STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
Robert Cleveland Cribb, SCDC #377495, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2019-CP-46-01237 **ORDER OF DISMISSAL**

INTRODUCTION

This matter is before the Court upon an action for post-conviction relief (PCR) commenced by Robert Cleveland Cribb (Applicant) on April 5, 2019. On December 8, 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 Tommy A. Thomas, 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. During its March 2018 term, the York County Grand Jury indicted Applicant for murder (2018-GS-46-01919), possession of a firearm during the commission of a violent crime (-01919a), and possession of a knife during the commission of a violent crime (-01919b). Applicant was represented by Assistant

Public Defender Mindy H. Lipinski. Assistant Solicitors Walter William Thompson, Sr. and Thomas Matthew Hogge of the Sixteenth Circuit Solicitor's Office prosecuted the case.

On August 24, 2018, Applicant appeared before the Honorable Daniel D. Hall, circuit court judge, and pleaded guilty but mentally ill to the lesser included offense of voluntary manslaughter and his remaining charges as indicted. Judge Hall sentenced Applicant thirty years for voluntary manslaughter and five years on each of the weapon offenses.

Applicant filed a timely notice of appeal. The South Carolina Court of Appeals dismissed the appeal for failing to provide a sufficient guilty plea explanation, as required by Rule 203(d)(1)(B)(iv) of the South Carolina Appellate Court Rules. The Remittitur was issued on November 2, 2018.

STATEMENT OF FACTS

On August 9, 2017, Applicant was at his home with his mother (Mother) on Justin Drive in York County. (GP Tr. 19.) Jerry "Sonny" Proctor (Victim) came by Applicant's residence to hang out and watch television after picking up his mail. (GP Tr. 19.) Applicant and Victim lived in the same trailer park, and it was not uncommon for Victim to stop by and visit Applicant's residence. (GP Tr. 19.) Applicant told officers he considered Victim a friend. (GP Tr. 19-20.) Mother left the residence for approximately thirty minutes to pick up her power bill. (GP Tr. 20.) While Mother was away, Applicant's grandmother received a call from Applicant asking for his grandfather and stating that he needed help. (GP Tr. 20.) Applicant's grandfather was not available, so his grandmother and her son, Albert Hensley, walked over to Applicant's residence. (GP Tr. 20.) When they arrived at Applicant's residence they observed Victim deceased on the floor laying in a pool of blood and immediately called 911. (GP Tr. 20.)

Officers arrived on scene and observed various stab wounds to Victim's body and a

shotgun wound to the face and right hand. (GP Tr. 20.) It appeared to officers that Victim was shot in Applicant's bedroom while his hand was over the muzzle of the shotgun as it was fired. (GP Tr. 20.) Blood was located throughout the residence. (GP Tr. 20.) It appeared to officers that Applicant attempted to clean up the blood as the blood was smeared on the floor, bloody towels, shorts, and Victim's wallet were found in the washing machine. (GP Tr. 20.) A knife was located in Applicant's bathroom and the shotgun was located on his bed. (GP Tr. 20.) Applicant told officers Victim had attacked him by choking him from behind with the cord from a phone charger. (GP Tr. 21.) Applicant stated he stabbed Victim from behind by "swinging backwards at him with the knife." (GP Tr. 21.) Applicant told officers that at some point Victim got the knife and that is when he grabbed the .12 gauge shotgun and shot Victim while he was four or five feet away. (GP Tr. 21.) Applicant then called his grandfather for help. (GP Tr. 21.)

Officers did not believe Applicant's story as Applicant had no injuries – especially around his neck where Applicant claimed he had been choked from behind with a charger cord. (GP Tr. 22.) Further, the autopsy revealed Victim was stabbed in the upper back in a forward and upper motion, which did not fit with Applicant's story that he stabbed Victim by flinging the knife behind him as he was being choked by Victim. (GP Tr. 22.) Victim also received a second stab wound to the chest. (GP Tr. 22.) Victim's death was ultimately caused by a close contact shotgun blast that went through the palm of Victim's right hand and into his face causing extensive damage to his brain. (GP Tr. 22.)

Mother told officers Applicant and Victim were fine together and the only thing she worried about when she left them alone was them smoking marijuana while she was gone. (GP Tr. 21.) Mother told officers Applicant and Victim had always gotten along and had a friendly relationship. (GP Tr. 21.) Mother told officers she noted a change in Applicant's behavior after

he returned from a beach trip with his father recently. (GP Tr. 21.) Applicant seemed more depressed to Mother and was drinking frequently. (GP Tr. 21.) Applicant began making statements to Mother indicating Victim was going to kill her, his grandparents and him. (GP Tr. 21-22.) Applicant was taken to the Piedmont Medical Center (PMC) for a mental evaluation. (GP Tr. 22.) The diagnosis from PMC was that Applicant was under a lot of stress and was prescribed Didrex and released with a referral to the Catawba Mental Health facility for follow-up, which was never done. (GP Tr. 22.)

CURRENT APPLICATION

Applicant timely commenced this PCR application on April 5, 2019. In his application Applicant alleged he was entitled to relief based on the following grounds:

1. Ineffective Assistance of Counsel
2. Involuntary Guilty Plea

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

1. The Applicant suffered severe depression and was under medication while in the County Detention Center. Applicant believes that this medication and his mental illness influenced his decision to accept a guilty plea. That he was unable to knowingly and intelligently enter into the guilty plea.
2. That the Solicitor made misleading comments in Court especially concerning the Applicant's mental illness. That Dr. Mulbry who performed the psychiatric evaluation was present in Court. That Dr. Mulbry was not used by Defense counsel to refute the remarks of the Solicitor. The Applicant believes these comments adversely affected his sentencing.
3. That the Applicant was under the impression that he would get ten (10) to fifteen (15) years. However, he was sentenced to a term of thirty (30) years. The Applicant was offered a plea of 0-30 years or 10-25 years. That this exposed him to the sentence of thirty (30) years.
4. That the Applicant is informed and believes that there was a credible issue regarding self-defense that was not properly evaluated and argued on behalf of the Applicant.
5. That Defense counsel was ineffective for not properly investigating the scene of the crime.

6. That the Applicant did not get a copy of, nor have an opportunity to review his discovery until three days prior to Court.
7. Defense Counsel advised him that he could get less time if he pled guilty but mentally ill. That upon being received at the South Carolina Department of Corrections, he realized that the guilty but mental ill plea was going to prevent him from being able to advance in custody levels within the Department of Corrections as well as imposing other restrictions on him.
8. That Applicant's plea was not freely, voluntarily, knowingly, or intelligently given.

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 proceeds to the claims raised in the application and amended application and finds each 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.

A. Plea Counsel Incorrectly Advised Applicant He Would Be Sentenced to Ten to Fifteen Years Imprisonment[1]

Applicant contends Counsel was ineffective for incorrectly advising Applicant he would be sentenced to 10 – 15 years imprisonment if he pleaded guilty. This Court disagrees, and finds Applicant was properly advised of his plea and the consequences thereof. This Court finds credible and persuasive the testimony of Counsel, who presented well-recollected testimony of the advice she communicated to Applicant, including his potential exposure to thirty (30) years imprisonment if he pleaded guilty. Furthermore, Applicant was correctly advised of the consequences he faced during the plea colloquy.

1. PCR Testimony

Applicant testified he pleaded guilty because Counsel informed him he would be sentenced to the lower part of the sentencing range for voluntary manslaughter. (PCR Tr. p. 11). Applicant

[1] Claim 3.

testified he was under the impression he would be sentenced to 10 – 15 years if he pleaded guilty. Applicant testified he informed the plea court he understood he could be sentenced to thirty (30) years for voluntary manslaughter. (PCR Tr. p. 17). When cross-examined on whether he recalled informing the plea court he had plenty of time to discuss the case with Counsel, Applicant testified he did not recall, and subsequently, disputed the accuracy of the guilty plea transcript itself. (PCR Tr. p. 17 – 18).

Counsel testified she informed Applicant 10 – 15 years was their target range and that is what she asked the plea court to consider. However, Counsel testified she explained to Applicant "that the full sentencing range was open to the judge." (PCR Tr. p. 35). Counsel testified Applicant was aware he could potentially be sentenced to thirty (30) years for voluntary manslaughter. (PCR Tr. p. 35). Counsel testified she hoped, through mitigation, she could possibly get something in the range of 10 – 15 years. (PCR Tr. p. 37). Counsel testified she presented mitigation to the court including Applicant's lack of any prior record, lack of disciplinaries at school, and the fact he was a law abiding citizen until this incident. (PCR Tr. p. 34). Furthermore, Counsel testified she hoped a plea of guilty but mentally ill would lead to a more lenient sentence. (PCR Tr. p. 33).

2. Guilty Plea Testimony

During the guily plea hearing, Applicant informed the plea court he understood he could potentially be sentenced to thirty years imprisonment for voluntary manslaughter. (GP Tr. p. 12). The plea judge then explained to Applicant, in great detail, the nature of the plea and the consequences thereof:

> The Court: There has been a reduction in the charge from murder to the voluntary manslaughter and it appears that has been a benefit that the State has made in this case; however, you understand that this also called a straight-up plea where I could sentence you to five years twice consecutive so you could get up to forty years for this. Do you understand that?

Mr. Cribb: Yes, your Honor.

(Gp Tr. p. 18).

Furthermore, Applicant testified at the plea hearing he was not promised anything in exchange for the plea. (Gp. Tr. p. 18).

3. Discussion

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." *Reed v. Becka*, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Accordingly, because a criminal defendant waives several constitutional rights by pleading guilty, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999). To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him and the consequences of his plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). To be voluntary, a plea must be free of threats or other coercion that would impermissibly distort the defendant's choice. *Id.* At 755; *see also United States v. Smith*, 440 F.2d 521, 528–529 (7th Cir.) (Stevens, J., dissenting) (explaining that voluntariness relates to the trustworthiness of the admission of guilt and binding character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). The State may properly encourage guilty pleas either by being more lenient to those who enter such pleas, *Brady*, 397 U.S. at 750–53, or by increasing the risks of punishment on those who do not. *Alford*, 400 U.S. at 37 (1970); *cf. United States v. Cox*, 464 F.2d

937, 942 (6th Cir. 1972) ("It is well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment." (citing *Brady*, 397 U.S. 742)). An applicant who enters a plea on the advice of counsel may "only attack voluntary, knowing and intelligent character of the plea by showing that plea counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the [applicant] would not have pled guilty, but would have insisted on going to trial." *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing *Hill*, 474 U.S. 52).

Before a court can accept a guilty plea, the defendant must be advised of the constitutional rights he or she is waiving; the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. *Boykin*, 395 U.S. at 243. Additionally, the defendant "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999).

"Defendant's knowing and voluntary waiver of statutory or constitutional right must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." *State v. Ray*, 310 S.C. 431, 427 S.E.2d 171 (1993). Any possible misconceptions regarding sentencing on a defendant's part can be "cured by the colloquy during the actual guilty plea hearing." *Wolfe v. State*, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997).

This Court finds Applicant's allegation he pleaded guilty based on Counsel's erroneous advice regarding sentencing is without merit. Counsel credibly testified she informed Applicant the requested target sentencing range she would communicate to the plea court was 10 – 15 years.

Counsel further testified she informed Applicant that, although 10 – 15 years was their target range, he could still be sentenced to the maximum of thirty years imprisonment. During the plea hearing, Counsel requested the court to sentence Applicant to the lower third of the sentence in light of several mitigating factors which were properly presented to the court. Despite Counsel's lengthy and compelling mitigation presentation, the plea judge sentenced Applicant to thirty (30) years for voluntary manslaughter. This Court finds that Counsel properly advised Applicant regarding the consequences of his plea and Counsel was **NOT DEFICIENT** in advising applicant of the consequences of his plea.

Even supposing Counsel did errouneously advise Applicant he would be sentenced to 10 – 15 years if he pleaded guilty, his allegation still lacks merit. Applicant testified he pleaded guilty with the hope he would be sentenced in the range of 10 – 15 years; however, Applicant *twice* stated on the record at his guilty plea hearing that he understood he could be given a maximum sentence by pleading guilty. Applicant further informed the plea court he was promised nothing in exchange for the plea. Although Applicant was hoping for a light sentence for pleading guilty, "wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made." Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997).

Accordingly, Applicant's claims pertaining to Counsel's alleged misadvice regarding his sentencing and his subsequent reliance on that misadvice is **DENIED.**

B. Plea Counsel Failed to Properly Evaluate and Argue Self-Defense[2]

Applicant next contends Counsel failed to properly evaluate and argue self-defense. This Court disagrees, and finds Applicant failed to present any evidence or testimony indicating how further preparation into the claim of self-defense would have affected his decision to plead guilty. This Court finds credible the testimony of Counsel and Assistant Solicitor Hogge (Solicitor Hogge), who both testified a self-defense argument would have likely been unsuccessful at trial considering the evidence in this case. Furthermore, the record of the guilty plea coupled with credible testimony of Counsel demonstrate Counsel adequately evaluated the claim of self-defense.

1. PCR Testimony

Applicant testified he met with Counsel approximately six to ten times. (PCR Tr. p. 8). Applicant testified the defense at trial was going to be self-defense; however, Counsel informed Applicant it was an inconsistent self-defense case. (PCR Tr. p. 9). On cross-examination Applicant testified he went over self-defense with his Counsel. (PCR Tr. p. 16).

Counsel testified she met with Applicant somewhere "in the neighborhood of ten to twelve" times. (PCR Tr. p. 29). Counsel testified she discussed with Applicant the elements of the crimes and what the State was required to prove. (PCR Tr. p. 29). Counsel testified Applicant initially told law enforcement he had acted in self-defense. (PCR Tr. p. 30). Counsel testified Applicant told law enforcement that the victim attacked him by using a cell phone charger cord to choke him out and in an effort to defend himself grabbed a knife and stabbed him in self-defense and "that a struggle ensued and that he went and eventually got a shotgun and shot him." (PCR Tr. p. 31). Counsel testified there were no red marks around his neck, no bruising to his neck, and there was

[2] Claim 4.

no evidence of a struggle within the house. (PCR Tr. p. 31). Furthermore, Counsel testified the injuries to victim were not consistent with Applicant's version of events. (PCR Tr. p. 31). Counsel testified she did not feel a jury would find Applicant's story credible, or that a reasonable person would have feared for their life according to Applicant's version of events. (PCR Tr. p. 31-32). Counsel testified she did not believe a jury trial would have been successful. (PCR Tr. p. 32).

Solicitor Hogge testified there was no evidence of self-defense. (PCR Tr. p. 43). Solicitor Hogge testified there was no evidence victim attacked Applicant whatsoever; there were no "marks at all on the defendant... and certainly no reasonable person would have felt that they were in imminent death and, thereby, would have felt it necessary to shoot through someone's hand into their face with a shotgun and then stab them repeatedly." (PCR Tr. p. 43-44).

2. Guilty Plea Testimony

During the guily plea hearing the following colloquy occurred between the judge and Applicant:

> The Court: Do you understand by entering your plea today, even though you may have talked to your lawyer in detail about potential self defense, you give that right up and waive that right in order to plead guilty. Do you understand that?
>
> Mr. Cribb: Yes, your Honor.
>
> The Court: In other words you can't raise the issue of self defense once you enter your guilty plea. Has that all been explained to you?
>
> Mr. Cribb: Yes, you Honor.

(GP. T. p. 48).

3. 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 credibly testified she reviewed the evidence in discovery and came to the reasonable conclusion that a self-defense argument at trial would have been unsuccessful. Applicant himself testified that Counsel went over the self-defense claim with him and informed him it was an imperfect self-defense case. Solicitor testified as to what evidence the State would present at trial to rebut any self-defense claim, and it is clear, from the evidence presented, that Counsel exercised reasonable professional judgement in determining self-defense would be unsuccessful at trial. This Court finds Counsel adequately investigated and evaluated the claim of self-defense. Accordingly, this Court finds Counsel was **NOT DEFICIENT** in evaluating the claim of self-defense.

Furthermore, the plea judge properly advised Applicant that by entering a plea of guilty he would be waiving any potential self-defense argument. Applicant asserted he understood he would be waiving that right. This Court finds Applicant waived the right to present a defense. Accordingly, Applicant's allegation Counsel failed to properly evaluate and argue self-defense is **DENIED**.

C. Applicant Reviewed Discovery Only Three Days Prior to Guilty Plea[3]

Applicant next contends he was only given an opportunity to review discovery three days prior to his guilty plea. This Court disagrees, and finds Applicant failed to present sufficient

[3] Claim 6.

evidence and testimony how additional time to review discovery would have affected his decision to plead guilty.

1. PCR Testimony

Applicant testified he received discovery two or three days prior to his sentencing. (PCR Tr. p. 10). Applicant testified he did have an opportunity to review the discovery with Counsel. (PCR Tr. p. 10). As previously stated, Counsel testified she met with Applicant "in the neighborhood of ten to twelve" times. (PCR Tr. p. 29). Counsel testified they reviewed discovery, went over the elements of the crimes charged, and discussed Applicant's potential self-defense claim. (PCR Tr. p. 29-30)

2. Guilty Plea Testimony

During the guilty plea hearing the following colloquy occurred between Applicant and the presiding judge:

> The Court: Have you had plenty of time to talk to Ms. Lipinski about this case and discuss it in detail with her?
>
> Mr. Cribb: Yes, your Honor.
>
> The Court: Has she provided you with information; documents, might be statements, case summaries, incident reports, things that the State is required to give her when you file a Motion for Discovery. Have y'all been able to go over all those?
>
> Mr. Cribb: Yes, your Honor.

(GP. Tr. p. 18).

3. Discussion

Applicant's allegation he was not afforded enough time to review discovery is without merit. Applicant testified he reviewed discovery with Counsel. Counsel credibly testified they reviewed discovery, went over the elements of the crimes charged, and discussed potential defenses. Furthermore, Applicant informed the plea court he reviewed discovery with Counsel and

had plenty of time to discuss the case with her. Accordingly, this Court finds Applicant has failed to present any evidence or testimony that demonstrates he would not have pleaded guilty if afforded more time to review the discovery, thus, this allegation is **DENIED.**

D. Plea Counsel Failed to Inform Applicant of Collateral Consequence of Pleading Guilty But Mentall Ill[4]

Applicant next contends Counsel failed to properly advise him of the consequences within the South Carolina Department of Corrections (SCDC) if he pleaded guilty but mentall ill. This Court disagrees, and finds the record from Applicant's guilty plea refutes this allegation. Furthermore, this Court finds the allegation fails as a matter of law.

1. PCR Testimony

Applicant testified his decision to plead guilty but mentally ill has caused him to be subject to certain restrictions at the South Carolina Department of Corrections. (PCR Tr. p. 11). Applicant testifed he is still having mental health issues. (PCR Tr. p. 11). Counsel testified there was evidence Applicant "had been ongoing some level of psychosis for some time." (PCR Tr. p. 32). Counsel testified the decision to plead guilty but mentally ill was made to "broadcast to the Court that everybody agreed that that was a factor and that was what was transpiring on the day in question." (PCR Tr. p. 33).

2. Guilty Plea Testimony

During the guilty plea hearing, Counsel informed the Court of the rational basis for the guilty but mentally ill plea; she explained Applicant was diagnosed with schizophrenia which caused him to lack the ability to conform his conduct to the law. (GP. Tr. p. 7).

The plea judge informed Applicant of the consequences of pleading guilty but mentally ill:

[4] Claim 7. Applicant presented no testimony that Counsel informed him he would get less time if pleaded guilty but mentally ill, so that portion of the claim is not addressed here.

> The Court: The Court has been told that you intend to enter a plea to these charges, and we're gonna talk about it in just a minute, but it's a guilty but mentally ill. Even though it's classified they're called guilty but mentally ill. Practically what that means is if I accept the guilty but mentally ill that you would go to the Department of Corrections; you would be treated for a time in a mental part of the Department of Corrections. Once they determine you are able to function within the system then you move out of there to a regular population. Is that your understanding of what guilty but mentally ill plea is?
>
> Mr. Cribb: Yes, your Honor.

(Gp. Tr. p. 12). The Court subsequently found there was a rational basis for the guilty but mentally ill plea. (Gp. Tr. p. 19).

3. Discussion

Applicant's allegation he was not informed of the SCDC restrictions imposed upon him as a result of pleading guilty but mentally ill is without merit. The plea court informed Applicant that he will be placed in a restricted unit until the Department of Corrections determines he can function in the regular population. Applicant stated on the record he understood these consequences. Thus, Applicant was informed by the Court of the potential consequences of pleading guilty but mentally ill. Furthermore, the plea court ruled there was a rational basis for a guilty but mentally ill plea.

Even if Applicant was not informed of the restrictions imposed upon him by SCDC as a result of the plea, "a defendant need not be advised of all collateral consequences of his or her plea in order for the plea to withstand Constitutional scrutiny." *Williams v. State*, 378 S.C. 511, 662 S.E.2d 615 (Ct. App. 2008). Any restriction on his detention imposed upon Applicant for pleading guilty but mentally ill is a collateral consequence he need not be advised. This is because the restrictions are not a matter within the jurisdiction of the trial court, but are determined by the South Carolina Department of Corrections. *See Brown v. State*, 306 S.C. 381, 383, 412 S.E.2d 399, 400–01 (1991) (recognizing that parole eligibility is a collateral consequence because it is not a

matter within the jurisdiction of the trial court, but falls within the province of the Board of Probation, Parole, and Pardon Services).

This Court finds Counsel was not deficient for failing to inform Applicant of the restrictions imposed upon him by the South Carolina Department of Corrections. Accordingly, Applicants allegation is **DENIED.**

E. Counsel Was Ineffective for Failing to Utilize Dr. Mulbry at the Plea Hearing to Rebut Solicitor's Misleading Comments Regarding Applicant's Mental Illness[5]

Applicant next contends Counsel was ineffective for failing to utilitze Dr. Mulbry at Applicnat's plea hearing to rebut Solicitor's misleading comments regarding Applicant's mental illness. Applicant contends the misleading comments adversely affected his sentence. This Court disagree, and finds Counsel made a reasonable strategic decision in not calling Dr. Mulbry to testify and Counsel adequately rebutted the comments during her mitigation presentation. Furthermore, it is purely speculative that Applicant's sentence was adversely affected by the misleading comments.

1. PCR Testimony

Applicant testified Dr. Mulbry found him competent to stand trial. (PCR Tr. p. 12). Applicant testified Solicitor told the plea court he would not get better when discussing Applciant's mental illness. (PCR Tr. p. 12). Applicant testified Solicitor brought up a family member who was diagnosed with schizophrenia and the disease only got worse. (PCR Tr. p. 13). Applicant testified he believed this was a biased opinion. (PCR Tr. p. 13). Applicant testified Solicitor told plea court he was a danger to society and would not get any better. (PCR Tr. p. 13). Applicant testified Counsel did not object to any of the comments. (PCR Tr. p. 14). Applicant testified he would not have pleaded guilty if he had known what Solicitor was going to say. (PCR Tr. p. 15).

[5] Claim 2.

Dr. Mulby testified his impression was Solicitor Thompson was depicitng schizophrenia as a "progessive, degenerative disease that almost invariably results in decline, worsening and more danger in the future." (PCR Tr. p. 22 – 23). Dr. Mulbry characterized these comments as inaccurate. (PCR Tr. p. 23). Dr. Mulby testified he has treated many individuals who are functioning at a very well in the community and schizophrenia "can be very effectively treated and not necessarily progressive and people do not... become more dangerous as a rule over time." (PCR Tr. p. 23). Dr. Mulbry testified that extensive studies show schizophrenia does provide a small increased risk of violence compared to the general non-mentally ill population. (PCR Tr. p. 23 – 24). Dr. Mulbry testified that the most dangerous people out there are people who are abusing substances. (PCR Tr. p. 24). Dr. Mulbry testified that people diagnosed with schizophrenia who are consistently treated and stay away from drugs and alcohol tend to do very well. (PCR Tr. p. 24).

Dr. Mulbry testified he has treated a number of individuals at SCDC who were diagnosed with a variety of mental illnesses. (PCR Tr. p. 25). Dr. Mulbry testified that incarcerated individuals with schizophrenia have been effectively treated within SCDC and generally people who are treated with schizophrenia can function very well in society. (PCR Tr. p. 25). Dr. Mulbry testified Solicitor Thompson's comments that schizophrenia is a progressive, degenerative disease marked by decline is an inaccurate characterization of the disease and he would have testified to that effect had Counsel asked him to. (PCR Tr. p. 26).

Counsel testified she refuted the comments made by Solicitor Thompson during her mitigation presentation. (PCR Tr. p. 34). Counsel testified had concerns about using Dr. Mulbry to refute Solicitor Thompson's comments. Counsel testified that Dr. Mulbry explained to her that Applicant's high doseage of medication, and his ability to tolerate it, "was an indication that he

truly was suffering from this kind of heightened state of psychosis and that it wasn't substance abuse related and was organic." (PCR Tr. p. 39). However, Dr. Mulbry dialed back Applicant's dosage the morning of the plea, and Counsel was concerned that if Dr. Mulby were to testify the reduced dosage may come out and potentially undermine Counsel's mitigation surrounding Applicant's mental illness. (PCR Tr. p. 39). Counsel further testified she did not believe Judge Hall was going to take mental health advice from a Solicitor and she did not feel the Court was giving any credence to Solicitor Thompson's comments. (PCR Tr. p. 40).

2. Guilty Plea Testimony

During the guilty plea hearing, Solicitor Thompson made the following comments regarding Applicant's mental health to the Court when arguing for a maximum sentence:

> The other aspect I'd like the Court to look at is the future dangerousness of the Defendant. Schizophrenia, and we've dealt with a lot in the court system; I'm sure you have just as I have had. I even have a relative who suffers from schizophrenia and I've seen the decline of him over the years, and it becomes obvious that it doesn't really get better. At times it can be controlled; at time it can be, you know, therapy and things like that help, and medication help, but eventually it does not. And the mind deteriorates and the Defendant has, or the person has the perplibity or any probility [*sic*] toward violence, that shines through and comes out. And I believe that he would be a danger later on in life because I think there's nothing – if this is the first psychotic episode he shows it is about as bad as you can get.
>
> I think from here on out his mental abilities in ten, fifteen, twenty years, or farther will be worse. And I think that makes him dangerous because if you can't control your conduct you become someone who is very dangerous because you have occasionally the psychotic thoughts of whether its suicide or harming other and it would be others that would be maybe friends of yours or people trying to help you. It could be stranger or it could be anybody.
>
> So I point out that the horrific nature of the crime itself, and the fact that he's unlikely to really truly ever be healed from this mental health problem that he suffers from, makes him a future danger and a danger to the community. And even if we were just sentencing on the punishment alone for the violent nature and the awfulness of this crime, that would warrant a very large sentence and would certainly warrant I think the thirty years that he faces on the manslaughter charge which the State has reduced the crime to basically giving him a break in this case, recognizing the mental health issues that suffers from but that's a huge break.

(GP Tr. p. 32 – 33).

Solicitor Thompson then made the following comments regarding the brutality of the crime in the same argument:

> But as we look at things and we look at sentencing, one of the main things we also consider is the crime itself and the nature of the crime, the severity of it and the brutality of it. And for his first crime he ended up committing one that was extremely egregious. The brutality is its great. In addition to the stab wound that there was one in the chest that wasn't very deep; I believe like an inch and a half or so, but it hit to the bone and why it didn't go any farther.
>
> ...
>
> The major consideration of punishment that I'm asking the Court to look at are mainly two things and one is the complete brutality of this crime. I imagine the last few moments of a few minutes of the victim's life for Sonny Proctor were horrifying, like living through a very gory part of not knowing why someone's attacking you, and someone you feel to be a friend, or someone you feel that would never harm you doing these things to you. And obviously not really fighting back because there is no indication that the defendant was injured in any way. So the horrifying nature of being on the floor after you've been stabbed and then looking up and seeing the shotgun blast that obviously kills you at that point had to be horrifying for Sonny at that point in time. And it was brutal and it was up close and personal.
>
> ...
>
> And that alone, as I said the brutality of the crime, the nature of it would be enough for the thirty years. And I think when you add in the fact that he will likely never become better than he is now, and only become worse in later years, that that dangerousness is something the Court should consider as well.
>
> As the victim's family has said they really don't want to see anyone else go through this again either. And so I would ask the Court to consider that in sentencing. I'd ask the Court to sentence him to the thirty years that he faces under this plea.

(GP Tr. p. 31 – 34).

Counsel presented a lengthy mitigation argument during the plea hearing that included the following rebuttal of Solicitor Thompson's comments regarding Applicant's mental health:

> And as much as Mr. Thompson wants to portray that he's gonna be this evil violent person, he is at all times cooperative with law enforcement. He answers their questions; sits in the back of the car. He's not had any violence while he's going to the jail. They've been able

> to medicate him. He's been in C Block for the better part of this year. This isn't somebody who was going to struggle with all these things and be a violent person because there is no other diagnoses of sociopath or psycho path that you also see with schizophrenics who normally turnout like this.
>
> This is somebody who can appreciate the disease who is intelligent enough to learn from it. But he's also not cunning, he's also not manipulative and he did - - who the family who say we saw all these red flags and comments.
> ...
> It's time we as a society respect mental health, respect that when families bring people to us in the emergency room and say help that something extraordinary is going on, and that we don't need to give them five days worth of mental health and then tell 'em to follow up; that if you get to that point that that is significant and we need to address it.

(GP Tr. p. 43 – 45).

3. Discussion

Applicant's allegation Counsel was ineffective for failing to call Dr. Mulbry to rebut Solicitor Thompson's misleading comments regarding Applicant's mental health is without merit. Counsel credibly testified she did not call Dr. Mulbry to testify at the plea hearing for two reasons: 1) she did not believe the Plea Court was giving any credence to Solicitor Thompson's arguments regarding mental health, and 2) she was concerned that Dr. Mulbry may testify about Applicant's reduced dosage of medication which could undermine her argument in mitigation that Applicant's mental illness was the root cause of the crime. Instead, Counsel made the strategic decision to rebut Solicitor Thompson's comments herself during her lengthy and compelling mitigation presentation. "Where counsel articulates a valid trial strategy for failing to call an expert witness to testify at trial, such conduct will not be deemed ineffective." *Reeves v. State*, 415 S.C. 366, 377, 782 S.E.2d 747, 752 (Ct. App. 2015) (citing *Legare v. State*, 333 S.C. 275, 281, 509 S.E.2d, 475 (1998).

Despite Dr. Mulbry's credible testimony at the evidentiary hearing about what he would have testified to in rebuttal, Counsel's decision not to call him was a valid and reasonable strategy.

Counsel believed putting Dr. Mulbry on the stand could lead to unfavorable testimony regarding the dosage reduction of Applicant's medication. This was a valid concern, since the high dosage of Applicant's medication, and his ability to tolerate it, supported Counsel's argument that Applicant's mental illness was the root cause of the crime. Thus, Counsel was **NOT DEFICIENT** in failing to call Dr. Mulbry to rebut Solicitor Thompson's misleading comments regarding Applicant's mental health.

Furthermore, this Court finds Applicant was not prejudiced even if a deficiency existed. Applicant entered into a knowing and voluntary guilty plea where he was allowed to plead guilty to the lesser included offense of voluntary manslaughter. As discussed above, Applicant was fully aware he could be sentenced to thrity (30) years imprisonment for voluntary manslaughter. It is purely speculative that the plea judge sentenced Applicant to thrity (30) years imprisonment because of Solicitor Thompson's remarks regarding shizophrenia. Applicant's mental illness was only part of his argument supporting a maximum sentence. As the record shows, the brutality of the crime and the victim impact statements were used to support an argument for a maximum sentence. Thus, Applicant failed to present sufficient evidence and testimony that he was prejudiced even if a deficiency existed.

Accordingly, this Court finds Applicant's allegation Counsel was ineffective for failing to call Dr. Mulbry to rebut Solictitor Thompson's misleading comments regarding Applicant's mental illness is **DENIED**.

F. Applicant Was Incompetent to Enter a Guilty Plea[6]

Applicant contends his depression and mental illness caused him to be unable to knowing and voluntarily plead guilty. This Court finds Applicant presented no evidence to support this

[6] Claim 1

allegation during the evidentiary hearing, thus he has not met his burden entitling him to post-conviction relief on this issue. Notwithstanding the lack of evidence on this claim, the plea court held a *Blair*[7] hearing and found Applicant competent to stand trial. (GP Tr. p. 11). Furthermore, Applicant testified at his plea hearing that his medication did not affect is ability to understand the proceedings. (GP. Tr. p. 9).

Accordingly, this allegation is **DENIED**.

G. Counsel Failed to Properly Investigate the Crime Scene[8]

Applicant contends Counsel failed to properly investigate the crime scene. Applicant presented no evidence of this allegation at the evidentiary hearing, thus he has not met his burden entitling him to post-conviction relief. Accordingly, this allegation is **DENIED**.

CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. This Court finds Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. For the all the reasons discussed above, this Court finds Applicant freely, knowingly, and voluntarily pleaded guilty. Therefore, this 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

[7] *State v. Blair*, 273 S.E.2d 536 (S.C. 1981).
[8] Claim 5

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