

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

**RECEIVED**

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
THE HONORABLE G. Edward Welmaker

MAY 14 2014

S.C. SUPREME COURT

CA No. 2012-CP-23-6447

TAMMY TWITTY,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA


RESPONDENT.

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMER  
2014 MAY 9 AM 8 55

**NOTICE OF APPEAL**

Appellant TAMMY TWITTY, appeals from the Order of the Honorable G. Edward Welmaker, Circuit Court Judge clocked April 9, 2014.

Respectfully submitted,

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

Date: May 8, 2014

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

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

IN THE SUPREME COURT

Tammy Twitty, )  
 )  
Appellant, )

C.A. No. 2012-CP-23-6447

-vs- )

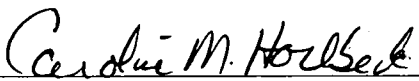
CERTIFICATE OF SERVICE

State of South Carolina, )  
 )  
Respondent. )

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

Ms. Lorie French  
S.C. Office of Appellate Defense  
P.O. Box 11433  
Columbia, SC 29211

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

  
Caroline M. Horlbeck

Greenville, South Carolina

May 9, 2014

CAROLINE M. HORLBECK

ATTORNEY AT LAW

pcr

101 WHITSETT ST.  
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**RECEIVED**

MAY 14 2014

**S.C. SUPREME COURT**

May 9, 2014

**Via Regular Mail**

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

**Re :** TAMMY TWITTY v. State

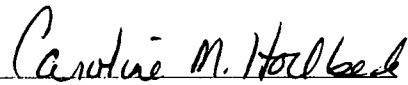
Dear Mr. Shearouse:

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 M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General  
Office of Appellate Defense

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Tammy Donnette Twitty, )  
 S.C.D.C. No. 174524, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2012-CP-23-6447

**ORDER OF DISMISSAL**

FILED - CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSINGER  
 2014 APR -9 P 3:02

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed October 9, 2012. The Respondent made its return on May 2, 2013. An evidentiary hearing into the matter was convened on February 18, 2014 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on her own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, Fletcher N. Smith, Esquire. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the December 2011 term of the Greenville County Grand Jury for two (2) counts of shoplifting, third offense or greater (2010-GS-23-10288, 2011-GS-23-2187. She was

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represented by Fletcher N. Smith, Esquire.

On June 21, 2012, the Applicant pled guilty. The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of seven years on each count of shoplifting, third offense or greater. The Applicant did not appeal.

### ALLEGATIONS

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

1. Ineffective assistance of counsel.
  - a. Failed to procure a plea bargain.
  - b. "Didn't receive credit for a drug bust."

### 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 she 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).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective.

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performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). 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, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The Applicant stated she retained plea counsel and asked him about the possibility of house arrest but that counsel said the State wanted prison time. The Applicant stated she worked for Investigator Mack in Spartanburg and he had promised to make sure she did not receive prison time. The Applicant stated she gave Mack's information to plea counsel. The Applicant stated Mack spoke with the assistant solicitor but nothing was said about this at the plea hearing. The Applicant stated plea counsel should have obtained a plea recommendation. The Applicant stated plea counsel said he would get a recommendation if she paid him \$500 but admitted she did not tell the plea judge about this.

Plea counsel testified he was retained and filed discovery motions. Plea counsel testified he received the discovery materials and reviewed them with the Applicant. Plea counsel testified they also reviewed her extensive criminal record. Plea counsel testified they had a meeting on March 11, 2012 in which they reviewed the discovery materials and he advised the Applicant she would receive some prison time for the charges. Plea counsel testified the Applicant told him about Investigator Mack and that he contacted the Spartanburg solicitor's office. Plea counsel testified Mack's input did not help their case because the assistant solicitor took a hard line on these charges. Plea counsel testified the State never made any plea offers in this case. Plea counsel testified the Applicant pled guilty once the case was on the trial docket and there were

A handwritten signature in black ink, appearing to be "C. H. H. 3", is written over the page number 3.

no promises of any recommendation. Plea counsel testified he was prepared for trial that day, as he had been advised there would be no continuances and the judge would not relieve him from representation.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet her burden of proof. This Court finds the Applicant's testimony is not credible, while also finding plea counsel's testimony is credible. This Court further finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

The Applicant admitted to the plea judge both that she was guilty and that the facts recited by the solicitor were true. (Plea transcript, p.3; p.4; p.6; p.14). The Applicant also told the plea judge that she understood the trial rights she was waiving in pleading guilty and had not been coerced in any way. (Plea transcript, p.3; p.5).

This Court finds the Applicant failed to meet her burden of proving plea counsel should have followed up with the work she did in Spartanburg County. Plea counsel testified he was aware the Applicant had worked for Investigator Mack in Spartanburg. Plea counsel testified he spoke to the solicitors' offices in both Spartanburg and Greenville about this but that the prosecuting attorney chose not to make any plea offers in this case. This Court finds plea counsel's testimony is credible. This Court notes the State told the judge at the plea hearing that they had been advised of the Applicant's assistance in Spartanburg and that, while it was considered, there were no plea offers made. (Plea transcript, pp.13-14). Plea counsel also noted her assistance in Spartanburg during the guilty plea hearing. (Plea transcript, p.15). This Court finds the Applicant has not met her burden of proving plea counsel improperly handled this issue. Further, this Court cannot speculate as to what Investigator Mack may have said to the

assistant solicitor because he did not testify at the PCR hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court “has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.”) (emphasis in original).

This Court finds the Applicant failed to meet her burden of proving plea counsel was deficient in not obtaining a plea offer. Plea counsel testified the assistant solicitor in this case was unwilling to make any plea offers in this case because of the Applicant’s extensive prior criminal record. This Court notes both that plea counsel cannot make the State engage in plea negotiations and that there is no constitutional right to plea bargain. See State v. Chisolm, 312 S.C. 235, 237, 439 S.E.2d 850, 852 (1994). The Applicant has failed to meet her burden of proving plea counsel was deficient in this regard.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea 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 she was prejudiced by plea counsel’s performance.

This Court concludes the Applicant has not met her burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### **All Other Allegations**

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to

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present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

**CONCLUSION**

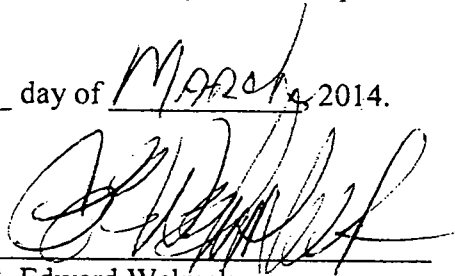
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during her guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that she must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if she wants to secure appropriate appellate review. Her 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 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.

**AND IT IS SO ORDERED** this 31 day of March, 2014.

  
\_\_\_\_\_  
G. Edward Welmaker  
Presiding Judge  
Thirteenth Judicial Circuit

, South Carolina.

**Via Regular Mail**

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