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April 11, 2014

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: Philip Jackson, 317505 vs. State of South Carolina
2012-CP-32-4378

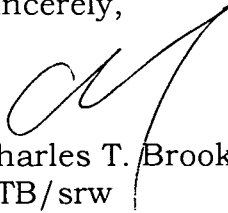
Dear Sir or Madam:

Enclosed herewith you will find the **Notice of Appeal, Order of Dismissal**, along with a **Proof of Service** in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,



Charles T. Brooks, III
CTB/srw

RECEIVED

APR 14 2014

S.C. SUPREME COURT

Enclosed as stated

cc: Walt Whitmire, Office of Attorney's General
South Carolina Office of Appellate Defense
Philip Jackson, 317505

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas
Honorable R. Lawton McIntosh Circuit Court Judge

Case No: 2012-CP-32-4378

Phillip Jackson.....Appellant

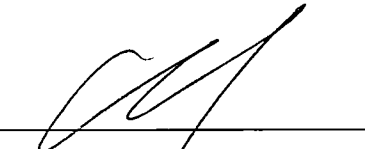
S.C.D.C. 317505

v.

The State Respondent

NOTICE OF APPEAL

Phillip Jackson, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable R. Lawton McIntosh, March 27, 2014, which I, Charles T. Brooks, III, received on April 10, 2014.



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Attorney for Appellant

Other Counsel on Record:
Walt Whitmire, Esquire
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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas
Honorable R. Lawton McIntosh Circuit Court Judge

Case No: 2012-CP-32-4378

Phillip Jackson.....Appellant

S.C.D.C. 317505

v.

The State Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 11th day of April, 2014, I served the foregoing **Notice of Appeal, Order of Dismissal** , as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on April 11, 2014, addressed to the following as indicated below:

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

South Carolina Office of Appellate Defense
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29211-1589

Office of Attorney's General
Attn: Walt Whitmire, Esquire
Post Office Box 11549
Columbia, South Carolina 29211-1549

Phillip Jackson, 317505
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

Dated: April 11, 2014

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STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Phillip Jackson,
S.C.D.C. No. 317505,

Applicant,

v.

State of South Carolina,

Respondent.

FILED IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

2014 MAR 31 A 11:46
Case No. 2012-CP-32-4378

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

ORDER OF DISMISSAL

This matter reaches the Court by way of an Application for Post-Conviction Relief (PCR) filed October 30, 2012. Respondent made its Return on March 22, 2013. An evidentiary hearing was convened on November 14, 2013 at the Lexington County Courthouse. Applicant was present and was represented by Charles T. Brooks, III. Esq. Respondent was present and was represented by Walt Whitmire, Esq., of the Office of the Attorney General.

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 Lexington County. The Applicant was indicted at the May 2011 term of the Court of General Sessions for Lexington County for armed robbery 2011-GS-32-01269) and murder (2010-GS-32-02979). Charles E. Johnson, Esq., represented Applicant. On February 28, 2012, Applicant pled guilty to armed robbery and he pled guilty pursuant to North Carolina v. Alford¹ to the lesser included offense of voluntary manslaughter. The Honorable R. Ferrell Cothran, Jr. sentenced Applicant to a twenty-five (25) year term of imprisonment on each offense. The offenses were to be served concurrently.

¹ North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970)

Applicant did not appeal his sentence or conviction. At the PCR hearing, Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. failure to adequately advise Applicant on the “hand of one” accomplice liability theory of guilt;
 - b. failure to review the State’s discovery disclosure in its entirety;
 - c. failure to object to Applicant receiving a disproportionate sentence to his co-defendants.

SUMMARY OF TESTIMONY

Applicant alleged counsel was ineffective for failing to review all of State’s discovery disclosures with him. Applicant testified that he initially wanted to proceed directly to trial. He stated that he only had the opportunity to review thirty-five of the nearly seven hundred pages of discovery provided to counsel. He testified that he was not able to look at the State’s ballistics and trace evidence that he asserted constituted exculpatory evidence on the murder charge. Applicant claimed that he would have proceeded to trial based on this information. He testified he met with counsel more than twice but was not certain the actual number. He testified that he believed he would have had a fifty-fifty shot at being acquitted of the murder charge had counsel taken the case to trial. Applicant’s assertion was based upon information he has recently learned.

Applicant alleged counsel was ineffective for failing to adequately advise him on the “hand of one” accomplice theory of guilt. He testified he told counsel that he was not present in the vehicle during the murder. He testified that he did not “understand the law” prior to entering the plea and now believes that the State could not prove “hand of one” based on the evidence. He did testify that counsel discussed the statements of all his co-defendants that placed him in the vehicle and at the crime scene at the time of the murder. He opined that his co-defendants made false statements against him in order to further their plea negotiations. He testified that his guilt

for armed robbery was not in question. Applicant claimed his attorney wanted him to take the negotiated plea offer because he was already looking at prison for the armed robbery. Last, Applicant alleged counsel was ineffective for failing to ensure he received a prison sentence proportional to the sentences that his co-defendant's received.

Counsel testified to the manner in which he handled Applicant's case. He employed an investigator and noted that the defense team expended a substantial amount of time and effort into Applicant's case. Counsel filed for discovery, reviewed the State's evidence, and then discussed his impressions with Applicant. Counsel noted that he only provided Applicant physical copies of the discovery documents that directly concerned him. Regarding the armed robbery, Applicant was caught fleeing the scene of the offense with his co-defendants. Applicant told counsel that he never entered the residence, yet he did not dispute his involvement in the offense. Regarding the murder, a firearm used in the armed robbery was identified as the same weapon used in a murder that occurred five days prior to the armed robbery. All of the co-defendants in the vehicle with Applicant and the victim gave statements to police that identified Applicant as the sole shooter. It was Applicant's version of the facts that he was not present in the vehicle at the time of the murder. Yet, Applicant never provided counsel an alibi during the course of the representation. Counsel discussed the strength of the State's evidence and expressed his concerns that the jury would most likely convict him of murder if he proceeded to trial. He stated that all the co-defendants gave consistent accounts of the murder. In route, Applicant told the others in the vehicle he wanted to commit a murder just for the sake of committing a murder. When Applicant noticed an unknown pedestrian walking along the rule road, he seized upon the opportunity to kill him. Counsel stated he explained the sentencing exposure Applicant was looking at if he did not consider entering favorable plea. Counsel stated

that Applicant was exposed to a mandatory life without the possibility of parole (LWOP) prison sentence or worse had the State pursued separate trials. The negotiated plea offer for an aggregate twenty-five year prison sentence was as far as the State was willing to bend. Counsel stated that under the circumstances of the case he felt as if he did a good job to get the State to agree to the twenty-five year prison sentence. Counsel discussed the constitutional implications attached to entering a guilty plea and the benefits and detriments of the State's offer with Applicant. Counsel advised Applicant to accept the offer but apprised him that he had to make the ultimate decision. Counsel stated Applicant's co-defendant's pled guilty after Applicant's plea.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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. at 441, 334 S.E.2d at 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. at 668, 104 S.Ct. at 2064. 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, *supra*. 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court's records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Application for Post-Conviction Relief, the transcripts and exhibits from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds counsel's testimony credible and notes that he certainly had a valid defense strategy during the representation to keep Applicant from spending the rest of his life in prison. This Court finds Applicant knowingly, intelligently, and voluntarily entered his plea pursuant to counsel's quality performance and as exhibited by the plea colloquy.

A.

This Court finds Applicant failed to meet his burden to prove counsel failed to properly advise him regarding the "hand of one" accomplice liability theory of guilt. "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a

plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). "In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). This Court finds counsel's testimony substantially more credible than Applicant's testimony in light of the Record and a complete lack of credible evidence to corroborate Applicant's testimony. First, this Court finds the manner in which counsel reviewed the discovery disclosures and communicated them to Applicant to be sound. This Court notes Strickland does not mandate a *per se* duty on a criminal defense attorney to provide physical copies of all discovery materials their clients. Furthermore, Applicant ensured the Plea Judge that he was satisfied with the opportunity he had to review discovery. Even Applicant's allegation was facially lacking. He noticeably was unable to explain what beneficial impact the ballistics evidence would have rendered his defense had he decided to pursue a jury trial. Applicant was also unable to explain how an alleged lack of fingerprint evidence would call into question eye witness testimony and forensic evidence that established that the firearm discovered during the armed robbery was in fact the murder weapon.

Second, this Court finds Applicant's allegation that counsel failed to properly advise him on the application of "hand of one" to his case to be wholly without merit. Under the "hand of one is the hand of all" theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999). Applicant has produced no credible evidence that shows how the State would not be able to convincingly

prove his culpability as an accomplice for the armed robbery. The doctrine had no application on the murder charge where Applicant claimed he was not present at the scene in light of the State's clear evidence that he was the chief perpetrator. This Court finds Applicant's testimony not credible that counsel did not properly advise him of mitigating facts and potential defenses. That Court finds that Counsel is an accomplished criminal defense attorney who devoted significant time and resources in Applicant's case. Based upon counsel's testimony, this Court is convinced counsel met his threshold duty to discuss the appropriate law for potential defense theories. Applicant did not provide much for counsel to work with. Applicant claimed he was not involved in the murder because he was not at the scene but was unable to provide any alibi information. Notably, Applicant did not testify in particularity to the credibility of his co-defendants. As a result, this Court finds Applicant received effective assistance of counsel in counsel's performance in negotiating the lucrative plea offer. The Record clearly shows counsel met his duty to competently advise Applicant of his fundamental rights and options when Applicant decided to enter the negotiated plea agreement. Therefore, these allegations are denied and dismissed.

B.

This Court finds Applicant's allegation that counsel was ineffective for failing to ensure Applicant received a similar prison sentence as his co-defendants is without merit. This Court finds counsel's testimony credible and Applicant's testimony irrational. "Disparate sentences between co-defendants is not per se abuse of discretion." Griffin v. State, 361 S.C. 173, 177, 604 S.E.2d 394, 396 (2004) (citing State v. Dozier, 263 S.C. 267, 210 S.E.2d 225 (1974)). "[W]ishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of

sentences and that no promises have been made.” Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997). The Record clearly shows that Applicant was substantially more culpable than his co-defendants. Furthermore, Applicant has no constitutional right to a plea bargain. Applicant voluntarily entered a negotiated plea agreement with the State. See Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding the applicant's claim lawyer misadvised him). Therefore, this allegation is denied and dismissed.

E.

Except as discussed above, this Court finds that Applicant affirmatively abandons the remaining allegations set forth in his application at the hearing. 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). Applicant's failure to address these issues 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.

CONCLUSION

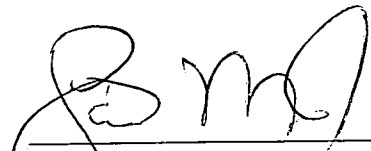
Based on all the forgoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his Application for Post-Conviction Relief. Therefore, this Application for Post-Conviction Relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice 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. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 27 day of March, 2014.


R. LAWTON MCINTOSH
Presiding Judge
Eleventh Judicial Circuit

Anderson, South Carolina

FILED
2014 MAR 31 A 11:46
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

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