

THE GIESE LAW FIRM, LLC  
1315 BLANDING STREET  
COLUMBIA, SC 29201

W. BARNEY GIESE

KEITH GIESE

JONATHAN D. WALLER

JUSTIN M. KATA

KELLY L. GIESE

RECEIVED

JUN 24 2015

(803) 708 - 6767  
FAX (803) 708 - 6769  
WWW.GIESELAWSC.COM

June 22, 2015

S.C. SUPREME COURT

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

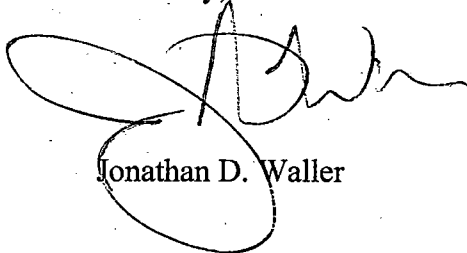
Re: Derrick S. Prescott vs. State of South Carolina  
C/A No: 2011-CP-21-01662

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Prescott in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-708-6767.

Sincerely,



Jonathan D. Waller

Cc: J. Croom Hunter, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

APPEAL FROM FLORENCE COUNTY  
D. Craig Brown, Circuit Court Judge

JUN 24 2015

2011-CP-21-01662

S.C. SUPREME COURT

Derrick S. Prescott, #268843,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Derrick S. Prescott, #268843, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed June 2, 2015, issued by the Honorable D. Craig Brown, Presiding Judge, Twelfth Judicial Circuit.



Jonathan D. Waller

Giese Law Firm  
SC Bar No.: 76290  
1315 Blanding Street  
Columbia, SC 29201  
803-708-6767 (phone)  
803-708-6769 (fax)  
jonathanwallerlaw@gmail.com  
ATTORNEY FOR PETITIONER

This 22 day of June, 2015.

Other Counsel of Record:

J. Croom Hunter, Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3319

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM FLORENCE COUNTY  
D. Craig Brown, Circuit Court Judge

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2011-CP-21-01662

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RECEIVED

JUN 24 2015

S.C. SUPREME COURT

Derrick S. Prescott, #268843,

Appellant,

v.

STATE OF SOUTH CAROLINA,

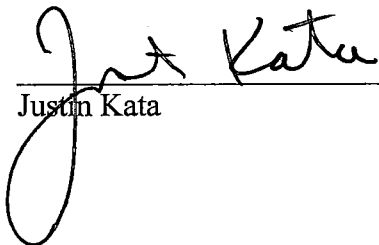
Respondent.

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Croom Hunter, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 22 day of June 2015.

  
Justin Kata

STATE OF SOUTH CAROLINA  
COUNTY OF Florence

FILED

JUDGMENT IN A CIVIL CASE

IN THE COURT OF COMMON PLEAS 2015 JUN -2 AM 9:30 2011-CP-21-1662

Derrick S. Prescott #268843  
PLAINTIFF(S)

State of South Carolina  
DEFENDANT(S)

Attorney for :  Plaintiff  Defendant  
or  
 Self-Represented Litigant

Submitted by:

**DISPOSITION TYPE (CHECK ONE)**

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

CERTIFIED: A TRUE COPY  
Christie Reel  
CLERK OF COURT, C.P. & G.S.  
FLORENCE COUNTY, S.C.

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

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

**ORDER INFORMATION**

This order  ends  does not end the case.  
Additional Information for the Clerk : \_\_\_\_\_

**INFORMATION FOR THE JUDGMENT INDEX**

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

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

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

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

Circuit Court Judge

Judge Code

Date



STATE OF SOUTH CAROLINA  
COUNTY OF FLORENCE

FILED

IN THE COURT OF COMMON PLEAS  
TWELFTH JUDICIAL CIRCUIT

2015 JUN -1 PM 2:24

Derrick S. Prescott, #268843,

CONNIE REEL-SHEARIN  
CCCP & GS  
FLORENCE COUNTY, SC

Case No. 2011-CP-21-1662

Applicant,

v.

**ORDER OF DISMISSAL**

State of South Carolina,

Respondent.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 24, 2011. Respondent made a Return on or about September 20, 2011. The Court convened an evidentiary hearing into the matter on April 14, 2015, at the Florence County Courthouse. Applicant was present at the hearing and represented by Jonathan Waller, Esquire. J. Croom Hunter, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, A. Grayson Smith, Esquire, also testified. The Court had before it a copy of the plea transcript, the records of the Florence County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings in this matter.

The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Florence County Clerk of Court's orders of commitment. Applicant was indicted at the March 2010 term of the Florence County Grand Jury for possession of a stolen pistol (2010-GS-

CERTIFIED: A TRUE COPY  
*Connie Reel-Shearin*  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

21-0064), distribution of cocaine, third offense (2010-GS-21-1031), possession of marijuana with intent to distribute, third offense (PWID), and possession of marijuana with intent to distribute within proximity of a school or park. Applicant was represented by A. Grayson Smith, Esquire. On January 27, 2011, Applicant pled guilty as indicted to PWID and the pistol charge. Applicant also pled guilty to the lesser included offense of distribution of cocaine base, second offense. The proximity charge was dismissed. The Honorable Thomas A. Russo sentenced Applicant to concurrent terms of ten years on the drug charges and five years on the pistol charge. Applicant did not appeal.

## **II. ALLEGATIONS**

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

1. Ineffective assistance of counsel.
  - a. "Correction of sentence/Reduction in sentence and/or whatever relief the Court deems just and proper."

## **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court finds Counsel's testimony credible and Applicant's testimony not credible. The 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).

### **A. Summary of Testimony**

Applicant testified at the PCR hearing that Grayson Smith (Counsel) was appointed to

represent him. Applicant testified he was out on bond at the time, and the charges he pled to stemmed from three separate incidents. Applicant testified he had issues with the validity of the arrest and search warrants. Applicant testified he only met with Counsel two or three times, and they discussed all three charges to which he pled. Applicant testified Counsel would not let him watch the video of the confidential informant (CI) buying drugs from him. Applicant testified Counsel discussed the elements of the charges but not in great detail, as well as the potential penalties Applicant was facing. Applicant testified Counsel never discussed suppressing the evidence, but that he did not consent to a search. Applicant testified he discussed with Counsel that the address on the search warrant resulting in the recovery of the pistol was wrong. Applicant testified he did not know he was supposed to go to court the day his trial was scheduled to start, but that he did meet with Counsel and prepare for trial on the PWID charge. Applicant testified he pled guilty to a negotiated ten year sentence. Applicant testified Counsel told him he was pleading to a nonviolent offense and would have to serve 65% of the sentence. Applicant testified he had concerns about Counsel's representation, but he did not notify the plea judge. Applicant testified he wishes he had gone to trial.

On cross-examination, Applicant recalled the plea judge explaining the constitutional rights he was waiving by pleading guilty. Applicant recalled telling the plea judge he was satisfied with Counsel's performance and had no complaints. Applicant recalled telling the plea judge no one promised him anything or forced him to plead guilty. Applicant recalled telling the plea judge he was guilty. Applicant recalled going over the fact that he was pleading to a serious offense and the consequences that carried with regard to the two strikes-three strikes law. Applicant acknowledged that he apologized to the Court at the end of his plea.

Counsel testified he was assigned to Applicant's case during the course of his employment with the Public Defender's Office. Counsel testified he did not specifically recall how many times he met with Applicant prior to his plea, but he did meet with him on multiple occasions because he remembered he and Applicant had some very emotional conversations. Counsel testified he received Rule 5 and *Brady* materials and reviewed everything with Applicant except the video of the CI buy. Counsel testified Florence County had a policy that restricted defendants from watching videos that revealed the identities of their confidential informants. Counsel testified he did watch the video, and Applicant was clearly the person selling drugs. Counsel testified he discussed the elements of the charges Applicant was facing and reviewed Applicant's constitutional rights prior to the plea. Counsel testified he went over and had Applicant sign a plea affidavit. Counsel testified he never had any trouble communicating with Applicant. Counsel testified he spent a great deal of time on the case, and that he did not think there were any meritorious issues to argue regarding the search and arrest warrants. Counsel testified it was his practice to tell his clients what they would likely have to serve, but to tell them SCDC is unpredictable. Counsel testified he would not guarantee a client anything with regard to prison time.

On cross-examination, Counsel testified Applicant did not show up for trial when it was scheduled. He recalled having a conversation with Applicant after the PWID trial began regarding entering a guilty plea. Counsel testified Applicant was not in the courtroom when the trial began, despite what Applicant may have claimed at the PCR hearing. Counsel testified he only prepped the PWID charge for trial because that was the only charge Applicant was planning to go to trial on at that time. Counsel testified he had plenty of time to prepare and was prepared

for trial. Counsel testified it was Applicant's decision to plead guilty.

### **B. Ineffective Assistance of Counsel**

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, Applicant must prove trial 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). 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).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced 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.

This Court finds Applicant has failed to show Counsel’s performance fell below an objective standard of reasonableness. Counsel’s testimony indicated he was extremely familiar with the facts of Applicant’s case, and he was prepared to take Applicant’s case to trial. This Court finds Counsel met with Applicant an adequate number of times and was familiar with the discovery materials. Counsel testified that after reviewing the warrants, in his professional judgment suppression was unlikely. This Court further finds that based upon the solicitor’s recitation of the facts at the plea colloquy, combined with Counsel’s testimony at the PCR hearing, the evidence against Applicant was such that it was in Applicant’s best interest to go forward with the plea. As such, Applicant has failed to show ineffectiveness of counsel, and the allegation is without merit.

### **C. Involuntary Guilty Plea**

Although not specifically alleged, this Court finds Applicant’s allegations could be construed as alleging his plea was involuntary. This Court finds the allegation to be without merit.

In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An Applicant 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 Applicant 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) (citations omitted). An Applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985); Bennett v. State, 371 S.C. 198, 204, 638 S.E.2d 673, 675 (2006).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. Id. at 243, 89 S. Ct. at 1712. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. Moreover, a criminal defendant entering a guilty plea "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citation omitted). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000).

When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000).

This Court has had the opportunity to review the testimony from the PCR hearing, as well as the guilty plea transcript and finds Applicant knowingly, intelligently, and voluntarily entered his guilty plea. Applicant has presented no credible evidence to the contrary. Applicant's testimony that he wishes he had proceeded to trial does not undermine the validity of his plea. As such, this Court finds the allegation is without merit.

**D. All Other Allegations**

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

**IV. CONCLUSION**


Based on the foregoing, the Court finds and concludes 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.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED THAT:**

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 15<sup>th</sup> day of May, 2015.

  
D. CRAIG BROWN  
Presiding Judge  
Twelfth Judicial Circuit

Florence, South Carolina

FILED  
2015 JUN -1 PM 2:24  
CONNIE REEL-SHEARIN  
DCCP & GS  
FLORENCE COUNTY, SC

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