CAROLINE M. HORLBECK
ATTORNEY AT LAW

101 WHITSETT ST.
GREENVILLE, SOUTH CAROLINA 29601
horlbecklawfirm@gmail.com

(864) 315-9919
Fax(864) 232-4756

February 11, 2014

Via Regular Mail
Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *LANCE Q. HOLLOWAY v. State*

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,

Caroline Horlbeck
Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General
Office of Appellate Defense

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
THE HONORABLE W. Jeffrey Young

CA No. 2011-CP-23-2441

LANCE Q. HOLLOWAY,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA

RESPONDENT.

NOTICE OF APPEAL

Appellant LANCE Q. HOLLOWAY, appeals from the Order of the Honorable W. Jeffrey Young, Circuit Court Judge clocked January 17, 2014.

Respectfully submitted,

Caroline Horlbeck

Caroline M. Horlbeck, Esq.
101 Whitsett St
Greenville, SC 29601

Date: February 4, 2014

Other Counsel of Record: Karen Ratigan, Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA	)	**IN THE SUPREME COURT**
	)	
COUNTY OF GREENVILLE	)	
	)	**C.A. No. 2011-CP-23-2441**
LANCE Q. HOLLOWAY,	)	
	)	
APPELLANT,	)	
	)	
-vs-	)	**CERTIFICATE OF SERVICE**
	)	
	)	
STATE OF SOUTH CAROLINA	)	
	)	
RESPONDENT.	)	
	)	

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorneys for Applicant, and that I have this day caused to be served upon the person(s) named below Applicant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Loriene French
S.C. Office of Appellate Defense
1205 Pendleton St., Suite 306
Columbia, SC 29201

Karen Ratigan, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Ashley A. Foy

Greenville, South Carolina

February 14th, 2014

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Holloway, Lance Q., SCDC# 245099, Applicant, v. State of South Carolina, Respondent.	)	IN THE COURT OF COMMON PLEAS 2011-CP-23-2441 ORDER OF DISMISSAL

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 12, 2011. The Respondent made its Return on September 20, 2011. An evidentiary hearing into the matter was convened on February 13, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and was represented by Caroline M Horlbeck, Esquire. Brian T. Petrano of the South Carolina Attorney General's Office represented the Respondent.

At the hearing, the Applicant testified on his own behalf. The Applicant's trial counsel, H. Chase Harbin, Esquire also testified. This Court had before it the records of the Greenville County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

The Applicant is presently incarcerated within the South Carolina Department of Corrections. He pled guilty on April 9, 2010 before the Hon. G. Edward Welmaker. The Applicant was originally indicted by the South Carolina State grand jury 2008GS4711 (the June

2009 term). The original State grand jury indictment is a multi-count indictment against multiple defendants. The counts applicable to the Applicant are counts 2, 3, and 20. The Applicant was originally indicted for two counts (counts 2 and 3) of trafficking methamphetamines, i.e. CDR code 0370 (South Carolina code section 44 – 53 – 0375(C)(2)(c)). The Applicant was also originally indicted (count 20) for manufacturing or distribution of methamphetamine, i.e. CDR code 3014 (South Carolina code section 44 – 53 – 0375(B)(1)). Pursuant to a negotiated plea agreement, the Applicant pled guilty as indicted for count 20 and to lesser charges for counts 2 and 3. The negotiated plea was for a recommendation by the State of 12 years. At the PCR hearing, the State introduced a copy of a written plea agreement. The written plea agreement is dated the same day of the guilty plea, i.e. April 9, 2010; the plea agreement is signed by the Applicant himself, his attorney, and the prosecutor from the Atty. Gen.'s office.

At the outset of the PCR hearing before this court, the Applicant's PCR counsel explained that there was a potential conflict considering the fact that she represented one of the codefendants in the original case. This court found that there was no conflict.

The State argued that the PCR application was untimely and that a full PCR hearing was precluded by the fact that the written plea agreement contained a clause which waived PCR. This court took the untimeliness and the waiver of PCR arguments under advisement.

At the evidentiary hearing, Applicant proceeded for the most part on the allegations stated in the application for post-conviction relief.

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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (1985).

The Applicant testified that he met with defense counsel one or more times and that he, the Applicant, wanted to go to trial and was not interested in the 12 year plea offer relayed to him by his attorney. The Applicant claimed that he had yet to see all of his discovery. The Applicant explained that he wanted one or more witnesses to testify on his behalf. The Applicant explained that when he signed the sentencing sheets before the plea the sheets said 10 to 28 g at the time he saw them and signed them. The Applicant explained that they were changed after he signed them. Applicant explained that he thought he was pleading to what was on the sentencing sheets, i.e. 10 to 28 g. The Applicant explained that defense counsel did review the plea agreement with him and did specifically review the section that waived PCR. The Applicant explained that defense counsel told him that waiving PCR was probably a violation of his rights but that he signed the plea agreement anyway, based on the advice of counsel-because he did not think it was enforceable. The Applicant explained, consistent with the plea transcript, that there was some confusion during the plea proceedings regarding the correct CDR code of the negotiated lesser included offenses. The Applicant explained that after about 9 months it came to his attention that his max out date changed. The Applicant testified that if he had known he was pleading to 28 to 100 g he would not have pled. At the time of the plea he did not know what 10

to 28 g carried, but he does now. Applicant also explained that he wanted credit for time served because he thought he was supposed to get that credit even though it was for another offense. The Applicant also explained how he met with the prosecutor and testified against one or more codefendants, as provided in the plea agreement. The Applicant explained that he did not discuss an appeal with his attorney but that 7 days after the plea he called his attorney's office and asked to file an appeal but he never got a chance to speak with his attorney. However, the Applicant explained that from his perspective it seemed that the appeal was taking care of by that simple phone call.

Plea counsel testified that he recalled his representation of the Applicant. Plea counsel explained that he reviewed the discovery with the Applicant, they discussed the minimum and maximum potential penalties, and that they were going to shoot for 8 years. Plea counsel acknowledged that there was some confusion during the plea proceedings on the part of the prosecutor; plea counsel explained that the sentencing sheets when originally presented contained a 10 to 28 g charge versus the negotiated 28 to 100 g. Plea counsel explained that the potential error was in favor of the Applicant. Plea counsel explained that he had no knowledge whatsoever of any type of appeal request and that if he had received a timely appeal request certainly would have honored it and filed the appropriate notice. Plea counsel explained that the credit for time served before the plea was more of a gesture because the Applicant was in custody for another charge. Plea counsel testified that he certainly did review the plea agreement with the Applicant and that they specifically discussed the section that waived PCR. Plea counsel explained that he advised the Applicant that a waiver of PCR is somewhat circular. Finally, plea counsel testified that it was the Applicant told him that he wanted to plead guilty; plea counsel

explained that he thought it was in the Applicant's best interest to do so and that once his client told him he wanted to plea then that was the course he followed. Council noted that he did not recall giving the Applicant a copy of the discovery or whether they went through a line by line by line-but they certainly reviewed the information.

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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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 (1985); Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

Courts use a two-pronged test in evaluating 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." Cherry, 300 S.C. at 117, 385 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. As discussed throughout, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

Beyond his review of the undisputed procedural history, this Court finds Applicant's testimony is not credible. Plea counsel's testimony is credible. Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

The State argues that this application is untimely. The state relies on a strict interpretation of South Carolina code section 17 – 27 – 45 (a). The State explained that the Applicant pled guilty on April 9, 2010 and that the PCR statute allows for one year, then adding one additional day per rule 6(a) of South Carolina Rules of Civil Procedure means that this PCR application had to be filed by April 10, 2011. Because April 10, 2011 was a Sunday, the PCR application had to be filed by April 11, 2011. The PCR application was not filed until April 12, 2011. The State argued consistent with and provided a copy of Pelzer v. State of South Carolina, 378 SC 516

(2008). Similarly, the State argued that the waiver of PCR was valid pursuant to Spoone v. State, 379 S.C. 138 (2008). This court is specifically not ruling on the timeliness or waiver issues. Because this court directed the state to draft a proposed order including the above discussion of the waiver and timeliness issues, there is no need for the State to file any type of rule 59(e), SCRCP motion.[1]

At first blush, the Applicant's claim regarding an amended sentencing sheet appears significant. However, a review of the plea transcript deflates this claim. This court acknowledges, as did the plea court, that there was some momentary confusion as to the negotiated lesser-included sentence regarding counts 2 and 3. The learned plea court addressed the issue and specifically asked the defendant whether he was sure he wanted to plea to 2 counts of 28 to 100 g, see page 10 of the guilty plea transcript. This court notes that the defendant told the plea court on one or more occasions that he was satisfied with the services of his attorney, for example see page 13 of the guilty plea transcript. This Court specifically finds plea counsel credible in that he and the Applicant reviewed the discovery materials and were fully aware of the specific nature of the intended negotiated plea details. Mindful of the Applicant's testimony that he called his attorney's office after the plea, this Court does not find sufficient evidence that the Applicant ever requested that plea counsel file an appeal – plea counsel explained that he would have complied had such a request been made.[2] Finally, the plea court specifically rejected the Applicant's request for credit for time served while he was incarcerated for another charge (although of course there is nothing to suggest that the plea court had the authority to do anything different considering South Carolina code 24 – 13 – 40).

---

[1] This court is of course aware of Marlar v. State, 375 S.C. 407 (2007).

[2] *But see,* Rule 203(d)(1)(B)(iv), SCACR.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel's representation. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. As to any and all allegations that were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court cautions the Applicant that he 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 PCR. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant and counsel are 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 filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

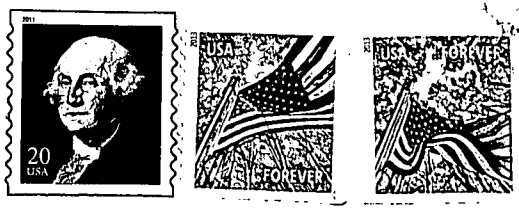
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 9 day of Jan, ~~2013.~~ 2014

The Honorable W. Jeffrey Young
Presiding Judge
Thirteenth Judicial Circuit

Sumter, South Carolina.

CAROLINE M. HORLBECK
Attorney At Law
101 WHITSETT ST.
GREENVILLE, SOUTH CAROLINA 29601



Via Regular Mail
Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

29211$1330 B099