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September 24, 2014

Hon. Daniel E. Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re.: State v. Burr

Dear Clerk Shearouse:

Please find enclosed two copies of the Notice of Appeal and Certificate of Service along with the Circuit Court Order on the above referenced case. Please file the original and mail the copies back in the also enclosed self addressed stamped envelope. Please feel free to contact me with any questions or concerns you may have. Thank you.

Sincerely Yours,

Nathan Sheldon
Shaw Law Firm

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2013-CP-12-0224

State of South Carolina, Respondent,

v.

Earl Malcolm Burr, Appellant.

NOTICE OF APPEAL

Earl Malcolm Burr appeals the order of the Honorable W. Jeffrey Young dated August 28, 2014. Appellant received written notice of entry of this order on September 17, 2014.

September 24, 2014

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2013-CP-12-0224

The State of South Carolina Respondent,

v.

Earl Malcolm Burr Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the below listed people by depositing a copy of them in the United States Mail, postage prepaid, on September 24, 2014, to the addresses listed below.

J. Croom Hunter
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Post Office Box 11549
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Hon. Sue K. Carpenter
Chester County Clerk of Court
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Nathan Sheldon
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September 24, 2014

STATE OF SOUTH CAROLINA COUNTY OF CHESTER	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT
Earl Malcolm Burr, II, #350912, Applicant, v. State of South Carolina, Respondent.	Case No. 2013-CP-12-0224 **ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on May 21, 2013. Respondent made its return on September 4, 2013. An evidentiary hearing into the matter was convened on July 28, 2014, at the Lancaster County Courthouse. Applicant was present at the hearing and was represented by Nathan J. Sheldon, Esquire. Respondent was represented by Assistant Attorney General J. Croom Hunter of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chester County Clerk of Court. Applicant was indicted during the January 2012 term of the Chester County Grand Jury for hit and run involving death (2012-GS-12-005) and felony DUI causing death (2012-GS-12-006). Applicant was represented by Mike Lifsey, Esquire. On May 8, 2012, Applicant appeared before the Honorable Brooks P. Goldsmith, where he pled guilty as indicted. Judge Goldsmith sentenced applicant to twenty (20) years imprisonment.

Applicant filed a Notice of Appeal (Appellate Case No. 2012-212238). The South Carolina Court of Appeals dismissed the appeal for failure to provide sufficient explanation as required by Rule 203, SCACR. The Remitter was issued on October 15, 2012.

ALLEGATIONS

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully based on the following grounds:

1. "I am innocent."
2. "My counsel did not take appropriate."
3. "I did not drive south on I-77."
4. "I was forced to fire my original counsel."

MOTION FOR CONTINUANCE

Immediately prior to the post-conviction relief hearing, Applicant moved for a continuance based upon the assertion that Applicant had not taken his medicine in six (6) days. The State objected to Applicant's motion for continuance. This Court denied Applicant's request pursuant to Council v. Catoe, 359 S.C. 120, 123, 597 S.E.2d 782, 783 (2004) (holding a petitioner's mental incompetency does not impede his ability to assert his meritorious PCR claims). Additionally, this Court had a full opportunity to observe Applicant during the PCR hearing and finds no deficiencies in Applicant's mental competency.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from plea counsel, Mike Lifsey, Esquire (Counsel). This Court also had before it a copy of the plea transcript, the Chester County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

During the evidentiary hearing, Applicant testified that he was represented at his plea by Mike Lifsey, Esquire. Applicant testified he had not taken his medicine for six days prior to the

PCR hearing. Applicant testified his medicine affects his ability to think clearly. Applicant testified that prior to being represented by Mr. Lifsey, he was represented by Ross Burton for four months. Applicant testified he fired Burton because they did not communicate enough. Applicant testified that Counsel tried to help him once he came on to the case, but he only had one month to prepare. Applicant testified that Counsel hired an investigator, but he came on the case too late to help. Applicant testified he was deprived of a thorough investigation of the facts surrounding his case. Applicant testified Counsel never provided him with his discovery. Applicant testified that he was not guilty of the crimes.

Following Applicant's testimony, Mike Lifsey, Esquire (Counsel), testified. Counsel testified he took over the case on March 20, 2012. He testified that he retained an investigator on March 22, 2012. Counsel testified he also retained a psychologist to evaluate Applicant. Counsel testified he reviewed discovery with the Applicant. Counsel testified he discussed the nature of the charges against Applicant the consequences of pleading guilty. Counsel testified he reviewed Applicant's constitutional rights with him. Counsel testified that Applicant's version of the facts did not line up with the discovery, and that the investigator did not find any evidence to support Applicant's story. Counsel testified the investigator did not provide a written report, but that the investigator met with Applicant numerous times. Counsel testified the investigator had enough time to perform a thorough investigation. Counsel testified that Applicant claimed he was kidnapped in Gastonia, North Carolina. Counsel testified, Applicant stated that he witnessed these people kill someone, and that is why they kidnapped him. Counsel testified that Applicant claimed he was not driving, and the kidnappers disappeared after the wreck. Counsel testified Applicant's story seemed incredible, and there was no evidence to support it. Counsel testified Applicant took Prozac and Ibuprofen. Counsel testified he did not remember whether he asked

Applicant if he took his medication the day of the plea. Counsel testified Applicant appeared to be competent at his plea. Cou8nsel testified that he believed he went over the psychologist's report with Applicant. Counsel testified that he presented Applicant's mental health problems as part of his mitigation. Counsel testified he did not need more time to prepare for the case.

INEFFECTIVE ASSISTANCE OF COUNSEL

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his 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, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 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. 668. 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. 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. With respect to guilty plea counsel, the Applicant

must show that 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, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

This Court finds Applicant failed to demonstrate that Counsel's performance was deficient in any way. This Court further finds that Applicant presented no evidence to show any prejudice resulting from Counsel's representation. Additionally, this Court finds Counsel's testimony credible and Applicant's testimony not credible.

This Court finds that Counsel met with Applicant multiple times prior to the guilty plea. This Court further finds Counsel obtained discovery from the solicitor and went over it with Applicant. Accordingly, this Court finds Applicant's claim that Counsel did not receive his discovery is without merit. This Court finds Counsel's belief that Applicant's version of the facts was not credible was reasonable. This Court finds Counsel had Applicant mentally evaluated. This Court further finds Applicant's claim that Counsel did not have adequate time to prepare is without merit. This Court finds that Counsel hired an investigator to determine whether evidence existed to support Applicant's story. This Court finds that the evidence against Applicant was overwhelming, and Counsel did everything he could reasonably have done to obtain a favorable outcome for Applicant. This Court further finds that Counsel thoroughly prepared Applicant's case, and Applicant's claim that he was prejudiced by the work done by prior counsel on the case is without merit.

Accordingly, this Court finds Applicant did not demonstrate any deficiencies in Counsel's representation. This Court finds that because Counsel's representation was well within the range of competence required in criminal cases, Applicant has further failed to make any showing that but for Counsel's alleged deficiencies, the result of Applicant's case would have

been any different.

INVOLUNTARY GUILTY PLEA

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. Id. at 243, 89 S. Ct. at 1712. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. Moreover, a criminal defendant entering a guilty plea "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citation omitted). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)).

When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

This Court finds Applicant has failed to demonstrate that his guilty plea was entered involuntarily.

This Court finds Applicant was aware of the nature of the charges he was facing and the

possible penalties. This Court further finds that Applicant was fully aware that an Alford plea carried the same ramifications as a guilty plea. This Court finds Applicant told the plea judge he was satisfied with his attorney and did not need any more time. This Court finds Applicant was well aware that by pleading guilty he was waiving his ability to challenge the evidence against him. This Court further finds Applicant was well aware of the constitutional rights he was waiving by pleading guilty. This Court further finds that Applicant pled guilty voluntarily and of his own free will.

Accordingly, this Court finds Applicant's guilty plea was knowingly and voluntarily entered. This Court finds that the evidence presented at the evidentiary hearing as well as contained within the guilty plea transcript clearly supports a finding that the guilty plea was not coerced or involuntary; rather, it was freely, knowingly, and voluntarily entered. This Court finds Applicant was informed of the nature and elements of the offenses with which he was charged and to which he pled guilty. This Court further finds that Applicant was fully apprised of the rights he was forfeiting in order to plead guilty and that Applicant decided to go forward with his guilty plea.

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.

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 in regard to the claims raised by Applicant. 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:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 28 day of Aug, 2014.

W. JEFFREY YOUNG
Presiding Judge
Sixth Judicial Circuit

Sumter, South Carolina

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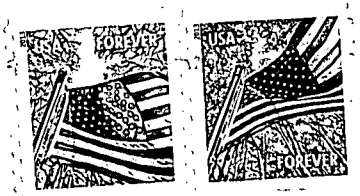

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