

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

RECEIVED

MAY 29 2012

S.C. Supreme Court

DAVID LOZANO,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

2012 - 209531

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STATE OF SOUTH CAROLINA COURT OF GENERAL SESSIONS
 COUNTY OF CHARLESTON 2008-GS-10-9357

STATE OF SOUTH CAROLINA)
) TRANSCRIPT OF RECORD
)
) February 24, 2010
 -vs-)
 DAVID LOZANO,)
) Charleston, South Carolina
) Defendant.)

B E F O R E:

The Honorable Thomas L. Hughston, Jr., Judge.

A P P E A R A N C E S:

Trip Lawton, Assistant Solicitor
 Attorney for the State

 John Crumrine, Esquire
 Attorney for the Defendant

Amanda K. Haffenden, RPR, CRR
 Circuit Court Reporter

1 THE COURT: David Lozano, is that your name?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: I have here in my hands two
4 indictments. The state claims that you did on or about
5 July 13, 2008 commit an armed robbery. They say you were
6 armed with a pistol and that you took money or goods from
7 one or more of these people: Forrest Tucker, Karen
8 Tucker, Victoria Tucker, Christian Tucker, Kelly Siles.
9 Armed robbery, while armed with a deadly weapon, you
10 stole something from one or more of those people.

11 Do you understand that charge?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: That carries a maximum penalty of
14 what?

15 MR. LAWTON: Thirty years, Your Honor.

16 THE COURT: Thirty years in the penitentiary,
17 minimum of ten years in the penitentiary. Do you
18 understand that?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: So you're going to get at least
21 ten years. Do you understand that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: All right. And then September 2,
24 2007, the state claims you did commit an assault and
25 battery of a high and aggravated nature -- actually, this

1 is a Berkeley County case, not a Charleston case. This
2 is a Berkeley County case, and it's been sent down here
3 to be handled at the same time we're handling this other
4 one. I want to tell you, you have the right to have this
5 case handled up in Moncks Corner, up in Moncks Corner,
6 Berkeley County, here, or you can agree and let me handle
7 it here today. What do you want to do?

8 THE DEFENDANT: You can handle it here today,
9 sir.

10 THE COURT: Okay. September 2, 2007, the
11 state says you did commit assault and battery of a high
12 and aggravated nature on James Pierce. Do you understand
13 that charge and the possible penalty of ten years on
14 that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Of course, you don't have to
17 plead guilty to either one of these charges, Mr. Lozano.
18 You have an absolute right to a jury trial. Put the
19 state to the test. See if they can convince 12 jurors
20 that you're guilty beyond a reasonable doubt. Do you
21 understand that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: If you want a jury trial, you and
24 your attorney would help select a jury, 12 people, and
25 they would take an oath to decide your case based only on

1 the evidence presented against you in court. They cannot
2 convict you and I'm not going to sentence you to anything
3 unless all 12 members of the jury were convinced by the
4 evidence presented here in court that you were guilty
5 beyond a reasonable doubt.

6 Do you understand that?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: After having helped select the
9 jury, you and your attorney would participate fully in
10 the trial, cross-examine the state's witnesses, answer
11 questions to make sure they were telling the truth. You
12 could call witnesses and you could testify if you wanted
13 to, although you don't have to. Nobody can make you
14 testify against yourself.

15 Do you understand that?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Would you like to have a jury
18 trial?

19 THE DEFENDANT: No, sir.

20 THE COURT: How do you wish to plead?

21 THE DEFENDANT: Guilty.

22 THE COURT: Are you really guilty?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Has anybody promised you anything
25 or threatened you in any way to get you to plead guilty?

1 THE DEFENDANT: No, sir.

2 THE COURT: Are you pleading guilty then of
3 your own free will?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Well, I'm going to say right now
6 that earlier today, your lawyer and the state's lawyer
7 came to me in my office and discussed this situation with
8 me. They say that they have been negotiating about what
9 all happened. They've been talking for a long time about
10 your case. I didn't know anything about it until today,
11 but they've been talking for a long time, apparently, and
12 they have negotiated a sentence of the armed robbery of
13 ten years and also a sentence on the assault and battery
14 of a high and aggravated nature of ten years concurrent.

15 They asked me if I would agree to that. Of
16 course, it doesn't do any good for them to agree to it if
17 I don't agree to it, but after hearing from them and the
18 explanation of the facts, circumstances, background,
19 record, no record, all the different facts that go into
20 making up decisions like that, I agreed that I will give
21 you ten years on each of these concurrent.

22 So that has been agreed to. We'll have that
23 on the record so there wouldn't be any question about it.
24 Did your lawyer tell you that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: All right. So you know about
2 that.

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Understanding then, do you still
5 wish to waive your right to a jury trial and plead guilty
6 to these charges?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: All right. Solicitor, anything
9 else you want to tell me? I'll accept his pleas.

10 MR. LAWTON: Just for the record, Your Honor,
11 the armed robbery occurred in Charleston County.

12 THE COURT: Just for the record, because I've
13 heard from the codefendant a little while earlier, so I
14 know the facts pretty much, but we need to make the same
15 facts on the record.

16 MR. LAWTON: For the armed robbery, Your
17 Honor, this occurred on July 13, 2008 in Charleston
18 County on Johns Island. It occurred at the nighttime.
19 The victims were in a locked house, at their home, and
20 the defendant, along with two others, kicked in the door,
21 committing a burglary, and at least one of them was armed
22 with a pistol. A pocketbook was taken, along with credit
23 cards and a cell phone during the assault and home
24 invasion. The defendant was later in a show-up
25 identification identified by the victims, Your Honor.

1 As far as the ABHAN as mentioned, for the
 2 record, he has waived venue for Berkeley and has agreed
 3 to do it here in Charleston County, but that incident
 4 occurred on September 2nd, 2007, about 3:00 in the
 5 morning. He was involved with an attempted strong-arm
 6 robbery in Berkeley County. An eyewitness was attempting
 7 to write down the license tag of the fleeing vehicle the
 8 defendant was in, and a shot was fired from the vehicle
 9 and struck the victim in the leg.

10 That's all, Your Honor.

11 THE COURT: All right. Any record?

12 MR. LAWTON: 2003, burg second, as well as
 13 grand larceny, Your Honor.

14 THE COURT: All right. Mr. Crumrine, I know
 15 Mr. Tucker is here and has already had his say, so to
 16 speak, in regard to this. I certainly remember what you
 17 said in connection with the other defendant a little
 18 while ago, but I wanted to let you -- is there anything
 19 else you want to say in addition to what you've already
 20 told me earlier, I'll be glad to hear from you.

21 THE VICTIM: With all due respect to you
 22 again, Your Honor, this is also the guy that struck my
 23 son. I understand the sentencing you're handing down,
 24 and stuff like that, which -- it's not amounting up to
 25 what I think it should be. He's also the one who talked

1 to another of his cohorts, and he so nonchalantly said,
2 shoot him in his face. So I just want to bring that to
3 your attention.

4 THE COURT: All right. I appreciate that.
5 All right. Anything else from the state?

6 MR. LAWTON: No, Your Honor.

7 THE COURT: All right. We'll switch it to
8 the other side. What would you like to tell me on behalf
9 of your client?

10 MR. CRUMRINE: Yes, Your Honor. Since you
11 said you were agreeable and not wanting to gamble, I
12 don't want to go on too much, but let me tell you --

13 THE COURT: I appreciate that.

14 MR. CRUMRINE: -- David is very sorry, and
15 his family means the world to him. He wants to be out.
16 He has a four-year-old child and a three-year-old, both
17 sons. He wants to be part of their lives, and this plea
18 will give him a chance to teach them better.

19 His wife is here and his mothers and sisters
20 and you've heard them. They're very nice people, very
21 eloquent, always kind of don't want to gamble, having
22 been other family members go on because it's an emotional
23 thing, but I know they want to tell you they care for
24 David, they love him, and they want --

25 THE COURT: Mr. Lozano, anything you want to

1 say to me or anybody else present?

2 THE DEFENDANT: No, sir.

3 THE COURT: One second, Your Honor.

4 MR. CRUMRINE: Judge, would you hear his
5 , sister? Tell me your name again.

6 THE WITNESS: Tina Nelson. This here is my
7 kid brother, practically raised him, and, again, I just
8 want you to know you what you already heard and that he's
9 got a special needs child and a wife and two kids, and,
10 again, I'm thankful that the plea is not -- is reasonable
11 for what is going on. We're just here. We just want you
12 to know we're just here and he's been great. He's a
13 great uncle to my kids. I can't believe what he's being
14 accused of and what is happening.

15 THE COURT: What he did.

16 THE WITNESS: What he did, but I don't know
17 what was going on. David has always been there for the
18 children. He's always been there for my mother, his
19 wife, and I just ask that you understand that he needs to
20 come home so he can help his wife because we are taking
21 his role. His brother here is also helping.

22 THE COURT: All right. Well, as I said on
23 the other case, it's going to be important for y'all to
24 stay in touch and support him while he's serving this
25 time and when he gets out. There are a lot of good

1 things when you're serving this time, Mr. Lozano. I hope
2 you take advantage of what opportunities are available to
3 you.

4 MR. CRUMRINE: If I could say one more thing,
5 he has spent 763 days between two counties, Berkeley and
6 Charleston.

7 THE COURT: 763. All right. If there is
8 nothing further then, the sentence on each indictment is
9 that you be confined to the South Carolina Department of
10 Corrections for a period of ten years. Those sentences
11 are concurrent. You'll get credit for 763 days jail time
12 toward those sentences. Good luck to you.

13 ---
14 (Whereupon, the proceedings were concluded.)
15 ---
16
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25

I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 24th of February 2010.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 25, 2011



Circuit Court Reporter

gt
mc

STATE OF SOUTH CAROLINA)
)
County of B Charleston)

2011-CP-10-572
IN THE COURT OF COMMON PLEAS

David Lozano #292460)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

2011 JAN 25 AM 11:34
FILED
JULIE J. ARMSTRONG
CLERK OF COURT
BY

APPLICATION FOR
POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Allendale Correctional Inst.

2. Name and location of Court which imposed sentence Charleston, S.C. 29401

3. Name(s) of co-defendant(s) (if any) Filiberto Esparza, Kent Steven Gudzinski

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008GS1009357
 - (b) 2007GS082409

- (b) _____
- (c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

- (a) Feb. 24, 2008
- (b) 10 yrs Volent
- (c) _____

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

No

8. If you answered "yes" to (7), list:

- (a) the name of each Court to which you appealed:
 - i. _____
 - ii. _____
 - iii. _____
- (b) the result in each such Court to which you appealed:
 - i. _____
 - ii. _____
 - iii. _____
- (c) the date of each such result:
 - i. _____
 - ii. _____
 - iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. _____
 - ii. _____
 - iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) Ineffective assistance of Counsel

- (b) _____
- (c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance of Counsel
- (b) _____
- (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) failure to represent applicant to the best of his ability
- (b) failure to prepare a proper defense
- (c) failure to explain lesser included offense

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Ineffective Assistance by Counsel

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? yes

(b) your trial, if any? None

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. John D. Crumrine

147 Wappoo Creek Dr. Suite 303

ii. Charleston, SC 29412

iii. _____

(b) the proceedings at which each such attorney represented you:

i. _____

ii. _____

iii. _____

19. State clearly the relief you seek in filing this application:

I would like for my case to be overturned
or at least be afforded the same opportunity
as my Co-defendant.

20. Are you now under sentence from any other court that you have not challenged?

No

Revised 3/2003

STATE OF SOUTH CAROLINA)
County of Allendale)

VERIFICATION

I, David Lozano, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

David Lozano

SWORN to and subscribed before me this 19
day of January, 2011.

Helen P. Freeman (L.S.)
Notary Public

My Commission Expires: 5/18/14

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, David Lozano, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

David Lozano
Applicant

SWORN or affirmed to and subscribed before me this

19 day of January, 2014.

Hilda P. Luoma
Notary Public

My Commission Expires: 5/18/14

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON)	
)	2011-CP-10-572
David Lozano, #292460,)	
)	
Applicant,)	
)	
v.)	RETURN
)	
State of South Carolina,)	
)	
Respondent.)	

The Respondent, making its Return to the application for post-conviction relief (PCR) filed January 25, 2011, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Applicant was indicted at the December 2008 term of the Charleston County Grand Jury for armed robbery (2008-GS-10-9357). John Crumrine, Esquire, represented him. On February 24, 2010, Applicant pled guilty as indicted. Pursuant to a negotiated plea agreement, the Honorable Thomas L. Hughston, Jr. sentenced him to confinement for ten (10) years. Applicant did not appeal the plea or sentence.

Attached herewith and incorporated herein are the records of the Charleston County Clerk of Court regarding the subject conviction, the records of the South Carolina Department of Corrections, and the guilty plea transcript.

II.

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

1. Ineffective assistance of plea counsel in that counsel
 - a. Failed to represent Applicant to the best of his ability.
 - b. Failed to prepare a proper defense.
 - c. Failed to explain lesser-included offense.

III.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for

counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent denies each allegation that is not expressly admitted, qualified, or explained.

V.

WHEREFORE, the State requests an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

By: Math J. Friedman
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

April 6, 2011.

STATE OF SOUTH CAROLINA)	
)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON)	
David Lozano,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 11-CP-10-0572
)	
State of South Carolina,)	
)	
Defendant.)	

TRANSCRIPT OF HEARING

The within Hearing was held on July 18, 2011, before The Honorable R. Markley Dennis, Jr. in Courtroom 4C of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by Counsel, as follows:

APPEARANCES:

T. Scott Forster, Esq.
SEIBELS LAW FIRM
127 King Street, Suite 100
Charleston, SC 29401
Appearing for Applicant

Matthew Friedman, Esq.
OFFICE OF ATTORNEY GENERAL
P O Box 11549
Columbia, SC 29211-1549
Appearing for State of South Carolina

DEBORAH GARRISON
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 901
Johns Island, South Carolina 29457
dGarrison@sccourts.org

Davis Lozano v State of South Carolina

2

Case No. 11-CP-10-0572

Hearing of July 18, 2011

Before The Honorable R. Markley Dennis, Jr.

1 THE COURT: You are Mr. Forster?

2 MR. FORSTER: Yes, sir.

3 THE COURT: You are David Lozano?

4 APPLICANT: Yes, sir.

5 THE COURT: Mr. Lozano, I've been

6 handed a packet. I'm sure that you have

7 discussed with your lawyer what your options

8 are here today, or what my options are.

9 APPLICANT: (Affirmative nod).

10 THE COURT: One of the things that I

11 want to assure you -- because -- the only

12 reason that I do this, and I am not suggesting

13 that you don't know it, but I -- I just want to

14 reiterate it because when I was practicing law

15 I had the pleasure of representing some

16 applicants in my practice. Since I've been a

17 judge for seventeen years, I've had several

18 come and they were under the mistaken

19 impression that they could have their sentence

20 reduced or modified in some fashion. I can't

21 do that. All I can do is to return to you to

22 basically what I call square one. That means

23 that any deals or benefits that you received

24 before today concerning this charge, or

25 charges, would all be washed away, wiped clean,

Davis Lozano v State of South Carolina

Case No. 11-CP-10-0572

Hearing of July 18, 2011

Before The Honorable R. Markley Dennis, Jr.

1 and you would start over. So -- I don't know
2 anything about this case other than what --
3 that it is on the docket, but I just want that
4 to be stated on the record. You understand
5 that, sir? And you want to go forward with
6 this application?

7 APPLICANT: Yes, sir. I understand.

8 THE COURT: Very well. I will be
9 happy to hear from you, Mr. Forster. You may
10 call your first witness.

11 MR. FORSTER: Thank you, Your
12 Honor.

13 THE COURT: This is a trial or this
14 is a Motion?

15 MR. FRIEDMAN: This is a trial,
16 Your Honor.

17 THE COURT: Okay.

18 MR. FORSTER: We call David
19 Lozano.

20 THE COURT: All right.

21 (WITNESS TAKES STAND)

22 DAVID LOZANO, being duly sworn to tell
23 the truth, the whole truth and nothing but the
24 truth, testified, as follows:

25 DIRECT EXAMINATION

Davis Lozano v State of South Carolina

4

Case No. 11-CP-10-0572

Hearing of July 18, 2011

Before The Honorable R. Markley Dennis, Jr.

1 BY MR. FORSTER:

2 Q. Mr. Lozano, will you tell the court what
3 crimes you are currently serving time for right
4 now?

5 A. Armed robbery and an ABHAN.

6 Q. What sentence did you receive for each one
7 of those crimes?

8 A. Ten years sentences, concurrent, for both.

9 Q. Did you receive ten years for each one?

10 A. Yeah. Ten years, concurrent.

11 Q. Were you tried and found guilty or did you
12 plead guilty to both of these crimes?

13 A. Plead guilty.

14 Q. Who was your defense attorney who
15 represented you at the guilty plea?

16 A. John Crumrine.

17 Q. Did Mr. Crumrine go over with you the
18 evidence that the State had against you for
19 both of these crimes?

20 A. Yeah, we discussed it.

21 Q. Did he discuss with you the problems that
22 the State had with both of these crimes?

23 A. Yes, sir.

24 Q. As far as proving them?

25 A. Yes, sir.

1 Q. Would you give the Court kind of a
2 background as to what some of these problems
3 were?

4 A. More identification, shoe prints,
5 fingerprints, the showup, lineup when we got
6 pulled over.

7 Q. Let's start from the very beginning. The
8 armed robbery, can you briefly describe what
9 the allegations were that were made against
10 you, that you pled guilty to?

11 A. More they said that I was guilty of
12 breaking into someone's house, armed robbing
13 them. Then about twenty or thirty minutes
14 later, we got pulled over and they did a show-
15 up lineup. One of the victims said that he
16 wasn't real sure about me. But they still
17 locked me up and charged me with it.

18 The description, they were looking for a
19 man six feet, two hundred eighty pounds and a
20 smaller guy, 5'4", one hundred forty pounds. I
21 am 5'6"/180.

22 Q. So there were some issues with the
23 identification?

24 A. Yes, sir.

25 Q. Were there other individuals involved in

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1 the armed robbery?

2 A. Yes, sir.

3 Q. Who were those individuals?

4 A. Filaberto Esposia (phonetic) and Ken
5 Kysinski (phonetic).

6 Q. What sentence did those two individuals
7 receive for the armed robbery?

8 A. Kysinski's charges were dropped and
9 Filaberto received a ten-year nonviolent
10 offense.

11 Q. Did he plead guilty to strong armed
12 robbery?

13 A. Yes, sir.

14 Q. How did you find out about Filaberto's
15 sentence?

16 A. Well, my lawyer briefly discussed it with
17 me before I pleaded guilty. Filaberto can back
18 in after pleading guilty, he told me that he
19 received a ten-year nonviolent offense.

20 Q. So did you find out the same day that you
21 pled guilty what Filaberto had pled guilty to?

22 A. Yes, sir.

23 Q. Just to be sure, when -- were you walking
24 into the courtroom to plead guilty when you
25 found out about Filaberto's plea deal?

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1 A. Well, when walked in, I was coming out and
2 he told me then.

3 Q. When he was walking into the back after he
4 had pled guilty ---

5 A. Yes, sir.

6 Q. --- and you were walking out to the
7 courtroom to plead guilty, that's when you
8 found out?

9 A. Yes, sir.

10 Q. Did your lawyer talk to you about
11 Filaberto's plea deal before you pled guilty?

12 A. Yeah, he briefly discussed it with me
13 before I came to plead guilty.

14 Q. What did he talk to you about it?

15 A. In the booth before I came in here to
16 plead guilty.

17 Q. The same day, right before you pled
18 guilty?

19 A. Yes, sir.

20 Q. Did you feel that you firmly understand
21 the implication of Filaberto's plea before you
22 pled guilty?

23 A. If I fully what?

24 Q. If you understood what the implication of
25 Filaberto pleading to a strong arm robbery,

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1 what that did to your armed robbery plea? Did
2 you understand that before you pled guilty?

3 A. Nuh-uh, (negative gesture).

4 Q. If you had known beforehand about
5 Filaberto's plea deal, would you have pled
6 guilty that day?

7 A. No. No, sir.

8 Q. Why not?

9 A. Well, because basically he received a ten-
10 year nonviolent offense (sic) and he was the
11 principal in the crime and received a
12 nonviolent offense. I was just merely present
13 and received a ten violent. I would have never
14 pleaded guilty because if I would have known
15 the two charges that were being held against
16 me, that was I was still innocent of, if I
17 would have known them two charges, I would have
18 handled them at a separate time. And if I
19 could have plead guilty to a strong arm
20 robbery, a ten year nonviolent offense, I would
21 never have pleaded guilty to the violent
22 offense.

23 Q. Did the knowledge that Filaberto got a
24 better plea deal, did that -- did that affect
25 your opinion of the State's evidence against

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1 you?

2 A. Yes, sir.

3 Q. How did it affect your opinion of the
4 State's evidence?

5 A. Well, because if we're charged with the
6 same crime and everything derived from one
7 incident and he's being charged with a non-
8 violent offense, why is it that I am being
9 charged with a violent offense?

10 Q. Just to be clear, would you have pled
11 guilty that day if you had known about
12 Filaberto's plea deal before you pled guilty?

13 A. No, sir.

14 Q. Would you have gone to trial on both of
15 separate charges, the armed robbery charge and
16 the ABHAN charge, if you had known about
17 Filaberto's plea deal?

18 A. Yes, sir.

19 Q. This is the last time that you've got to
20 say anything to the Judge. Is there any other
21 argument that you want to make to him about
22 this case?

23 A. Well, lately I've been in the law library
24 and I was reading under the Fourteenth
25 Amendment, equal protection of the laws, and I

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1 just wanted to know what was the rational basis
2 that the Solicitor's disparately treated us.
3 Basically what it says under the equal
4 protection of the law ---

5 THE COURT: That is not an
6 appropriate question for him. That is an
7 improper question.

8 APPLICANT: Well, I just wanted ---

9 THE COURT: No, sir. Listen. You
10 don't ask questions. You answer questions.
11 Okay? That's what you are here today? Okay.
12 Testify. All right. Thank you, sir. If your
13 lawyer asks you a question, answer the
14 question.

15 APPLICANT: If you ---

16 THE COURT: I am not going to allow
17 him to make a statement in argument, Mr.
18 Forster. It's just inappropriate. Thank you.

19 APPLICANT: I ---

20 EXAMINATION CONTINUED

21 BY MR. FORSTER:

22 Q. Mr. Filaberto -- excuse me, Mr. Lozano.
23 Do you feel that you were given equal
24 protection by the State, if you ---

25 A. No, sir.

1 Q. --- pled guilty to the same crime that Mr.
2 Filaberto had pled guilty to?

3 A. No, sir.

4 MR. FRIEDMAN: Objection, Your
5 Honor.

6 THE COURT: Sustained. Mr. Forster,
7 you're a lawyer. You better be careful what
8 you ask, questions that are not really founded.
9 You know that's not correct and you know that
10 doesn't apply in a situation like this.

11 MR. FORSTER: Yes, Your Honor.

12 THE COURT: All right, you have --
13 you took an oath just as I did, sir.

14 DIRECT EXAMINATION CONTINUED

15 BY MR. FORSTER:

16 Q. Mr. Lozano, do you feel that you were
17 prejudiced by not knowing about Filaberto's
18 charge before you pled guilty?

19 A. Yes, sir.

20 Q. And to be clear, would you have gone to
21 trial on these charges if you had known
22 beforehand ---

23 THE COURT: You've covered that,
24 please.

25 MR. FORSTER: That's all the

1 questions that I have, Your Honor.

2 THE COURT: Cross-examine.

3 MR. FRIEDMAN: Thank you.

4 CROSS EXAMINATION

5 BY MR. FRIEDMAN:

6 Q. Mr. Lozano, you pled guilty; is that
7 right?

8 A. Yes, sir.

9 Q. Do you remember telling the plea court
10 that you understood the nature of the charges
11 and the possible punishments?

12 A. Yes, sir.

13 Q. I believe the punishment for armed robbery
14 is ten to thirty years; is that right?

15 A. Yes, sir.

16 Q. You received ten years. Is that right?

17 A. Yes, sir.

18 Q. You told the Court that you understood
19 your Constitutional rights, including your
20 right to a jury trial. Do you remember that?

21 A. Yes, sir.

22 Q. You also told the Court that you were in
23 fact guilty of these offenses, is that right?

24 A. Yes, sir.

25 Q. Do you remember telling the Court that no

1 one promised you anything or threatened you
2 with anything to get you to plead guilty?

3 A. Yes, sir.

4 Q. You also told the Court that you were
5 pleading guilty of your own free, is that
6 right?

7 A. Yes, sir.

8 Q. You also told the Court that you
9 understood the terms of the negotiated
10 sentence?

11 A. Yes, sir.

12 Q. Ten years?

13 A. That's right.

14 Q. Did you have a prior record before this
15 incident?

16 A. I had a YOA that I did in 2003 and was
17 release '04. I was released 2004.

18 Q. Did you discuss your prior record with
19 your attorney before the plea?

20 A. Yes, sir.

21 MR. FRIEDMAN: I have nothing
22 further.

23 THE COURT: Redirect.

24 MR. FORSTER: No, Your Honor.

25 THE COURT: Just to be sure that I

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1 understand, Mr. Lozano, because we had this
2 conversation -- you understand and you answered
3 that you understood that, and I've read your
4 plea, the transcript of your plea before Judge
5 Hughston. You understand that the minimum
6 sentence that Judge Hughston could impose was
7 ten years?

8 APPLICANT: Yes, sir.

9 THE COURT: That he didn't have an
10 option?

11 APPLICANT: Yes, sir.

12 THE COURT: Okay. And you
13 understood that it was a negotiated sentence?

14 APPLICANT: Yes, sir.

15 THE COURT: Which means that you
16 participated in the sentencing through your
17 lawyer, is that correct?

18 APPLICANT: That's correct.

19 THE COURT: Okay. Thank you, sir.
20 Any additional questions based on the Court's
21 inquiries?

22 MR. FORSTER: No, Your Honor.

23 THE COURT: Thank you so much, sir.
24 You may step down.

25 (WITNESS STEPS DOWN)

1 THE COURT: Call your next witness.

2 MR. FORSTER: That is the only
3 witness we will call, Your Honor.

4 THE COURT: Does the State have any
5 witnesses?

6 MR. FRIEDMAN: Yes, sir. The
7 State would call John Crumrine.

8 (WITNESS TAKES STAND)

9 JOHN D. CRUMRINE, being duly sworn to
10 tell the truth, the whole truth and nothing but
11 the truth, testified, as follows:

12 DIRECT EXAMINATION

13 BY MR. FRIEDMAN:

14 Q. Good morning, Mr. Crumrine.

15 A. Good morning.

16 Q. How long have you been practicing law?

17 A. It's thirty-two years now.

18 Q. Were you appointed or retained in this
19 case?

20 A. I was appointed.

21 Q. Do you remember about how many times you
22 met with the Applicant prior to the plea?

23 A. I don't have an estimate but it was, uh,
24 more than a handful. And we also talked on the
25 telephone quite often.

1 Q. Do you recall if you discussed the
2 elements of the charges that the State was
3 required to prove?

4 A. Yes.

5 Q. Did you discuss potential defenses with
6 him?

7 A. We did.

8 Q. I believe that it was a negotiated
9 sentence, is that correct?

10 A. It was, yes, sir.

11 Q. Did you explain to him what that means?

12 A. I did.

13 Q. Did you ever have any discussion with the
14 Solicitor about pleading to a strong armed
15 robbery?

16 A. Yes. We were trying hard to get the same
17 deal that Filaberto had and, uh, was not
18 successful in convincing the solicitor.

19 Q. Do you recall if you discussed the
20 Applicant's prior record with him?

21 A. Right now I can't recall exactly whether
22 it was one thing or a combination, but it was
23 either that David's record was worse or that he
24 had two other cases pending. I don't know how
25 many Filaberto had or whether it was -- there

1 is also a factor that one of the witnesses had
2 said that they were ninety-nine-point-nine
3 percent certain that David was one of the
4 people who did this. But it was either one or
5 a combination of things in there that, uh, that
6 the solicitor didn't feel that he deserved the
7 same break that Filaberto had.

8 Q. Did you discuss the showup lineup with the
9 Applicant?

10 A. Yes, and I agreed with him that it was a
11 very weak showup lineup.

12 Q. Did you inform the Applicant of the
13 consequences of the plea?

14 A. Yes.

15 Q. Whose decision was it to plead guilty?

16 A. Ultimately it was David's decision.

17 MR. FRIEDMAN: I have nothing
18 further.

19 THE COURT: Cross-examine.

20 MR. FORSTER: Yes, sir.

21 CROSS EXAMINATION

22 BY MR. FORSTER:

23 Q. Mr. Crumrine, do you remember if you
24 talked with David about Filaberto's plea
25 sentence, plea deal?

1 A. Well, I don't recall specifically
2 conversation. He testified that we talked
3 about it just before the plea. It sounds
4 right. I can't remember where or when but I
5 -- I know that I was aware of the deal and I
6 was trying to get David the same deal.

7 MR. FORSTER: Thank you.

8 THE COURT: Any additional
9 questions?

10 MR. FRIEDMAN: Nothing further.

11 THE COURT: Thank you, you may step
12 down.

13 (WITNESS STEPS DOWN)

14 THE COURT: Any additional
15 witnesses?

16 MR. FRIEDMAN: No other witnesses
17 for the State.

18 THE COURT: Any reply testimony?

19 MR. FORSTER: No, Your Honor.

20 THE COURT: I will be delighted to
21 hear from you, sir, in closing arguments?

22 MR. FORSTER: Your Honor, we are
23 asking this Court to find in favor of David
24 based on his involuntary plea. The argument is
25 that if he had known about Filaberto's plea

1 deal before he pled that that would have
2 affected whether or not he decided to go
3 forward with the plea. He didn't know about
4 that fully before he pled. If he had known
5 about it before he pled, he would have gone
6 more with trial on both of these charges. We
7 believe that he was prejudiced by not knowing
8 it and that it was an error on Mr. Crumrine's
9 part to not fully inform about the codefendants
10 plea deal.

11 MR. FRIEDMAN: Just briefly, Your
12 Honor, the State would submit that the
13 Applicant has failed to meet his burden.
14 Counsel testified that he tried to get a plea
15 to strong arm robbery, that the codefendant got
16 the same deal, but that the solicitor was not
17 agreeable to that. Whether it was based on the
18 Applicant's pending charges or his prior
19 record. The record reflects that the plea was
20 entered freely and voluntarily. He testified
21 that no one had threatened him or promised him
22 anything, that he was pleading guilty of his
23 own free will. That he understood the terms of
24 the negotiated sentence. For those reasons we
25 would ask the Court to deny Mr. Lozano's

1 application.

2 THE COURT: Response?

3 MR. FORSTER: No, Your Honor.

4 THE COURT: I find the record of
5 this proceeding, including the review of the
6 transcript of all the testimony, that the
7 Applicant has failed to meet his burden of
8 proof as to either prong.

9 I understand his frustration. It's
10 something that has existed for the entire time
11 that I practiced law and been involved in the
12 legal profession, since 1973. It's the
13 solicitor's call as to whether or not they want
14 to offer. There is no "right" to have a plea
15 to a lesser-included offense. You can have a
16 trial and if you put in evidence that could
17 refute that or raise the issue of a strong-arm
18 robbery, then you could. But you'd run the
19 risk, obviously, of facing a sentence of thirty
20 years. Even consecutive sentences.

21 Given the testimony of the victim in
22 the case, who was obviously not very satisfied
23 with the State's handling of it, -- in fact,
24 clearly Mr. Crumrine did a superb job in
25 getting and in obtaining for you a minimum

1 sentence. I mean, it just -- that didn't just
2 happen. That's something that -- because the
3 solicitor really generally is very reluctant to
4 go against what the victims want.

5 This solicitor made a call and -- I
6 would suggest that it had to do with Mr.
7 Crumrine's involvement, some of the issues that
8 you mentioned about identification and
9 certainly those are motivating factors and I am
10 not suggesting that. That is a big risk.

11 You know that and he -- this
12 defendant, I don't find his testimony to be
13 credible on that particular issue, that he
14 would have gone to trial. He's very savvy,
15 he's been involved in the process before. He
16 understands how it works. For those reasons
17 the Court finds that he has failed to meet his
18 burden, and I ask the State to please prepare
19 the appropriate Order. I would like to receive
20 it within thirty days.

21 Thank you.

22 (HEARING CONCLUDED)

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CERTIFICATE OF REPORTER

I, the undersigned, Deborah Garrison,
official court reporter for the 9th Judicial
Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true,
accurate and complete transcript of the hearing
held before The Honorable R. Markley Dennis,
Jr., on July 18, 2011;

I further certify that I am neither kin
nor counsel to any of the parties and have no
interest in the outcome of this action.



Deborah Garrison
Circuit Court Reporter
9th Judicial Circuit

Charleston, South Carolina
September 28, 2011

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 David Lozano, #292460,)
)
 Applicant,)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 2011-CP-10-572

ORDER OF DISMISSAL

FILED
 2011 FEB 22 2 00 PM
 CLERK OF COURT FROM

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 25, 2011. The Respondent made its Return on April 6, 2011. An evidentiary hearing into the matter was convened on July 18, 2011 at the Charleston County Courthouse. The Applicant was present at the hearing and was represented by T. Scott Forster, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

Applicant and plea counsel, John Crumrine, Esquire, testified at the PCR hearing. This Court had before it the guilty plea transcript, the records of the Charleston County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the PCR application, and Respondent's Return thereto.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the December 2008 term of the Charleston County Grand Jury for armed robbery (2008-GS-10-9357). John Crumrine, Esquire, represented the Applicant. On February 24, 2010,

RMDA/1

the Applicant pled guilty as indicted. Pursuant to a negotiated plea agreement, the Honorable Thomas L. Hughston, Jr. sentenced him to confinement for ten (10) years. The Applicant did not appeal the guilty plea or sentence.

ALLEGATIONS

The Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel in that counsel
 - a. Failed to represent Applicant to the best of his ability.
 - b. Failed to prepare a proper defense.
 - c. Failed to explain lesser-included offense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court had the opportunity to review the record in its entirety and hear the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court 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).

The Applicant testified that he plead guilty to armed robbery and ABHAN and was given concurrent ten (10) year sentences. The Applicant testified that he and his plea counsel did discuss the evidence against him and problems with the evidence.

The Applicant testified that he had two co-defendants; one of them had his charges dropped and the other was given a ten (10) year non-violent sentence to strong arm robbery. The Applicant testified that he found out about his co-defendant's sentence the day the Applicant was scheduled to plead guilty. The Applicant testified that he discussed his co-defendant's sentence with his plea counsel but that he did not understand his co-defendant's plea deal. The Applicant testified that he would not have pled guilty to a violent offense if he understood his co-

RMDH/2

defendant's plea deal. The Applicant testified that he would have gone to trial on both charges.

Applicant testified that, at his plea, he understood the charges against him and the punishment for those charges. The Applicant testified that he received ten (10) years out of a ten (10) to thirty (30) potential sentence range. The Applicant testified that he understood that he entered into a negotiated plea. The Applicant testified that he had a prior record and he discussed his record with plea counsel.

Plea counsel testified that he met with the Applicant more than a handful of times and also talked with the Applicant over the telephone often. Plea counsel testified that he and the Applicant discussed elements of the crime, potential sentences, a negotiated sentence and the consequences involved in one. Plea counsel testified that he tried to get the Applicant the same plea offer as his co-defendant, but the State would not make the same offer. Plea counsel testified that one of the witnesses was 99.9% sure the Applicant was the principal actor in the crime so the Solicitor would not offer Applicant the same deal as his co-defendant. He also testified that he and the Applicant discussed Applicant's prior record, the evidence against him, and consequences of his plea agreement. Plea counsel testified that he discussed the co-defendant's plea deal with the Applicant.

Ineffective Assistance of Counsel

The Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be

relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The applicant must overcome this presumption in order to receive relief. Cherry, 386 S.E.2d 624.

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Id. at 625 (citing Strickland, 466 U.S. 668). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). When there has been a guilty plea, the applicant must prove that counsel’s representation was below the standard of reasonableness and that, but for counsel’s unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When

determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)). When a defendant pleads guilty on the advice of counsel, the plea may only be attacked through a claim of ineffective assistance of counsel. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2002) (citations omitted).

This Court finds that counsel's testimony is credible. This Court finds that counsel is a trial practitioner who has experience in the trial of serious offenses. Counsel conferred with the Applicant on numerous occasions, both in person and over the telephone. During conferences with the Applicant, counsel discussed the pending charges, the elements of the charges and what the State was required to prove, Applicant's constitutional rights, Applicant's version of the facts, and possible defenses or lack thereof. This Court finds that the record reflects that Applicant's plea was entered freely, voluntarily, knowingly, and intelligently. Applicant acknowledged that he understood the possible punishments for armed robbery. (Plea transcript p. 2, l. 3). He told the court that no one had threatened him or promised him anything to get him to plead guilty. (Plea transcript p. 4, l. 24). He admitted that he was, in fact, guilty of this offense. (Plea transcript p. 4, l. 22). Applicant told the court that he was pleading guilty of his own free will. (Plea transcript p. 5, l. 2). Applicant told the court that plea counsel told him the terms of the negotiated sentence. (Plea transcript p. 5, l. 24). This Court finds that it was Applicant's decision to plead guilty with a full understanding of the consequences of the plea.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that Applicant's attorney

RMDA/5

demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation. He obtained a favorable sentence for Applicant considering the circumstances and bad facts in this case. This Court finds counsel's testimony credible that he was unable to obtain the same plea that the Applicant's co-defendant was given. This Court also finds counsel's testimony credible that he discussed the co-defendant's plea agreement with the Applicant, including the lesser-included offense that was part of that agreement. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test, specifically that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that counsel committed either errors or omissions in his representation of the Applicant. The Applicant failed to show that counsel's performance was deficient. This Court also finds the Applicant has failed to prove the second prong of Strickland, specifically that he was prejudiced by plea counsel's performance. Applicant's complaints concerning counsel's performance are without merit and are denied and dismissed.

Equal Protection

RMB/CL

The Applicant alleges that his sentence was a denial of equal protection under the law in violation of the United States Constitution. This Court finds such an allegation is not a valid PCR argument. Therefore, this allegation is denied.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

IT IS THEREFORE ORDERED:

RMD/7

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

AND IT IS SO ORDERED this 17th day of February, 2011.

151 R. Markley Dennis, Jr.
 R. Markley Dennis, Jr.
 Presiding Judge
 9th Judicial Circuit

Mounts Lurue, South Carolina.

~~ATTORNEY AT LAW~~
JULIE J. ARMSTRONG (SEAL)
 CLERK, C.F. & F.C.
 By [Signature]
 DEPUTY CLERK

RMDF/8

NSW20080704258

WITNESSES

Charleston City Police Department

AGENCY CASE NUMBER

0814017

ARREST WARRANT NUMBER

K350433

DATE OF ARREST

July 13, 2008

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

DEC 08 2008

Date:

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2008GS1009357

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

December Term 2008

THE STATE

vs.

DAVID LOZANO JR

DOB:

W/M

Indictment for

Armed Robbery

FILED

2008 DEC 12 PM 3:25

JULIE J. ARMSTRONG
CLERK OF COURT

BY

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

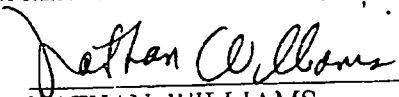
INDICTMENT

At a Court of General Sessions, convened on December 8, 2008 the Grand Jurors of Charleston County present upon their oath:

Armed Robbery

That on or about July 13, 2008, in Charleston County, South Carolina, at Island Estates Drive, Charleston, alone or while acting with others, by use of force, threats or intimidation and while armed with a deadly weapon, to wit: a pistol, the Defendant, DAVID LOZANO JR. did take and carry away goods and/or monies from the person or immediate presence of Forrest Tucker and/or Karen Tucker and/or Victoria Tucker and/or Christin Tucker and/or Kelly Sides with the intent to permanently deprive them of possession thereof, in violation of Section 16-11-330(A) of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


 NATHAN WILLIAMS
 ASSISTANT SOLICITOR