

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM YORK COUNTY  
Court of Common Pleas

J. ERNEST KINARD, JR, Circuit Court Judge

Civil Action Number: 2013-CP-46-1791

JAMES ENRICO DIEGO  
#200602,

Petitioner,

v.

STATE OF SOUTH  
CAROLINA,

Respondent.

RECEIVED

OCT - 3 2014

S.C. Supreme Court

NOTICE OF APPEAL

The Petitioner above appeals the order of the Honorable J. Ernest Kinard, Jr. dated September 26, 2014 denying his application for Post-Conviction Relief.

September 30, 2014



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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

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Civil Action Number: 2013-CP-46-01791

James Enrico Diego,

Petitioner,

v.

State of South Carolina,

Respondent.

**RECEIVED**

OCT - 3 2014

S.C. Supreme Court

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PROOF OF SERVICE

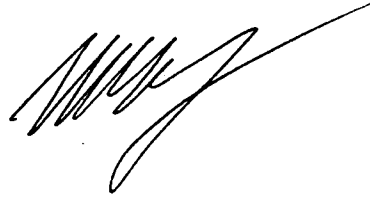
I certify that I have served the Notice of Appeal in the above captioned case on the following individuals by depositing a copy of it in the United States Mail, postage prepaid, on October 2, 2014, addressed to:

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October 1, 2014



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STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS )  
SIXTEENTH JUDICIAL CIRCUIT )

James Enrico Diago, #200602, )  
Applicant, )

2013-CP-46-1791 )

v. )

**ORDER OF DISMISSAL** )

State of South Carolina, )

Respondent. )  
\_\_\_\_\_ )

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YORK COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 7, 2013. The Respondent made its Return on March 27, 2014. An evidentiary hearing into the matter was convened on August 4, 2014, at the Moss Justice Center in York, SC. W. Michael Hemlepp, Jr., Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, Applicant testified on his own behalf. Phil Smith, Esquire also testified. This Court had before it a copy of the records of the York County Clerk of Court, records from the South Carolina Department of Corrections, the application, the State's Return and the guilty plea transcript.

#### **PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. The Applicant was indicted at the March 2012 term of the York County Grand Jury for Murder (2012-GS-46-1260), Attempted Murder (2012-GS-46-1261), two counts of Possession of a Firearm during the commission of a violent crime (20120GS-46-1260A, -1261A) and Possession of a Firearm by a person convicted of a violent crime.

Phil Smith, Esquire, represented him. On December 17, 2012, the Applicant pled guilty to all charges as indicted before the Honorable Michael G. Nettles and was sentenced, pursuant to recommendations from the State, to forty (40) years for Murder, thirty (30) years, concurrent, for attempted murder and five years, concurrent, for each of the possession charges. Applicant did not appeal his conviction and sentence.

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

1. "Ineffective Assistance of Counsel"
  - a. "Trial Counsel failed to investigate the facts surrounding the nature of the offenses"
2. "Coercive Nature of the Plea Bargain"
  - a. "Forced Plea by threats from solicitor and attorney using scare tactics and coahursion(sic)"
3. "Conflict of Interest"
  - a. "Evidence was not proper and forensic was not sound or proper"
4. "Involuntary plea"
  - a. "Plea was forced by threats from attorney"

At the hearing, the Applicant proceeded on his claim of ineffective assistance of plea counsel and involuntary guilty plea.

#### **SUMMARY OF TESTIMONY**

At the evidentiary hearing, Applicant testified he was charged with two counts of possession of a weapon during the commission of a violent crime even though there was only one incident. He also stated he was represented by Harry Dest and Phil Smith, with Counsel Smith being his main attorney. Applicant claimed he was not guilty of murder, but rather guilty of voluntary manslaughter

because he thinks this incident occurred during the heat of passion because he and Victim's emotions were running high concerning their daughter. Applicant testified he called 911 and said he accidentally shot Victim.

Applicant testified he pled guilty because Counsel Smith said he could not put up a defense. Applicant claims he was interrogated by Counsel Dest, Counsel Smith, and BJ Barrowclough for about an hour at the York County Detention Center where all attorneys told him that no jury would find him guilty of voluntary manslaughter. Applicant testified he had no other option but a murder charge. Applicant admitted that he killed Victim after an argument about their daughter and that both he and Victim were agitated.

Concerning his indictments, Applicant testified he was indictment for both murder and attempted murder because he shot both Victim and Victim's son. Applicant also testified this occurred during one event and that Victim was in the driver's seat of the car and Victim's son was in the passenger's seat. Applicant claims Counsel Smith did not object to the indictments based on a Double Jeopardy claim because there was only one gun used; his gun.

Further, Applicant testified he pled guilty because he felt like he had no other choice. Applicant claimed he felt coerced into pleading guilty because Counsel Smith told him there would be no lesser included offenses and at trial, Applicant would be found guilty.

On cross-examination, Applicant admitted he was guilty of shooting and killing Victim. Applicant admitted he was not under the influence of any drugs or alcohol and had no mental or emotional issues during the guilty plea. Applicant admitted that he agreed with the facts of the case as articulated by the State at the plea and that he was indeed guilty. Applicant stated he understood his constitutional rights and waived them. Applicant admitted he told the plea judge, under oath, that

he was satisfied with Counsel, understood all of his conversations with Counsel, and had no complaints against Counsel. Applicant also admitted that it was his decision to plead guilty and that nobody forced him and promised him anything to plead guilty. Applicant further admitted that he told the plea court that he understood all of the plea court's questions and answered them truthfully. Applicant then admitted that he lied multiple times under oath during the guilty plea.

Counsel testified he was appointed to Applicant's case as a public defender and has been practicing criminal law for twenty years. Counsel also testified he met with Applicant on numerous occasions as did his investigator Barton O'Kelly. Counsel stated he had Applicant mentally evaluated and discussed all of the discovery with Applicant. Counsel testified he had meetings with Applicant, Counsel Dest and Counsel Barrowclough and discussed the relevant case law with Applicant. Counsel testified he fully explained the difference between murder and voluntary manslaughter to Applicant.

Counsel testified he met with Applicant in a holding cell, and Applicant explained to Counsel that he did not want to plead guilty. Counsel also testified Applicant's mother met with Applicant and after this discussion, Applicant wanted to plead guilty. Counsel testified Applicant told him Applicant's version of the facts. Counsel also stated he reviewed Victim's call to 911 and that the shooting could be heard on the phone call. Applicant had a contention with the fact that he also shot Victim's son. Applicant expressed remorse for his actions. Additionally, Counsel testified Applicant would not have been guilty of voluntary manslaughter because there was no sufficient legal provocation. Counsel stated he researched the law and was prepared for trial, but the State would not reduce the charge from murder.

In addition, Counsel testified he would have argued a nullification defense, but it would not

have been successful. Counsel also testified he did not object to the two indictments of possession of a weapon during the commission of a violent crime as a Double Jeopardy claim because the charges

constituted two separate violent acts under S.C. law. *IN ADDITION THE WEAPON CHARGES WERE RUN CONCURRENT; TO APPLICANT*

Counsel lastly testified that it was Applicant's decision to plead guilty, that he did not coerce Applicant to plead guilty and that he did not talk Applicant out of pursuing a trial.

On cross-examination, Counsel testified that to get a lesser included offense jury charge there must exist evidence of that lesser included and that words alone are not sufficient. Counsel stated he did not think this would be a viable defense. Counsel also testified Applicant gave statements to law enforcement and that two phone calls about Applicant's mental struggle were played for the plea judge.

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JEA*

Counsel also testified Counsel Dest became involved with this case because the 16<sup>th</sup> Circuit Public Defender's Office assigns two attorneys when it is a murder case. Counsel testified the State did not interrogate Applicant like he claimed; but that it was Applicant's choice to speak with the prosecutor. Counsel further stated there were two counts of possession of a weapon during the commission of a violent crime because they were separate acts and had separate elements as two different victims were involved. Counsel lastly testified that he did not object on a Double Jeopardy claim because murder and attempted murder had different elements; again, there were two different victims in this case.

**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 at the post conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony

accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

### **Ineffective Assistance of Counsel**

The Applicant alleges 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) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged 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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 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,(1985).

This Court finds Counsel was competent and diligent in his representation of the Applicant in this case. Counsel sufficiently advised the Applicant of the charges against him, the potential penalties if convicted at trial, and the evidence the State would produce at trial. Counsel satisfactorily investigated this case based on the information supplied by the Applicant and the evidence available. Counsel also engaged in plea negotiations which were beneficial to the Applicant. This Court also finds the Applicant was well informed by Counsel in this case. The Applicant expressed to the plea court that he was satisfied with Counsel's representation. Moreover, the Applicant admitted his guilt and accepted responsibility for his actions. The Applicant pled guilty without any threat or coercion and was not under the influence of any intoxicant at the plea. The Applicant also waived his Constitutional rights afforded to him. This Court finds the Applicant pled knowingly, voluntarily, and on his own free will.

This Court further finds the Applicant's testimony regarding Counsel's performance is not credible while also finding Counsel's testimony is credible. This Court finds Applicant had a tough decision to make, but the decision to plead guilty was made by Applicant without any threats or coercion from Counsel or anybody else; thus, Applicant's plea was freely and voluntarily made. This Court finds the Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby. Accordingly, this allegation is denied.

#### **Involuntary Guilty Plea**

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to

consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993).

The Applicant alleged his guilty plea was not voluntarily entered because he felt that he coerced into pleading guilty. However, the guilty plea transcript and the Applicant's answers during cross-examination at the PCR hearing directly refute his claims.

At the guilty plea, Applicant testified he understood his constitutional rights and waived those rights. (Tr. p. 14 line 5). The Applicant testified he was not promised anything or threatened in any way to influence him to enter a guilty plea. (Tr. p. 16 lines 4-8). He also stated he was satisfied with Counsel's services. (Tr. p. 15 lines 4-24). The Applicant testified he was not under the influence of drugs or alcohol and that he had no mental or emotional condition that would interfere with his judgment. (Tr. p. p lines 1-5). He also stated he was pleading freely and voluntarily. (Tr. p.

7 line 21). Applicant further testified that he agreed with the facts as presented by the solicitor. (Tr. p. 12 line 24). Applicant lastly testified he was guilty of the charges. (Tr. p. 13 lines 1-15).

On cross-examination at the PCR hearing, the Applicant freely admitted he testified to all of the above at his guilty plea.

Based on the foregoing, this Court finds the Applicant's testimony concerning an involuntary guilty plea not credible, while finding Counsel's testimony at the PCR hearing credible. This Court also finds the Applicant pled guilty freely, voluntarily and without any coercion, threats or promises. Therefore, this allegation is denied.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that 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 Counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, these allegations are denied.

### CONCLUSION

Based on all the foregoing, 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. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.


This Court notifies the Applicant that he must file and serve a notice of appeal within thirty

(30) days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention 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!**

  
\_\_\_\_\_  
J. Ernest Kinard, Jr.  
Presiding Circuit Court Judge  
Sixteenth Judicial Circuit

9/3, 2014  
Beaufort, South Carolina