

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
THE HONORABLE Robin B. Stilwell

CA No. 2013-CP-23-3234

TIMOTHY LEE OWENS,  
APPELLANT,  
vs.  
STATE OF SOUTH CAROLINA  
RESPONDENT.

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMMER  
2014 SEP 8 PM 2 13

NOTICE OF APPEAL

Appellant TIMOTHY LEE OWENS, appeals from the Order of the Honorable Robin B. Stilwell, Circuit Court Judge clocked August 13, 2014.

**RECEIVED**

SEP 8 2014

S.C. SUPREME COURT

Respectfully submitted,

*Caroline Horlbeck*

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

Date: September 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

Timothy Lee Owens, )  
 )  
Appellant, )

C.A. No. 2013-CP-23-3234

-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

Sept. 11, 2014

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Timothy Lee Owens, )  
 S.C.D.C. No. 169604, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2013-CP-23-3234

**ORDER OF DISMISSAL**

FILED IN THE COURT  
 OF COMMON PLEAS  
 GREENVILLE CO. S.C.  
 PAUL A. WICKENS/SMER  
 2014 AUG 13 PM 3 52

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 10, 2013. The Respondent made its return on October 18, 2013. An evidentiary hearing into the matter was convened on June 17, 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 his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, Larry H. Cooke, 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, the return and the Applicant's Exhibits 1-3.

**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 2012 term of the Greenville County Grand Jury for two counts of grand larceny

(2012-GS-23-5463, -5470),<sup>1</sup> three counts of breaking and entering a motor vehicle (2012-GS-23-5464, -5465, -5466) and second-degree burglary (2012-GS-23-5469). He was represented by Larry H. Cooke, Esquire.

On December 5, 2012, the Applicant pled guilty. The Honorable William H. Seals, Jr., sentenced the Applicant to consecutive terms of one year for each count of grand larceny, one year for each count of breaking and entering a motor vehicle and thirteen years for second-degree burglary. The Applicant did not appeal.

### **ALLEGATIONS**

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

1. Ineffective assistance of counsel.
  - a. "My counsel failed to object to Reneged plea."
  - b. "Counsel failed to question the altered indictment or the altered sentencing sheet or the plea offer."
2. "Involuntary [sic] sentence of the States recommendation/negotiation of plea offer, never ask for jail time."

### **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).

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<sup>1</sup> These indictments were under S.C. Code Ann. § 16-1-57.

### Ineffective Assistance of Counsel

The Applicant alleges his guilty plea was involuntary. 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 plea counsel mailed him both an amended plea letter from the State (dated October 4, 2012<sup>2</sup>) and discovery materials with a cover sheet dated November 27, 2012.<sup>3</sup> The Applicant stated the offer was for a twelve year cap, that he wanted to accept this offer, and that no one ever explained the offer to him. The Applicant stated the Solicitor's Office visited him at the detention center in late November 2012 to serve notice of intent to seek life imprisonment without parole (LWOP). The Applicant stated plea counsel told him at a December 4, 2012 meeting that he would plead guilty to a twelve year cap. The Applicant admitted he signed the sentencing sheets the morning of the guilty plea, but stated he did not take

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<sup>2</sup> Applicant’s Exhibit 1.

<sup>3</sup> Applicant’s Exhibit 2.

notice of the "without negotiations or recommendation" box and whether it was marked. The Applicant stated a recommendation was not made at the plea hearing, but that during a break in the proceedings, plea counsel said he could handle it. The Applicant stated he told plea counsel to withdraw his guilty plea when he did not receive a twelve year sentence. The Applicant stated he would have rather gone to trial than receive a sentence in excess of twelve years.

Plea counsel testified he was appointed in this case. Plea counsel testified he filed discovery motions, received those materials and reviewed them with the Applicant. Plea counsel testified the State had a solid case and the Applicant wanted to plead guilty. Plea counsel testified there was a note in the public defender database<sup>4</sup> that an email was sent to the assistant solicitor on June 15, 2012 about a plea offer. Plea counsel testified there was an August 27, 2012 note that the assistant solicitor would not make another offer because of the Applicant's prior record. Plea counsel testified there was a note that he received an October 5, 2012 letter from the assistant solicitor. Plea counsel testified there was a note that he sent a copy of the October 4 plea offer to the Applicant on October 10, 2012. Plea counsel testified there was a note on October 22, 2012 that the Applicant wanted a jail visit. Plea counsel testified there was a note on November 26, 2012 that indicated: he must have told the assistant solicitor the Applicant would not accept the plea offer (because the Applicant wanted non-violent instead of violent), that LWOP notice had been served and that the case had been put on the trial docket. Plea counsel testified he would not have told the Applicant the twelve year cap was still available at that point. Plea counsel examined Applicant's Exhibit 2 (the November 27, 2012 cover letter) and testified his cover letters always list all of the items being sent and stated that, if he had sent

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<sup>4</sup> Plea counsel testified his file could not be located but that he had all of the notes that his investigator entered into the public defender database for this case.

a copy of the plea letter, it would have been mentioned in the cover letter.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly convey the plea offer in this case. While the Applicant stated he did not receive the October 4, 2012 plea offer until late November 2012, plea counsel testified his notes indicated this plea offer was sent to the Applicant on October 10, 2012. Plea counsel also testified his notes reflected that he would have informed the State by November 26, 2012 that the Applicant did not accept the twelve-year offer because the State served notice of intent to seek LWOP and placed the case on the trial docket. This Court finds plea counsel's testimony is more credible. This Court finds the Applicant rejected any and all plea offers made by the State and was well aware on the day of the guilty plea that he would be pleading guilty without a sentence recommendation. The Applicant admitted to the plea judge that he was guilty. (Plea transcript, p.10). 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 in any way. (Plea transcript, pp.2-3; p.5; pp.7-8; pp.9-10). The Applicant did not object when it was noted he was pleading guilty without a recommendation. (Plea transcript, p.3). The Applicant also admitted to the plea judge that the State made a plea offer for a twelve-year cap but he wanted a ten-year offer for non-violent charges. (Plea transcript, pp.8-9). The Applicant informed the plea judge that he wanted to put these charges behind him and plead guilty. (Plea transcript, p.9). As such, this Court finds the Applicant's allegations are refuted by the guilty plea transcript. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007); see also 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 applicant's claim lawyer misadvised him).

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 he was prejudiced by plea counsel’s performance.

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

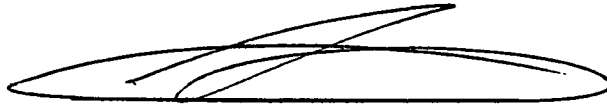
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel’s representation. 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 12 day of Aug, 2014.



Robin B. Stilwell  
Presiding Judge  
Thirteenth Judicial Circuit

G'VILLE, South Carolina.

CAROLINE M. HORLBECK  
ATTORNEY AT LAW

par

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(864) 315-9919  
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September 11, 2014

**RECEIVED**

SEP 16 2014

**S.C. SUPREME COURT**

**Via Regular Mail**

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

**Re:** TIMOTHY LEE OWENS v. State

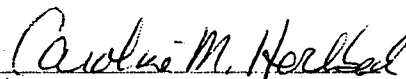
Dear Mr. Shearouse:

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

# CAROLINE M. HORLBECK

*Attorney At Law*

101 WHITSETT ST.  
GREENVILLE, SOUTH CAROLINA 29601

## Via Regular Mail

Mr. Daniel E. Shearouse  
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