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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The South Carolina Supreme Court

Appeal from Greenville County
Greenville County Court of Common Pleas
Hon. Judge J. Derham Cole, Circuit Court Judge, Presiding

2017-CP-23-05752

Jakobe German.....Petitioner,

Versus

State of South Carolina .....Respondent.

NOTICE OF APPEAL

Jakobe German APPEALS the order entered in the above titled Post-Conviction Relief matter, which was signed on August 2, 2024, clocked with the Greenville County Clerk of Court on August 9, 2024, and is attached to this Notice of Appeal. The Petitioner received written notice of the entry of the Order and Judgment in this matter on August 11, 2024.

s/Scarlet B. Moore

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September 7, 2024.
Greenville, S.C.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	The THIRTEENTH JUDICIAL CIRCUIT
Jakobe GERMAN, SCDC #369515,	)	
	)	
Applicant,	)	
v.	)	
	)	**ORDER OF DISMISSAL**
The STATE of South Carolina,	)	
	)	Civil Action No.: 2017-CP-23-05752
Respondent.	)	
	)	

This matter was before the Court on November 9, 2022 for an evidentiary hearing on an application for post-conviction relief filed by Applicant on September 6, 2017, and amended on November 3, 2021. Applicant was present and represented by counsel, Scarlett B. Moore, Esq.[1] Assistant Attorney General Lilly Meadows represented Respondent, the State. At the close of the hearing the decision was taken under advisement. By a civil action Form 4 order issued on November 29, 2022, this Court denied relief and directed Respondent's counsel to prepare and submit a proposed order.[2]

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections, McCormick Correctional Institution. Applicant was 15 years old at the time he participated in multiple crimes with his co-defendants. Initial proceedings began in Family Court. Alexander Kornfeld, Esq., represented Applicant.[3] On June 19, 2015, after presiding over a contested waiver

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[1] Sara M. Henry, Esq., was previously appointed to represent Applicant. Ms. Henry filed the amended application during the time of her representation. On March 17, 2022, Ms. Henry moved to be relieved from appointment, which the Honorable Eugene C. Griffith, Jr., granted by Order dated March 25, 2022. Ms. Moore was subsequently appointed and appeared at the hearing.

[2] The proposed order was circulated among counsel prior to this Court's acceptance. *See Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019) (providing a "proposed order should be transmitted to opposing counsel" for review and that counsel "should … alert preparing counsel and the PCR court as to any deficiencies in the proposed order.").

[3] The crimes referenced in the Family Court proceedings included: "Attempted Burglary First Degree (2014 JU 23 941), 4 Counts of Attempted Murder (2014 JU 23 790,942,954, 976), Attempted Armed Robbery (2014 JU 23 789), 4 Counts of Assault & Battery First Degree during the commission of an Armed Robbery (2014 JU 23 791,792,970,971), 3 Counts of Burglary First Degree (2014 JU 23 797, 956, 975), 5 Counts of Armed Robbery (2014 JU 23 955, 977, 978, 979, 981), 4 Counts of Kidnapping (2014 JU 23 953, 968, 969, 980) and Burglary Second Degree Violent (2014 JU 23 983)." (Waiver Order, at 1). The Family Court noted all "[t]he alleged offenses occurred in

hearing, the Honorable Usha J. Bridges issued an order granting the prosecution's motion to waive Applicant to the Court of General Sessions.[4] Judge Bridges concluded "that there is little likelihood that Jakobe T. German, can be rehabilitated in the Juvenile Justice System," and that "[i]t is in the best interest of Jakobe T. German, and the public, that he be waived to the Court of General Sessions for proceedings on the charges alleged in Petitions...." (Waiver Order, p. 2). Mr. Kornfeld was again appointed as counsel for the General Sessions proceedings and continued representation. (PCR Tr. at 8).

Among other charges, the Greenville County grand jury indicted Applicant for two counts of armed robbery (2015-GS-23-06101A and 06107A) and two counts of first-degree burglary (2015-GS-23-06106A and 06111A) in July 2015. On August 22, 2016 Applicant appeared before Circuit Judge D. Garrison Hill to plead guilty to these four charges.

Prior to accepting Applicant's plea, Judge Hill ensured that Applicant was satisfied with his counsel's representation and had been afforded sufficient time to discuss his case with counsel; that he was pleading because he was factually guilty; that he understood the minimum and maximum sentencing possibilities; that he was not threatened or coerced and was of sufficient mind to understand the proceedings; that he understood that he was waiving his trial rights, including the right to cross-examine witnesses and require the State to proof its case beyond a reasonable doubt; and also, that he understood that he was foregoing any defenses he may have to the charges. (Plea Tr. at 3-6 and 9).

The State provided the following recitation in support of a factual basis for the charges:

> With respect to the first incident. On September 2nd of 2014, just before 10:00 p.m., officers responded to a robbery at a residence on Evelyn Drive in Greenville County.
>
> One of the victims described that she was on the front porch of the home when four to six masked individuals approached her and struck her in the head with a handgun before dragging her into the home as they forced their way inside. The intruders attacked

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Greenville County on or about July 28, 2014, August 23, 2014, August 26, 2014, September 2, 2014 and September 3, 2014, when the defendant was fifteen (15) years and 6 (six) months old." (Waiver Order, p. 1).

[4] The record shows that the State and counsel for Applicant made efforts to obtain the transcript; however, it was determined that a transcript was not available. (See PCR Tr. at 9; see also Motion for Production of Transcript). The basis of the State's case was submitted in summary fashion at the PCR. (PCR Tr. 35-48).

three other victims in the home before taking cash, purses, phones, and keys to the two cars, which they used to flee the scene.

At least, one co-defendant has given a statement to police admitting their own involvement in the home invasion. In statements not only from that co-defendant but others, they described that this – the robbery was [Applicant's] idea and that the group walked to the victim's home. [Applicant] struck the victim outside on the front porch before he and others kicked open the door and forced their way inside.

Then, . . . the next day, on September 3rd of 2014, just before 9:00 p.m., officers with the sheriff's office responded to a shooting at a residence on East Parker Road. The shooting victim told police he was outside with a second victim when the two observed, at least, five masked individuals approach the home bearing firearms.

The attackers demanded money from the victims and struck each of the two victims with handguns several times. One of the attackers then fired shots at the victims and struck one of those victims several times in the leg. Other gunmen fired shots into the door of the home and forced their way inside. A third victim was injured during that forced entry.

At least, two co-defendants have given statements to police admitting their involvement in this robbery. The co-defendants identified [Applicant] as one of the gunmen and described how the 10 involved defendants planned and executed the robbery of what the defendants believed was a ticket house where cash could be found.

The defendants further identified [Applicant] as a leader, or organizer, or, at least, some high-ranking member in each of – in the Cross Tracks street gang, which is involved in each of these indictments.

(Plea Tr. at 6-8).

Judge Hill asked Applicant, "Is that what happened," to which Applicant replied, "Yes, sir." (Plea Tr. at 8).

Judge Hill also reviewed that, if Applicant was convicted again of a serious or most serious crime, the convictions would "subject [him] to a mandatory life sentence without any possibility or hope of parole." (Plea Tr. at 9-10). Further, Judge Hill ensured that Applicant had not been given any assurances about parole eligibility, nor had anyone "predicted" parole or parole eligibility. (Plea Tr. at 10).

The State placed on the record that in exchange for the plea, the State would be "dismissing four counts of kidnapping, four counts of assault and battery in the first degree, two additional counts of burglary in the first degree, burglary second degree, four counts of attempted murder, and four counts of armed robbery," but would not be making a recommendation on the sentence. (Plea Tr. at 10).

Judge Hill found that there was a factual basis for the entry of the guilty pleas, and accepted the pleas as free and voluntary and given "with the assistance of competent counsel." (Plea Tr. at 10). He deferred sentencing until August 25, 2016. (Plea Tr. at 10). When the hearing was reconvened on that date, the defense made its presentation that included Applicant's grandmother requesting leniency. (Plea Tr. at 14). Applicant was given the opportunity to admit involvement of Tyler Hill in the September home invasion resulting in injuries and stealing of two cars; however, contrary to "all the other defendants" he declined to do so. (Plea Tr. at 15). Judge Hill noted the severity of the crimes, telling Applicant "you're lucky someone wasn't killed in this, or you weren't killed. But people were traumatized, and seriously hurt, and had their lives shattered." (Plea Tr. at 16). Judge Hill then fashioned a sentence recognizing the significant harm inflicted by Applicant, but also allowing Applicant the potential opportunity to "still have a life you can put back together again." (Plea Tr. at 16). Judge Hill sentenced Applicant to 17 years on each burglary and 10 on each armed robbery, concurrent, with 720 days of time served. (Plea Tr. at 16-17). Applicant did not appeal.

Post-Conviction Relief Allegations

In his amended application filed November 3, 2021, Applicant made the following allegations of error:

a. Ineffective assistance of counsel and Involuntary Guilty Plea:

i. Applicant did not knowingly and intelligently waive

his right to an appeal;

ii. Plea counsel failed to inform Applicant of his right to appeal the sentence and conviction. The court also did not inform Applicant of his right to appeal the conviction.

iii. Plea counsel nor the court informed Applicant of his right to appeal the family court waiver would not be preserved if Applicant pled guilty.

iv. Plea counsel failed to discuss the potential appealable issues from the family court waiver hearing, or the process with Applicant.

v. That the above actions by counsel do not meet the standard of effective assistance of counsel under current professional norms, and there is a reasonable probability that but-for the above listed errors by counsel the outcome of the proceeding would have been different.

(See also PCR Tr. at 6-7).

Applicant's PCR counsel confirmed to this Court at the beginning of the PCR hearing that these allegations were the allegations Applicant would go forward on. (PCR Tr. at 7).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In addition to carefully considering the record and the arguments presented by counsel, this Court has also had the opportunity to consider the testimony presented at the PCR evidentiary hearing and has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. §17-27-80 (2003).

Applicable Law

For claims that trial counsel provided ineffective assistance, this Court is guided by the familiar test: To show a violation of the Sixth Amendment, an applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there

is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington,* 466 U.S. 668, 694 (1984); *Simpson v. Moore,* 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). It is the applicant's burden to prove, by a preponderance of the evidence, that he is entitled to relief. Rule 71.1 (e), SCRCP. *See also Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("the burden of proof is on the applicant to prove the allegations in his application"). Because Applicant's claims center on advice regarding appeal, consideration of the ineffective assistance claims will be guided by specialized inquiry, and that inquiry differs slightly depending on the nature of the proceedings.

The Supreme Court has recognized "that counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). The normal requirement of showing prejudice, however, does not attach. Rather, the prejudice showing required is that the applicant "must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.*, at 484.

Regarding the duty to advise, our Supreme Court has instructed that "[f]ollowing a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal." *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (*Turner I*). However, our Court has found that "absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." *Weathers v. State*, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995); see also *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 n. 1 (2010) ("*Turner I* is the standard attorneys shall meet for trials and *Weathers* is the standard for pleas"); *Turner v. State*, 384 S.C. 451, 456, 682 S.E.2d 792, 795 (2009) (*Turner II*) ("Although decided prior to *Flores–Ortega,* the *Weathers* analysis is compatible with the *Flores–Ortega* analysis and remains good law."). Thus, where a guilty plea was entered, "[t]he bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief." *Weathers,* at 61, 459 S.E.2d at 839. Instead, the burden is on the applicant to show "extraordinary circumstances." *Id.*

Discussion

At the PCR hearing, plea counsel testified that the waiver was keenly contested, but he saw no basis for a challenge to the family court's conclusion on waiver. (PCR Tr. 10-11). Plea counsel

testified that he confirmed with "other older lawyers" practicing in the family court area, that his initial thought that an appeal would be interlocutory and improper was correct; thus, there was nothing that could be appealed at that time. (PCR Tr. at 12-13). He recalled that he discussed the waiver with Applicant and advised that "we could possibly make arguments to that, but they would be unsuccessful." (PCR Tr. at 25). However, counsel did not discuss "the waiver hearing at the time of the plea." (PCR Tr. at 25-26). Counsel testified that Applicant's case "was set on the trial docket," and:

> ... [another] of his co-defendants pled before us and were - - and part of that was that they were going to testify as well on behalf of the State. Knowing that, we - - our negotiations intensified. And then I would have communications with Mr. German about those. And he ultimately decided to plead guilty.

(PCR Tr. 13).

Applicant testified that counsel did not tell him about the right to an appeal after the guilty plea. (PCR Tr. at 28). He also testified that he understood the finality of the plea, and that he could not continue to present facts and defenses. (PCR Tr. at 28, ("I thought once you go to court, you never have a chance to go back and argue it again"; and 34, "I thought that was final, that was all."). He also recalled counsel's advice that had he gone to trial, "it could have been a lot more severe than the actual plea that I was given." (PCR Tr. at 31).

As an initial matter, this Court finds that plea counsel was not ineffective for failing to immediately appeal the transfer order to General Sessions. A transfer order is interlocutory and not immediately appealable. *See Sanders v. State*, 281 S.C. 53, 314 S.E.2d 319 (1984) (citing *State v. Lockhart*, 267 S.E.2d 720 (S.C. 1980)). Therefore, the Court considers Applicant's claim as to whether counsel was ineffective in failing to advise of the right to appeal following the guilty plea. This leads to the question of whether counsel was deficient in advising of the right to appeal after the guilty plea, which is controlled by *Weathers, supra*. Applicant has failed to carry his burden of showing *Strickland* deficiency.

Applicant admittedly did not ask about an appeal, and the guilty plea itself waived the ability to appeal the family court finding. *Rivers v. Strickland,* 264 S.C. 121, 213 S.E.2d 97, 98 (1975) ("The general rule is that a plea of guilty, voluntarily and understandingly made, constitutes

a waiver of nonjurisdictional defects and defenses...."); *State v. Rice*, 401 S.C. 330, 333, 737 S.E.2d 485, 486 (2013) ("an erroneous order transferring a juvenile to general sessions court would be a judicial error—not a jurisdictional error"). After an examination of the record, and viewing the circumstances in its totality, this Court finds that based on the multitude of charges, the seriousness and violent nature of the charges, and the known evidence against Applicant, Applicant would have no rational desire to appeal his guilty plea and sentence.

Again, Applicant was facing multiple, serious criminal charges. When he pled guilty to two counts of first-degree burglary, and two counts of armed robbery, he received an aggregate sentence of 17 years, and the prosecution dismissed the remaining charges. Further, plea counsel credibly testified the evidence against Applicant was overwhelming. Plea counsel testified that he expected two of Applicant's co-defendants would testify against Applicant at trial; noted that Applicant did not have an alibi; and also noted that there was video evidence matching Applicant's description in addition to the victims identifying Applicant.[5] (PCR Tr. at 14-15). Considering the totality of the circumstances, this Court finds that plea counsel was not ineffective for failing to inform Applicant of his right to a direct appeal following the plea. Applicant has failed to show an "extraordinary circumstance" that would warrant a finding of deficiency. *Weathers, supra.*

Consequently, Applicant has failed to show "a rational defendant would want to appeal" such as knowledge of "nonfrivolous grounds for appeal" as suggested in *Roe v. Flores-Ortega, supra.* Critically, the appeal possible would be an appeal of the guilty plea itself, not the family court waiver.[6] Applicant neither attempted to, nor could he legally, condition his plea on the ability to appeal the waiver. On this point, this Court credits counsel's testimony that he was well-aware that South Carolina does not allow conditional guilty pleas. (PCR Tr. at 17-18). See, e.g., *State v. Truesdale,* 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982) ("expressly disapprov[ing]" attempts to place a "condition or qualification" finding if such qualification is offered, the plea must be rejected). Attempting to attach a condition to the plea would result in the plea either falling apart

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5 The overwhelming evidence of guilt has not been called into question. And, as the record reflects, Applicant admitted to the factual basis for the pleas without qualification.

6 This Court also credits plea counsel's testimony at the PCR hearing that he had discussed the waiver order with Applicant and counsel's opinion that the waiver order would likely be upheld if challenged. (See PCR Tr. at 25). Thus, plea counsel discussed the viability of arguments, though counsel underscored he did not do so at or after entry of the plea. (PCR Tr. at 25). This Court finds counsel's credible testimony establishes that Applicant was aware of that opinion prior to considering the plea.

or being reversed on appeal. *Id.* See also *State v. Peppers*, 346 S.C. 502, 505, 552 S.E.2d 288, 290 (2001) (vacating a plea accepted with assurances that a motion to quash the indictment was preserved). In short, it would be contrary to his client's interest in securing the plea bargain had plea counsel tried to preserve the issue.[7]

Lastly, this Court has carefully considered the sentence imposed in light of the multitude of charges and overwhelming evidence of guilt. The 17-year sentence, though certainly a significant term of years, was concurrent and only slightly beyond the minimums possible (15 and 10), that Applicant confirmed he understood. (See Plea Tr. at 9). The maximum on the burglary first degree charge alone was life imprisonment, which Applicant also told Judge Hill at the plea that he understood. (Plea Tr. and 9). Again, the 17-year sentence is not by any means short, but in light of the potential for multiple life sentences, its acceptance is eminently reasonable. The favorable terms secured with the assistance of counsel, combined with Applicant's unqualified admission of guilt and unqualified admission of the specific facts offered as a basis for the charges,

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[7] While Applicant's claims do not directly attack the voluntariness of the plea based on counsel's advice on any issue regarding the waiver process and viability of an appeal on same, even so, the record convinces this Court that counsel did not give incorrect advice; thus, to the extent Applicant would challenge the voluntariness of the plea on this point, such a claim would be wholly without merit. See generally *Smith v. State,* 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) ("In the context of a guilty plea, the court must determine whether 1) counsel's advice was within the range of competence demanded of attorneys in criminal cases—i.e. was counsel's performance deficient, and 2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty." (citing *Hill v. Lockhart,* 474 U.S. 52, 56–58 (1985).

Regarding Applicant's understanding or expectation, this Court credits Applicant's testimony that he understood that his plea was final. There was no reliance on an incorrect understanding that he could appeal the family court waiver. Further, that understanding of finality was precisely the point of the extensive and detailed colloquy with Judge Hill. (See generally Plea Tr. 6, [Applicant affirmatively represented the understanding that he was waiving defenses, if any, by entering plea]). Clearly, Applicant had no expectation of any other result. See generally *State v. Patterson*, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982) ("A plea of guilty is more than an admission of conduct; it is a conviction which leaves only the punishment to be determined.").

[cont.]

Lastly, to the extent Applicant testified that if he had known he could appeal he "probably would have never even took a plea arrangement," (PCR Tr. at 28), that testimony is patently speculative and insufficient to carry his burden of showing he would not have pled guilty. In fact, the totality of his PCR testimony appears to demonstrate his desire to have another opportunity to argue his "side in court." (PCR Tr. at 31-32). That does not bear on the decision to plead at the time under the circumstances in question. See *Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009) (finding that "*Hill* makes clear that this prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial"). See also *Lee v. United States*, 582 U.S. 357, 367 (2017) ("A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial."). Applicant's testimony demonstrates a misunderstanding of the relief available, but, critically, it does not support any incorrect advice by counsel or by the plea court that mislead him to his detriment. Again, Applicant fails to carry his burden of proof.

demonstrate that the plea was a voluntary and knowing choice. See *Hill*, 474 U.S. at 56 ("The longstanding 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.' ") (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). Simply, there were no arguable, available issues that would even prompt consideration of appeal. Counsel was not deficient.

CONCLUSION

Based upon the foregoing, this Court finds that Applicant failed to carry his burden of proof. The applicant has failed to establish; any deficient performance on the part of counsel under prevailing professional norms; and/or any prejudice resulting from counsel's performance as there is no reasonable probability that, but for counsel's performance, the result of the proceeding would have been different, *Strickland v. Washington*, 466 US 668 (1984) and *Cherry v. State*, 300 SC 115 (1989), and/or any other cognizable claim.

The applicant's request for **POST-CONVICTION** relief should be and **IS** therefore **DENIED** and the **APPLICATION DISMISSED WITH PREJUDICE** and the applicant remanded to custody for completion of the sentence imposed.

In order to secure appellate review, Applicant must file and serve a notice of appeal within thirty (30) days of receipt by counsel of written notice of entry of judgment. *See* Rule 203, SCACR. Applicant has the right to an 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). If an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

AND IT IS SO ORDERED this the 2nd day of August, 2024.

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J. DERHAM COLE
Presiding Judge, 13th Judicial Circuit

Spartanburg, South Carolina.

Copy mailed to
Attorney General/Scarlett Moore
on 8/9/2024.