

IN THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY

COURT OF COMMON PLEAS

ROBERT E. HOOD, CIRCUIT COURT JUDGE

2013-CP-40-6380

**RECEIVED**

NOV 03 2014

**S.C. Supreme Court**

Eric Marsh,.....Petitioner.

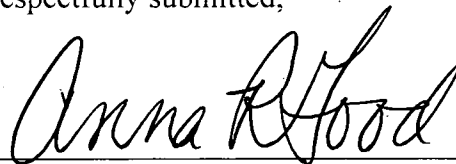
vs

The State of South Carolina,.....Respondent.

**NOTICE OF APPEAL**

Eric Marsh appeals the Honorable Robert E. Hood's October 6, 2014, Order of Dismissal. Undersigned counsel received notice of entry of the order on October 31, 2014. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Anna R. Good  
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1720 Main Street, Suite 303  
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Telephone: (803) 429-9107  
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Attorney for the Petitioner.

November 3, 2014.

OTHER COUNSEL OF RECORD:  
Ashleigh Wilson  
South Carolina Attorney General's Office  
Post Office Box 11549  
Columbia, SC 29211-1549

IN THE STATE OF SOUTH CAROLINA  
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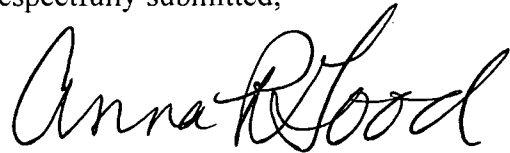
vs

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**PROOF OF SERVICE**

I, Anna Good, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record, Ashleigh Wilson, P.O. Box 11549, Columbia, South Carolina 29211-1549. I further certify that all parties required by Rule to be served have been served this 3rd day of November 2014.

Respectfully submitted,



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Anna R. Good, Esquire  
Law Office of Anna Good, LLC  
1720 Main Street, Suite 303  
Columbia, South Carolina 29201

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )  
 )  
Eric Dwayne Marsh, #345716, )  
 )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
2013-CP-40-6380

**ORDER OF DISMISSAL**

RECEIVED  
2014 OCT 20 PM 1:08  
RICHLAND COUNTY  
CLERK OF COURT

Presiding Judge: The Honorable Robert E. Hood  
Applicant's Attorney: Anna R. Good, Esquire  
Respondent's Attorney: Ashleigh R. Wilson, Esquire  
Plea Counsel: Theodore N. Lupton, Esquire  
Date of Hearing: September 2, 2014  
Court Reporter: Karen Ambroziak

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed October 18, 2013 and amended April 24, 2014. The Respondent made its Return on February 24, 2014. An evidentiary hearing into the matter was convened on September 2, 2014 at the Richland County Courthouse. The Applicant was present at the hearing and represented by Anna R. Good, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. The Applicant's plea counsel, Theodore (Ted) Lupton, Esquire, also testified at the hearing. This Court had before it the guilty plea transcript, the records of the Richland County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the PCR application, Respondent's Return thereto, the Applicant's appellate records, and the Applicant's Exhibit 1<sup>1</sup>.

<sup>1</sup> Applicant's Exhibit 1 is a *pro se* handwritten document drafted by the Applicant and presented to the Court.



## 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 Richland County. The Applicant was indicted at the May 2011 term of the Richland County Grand Jury for criminal sexual conduct with a minor- second degree (2011-GS-40-1996)<sup>2</sup>. Theodore (Ted) Lupton, Esquire, represented the Applicant. On March 20, 2013, the Applicant pled guilty pursuant to North Carolina v. Alford<sup>3</sup>. The Honorable G. Thomas Cooper sentenced the Applicant to confinement for fifteen (15) years.

The Applicant filed a Notice of Appeal. His appeal was dismissed by the Court of Appeals for failure to provide a sufficient explanation as required by SCACR Rule 203(d)(1)(B)(iv)<sup>4</sup>. The Remittitur was issued on September 17, 2013.

## ALLEGATIONS

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

1. Ineffective assistance of counsel.
  - a. "Counsel failed to give effective assistance at a critical stage of the trial proceeding including protection of my right to due process of law."

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

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<sup>2</sup> The Applicant was indicted for a second count of criminal sexual conduct with a minor- second degree (2013-GS-32-0965) in Lexington County. He was represented on the Lexington County charges by Bennett Casto, Esquire. The Applicant also pled guilty to his Lexington County charge on March 20, 2013. In this application for post-conviction relief filed in Richland County, the Applicant is solely challenging his Richland County conviction.

<sup>3</sup> North Carolina v. Alford, 400 U.S. 25 (1970).

<sup>4</sup> SCACR 203(d)(1)(B)(iv) states: "If the appeal is from a guilty plea, an Alford plea or a plea of nolo contendere, a written explanation showing that there is an issue which can be reviewed on appeal. This explanation should identify the issue(s) to be raised on appeal and the factual basis for the issue(s) including how the issue(s) was raised below and the ruling of the lower court on that issue(s). If an issue was not raised to and ruled on by the lower court, the explanation shall include argument and citation to legal authority showing how this issue can be reviewed on appeal. If the appellant fails to make a sufficient showing, the notice of appeal may be dismissed."

1. Ineffective assistance of counsel.
  - a. "Trial counsel failed to properly investigate the case."
  - b. "Trial counsel misadvised client as to sentencing for the plea."

At the hearing, the Applicant proceeded solely on the claim of ineffective assistance of counsel for misadvising the Applicant regarding the sentence he could receive after pleading guilty. Therefore, this Court deems abandoned any other claims raised by the Applicant's applications.

### **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. § 17-3-20 (2003).

#### **Summary of the Testimony**

The Applicant was present and testified he was represented by Ted Lupton. The Applicant testified he met with Lupton five or six times prior to his guilty plea. He testified he reviewed his discovery with counsel and told counsel about potential witnesses. The Applicant testified he did not discuss possible defenses with counsel.

The Applicant testified he discussed the DNA evidence with counsel and was told the DNA evidence had been lost for two years. He testified he was also told that the DNA evidence had been transferred from one jurisdiction to another and that the evidence had not been tested. The Applicant testified he told counsel there was also a problem with the DNA collection. The Applicant testified his attorney never argued against the DNA evidence, but he recalled

telling the Court during his guilty plea that there was no forensic evidence linking him to the Richland County incident. The Applicant testified he never saw the DNA evidence.

The Applicant testified counsel filed a motion for speedy trial on his behalf. He testified his trial was set for December 2012. The Applicant testified he wanted to go to trial, but counsel got him a plea offer from the State. He testified counsel told him it was in his best interest to plead guilty because if he went to trial he could get life without parole. The Applicant testified trial counsel told him the State would ask for a cap of fifteen years. He testified counsel told him he was facing a sentence from zero to fifteen years, but that he would not get the maximum sentence. The Applicant testified counsel told him he would get a sentence in the three to five year range. The Applicant testified he would not have pled guilty if he had known he could get a sentence greater than three to five years.

Ted Lupton, Esquire, was present and testified he was appointed to represent the Applicant in June 2012. Counsel testified he has been practicing criminal law for the past nineteen years. Counsel testified he met with the Applicant at least fifteen times prior to the Applicant's guilty plea. He testified he filed Brady and Rule 5 motions on the Applicant's behalf and reviewed the discovery materials he received with the Applicant. Counsel testified he received in the discovery materials police reports, the victim's statements and interviews, the victim's medical records, evidence regarding the Applicant's Lexington County charge, and an audio recording of the Applicant confessing to the Lexington County allegations.

Counsel testified he and the Applicant frequently discussed the elements of the charges the Applicant was facing and what the State was required to prove. He testified they discussed the Applicant's version of the facts and possible defenses multiple times. Counsel testified the Applicant had a good case without the related Lexington charge, but he felt the Lexington charge

would come in at the Applicant's Richland County trial since the Lexington County assault resulted in the victim recanting her statement about the Richland assault. He testified there was no DNA evidence linking the Applicant to the Richland County assault.

Counsel testified he contacted potential witnesses given to him by the Applicant. He testified he was able to reach some of the witness and unable to reach others. He testified the witnesses he was able to speak with were not helpful to the Applicant's defense. Counsel testified while investigating the Applicant's case he also reviewed the solicitor's file on both the Richland and Lexington County charges.

Counsel testified the DNA evidence taken from the victim after the Lexington County assault initially matched the Applicant's DNA sample from his prior Connecticut conviction found in CODIS. He testified they had a Schmerber hearing and fought against the Applicant giving a DNA sample to confirm the CODIS hit. Counsel testified the Applicant gave a DNA sample. Counsel testified there was no evidence that the officer who collected the sample tampered with the DNA evidence, but he told the Applicant that they could attack the DNA evidence at trial. Counsel testified the DNA testing confirmed the CODIS hit and matched the Applicant to the DNA evidence in the Lexington assault. Counsel testified the solicitor did not forward a copy of the DNA testing results until the guilty plea, however, he knew the CODIS hit would likely be confirmed by the DNA testing. Counsel testified the DNA results linked the Applicant to the Lexington assault. Counsel testified receipt of the DNA evidence during the guilty plea did not affect his advice to the Applicant about pleading guilty. He testified if anything, the DNA results confirming the CODIS hit made his recommendation to the Applicant to plead guilty stronger.

Counsel testified he and the Applicant discussed pleading guilty frequently and the

Applicant was initially resistant to a guilty plea. Counsel testified the Applicant was originally offered and rejected a plea to common law assault and battery of a high and aggravated nature. Counsel testified he talked to the Applicant about the potential sentence he was facing and the possibility that he could face life without parole if he proceeded to trial. He testified the Applicant was never offered a plea to time served.

Counsel testified it took a lot of negotiation with the solicitor to obtain the negotiated plea to a cap of fifteen years. He testified he communicated the plea offer to the Applicant and made it clear to the Applicant that if he pled guilty his sentence would be capped at fifteen years. He testified he and the Applicant discussed the Applicant wanting a sentence in the range of three to five years. Counsel testified he told the Applicant he would ask for a sentence in the range of three to five years, but to expect something more. He testified he told the Applicant that the State would ask for a sentence greater than three to five years. He testified he told the Applicant that usually people do not get the full fifteen year sentence, but that he could get a fifteen year sentence.

Counsel testified he informed the Applicant of his constitutional rights. He testified he explained to the Applicant the difference between a negotiated sentence and a recommendation from the State. Counsel testified the Applicant was initially pleading to a negotiated cap of fifteen years. He testified Judge Cooper did not accept negotiations, but would follow recommendations from the State. He testified the Applicant was sentenced within the State's fifteen year recommendation. Counsel testified the change of the Applicant's plea from a negotiated sentence to a recommendation from the State did not affect the Applicant's understanding of his guilty plea. He testified the Applicant never indicated he did not understand the things they discussed prior to his guilty plea.

### Ineffective Assistance of Counsel

The Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 (1984); Butler, 286 S.C. 441, 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).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. 668). 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.” Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). 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 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

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, 243-44 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). 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)). When a defendant pleads guilty on the advice of counsel, the plea may only be attacked through a claim of ineffective assistance of counsel. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2002) (citations omitted).

This Court finds counsel is a criminal practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on numerous occasions. During conferences with the Applicant, counsel discussed the pending charges, the elements of the charges and what the State was required to prove, the Applicant's constitutional rights, the Applicant's version of the facts, and possible defenses or lack thereof.

This Court also finds the Applicant's guilty plea was entered freely and voluntarily. The record reflects the Applicant was advised of the following by the Court during his guilty plea: his right to a jury trial (T. 7:8-15), his right to remain silent (T. 7:4-7), his right to confront his accusers (T. 7:16-8:12), and his right to appeal (T. 8:8-9, 20:20-25). The Applicant told the Court he had not been promised anything or threatened to get him to plead guilty. (T. 8:16-19). The Applicant also told the Court he was not under the influence of drugs or alcohol and he did not suffer from any mental illnesses. (T. 9:13-16, 20:17-20). The Applicant also told the Court he

was satisfied with counsel's representation and that counsel had done everything he asked. (T. 8:20-22, 9:1-3, 9:10-12). This Court finds and the record reflects the Applicant pled guilty with a full understanding of the consequences of pleading guilty.

As an initial matter, this Court finds counsel provided credible testimony at the evidentiary hearing. This Court finds the Applicant did not provide credible testimony at the evidentiary hearing. Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds the Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with the Applicant, conducted a proper investigation, and provided thorough representation. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

The Applicant alleges counsel was ineffective for misadvising the Applicant regarding the potential sentence he would receive if he pled guilty. The Applicant claims counsel told him if he pled guilty he would receive a sentence in the range of three to five years. This Court finds this allegation is wholly without merit. This Court finds counsel properly advised the Applicant of the potential sentence he could receive if he pled guilty. This Court finds credible counsel's testimony that he advised the Applicant that if he pled guilty the State would recommend a cap of fifteen years. This Court also finds credible counsel's testimony that he advised the Applicant he could receive the full fifteen year sentence.

This Court finds to be not credible the Applicant's testimony that counsel told him he would receive a sentence in the three to five year range. This Court finds counsel provided

credible testimony that the Applicant wanted a sentence in the range of three to five years. Counsel testified he told the Applicant that he would request a sentence in the three to five year range, but that he would likely receive a higher sentence. The record reflects counsel indeed asked the Court for a sentence of time served or a sentence in the range of three to five years at the Applicant's guilty plea. (T. 26:11-18, 27:18-22). This Court finds the Applicant's wishful thinking with regard to the sentence that he would receive after pleading guilty did not equal a misapprehension by the Applicant concerning the possible range of sentence the Applicant could receive. See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997).

Considering this Applicant was represented on his two charges by two public defender, this Court finds it is very unlikely that the Applicant was not made aware of the potential sentence he was facing and the substance of the State's plea offer. This Court finds further the change of the Applicant's plea from a negotiated plea to recommendation by the State did not affect the voluntariness of the Applicant's guilty plea. This Court finds this change did not result in any prejudice to the Applicant since he ultimately was sentenced within the range of the original negotiated sentence offered by the State. This Court finds the Applicant has failed to carry his burden of proving counsel misadvised the Applicant regarding the potential sentence he would receive if he pled guilty. This Court finds counsel's performance was not deficient and did not result in any prejudice to the Applicant.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test, specifically 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 while representing the Applicant. The Applicant failed to show that counsel's performance was deficient. Therefore, this Court need

not address prejudice. The Applicant's complaints concerning counsel's performance are without merit and are denied and dismissed.

#### **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 evidence regarding such allegations. Accordingly, this Court finds the Applicant abandoned such allegations. Therefore, they are hereby denied and dismissed.

#### **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, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR 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 written notice of entry of this Order 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 served and 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 6 day of October, 2014

*Re Hood*

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The Honorable Robert E. Hood  
Presiding Judge  
5th Judicial Circuit

Columbia, South Carolina.