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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

January 10, 2014

RECEIVED

JAN 15 2014

S.C. Supreme Court

THE HONORABLE DANIEL E. SHEAROUSE
CLERK, SUPREME COURT OF SOUTH CAROLINA
PO BOX 11330
COLUMBIA, SC 29211-1330

314924
RE: Shaquan Burgess, #312924 v. State of South Carolina
Case No.: 2009-CP-21-0444

Dear Mr. Shearouse :

Enclosed herewith please find Notice of Appeals on behalf of Petitioner Shaquan Burgess and a Certificate of Service showing this was served on Respondent's counsel by mail. A copy of the order appealed from is included.

With kind regards, I am,

Yours very truly,

Louis D. Nettles

LDN/app01

Enclosure

cc:
Joshua L. Thomas, Esq.

S.C Commission on Indigent Defense
Division of Appellate Defense
1330 Lady St., Suite 401
Columbia, SC 29201

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Judge

RECEIVED

JAN 15 2014

S.C. Supreme Court

Case No. 2009-CP-21-444

Shaquan Burgess, #314924 Petitioner

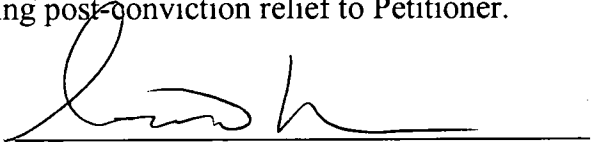
Vs.

State of South Carolina Respondents

NOTICE OF APPEAL

Shaquan Burgess appeals from the Order of the Florence County Court of Common Pleas, William H. Seals, Jr., Circuit Judge, filed December 11, 2013 received by Petitioner on December 13, 2013 denying post-conviction relief to Petitioner.

January 10, 2014



LOUIS D. NETTLES
Folkens Law Firm, PA
PO Box 6139
Florence, South Carolina 29502
Attorney for Appellant
843-665-0100

OTHER COUNSEL OF RECORD

Joshua L. Thomas
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JAN 15 2014

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

S.C. Supreme Court

William H. Seals, Jr., Circuit Judge

Case No. 2009-CP-21-444

Shaquan Burgess, #314924 Petitioner

Vs.

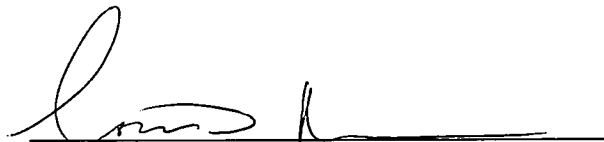
State of South Carolina Respondents

CERTIFICATE OF SERVICE

I certify that I have served the Petitioner's Notice of Appeal on Respondent's Attorney by depositing a copies of the same in the United States Mail, postage prepaid, on January 10, 2014, addressed to the following address:

Joshua L. Thomas
PO Box 11549
Columbia SC 29211-1549

January 10, 2014



LOUIS D. NETTLES
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Florence, South Carolina 29502
Attorney for Appellants
843-665-0100

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
IN THE COURT OF COMMON PLEAS

FILED

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2009CP2100444

Shaquan Burgess

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CONNIE REEL ONEARTH
CCCP & GS
FLORENCE COUNTY, SC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

12/12/2013
Date

For Clerk of Court Office Use Only

CERTIFIED TRUE COPY
Connie Reel Onearth
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

This judgment was entered on **December 11, 2013**, and a copy mailed first class or placed in the appropriate attorney's box on **December 12, 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

Louis David Nettles POB 6139 Florence, SC 29502-6139

Jenna Thomas

PO Box 11519 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Connie Reel Shearin

Court Reporter

Connie Reel-Shearin - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS
FOR THE TWELFTH JUDICIAL CIRCUIT

Shaquan Burgess, #314924,)

Case No. 2009-CP-21-444

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

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CCCP & GS
FLORENCE COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed March 11, 2009. Respondent made its Return on or about July 15, 2009. The Court convened an evidentiary hearing into the matter on October 8, 2013, in Marion County. Applicant was present at the hearing and represented by Louis D. Nettles, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the PCR hearing. Applicant's plea counsel, John M. Prosser, Jr., Esquire, also testified. The Court had before it a copy of the plea and sentencing transcripts, the records of the Florence County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application, and the return. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Florence County Clerk of Court. In April 2006, the Florence County Grand Jury indicted Applicant for two counts of armed robbery and one count of possession of a weapon during the commission of a violent crime (2006-GS-21-636). On June

CERTIFIED A TRUE COPY
Amie [Signature]
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

13, 2007, Applicant waived presentment of a third indictment for armed robbery (2007-GS-21-1162). He was represented on all charges by John M. Prosser, Jr., Esquire ("plea counsel"). Also on June 13, 2007, Applicant pled guilty to the three counts of armed robbery. The Honorable Thomas A. Russo accepted Applicant's plea and deferred sentencing to June 18, 2007. Applicant did not appear at sentencing, and Judge Russo issued a sealed sentence and issued a bench warrant for Applicant. Applicant was apprehended brought before Judge Russo on May 28, 2008, where Judge Russo pronounced Applicant's sentenced of incarceration for a period of twenty (20) years. Applicant did not appeal his plea or sentence.

II. ALLEGATIONS

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

1. "Ineffective assistance of counsel"
2. "Due process and equal protection rights violated"
3. "Plea agreement for the sentence negotiated not kept by the solicitor that made the deal"

Included with his application was a four (4) page attachment outlining Applicant's grounds for PCR. Among these various claims, Applicant proceeded at the PCR hearing on only the allegations plea counsel was ineffective for failing to investigate his mental competency and the State breached its plea agreement.

III. SUMMARY OF TESTIMONY

Applicant testified he had difficulties in school growing up. He admitted he was out on bond on a set of armed robbery charges when he was arrested again for armed robbery. He recalled meeting with plea counsel and discussing the State's discovery and any possible defenses he may have. Applicant alleged the State made an offer to plea to the charges in

exchange for a recommendation of ten (10) years. He further testified plea counsel advised him the State agreed to a ten (10) year sentence, and he would not have pled if he had known he would get twenty (20) years. However, Applicant admitted he signed the sentencing sheets reflecting a sentencing range of ten (10) to thirty (30) years.

Applicant testified plea counsel arranged for him to plead to both sets of charges on a Friday and return on Monday for sentencing. Applicant testified he returned to court on Monday after pleading, but plea counsel was not there. He testified he was in court the whole morning with his stepfather, but no one approached him about his case. On cross-examination, Applicant admitted he did not attempt to speak with anyone the morning of his sentencing, he did not attempt to call plea counsel, and he did not go by plea counsel's office.

Plea counsel testified the State made a ten (10) year offer to Applicant's prior appointed counsel. He recalled meeting with Applicant more than twice and discussing discovery, the elements of the crimes, and any possible defenses. Plea counsel also recalled discussing Applicant's education and background. Plea counsel testified Applicant was good natured, communicative, and cooperative. However, plea counsel had Applicant evaluated because he had some concerns about his mental functioning. The evaluation came back showing Applicant had some mild mental retardation and substance abuse, but was otherwise competent to assist in his defense and capable of conforming his conduct to the requirements of the law. Plea counsel testified he had no reason to doubt the findings of the evaluation.

Plea counsel further testified Applicant was arrested for a third armed robbery while out on bond and awaiting the results of the evaluation. In light of this arrest, the State withdrew the offer for a recommendation of ten (10) years. Plea counsel testified he communicated to

Applicant that the recommendation was off the table. He also testified he communicated to Applicant the State's new offer to recommend concurrent time and drop the weapons charge. Plea counsel recalled telling Applicant he would argue to the plea judge for the minimum sentence. Plea counsel testified Applicant was hesitant to go to jail, but never indicated he wanted to go to trial. He also testified Applicant made the ultimate decision to plead guilty.

Plea counsel also testified he did not speak to Applicant between the day he pled and the day his sentence was unsealed. He testified it was clear to all parties Applicant was to return to court that Monday to be sentenced. Plea counsel did not recall if he was in court that Monday morning. However, he did testify Applicant never called or reached out to him that day. Plea counsel did attempt to locate Applicant before sentencing by contacting his family, but Applicant's stepfather did not know Applicant's whereabouts. Plea counsel testified he argued for mitigation as best he could in light of Applicant's absence.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The 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).

A. Ineffective Assistance of Plea Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). 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 in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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. 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, 59 (1985).

The Court finds Applicant failed to meet his burden of proving plea counsel ineffective. The Court finds trial counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in his representation. Regarding the claim counsel failed to investigate Applicant's mental condition, the Court finds this allegation is not supported by the record. Failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). The record reflects plea counsel had Applicant evaluated for his capacity to conform his conduct to the requirements of the law and for his capacity to assist with his defense. The Court finds plea counsel's testimony he had no reason to doubt the findings of the evaluators be very credible. Plea counsel also discussed the results of the valuation with Applicant. (Plea Tr. 3:24-25 June 13, 2007). Both evaluations were presented to Judge Russo and made part of the record. (Plea Tr. 4:4-15). Accordingly, Judge Russo found Applicant was competent at the time of the robberies and at the time of the plea. Applicant presented no evidence at the PCR hearing to refute these findings. Therefore, he has not shown how any further investigation into his mental condition would have changed the outcome of his case.

B. Plea Agreement

The Court also finds Applicant's allegations regarding the plea agreement to be without merit. The State may withdraw a plea offer at any time prior to the court accepting the defendant's plea. Reed v. Becka, 333 S.C. 676, 688, 511 S.E.2d 396, 402 (Ct. App. 1999) ("A plea agreement is only an 'offer' until the defendant enters a court-approved guilty plea. A defendant accepts the 'offer' by pleading guilty. Thus, until formal acceptance of the plea by the

court has occurred, the plea binds no one, not the defendant, the State, or the court.” (citing Harden v. State, 453 So.2d 550 (Fla. Dist. Ct. App. 1984))). The only exception to this rule is when the defendant detrimentally relies on the plea offer. Id. The Court finds very credible plea counsel’s testimony the State withdrew the ten (10) year offer when Applicant was subsequently arrested for a third armed robbery. The Court finds not credible Applicant’s testimony he thought he would still receive ten (10) years when he pled. Furthermore, Applicant presented no evidence he relied on the State’s offer to his detriment. Accordingly, the Court finds plea counsel was not ineffective in advising Applicant of his potential sentence and the State has not breached any plea agreement.

The record also reflects Applicant entered his plea freely, knowingly, and voluntarily. Simpson v. State, 317 S.C. 506, 508, 455 S.E.2d 175, 176 (1995) (“To knowingly and voluntarily enter a plea of guilty, all that is required is that a defendant have a full understanding of the consequences of his plea and of the charges against him.” (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991))). Judge Russo clearly advised Applicant of the potential sentence he was facing. (Plea Tr. 5:5-23). Judge Russo also discussed with Applicant the State’s recommendation was merely for concurrent sentences. (Plea Tr. 12:5-23). Thus, the record shows Applicant was not under the impression he was guaranteed a ten (10) year sentence. Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997) (any possible errors by counsel regarding sentencing advice cured by plea colloquy). Therefore, Applicant has not met his burden of proof to show he was entitled to a ten (10) year sentence. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (“[S]tatements 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.” (citing Crawford v. United States, 519 F.2d 347 (4th Cir.1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir.1976))).

C. All Other Allegations

As to any and all allegations raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present sufficient evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

V. CONCLUSION

Based on the foregoing, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes that Applicant must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel’s assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on the applicant’s behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 27 day of November, 2013.



THE HONORABLE WILLIAM H. SEALS, JR.
Presiding Judge

Mani, South Carolina

CONNIE REEL-SHEA
CCCP & GS
FLORENCE COUNTY

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FLORENCE COUNTY, S.C.

Folkens Law Firm, P.A.
P.O. Box 6139
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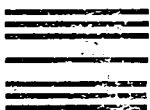
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The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia SC 29211-1330



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