smith testified he informed Applicant that since he broke a window with a brick to enter the apartment, nobody was going to believe Applicant was invited or had a right to enter. Counsel Smith testified he reviewed the discovery with Applicant and went over anything that was questionable including whether Applicant had a right to enter the apartment. Counsel Smith reiterated that Applicant's main concern was his right to enter, and Counsel certainly went over that with Applicant. Counsel Smith testified he went over the elements of first-degree burglary with Applicant; furthermore, Counsel's testimony is corroborated by the plea affidavit.

On cross-examination, Counsel Smith testified that although Applicant had mental issues that required evaluations, Counsel was satisfied with Applicant's general level of understanding. Counsel Smith again testified that Applicant's focus was on the right of entry and Counsel Smith explained to Applicant why he did not believe that was a good defense.

Counsel Hirsch testified she was employed with the York County Public Defender's Office during her representation of Applicant. Counsel Hirsch became involved in this case due to her knowledge and experience in dealing with a spectrum of mental health issues with clients. Counsel Hirsch testified she offered to assist in communicating with Applicant that the offer on the table was a good one. Counsel Hirsch testified she believed, at that point in the negotiations, it was in Applicant's best interest to plead guilty. Counsel Hirsch testified she explained the terms of the

plea deal to Applicant. Counsel Hirsch testified she investigated mental health issues relating to Applicant's competency to stand trial. As part of her investigation, Counsel Hirsch testified she examined the contents of Applicant's cell phone, specifically text messages between Applicant and Ms. Boozer. Counsel Hirsch testified the text messages contained a wealth of information, including possible impeachment evidence and information necessary for any independent experts in the mental health category to evaluate. Counsel Hirsch testified she investigated upwards of 2,000 pages of Applicant's Social Security file, where she found Applicant had scored a 55 on his most recent IQ test. Counsel Hirsch testified Applicant was evaluated at least twice for competency and both times Applicant was found competent to stand trial.

2. Discussion

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland*). Counsel Smith and Hirsch's credible testimony indicates they met with Applicant several times and thoroughly informed Applicant of his charges, potential defenses, and reviewed discovery with Applicant. Notwithstanding Applicant's testimony he was not informed of the elements of first degree burglary and never had the opportunity to review the discovery, the testimony of Counsels Smith and Hirsch, coupled with the plea affidavit signed by Applicant, refute this allegation. Counsel Smith credibly testified he informed Applicant of the elements of first degree burglary. Applicant's insistence that he had a right to enter the victim's apartment demonstrates he was aware of at least some of the elements of first degree burglary. Furthermore, Applicant signed a plea waiver form in which he acknowledges the nature of his charges and that possible defenses have been explained to him. Similarily, Counsel Smith signed the plea waiver

form certifying he discussed all charges, all discovery provided by the State, and possible defenses with Applicant. Thus, the allegation Counsels failed to inform Applicant of the elements of burglary in the first degree and review all discovery with him is without merit.

Furthermore, the credible testimony of Counsels Smith and Hirsch demonstrate they adequetaly investigated the case. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* "In particular, what investigation decisions are reasonable depends critically on such information." *Id.*

Counsel Smith testified he visited the crime scene and spoke with victim on several occassions. Counsel Smith testified that based on his investigation and conversation with the victim, he believed Applicant would be found guilty of first-degree burglary. Counsel Smith's credible testimony show he spoke with Applicant repeatedly about this and Applicant insisted he had a right to enter the apartment. In response to this, Counsel Smith obtained some of Applicant's belongings that were left at victim's apartment to potentially use them as evidence corroborating

this defense. Counsel Smith credibly testified he informed Applicant that, after reviewing all of the evidence, a jury was likely not going to beleive he had a right to enter. Counsel Smith's testimony demonstrates Applicant did assist in his own defense and Counsel investigated the case based on the information provided to him by Applicant. This Court finds Counsel Smith adequately investigated the facts of the case and allowed Applicant to assist in his own defense. Counsel adequately discussed potential defenses with Applicant, including the likelihood of those defenses succeeding at trial.

Counsel Hirsch credibly testified she investigated any potential mental health issues invovled in this case. Encompassed in those investigations, Counsel Hirsch reviewed upwards of 2,000 pages of Applicant's social security file in which she discovered Applicant only had an IQ of 55. Counsel Hirsch had Applicant evaluated for mental competency twice before the guilty plea and, in both instances, Applicant was found competent to stand trial.

This Court finds Counsels Smith and Hirsch made reasonable investigations in this case, properly reviewed discovery with Applicant allowing him to assist in his own defense, and properly informed Applicant of the charge he faced. Therefore, this Court finds Counsels were NOT DEFICIENT in this regard.

Furthermore, Applicant has presented no evidence or testimony indicating how any alleged deficiency affected his decision to plead guilty. In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. *Harris v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the evidence or defenses would

have resulted in a different outcome. *Id.* (citing *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); *Skeen v. State*, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.*, 377 S.C. at 75, 659 S.E.2d at 145 (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)). Here, Applicant has presented no evidence or testimony of how further preparation of this case would have led to the discovery of evidence which could have affected his decision to plead guilty. Accordingly, this Court finds this allegation is **DENIED.**

Whether or Not Applicant Actually Admitted Guilt During the Plea Colloquy/Counsel Failed to Inform Applicant that Intent to Commit a Crime is an Element of First-Degree Burglary[2]

Applicant next contends Applicant never actually admitted guilt during the plea colloquy. Applicant contends Counsel failed to inform him that intent to commit a crime is a necessary element of the offense of burglary in the first degree and he would not have pleaded guilty had he been aware. This Court disagrees and finds Counsel did inform Applicant of all the elements of first-degree burglary. This Court further finds Applicant admitted guilt during the plea colloquy. Additionally, this allegation fails as a matter of law.

1. PCR Testimony

At the PCR hearing, Applicant testified to his version of events on the day of the incident. In short, Applicant testified that he went over to Ms. Boozer's house to get some sleep and change clothes; however, she would not let him in, so he threw a brick through her window and went inside and changed clothes. Applicant testified he never admitted to anything beyond that during the guilty plea hearing.

[2] This allegation was first raised at the outset of Applicant's plea hearing and testimony was given supporting both interpretations of this allegation. Therefore, the Court addresses both in this Order.

Counsel Smith testified to the condition of the inside of the apartment just after the incident occurred. Counsel testified everything was in dissarray; there was glass shattered into the bedroom, a bunch of food appeared to have been thrown out of the freezer, and items on the counter were in disarray. Additionally, Counsel testified there was a knife that was photographed, but Applicant would have indicated it was a knife from inside the apartment and not anything he brought inside. Counsel testified Applicant admitted he had a box cutter on him. Counsel testified he believed the State had enough evidence to prove Applicant had an intent to commit a crime.

On cross-examination, Counsel Smith testified he beleived Applicant admitted to an assualt of Ms. Boozer based on the state of the apartment after the incident. Counsel Smth testified Applicant pleaded guilty because he did not want to risk a life sentence. Counsel Smit testified that, based on the facts recited by the Solicitor and the Applicant's version of the story, he believed a jury would find Applicant guilty of first degree burglary. Counsel Smith testified there would have been more that a jury would have believed than Applicant's account.

2. Guilty Plea Testimony

During the guilty plea hearing, the Court informed Applicant of the elements the State must prove in order to be found guilty of burglary in the first-degree evinced below:

> The Court: And of course I'm sure your lawyers have gone over with you what the State would have to prove in order for you to be found guilty of burglary in the first degree. Have they discussed that with you?
>
> Mr. Brice: Yes, sir.
>
> The Court: And of course what it involves is of course a[n] illegal entry into a dwelling for the purpose of committing a crime therein. The person – they must prove that you intended to commit a crime at the time of your entry and that that intent can be shown by certain acts. And it also has to be shown some of the elements are that when entering the dwelling you were armed with a weapon, or that while entering the dwelling you caused physical injury to someone, or that when entering the dwelling you threatened someone with a dangerous object, or that you entered the dwelling when you displayed what appeared to be a knife, pistol, or other weapon. And of couse there can also be if you have two or more

convictions for a burglary and prior of course it has to be done in the nightime. So are you aware of those elements for the crime?

Mr. Brice: Yes, sir.

The Court: And so they've discussed that with you?

Mr. Brice: Yes, sir.

(GP Tr. p. 21).

The Solicitor gave the following recitation of the facts during the guilty plea hearing:

> On June the 20th of 2016, in the early hours of the morning officers responded to 1313 Holly Dale Drive which is in Rock Hill in York County, South Carolina in response to a burglary. Upon arrival officers spoke with the victim in this case Ms. Blondell Boozer and told them that an ex-boyfriend, the defendant David Brice, had broke the rear window of her home and he had entered her home and he had threatened her with a knife. She then fled the scene and while he was in the home he damaged property that belonged to her including throwing food out of her refrigerator damaging personal effects and smashing a cell phone that belonged to her. Officers attempted to locate the defendant but were unable to do so on scene. Officers did make contact with him where it appeared that he was suicidal. They were able to track him using a cell phone ping and he was taken into custody and taken to Piedmont Medical Center for care. At the conclusion of his medical care Detective Smith and Mr. Brice did give a statement to officers indicated that he had in fact entered the home and had gotten into an altercation with the victim. Those would be the substantive facts, your Honor, however at the appropriate time the State would like to be heard on sentencing.

(Gp. Tr. p. 22).

The following exchange then occured between the Court and Applicant:

> The Court: I see. Mr. Brice, did you hear what the solicitor just told me about what happened?
>
> Mr. Brice: Yes, sir.
>
> The Court: Did you understand what he just told me?
>
> Mr. Brice: Yes, sir.
>
> The Court: Now is that information true?
>
> Mr. Brice: Not all of it, sir.

The Court: Well tell me what you disagree with.

Mr. Brice: I disagree when he stated the knife part.

The Court: The what? The knife part?

Mr. Brice: The knife part.

The Court: Okay. What else do you disagree with?

Mr. Brice: I did went inside the house. That's about it.

The Court: All right. Now what aggravating factors are you relying on in your case?

Solicitor Newkirk: That the defendant did have what appeared to be a knife or did have a knife and that the burglary did occur in the night time.

The Court: I see. You agree that the event occured in the night time?

Mr. Brice: Yes, sir.

The Court: Okay. Do you agree with the other facts other than that?

Mr. Brice: Yeah.

(Gp. Tr. pp. 23–24).

3. Discussion

This Court finds Applicant was properly informed of the elements of first-degree burglary, including the intent to commit a crime element. Although Applicant testified he would not have pleaded guilty had he known the intent to commit a crime was a necessary element of first degree burglary, the credible testimony of Counsel Smith, the plea waiver form, and Applicant's own testimony during the guilty plea hearing refute this allegation. As discussed above, Counsel Smith credibly testified he informed Applicant of all the elements of first-degree burglary prior to the guilty plea. The Court thoroughly explained the elements of first-degree burglary to Applicant *prior* to the entry of the guilty plea. Upon inquiry by the Court, Applicant stated he was aware of the elements of first-degree burglary and his attorneys have discussed the elements with him.

Counsel Smith credibly testified that he believed Applicant would be found guilty of first-degree burglary if he proceeded to trial. Counsel Smith credibly testified he informed Applicant a jury would probably not believe he had a right to be in the apartment after throwing a brick through the window. Counsel Smith was not ineffective in advising Applicant that a jury would likely find him guilty of first-degree burglary, because "the jury was free to disbelieve defendant's version of events and find that he intended to commit a crime based on his actions in forcibly breaking and entering at night." *McMillian v. State*, 383 S.C. 480, 680 S.E.2d 905 (2009). Therefore, this Court finds Counsels Smith and Hirsch were **NOT DEFICIENT** in advising Applicant of the elements of first-degree burglary and a jury could find Applicant guilty of first-degree burglary if he proceeds to trial.

This Court further finds Applicant admitted he was guilty of first-degree burglary at the guilty plea hearing. Following the Solicitor's recitation of the facts of the case, the Court inquired whether Applicant agreed with the facts or not. Applicant asserted he did not agree with the facts as it pertains to the knife; however, he agreed with all other facts. First-degree burglary in South Carolina is a statutory offense that is defined as follows:

A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:

(1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:

(a) is armed with a deadly weapon or explosive; or

(b) causes physical injury to a person who is not a participant in the crime; or

(c) uses or threatens the use of a dangerous instrument; or

(d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or

(2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or

(3) the entering or remaining occurs in the nighttime.

S.C. Code Ann. § 16-11-311.

Here, it is undisputed Applicant entered a dwelling without consent at nighttime. Applicant maintains he was not armed with a deadly weapon, nor did he enter the apartment with an intent to commit a crime. The State indicated they had evidence of both during the guilty plea hearing. Applicant disagreed with being armed with a knife, but even taking that as true, Applicant agreed to all other facts including damaging Ms. Boozer's personal property, which constitutes a crime. Therefore, this Court finds Applicant admitted he was guilty of first-degree burglary.

Even supposing Applicant did not precisely admit guilt during the plea hearing, this allegation still fails as a matter of law. It is well settled that "a defendant need not admit guilt in order to enter a valid guilty plea; instead, a guilty plea need only represent a voluntary and intelligent choice among alternative course of action open to the defendant." *James v. State*, 377 S.C. 81, 659 S.E.2d 148 (2008) (citing *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Here, Applicant was facing a possible life sentence if convicted. Applicant freely and voluntarily pleaded guilty to first-degree burglary following a thorough colloquy with the Court wherein Applicant was advised of the consequences of the plea, the charge he was facing, and the Constitutional rights he was waiving by entering a guilty plea. Therefore, this Court finds Applicant's guilty plea was constitutionally valid. Accordingly, these allegations are **DENIED.**

Issues Related to the Waiver or Non-Waiver of the Indictment

Applicant further raises issues related to the waiver or non-waiver of the Grand Jury indictment. This Court disagrees and finds Applicant freely and voluntarily waived presentment to the Grand Jury.

1. PCR Testimony

Applicant testified he was initially indicted for first-degree burglary by a Grand Jury. Applicant testified he requested a copy of the indictment from the clerk of court's office, and they informed

him the indictment was dismissed and he was charged under a separate indictment that was never presented to a Grand Jury. Applicant testified he was previously shown the original indictment but did not know about a new indictment. Applicant testified he did not know he was pleading guilty to a new indictment.

Counsel testified the original indictment was lost on the day of the plea and the clerk's office did not have it. Counsel testified there were discussions about whether Applicant should plead on a copy of the indictment; however, it was ultimately decided the safest way to proceed was for Applicant to plead on a new indictment and waive presentment to a grand jury. Counsel testified he went over this with Applicant and Applicant signed both places on the indictment. Counsel testified he discussed the indictment issue with Applicant the day of the plea.

2. Plea Testimony

During the plea hearing, the court engaged in the following colloquy with Applicant:

> The Court: Mr. Brice, you're before me today, the State has presented an indictment to me. This indictment is for burglary in the first degree. Are you familiar with the charge?
>
> Mr. Brice: Yes, sir.
>
> The Court: Have you gone over the indictment with your attorney?
>
> Mr. Brice: Yes, sir.
>
> The Court: Do I need to go over that indictment with you again?
>
> Mr. Brice: No, sir.
>
> The Court: All right, sir. Now that indictment has not yet been presented to a Grand Jury. You have Constitutional right to have the Grand Jury consider that charge before it comes to this court for either a trial or a plea. Now I cannot take up your case unless either the Grand Jury has acted upon the indictment, or you are willing to waive or give up that step in the proceedings and proceed to a hearing in this court. Now it appears to me that you have initialed the papers I've received indicating that you do wish to give up presentment to the Grand Jury and proceed directly to this hearing, is that correct?
>
> Mr. Brice: Yes, sir.

The Court: And have you discussed that right with your attorney?

Mr. Brice: Yes, sir.

The Court: And you understand that by doing that you're giving up a constitutional right that you have?

Mr. Brice: Yes, sir.

(Gp. Tr. pp. 5–6)

3. Discussion

This Court finds Applicant freely and voluntarily waived presentment to the Grand Jury on the charge of first-degree burglary. Although Applicant testified he did not know he was pleading guilty to a new indictment, the credible testimony of Counsel Smith and the record of the guilty plea hearing refute this allegation. Counsel Smith credibly testified he discussed the new indictment with Applicant prior to his guilty plea. During the guilty plea hearing, the Court engaged in a thorough colloquy with Applicant explaining his Constitutional right to have a Grand Jury consider the charge before pleading guilty. Applicant asserted he understood and has discussed this with his attorney. Thus, this Court finds Applicant freely and voluntarily waived presentment to a grand jury on the charge of first-degree burglary. Accordingly, this allegation is **DENIED.**

Counsel Erroneously Informed Applicant He Would Be Sentenced to 15 Years

Applicant further contends Counsel informed him he would be sentenced to 15 years if he pleaded guilty. This Court disagrees and finds Applicant was properly advised of the consequences of the guilty plea.

1. PCR Testimony

Applicant testified Counsel Hirsch informed him to accept the plea deal because he was facing a life sentence. Applicant testified Counsel Hirsch informed him he would likely receive fifteen years. Applicant testified if he had known he would receive twenty-five years he would not have pleaded guilty.

Counsel Smith testified he recalled discussing the plea negotiation with Applicant; it was a very long process and once life notice was served it heightened the urgency of the negotiations. Counsel Smith testified he never told Applicant he would be sentenced to 15 years if he pleaded guilty. Counsel Smith testified he informed Applicant he could receive up to 40 years under the terms of the negotiated plea.

Counsel Hirsch testified she never informed Applicant he would be sentenced to 15 years if he pleaded guilty.

2. Guilty Plea Testimony

During the guilty plea hearing, Solicitor Newkirk explained the negotiated plea deal to the court:

> Solicitor Newkirk: The negotiation in the case, your Honor, is for a cap of 40 years effectively making this a range of 15 to 40 years.

(Gp. Tr. pp. 4–5).

Furthermore, the court explained to Applicant the consequences of the plea:

> The Court: I hope that you are aware that this charge is the charge of burglary in the first degree. It carries a possible sentence of 15 years up to life. That means there is a minimum of 15 years with the maximum sentence would be life. However given the negotiations in this matter the parties, you and the State, have agreed to limit the possible maximum sentence to 40 years. Is that your understanding of the negotiations?
>
> Mr. Brice: Yes, sir.

(Gp. Tr. p. 12).

3. Discussion

This Court finds Applicant was properly advised of the terms of the negotiated plea. Counsels Smith and Hirsch both testified they never informed Applicant he would be sentenced to 15 years if he pleaded guilty. Furthermore, the plea court informed Applicant of the consequences of the guilty plea prior to entry of the guilty plea. Applicant stated he understood the terms of the negotiated sentence. Thus, Applicant's allegation he was erroneously informed he would be sentenced to 15 years if he pleaded guilty is **DENIED**.

All Remaining Allegations

This Court finds Applicant presented no evidence or testimony supporting any of the remaining allegations. Thus, the Court concludes these allegations are abandoned and, therefore, **DENIED**.

CONCLUSION

Based on the foregoing, this Court concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. In so holding, the Court finds Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. This Court finds Applicant freely, knowingly, and voluntarily pleaded guilty. Therefore, the Court **DENIES** relief on all allegations and dismisses this PCR action with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a

notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 15 day of AUGUST, 2023.

WALTON J. MCLEOD IV
Presiding Judge
Sixteenth Judicial Circuit

Lexington, South Carolina