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STATE OF SOUTH CAROLINA)
)
 COUNTY OF McCORMICK)
)
 Roger Allen Dyke,)
 S.C.D.C. No. 347608,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 ELEVENTH JUDICIAL CIRCUIT

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C.A. No. 2012-CP-35-064

ORDER OF DISMISSAL COPY

Gwendolyn S. Childs
 Clerk of Court, McCormick County

By: *Debbie Sholler, Deputy*

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed July 13, 2012. Applicant filed a motion for default for Respondent's failure to file a timely responsive pleadings. Respondent made its Return on March 11, 2013. An evidentiary hearing into the matter was convened on November 11, 2013 at the Lexington County Courthouse. Applicant was present and was represented by John R. B. Long, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General. Applicant and counsel testified at the hearing.

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 McCormick County. The Applicant was indicted at the August 2011 term of the Court of General Sessions for McCormick County for two counts of burglary, first-degree (2011-GS-35-0115; -0118), petit larceny (2011-GS-35-0116), resisting arrest with a deadly weapon (2011-GS-35-0117), grand larceny (2011-GS-35-0119), attempted murder (2011-GS-35-0120), attempted armed robbery (2011-GS-35-0121), and possession of a weapon during a violent crime (2011-GS-35-0122). The Applicant was repre-

sented by Greg Seigler, Esq., On August 29, 2011, the Applicant entered a plea to attempted armed robbery and burglary, first-degree. As part of the plea agreement, the remaining charges were *nol prosequi*. He was sentenced by the Honorable Edward B. Cottingham to five (5) years imprisonment for attempted armed robbery and fifteen (15) years for burglary, first-degree. The sentences were to be served consecutively. Applicant did not appeal his sentence or conviction.

At the PCR hearing, Applicant only proceeded on the following allegations: reasons:

1. Ineffective Assistance of Counsel:
 - a. failure to file and obtain discovery materials;
 - b. failure to review discovery materials with Applicant;
 - c. failure to correctly advise Applicant on the sentencing exposure in his guilty plea.

SUMMARY OF TESTIMONY FROM THE PCR HEARING

Applicant testified he desired pursuing his application despite the exposure of a possible life sentence plus a substantial amount of prison time. Applicant stated that he only met with counsel on one occasion prior to entering his plea. He explained that this consultation with counsel lasted for five minutes and occurred immediately prior to the plea. He stated that he never received discovery. He asserted that had he reviewed the discovery materials, he would have insisted on proceeding to trial. However, Applicant acknowledged that he was excessively candid with the plea judge regarding his culpability. He also acknowledged that the plea judge commented on the matter and rewarded him for his honest posture during the sentencing phase of the plea hearing.

Applicant testified counsel pressured him to accept the solicitor's plea offer. He stated counsel misadvised him on his possible sentence. He disputed the notion that it was he who absolutely insisted an immediately plead guilty. According to Applicant, counsel promised him that he would receive a fifteen year prison sentence if he pled guilty. Based on Applicant's

review of the sentencing sheets, he claimed his now is aware that counsel had 'lied' to him. He stated that counsel never apprised him of the elements of the offenses at issue.

Applicant acknowledged that he told the plea judge that he was completely satisfied with counsel efforts on his case. Yet, he explained that he was 'under the influence' at his plea hearing. As a result, Applicant testified that he passively answered the plea judge's questions during the colloquy as counsel had instructed.

Counsel testified to his course of conduct during the representation. He conducted two consultations with Applicant prior to the plea. Counsel stated that he advised Applicant on the elements and the sentencing range of the offenses for which he was charged. He unequivocally asserted that Applicant was absolutely insistent on an immediate plea from the beginning of the case. He strongly encouraged Applicant to reconsider the matter in order to provide counsel additional time to evaluate the case. Counsel had made his standard motions for discovery in Applicant's case but was unaware if he was afforded the occasion to discuss the materials with Applicant as a result of his posture. He stated that he would have timely reviewed all of the discovery materials that he obtained with Applicant during the representation. He stated he explained the consequences of pleading at this stage of the case to Applicant. He stated that it was Applicant's decision to plead guilty. Counsel asserted that he would have conducted further investigation into Applicant's case had Applicant made the request. He stated that Applicant never wrote him while he was in pre-trial detention to inquire about the status of his case during the representation. He noted that he first received correspondence from Applicant long after the disposition of the case.

Counsel testified that Applicant however did receive a benefit from his candid dealings with the police and the solicitor in plea bargaining. As a result, the solicitor conveyed a favorable

plea offer where numerous serious charges were *not prosed*. He stated he explained the judge's discretion in sentencing; in particular the possibility of connective service instead of concurrent service.

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 records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and, 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.

A.

This Court heard argument on Applicant's motion for default judgment. Respondent relayed the brief procedural history of the case and argued that the motion was wholly without merit. This Court agrees with Respondent and summarily dismisses Applicant's motion for default judgment. This Court finds default judgment on behalf of Applicant is not appropriate. Compliance with proscribed filing period is a discretionary with the court. Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973). Absent a showing of prejudice by Applicant, the failure to file responsive pleadings within the proscribed filing period does not warrant granting the relief sought. Pleading were filed, the matter was scheduled for a hearing, and a hearing was held in a timely manner. Furthermore, this Court notes that it was Applicant who moved to have the hearing continued when this case was first scheduled in August of 2013. Applicant has completely failed to make credible showing that he was even remotely prejudiced by the manner in which Respondent filed its pleadings. See Kneece v. State, 269 S.C. 177, 236 S.E.2d 746 (1977). Therefore, this motion is summarily dismissed.

B.

This Court summarily dismisses Applicant's allegation that counsel was ineffective for failing to file for discovery during the representation where counsel provided credible testimony to the contrary. Therefore, this allegation is summarily denied and dismissed.

This Court finds Applicant has failed to meet his burden to prove counsel was ineffective for failing to review the discovery materials with him prior to the plea. Applicant has entirely failed to meet Strickland's deficiency prong. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. Counsel testified he explained to Applicant the consequences of entering a guilty plea at this juncture of the case. This Court finds counsel's testimony credible and his performance here competent in the context of this case. Furthermore, counsel's conduct in allowing Applicant to plead guilty was reasonable in light of the overwhelming and undisputed evidence of Applicant's guilt and the considerably favorable plea offer that was conveyed to Applicant. In contrast, this Court finds Applicant's testimony incredible that he was counsel pressured him to plead guilty. This Court also finds Applicant's testimony that he was dishonest in telling the plead judge that he was satisfied with counsel to be inherently suspect and not credible. See Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)) ("A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed."). Invariably, this Court finds Applicant received a benefit of his desire for a speedy and non-contested disposition of his charges; he must now

bear the fruit of decisions. See White v. Livingston, 231 S.C. 301, 308, 98 S.E.2d 534, 537 (1957) (“It may be added that the evidence adduced before the referee indicates that the result of the case is not a serious miscarriage of justice, if it is a miscarriage at all. At any rate, appellant has made his bed and he must lie in it.”).

Regardless, Applicant failed to even make a credible prima facie case of prejudice where he fails to enunciate just what discovery materials supported his allegation here. “[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the ‘prejudice’ inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.” Stalk v. State, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009). Again, this Court finds Applicant’s haphazard testimony on the matter lacking in credibility. Therefore, this allegation is denied and dismissed.

C.

Applicant has failed to meet his burden to prove counsel was ineffective for misadvising him on the plea judge’s discretion to impose consecutive terms of imprisonment in sentencing. Applicant has failed provide convincing evidence to overcome counsel’s credible testimony on the matter. Counsel specifically testified he apprised Applicant on concurrent versus consecutive service along with other sentencing and constitutional implications at issue with accepting the plea offer. Regardless, the credibility of the allegation itself is sufficiently undercut by the thoroughness of the plea colloquy. See Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) ([W]here 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 applicant’s claim lawyer misadvised him.). Therefore, this allegation is denied and dismissed.

D.

Except as discussed above, this Court finds that the 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). The 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

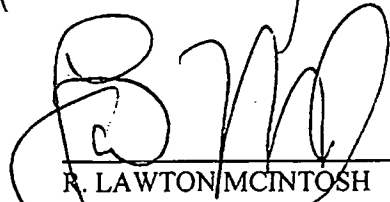
Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed 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. The 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 19 day of May, 2014.



R. LAWTON MCINTOSH
Presiding Judge
Eleventh Judicial Circuit

Anderson, South Carolina