

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
G. Edward Welmaker, Presiding Judge

2012-CP-23-4612

KEVIN K. FOWLER, 349603

Applicant,

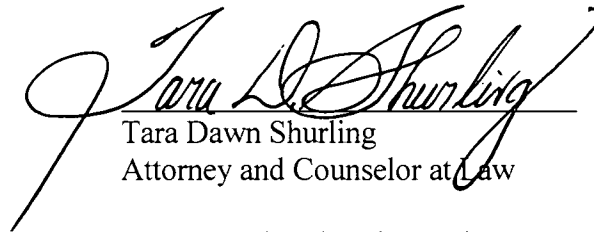
v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

NOW COMES the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned counsel, giving notice of his appeal from the Order of Dismissal denying his Post-Conviction Relief action filed March 25, 2014, and the Order Denying the Applicant's Motion to Alter or Amend pursuant to Rule 59(e) SCRCP which was filed with the Greenville County Clerk of Court on April 15, 2014, and a Supplemental Order denying that motion which was filed on April 29, 2014.



Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 FAX

ATTORNEY FOR APPLICANT

This 13th day of May, 2014.

Other Counsel of Record:
Karen C. Ratigan, Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

RECEIVED

MAY 15 2014

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
G. Edward Welmaker, Presiding Judge

2012-CP-23-4612

KEVIN K. FOWLER, 349603

Applicant,


v.

THE STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Applicant's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Karen C. Ratigan, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 13th day of May, 2014.


Suzanne Graham
Paralegal to Tara Dawn Shurling

SWORN TO BEFORE me this 13th day
of May, 2014.

Sharon H. Mcollister (L.S.)

Notary Public for South Carolina

My Commission Expires: Jan. 16, 2017

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2012CP2304612

FILED - CLERK OF COURT
GREENVILLE, S.C.
PAUL B. WICKENSIMER
2014 MAR 25 PM 12:56

Kevin K Fowler vs. South Carolina State Of

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):**
SCRCP (Vol. Nonsuit); Rule 43(k), SCRCP (Settled); Rule 12(b), SCRCP; Rule 41(a),
 Other: _____
- ACTION STRICKEN (CHECK REASON):**
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other: _____
 Rule 40(j) SCRCP; Bankruptcy:
- 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:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the . and a copy mailed first class this . to attorneys of record or to parties (when appearing pro se) as follows:

Tara Dawn Shurling 3614 Landmark Drive Suite A
Columbia, SC 29204

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

MAR 31 2014

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Kevin K. Fowler,)
S.C.D.C. No. 349603,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
C.A. No. 2012-CP-23-4612

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL S. WICKENSINER
2014 MAR 25 PM 12 36

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 19, 2012. The Respondent made its return on November 30, 2012. An evidentiary hearing into the matter was convened on December 18, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Tara D. Shurling, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying were: Allison Fowler, Nancy Fowler, and the Applicant's plea counsel, Matt Kappel, 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 original and amended PCR applications, the return, the appellate records, and Applicant's Exhibits 1-2.

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 November 2011 term of the Greenville County Grand Jury for lewd act upon a minor

1


(2011-GS-23-8818) and second-degree criminal sexual conduct (CSC) with a minor (2011-GS-23-8819). He was represented by Matt Kappel, Esquire.

On February 6, 2012, the Applicant pled guilty to second-degree CSC with a minor.¹ The Honorable Letitia H. Verdin sentenced the Applicant to eight years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. The Applicant was represented by Tara D. Shurling, Esquire. The Court of Appeals granted the Applicant's request to withdraw his appeal by order filed June 29, 2012.

ALLEGATIONS

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

1. Ineffective assistance of counsel:
 - a. "Trial Counsel failed to adequately investigate the Applicant's charges, failed to investigate and interview potential witnesses and failed to give his client adequate legal advise [sic] prior to the Applicant's guilty plea proceeding. Trial counsel failed to fully advise the Applicant [sic] of the consequences of his plea and further failed to investigate defenses against the charge against the Applicant. Trial Counsel neglected to adequately review discovery materials with the Applicant."
2. Involuntary guilty plea:
 - a. "Counsel failed to provide client effective assistance of counsel prior to and during his guilty plea proceeding. The Applicant's plea of guilt were [sic] coerced by counsel's failure to provide adequate representation."

In an "Amended Application for Post-Conviction Relief" dated December 11, 2013, the Applicant made the following allegations:

1. Ineffective assistance of plea counsel:
 - a. Failed to communicate a written plea offer from the State which would have been beneficial to the Applicant and which he would have accepted.

¹ The State not prossed the charge of lewd act upon a minor. (Plea transcript, p.9, lines 8-9).

- b. Failed to discuss with the Applicant the possibility of attacking the mandatory electronic monitoring provision of the Sex Offender Registration law on constitutional grounds if he pled guilty to, or was convicted of, lewd act upon a minor.
- c. Failed to ask for specific enforcement of the State's agreement not to make a recommendation as to sentence if the Applicant pled guilty.
- d. Failed to fully review the discovery materials in this case with the Applicant before requiring him to make a decision about entering a guilty plea.
- e. Failed to provide the plea judge with a copy of the full report issued by the mental health expert hired by the defense.

At the PCR hearing, the Applicant proceeded solely upon the allegations in the Amended 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 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 his guilty plea was involuntary and that 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).

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 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 he reviewed the State's evidence with plea counsel and relayed his version of events. The Applicant stated plea counsel explained the maximum sentences for each of the charges. The Applicant stated he told plea counsel that he would be able to keep his job if he did not receive prison time. The Applicant stated he and plea counsel discussed the State's offer for him to plead guilty to lewd act and that plea counsel said the State would not request a prison sentence. The Applicant stated he rejected the plea offer because of the lifetime GPS (and its cost). The Applicant stated plea counsel never mentioned challenging the constitutionality of the GPS statute. The Applicant stated that he never saw the written plea offer. The Applicant stated he decided to plead guilty to CSC instead of lewd act on the day of the plea hearing (and after plea counsel recommended he do so). The Applicant stated, however, that he would have rather pled guilty to lewd act without a sentence recommendation from the State (even with lifetime GPS monitoring) because he believed he could have kept his job. The Applicant stated plea counsel told him the day of the plea hearing that he had misunderstood and that the State would be requesting a prison sentence.

Allison Fowler, the Applicant's ex-wife and the victim's cousin, stated she met with the Applicant and plea counsel. Allison Fowler stated plea counsel told the family before the plea

4


hearing that the Applicant could plead guilty to lewd act with lifetime ankle monitoring but that – regardless of what charge the Applicant pled guilty to – the State would not ask for a prison sentence. Allison Fowler stated that, before the plea hearing, plea counsel advised them that he had misunderstood and that the State would be asking for a prison sentence. Allison Fowler stated there was no discussion of challenging the constitutionality of the GPS statute..

Nancy Fowler, the Applicant's mother, stated plea counsel had a discussion with everyone before the plea hearing. Nancy Fowler stated plea counsel discussed the differences between lewd act and CSC with a minor. Nancy Fowler stated plea counsel told them in the courtroom that the assistant solicitor would ask for a prison sentence.

Plea counsel testified he filed discovery motions and received full discovery. Plea counsel testified he reviewed the discovery materials with the Applicant and the impact of this evidence. Plea counsel testified he reviewed the elements of both charges and the sentencing ranges. Plea counsel testified the Applicant relayed his version of events and that there were no viable defenses. Plea counsel testified he met with the assistant solicitor numerous times about this case. Plea counsel testified there was a plea offer from the State (in a letter² dated October 3, 2011) for the Applicant to plead guilty to lewd act in exchange for the dismissal of the CSC charge and no recommendation from the State. Plea counsel testified he reviewed the offer with the Applicant, who rejected it. Plea counsel stated he met with the Applicant and his family in the courthouse on the day of the plea hearing and discussed that CSC had a greater maximum sentence (with a larger percentage of the sentence that must be served) but that a lewd act conviction involved lifetime GPS monitoring and a second-degree CSC with a minor conviction did not. Plea counsel testified they likely did not discuss making a constitutional challenge to

² Applicant's Exhibit 1.



lifetime GPS. Plea counsel testified the Applicant agreed to plead guilty to the second-degree CSC with a minor charge. Plea counsel confirmed the Applicant did not plead guilty pursuant to the original plea offer but that he felt he should have objected when the assistant solicitor requested a prison sentence. Plea counsel testified, however, that he did not believe the assistant solicitor's request made a difference to the plea judge. Plea counsel testified he hired Dr. Gunter to evaluate the Applicant in order to show he was not a danger to children. Plea counsel testified that, while a letter³ from Dr. Gunter referenced a full report he did not recall receiving a report. Plea counsel testified, however, that he did not want a full report – he just wanted the information referenced in the letter. Plea counsel testified he was sure he had discussed Dr. Gunter's letter with the Applicant.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds the Applicant's testimony is not credible, while also finding plea counsel's testimony is credible. The Applicant admitted to the plea judge that he was guilty of second-degree CSC with a minor. (Plea transcript, p.6). The Applicant did not dispute the assistant solicitor's recitation of the facts. The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced or made any promises in exchange for his guilty plea. (Plea transcript, pp.4-5).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not review the discovery materials. The Applicant admitted on cross-examination that he reviewed the State's evidence with plea counsel. Plea counsel testified they reviewed all of the discovery materials together. Plea counsel advised the plea judge that he and the Applicant "have had

³ Applicant's Exhibit 2.

sufficient time to review all of the evidence in the file” and the Applicant did not refute this. (Plea transcript, p.16, lines 21-22). This Court finds the Applicant has failed to articulate either what discovery materials he did not review with plea counsel or the alleged prejudice he would have suffered as a result.

This Court finds the Applicant failed to meet his burden of proving plea counsel was deficient in not providing a written report from Dr. Gunter to the plea judge. Plea counsel testified that the purpose of hiring Dr. Gunter to evaluate the Applicant was to be able to demonstrate to the judge that the Applicant was not a danger to children. Plea counsel testified this conclusion was contained in Dr. Gunter’s letter and that he did not believe a full report was necessary. Plea counsel testified he had several conversations with Dr. Gunter following the evaluation, but that they producing nothing worth reducing to writing. This Court finds plea counsel’s testimony is credible. This Court notes plea counsel relayed the information in Dr. Gunter’s letter to the plea judge and made it available to the judge if she wished to read it. (Plea transcript, p.12, lines 2-8). This Court finds the Applicant has failed to meet his burden of proving either that plea counsel should have obtained a written report or that the failure to obtain such prejudiced his case.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not communicate the written plea offer. The Applicant testified he and plea counsel discussed the State’s original offer for him to plead guilty to lewd act upon a child (and that the State would be silent as to a sentence recommendation). The Applicant admitted he rejected this plea offer. Plea counsel confirmed he reviewed this plea offer with the Applicant. This Court finds plea counsel conveyed the plea offer contained in the assistant solicitor’s October 3, 2011 letter to the Applicant and that they discussed it. This Court finds plea counsel has fulfilled his obligation in

7


this regard. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance).

This Court finds the Applicant failed to meet his burden of proving plea counsel should have objected when the assistant solicitor requested an active prison sentence. This Court notes the original plea offer from the State was for the Applicant to plead guilty to lewd act upon a child and that the State would not make a sentence recommendation. The Applicant, however, rejected this plea offer and it was not in place when he eventually pled guilty. When the Applicant pled guilty, it was with the understanding that it would be to the charge of second-degree CSC with a minor and that the State would dismiss the lewd act charge. The Applicant admitted he was advised prior to the guilty plea hearing that the State would not be silent about a sentence recommendation, yet he chose to proceed with the guilty plea hearing. Plea counsel was not deficient in his representation.⁴ Regardless, the Applicant cannot prove he was prejudiced. The assistant solicitor had no obligation to refrain from seeking an active jail sentence because, as noted supra, the Applicant did not enter his guilty plea to second-degree CSC with a minor pursuant to the October 3, 2011 plea offer. Further, the assistant solicitor's request for active time had, at most, a minimal effect on the ultimate sentence imposed. Contrary to the Applicant's assertions at the PCR hearing, the assistant solicitor only requested an active jail sentence once during the plea hearing. (Plea transcript, p.9, lines 6-7). This Court finds a thorough review of the plea transcript reveals the assistant solicitor's request had a negligible effect on the plea judge's decision, as the plea judge relied heavily on both the

⁴ This Court is familiar with the recent Court of Appeals decision of Smith v. State, Op. No. 5194 (S.C. Ct. App. filed February 5, 2014) (Shearouse Adv. Sh. No. 5 at 41). Although the facts of Smith are similar, this Court believes Smith is distinguishable because the Applicant in Smith plead pursuant to a plea agreement and was assured by plea counsel that the State would not be making a sentencing recommendation in contrast to the facts of the instant case.



arguments of plea counsel and the victim's input. (Plea transcript, pp.19-21). Specifically, the plea judge stated:

I'll be honest with you that if I heard just your conduct and not the words that your attorney had said and people that came with you today had said, if I had just heard those things and I had not heard the heartbreaking plea in a letter from the victim thinking about your family, then I would have given you twenty years. I think that your conduct warrants the maximum sentence in this case. . . . I can not put you on probation. I will not put you on probation. This is not a probationary case.

(Plea transcript, pp.20-21). This Court notes that, given the plea judge's comments, it is likely the outcome of this case would have remained the same even if the Applicant had pled guilty pursuant to the original plea agreement.

This Court finds the Applicant failed to meet his burden of proving plea counsel was deficient in not discussing whether to challenge the constitutionality of the GPS statute. Both the Applicant and plea counsel testified a main reason for the Applicant's rejection of the State's initial plea offer was that the charge of lewd act upon a minor carried mandatory lifetime GPS monitoring.⁵ At the time of the commission of the offenses in this case, mandatory GPS monitoring was in effect for all persons convicted of lewd act upon a child. S.C. Code Ann. § 24-3-540(C) (Supp. 2011). This mandatory GPS monitoring was for the defendant's lifetime. S.C. Code Ann. § 24-3-540(H) (Supp. 2011). The recent case of State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013) found subsection (C) was constitutional but found the two offenses affected by that subsection could not be barred from judicial reviewed under subsection (H). This Court, however, does not find plea counsel was deficient in not challenging the constitutionality of lifetime GPS monitoring. Counsel is not required to be clairvoyant about

⁵ The offense of second-degree CSC with a minor has never required mandatory lifetime GPS monitoring.

changes in the law. See State v. Gilmore, 314 S.C. 453, 445 S.E.2d 454 (1994). "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland v. Washington, 466 U.S. at 690, 104 S. Ct. at 2066. Based upon the state of the law at the time of the Applicant's charges, this Court finds it was not reasonable for plea counsel to have challenged the constitutionality of S.C. Code Ann. § 24-3-540. This is especially true because of: (1) the overwhelming evidence of the Applicant's guilt and (2) the Applicant's key concern at the time (based upon the Applicant's own testimony) was the possibility of attaining a probationary sentence.

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 finds plea counsel conveyed the original plea offer to the Applicant – as well as the offer he eventually pled guilty to – and discussed the advantages and disadvantages of each. This Court finds plea counsel properly advised the Applicant about the collateral issue of mandatory GPS monitoring with a conviction for lewd act upon a child. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel's performance. The Applicant has failed to present any credible evidence or testimony to support his claim that the outcome of his case would have been different but for counsel's representation.

This Court concludes the Applicant has not met his 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 present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

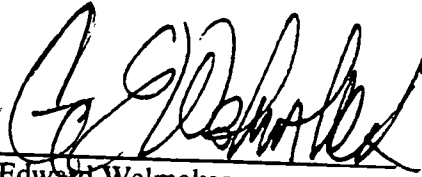
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation.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

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His 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 11 day of MARCH, 2014.



G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit

Pickens, South Carolina.

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2012CP2304612

FILED-CITIZEN COURT
GREENVILLE, S.C.
PAUL B. WICKENSIMER
2014 APR 15 PM 2:49

Kevin K Fowler vs. South Carolina State Of

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

- ACTION STRICKEN (CHECK REASON):**
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other: _____
 Rule 40(j) SCRCP; Bankruptcy:

- 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:
Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the . and a copy mailed first class this . to attorneys of record or to parties (when appearing pro se) as follows:

Tara Dawn Shurling 3614 Landmark Drive Suite A
Columbia, SC 29204

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)
 COUNTY OF GREENVILLE)
)
 Kevin K. Fowler,)
 S.C.D.C. No. 349603)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2012-CP-23-4619

ORDER DENYING APPLICANT'S MOTION TO ALTER/AMEND

FILED-COURT
 GREENVILLE, S.C.
 PAUL B. WELMAKER
 APR 15 2 44 PM '14

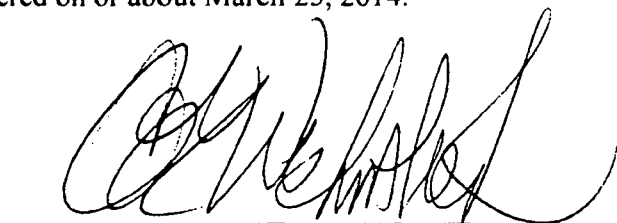
This matter comes before the Court by way of Applicant's Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRPC. Applicant asks this Court to reconsider its Order of Dismissal filed on March 25, 2014. Specifically, Applicant submits that the Order of Dismissal fails to incorporate his arguments that plea counsel rendered ineffective assistance of counsel when he failed to object to the Solicitor's recommendation for an active sentence and when counsel failed to remind the Solicitor of her previous agreement not to recommend an active sentence.

After careful consideration of the record in this case and the arguments of counsel, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Applicant's Motion pursuant to Rule 59, SCRPC, to Alter or Amend Judgment of this Court's Order entered on or about March 25, 2014.

IT IS SO ORDERED.

April 15, 2014

Pickens, South Carolina



Honorable G. Edward Welmaker
 Judge, Thirteenth Judicial

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

Kevin K. Fowler,)
S.C.D.C. No. 349603)

Applicant,)

vs.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2012-CP-23-4612

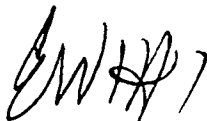
**SUPPLEMENTAL ORDER DENYING
APPLICANT'S MOTION TO ALTER/AMEND**

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL D. WICKENS/SIMMER
APR 29 PM 3 15

This matter comes before the Court by way of Applicant's Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRPC. An order was filed April 15, 2014, ruling upon this motion. Simultaneously, additional documents were being filed by both parties. Having thoroughly reviewed and considered this Court's prior orders, Respondent's Return dated April 16, 2014, and Applicant's Reply dated April 17, 2014, this Court finds that the Order of Dismissal filed March 25, 2014 accurately reflects the findings of the Court and properly ruled upon all issues. Accordingly, Applicant's Motion to Alter or Amend is DENIED with the following clarification:

First, Applicant argues that Plea Counsel rendered ineffective assistance when he failed to mention the October plea offer to the Solicitor prior to the plea and when he failed to object or mention the offer on the record. Second, Applicant argues that Plea Counsel rendered ineffective assistance when he lead Applicant to believe that the Solicitor would be seeking active time no matter what charge he plead to. Regardless of whether Plea Counsel committed unprofessional error, Applicant has suffered no prejudice by either alleged error because he would have received an active sentence even if Plea Counsel had performed to his satisfaction.

Addressing Applicant's first argument, this Court finds that the Solicitor's single request



for an active sentence had, at most, a *de minimis* effect on the ultimate outcome. Applicant submits that Plea Counsel was ineffective in not objecting to the Solicitor's mention of an active jail sentence on the record and also by not reminding the Solicitor of the October plea offer during "an in chambers conference."¹ Argument that such action by Plea Counsel "may have" impacted the judge or "may have" caused the Solicitor to refrain from seeking active time does not meet the required standard of proof.² The assertion that Applicant would have pled to Lewd Act, in light of the all the evidence in the record, is not persuasive.

Moreover, Applicant seeks "judicial notice" by this Court that silence by the prosecution in a plea always "sends a message" for a lenient sentence. The experience of the undersigned does not support that premise. Just as a Solicitor's statement for "an active jail sentence" (as here) can mean 30 days or more, total silence by the prosecution can mean *substantial* time. Plea Counsel candidly admitted to seeking the most favorable judge to hear the plea. Ultimately, Applicant would have received an active sentence whether the Solicitor had remained silent or not as evidence by the comments of the Plea Judge. *See* Order of Dismissal, pp. 8-9. If anything, Plea Counsel's efforts, along with a letter written by the victim, actually served to reduce the Applicant's resulting sentence. *Id.*

Addressing Applicant's second argument, Applicant's assertion that he would have pleaded guilty pursuant to the October plea is not persuasive in light of all the evidence. Plea Counsel testified that no viable defense existed, and he testified that Applicant rejected the October plea offer due to the prospect of lifetime GPS monitoring for Lewd Act. In considering the sum of the evidence in this case, this Court finds that Applicant has failed to prove there is a

¹ The notes kept by the undersigned do not reflect a conference with the judge prior to the hearing. Whether or not such conference occurred would not change the outcome.

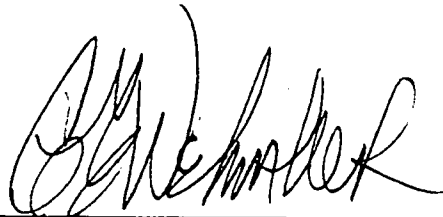
² The Assistant Solicitor did not testify at the PCR Hearing.

[Handwritten signature]

reasonable probability the result would have been different but for Plea Counsel's alleged errors. *See Edwards v. State*, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) (a PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome") (citations omitted).

IT IS SO ORDERED.

April 25, 2014
Pickens, South Carolina



Honorable G. Edward Welmaker
Judge, Thirteenth Judicial Circuit

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2012CP2304612

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 APR 29 PM 3 15

Kevin K Fowler vs. South Carolina State Of

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 and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
SCRC (Vol. Nonsuit); Rule 12(b), SCRC; Rule 41(a),
 Rule 43(k), SCRC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRC; 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:
Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the . and a copy mailed first class this . to attorneys of record or to parties (when appearing pro se) as follows:

Tara Dawn Shurling 3614 Landmark Drive Suite A
Columbia, SC 29204

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

LAW OFFICE OF



TARA DAWN SHURLING, PA

Attorney and Counselor at Law

3614 Landmark Drive

Suite A

Columbia, South Carolina 29204

(803) 738-8622

(Fax) (803) 738-1600

E-Mail: tdslaw@shurlinglaw.com

May 13, 2014

RECEIVED

MAY 15 2014

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211-1330

Re: Kevin K. Fowler, 349603 v. State of South Carolina;
2012-CP-23-4612.

Dear Mr. Shearouse:

Enclosed please find for filing a Notice of Appeal in the above captioned Post-Conviction Relief matter along with proof of service on opposing counsel. This Notice addresses the client's intent to appeal three (3) Orders issued by Judge Welmaker in this matter; the Order of Dismissal and two orders issued in response to the Rule 59(e) Motion I filed in this case. I was retained to represent this client in the circuit court only. The client's family now advises me that they will not be able to hire me to represent Mr. Fowler on his PCR appeal. I am providing the client a copy of this Notice of Appeal, and a Form Affidavit of Indigency which I am instructing him to fill out and return to me immediately for submission to Appellate Division of the South Carolina Commission on Indigent Defense, if he wishes to seek representation by them. I will make certain he is aware that time is of the essence, and that he must return his affidavit to me immediately. For now, I would appreciate having the two additional copies of this notice enclosed with this correspondence clocked and returned to me in the self-addressed, stamped envelope provided. With my thanks for your kind assistance always, I am,

Sincerely yours,

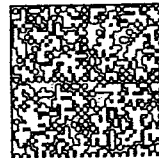
A handwritten signature in black ink that reads "Tara Dawn Shurling". The signature is fluid and cursive.

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/shm

cc: Karen Ratigan, Assistant Attorney General
Sharon Graham, Legal Service Coordinate, Appellate Defense
Kevin Fowler, 349603
Nancy Fowler

FIRST-CLASS



UNITED STATES POSTAGE
PITNEY BOWES
\$002.030
02 1P
0002929654 MAY 13 2014
MAILED FROM ZIP CODE 29204

Law Office of

TARA DAWN SHURLING, PA

3614 LANDMARK DRIVE, SUITE D
COLUMBIA, SOUTH CAROLINA 29204



The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211-1330