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April 13, 2015

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

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APR 16 2015
S.C. Supreme Court

RE: THE STATE VS. Tony Paul Medford

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
Tony Paul Medford

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

RECEIVED
APR 16 2015
S.C. Supreme Court

Case No.: 2012-CP-42-4240

The State, Respondent,

v.

Tony Paul Medford, Appellant.

NOTICE OF INTENT TO APPEAL

Tony Paul Medford 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 April 2, 2015. Appellant received notice of the same on that date.

April 13, 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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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

RECEIVED
APR 16 2015
S.C. Supreme Court

Case No.: 2012-CP-42-4240

The State, Respondent,

v.

Tony Paul Medford, Appellant.

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 13, 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
13 DAY OF April, 2015.

Catherine D Telnet
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: Aug 3, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
	)	2012-CP-42-4240
Tony Paul Medford, #349218,	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Christopher D. Brough, Esquire
Respondent's Attorney:	Suzanne H. White, Esquire
Plea Counsel:	Matthew W. Shealy, Esquire
	Clay T. Allen, 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 October 8, 2012. The Respondent made its Return on or about October 2, 2013. 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. Danny Crisp also testified on Applicant's behalf. Matthew W. Shealy, Esquire, (Counsel) 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, the Appellate Court records, and the trial and plea transcripts.

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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. The Applicant was indicted at the March 2011 term of the Spartanburg County Grand Jury for Murder[1] (2011–GS–42–1821). The Applicant was represented by Matthew Shealy, Esquire. Mr. Shealy was assisted in trial by Clay T. Allen, Esquire. After beginning pre-trial motions, on January 9, 2012, the Applicant pled guilty under Alford[2] to Voluntary Manslaughter for a negotiated term of fifteen (15) years' imprisonment.[3] The Applicant was sentenced by the Honorable J. Derham Cole to a period of incarceration for fifteen (15) years for Voluntary Manslaughter. The Applicant did not appeal his conviction or sentence.

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 failed to retain expert,
   b. Counsel provided improper adversarial skills.
2. Violations of both US and State Constitutions (Due Process and Equal Protection), in that;
   a. "vindictive prosecution no following through with motion."

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[1] "A person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life." . . . For purposes of this section, "life" or "life imprisonment" means until death of the offender without the possibility of parole." S.C. CODE ANN. § 16–3–20 (2011). "No person sentenced to a mandatory minimum term of imprisonment for thirty years to life pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years to life required by this section." Id.

[2] North Carolina v. Alford, 400 U.S. 25 (1970).

[3] "A person convicted of manslaughter, or the unlawful killing of another without malice, express or implied, must be imprisoned not more than thirty years or less than two years." S.C. CODE ANN. § 16–3–50 (2011).

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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 his or her 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 the Testimony

The Applicant testified that he was originally indicted for Murder and proceeded to trial on that charge. However, Applicant testified that after the State rested its case and prior to presenting a defense, he pled guilty to the lesser-included offense of Voluntary Manslaughter pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). The Applicant testified he met with Counsel only three (3) times prior to trial. The Applicant testified that he had five major surgeries following his arrest on this charge and was in the hospital often prior to trial.[4] The Applicant acknowledged that Counsel made a "stand your ground" motion in regards to the Applicant's right to protect himself and assert self defense.[5] The court held a pre-trial hearing at which the Applicant testified, but the court denied the Applicant's motion. The Applicant testified that he wanted to testify at trial, but Counsel advised him against testifying advising him that "we won the case" and "we won, this isn't Murder." The Applicant acknowledged that the trial court advised him of his right to testify and admitted that it was his choice whether to testify or not, but claimed that if his attorney had allowed him to testify, he would have been acquitted.

[4] The Applicant testified that he suffers from severe health problems and had numerous major surgeries while incarcerated. The Applicant testified that Counsel visited the hospital in the attempts to secure the Applicant a bond, however the issue of the Applicant's bond is not germane to the collateral review of his conviction and sentence.

[5] See S.C. CODE ANN. § 16–11–440(C) (2011).

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The Applicant testified that the victim, Richard Allen Hayes, was using methamphetamine and was making threatening statements before pointing a gun at the Applicant. The Applicant's testimony was that he took the victim's gun and shot the victim in self-defense. The Applicant testified that law enforcement found forty-five (.45) caliber rounds near the shoe of the victim's body and a clip for a forty-five (.45) caliber pistol in the pocket of his friend and cousin, Danny Crisp.[6] The Applicant testified that he was paralyzed from the waist down at the time of the shooting and could not get away since he was riding in the car with Danny Crisp and the victim.

The Applicant testified that Danny Crisp, driver of the vehicle at the time the victim was shot, was listed as a State's witness, but did not testify. The Applicant testified that Crisp was driving, while Applicant was in the front passenger seat and the victim was in the back seat of the vehicle behind the Applicant. The Applicant alleged that the victim reached into the back seat and pulled a gun on the Applicant. He further testified that had the .45 caliber gun been "brought out," his trial would have been different. The Applicant alleged that Crisp knew that the victim was acting threatening and had a gun, had arranged a plea deal in exchange for his testimony, and could have testified to those facts on behalf of the Applicant.

The Applicant admitted that he testified during both his "stand your ground" and Jackson v. Denno hearings. The Applicant additionally testified that he grabbed the victim's gun not intending to kill him and stated "why would I murder someone seated behind me?"

The Applicant testified that if he did not take the plea deal, his attorneys and the presiding judge "scared" him that he would receive life in prison without possibility of parole.

[6] The record reveals that the victim suffered wounds from a twenty-two (.22) caliber pistol (Tr. 219:8–220:10) and law enforcement discovered a clip and magazine in the victim's pocket (Tr. 179:11–25). Law enforcement found four (4) unfired, forty-five (.45) caliber rounds by the victim's shoe (Tr. 192:11–193:6). The record further reflects that all bullets, clips, magazines, and gun paraphernalia were introduced into evidence.

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The Applicant further testified that he suffered from medical conditions and received care from the South Carolina Department of Corrections, but there was an issue with the way his time was calculated. The Applicant testified that he communicated with his attorney through his mother about his attorney failing to visit him while he was incarcerated.

Danny Ray Crisp, the Applicant's co-defendant, testified on the Applicant's behalf.[7] Crisp testified that he has known the Applicant for years because the Applicant's mother married Crisp's uncle. Crisp testified that he was with the Applicant on the night of the shooting and had given the Applicant a ride to the victim's home. Crisp further testified that there were a total of five (5) guys altogether. Crisp testified that the Applicant and victim asked him to take them to Tonya's house, which he declined at first, instigating an argument, but then agreed to take Rick to Tonya's house. On the way back from Tonya's house, Rick and the Applicant argued while the Applicant sat in the front passenger seat. The next thing, Crisp testified, he heard a gunshot and stopped the vehicle, he and the Applicant alighted from the vehicle, and Crisp implored them not to shoot in his car and told the Applicant he was "full of mess." Crisp testified that he then saw a .45 caliber gun on the floor in the backseat with the victim, which he said was the gun pulled on him. Crisp clarified that he heard but did not witness the shooting and that he saw the gun on the back floorboard when the victim got out of the car. At that time, Crisp testified, the Applicant still had a gun in his hand. Crisp finally testified that he gave a statement to the police and the Solicitor on January 12, 2011 and 12:12 AM. He testified he provided a handwritten

[7] Danny Crisp was represented by Steve Sumner, Esquire. Prior to Crisp's testimony, this Court questioned him as to whether he had received a subpoena issued by the State to testify regarding the Applicant's trial. This Court further inquired as to whether Crisp wished to call his attorney to be present during his testimony at the evidentiary hearing, which he declined. This Court further advised that any statements he may make on the stand while under oath may be used by the State against him to seek additional penalties for any crimes he may have committed in the past or into the future. The Court finally advised Crisp that he should offer his testimony only if he was not compelled to testify in violation of his right against self-incrimination. Crisp declined to consult with his attorney, indicated that he understood the Court's instruction, and told the Court he wished to testify.

statement to the police and that he and the Applicant drove around to drop the guns but that the police were reluctant to go find them.

Counsel testified that he received the case in January 2011 prior to proceeding to trial in January 2012 and that he was assisted by Clay T. Allen, Esquire. Counsel testified that he could not specifically state how many times he met with the Applicant, but did believe that it was more than three (3) times. Counsel specifically remembered visiting the Applicant twice in the hospital with the investigator and "spending a good bit of time there." Counsel recalled meeting with the Applicant several times in the medical area of the detention center and several times in either Pod 3 or 6. Counsel testified that at that time, when the Applicant was in the hospital, they discussed his charges but that he was concerned that the Applicant did not fully understand him because of all the medications he was on.

Counsel testified that the Applicant's defense was always self-defense and that they sought immunity under the "stand your ground" statute. He testified that the victim was shot through the eye, suffering a close contact wound to the back of the brain, and the bullet was lodged into the back of his brain, the Applicant's self-defense argument was improbable and perhaps even impossible. Counsel testified that the jury would use their "common sense" and he projected that the Applicant's self-defense argument at best would have "80/20" odds of success. Counsel testified that the victim accused the Applicant of "messing" with his wife, Tonya that she was "fooling" around on him, that the Applicant was cuckolded, and the Applicant knew by whom.

Counsel testified that he and Applicant thoroughly explained and discussed the Applicant's right to testify at trial, but Counsel advised against it because of his concern as to how the testimony would be perceived. Counsel testified that overall, Applicant's testimony at

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the pre-trial hearing was consistent, but somewhat rambling and the Applicant tended not to answer the question asked. Counsel opined that the Applicant never "fully formed" an explanation of what happened, thus Counsel was concerned about calling him as a witness. Counsel testified that he felt the Applicant tended to answer questions that were not asked, which would be a major concern, especially during the State's cross-examination. Counsel testified that ultimately it was the Applicant's decision not to testify at trial. Furthermore, Counsel testified that the Applicant's statement regarding the victim pulling a gun and pointing it at Applicant was in the record and did not explain why someone pulled a gun or identify the shooter.

Additionally, the evidence and testimony showed that law enforcement found .45 caliber bullets and a clip—which he argued belonged to the victim—near the victim's body. Counsel testified that the background of the altercation was that the parties were involved in a methamphetamine manufacturing enterprise and that they used guns as "cash" in the drug trade. Counsel and the Applicant discussed Crisp testifying consistently about the gun on the floorboard in exchange for a plea deal. Counsel testified that Crisp's testimony could have confirmed that the victim did have a gun, but he could not testify if the victim was pointing the gun at the Applicant or who fired the gun. Counsel testified that a large portion of the facts were "not in contention," including the identity of the victim's assailant, and that the only issue was "who shot whom first," which would determine whether the Applicant could assert self-defense. Counsel testified that another issue with the Applicant's self-defense argument was regarding whether the victim had a gun and the corresponding fact that the Applicant and Crisp disposed of both guns following the shooting. However, the only gun that was recovered was the Applicant's gun, a .22 caliber pistol.

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Counsel testified that he would have lost final argument if they presented any testimony and he believed that when looking at the benefits, especially considering that he was able to get the Applicant's statement of events into evidence, final argument outweighed the risks of having Applicant or Crisp testify. Counsel further opined that the Applicant's statement, as recorded by police, helped the Applicant's self-defense argument without necessitating the Applicant's testimony at trial. Counsel testified that the Applicant's statement was an uncontroverted version of the events, that the State could present no other version, and that the State would call no rebuttal witnesses. Counsel further explained that the State introduced the .45 caliber shells, clip, casings, methamphetamine, and guns into evidence, which bolstered the defense's argument. The rest of the Applicant's testimony, Counsel opined, was self-serving, bolstering, hearsay not subject to an exception, and generally inadmissible. Other statements, Counsel opined, were not valuable enough to give up last argument. Counsel finally testified that after charge conference, he believed the judge would charge the jury on self-defense.

Counsel testified that the Applicant was willing to entertain a plea and was always in a posture to negotiate, but the State originally offered a plea to voluntary manslaughter for twenty-five (25) to thirty (30) years, and the Applicant consistently refused to plead to any negotiated sentence longer than ten (10) years. Counsel testified that right before closing arguments, the State made the fifteen (15) year offer, which the Applicant accepted. Counsel testified that he had attempted to get the State to lower its initial offer to twenty-five (25) years, then again to twenty (20) years, and then finally to fifteen (15) years. Counsel felt the fifteen (15) year offer was fair at that point, but that the Applicant was "vague" and "not adamant" about accepting the offer, stating repeatedly that he would "leave [it] in God's hands." Finally, the Applicant testified, the Applicant decided to take the fifteen (15) year offer.

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Counsel testified that he was fully prepared to present his closing arguments had the Applicant chosen to not accept the plea and was willing to finish the trial. He clarified that he already had his closing done at the time the Applicant accepted the plea and that he was dedicated to being a "zealous advocate" for his client, which was also a basis for his strategic decision to advise the Applicant not to testify at trial in order to preserve last argument. Counsel further testified that the Applicant's plea was free and voluntary and denies any "coercion" on his part of the Applicant or "twisting his arm." Counsel testified that all serious fighting and advocacy was done. He further testified that the Applicant was not "happy" that his case came down to a guilty plea, but that he rests on the record and transcript of the Applicant's trial and plea. Counsel finally opined that the Applicant was not prejudiced by not utilizing Crisp's testimony because it did not add anything to the record. Counsel affirmed that the Applicant could have told the judge he wanted to testify during his guilty 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), SCRCP; 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

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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 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).

The Applicant alleges he received ineffective assistance of counsel. This Court finds the testimony of Counsel to be more credible than the testimony of Applicant as to all allegations. 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 and discussed the pending charges, the elements of the charges and what the State was required to prove, the Applicant's version of the facts, the penalty ranges associated with the charged offenses, and the Applicant's defenses he could present at trial. The record reflects that Counsel effectively explained the charges, their

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associated penalty ranges, and the consequences of pleading guilty. The record is completely devoid of any evidence that Counsel forced the Applicant to waive his right to testify on his own behalf and plead guilty. The record is also devoid of any evidence that Counsel failed to visit the Applicant, return his communications, deny the Applicant's request to call witnesses during his case-in-chief, fully argue all motions on the Applicant's behalf, and zealously advocate on his client's behalf. The record further reflects 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 and provided thorough representation. This Court finds that Counsel's representation did not fall below an objective standard of reasonableness.

Deficient Adversarial Skills

In his Application and at the evidentiary hearing, the Applicant argued that Counsel's adversarial skills were deficient.[8] Additionally, the Applicant alleges Counsel was inefficient for failing to call Crisp as a witness at trial and failure to allow the Applicant to testify on his behalf.

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[8] In his Application, the Applicant alleged Counsel was inefficient for failing to call an expert witness on his behalf; however, at the evidentiary hearing, the Applicant failed to articulate his argument. Therefore, this assertion of error

In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id.

Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 778–79 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. U.S., 564 F.2d 1071 (4th Cir. 1977)). See Stokes, 308 S.C. at 548, 419 S.E.2d at 778–79 (finding counsel's decision not to call witnesses reasonable where their testimony would have been of no value to the case and witnesses were not credible); Abney v. State, 408 S.C. 41, 51, 757 S.E.2d 544, 549 (Ct. App. 2014) ("While trial counsel should consult with his client, the final decision on strategy belongs to counsel."); More v. State, 399 S.C. 641, 723 S.E.2d 871, 873 (2012) (citing Florida v. Nixon, 543 U.S. 175, 187, 125 S. Ct. 551 (2004) ("Attorneys have a duty to consult with their clients regarding 'important decisions,' including questions of overarching 'defense strategy.' . . . This does not require

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is deemed abandoned and dismissed. Nevertheless, the Applicant was not prejudiced by Counsel's failure to call an expert witness to testify about the victim's injuries at trial. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812 (2005) (citing McLaughlin v. State, 352 S.C. 476, 483–84, 575 S.E.2d 844–45 (2003)) (finding defense counsel's

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counsel to obtain the defendant's consent on every strategic decision, but certain decisions regarding the waiver of basic trial rights [to plead guilty, waive a jury, testify on his own behalf, or take an appeal] cannot be made for the defendant by surrogate").

This Court finds that Counsel's testimony was credible, while finding that the Applicant's testimony was not credible. This Court finds Counsel articulated a strategic basis for his decision not to call any witnesses at trial and preserve last argument. Further, Counsel's concerns with the Applicant's disjointed and muddled testimony were valid, especially considering Counsel's credible testimony that the Applicant's testimony still did not explain why the offense occurred; the State already introduced evidence at trial that corroborated the Applicant's uncontroverted version of events; Counsel achieved his objective of introducing the Applicant's statement and any further testimony would have been moot and most likely detrimental; all the evidence the Applicant and Counsel intended on presenting was already entered into the record. This Court finds Counsel's strategy to allow the Applicant's statement in through the officer effective and most likely inured to the Applicant's benefit, considering the State effectively introduced testimony regarding the bullets, clip, methamphetamine use, and methamphetamine manufacturing business without the Applicant's testimony.[9] Additionally, this Court finds Counsel's reasons for not calling Crisp to be reasonable, when Crisp could only testify that he heard, but did not see, a gunshot and saw a gun on the backseat floorboard and his statement was generally uncontroverted.

This Court finds most compelling Counsel's argument that preserving last argument was more valuable than risking the consequences of presenting his client and Crisp's testimony to the jury. Further, the Applicant presented no evidence at the hearing that Counsel made decisions on

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decision not to call an expert witness to rebut the State's expert witness was legitimate strategic decision and any resulting prejudice to the Applicant would be merely speculative).

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fundamental trial strategies without his consent. Therefore, this assertion of error is without merit.

Although the Applicant testified on his behalf and presented testimony from Crisp, this Court finds that the testimony failed to establish that the Applicant suffered any prejudice from Counsel's decision not to present either witness. Further, this Court finds the Applicant's testimony that he did not testify at his trial because he was not allowed by Counsel is not credible. The Applicant failed to meet his burden of establishing that the testimony would have affected the outcome of his trial.

Finally, this Court finds no evidence that Counsel forced or coerced the Applicant into waiving his right to testify and pleading guilty. Counsel presented the only applicable defense to the charge and was a zealous advocate on the Applicant's behalf. However, as Counsel testified, the Applicant chose to accept the State's plea offer following the close of their case. The contemporaneous record of the trial and plea transcripts indicates that the court fully advised the Applicant of his constitutional rights (Tr. 254:8–258:4). The Applicant thereafter waived his right to testify of his own free will and accord and free from pressure (Tr. 256:22–257:15). The next morning, the Applicant pled guilty to the lesser-included offense of Voluntary Manslaughter pursuant to the negotiated twelve (12) year plea. The contemporaneous record indicates his plea was entered into freely and voluntarily. The Applicant affirmed that he intended to plead guilty under Alford (Tr. 5:16–18; 6:10–12). The Applicant affirmed that he was pleading of his own free will and accord and his plea was free of force, pressure, coercion (Tr. 5:19–6:3). The Applicant told the court that he had plenty of time to discuss his decision with his lawyers (Tr. 4:17–19; 6:4–9). Further, the Applicant presented no credible testimony or evidence to the contrary. Therefore, this claim is denied and dismissed.

[9] See note 6, *supra*.

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CLERK OF COURT
SEVENTH JUDICIAL DISTRICT
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IDAHO BLAINE COUNTY

Constitutional Violations

In his Application, the Applicant alleges violations of his constitutional rights based upon vindictive prosecution. However, the Applicant failed to present any argument supporting his claim at the evidentiary hearing. Therefore, this ground is deemed abandoned and dismissed. Nevertheless, the Applicant's vindictive prosecution claim is procedurally barred. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. CODE ANN. § 17–27–20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993).

Applicable South Carolina jurisprudence on vindictive prosecution provides:

> It is a due process violation to punish a person for exercising a protected statutory or constitutional right. United States v. Goodwin, 457 U.S. 368, 372, 102 S. Ct. 2485, 2488, 73 L.Ed.2d 74 (1982) . . . In a criminal prosecution, however, punishment of the offender is recognized as a proper motivation for a sentencing trial judge or a prosecutor. Goodwin, 457 U.S. at 372-73, 102 S. Ct. at 2488-89. As stated in Goodwin, "[t]he presence of a punitive motivation, therefore, does not provide an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived criminal conduct from governmental action that is an impermissible response to noncriminal, protected activity." Id. at 373, 102 S. Ct. at 2488. For this reason, the United States Supreme Court has fashioned certain rules as a protection against vindictive action in response to a criminal defendant's exercise of a statutory or constitutional right.

State v. Fletcher, 322 S.C. 256, 259-60, 471 S.E.2d 702, 704 (Ct. App. 1996).

The Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief.

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).

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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, 546 S.E.2d 417 (2001). 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 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

Furthermore, a freely and understandingly made guilty plea generally constitutes a waiver of non-jurisdictional defects and claims of violations of constitutional rights. See Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) (a plea of guilty constitutes a waiver of non-jurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea); Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981). This Court finds that the Applicant failed to present any evidence or testimony to support his claim that his constitutional rights were violated. Furthermore, the Applicant pled guilty and therefore waived any claims of violations of constitutional rights prior to his plea.

Involuntary Guilty Plea

The Applicant alleges that Counsel coerced him into pleading guilty by scaring him with the threat of life imprisonment without possibility of parole. 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

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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 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 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-Shabazz 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).

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This Court finds that the Applicant failed to meet his burden of proof as to this claim. This Court finds the transcript of the trial and guilty plea to be most compelling. Upon Counsel's motion, the court published his client's record for impeachment purposes; thoroughly advised the Applicant of his constitutional rights; advised the Applicant of his right to testify on his own behalf; ensured the Applicant understood his rights; ensured the Applicant had an opportunity to discuss the advantages and disadvantages of testifying with Counsel; and that he had time to reflect upon his decision (Tr. 253:20–256:7). Further, the Applicant affirmed that while Counsel recommended the Applicant not testify, Counsel cannot make the decision for him and that he had to make his decision based upon any considerations that he felt appropriate and relevant (Tr. 256:8–21). The Applicant thereafter waived his right to testify of his own free will and accord and free from pressure (Tr. 256:22–257:15). Moreover, the Applicant affirmed that he had enough time to think about his decision, was satisfied with his decision, had no further evidence to introduce on his behalf, and wished to call no witnesses on his behalf (Tr. 257:7–18). Therefore, this Court finds that the Applicant freely, voluntarily, knowingly, and intelligently waived his right to testify on his own behalf and present his defense at trial.

The morning after the Applicant waived his right to testify, he changed his plea to guilty under Alford with a negotiated sentence of fifteen (15) years to the lesser included offense of Voluntary Manslaughter (Tr. 3:5–4:1). At that point in the proceedings, the State had presented its evidence; the Applicant's case was being presented to the jury for deliberation; and, after hearing the evidence against him, the Applicant determined there was a significant likelihood that the jury would find him guilty of Murder, which risk he felt comfortable avoiding (Tr. 7:19–8:7). The Applicant understood that the possible penalty was up to thirty (30) years imprisonment (Tr. 17–20); that he was waiving his constitutional rights, including his right to

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testify and confront witnesses against him (Tr. 4:2–16); and understood that Voluntary Manslaughter is classified as a violent offense, most serious offense, and no-parole sentence, and understood the significance of those classifications (Tr. 4:20–5:15). The Applicant affirmed that he intended to plead guilty under Alford (Tr. 5:16–18; 6:10–12). The Applicant affirmed that he was pleading of his own free will and accord and his plea was free of force, pressure, coercion (Tr. 5:19–6:3). The Applicant told the court that he had plenty of time to discuss his decision with his lawyers (Tr. 4:17–19; 6:4–9). Thereafter, the sentencing court accepted the Applicant's plea and sentenced him in accordance with the negotiated plea agreement.

Therefore, this Court finds that the Applicant failed to meet his burden of proving that his plea was involuntary.

Prejudice

At the hearing, the Applicant made the blanket assertion that if Counsel would have allowed him to testify on his behalf, he would have been acquitted. Thus, the Applicant argued, he was prejudiced. This Court finds the overwhelming evidence of the Applicant's guilt presented by the State at trial negates any claim that Counsel's performance could have reasonably affected the outcome of the Applicant's trial. 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); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding no reasonable probability the result of trial would have been different had counsel's performance not been deficient where there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt).

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The Applicant proceeded to trial and received the substantial benefit of hearing all of the State's evidence against him. Thereafter, the State generously extended a negotiated plea agreement, which the Applicant accepted with full knowledge of his probability of success at trial. Additionally, this Court notes that the State had no obligation to re-extend a negotiated guilty plea offer on the eve of jury deliberation, especially after the State had successfully presented its case at trial. Moreover, based on Counsel's credible testimony that the victim was shot at point-blank range in the face, the State's corroborated evidence against the Applicant, and this Court's review of the record, this Court finds that the Applicant's assertion that had he presented his testimony to the jury, he could have been acquitted is without merit. Thus, regardless of the Applicant's complaints against Counsel, this Court can discern no prejudice affecting the Applicant's trial and guilty plea.

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 allegations. Therefore, they are hereby denied and dismissed. In his Application, the Applicant alleges that his constitutional rights were infringed based on Counsel's failure to follow through on motions. At the hearing, the Applicant admitted that he testified during both his "stand your ground" and Jackson v. Denno hearings—which the transcript of the proceedings accurately reflects—and failed to present any further argument on this ground. Therefore, this ground is deemed abandoned, denied, and dismissed.

CONCLUSION

This Court finds in regards to the allegations of ineffective assistance of counsel,

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Applicant's testimony as a whole was not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness. This Court finds that the Applicant failed to meet his burden of proof to support his claims. Therefore, they are denied and dismissed.

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 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 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), SCRCP, provides that if the applicant wishes

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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 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 2nd day of April, 2015.

Deadra L. Jefferson
Presiding Judge
Seventh Judicial Circuit

Charleston, South Carolina
At Chambers

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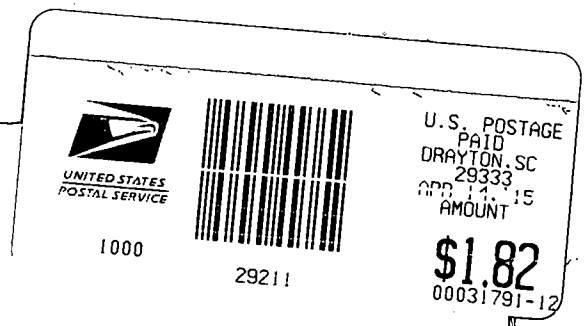

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