

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Honorable George C. James, Jr., Circuit Court Judge

Case No: 2012-CP-26-5275

Nicolas Macklen.....Appellant
S.C.D.C. 323454
v.
The State.....Respondent

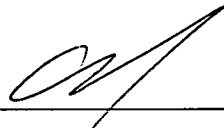
NOTICE OF APPEAL

Nicolas Macklen, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable George C. James, Jr., June 4, 2014, which I, Charles T. Brooks, III, received on June 20, 2014.

RECEIVED

JUN 26 2014

S.C. SUPREME COURT



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PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 24th day of June, 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 June 24, 2014, addressed to the following as indicated below:

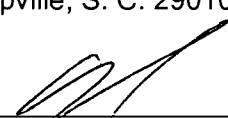
South Carolina Supreme Court
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Dated: June 24, 2014

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STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Nicholas Macklen, #323454,)
)
Applicant,)

Case No. 2012-CP-26-5275

v.)

ORDER OF DISMISSAL

State of South Carolina,)
)
Respondent.)

HORRY COUNTY
14 JUN 11 PM 1:38
MELANIE HUGGINS-WARD
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed July 9, 2012. Respondent made a timely Return on or about September 18, 2012.

The Court convened an evidentiary hearing into the matter on March 20, 2014, at the Horry County Courthouse. Applicant was present at the hearing and represented by Charles T. Brooks, III, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the PCR hearing. Applicant's plea counsel, Ralph J. Wilson, Sr., Esquire, also testified. The Court had before it a copy of the plea transcript, the records of the Horry County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the appellate records, the application for post-conviction relief, and the return. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In March 2009, the Horry County Grand Jury indicted Applicant for murder (2009-GS-26-1245), first degree burglary (2009-GS-26-1248), leaving the scene of a watercraft accident resulting in death (2009-GS-26-1270), and



three (3) counts of leaving the scene of a watercraft accident resulting in great bodily injury (2009-GS-26-1271, -1272, and -1273). Ralph J. Wilson, Sr., Esquire (“plea counsel”), represented Applicant. On May 18, 2010, Applicant entered a negotiated plea of guilty to first degree burglary, leaving the scene of a watercraft accident resulting in death, and three (3) counts of leaving the scene of a watercraft accident resulting in great bodily injury. As part of the negotiations, the State dismissed the murder indictment in exchange for the plea. The Honorable Larry B. Hyman, Jr., sentenced Applicant to concurrent terms of twenty-seven (27) years for first degree burglary, twenty-five (25) years for leaving the scene of a watercraft accident resulting in death, and ten (10) years for each count of leaving the scene of a watercraft accident resulting in great bodily injury.

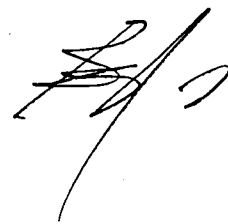
Applicant filed a timely notice of appeal, and Wanda H. Carter, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of an Anders¹ brief. The South Carolina Court of Appeals dismissed Applicant’s appeal on February 22, 2012. State v. Macklen, Op. No. 2012-UP-106 (S.C. Ct. App. filed February 22, 2012). The remittitur was returned to the circuit court on March 12, 2012.

II. ALLEGATIONS

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

1. “Ineffective Assistance of Counsel”
2. “Unknowing and Involuntary guilty plea/Trial counsel failure to object to guilty plea”
3. “Trial Judge failure to inform Applicant of his constitutional rights before accepting guilty plea”
4. “Exhibit A Trial Transcript pg 24, 25, Trial counsel failure to object 6th Amendment violation”

¹ Anders v. California, 386 U.S. 738 (1967).

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At the PCR hearing, the Applicant proceeded on only two (2) allegations. First, he alleged plea counsel was ineffective in advising Applicant to reject a twenty (20) year plea offer. Second, he alleged his plea was involuntary because Judge Hyman failed to adequately advise him of his rights.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed 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).

A. Summary of Testimony

Applicant testified the State initially offered him a plea of twenty (20) years. He testified plea counsel told him to reject this offer because he could get a better offer of eight (8) to twelve (12) years. Applicant further testified plea counsel advised him to reject the twenty (20) year offer because he had a good chance of success at trial. Applicant recalled intending to take the case to trial until his co-defendant decided to give a confession. On cross-examination, Applicant admitted it was his decision to decline the initial plea offer.

Applicant also testified he was crying during the guilty plea and upset about the amount of time he would be getting. He recalled Judge Hyman did not inform him he was waiving his right to confront the witnesses against him. On cross-examination, Applicant recalled raising on direct appeal the issue of Judge Hyman's lack of advice regarding the right to confront witnesses.

Plea counsel testified he has been practicing criminal law since 1977. He recalled

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meeting with Applicant or his family at least seven (7) times. Plea counsel also recalled filing discovery motions and receiving a complete response from the State. Plea counsel testified the State initially did not have proof Applicant participated in the burglary or was in the boat fleeing the burglary scene. However, plea counsel recalled advising Applicant the situation could change if the co-defendant decided to testify. Plea counsel admitted he advised Applicant to reject the twenty (20) year plea offer because the State could not prove Applicant's guilt. However, plea counsel also testified the ultimate decision to reject the offer was Applicant's. On cross-examination, plea counsel testified he did not recall promising Applicant an eight (8) to twelve (12) year sentence. Plea counsel testified any discussion of a lesser sentence would have been in the context of what he hoped he could get if he continued to negotiate with the State.

Plea counsel testified his advice was based on the inability of the State to tie Applicant to the boat involved in the accident. He recalled his advice changed when the co-defendant agreed to cooperate with the State and when Applicant's niece gave a statement that tied Applicant to the boat. The co-defendant identified Applicant as participating in the burglary and driving the boat involved in the accident. At that time, the State rescinded its twenty (20) year offer. Plea counsel admitted he was most concerned with the murder and burglary charges at that time. Plea counsel negotiated the twenty-seven (27) year offer and discussed it with Applicant. He testified he also discussed the risks and benefits of a trial. Plea counsel recalled discussing with Applicant his right to testify in his own defense and his right to cross-examine the State's witnesses.

B. Ineffective Assistance of Plea Counsel

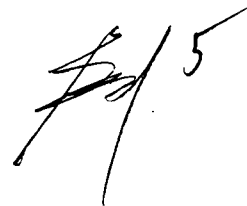
In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985)



(citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of plea counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the plea proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes plea counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118; 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the Applicant must prove plea counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea 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." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).



The Court finds Applicant failed to meet his burden of proving plea counsel was ineffective in advising Applicant to reject the twenty (20) year plea offer. Regarding this allegation, the Court finds plea counsel's testimony credible and Applicant's not credible. The Court further finds counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

As to plea counsel allegedly promising Applicant an eight (8) to twelve (12) year sentence, the Court finds credible plea counsel's testimony that any reference to such a potential range of sentences would have been as a "best case scenario" for Applicant. The Court is also persuaded by the fact this conversation occurred before the co-defendant turned on Applicant and placed him at the scene of the burglary, as well as before anyone came forward with information connecting Applicant to the boat. After the State got this information, the 20 year offer was withdrawn and plea counsel's attempts to negotiate a lower sentence were ~~rebutted~~ ^{rebuffed.} (87)
The record reflects Applicant was clearly aware of the risk of rejecting the initial offer if the co-defendant decided to cooperate. Applicant made the decision to reject the initial offer with full understanding of the potential consequences, and he cannot now allege counsel was some way ineffective under these circumstances.

Everything in plea counsel's plans to go to trial seems to have unraveled when the co-defendant turned on Applicant. This change of events because of new information being supplied to the State does not render plea counsel's assistance ineffective in any way. The Court finds plea counsel's performance was reasonable under the circumstances, and certainly "reasonable under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688).



C. Involuntary Guilty Plea

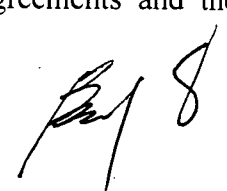
The voluntariness of a guilty plea is determined in light of the entire record before the court. Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012) (citing Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000)). “To knowingly and voluntarily enter a plea of guilty, all that is required is that a defendant have a full understanding of the consequences of his plea and of the charges against him.” Simpson v. State, 317 S.C. 506, 508, 455 S.E.2d 175, 176 (1995) (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991)). Furthermore, a defendant must only be informed of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Roddy, 339 S.C. at 33, 528 S.E.2d at 421 (citing Boykin v. Alabama, 395 U.S. 238 (1969)). “When attempting to determine the voluntary and intelligent nature of a plea, the plea colloquy ordinarily serves as confirmation that a criminal defendant is waiving the right to raise certain constitutional claims by pleading guilty.” Hyman, 397 S.C. at 44, 723 S.E.2d at 379 (citing Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97, 98 (1975)). However, the plea judge need not provide an “enumeration of specific rights waived ... where the record otherwise reveals affirmative awareness of the consequences of a guilty plea.” State v. Lambert, 266 S.C. 574, 579, 225 S.E.2d 340, 342 (1976) (citing Stinson v. Turner, 473 F.2d 913 (10th Cir. 1973)). Furthermore, “[a] guilty plea is a solemn, judicial admission of the truth of the charges” against the applicant. 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 (1977)). Admissions “made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements.” Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).



The Court finds Applicant failed to demonstrate his plea was not knowingly and voluntarily entered. As an initial matter, the Court notes Applicant raised in his direct appeal the issue of Judge Hyman's failure to advise him of the right to confront his accusers. To the extent this issue has already been decided by the Court of Appeals, it is not properly raised in post-conviction relief. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal.").

Regardless, the Court finds the record before it supports a conclusion Applicant's plea was knowingly and voluntarily entered. The Court finds plea counsel's testimony on this issue to be credible, and finds Applicant's testimony to be not credible. From the transcript, it appears Judge Hyman fully advised Applicant of his rights and that Applicant understood the rights he was giving up by pleading guilty. Judge Hyman advised Applicant of his right to remain silent, his right to testify, and his right to have plea counsel represent him throughout a trial and challenge the State's case, as well as put up a case or raise defenses that could be helpful to him. (Trial Tr. p. 24-25). At the time of the plea, Applicant indicated he understood the rights he was giving up and had no mental issues that would keep him from understanding what he was doing. (Trial Tr. p. 16-18). Furthermore, prior to the plea, plea counsel discussed with Applicant the way a jury trial worked including his right to present witnesses and cross-examine the State's witnesses. Accordingly, the Court finds Applicant pled guilty with a full understanding of the rights he was waiving by entering the plea.

Nothing in the record indicates Applicant did not intend to plead guilty at the time of the plea. Plea counsel and Applicant went over the facts, the charges and their elements, and the potential sentences well before the plea. Plea counsel and Applicant met at least seven (7) times prior to the plea, giving Applicant many opportunities to discuss plea agreements and the

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possibility of a trial with plea counsel. Plea counsel and Applicant discussed the prospect of a trial at first, but this strategy changed once the co-defendant agreed to cooperate. After evidence linked Applicant to the scene of the burglary as well as the boat, Plea counsel and Applicant discussed the change in circumstances and Applicant made the ultimate decision to accept the negotiated plea. Nothing from the PCR hearing or the plea transcript shows credible evidence Applicant did not have a full understanding of the consequences of his plea. Accordingly, the Court finds Applicant's plea was knowingly and voluntarily entered.

D. 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, the Court finds Applicant failed to present sufficient evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Plea counsel rendered effective assistance and Applicant's plea was knowingly and voluntarily entered. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek

appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 4 day of June, 2014.



THE HONORABLE GEORGE C. JAMES, JR.
Presiding Judge

Junder, South Carolina

BJ 10

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June 23, 2014

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: Nicholas Macklen, 323454 vs. State of South Carolina
2012-CP-26-5275

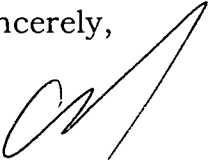
Dear Sir or Madam:

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

Enclosed as stated

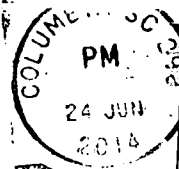
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S.C. SUPREME COURT

cc: Joshua L. Thomas, Office of Attorney's General
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