

LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW

January 9, 2014

RECEIVED

JAN 13 2015

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

S.C. SUPREME COURT

RE: Michael T. Cannon, SCDC # 318275, vs. State of South Carolina
Appeal of Case No. 2013-CP-32-3322

Dear Mr. Shearouse,

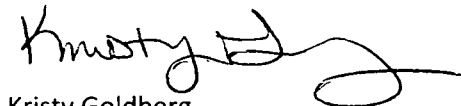
Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

Please note that the final order dismissing the underlying PCR matter was filed June 12, 2014. However, neither the Applicant nor his counsel was served with the final order by the Clerk of Court or Attorney General's Office. Counsel for the Applicant did not receive a copy of the final order from the Clerk of Court until January 8, 2014.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal so that they may begin representation of Mr. Cannon as I was appointed in this matter. I am also hereby requesting that Appellate Defense obtain a copy of the court transcript within the time required by this court.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,



Kristy Goldberg

CC: Walt Whitmire
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Michael Cannon, SCDC # 1366479
Walden Correctional Institution
4340 Broad River Road
Columbia, SC 29210

The Honorable Beth Carrigg
Clerk of Court
205 East Main Street
Lexington , South Carolina 29072

Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

RECEIVED

Case No. 2013-CP-32-3322

JAN 13 2015

S.C. SUPREME COURT

Michael T. Cannon, SCDC # 318275, Appellant

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant Michael T. Cannon hereby appeals from the Order of the Honorable William P. Keesley presiding Judge for the 11th Judicial Circuit, filed June 12, 2014 and received by counsel for the Applicant on January 8, 2015 in the matter of Michael T. Cannon v. State of South Carolina, Case No. 2013-CP-32-3322.

January 9, 2015


Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 301
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Phone (803) 252-2299
kristy@kristygoldberglaw.com

Other Counsel of Record:

Assistant Attorney General, Walt Whitmire
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Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2013-CP-32-3322

Michael T. Cannon, SCDC # 318275, Appellant

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes
and states:

She is the counsel of record for Applicant;
Service by mail is proper in this instance; and
She has served the NOTICE OF APPEAL on the following party on January 9, 2015 by
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Walt Whitmire
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211


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Other Counsel of Record:
Assistant Attorney General, Walt Whitmire
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TTJN232014

STATE OF SOUTH CAROLINA FILED IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON ELEVENTH JUDICIAL CIRCUIT

Michael Tyrone Cannon,
S.C.D.C. No. 318275,

Applicant,

v.

State of South Carolina,

Respondent.

2014 JUN 12
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

2013
C.A. No. ~~2012~~-CP-32-3322

ORDER OF DISMISSAL

ORIGINAL

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed September 27, 2013. Respondent made its Return. An evidentiary hearing into the matter was convened at the Lexington County Judicial Center on April 17, 2014. Applicant was present and was represented by Kristy Goldberg, Esquire. Respondent was represented by Assistant Attorney General Walt Whitmire. Applicant and plea counsel testified at the PCR hearing.

WAL
#1

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. Applicant was indicted at the April 2012 term of the Court of General Sessions for Lexington County for distribution of crack cocaine, third or subsequent offense (2012-GS-32-0987). Assistant Public Defender Sarah Mauldin¹ represented Applicant. On December 11, 2012, Applicant entered a guilty plea to the lesser-included offense of distribution, second-offense, pursuant to a plea agreement. The Honorable Roger M. Young, Sr., sentenced Applicant to a ten (10) year term of imprisonment.

¹ Formerly Sarah Hahn at the time of the representation.

As a result of the plea, Judge Young revoked Applicant's probationary sentence on a separate distribution conviction in full. Applicant did not appeal his sentence or conviction.

At the PCR hearing, Applicant alleged that he was being held in custody unlawfully for the following reasons:

- 1. Ineffective Assistance of Counsel:
 - a. failure to advise Applicant on the consequences of rejecting the State's first plea offer and failing to revive the offer.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

WPC
#2

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. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, *supra*.

JUN232014

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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

WPK
#3

As a matter of general impression, this Court has evaluated the credibility of the applicant, and the actions of the attorney in preparing the case for trial refute the applicant's version of events related to his failure to go accept the initial plea offer of distribution, first-offense. This Court finds that the Applicant failed to meet his burden to prove counsel's performance was deficient or prejudicial in advising him on the terms and conditions of the first plea offer and not making a motion for specific performance or a revival of the first rejected plea offer.

A.

"The Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected. That right applies to "all 'critical' stages of the criminal proceedings." Missouri v. Frye, --- U.S. ----, ---, 132 S.Ct. 1399, 1402 (2012). "The question is whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction

on lesser charges, or both.” Id., --- U.S. at ---. 132 S.Ct. at at 1408. “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness.” Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). “To show prejudice from ineffective assistance of counsel in a case involving a plea offer, petitioners must demonstrate a reasonable probability that (1) they would have accepted the earlier plea offer had they been afforded effective assistance of counsel, and (2) the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law.” Merzbacher v. Shearin, 706 F.3d 356, 366 (4th Cir. 2013) cert. denied, 134 S. Ct. 71, 187 L. Ed. 2d 56 (U.S. 2013) reh'g denied, 134 S. Ct. 725, 187 L. Ed. 2d 580 (U.S. 2013) (internal quotations omitted).

WPK
#4

At the beginning of the PCR hearing, PCR counsel stated Applicant was solely proceeding upon an allegation of ineffective assistance of counsel concerning the expiration of a more favorable initial plea offer. Applicant faced multiple charges, including distribution, third-offense or greater. In addition, Applicant was serving a probationary sentence and was facing a probable revocation. At the PCR hearing, counsel summarized the ‘buy-bust’ transaction that led to Applicant’s arrest and conviction. She further independently investigated the State’s confidential informant ‘C.I.’ and other evidence related to the buy-bust.

Counsel made the necessary requests for discovery materials. She came upon an error related to the discovery materials provided. The Solicitor's office had some confusion at the beginning of handling these cases, and a video that was thought to be one involving this Applicant actually was one involving his uncle. The State did have an audiotape of the alleged transaction. Because of the confusion, the Assistant Solicitor who originally had the case

decided to extend the original plea offer so as to benefit Applicant further. An offer was conveyed to plead Applicant to the lesser-included offense of distribution, first-offense. The plea did not go forward on first offense distribution because of something the judge indicated that caused the Applicant to refuse to go forward.

Applicant testified that he appeared in court to plead guilty under the plea bargain whereby his charges of distribution, third-offense, were to be treated as a first-offense. Since he was on probation, he faced a probation revocation proceeding at the same time. The circuit judge that was about to accept Applicant's plea of guilty indicated that he was going to revoke 14 or 15 years on the probation matter. The underlying charge for which he was on probation was not an 85% minimum service offense. His claim is that his attorney advised him not to go forward and to wait for another judge.

WPA
HS
The State's initial plea offer was terminated and Applicant eventually entered a less favorable plea agreement. Thus, Applicant pleaded guilty to distribution, second-offense, which made the sentence fall under the no-parole (minimum 85%) provisions, with community supervision to follow, in addition to a revocation.

Counsel testified at the PCR hearing that she could not recall specifically whether she advised Applicant not to go forward at the first effort to plead guilty. She was unable to specifically stipulate to or dispute Applicant's version of the representation regarding his decision to reject the initial plea offer. However, she does remember that she considered the case to be a trial from the point that the plea agreement was rejected, and she began preparing in that fashion. The cases then appeared on multiple trial dockets over a course of several months, as opposed to plea dockets. This Court finds that such an understanding and preparation is totally inconsistent with an intention of waiting for another judge to consider the plea.

This Court finds that it is undisputed that the Assistant Solicitor who was handling the case left his job. Another Assistant Solicitor took over the case. Applicant asked counsel to inquire to determine if the initial offer that he rejected was still on the table. There is no indication that the prior plea was put in writing or that it had been communicated to have an expiration date. Counsel contacted the new Assistant Solicitor, who rejected renewing the original terminated plea offer. See Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999) - A defendant has no constitutional right to plea bargain. Applicant had an extensive criminal record and was facing multiple charges that allegedly occurred while he was on probation. A new set of plea negotiations resulted in the State conveying a second plea offer to the lesser-included offense of distribution, second-offense, in addition to the *nol prosequere* dismissal of several other pending charges. Because of the change, Applicant, is expected to serve a slightly greater active term of imprisonment in the Department of Corrections than he would had he not rejected the initial plea agreement. He also has to go through community supervision. This Court finds that the Applicant made the intelligent and voluntary decision to enter the second plea agreement.

This Court finds that there is no indication that the State had anything to do with the Applicant's decision not to go forward on the plea agreement. While there was no expiration date specified, there also was not an indication that the plea bargain was effective forever. Solicitors have the right to withdraw their plea offers, except where the Applicant can prove detrimental reliance. See Custodio v. State, 373 S.C. 4, 10, 644 S.E.2d 36, 39 (2007) - Absent an actual plea of guilty, a defendant may enforce an oral plea agreement only upon a showing of detrimental reliance on a prosecutorial promise in plea bargaining.

Applicant has the burden of proof in this PCR case. First, he has not met the burden to prove that the Solicitor's office did anything that caused him to rely to his detriment. Therefore, counsel could not have been ineffective for failing to revive the original offer as a matter of course on a theory of detrimental reliance. The record shows a motion to enforce the original plea offer would have been without merit. See Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308 (1983).

Second, Applicant has not met his burden to prove counsel's performance was ineffective in advising him on the terms, consequences, and conditions of the original plea offer. This Court finds that the Applicant intelligently and voluntarily rejected the first plea offer based on the prospect of a full revocation on his probationary sentence. Despite the inability of counsel to recall the specifics of the conversation, her actions following that decision belie a belief that the plea would merely be rescheduled in front of another judge. See Burt v. Titlow, ---- U.S. ----, 134 S. Ct. 10, 16, 187 L. Ed. 2d 348 (2013) ("It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'"). She prepared for trial. The case appeared on multiple trial rosters. The Applicant's assertion that he was advised to reject the initial plea offer without being told of the consequences of his decision are not credible. See Stewart v. Secretary, Dept. of Corrections, 476 F.3d 1193, 1209 (11th Cir. 2007) - the experience of counsel strengthens the presumption of reasonable assistance.

It is equally or more likely that the applicant decided not to enter a plea and elected to go to trial based on his own intelligent and accurate assessments, not on the alleged deficient performance of counsel. See White v. Livingston, 231 S.C. 301, 308, 98 S.E.2d 534, 537 (1957) ("[E]vidence adduced before the referee indicates that the result of the case is not a serious

miscarriage of justice, if it is a miscarriage at all. At any rate, appellant has made his bed and he must lie in it.") Applicant's hope that the original plea offer would not terminate or be revived was a product of wishful thinking, not deficient performance from counsel. The Applicant has a history of involvement with the workings of General Sessions Court. See Merzbacher at 366-67 ("But it is entirely clear that to demonstrate a reasonable probability that he would have accepted a plea, a petitioner's testimony that he would have done so must be credible.") Therefore, this allegation is denied and dismissed.

B.

Except as discussed above, this Court finds that the Applicant affirmatively abandons the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

WAC
#8

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 for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCF; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 10th day of June, 2014.

#9

William P. Keesley

 WILLIAM P. KEESLEY
 Presiding Judge
 Eleventh Judicial Circuit

Edgefield, South Carolina

FILED
 2014 JUN 12 A 11:42
 BETH A. CARRIGG
 CLERK OF COURT
 LEXINGTON, SC

TTTN232014

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP3203322

Michael Tyrone Cannon
#318275

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

6/20/2014

Circuit Court Judge

Judge Code

Date

JUN232014

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on **20th of June 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

Michael Tyrone Cannon #318275

J Walt Whitmire SC Attorney Generals Office

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/mh

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

LAW OFFICE OF
Kristy Grafon Goldberg, LLC
ATTORNEY AT LAW
1720 MAIN STREET, SUITE 301
COLUMBIA, SOUTH CAROLINA 29201

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

