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JOHN M. TATUM, III
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J. SAM SCOVILLE
KEVIN E. DUKES

November 22, 2013

Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Notice of Appeal
Dominic Gilbert vs. State of South Carolina
Post-Conviction Relief Case #2012-07-2600

Dear Clerk:

I am the court appointed attorney for the Petitioner/Appellant in this appeal from a denial of his PCR. Enclosed please find for filing the Notice of Appeal, Proof of Service on the Attorney General, and the Order of Dismissal appealed from.

As I am court appointed, it is my understanding that the Office of Appellate Defense will handle this matter.

Sincerely,

HARVEY & BATTEY, P.A.

John M. Tatum, III

JMT,III/kmp
cc: Ashleigh Wilson, Office of the Attorney General
Dominic Gilbert
Jeri Roseneau, Beaufort County Clerk of Court
Kimberly McCall, SC Appellate Defense

THE SOUTH CAROLINA SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Deadra L. Jefferson, Judge

Case No. 2012-CP-07-2600

Dominic Gilbert #350007, Appellant,

v.

State of South Carolina, Respondent

Notice of Appeal

Appellant appeals the Order of Dismissal of the Honorable Judge Deadra Jefferson dated November 8, 2013 which was placed in the mail November 18, 2013 to appellant's counsel. Written notice of the order was received by appellant's counsel on November 19, 2013.

John M. Tatum, III, Esquire
Harvey & Battey, P.A.
Post Office Drawer 1107
Beaufort, SC 29901
(843)-524-3109
Court Appointed Attorney for PCR Petitioner/Appellant

November, 22, 2013

Other Counsel of record:
Ashleigh R. Wilson, Esquire
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THE SOUTH CAROLINA SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Deadra L. Jefferson, Judge

Case No. 2012-CP-07-2600

Dominic Gilbert #350007, Appellant,

v.

State of South Carolina, Respondent

Proof of Service

I certify that I have served Appellant's Notice of Appeal by depositing a copy of it in the United States Mail, postage prepaid, on November 22, 2013, addressed as follows:

Ashleigh R. Wilson, Esquire
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

John M. Tatum, III, Esquire
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Court Appointed Attorney for PCR Petitioner/Appellant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	2012–CP–07–2600
	)	
Dominic Gilbert, #350007,	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	John M. Tatum, III, Esquire
Respondent's Attorney:	Ashleigh R. Wilson, Esquire
Plea Counsel:	Helen Roper Dovell, Esquire
Date of Hearing:	August 30, 2013
Court Reporter:	Susan "Mia" Perron

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 16, 2012. The Respondent made its Return on February 25, 2013. An evidentiary hearing into the matter was convened on August 30, 2013 at the Beaufort County Courthouse. The Applicant was present at the hearing and represented by John M. Tatum, III, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

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

1 of 13

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Beaufort County. The Applicant was indicted at the January 2011 term of the Beaufort County Grand Jury for Attempted Murder[1] (2010–GS–07–2391) and Possession of a Sawed Off Shotgun[2] (2010–GS–07–2392). Helen Roper Dovell, Esquire, represented the Applicant. The Applicant pled guilty to Assault and Battery of a High and Aggravated Nature (ABHAN)[3] a lesser included offense of Attempted Murder. The State *nolle prossed* the weapons charge in exchange for the Applicant's guilty plea. On February 27, 2012, the Honorable Roger M. Young, Sr. sentenced the Applicant to eight (8) years confinement. The Applicant did not appeal the conviction or sentence.

ALLEGATIONS

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

1. Ineffective inadequate representation.
2. Denial of fundamental fairness essential to the concept of justice.
3. Fraud, dishonesty, and deceit.

At the evidentiary hearing, the Applicant alleged the following:

1. Ineffective assistance of counsel.
    a. Counsel failed to advise the Applicant of his right to appeal.
2. Involuntary guilty plea.

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[1] Attempted Murder is a violent, most serious felony punishable by imprisonment for not more than thirty (30) years, none of which sentence may be suspended, nor probation granted. S.C. CODE ANN. § 16–3–29 (2010).
[2] Possession of Unlawful Weapons, such as a Sawed Off Shot Gun, is a felony punishable by not more than ten (10) years imprisonment or a maximum fine of ten-thousand dollars ($10,000), or both. S.C. CODE ANN. § 16–23–260 (1993).
[3] Assault and Battery of a High and Aggravated Nature is a violent, serious felony punishable by imprisonment for not more than twenty (20) years. S.C. CODE ANN. § 16–3–600(B)(2) (2011).

This Court finds all allegations other than those raised at the evidentiary hearing were abandoned by the Applicant because he failed to present any argument or testimony in support of those arguments.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard 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).

Summary of the Testimony

The Applicant was present at the hearing and testified he was originally charged for Attempted Murder, Attempted Armed Robbery, and Possession of a Sawed Off Shotgun. He testified he was represented by Helen Roper Dovell, Esquire. The Applicant testified he met with counsel over five (5) times over a period of fifteen (15) months prior to pleading guilty. He testified they discussed possible defenses and potential leads and witnesses. He testified he went over part of the discovery with his attorney.

The Applicant testified he spoke with counsel about going to trial. He testified he wanted to go to trial, but counsel advised him to plead guilty. He testified that after speaking with counsel about the State's plea offer, he discussed the plea offer with his mother, brother, and another attorney and that none of his co-defendants had requested a trial. The Applicant testified he ultimately decided to plead guilty although his attorney was aware of his unhappiness with his plea deal. He testified it was "kind of sort of" his decision to plead guilty. The Applicant

testified he recalled telling the plea court he was guilty, waiving his constitutional rights, and telling the court he was satisfied with his attorney's representation. He also testified that he requested a jury trial during the course of his guilty plea.

The Applicant testified counsel did not advise him of his right to appeal. He testified he asked counsel to appeal his case before, during, and after pleading guilty. The Applicant claimed that he would have appealed had he known he could have withdrawn his plea during the colloquy and that he wanted to withdraw his guilty plea because the forensics in his case proved he was not guilty. At the hearing, the Applicant claimed that he did not tell the plea court that he had not been promised anything to plead guilty.

Helen Roper Dovell, Esquire, also testified at the hearing. She testified she has been practicing law for nine (9) years and has spent six (6) of those years in criminal defense. She testified she was appointed to represent the Applicant as an Assistant Public Defender. Counsel testified she met with the Applicant six (6) to ten (10) times prior to his plea. She testified she filed Brady and Rule 5 motions on the Applicant's behalf as well as a supplemental Rule 5 motion in order to discover the DNA evidence. She testified she filed the supplemental Rule 5 to also obtain a DNA expert. She testified she reviewed all the discovered material with the Applicant but did not provide him all the raw DNA data because she doubted the Applicant would understand the data without the help of an expert. Counsel further testified that she did not understand the raw DNA data without the assistance of the expert explaining it to her.

Counsel testified she discussed with the Applicant the elements of the charge and what the State was required to prove, range of penalty, the Applicant's version of the facts, and possible defenses including self-defense, which would have been the Applicant's only defense, but only if evidence the alleged victim was armed became admissible. She further testified that

4 of 13

self-defense was not really a viable defense available to the Applicant. She testified the State had strong evidence against the Applicant. She testified that she investigated all witnesses and leads given to her. Counsel testified she felt strongly the Applicant would be convicted at trial.

Counsel testified she hired an expert to explain the DNA evidence in the case. She further testified that she hired a crime scene expert to reconstruct the crime scene. She testified she could have challenged the way the incident occurred, but the DNA did not exculpate the Applicant and the expert's testimony at trial would not have exonerated the Applicant. The Applicant tested positive for GSR and his DNA was present on the shotgun's trigger and stock. (Tr. 15:1–25). She further testified that the information could have been useful to impeach the victim in some ways but was limited because it did not exonerate the Applicant. She further testified that the expert's testimony more likely than not would inculpate the Applicant. Counsel testified that the Applicant did not give a statement, but that the State's evidence against the Applicant was strong. Counsel testified her investigation of the case included speaking with the Applicant's cousin, Mr. Green. She testified her investigator spoke with Mr. Green, who said he did not know anything about the incident. She further testified that after this interview, the investigator could not find him even after extensive efforts.

Counsel testified she entered into plea negotiations on behalf of the Applicant early on in the case. She testified she discussed a plea offer with the Applicant to plead to Assault and Battery of a High and Aggravated Nature for a six (6) year sentence and he said he would "think about it," which plea offer he ultimately rejected. She testified the Applicant was then offered a plea to Assault and Battery of a High and Aggravated Nature. She testified she tried to convince the Applicant that pleading guilty was in his best interest. Counsel testified if the Applicant went to trial and was found guilty, he likely would have been sentenced to approximately thirty (30)

years imprisonment served at eighty-five (85) percent and received a most serious strike. Counsel testified the Applicant spoke with her bosses (other public defenders), his mom, brother, and family members before pleading guilty. Counsel testified that she did everything she could to have the Applicant see the "wisdom" of the plea offer because she was concerned about him receiving a higher sentence if convicted. She testified, however, that she was preparing for trial all along in the event the Applicant wanted to proceed with a jury trial.

Counsel testified before the Applicant pled guilty, she informed him of the consequences of his plea and his constitutional rights. She testified the Applicant always indicated he understood his rights as she explained them to him. Counsel testified she recalled the Applicant wanting to stand down at his guilty plea to discuss requesting a jury trial, the Court giving them leave to discuss the issue, but that the Applicant ultimately still decided to plead guilty. She testified she felt the Applicant's plea was entered freely and voluntarily. Counsel testified she did not recall advising the Applicant of his right to appeal. She testified it is her general practice to advise her clients of their rights to appeal and that if her client requests an appeal, it is her general practice to file a notice of appeal on their behalf. Counsel testified the Applicant had no meritorious issues for appeal.

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 by a preponderance of the evidence. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 622, 300 S.E.2d 482, 483 (1983)). Where the Applicant 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, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2064).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. See Strickland at 690, 104 S. Ct. at 2066. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See id. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

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. See id. at 117–18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its "'reasonableness under prevailing professional norms.'" Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). 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 117–18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

This Court finds counsel's testimony to be credible and finds the Applicant's testimony not credible. This Court finds that counsel is a trial practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on numerous occasions.

During conferences with the Applicant, counsel discussed the pending charges, the elements of the charges and what the State was required to prove, range of punishment, the Applicant's constitutional rights, the Applicant's version of the facts, and possible defenses or lack thereof.

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 the Applicant's attorney 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, 5, 239 S.E.2d 750, 752 (1977); Strickland, 466 U.S. at 687–88, 104 S. Ct. 2052, 2064–65; Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687–88, 104 S. Ct. at 2064–65, Turner v. Bass, 753 F.2d 342, 348 (4th Cir. 1985), *rev'd on other grounds*, Turner v. Murray, 106 S. Ct. 1683 (1986); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977)). This Court further finds counsel adequately conferred with the Applicant, conducted a proper investigation, and provided thorough representation. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

This Court finds that trial counsel was not ineffective for failing to file an appeal for the Applicant. The United States Supreme Court has rejected a "bright-line rule that counsel must always consult with the defendant regarding an appeal." Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036, 145 L. Ed. 2d 985 (2000). They instead held 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 non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Id. "[A]lthough not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both

because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." Id.

This Court finds that this allegation is without merit and the Applicant has failed to carry his burden of proving trial counsel was ineffective for failing to file an appeal on his behalf. Counsel provided credible testimony that it was her general practice to discuss with clients their right to appeal and to file a notice of appeal upon request. She also provided credible testimony that the Applicant had no meritorious issues to raise on appeal and that his appeal likely would have been dismissed pursuant to an Anders brief. Anders v. California, 386 U.S. 738, 741–42, 87 S. Ct. 1396, 1398–99 (1967). This Court finds the Applicant was not prejudiced by counsel's performance because counsel had no constitutionally imposed duty to consult with the Applicant about an appeal after his guilty plea. See Roe, 528 U.S. at 479–80, 120 S. Ct. at 1036. This Court finds the Applicant failed to carry his burden of proving he had meritorious issues for appeal or that he demonstrated to counsel an interest in appealing his guilty plea. Therefore, the Court finds this allegation is without merit.

Involuntary Guilty Plea

This Court finds that the Applicant's guilty plea was entered freely and voluntarily. When the applicant has plead guilty, 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, 52, 106 S. Ct. 366, 366 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Lockhart, 474 U.S. at 52, 106 S. Ct. at 366; Jackson v. State, 342 S.C 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)).

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) (citing State v. Hazel, 275 S.C. 392, 394, 271 S.E.2d 602, 602 (1980)). 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. Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009) (citing Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 650 (2000)). See 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 be attacked through only a claim of ineffective assistance of counsel. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2002) (citing Al-Shabazz v. State, 338 S.C. 354, 363–64, 527 S.E.2d 742, 747 (1999)).

Defendant's knowing and voluntary waiver of statutory or constitutional rights 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." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137–38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 73–74, 97 S. Ct. 1621, 1629–30 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347, 350 & n.1 (4th Cir.1975), *overruled on other grounds*, United States v. Whitley, 759 F.2d 327, 331 (1985).

This Court finds that this allegation is without merit and the Applicant failed to carry his burden of proving that his guilty plea was involuntarily made. This Court finds and the record reflects the applicant was adequately advised of the waiver of his constitutional rights by both counsel and the plea judge. The record reflects the Applicant was advised of the following: the potential sentence he was facing (Tr. 3:18–24) and his constitutional right to a jury trial (Tr. 4:15–21, 5:2-4, 5:8-25, 6:1, 13:16–19). The Applicant also told the court he was guilty (Tr. 6:6–13) and that he was not threatened or coerced into pleading guilty, nor was he promised anything for his plea. (Tr. 8:15–9:18). The Applicant told the Court he was not pleading because of any promises (Tr. 9:19–25, 10:1). The Applicant also stated that he was not under the influence of drugs or alcohol at the time of his plea (Tr. 6:17–19). The Applicant's plea was voluntary (Tr. 3:18–24). The Applicant was satisfied with the services of his attorney (Tr. 7:4–9). Further that he had adequate additional time to consult with his attorney (Tr. 8:1–6). The Applicant was also advised by the Court that he was pleading straight-up to Assault and Battery of a High and Aggravated Nature. (Tr. 3:18–24). It is apparent from the plea colloquy with the court that the Applicant's request for a jury trial only came about as a reaction when he anticipated that the plea court may have sentenced him to more than eight (8) years. (Tr. 10:1–25). Applicant's counsel argued mitigation on his behalf and requested a six (6) year sentence of the court. (Tr. 18:1–25; 19:1–25). However, the circumstances of this case were particularly egregious as reflected in the victim's representation that the Applicant laughed in his face as he shot him (Tr. 22:12–23). This Court finds the Applicant's guilty plea was entered freely and voluntarily with a full understanding of the consequences of his plea.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this

14 of 13

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. Therefore, all other allegations are hereby denied and dismissed.

CONCLUSION

Based on the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations occurring 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 post-conviction relief 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:

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.

12-4-13

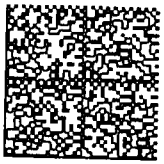
AND IT IS SO ORDERED this 8th day of November, 2013.

The Honorable Deadra L. Jefferson
Presiding Judge

Charleston, South Carolina
At Chambers

13 of 13

HARVEY & BATTEY, PA
ATTORNEYS AT LAW
SINCE 1922



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