

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

Case No. 2011-CP-02-1473

Joesph J. Magni, #345848,.....Petitioner,

v.

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

NOTICE OF APPEAL

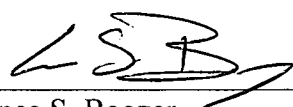
The Petitioner appeals the Honorable R. Knox McMahon Order dated October 3, 2014, denying post-conviction relief to the Petitioner. Undersigned counsel received notice of entry of the Order on October 9, 2014. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,

RECEIVED

NOV 05 2014

S.C. SUPREME COURT


Lance S. Boozer
The Boozer Law Firm, LLC
807 Gervais Street, Suite 203
Columbia, SC 29201
Tele: 803-608-5543

November 3, 2014

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PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Daniel Gourley, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 3rd day of November, 2014.


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PCR

THE BOOZER LAW FIRM, LLC

Lance S. Boozer, Esq.*

*Also admitted in Florida

807 Gervais Street, Suite 203
Columbia, SC 29201

Telephone: 803-608-5543
Fax: 803-926-3463

Email: lsb@boozerlawfirm.com
Website: www.boozerlawfirm.com

November 3, 2014

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

The Honorable Liz Godard
Clerk, Aiken County
P.O. Box 583
Aiken, SC 29802-0583

RECEIVED
NOV 05 2014
S.C. SUPREME COURT

**RE: Joseph J. Magni, #345848, v. State of South Carolina
2011-CP-02-1473**

Dear Mr. Shearouse and Ms. Godard:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Magni in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Magni in this appeal.

Yours very truly,



Lance S. Boozer

Enclosure

cc: Daniel Gourley, AAG
Office of Appellate Defense
Joseph J. Magni, #345848

Respondent.

Anita Knoepfle
Deputy Clerk

40-9465). Applicant was sentenced to twelve (12) years imprisonment on each charge, all sentences to run concurrently. Applicant did not appeal his plea or sentences.

ALLEGATIONS

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

1. Ineffective assistance of counsel.

Applicant filed an amended application on December 20, 2013, alleging that he was being held in custody unlawfully based on the following allegations:

1. Ineffective Assistance of Counsel

- a. "Did not interview witnesses for my case."
- b. "Did not argue the validity of the DNA correctly."
- c. "Did not have me evaluated by a medical professional."
- d. "Did not meet with me in a timely manner to retrieve text messages from my phone sent by the accuser apologizing and admitting she 'cried wolf.'"
- e. "Failure to investigate Applicant's prior surgery and medical treatment."
- f. "Failure to challenge victim's statement."
- g. "He (attorney) did tell me that my charges did not carry a minimum and he would try for probation."
- h. "He (attorney) did yell at me in the courtroom during a recess saying I had to plead guilty."
- i. "He (attorney) did tell me that the judge was going to ask certain questions about his performance and that I had to tell him I was happy with my counsel and that the plea was completely my own free will."
- j. "He (attorney) told me outside the courtroom that the judge believed me to be guilty and if I went to trial, I would go to prison for a very long time."

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from J. Marcus Whitlark, Esquire. (hereinafter "Counsel Whitlark") and Joshua Kendrick, Esquire (hereinafter "Counsel Kendrick"). This Court also had before it a copy of the



guilty plea transcript, the Aiken County Clerk of Court records, Applicant's South Carolina Department of Correction records, the PCR application, and return.

During the evidentiary hearing Applicant testified on his own behalf. Applicant stated he was represented by Counsel Kendrick, Counsel Whitlark, and Christopher Leonard, Esquire (hereinafter "Counsel Leonard"). Applicant stated he met with his counsels a few times prior to his plea. Applicant recalled reviewing the discovery material with counsels. Applicant stated he provided counsels with the names of various witnesses including, Amber Bannister, Marsha Peacock, Tippy Hopston, and Coach Crosby. Applicant stated that he did not know whether counsels interviewed these witnesses or subpoenaed them for his trial. Applicant stated that the witnesses would have testified that they had never seen him with the Victim. Applicant stated these witnesses were not present at the post-conviction relief hearing.

Applicant argued that counsels were ineffective for failing to properly argue against the admission of the DNA evidence. Specifically, Applicant stated counsels should have argued Victim's DNA was not found on the dress instead of a chain of custody argument.¹ Applicant stated counsels should have provided case law to the judge during the course of the suppression hearing. Applicant further argued that counsels were ineffective for failing to retrieve text messages sent to him from an unknown number apologizing and admitting she cried wolf. Applicant explained that he received these messages, informed Counsel Kendrick of them and Counsel Kendrick failed to make sure they were properly preserved. Applicant explained that the messages were automatically deleted thirty days after they were sent. Applicant stated he made no attempts to secure the messages himself. Applicant stated the messages would have been able to discredit the Victim during the course of trial.

¹ This Court notes that the transcript of the suppression hearing reveals that Applicant's DNA was located on a dress belonging to the Victim. (Pl. tr. p. 26-31).



Applicant stated counsels should have had him interviewed by a forensic psychologist. Applicant stated he did not meet the criteria for a pedophile and felt that an examination would show that he was not pedophile. Applicant stated that counsels told him he did not have enough money to pay for the proper examiner. Applicant stated he has not been evaluated by a forensic psychologist. Applicant further stated he had recently had surgery on his hip and near his private area in an effort to remove MRSA. Applicant stated the surgery left a noticeable scar. Applicant stated that Victim never mentioned a scar in her statement. Applicant stated counsels would have been able to impeach Victim with her inconsistencies if they had investigated this information.

Applicant stated that counsels told him the charges he was facing did not carry a minimum sentence and they would request probation. Applicant stated he was under the impression that if he pled guilty he would receive probation. However, Applicant recalled that the judge advised him that lewd act with a minor carried up to fifteen years and criminal sexual conduct with a minor—second degree carried up to twenty years.

Applicant stated his counsels forced him into pleading guilty. Applicant stated his counsels were yelling at him to plead guilty and he was in a state of shock the entire time. Applicant further stated he felt forced to plead guilty because the judge had told counsels that it was his opinion that Applicant was guilty. However, Applicant recalled telling the plea judge that no one was promising or threatening him in order to get him to plead guilty. Applicant further recalled telling the judge that he was pleading guilty of his own free will.

Applicant stated counsels had not prepared any type of defense and were not prepared for trial. Applicant stated he was arrested in September 2009 and was proceeding to trial in April 2011. Applicant stated Counsel Whitlark was brought on as a second chair in October 2010.



Applicant stated a year and a half is not sufficient time to prepare for trial. However, Applicant recalled telling the judge that he was satisfied with counsels' services and that they had enough time to research, investigate, and meet with him. Applicant further recalled waiving his constitutional rights during the guilty plea and telling the judge that he was indeed guilty. Applicant recalled apologizing to the Victim and telling the judge that he knew what he did was wrong. Applicant stated that he was told how to answer the questions during the guilty plea and only pled guilty to avoid a harsher sentence.

Following Applicant's testimony, Counsel Whitlark was called to testify. Counsel Whitlark stated that he has been practicing law for thirty-seven years. Counsel Whitlark stated he was retained as a second chair to help prepare and participate during trial. Counsel Whitlark explained that he met with Applicant eight or ten times prior to the plea. Counsel Whitlark stated their initial trial strategy was to cast a doubt on the accusations and argue that the Victim made everything up. Counsel Whitlark explained that there were no witnesses to any of the incidents and it was a "he said she said" case.

Counsel Whitlark stated that Applicant's DNA was found on the Victim's dress. Counsel Whitlark explained that they had their own expert conduct an independent analysis on the DNA and test results confirmed that it was Applicant's DNA. Counsel Whitlark stated they attempted to argue that the proper chain of custody could not be established and the DNA evidence should be suppressed. Counsel Whitlark stated that the judge was going to rule on the motion to suppress during the course of trial.

Counsel Whitlark stated that they did not see any basis to challenge the Victim's statement. However, Counsel Whitlark stated they were prepared to point out the inconsistencies within her statement; including the fact that she failed to identify any scarring Applicant would



have had on his body. Counsel Whitlark stated in his opinion, they left no stone unturned during their representation of Applicant. Counsel Whitlark stated they had discussions about proceeding to trial and the possible ramifications. Counsel Whitlark stated they felt there was a strong likelihood of Applicant being found guilty had they proceeded to trial and Applicant understood the risks.

Counsel Whitlark stated they discussed the plea offers and it was Applicant's decision whether or not to plead guilty. Counsel Whitlark stated no one ever wants to plead guilty and Applicant was no different. Counsel Whitlark explained that Applicant wanted to be found innocent and the charges to simply go away. Counsel Whitlark stated that in Applicant's mind he did not do anything wrong and he could not accept that his actions were illegal. Counsel Whitlark stated Applicant wanted to talk with Victim's father and discuss his future with Victim. Counsel Whitlark stated that he never forced Applicant to plead guilty nor did he promise him that he would receive a certain sentence.

Following Counsel Whitlark testimony, Counsel Kendrick was called to testify. Counsel Kendrick stated he was retained to represent Applicant and met with him numerous times prior to his plea. Counsel Kendrick stated Applicant denied his guilt. Counsel Kendrick stated that he filed for and reviewed the discovery material with Applicant. Counsel Kendrick stated Applicant gave him numerous witnesses to interview. Counsel Kendrick stated the witnesses were subpoenaed and prepared to testify if they proceeded to trial. Counsel Kendrick explained that the witnesses were not present during the first day of trial, because they knew they weren't going to be needed until the second day of trial. Counsel Kendrick stated the witnesses were going to testify that they never saw Applicant and Victim alone. Counsel Kendrick stated they discussed

A handwritten signature, possibly reading "MB", is located at the bottom right of the page, above the page number.

the various elements of the charges. Counsel Kendrick stated that they reviewed Applicant's constitutional rights.

Counsel Kendrick stated that he was prepared for trial. Counsel Kendrick stated he, Counsel Whitlark, and Counsel Leonard spent hours in their conference room discussing the case, going over the evidence, and possible trial strategies. Counsel Kendrick explained that they attempted to suppress the DNA evidence found on the Victim's dress because there was a thirteen month time span that it was in the possession of the Victim's family. Counsel Kendrick stated his argument to the court was that the evidence was not reliable given that lapse of time. Counsel Kendrick stated that he researched the case law and could not find anything to support his position as to why the evidence should be suppressed.

Counsel Kendrick stated that he discussed having Applicant evaluated by a forensic psychologist in order to provide some additional mitigation evidence if they chose to plea. Counsel Kendrick stated the reason why Applicant was not evaluated was not due to monetary concerns. Counsel Kendrick stated that Applicant had a trust account and had they needed an expert he could have paid for the expert. Counsel Kendrick stated on some occasions he has paid for an expert himself. Counsel Kendrick stated it is all about "winning." Counsel Kendrick stated Applicant was adamant that he did not want to plead guilty at that time. Therefore, they did not proceed with the evaluation.

Counsel Kendrick stated Applicant did inform him that he had received various texts from a random number apologizing. Counsel Kendrick stated he could not recall specifically when Applicant discussed the texts or why it was not looked into immediately. However, Counsel Kendrick stated he had his investigator conduct a memory dump of Applicant's cell phone to retrieve any and all text messages. Counsel Kendrick explained that even text messages



that were deleted would be retrieved. Counsel Kendrick stated that they did not find any text messages that were similar in nature to the ones Applicant alleged existed.

Counsel Kendrick stated they were prepared to challenge the Victim's statement. Counsel Kendrick stated they were going to challenge the Victim's statement "line by line." Counsel Kendrick stated they had investigated into Applicant's medical history and were prepared to argue that Victim failed to mention his surgical scars in her statement. Counsel Kendrick opined that it was a "good route to go."

Counsel Kendrick stated that it was Applicant's decision to plead guilty and that he did not force him to plead. Counsel Kendrick stated that he never promised Applicant that he would receive probation. Counsel Kendrick stated that Applicant was well aware that the plea judge was not going to give him probation. Counsel Kendrick stated that he did not tell Applicant to answer the plea judge's questions a certain way. Counsel Kendrick stated that the plea judge did not determine his guilt or innocence and he did not tell Applicant that the plea judge thought he was guilty. Counsel stated that the State had originally offered a ten year plea deal, however Applicant refused the offer and asserted that he was innocent. Counsel Kendrick stated that he was irritated with Applicant because Applicant refused to acknowledge the evidence against him. Counsel Kendrick stated Applicant was hoping that God would take care of everything.

Counsel Kendrick stated the State had a video statement of the Victim. Counsel Kendrick further stated the State had numerous cell phone records showing extensive text messages between Applicant and Victim. Counsel Kendrick stated that Applicant's DNA evidence was found on Victim's dress.

Counsel Kendrick stated that he could not recall whether he advised Applicant of his right to appeal. Counsel Kendrick stated there were no objections made during the plea and there was no basis to file an appeal.

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. Specifically, this Court finds Counsel Whitlark's and Counsel Kendrick's testimony credible and Applicant's testimony not credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

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), SCRPC; 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 (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, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must



overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating 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." 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, 88 L.Ed. 2d 203 (1985). After careful review based on the standard discussed above, the Applicant has failed to carry his burden in this action.

Ineffective assistance of counsel for failing to interview witnesses.

This Court finds Applicant's allegation that he received ineffective assistance of counsel for failing to interview various witnesses to be without merit. Applicant stated he provided counsels with the names of various witnesses including, Amber Bannister, Marsha Peacock, Tippy Hopston, and Coach Crosby. Applicant stated that he did not know whether counsels interviewed these witnesses or subpoenaed them for his trial. Counsel Kendrick stated the witnesses were subpoenaed and prepared to testify if they proceeded to trial. Counsel Kendrick explained that the witnesses were not present during the first day of trial, because they knew they weren't going to be needed until the second day of trial. Counsel Kendrick stated the witnesses were going to state that they never saw Applicant and Victim alone. This Court notes that



Applicant failed to provide testimony from any of the named witnesses. An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Additionally, Applicant can show no prejudice as there was clear evidence of overwhelming guilt. This Court notes Counsel Kendrick stated the State had a video statement of the Victim. Counsel Kendrick further stated the State had numerous cell phone records showing extensive text messages between Applicant and Victim. Counsel Kendrick stated that Applicant's DNA evidence was found on Victim's dress. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). Additionally, this Court notes Applicant entered a guilty plea based on a favorable plea offer from the State that was secured after counsels' competent performance. Accordingly, this Court finds that Applicant has failed to meet his burden of proof and thus, this allegation is denied and dismissed with prejudice.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that counsels failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that his counsels 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 his counsels' performances.



The Court concludes the Applicant has not met his burden of proving his counsels failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Ineffective assistance of counsel for failing to argue the validity of the DNA correctly.

This Court finds Applicant's allegation that he received ineffective assistance of counsel for failing to properly argue the validity of the DNA to be without merit. Counsel Whitlark stated that Applicant's DNA was found on the Victim's dress. Counsel Whitlark explained that they had their own expert conduct an independent analysis on the DNA and test results confirmed that it was Applicant's DNA. Counsel Whitlark stated they attempted to argue that the proper chain of custody could not be established and the DNA evidence should be suppressed. Counsel Whitlark stated that the judge was going to rule on the motion to suppress during the course of trial. Additionally, Counsel Kendrick explained that they attempted to suppress the DNA evidence found on the Victim's dress because there was a thirteen month time span that it was in the possession of the Victim's family. Counsel Kendrick stated he argued the evidence was not reliable given the lapse of time. Counsel Kendrick stated that he researched the case law and could not find anything to support his position as to why the evidence should be suppressed. This Court finds counsels representation of Applicant well within the bounds of "professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

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The Court concludes the Applicant has not met his burden of proving his counsels failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Ineffective assistance of counsel for failing to have Applicant evaluated by a medical professional.

This Court finds Applicant's allegation that he received ineffective assistance of counsel for failing to have him medically evaluated to be without merit. Counsel Kendrick stated that he discussed having Applicant evaluated by a forensic psychologist in order to provide some additional mitigation evidence if he chose to plead guilty. Counsel Kendrick stated the reason



why Applicant was not evaluated was not due to monetary concerns. Counsel Kendrick stated that Applicant had a trust account and had they needed an expert he could have paid for the expert. Counsel Kendrick stated on some occasions he has paid for an expert himself. Counsel Kendrick stated it is all about "winning." Counsel Kendrick stated Applicant was adamant that he did not want to plead guilty at that time. Therefore, they did not proceed with the evaluation. This Court finds counsels representation of Applicant well within the bounds of "professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). This Court finds the Applicant has failed to produce any reports or expert testimony regarding an evaluation of Applicant. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative").

Furthermore, Applicant can show no prejudice as there was clear evidence of overwhelming guilt. This Court notes Counsel Kendrick stated the State had a video statement of the Victim. Counsel Kendrick further stated the State had numerous cell phone records showing extensive text messages between Applicant and Victim. Counsel Kendrick stated that Applicant's DNA evidence was found on Victim's dress. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). Additionally, this Court notes Applicant entered a guilty plea based on a favorable plea offer from the State that was secured after counsels' competent performance. Accordingly, this Court finds that Applicant has failed to meet his burden of proof and thus, this allegation is denied and dismissed with prejudice.



Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that counsels failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that his counsels 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 his counsels' performances.

The Court concludes the Applicant has not met his burden of proving his counsels failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Ineffective assistance of counsel for failing to meet with Applicant in a timely manner to retrieve text messages from my phone sent by the accuser apologizing and admitting she cried wolf.

This Court finds Applicant's allegation that he received ineffective assistance of counsel for failing to retrieve text messages from his phone to be without merit. Counsel Kendrick stated Applicant did inform him that he had received various texts from a random number apologizing. Counsel Kendrick stated he could not recall specifically when Applicant discussed the texts or why it was not looked into immediately. However, Counsel Kendrick stated he had his investigator conduct a memory dump of Applicant's cell phone to retrieve any and all text messages. Counsel Kendrick explained that even text messages that were deleted would be retrieved. Counsel Kendrick stated that they did not find any text messages that were similar in nature to the ones Applicant alleged existed. Furthermore, Applicant stated he made no attempt to preserve the text messages himself. This Court notes that Applicant failed to provide any proof that these text messages actually existed. See Palacio v. State, 333 S.C. 506, 513, 511



S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense). Additionally, this Court finds counsels representation of Applicant well within the bounds of "professional norms." Cherry, 300 S.C. at 117, 385

Furthermore, Applicant can show no prejudice as there was clear evidence of overwhelming guilt. This Court notes Counsel Kendrick stated the State had a video statement of the Victim. Counsel Kendrick further stated the State had numerous cell phone records showing extensive text messages between Applicant and Victim. Counsel Kendrick stated that Applicant's DNA evidence was found on Victim's dress. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). Additionally, this Court notes Applicant entered a guilty plea based on a favorable plea offer from the State that was secured after counsels' competent performance. Accordingly, this Court finds that Applicant has failed to meet his burden of proof and thus, this allegation is denied and dismissed with prejudice.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that counsels failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that his counsels 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 his counsels' performances.



The Court concludes the Applicant has not met his burden of proving his counsels failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

*Ineffective assistance of counsel for failing to investigate
Applicant's prior surgery and medical treatment.*

This Court finds Applicant's allegation that he received ineffective assistance of counsel for failing to investigate his prior surgery and medical treatment is meritless. Counsel Kendrick stated they had investigated into Applicant's medical history and were prepared to argue that Victim failed to mention his surgical scars in her statement. Counsel Kendrick opined that it was a "good route to go." Counsel Whitlark stated they were prepared to point out the inconsistencies within her statement; including the fact that she failed to identify any scarring Applicant would have had on his body. Counsel Whitlark stated in his opinion, they left no stone unturned during their representation of Applicant. This Court finds counsels representation of Applicant well within the bounds of "professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Additionally, this Court notes Applicant failed to present any evidence to show how additional preparations would have had any effect on Applicant's decision to plead guilty outside of his bare assertion. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

Furthermore, Applicant can show no prejudice as there was clear evidence of overwhelming guilt. This Court notes Counsel Kendrick stated the State had a video statement of the Victim. Counsel Kendrick further stated the State had numerous cell phone records showing extensive text messages between Applicant and Victim. Counsel Kendrick stated that

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The Court concludes the Applicant has not met his burden of proving his counsels failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Ineffective assistance of counsel for failing to challenge victim's statement.

This Court finds Applicant's allegation that he received ineffective assistance of counsel for failing to challenge the victim's statement is meritless. This Court notes that Applicant waived his right to a jury trial. The plea court determined that Applicant knowingly and voluntarily pled guilty, therefore the plea waives any non-jurisdictional defects and defenses,



including challenges to the sufficiency of the evidence. See Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981); Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975). Therefore, any claim that counsels were ineffective for failing challenge the Victim's statement was waived when Applicant freely and voluntarily pled guilty.

Regardless, Counsel Whitlark stated that they did not see any basis to challenge the Victims statement. However, Counsel Whitlark stated they were prepared to point out the inconsistencies within her statement; including the fact that she failed to identify any scarring Applicant would have had on his body. Counsel Kendrick stated they were prepared to challenge the Victim's statement. Counsel Kendrick stated they were going to challenge the Victim's statement "line by line." Counsel Kendrick stated they had investigated into Applicant's medical history and were prepared to argue that Victim failed to mention his surgical scars in her statement. Counsel Kendrick opined that it was a "good route to go." Based on the foregoing, this Court finds counsels were prepared to challenge the Victim's statement had Applicant chose to proceed to trial. This Court finds counsels representation of Applicant well within the bounds of "professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

Furthermore, Applicant can show no prejudice as there was clear evidence of overwhelming guilt. This Court notes Counsel Kendrick stated the State had a video statement of the Victim. Counsel Kendrick further stated the State had numerous cell phone records showing extensive text messages between Applicant and Victim. Counsel Kendrick stated that Applicant's DNA evidence was found on Victim's dress. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt



negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). Additionally, this Court notes Applicant entered a guilty plea based on a favorable plea offer from the State that was secured after counsels' competent performance. Accordingly, this Court finds that Applicant has failed to meet his burden of proof and thus, this allegation is denied and dismissed with prejudice.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that counsels failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that his counsels 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 his counsels' performances.

The Court concludes the Applicant has not met his burden of proving his counsels failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Involuntary guilty plea for advising applicant that he would receive probation.

This Court finds Applicant's claim that his plea was involuntary due to counsels' failure to properly advise of his sentencing to be without merit. Counsel Kendrick stated that it was Applicant's decision to plead guilty and that he did not force him to plead. Counsel Kendrick stated that he never promised Applicant that he would receive probation. Counsel Kendrick stated that Applicant was well aware that the plea judge was not going to give him probation. This Court finds that his counsels' performances were reasonable and effective. This Court notes, Applicant was advised of the potential sentences and acknowledged on the record that he



was facing a significant amount of time. (Pl t. p. 72-73). Furthermore, Applicant entered a guilty plea based on a favorable plea offer from the State that was secured after counsels' competent performance. Cf. Holden v. State, 713 S.E.2d 611, 617, 393 S.C. 565, 575-76 (2011) (citing Roddy v. State, 339 S.C. 29, 36, 528 S.E.2d 418, 422 (2000)) ("Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made."). This Court finds that Applicant has failed to meet his burden of proof in regards to this allegation, and accordingly this allegation must be denied and dismissed with prejudice.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that counsels failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that his counsels 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 his counsels' performances.

The Court concludes the Applicant has not met his burden of proving his counsels failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Involuntary guilty plea.²

This Court finds Applicant's allegation that his plea was involuntary due to counsels' coercion, requirement that he answer the plea courts question a certain way, and threat that he would receive a harsher sentence if he proceeded to trial to be without merit. Counsel Whitlark

² This Court address Applicant's allegation h, i, and j as one claim of Involuntary guilty plea.

stated they discussed the plea offers and it was Applicant's decision whether or not to plead guilty. Counsel Whitlark stated no one ever wants to plead guilty and Applicant was no different. Counsel Whitlark explained that Applicant wanted to be found innocent and the charges to simply go away. Counsel Whitlark stated that in Applicant's mind he did not do anything wrong and he could not accept that his actions were illegal. Counsel Whitlark stated Applicant wanted to talk with Victim's father and discuss his future with Victim. Counsel Whitlark stated that he never forced Applicant to plead guilty nor did he promise that him that he would receive a certain sentence. Counsel Kendrick stated that it was Applicant's decision to plead guilty and that he did not force him to plead. Counsel Kendrick stated that he never promised Applicant that he would receive probation. Counsel Kendrick stated that Applicant was well aware that the plea judge was not going to give him probation. Counsel Kendrick stated that he did not tell Applicant to answer the plea judge's questions a certain way. Counsel Kendrick stated that the plea judge does not determine his guilt or innocent and he did not tell Applicant that the plea judge thought he was guilty. Counsel Kendrick stated that he was irritated with Applicant because Applicant refused to acknowledge the evidence against him. Counsel Kendrick stated Applicant was hoping that God would take care of everything.

This Court finds that the Applicant's guilty plea was entered freely and voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Defendant's knowing and voluntary waiver of statutory or constitutional rights 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)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (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. United States, 519 F.2d 347 (4th Cir.1975).

This Court finds that this allegation is without merit and the Applicant has failed to carry his burden of proving that his guilty plea was involuntarily made. This Court finds that the Applicant's testimony was entered freely and voluntarily. This Court finds further that the record reflects the Applicant was thoroughly advised of the waiver of his constitutional rights by both counsels and the plea judge. The record reflects the Applicant at his plea proceeding told the court that he wished to plead guilty. (Pl. tr. p. 76). The record also reflects that the Applicant told the Court that he had not been promised or threatened by anyone to get him to plead guilty. (Pl tr. p. 77). This Court finds that the Applicant had a full understanding of the consequences of his plea and the charges against him. This Court finds that the plea judge correctly found that the Applicant's plea was freely, voluntarily, and intelligently made. (Pl tr. p. 81).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that counsels failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that his counsels 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 his counsels' performances.

The Court concludes the Applicant has not met his burden of proving his counsels failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. 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.

[signature to follow]

A handwritten signature in black ink, appearing to be a stylized 'B' or similar monogram, located at the bottom right of the page.

CONCLUSION

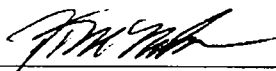
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that that Applicant must file and serve a notice of appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the 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 3 day of OCT, 2014.



R. KNOX MCMAHON
Presiding Judge
Second Judicial Circuit

hepington, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Joseph J Magni Jr,

Plaintiff(s),

-vs-

South Carolina State Of,

Defendant(s).

IN THE COURT OF COMMON PLEAS

Second JUDICIAL CIRCUIT

CASE NO.: 2011CP0201473

APPOINTMENT OF COUNSEL OR GAL

(Select one.)

☒ ORDER☐ AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

☒ Post-Conviction Relief (PCR)/habeas case☐ Adoption☐ Juvenile☐ SVP case☐ Custody and/or Visitation☐ Abuse and Neglect☐ Minor Name Change☐ Other: Post Convict Rel 500

It appears Joseph J Magni Jr, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

☐ counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.

☒ counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on:

☐ counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.

☐ court appointed counsel has obtained , Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.

☐ Other: .

Therefore, it is ordered that hereby is appointed as (Select one.)

☒ counsel ☐ lead counsel (if capital PCR case) ☐ guardian ad litem

for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

☐ (If Death Penalty PCR Case) It is further ordered that , Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED

May 17, 2013

☐ Circuit Judge☒ Clerk of Court

Plaintiff Attorney:

Lance Boozer	Joseph J Magni Jr
1331 Park Street	KCI PB64
Columbia SC 29201	4848 Goldmine Hwy
	Kershaw SC 29067

Defendant Attorney:

Daneil F Gourley	FILED 5.17.13
PO Box 11549	<i>L. H. H. H.</i>
Post-Conviction Relief Section	K.C.P. & G.S.
Columbia, SC 29211	<i>Anita K. Knepple</i>
	Deputy Clerk

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

CP20 (08/08)

SCCA/267 (03/07)

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THE BOOZER LAW FIRM, LLC
807 Gervais Street, Suite 203
Columbia, SC 29201

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