SHW 7

STATE OF SOUTH CAROLINA

COUNTY OF CHEROKEE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2010CP1100936

Kenyal Lamond Rogers #332892 *vs.* State of South Carolina

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.

☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ 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; ☐ Statement of Judgment by the Court:

Order of Dismissal

Dated at Gaffney, South Carolina, this the 21st day of February, 2014.

Court Reporter:

s/J. Derham Cole

PRESIDING JUDGE - J. Derham Cole

This judgment was entered on the the 19th day of February, 2014, and a copy mailed first class this the 21st day of February, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

Kenyal Lamond Rogers, MCI 386 Redemption Way
McCormick, SC 29899

ATTORNEY(S) FOR THE PLAINTIFF(S)

Office of Attorney General, PO Box 11549
Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Brandy W. McBee

Brandy W. McBee - Clerk of Court

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF CHEROKEE	)	
	)	2010-CP-11-0936
Kenyal Lamond Rogers, #332892,	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 10, 2010, and amendment filed July 31, 2013. The Respondent made its Return on or about November 1, 2011. An evidentiary hearing into the matter was convened on October 4, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and represented himself *pro se*[1]. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant and his mother, Angela Rogers, testified on Applicant's behalf. Thomas E. Shealy, Esquire, also testified. This Court also had before it a copy of the records of the Cherokee County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the plea transcript and Applicant's exhibits.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. The Applicant was

[1] Applicant asked to relieve appointed counsel and with the knowledge that he would not be appointed additional counsel, insisted that he would retain counsel; however, the Applicant was unable to do so and proceeded *pro se*.

indicted at the March 2008 term of the Cherokee County Grand Jury for murder (08-GS-11-0226). He was represented by Thomas E. Shealy, Esquire. On January 27, 2009, the Applicant pled guilty to the lesser-included voluntary manslaughter. He was sentenced by the Honorable Roger L. Couch to confinement for a period of thirty years.

The Applicant filed a timely notice of appeal. The South Carolina Court of Appeals dismissed the appeal by written Order. State v. Rogers, Op. No. 2010-UP-452 (filed October 21, 2010). The Remittitur was returned on November 9, 2010.

ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
   a. Counsel failed to discuss or explain the nature and crucial elements of the offense of murder or voluntary manslaughter prior to or during my trial,
   b. Counsel failed to provide me with adequate or sufficient legal advice to ensure the court that my guilty plea was intelligently, knowingly, and voluntarily entered; and
2. Trial court error, in that;
   a. The court failed to adhere to the mandates and rules of Rule 11 §§ (c)(1) and (d).
3. Lack of jurisdiction, in that;
   a. Applicant requested a preliminary hearing on January 30, 2008, following his arrest and never received one and, but was indicted on March 6, 2008.

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 their

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).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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 v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186,

480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant introduced Applicant's Exhibit #2, copies of three sign-in sheets from the Cherokee County Detention Center, indicating visits from Counsel to Applicant. Applicant testified that he was arrested on January 28, 2008, and Counsel was appointed on March 5, 2008. Applicant testified that the first time he met with Counsel was May 20, 2008. Applicant testified that they had a quick meeting about the case and bond hearing. Counsel informed Applicant that he had not received any discovery materials at that time. Applicant testified that his bond hearing was held on May 30, 2008. Applicant then testified that Counsel's second visit was on September 8, 2008. Applicant alleged that he had been granted bond on September 5, 2008, and Counsel, Judge J. Mark Hayes II, and the Assistant Solicitor were all aware that bond had been granted, but Applicant was not released on bond. Applicant testified that on September 8, 2008, Counsel informed Applicant that there were bond conditions that still needed to be worked out. In support of this claim, Applicant submitted Applicant's Exhibit #3, which was a copy of an unsigned proposed bond order. Applicant also introduced Exhibit #4, a signed bond Order from September 5, 2008, and fax cover sheet from September 9, 2008, and Exhibit #5, a letter from the Assistant Solicitor regarding a plea offer. Applicant testified that Counsel's last visit was on January 12, 2009, at which time Counsel informed Applicant that bond had been granted and informed Applicant that the case was set for trial.

Applicant testified that he believes Counsel should have hired a private investigator. Applicant testified that he provided Counsel with an alibi defense and Counsel never investigated his alibi. Applicant testified that he was prepared to go to trial for murder. Applicant testified that he received a copy of discovery materials on January 14, 2009, which included Applicant's Exhibit #6, the SLED DNA analysis report. Applicant testified that he

believed the report indicated that it was null and void. Applicant also testified that Counsel never told him if the State had found the gun, never told Applicant which witnesses were going to testify at trial, and never explained the elements of murder and voluntary manslaughter to Applicant. Applicant testified that Counsel came to him and indicated that there was no way to win at trial because the autopsy report could not be explained. Applicant testified that Counsel advised him that a negotiated plea for thirty years to voluntary manslaughter was Applicant's best option. Applicant also testified that he believed that the court should have informed Applicant of the nature and critical elements of murder and voluntary manslaughter during the plea pursuant to Rule 11(c)(1), Fed Crim.P.

Angela Rogers, Applicant's mother, testified that she met with Counsel a couple of times and spoke for a couple of hours total. Ms. Rogers testified that she and Counsel discussed discovery materials mainly. Additionally, Ms. Rogers testified that Counsel told her that Applicant did not need a copy of the discovery materials in jail because other inmates could potentially use it against him and then told her what Applicant's bond amount was.

Counsel testified that he has been practicing law in South Carolina since November 8, 1978. Counsel testified that he began at the public defender's office in 1994 and the majority of his experience since 1978 has been with criminal law. Counsel testified that he met with the Applicant many more than three times. Counsel testified that the sign-in sheets are kept in a loose-leaf notebook with no custodian of the records, so he does not agree that those three sheets are indications of the only meetings he had with Applicant. Counsel testified that the initial interview with Applicant was May 20, 2008, at which time Counsel discussed the charge of murder and Applicant's prior charges of possession of crack and possession of a firearm. Counsel testified that he read the statute regarding murder to the Applicant and asked Applicant

if there were any questions. Also, Counsel testified that he did the same for voluntary manslaughter, as early as August 2008. In fact, Counsel testified that he reviewed the elements of murder, voluntary manslaughter and involuntary manslaughter with the Applicant. Counsel testified that he received discovery materials in Applicant's case on May 22, 2008. Counsel testified that the Applicant claimed that he blacked out at the time of the shooting and denied having any arguments with the victim. However, the victim's father was in the house at the time of the shooting and was planning on testifying that he heard the arguing. Additionally, the victim's young daughter was present at the time of the shooting and was a witness, along with the video of the car showing the Applicant running from police. Counsel testified that he spoke with the Applicant about the witness statements and video. Counsel testified that he talked with the Applicant about presenting a defense of accident, but there was never an alibi defense. Counsel testified that the Applicant's ability to testify at trial was hurt because he was seen with the gun as he had run away from the victim's home.

Counsel testified that the Applicant was informed that bond had been granted, and agreed that bond was not granted until after the hearing in September 2008. Counsel testified that the Applicant called Counsel from the jail regarding bond and a copy of the Order granting bond was sent to Applicant on December 5, 2008. Counsel testified that the Applicant called Counsel from the county jail using three-way calling often, but Counsel advised Applicant that because the calls were recorded, it was not a good idea. Counsel testified that in most of their conversations, the Applicant appeared to be more concerned about bond than the case. Counsel testified that the Applicant authorized Counsel to negotiate with the Solicitor's office regarding a possible plea offer. Counsel testified that he attempted to negotiate a plea to involuntary manslaughter, but the Solicitor rejected that.

This Court finds the testimony of Counsel to be more credible that the testimony of the Applicant. The Applicant's allegation that Counsel did not conduct an adequate pre-trial investigation is without merit. Following testimony and review of the transcript, it is clear that Counsel had reviewed the facts and evidence, as well as the options that Applicant faced. The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). The Applicant failed to point to any specific matters Counsel failed to discover, or any defenses that could have been pursued had Counsel been more fully prepared. Although he alleged that Counsel failed to investigate Applicant's alibi defense, the Applicant failed to present any evidence or witness that would have supported that defense. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate preparation. Accordingly, this allegation is dismissed.

Additionally, as to the Applicant's claim that Counsel was ineffective for failing to review the elements of the charges with Applicant prior to his plea, this Court finds that the Applicant has failed to meet his burden of proof. This Court finds Counsel's testimony on this issue to be credible. Further, the transcript reflects that the Applicant was asked if Counsel reviewed the elements with him and the Applicant indicated in the affirmative. In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court held that the two-part standard

adopted in Strickland v. Washington, supra, for evaluating claims of ineffective assistance of counsel applies, as well, to guilty plea challenges based on ineffective assistance of counsel. To meet the Court's "prejudice" requirement, a criminal defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill at 59. Not only did the Applicant fail to establish that Counsel did not properly review the charge that Applicant faced or pled guilty to or fully investigate the case, but the Applicant has failed to establish that he would have proceeded to trial, but for, these alleged deficiencies of Counsel. Therefore, this claim is denied and dismissed.

Lack of Subject Matter Jurisdiction

Applicant testified that he was arrested on January 28, 2008, and was taken before a magistrate judge on January 30, 2008, at which time he was informed of his right to a preliminary hearing and the fact that he had ten days from the 30th to request a hearing. Applicant testified that he did want to know if there was probable cause for his arrest, so he did request a preliminary hearing. Applicant introduced his request for a preliminary hearing as Applicant's Exhibit #1. Applicant testified that he never received his preliminary hearing, so he believes that the indictments were null and void. Applicant acknowledged that a preliminary hearing is not constitutionally mandated, but required only by state statute. Counsel testified that he was appointed in early March and the Applicant was indicted by the Cherokee County Grand Jury on March 6, 2008.

A defendant has no constitutional right to a preliminary hearing. State v. Keenan, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982). Thus, although the Applicant may have timely requested a preliminary hearing, his right to have the hearing ended with the grand jury's

indictment. However, the Applicant has claimed that the trial court lacked subject matter jurisdiction due to the fact that he was never provided with a preliminary hearing. Subject matter jurisdiction is the power of a court to hear a particular class of cases. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994). An Applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry, 363 S.C. 93, 610 S.E.2d 494, 499 (2005); See also S.C. Const. Art. V, § 7. Thus, the Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. The Applicant's conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction. This claim is denied and dismissed.

Trial Court Error

The Applicant also alleged that the trial court erred during his guilty plea when Applicant was not informed of the critical elements of the offenses of murder and voluntary manslaughter at the plea. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the Applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v . State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). This Court finds that there was no error. The court completed a thorough plea colloquy, including making sure the Applicant was clear as to the charge he was

pleading to, the constitutional rights he was giving up at the plea, and the consequences of pleading at that time. Therefore, this Court finds that this allegation is denied and dismissed.

Summary

This Court finds in regards to the allegations of ineffective assistance of counsel, the Applicant's testimony is not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – 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.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier *supra*. Therefore, this allegation is denied.

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. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions 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. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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 19 **day of** February**, 2014.**

J. Derham Cole
Presiding Judge