

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Deadra L. Jefferson, Circuit Court Judge

Case No.: 2013-CP-42-1235

The State,

Respondent,

v.

Travis Hipp,

Appellant.

NOTICE OF INTENT TO APPEAL

Travis Hipp appeals the denial of his application for Post-Conviction Relief in this case. The Order of Dismissal was imposed by the Honorable Deadra L. Jefferson on March 26, 2015. Appellant received notice of the same on that date.

April 7, 2015



CHRISTOPHER D. BROUGH
175 Magnolia St., Suite 202
SPARTANBURG, SC 29306
(864) 585-3088
ATTORNEY FOR APPELLANT

Other Counsel of Record:
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PROOF OF SERVICE

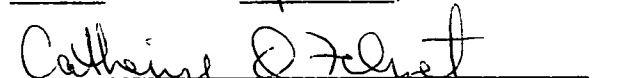
The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers and that a copy of the **Notice of Intent to Appeal**, was served upon the following person(s) on the State, by depositing copies of the same in the United States Mail, with sufficient postage affixed thereto, on April 7, 2015, addressed as follows:

The Honorable Alan Wilson
SC Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, S.C. 29201


Kirby Lanford

SWORN BEFORE ME THIS

7 DAY OF April, 2015.


NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: Aug 3, 2019

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Travis Franklin Hipp, #350200,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2013-CP-42-1235

ORDER OF DISMISSAL

Presiding Judge:	The Hon. Deadra L. Jefferson
Applicant's Attorney:	Christopher D. Brough, Esquire
Respondent's Attorney:	Suzanne H. White, Esquire
Plea Counsel:	Andrea L. Price, Esquire
Date of Hearing:	January 13, 2015
Court Reporter:	Pamela E. Green

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed March 12, 2013. The Respondent made its Return on or about March 28, 2014. An evidentiary hearing into the matter was convened on January 13, 2015, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Christopher D. Brough, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Lt. Mark Freeman and Andrea L. Price, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the Return, and the trial transcript. The Applicant submitted an amended application for PCR, filed January 2, 2015 at the hearing.

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PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the September 2011 term of the Spartanburg County Grand Jury for Petit Larceny-Third or Subsequent Property Offense¹ (2011-GS-42-5722, -5724), Breaking Into a Motor Vehicle² (2011-GS-42-5723), Burglary-First Degree (Dwelling)³ (2011-GS-42-5725), the October 2011 term for Malicious Injury to Real Property-Third or Subsequent Property Offense⁴ (2011-GS-42-6162), and the February 2012 term for Burglary-Second Degree (Building)⁵ (2012-GS-42-0593).⁶ The Applicant was represented on all charges by Andrea L. Price, Esquire. On March 19, 2012, after proceeding to trial on the Burglary-Second Degree charge, the Applicant chose to plead guilty to all of his pending charges as listed above. The Honorable Roger L. Couch sentenced Applicant to concurrent sentences of thirty (30) years for Burglary-First Degree, fifteen (15) years for Burglary-Second Degree, ten (10) years for each count of Petit Larceny-Third or Subsequent Property Offense and Malicious Injury to Real Property-Third or Subsequent Offense, and five (5) years for Breaking Into a Motor Vehicle. The Applicant did not appeal his conviction or sentence.

¹ Property Crime Enhancement is a felony punishable by ten (10) years' imprisonment. See S.C. CODE ANN. § 16-1-57 (2011).

² An offender who commits the offense of Breaking Into a Motor Vehicle "is guilty of a felony and, upon conviction, must be imprisoned not more than five [(5)] years or fined not more than one thousand dollars [(\$1,000.00)], or both." S.C. CODE ANN. § 16-13-160(B) (2011).

³ "Burglary in the first degree is a [violent, most serious] felony punishable by life imprisonment. For purposes of this section, 'life' means until death. The court, in its discretion, may sentence the defendant to a term of not less than fifteen [(15)] years." S.C. CODE ANN. § 16-11-311(B) (2011); S.C. CODE ANN. § 16-1-60 (2011); S.C. CODE ANN. § 17-25-45 (2011).

⁴ Property Crime Enhancement is a felony punishable by ten (10) years' imprisonment. See S.C. CODE ANN. § 16-1-57 (2011).

⁵ "Burglary in the second degree . . . is a [violent, serious] felony punishable by imprisonment for not more than fifteen [(15)] years, provided, that no person convicted of burglary in the second degree . . . shall be eligible for parole except upon service of not less than one-third [(1/3)] of the term of the sentence." S.C. CODE ANN. § 16-11-312(B)(2) (2011); S.C. CODE ANN. § 16-1-60 (2011); S.C. CODE ANN. § 17-25-45 (2011).

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ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
 - a. Counsel refused to communicate with Applicant;
 - b. Counsel failed to investigate the evidence;
 - c. Counsel failed to subpoena witnesses for the defense;
 - d. Counsel failed to inform Applicant of direct appeal;
 - e. Conflict of interest because Applicant had previously fired Counsel on prior charges and did not want her representing him;
 - f. Counsel failed to request a mental health evaluation;
2. Involuntary guilty plea, in that;
 - a. Applicant had no choice but to plead guilty because Counsel made no effort to represent Applicant and the court would not allow Applicant to fire Counsel.

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. § 17-27-80 (2003).

Summary of Testimony and Proceeding

The Applicant testified that he did not know he had the right to a direct appeal because Counsel did not inform him and did not file an appeal on his behalf. The Applicant also testified that Counsel failed to inform him of his plea offer. The Applicant further alleged that he was not

⁶ Originally indicted as Burglary-First Degree (2011-4346), but amended to Burglary-Second Degree and the

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properly noticed of the State's intention to seek a sentence of life imprisonment without possibility of parole (LWOP) if he was found guilty at trial and the notice was not included in the record. However, the Applicant later testified that he was served with the LWOP notice twice.

The Applicant testified that Counsel had only an email from the Solicitor dated November 4, 2011 and that Counsel did not convey the State's plea offer. The Applicant alleged that the State's offer would expire November 17, 2011 and, at that time, the State would then seek LWOP. The Applicant claimed he did not hear about the offer because his attorney told him "[you] can't beat the charges" and encouraged him to plead guilty. The Applicant summarized his understanding of the State's guilty plea offer as seeking the Burglary-First Degree conviction to be run concurrent with his Burglary-Second Degree conviction.⁷ The Applicant testified that the State would also seek restitution and would dismiss his other pending charges. The Applicant testified that his criminal record includes a prior Burglary-First Degree conviction from October 2006 and Burglary-Second Degree Violent conviction from August 2009.⁸

The Applicant testified that on March 19, 2012, once he proceeded to trial, the plea offer was no longer on the table. Only then, he testified, did he find out he was eligible for LWOP. He alleged he never found out that he was LWOP eligible through his attorney. The Applicant claimed he was entitled to his old deal as a remedy for Counsel's failure to explain the offer. The Applicant testified that he seeks the remedy imposed in Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) and Bell v. State, 401 S.C. 436, 765 S.E.2d 4 (2014), and asks this Court to honor the

Burglary-First Degree (2011-4346) was dismissed following the guilty plea (Tr. 19:14-23).

⁷ Based on a review of the record, it appears the Applicant was referring to the State's first plea offer.

⁸ At trial, the Solicitor published the Applicant's criminal history, which consists of the following prior convictions relevant to the trial and the Applicant's LWOP eligibility: Burglary-First Degree, Indictment Number 2006-GS-42-2095; Burglary-Second Degree, Indictment Number 2008-GS-42-6823; and Burglary-Second Degree, Indictment Number 2008-GS-42-6827 (Tr. 19:24-20:7). Prior to sentencing, the Solicitor clarified that the Applicant's prior Burglary convictions were: Burglary-First Degree in 2006, Burglary-Second Degree Violent in 2009, and Burglary-Second Degree Nonviolent in 2009 (Tr. 49:24-50:6).

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State's prior plea offer and grant a belated review of his direct appeal issues.

The Applicant testified that he was facing several charges and was incarcerated at the Spartanburg County Detention Center when Counsel received a second plea offer via email on Applicant's behalf, (Applicant's Exhibit #1). The Applicant alleged that he never was informed of the plea offer and would have accepted the offer had he known. The Applicant testified that Counsel never investigated the evidence against the Applicant and never advised him of his right to appeal the conviction and sentence. He testified he originally went to trial on his Burglary-Second Degree charge, but then agreed to plead guilty to all charges "before [he] knew the facts" and "hoping [he] would get a deal." He further testified that during his guilty plea, he was under "duress," in "tears," "shook up," and told the court his plea was not free and voluntary. The Applicant acknowledged that he pled guilty, but alleged that he informed the plea court that he said, "no, sir," when asked if he was pleading freely and voluntarily and had "changed [his] mind at that point" (Tr. 38: 16-17).⁹

Applicant acknowledged that he signed a statement on a sentencing sheet dated November 28, 2011, where he indicated that he did not want to plead guilty and was aware that if he chose not to accept the plea offer, he would face a possible sentence of life without parole. (State's Exhibit #1). The Applicant again summarized the deal he purportedly rejected as a straight up plea—"open plea out to everything concurrent" to his Burglary-First Degree charge, which carried the penalty range of fifteen (15) years' imprisonment to LWOP.¹⁰ The Applicant further testified that the plea deal did not include restitution and that he did not understand the three-strike law until he received LWOP notice from the State. He testified that he "didn't know

⁹ This Court notes that upon request, the court reporter reviewed her back up tape and submitted a revised transcript for page 38 because the tape reflected that when the plea court asked whether he was entering his guilty plea of his own free will, the Applicant answered "yes, sir" (Tr. 38: 16-17). Based on this review the original transcript clearly contained a scrivener's error.

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about court back then.”

The Applicant testified that Counsel visited him twice—once for her to tell the Applicant that his best interests were served by pleading guilty and once when he was served with notice that the State would seek a life without parole sentence on December 1, 2011. The Applicant testified that he proceeded to trial on March 19, 2012, but was not given the chance to fire Counsel at that time. The Applicant testified that Counsel previously represented him in 2008 but that he cursed at her, fired her, and hired Michael Brown, Esq. instead. In his opinion, the fact that he fired Counsel before shows “bias that she was appointed to represent [him] again.” Therefore, the Applicant opined at trial he should have been given the opportunity to be represented by another attorney.

Lieutenant Mark Anthony Freeman testified that he is employed by the Spartanburg Sheriff's Office as Custodian of Records. Freeman testified that the Detention Center's policy is that each visitor is to check-in and log-in their visit. Freeman identified the Applicant's Exhibit #2 as a record of visits for the Applicant and acknowledged that the record showed Counsel visited the Applicant once on March 18, 2012, twice in December 2011. However, Freeman also testified that attorneys are often waived through without signing in and can often visit with multiple clients after signing-in to meet with one particular client; therefore, he testified, it was possible that Counsel visited the Applicant but her name was not in the log.

Counsel testified that according to her notes, she met with the Applicant in the jail annex on August 12, 2011, and December 12, 2011; at the courthouse for the Applicant's arraignment in March 2012; and March 18, 2012 in the jail in order to get his measurements to clothe the Applicant for his upcoming trial. Counsel testified that she forwarded the plea information from

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¹⁰ Based on a review of the record, it appears the Applicant was referring to the State's second plea offer.

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the assistant solicitor, Zach Ellis contained in the email to Mr. James Cheek, Esquire, who works exclusively on jail cases. She further testified that Mr. Cheek met with the Applicant to extend the State's offer to plead guilty to one Burglary charge. Mr. Cheek also discussed the offer and reviewed the sentencing sheet with the Applicant. She testified that the Applicant rejected the offer, signed a rejection form, which Mr. Cheek returned to Counsel, and then Mr. Cheek explained the three (3) strikes law. She opined that the first offer the Applicant rejected was better than the latest offer included in the Solicitor's email. Counsel testified that the Applicant was served with notice that the State would seek life without parole shortly after the Applicant's rejection of the plea, which they thoroughly discussed during their meeting on December 12, 2011.

Counsel testified that she conversed with Mr. Cheek about the Solicitor's office re-extending the plea offer and testified that she prepared for trial and had picked a jury when the Solicitor's office extended the plea deal that the Applicant ultimately accepted. Counsel testified that the trial was the turning point leading to the Applicant's decision to plead guilty. She testified that at that point, she was able to negotiate with the State to secure the Applicant's plea to other charges if the State "took LWOP off the table" in return. Counsel has no recollection of Applicant indicating that he did not want to plead or accept the State's offer at that time. She further testified she did not believe the plea transcript to be accurate and likewise believed it contained a scrivener's error regarding the Applicant's response. Counsel likewise testified that she had no recollection that the Applicant told the plea court his plea was not entered voluntarily or that the Applicant indicated he wanted to stand down. Counsel testified that had the Applicant requested Counsel withdraw his plea, she would have done so, as she has withdrawn her client's pleas in the past. Counsel finally testified that based on her knowledge of the presiding judge, it

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is unlikely that the plea court would have continued the colloquy had the Applicant indicated he wanted to stop the proceedings or withdraw his plea.

Ineffective Assistance of Counsel

In a PCR action, “the burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 622, 300 S.E.2d 482, 483 (1983)). Where the Applicant 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, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2064).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. See Strickland at 690, 104 S. Ct. at 2066. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See id. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (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. See id. at 117–18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional

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86 of 26
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errors, the result of the proceeding would have been different.” Id. at 117–18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

This Court finds Counsel is a criminal practitioner who has experience in the trial of serious offenses. This Court finds Counsel provided credible testimony during the Applicant’s evidentiary hearing. 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 range of penalty and enhancements, the Applicant’s constitutional rights, the Applicant’s version of the facts, and his possible defenses or lack thereof. The record reflects that Counsel communicated the State’s offers and that the Applicant’s plea was entered freely, voluntarily, knowingly, and intelligently.

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 that 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, 5, 239 S.E.2d 750, 752 (1977); Strickland, 466 U.S. at 687–88, 104 S. Ct. 2052, 2064–65; Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687–88, 104 S. Ct. at 2064–65, Turner v. Bass, 753 F.2d 342, 348 (4th Cir. 1985), *rev’d on other grounds*, Turner v. Murray, 106 S. Ct. 1683 (1986); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977)). This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, and provided thorough representation. This Court finds that

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9 of 26
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Counsel's representation did not fall below an objective standard of reasonableness.

Failure to Meet with the Applicant

The Applicant alleges Counsel was ineffective for failing to meet with him to adequately convey the State's plea offers. This Court finds that Applicant's testimony is not credible because the record is replete with objective proof that the Applicant conferred with either Counsel or her co-counsel, Mr. Cheek, in order to discuss the Applicant's case and the State's offers: Mr. Cheek presented the offer included in the email dated November 4, 2011, which the Applicant rejected in a signed statement dated November 28, 2011. Counsel testified she met with the Applicant no less than four (4) times prior to trial. Further, Counsel testified that she had ample opportunity to explain the State's final plea offer during the Applicant's trial. Therefore, this Court finds the Applicant's argument that Counsel failed to meet with and advise him regarding his first and second plea offers is without merit. Further, the record reflects that the Applicant and Counsel were served with the State's Notice of Intention to Seek Life Imprisonment Sentence, filed February 24, 2012 with the Spartanburg County Clerk of Court, which included the Applicant's criminal history and record of a most-serious Burglary-First Degree and serious Burglary-Second Degree Violent convictions. Thus, the Applicant's argument that he was not notified that he was LWOP eligible and therefore could not understand his plea offers is without merit. Accordingly, this Court finds that the Applicant has failed to meet his burden of proof in this regard.

The Applicant argues that the sign-in log at the County Detention Center proves that Counsel failed to visit the Applicant. This Court finds the Applicant's argument is without merit. Neither the Applicant nor the State contend that the sign-in log is inaccurate; however, all parties

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understand that, and the records custodian testified that it is well known that the jails often waive attorneys through without requiring them to sign-in, or allow attorneys to sign-in under one client's name while visiting other clients at the jail at the same time. Moreover, on one occasion the Applicant met with Counsel's co-counsel, Mr. Cheek—the records custodian did not testify as to whether Mr. Cheek's name appeared in the sign-in log. Therefore, the sign-in log may not be a complete or accurate record of the Applicant's attorneys' visits. This Court finds Counsel's testimony enumerating the dates of her meetings with the Applicant and relating Mr. Cheek's meeting with the Applicant most credible. There is no evidence that Counsel was deficient in her representation of the Applicant and therefore his claim is denied and dismissed.

Failure to Advise of Direct Appeal

This Court finds that trial counsel was not ineffective for failing to advise the Applicant of his right to appeal. The United States Supreme Court has rejected a "bright-line rule that counsel must always consult with the defendant regarding an appeal." Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000). They instead held that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Id. "[A]lthough not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." Id. "In a plea proceeding, . . . there is no requirement that plea counsel inform a defendant of the right to a direct appeal absent

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extraordinary circumstances.” Turner v. State, 384 S.C. 451, 456, 682 S.E.2d 792, 794–95 (2009) (citing Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)).

This Court finds the Applicant’s broad assertion that Counsel was ineffective for failing to communicate his right to direct appeal is without merit. This Court finds the Applicant has failed to carry his burden of proving he expressed his desire to appeal to Counsel. This Court finds that the Applicant has provided no proof, evidence, or argument that any appeal taken from the Applicant’s guilty plea would have been meritorious. This Court also finds that a rational defendant would not want to appeal the Applicant’s sentence, especially since considering the Applicant’s prior record and the serious nature of the charges against him, the Applicant could have received life in prison without possibility of parole. Neither the Applicant nor Counsel testified to any meritorious issue the Applicant may have raised on appeal; therefore, this Court finds the Applicant’s appeal likely would have been dismissed pursuant to an Anders brief. See Anders v. California, 386 U.S. 738, 741–42, 87 S. Ct. 1396, 1398–99 (1967). This Court finds the Applicant was not prejudiced by Counsel’s performance because Counsel had no constitutionally imposed duty to consult with the Applicant about an appeal after his guilty plea. See Roe, 528 U.S. at 479–80, 120 S. Ct. at 1036. This Court finds this allegation is without merit and the Applicant has failed to carry his burden of proving Counsel was ineffective in this regard.

Failure to Investigate and Subpoena Witnesses

The Applicant asserts that Counsel was ineffective for failing to investigate and subpoena witnesses to bolster the Applicant’s case. “[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Walker v. State,

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397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012), *overruled on other grounds*, Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014). “Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result.” Porter v. State, 368 S.C. 378, 385–86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). “In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” Wiggins v. Smith, 539 U.S. 510, 521–22, 123 S. Ct. 2527, 2535 (2003).

Our Courts have repeatedly held a PCR 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, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). The Applicant’s mere speculation as to what a witness’ testimony would have been by itself cannot satisfy the Applicant’s burden of showing prejudice. Id. (citing Glover, 318 S.C. at 498–99, 458 S.E.2d at 540). See Edwards, 392 S.C. at 457, 710 S.E.2d at 65 (“So long as a defendant’s attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient.”); Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006) (citing Strickland, 466 U.S. at 691, 104 S. Ct. at 2066) (“Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”).

The trial transcript reflects that prior to the Applicant’s guilty plea, while arguing to the

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plea court to relieve Counsel, the Applicant asserted that Counsel failed to investigate and subpoena witnesses (Tr. 26:24-28:23). However, the Applicant offered the names of only character witnesses, his father, and his father's girlfriend. The Applicant has not supplemented the record with the substance of those witnesses' testimony, nor did he subpoena those witnesses to testify on his behalf at the PCR hearing. The Applicant has failed to provide this Court with any actual evidence tending to prove his assertions at the PCR hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). Ultimately, the Applicant has failed to produce the putative witnesses and present their purportedly beneficial testimony at the PCR hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). Thus, this Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to investigate and subpoena potential witnesses.

Conflict of Interest

The Applicant asserted that Counsel was appointed to represent him twice and thus his guilty plea was affected by Counsel's conflict of interest. "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008) (Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001)). The test used to determine when a conflict of interest results in a violation of sixth amendment rights is:

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In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance . . .

[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. . . .

But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.

Duncan v. State, 281 S.C. 435, 437-38, 315 S.E.2d 809, 810-11 (1984) (citing Cuyler v. Sullivan, 446 U.S. 335, 348-350, 100 S. Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980)). An actual conflict of interest occurs "when a defense attorney places himself in a situation inherently conducive to divided loyalties. . . . If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists." Id. (citations omitted) "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." Id. (citing State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005)). "Additionally, the fact that counsel does not advise a defendant of the potential conflict of interest does not affect the constitutionality of the conviction." Id. (citing Jackson v. State, 329 S.C. 345, 355, 495 S.E.2d 768, 773 (1998)). Moreover, the "Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction." Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993).

South Carolina jurisprudence contemplates a criminal defendant is prejudiced where his attorney has an actual or concurrent conflict of interest concerning multiple representations of adverse parties or parties to the same criminal episode. See Lomax, 379 S.C. at 101, 665 S.E.2d at 168; Duncan, 281 S.C. at 438, 315 S.E.2d at 811. Here, the Applicant plainly claims that Counsel was "biased" based on her prior representation of the Applicant in 2008. The Applicant claims Counsel's representation suffers from a conflict of interest because he fired her in 2008. The Applicant has failed to demonstrate an actual, cognizable conflict of interest. Further, the

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Applicant has failed to argue or provide authority for his proposition that Counsel's representation was fatally flawed because he relieved her as counsel in 2008. See Padgett v. State, 324 S.C. 22, 27, 484 S.E.2d 101, 103 (1997) (the mere possibility of a conflict of interest is insufficient to impugn a criminal conviction). Because the Applicant cannot show an actual conflict of interest, he must prove that he was prejudiced by Counsel's alleged conflict of interest. This Court finds that the record is devoid of any evidence that Counsel's alleged bias towards her client negatively affected her representation. Therefore, this Court finds that the Applicant failed to show prejudice. Accordingly, this Court finds the Applicant has failed to meet his burden of proving Counsel was ineffective in this regard.

Further, as to the Applicant's argument that the plea court should have fired Counsel, a motion to relieve counsel is addressed to the discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Gregory, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005). The defendant bears the burden of showing satisfactory cause for removal. State v. Graddick, 345 S.C. 383, 386, 548 S.E.2d 210, 211 (2001). In analyzing a defendant's motion to relieve counsel, the court may consider the following factors: "timeliness of the motion, adequacy of the trial [court]'s inquiry into the defendant's complaint, and whether the attorney-client conflict was so great that it resulted in a total lack of communication, thereby preventing an adequate defense." State v. Sims, 304 S.C. 409, 414, 405 S.E.2d 377, 380 (1991). "It is well-established that a defendant may waive the right to counsel and proceed pro se." Dearybury v. State, 367 S.C. 34, 39, 625 S.E.2d 212, 215 (2006) (citing Faretta, 422 U.S. at 834, 95 S.Ct. at 2525). "Although a defendant's decision to proceed pro se may be to the defendant's own detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law." Id. (citing Faretta, 422 U.S. at 834, 95 S.Ct. 2525). "The trial judge has the responsibility to ensure

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that the accused is informed of the dangers and disadvantages of self-representation, and makes a knowing and intelligent waiver of the right to counsel.” Id.

The transcript reveals that the plea court allowed the Applicant ample opportunity to air his grievances on the record (Tr. 24:1–30:10). Thereafter, the court extensively questioned the Applicant and cautioned the Applicant that he would not be able to secure new representation on the eve of trial, which the Applicant affirmed he understood (Tr. 28:20–30:10). Once the Applicant’s case was called to trial, the plea court advised, his trial would not be continued and thus the Applicant would be required to proceed *pro se*. See id.; State v. Williams, 312 S.C. 455, 459, 469 S.E.2d 49, 52 (1996) (where fifteen months had passed since counsel was retained and defendant could not show satisfactory cause to grant motion to relieve counsel, trial court did not abuse its discretion by denying defendant’s motion on the eve of trial). Further, prior to accepting the Applicant’s guilty plea, the court again insured that the Applicant’s complaints against Counsel had been satisfied and he no longer wished to fire her (Tr. 31:17–25). This Court finds that the trial court’s refusal to relieve Counsel on the eve of trial was not an abuse of discretion. This Court finds that the Applicant’s motion to relieve Counsel was a dilatory delay tactic and without merit. Accordingly, the Applicant’s assignment of error is overruled.

Involuntary Guilty Plea

In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel’s errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). A defendant alleging that

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his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347, 350 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566, 566 (4th Cir. 1976).

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, 474 U.S. at 52, 106 S. Ct. at 366; Roscoe, 345 S.C. at 20, 546 S.E.2d at 419 (citing Hill, 474 U.S. at 52, 106 S. Ct. at 366; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)). 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, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991) (citing State v. Hazel, 275 S.C. 392, 394, 271 S.E.2d 602, 602 (1980)). 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. Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009) (citing Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 650 (2000)). See Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record

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made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000). “In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of the plea.” Id. (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). A 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.” State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993). “Under the procedure, a defendant, before his guilty plea may be accepted, is examined under oath on the voluntariness of his plea, including particularly its freedom from coercion by threat.” Edmonds, 546 F.2d at 567. When a defendant pleads guilty on the advice of counsel, the plea may be attacked through only a claim of ineffective assistance of counsel. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2002) (citing Al-Shibazz v. State, 338 S.C. 354, 363–64, 527 S.E.2d 742, 747 (1999)).

Moreover,

a signed document that informs a defendant of the charges against him, such as a sentencing sheet, gives rise to a presumed regularity in the proceedings and signifies that the defendant has been notified of the charges to which he has pled guilty. . . . In a criminal case, a defendant who chooses to plead guilty has ample opportunity to be fully notified of the charges he is pleading guilty to. . . . [A] defendant may check a box to indicate that he wishes to plead guilty. In addition, a defendant may sign the sentencing sheet, indicating the defendant is informed of the choices and has selected the box that corresponds to the course of action the defendant wants to take in the case. As a result, we believe that all of these factors indicate that the Defendant had notice of the charges to which he chose to plead guilty.

State v. Smalls, 364 S.C. 343, 347, 613 S.E.2d 754, 756 (2005).

This Court finds that the Applicant failed to meet his burden of proof as to this claim. This Court finds the transcript of the guilty plea to be most compelling. The plea court

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thoroughly questioned the Applicant in order to ensure that he was pleading guilty with full knowledge of the charges, potential sentences, and constitutional rights he waived. The plea court reminded the Applicant that after he moved to relieve Counsel at the commencement of trial, he provided Counsel and the Applicant the opportunity to meet and discuss his case (Tr. 31:17-25). The Applicant then informed the court that he had the opportunity to fully discuss his case with Counsel, had nothing else to discuss with her before he pled guilty, felt there was nothing else she should do for him, and was ultimately satisfied with Counsel's representation (Tr. 32: 1-23). Further, the Applicant acknowledged to the court that Counsel reviewed the charges and the potential sentences and that he understood he was pleading to all pending charges without negotiations or recommendations other than the State's waiver of its intent to seek life imprisonment without possibility of parole (Tr. 32:24-33:13). The plea court confirmed that the Applicant was aware of each indictment, the charged offenses, and the penalty ranges associated with each offense and that he needed no additional explanation before entering his plea (Tr. 33:14-36:8; 37:10-15). The plea court further advised the Applicant that his violent and serious offenses were "no parole" offenses and could subject him to additional strikes and the possibility of life in prison without parole (Tr. 34:7-35:1). The Applicant affirmed that he required no additional clarification from his attorney (Tr. 34:20-35:1).

The plea court completed its colloquy with Counsel to ensure that she thoroughly discussed the matter with the Applicant, was satisfied that he understood their discussions and could assist in his defense, was satisfied that he understood the nature of the charges, the elements of the crimes, the potential penalties and mandatory minimum sentences, his parole eligibility, any defenses he might have had, and his constitutional rights (Tr. 36:9-37:9). The Applicant stated that he was thirty (30) years old, graduated high school with a 3.64 grade point

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average, and had no children (Tr. 37:16–19; 38:3–4). The Applicant affirmed to the court that he wanted to plead guilty to all of the charges and had not been threatened or coerced (Tr. 38:11–17). The Applicant further affirmed that he was entering his plea freely without any promises, guarantees, and assurances—specifically regarding his parole eligibility—and after he had sufficient time to consider his plea (Tr. 38: 16–39:3).¹¹ The plea court extensively advised the Applicant of the constitutional rights he was waiving, ensured he understood, had no questions, and waived his rights fully in order to plead guilty (Tr. 39:4–41:9). The Applicant again admitted his guilt (Tr. 41:7–9). Further, Applicant acknowledged that the facts, as published by the assistant solicitor, were correct and stated Applicant had told the truth to the court. (Tr. 41:10–47:17). When the court specifically asked the Applicant whether he wanted to change any part of his guilty plea, the Applicant answered “no” (Tr. 47:11–17). Ultimately, the court found that the applicant’s plea was entered freely and voluntarily and accepted the Applicant’s plea. (Tr. 47:18–23). Based on the testimony of Counsel and the transcript of the plea hearing, this Court finds that the Applicant failed to meet his burden of proof as to his claim that his guilty plea was involuntary. Accordingly, the Applicant’s claim is denied and dismissed.

Remedy Provided by Davie v. State

The Applicant asserts that he is entitled to the remedy provided by Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) and Bell v. State, 410 S.C. 436, 765 S.E.2d 4 (Ct. App. 2014), specifically that because Counsel was ineffective for failing to communicate the State’s plea offer, the Applicant should be entitled to a resentencing in accordance with that offer. Additionally, the Applicant claims that he is consequently entitled to a belated direct appeal. Pursuant to the professional standards espoused by the American Bar Association and the South

¹¹ See note 9, *supra*.

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Carolina Rules of Professional Responsibility, “counsel is required to fully communicate [a plea offer] with the client so that the client can make an informed decision regarding any proposals by the State.” Davie, 381 S.C. at 609, 675 S.E.2d at 420. Once the PCR court determines that counsel was ineffective for failing to adequately communicate a plea deal to his or her client, “the question becomes whether [the applicant] was prejudiced by this deficient performance.” Id. The PCR court uses a case-by-case approach in “assessing whether but for counsel’s deficient performance a defendant would have accepted the State’s proposed plea bargain and that he would have benefited from the offer. Id. at 613, 675 S.E.2d at 422. “The second prong of the ineffective assistance inquiry—prejudice—is shown by demonstrating through *objective* evidence . . . [the existence of] a reasonable probability that, but for counsel’s advice, [the defendant] would have accepted the plea. Mere statements by the PCR petitioner that he would have accepted the plea agreement but for counsel’s incompetence are insufficient to show prejudice because they are self-serving and inherently unreliable.” Judge v. State, 321 S.C. 554, 562, 471 S.E.2d 146, 150 (1996). “[D]epending on the facts of the case, a defendant’s self-serving statement may be sufficient to establish actual prejudice.” Davie, 381 S.C. at 613, 675 S.E.2d at 422. Where the applicant does not express a desire to proceed to trial, the remedy for counsel’s failure to communicate a plea offer is remand for a new sentencing hearing, not specific performance of the purported offer. See id. at 615–616, 675 S.E.2d at 423–24.¹²

As an initial matter, this Court has found that Counsel effectively communicated the State’s offers to the Applicant and therefore she was not inefficient. Accordingly, this Court need

¹² The Davie court further held: “Given that we cannot compel the State to reinstate or the circuit court judge to accept the original, fifteen-year plea offer, we remand the case for a new sentencing hearing with the limitation that Petitioner’s sentence should not exceed the original sentence of twenty-seven years’ imprisonment.” Davie, 381 S.C. at 616, 675 S.E.2d at 424.

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not reach the question of whether the Applicant suffered actual prejudice by Counsel's alleged failures.

Nevertheless, the underlying facts of the Applicant's case are distinguishable from Davie and Bell. In Davie, the court found that the applicant was prejudiced by counsel's failure to communicate the State's offer based on plea counsel's admission that he failed to communicate the offer to the applicant; the admission by both plea counsel and the applicant that had the offer been communicated to the applicant, he would have accepted the agreement; and based on the fact that had the applicant accepted the offer, he would have received a significantly lower sentence than the 27 year sentence actually imposed. See Davie, 381 S.C. at 614, 675 S.E.2d at 423. The facts of Bell are substantially similar to Davie, although, in Bell, the applicant's "trial counsel testified Bell's file contained a note indicating the solicitor made an offer of ten years imprisonment" and "Bell testified he did not know anything about a plea offer until his sentencing." Bell, 410 S.C. at 442, 765 S.E.2d at 7. However, the Solicitor and Bell's counsel disagreed as to whether the State ever tendered an offer. Id.

Here, Counsel testified the Applicant was aware of both plea offers. Counsel testified and the record reflects that the Applicant signed a plea rejection form after Counsel's co-counsel, Mr. Cheek advised the Applicant of the State's most recent offer while visiting the Applicant at the jail. Moreover, by the Applicant's own admission at the hearing, he testified to understanding the basic terms of the offers. Finally, on the eve of trial, the Applicant chose to take advantage of the State's concession that they would waive seeking life imprisonment without possibility of parole. Although the Applicant could have received as little as fifteen (15) years imprisonment had he pled to a single Burglary-First Degree charge, after accepting his plea, the court still would have had to accept the negotiated sentence and run any other charge concurrent. Even if the Applicant

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could have received less than a maximum sentence of fifteen (15) years imprisonment had he pled to a single Burglary-Second Degree Violent charge, the sentencing court still could have imposed the maximum penalty on that charge. Ultimately, the sentences imposed by the plea court were substantially more generous than the Applicant's possible exposure to life imprisonment without possibility of parole if he was found guilty at trial. Moreover, the Applicant never testified that had he been presented with the initial deal, he would have accepted it; he simply asked this Court to give him his deal "back." This Court finds compelling Counsel's ability to obtain any kind of agreement whatsoever on behalf of the Applicant once he had rejected prior negotiations and his case had been called and a jury empanelled. While this Court understands that the choice between a thirty (30) year sentence and potential life imprisonment without possibility of parole has difficult challenges, this Court finds that hindsight is not an adequate legal basis for vacating a sentence. Accordingly, this Court finds that the Applicant failed to show actual prejudice as required pursuant to Davie and Strickland. This Court finds the Applicant has failed to meet his burden of proof and therefore declines to remand the Applicant's case for resentencing.

This Court notes that Davie and its progeny does not stand for the proposition that upon Counsel's prejudicial failure to communicate a plea offer, a PCR applicant is entitled to a belated, direct appeal. As this Court has found *supra*, the Applicant is not entitled to a belated, direct appeal, pursuant to established precedent.

All Other Allegations

As to any and all allegations that the Applicant raised in the application 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

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allegations. Therefore, they are hereby denied and dismissed.

CONCLUSION

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. See Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in her representation of the Applicant. The Applicant failed to show that Counsel's performance was deficient. Therefore, this Court need not address whether the Applicant was prejudiced by Counsel's representation. See id. The Applicant's complaints concerning Counsel's performance are without merit and are denied and dismissed.

Based on 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 cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. The Applicant's attention is directed to South Carolina Appellate Court Rule 245 for appropriate procedures for appeal.

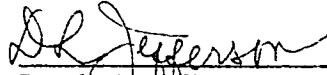
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IT IS THEREFORE ORDERED:

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.

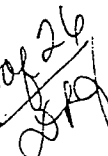
AND IT IS SO ORDERED this 26th day of March, 2015.



Deadra L. Jefferson
Presiding Judge
Seventh Judicial Circuit

Charleston, South Carolina
At Chambers

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The Brough Law Firm



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Spartanburg, SC 29306

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April 7, 2015

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

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RE: THE STATE VS. Travis Hipp

S.C. Supreme Court


Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Original Proof of Service upon opposing counsel.
- (2) Order of Dismissal.

If I can be of any further assistance please feel free to call me.

Sincerely,


Christopher D. Brough

Enclosure

cc: South Carolina Office of the Attorney General

The Brough Law Firm
175 Magnolia Street, Suite 202
Spartanburg, SC 29306

FIRST CLASS

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
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