FLETCHER N. SMITH, LLC
ATTORNEY AT LAW

P.O. BOX 10496, F.S. GREENVILLE, SOUTH CAROLINA 29603
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(864) 232-6541 FAX (864) 232-6756

June 30, 2015

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
Clerk of Court
1231 Gervais Street
P.O. Box 11330
Columbia , SC 29211

In Re: County of Spartanburg v. Kendrick Allen Gude
Appeal Number: 2015-CP-42-02049

Dear Mr. Shearson:

Please find enclosed a Notice of Appeal filed with the Court of Appeals. I at this point do not know which Appellate Court will ultimately retain jurisdiction. Nevertheless, I am filing the Notice of Appeal with the Court of Appeals for your records and for the benefit of Mr. Kendrick Gude and Appellate Defense.

Sincerely,

Fletcher N. Smith, Jr., Esq.

FNS/fns
Enclosure(s)

cc: Mr. Kendrick Gude, Appellant
Ms. Suzanne H. White, Esq. Assistant Attorney General
Ms. Loriene French, Esq. Indigent Defense
Clerk of the South Carolina Court of Appeals

FLETCHER N. SMITH, LLC
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(864) 232-6541 FAX (864) 232-6756

June 30, 2015

The Honorable Jenny Abbot Kitchings
Court of Appeals
Clerk of Court
PO Box 11629
Columbia, SC 29211

In Re: County of Spartanburg v. Kendrick Allen Gude
Warrant No(s).: 2013-CP-42-02049

Dear Ms. Abbot-Kitchings:

Please find enclosed a Notice of Intent to Appeal, attached lower court order along with a Certificate of Service by mail in the above captioned matter.

Sincerely,

Fletcher N. Smith, Jr., Esq.

FNS/fns
Enclosure(s)

cc: Ms. Suzanne H. White, Esq. of South Carolina Attorney General
Ms. Loriene French, Esq. of Indigent Defense
Clerk of Court Spartanburg County
Mr. Kendrick Allen Gude, Appellant
✓South Carolina Supreme Court Clerks Office

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

JUL 06 2015

S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

The Honorable Deadra L. Jefferson

Case No.: 2015-001133
Lower Court Case Number: 2013-CP-42-02049

KENDRICK ALLEN GUDE

Appellant(s),

Versus

STATE OF SOUTH CAROLINA,

Appellee.

NOTICE OF INTENT TO APPEAL

Comes now the Appellant, Kendrick Allen Gude by and through his undersigned attorney hereby appeals from the Order of the Honorable Deadra L. Jefferson amd the Court of Common Pleas of Spartanburg County in the above captioned action to the South Carolina Court of Appeals.

This Notice of Appeal is made pursuant to a denial of post conviction relief by the Honorable Deadra L. Jefferson on March 31 2015 and filed with the Spartanburg County Clerk of Court on April 6, 2015.

The Post Conviction hearing concerned issues related to a guilty plea entered by Appellant and as such the Appellant asserts at the very least an abuse of discretion as a basis for this appeal and would request a reversal of the March 31, 2015 order.

FLETCHER N. SMITH, JR.
Attorney for Plaintiff
South Carolina State Bar No. 5165
P.O. Box 10496, F.S.
Greenville, SC 29601
Office: (864) 232-6541
Counsel for the Appellant at Post Conviction hearing

Greenville, South Carolina
Dated: Tuesday, June 30, 2015

RECEIVED
JUL 06 2015
S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson

Case No.: 2013-CP-42-2049

KENDRICK ALLEN GUDE,

Appellant(s),

Versus

STATE OF SOUTH CAROLINA,

Appellee.

CERTIFICATE OF SERVICE

I, Fletcher N. Smith, Jr. do hereby certify that on this 30th day of June 2015 that I served upon the below named persons of interests copies of the Notice of Appeal by depositing via U.S. Postage prepaid, in an envelope addressed as follows:

Ms. Suzanne H. White
Assistant Attorney General
P.O. Box 11549
Columbia, S.C. 29211

Ms. Loriene French, Esq.
S.C. Commission of Indigent Defense
Division of Appellate Defense
P.O. Box 11433
Columbia, S.C. 29211

Clerk of Court Spartanburg County
180 Magnolia Street
Spartanburg, S.C. 29306

FLETCHER N. SMITH, JR.
Attorney for Plaintiff
South Carolina State Bar No. 5165

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
	)	2013–CP–42–2049
Kendrick Allen Gude, #287625,	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Fletcher N. Smith, Jr., Esquire
Respondent's Attorney:	Suzanne H. White, Esquire
Plea Counsel:	John G. Reckenbeil, 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 May 2, 2013. The Respondent made its Return on or about May 13, 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 Leah B. Moody, 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. John G. Reckenbeil, 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 plea transcript.

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 November 2011 term of the Spartanburg County Grand Jury for Possession with Intent to Distribute Marijuana–Second Offense[1] (2011–GS–42–6813) and Possession with Intent to Distribute Marijuana Within One–Half Mile of School[2] (PWID Proximity) (2011–GS–42–6814). He was also indicted at the June 2012 term for Distribution of Marijuana–Second Offense[3] (2012–GS–42–3192) and Possession With Intent to Distribute Marijuana–Second Offense[4] (2012–GS–42–3509). The Applicant was represented by John Reckenbeil, Esquire. On July 9, 2012, the Applicant pled guilty to each of the charges as first offenses with no recommendation or negotiation by the State. The Applicant waived presentment of Indictment Number 2012–GS–42–3509 to the grand jury (Tr. 17:14–19).[5]

The Honorable Roger L. Couch sentenced the Applicant to concurrent sentences of ten (10) years for the PWID Proximity–First Offense charge and five (5) years for each additional

---

[1] PWID Marijuana–First Offense is a felony punishable by imprisonment for "not more than five [(5)] years" or a fine of "not more than five thousand dollars [($5,000.00)], or both." S.C. CODE ANN. § 44–53–370(b)(2)(2011). For PWID Marijuana–Second Offense, "the offender is guilty of a felony and, upon conviction, must be imprisoned not more than ten [(10)] years or fined not more than ten thousand dollars [($10,000)], or both." Id.

[2] An offender who commits the crime of PWID Proximity is guilty of a "[serious] felony and, upon conviction, must be fined not more than ten thousand dollars [($10,000.00)], or imprisoned not more than ten [(10)] years, or both." S.C. CODE ANN. § 44–53–445(D)(1) (2011); S.C. CODE ANN. § 17–25–45 (2011).

[3] An offender who commits the felony of Distribution of Marijuana–First Offense "for a first offense must be imprisoned not more than five [(5)] years or fined not more than five thousand dollars [($5,000.00)], or both." S.C. CODE ANN. § 44–53–370(b)(2)(2011). For Distribution of Marijuana–Second Offense, "the offender is guilty of a felony and, upon conviction, must be imprisoned not more than ten [(10)] years or fined not more than ten thousand dollars [($10,000)], or both." Id.

[4] PWID Marijuana–First Offense is a felony punishable by imprisonment for "not more than five [(5)] years" or a fine of "not more than five thousand dollars [($5,000.00)], or both." S.C. CODE ANN. § 44–53–370(b)(2)(2011). For PWID Marijuana–Second Offense, "the offender is guilty of a felony and, upon conviction, must be imprisoned not more than ten [(10)] years or fined not more than ten thousand dollars [($10,000)], or both." Id.

[5] Upon review of the plea transcript, it appears that the Solicitor referenced that the Applicant waived presentment to the grand jury on both Indictment Number 2012–GS–42–3508 and Indictment Number 2012–GS–42–3509. Only Indictment Number 2012–GS–42–3509 is before the PCR Court. The Applicant waived presentment to the grand jury on Indictment Number 2012–GS–42–3509 (Tr. 16:2–4). However, the Applicant does not challenge this issue on collateral review.

charge. Specifically, the Applicant was sentenced to five (5) years for Possession with Intent to Distribute Marijuana–First Offense (2011–GS–42–6813); ten (10) years for Possession with Intent to Distribute Marijuana Within One–Half Mile of School (PWID Proximity) (2011–GS–42–6814); five (5) years for Distribution of Marijuana–First Offense (2012–GS–42–3192); and five (5) years for Possession With Intent to Distribute Marijuana–First Offense (2012–GS–42–3509). The plea court ordered the Applicant's drug charges be run concurrently with one another. In addition, Judge Couch revoked in full the Applicant's probation on Indictment Number 2005–GS–42–5073 and sentence of ten (10) years' imprisonment suspended upon the service of five (5) years' probation for PWID Marijuana Proximity. The plea court ordered the Applicant's probation revocation to run consecutively to his drug charges.

The Applicant's Counsel filed a Motion for Reconsideration on the Applicant's behalf, but the Motion was denied for a lack of jurisdiction because it was filed past the ten (10) day limitations period. See Rule 29(a), SCRCrimP. ("Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence.").The Applicant did not appeal his convictions or sentences.

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;
   i. Counsel provided Applicant with legal advice that Applicant would serve concurrent sentences of ten years,
   ii. Counsel guaranteed the Applicant a certain sentence to persuade the Applicant to plead guilty,
   iii. Counsel failed to file a Motion for Reconsideration within ten (10) days following sentencing.

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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 retained Counsel to represent the Applicant on drug charges and his guilty plea was scheduled for July 9, 2012. The Applicant testified that his probation revocation matter was handled at the same time as the guilty plea, but he believes it should have been handled at a later day because his active sentence on his probation revocation was imposed consecutively with his plea. Further, the Applicant testified that he never discussed the probation revocation matter with Counsel prior to the day of the plea. The Applicant testified that he never received a copy of the probation violation warrant, pursuant to S.C. CODE. ANN. § 24–21–300, –450 (2011), as required by statute. (Applicant's Exhibits #1 and #2). The Applicant testified that he never asked Counsel to file a motion for reconsideration.

Counsel testified that the Applicant's exposure was five (5) years and ten (10) years, concurrent on his pending drug charges. Counsel testified that he did discuss the possibility of handling the plea and probation revocation matter at the same time with the Applicant prior to the day of the plea and had advised the Applicant that his probation could be revoked; however, he and the Applicant "were both shocked" that the plea court ran the Applicant's probation revocation consecutively to his guilty pleas. Counsel did acknowledge that the Applicant was

never served with a copy of the probation violation warrant. Counsel testified that the Applicant never requested that Counsel file a motion for reconsideration; that he could not recall whether he filed the motion for reconsideration on the Applicant's behalf; but that he would have filed a motion for reconsideration if he had a basis and the Applicant had made that request. Counsel admitted that the Applicant's motion for reconsideration was not filed within the ten (10) day limitations period. Counsel likewise testified that he did not appeal the Applicant's sentence and conviction and believed that sentencing was "discretionary." Similarly, Counsel testified that had he discerned any legal ground to file an appeal, he would have filed an appeal on behalf of the Applicant.

Counsel further testified that the Applicant was not accepting responsibility for his probation violation; rather, he just wanted to apologize in general. Counsel stated that the Applicant's probation revocation could have been heard at a different time. Counsel further clarified that the Applicant's probationary case was from one (1) year before his plea and the Applicant had already served three (3) of his four (4) years of probation. Counsel instructed his client to file a PCR and said "I've never seen Judge Couch not run [a probation revocation] concurrent," although he did not believe Judge Couch made a mistake in protecting citizens from the Applicant's continued criminal behavior and illegal activities. Counsel further opined that "attorneys make judgment calls." Counsel acknowledged that the Applicant agreed to the probation agent's summary of his probation case. Counsel further clarified that although the probation agent stood up and said the Applicant's guilty plea was a violation of his probation, she never gave them a copy of the violation report.

The Applicant's finance, Dana Brakins testified that she and the Applicant were not married at the time of the Applicant's plea, but that they were together. She further testified that

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Counsel told them to file a PCR but had no idea about a motion for reconsideration.

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 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 Applicant's constitutional rights, and his possible defenses or lack thereof. The record reflects that Counsel effectively explained the charges, their associated penalty ranges, and the consequences of pleading guilty. The record is completely devoid of any evidence that Counsel promised or guaranteed the Applicant a specific sentence. 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, conducted a proper investigation, and provided thorough representation. This Court finds that Counsel's representation did not fall below an objective standard of reasonableness.

Failure to Receive Copy of Probation Violation Report

At the hearing, the Applicant alleged that his plea should be vacated because he did not receive a copy of the probation citation and violation report, pursuant to S.C. CODE. ANN. § 24–21–300, –450 (2011), as required by statute. "At any time during the period of probation or suspension of sentence the court, or the court within the venue of which the violation occurs, or the probation agent *may* issue or cause the issuing of a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence." S.C. CODE. ANN. § 24–21–450 (2011) (emphasis added). The statute provides the procedure for detaining individuals in order to conduct a probation violation hearing:

> In case of an arrest, the arresting officer or agent must have a written warrant from the probation agent setting forth that the probationer has, in his judgment, violated the conditions of probation, and such statement shall be warrant for the detention of such probationer in the county jail or other appropriate place of detention, until such probationer can be brought before the judge of the court or of the court within the venue of which the violation occurs. Such probation agent must forthwith report such arrest and detention to the judge of the court, or of the court within the venue of which the violation occurs, and submit in writing a report showing in what manner the probationer has violated his probation.

Id. Similarly, "[a]t any time during a period of supervision, a probation agent, instead of issuing a warrant, *may* issue a written citation and affidavit setting forth that the probationer, parolee . . . in the agent's judgment violates the conditions of his release or suspended sentence." S.C. CODE. ANN. § 24–21–300 (2011) (emphasis added). The procedure for court review of the probationer's violation commands the probation agent to forward her report to the judge:

> When directed by the court, the probation agent must fully investigate and report to the court in writing the circumstances of the offense and the criminal record,

> social history, and present condition of the defendant including, whenever practicable, the findings of a physical and mental examination of the defendant. When the services of a probation agent are available to the court, no defendant charged with a felony and, unless the court shall direct otherwise in individual cases, no other defendant may be placed on probation or released under suspension of sentence until the report of such investigation has been presented to and considered by the court.

S.C. CODE. ANN. § 24–21–420 (2011). The probation agent has a duty to issue a warrant or citation for the offender's arrest and furnish a copy to both law enforcement and the court in which the probationer's violation hearing may be heard. S.C. CODE. ANN. § 24–21–450 (2011). Likewise, when directed by the court, the probation agent has the duty to furnish her report to the reviewing court. S.C. CODE. ANN. § 24–21–420 (2011). Pursuant to the statutes cited by the Applicant in his prayer for relief, probation has no concomitant duty to provide the offender with a copy of its citation and report. S.C. CODE. ANN. § 24–21–450 (2011). The statutory procedure empowering probation to provide a copy of the violation citation and report to the probationer is not mandatory; in practical application, the probationer routinely waives his ability to review the citation and report prior to the hearing.[6] Therefore, the Applicant's assertion that his plea was involuntary based on probation's failure to provide him with a copy of the citation and report prior to his revocation hearing is without merit.

Moreover, this Court finds that Counsel's testimony was most credible that he discussed the nature of the offenses, potential sentences, and the fact that the guilty plea would be considered a willful violation of his probation. This Court finds that the statutes are discretionary in nature and that from a practical standpoint, handling his probation revocation simultaneously

[6] In practical application when a Defendant's guilty plea constitutes the willful violation of his probation and is being handled concurrent to the plea there is insufficient time in advance for the preparation of a warrant and violation report. The Defendant's actual entry of the guilty plea is the violation. As a result service of these documents under these circumstances is usually waived by the Defendant and his counsel. As a practical matter the only information that would be included in these documents forming the basis of the violation would be the violation of state law ergo the guilty plea. It is unusual that this information would have been provided to the probation department prior to the entry of the plea unless there were other violations and a warrant had already been issued for the Defendant.

with his guilty plea inured to the Applicant's benefit. This Court notes that the Applicant continued to receive charges while he was out on probation and as the record indicates, in formulating his sentence, the Honorable Roger L. Couch considered the Applicant's record and his decision not to take advantage of probation as a second chance and state of grace. The plea court fully articulated its reasons for sentencing and the record reflects the propriety of its ruling. It appears from the record that the turning point in the Applicant's sentencing was his record and the timing of his new charges, not a violation of his procedural due process. This Court finds that the plea court did not commit an abuse of discretion by sentencing the Applicant's plea sentences consecutive to his active service on his probation case based on his extensive continued criminal behavior while on supervision. See State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974) ("A broad discretion is allowed the trial judge in imposing sentence within the legal limits."); Treece v. State, 365 S.C. 134, 136, 616 S.E.2d 424, 425 (2005) (citing Finley v. State, 219 S.C. 278, 282, 64 S.E.2d 881, 882 (1954)) ("It is well-settled that sentences are deemed to run concurrently "unless the intention that one should begin at the end of the other is expressed."); Major v. S. C. Dep't of Prob., Parole & Pardon Servs., 384 S.C. 457, 465-66, 682 S.E.2d 795, 799–800 (2009) (citing State v. McKay, 300 S.C. 113, 115, 386 S.E.2d 623, 623 (1989)) ("Confined by these legislative enactments, and the doctrine of separation of powers, a sentencing court is not authorized to determine parole eligibility. Instead, a court's final judgment in a criminal case is the pronouncement of the sentence which includes the ability to designate whether sentences run concurrent or consecutive, subject to statutory restrictions.").

Failure to Advise of Penalty and Sentencing Consequences

The Applicant also alleges that Counsel was ineffective for failing to inform the Applicant of the penalty ranges associated with his charges, the potential sentences he was

facing, the terms of the plea offer, and the consequences of entering his plea. Specifically, the Applicant alleges Counsel failed to advise him that the plea court could run his sentences consecutively and "guaranteed" his sentence would be run concurrently.

This Court finds this allegation is wholly without merit. This Court finds credible Counsel's testimony that he informed the Applicant of the following: the elements of the charged offenses; the penalty ranges of the offenses; the potential sentences associated with his charges; and the potential that the plea court would find he violated his probation.

Further, the Applicant's prior record consisted of a 2000 Unlawful Carrying of a Weapon conviction; a 2000 Public Disorderly Conduct conviction; a 2002 Entry onto Another's Land After Notice conviction; 2003 Driving Under Suspension and Accessory After the Fact to a Class D Felony convictions; a 2004 Failure to Stop for a Blue Light conviction; a 2006 PWID Marijuana; and a 2010 Unlawful Carrying of a Weapon conviction (Tr. 28:24–29:6; 30:20–31:6). On June 9, 2006, the Applicant received a Youthful Offender Act probation revocation, which was completed in 2008. Thereafter, the Applicant committed the offenses that were the subject of his probationary case. The Applicant received a ten (10) year sentence suspended to five (5) years probation, five (5) of which were revoked during his plea sentencing.

Considering the Applicant's extensive criminal history, this Court finds his claim that he did not understand the judge's discretion in running sentences consecutively or concurrently is without merit. Further, considering the Applicant was on probation while he committed and pled guilty to the instant offenses, this Court finds it unreasonable that the Applicant would have thought that the plea court would not revoke his probation in full. Moreover, just because the Applicant's sentence was harsh and his plea ended in a bad result is not proof that Counsel's assistance was ineffective; the Applicant's contact with law enforcement, commission of the

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charged offenses, and guilty plea to the charged offenses consisted of willful violations of the Applicant's probation and had nothing to do with Counsel's assistance. The Applicant's guilty plea in and of itself was the willful violation of his probation and Counsel, the probation agent, and the plea court were not required to review any additional grounds or present any further proof at the Applicant's violation hearing. Therefore, this Court finds the uncorroborated assertion that Counsel "guaranteed" his sentences would run concurrently is without merit. This Court finds Counsel was not deficient in this regard and his performance did not affect the outcome of the Applicant's proceeding. Cf. Legare v. State, 333 S.C. 275, 282, 509 S.E.2d 472, 476 (1998) (where sentencing court had discretion in running terms concurrently or consecutively, counsel not ineffective for failing to request concurrent sentence). See generally Randall v. State, 356 S.C. 639, 641–42, 591 S.E.2d 608, 609–610 (2004) (citing Jackson v. State, 349 S.C. 62, 562 S.E.2d 475 (2002)) (failure to advise of collateral consequences of parole eligibility before the applicant proceeds to trial not ineffective assistance of counsel); Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000), *overruled on other grounds*, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (counsel is not ineffective for failing to advise a defendant regarding parole eligibility in connection with his guilty plea because it is a collateral consequence of sentencing); Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997) (unless counsel gives erroneous advice, parole information is not a ground for collateral attack of a guilty plea); Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991) (guilty plea is not rendered involuntary if the defendant is not informed of the collateral consequences of his sentence).

"A defendant must be advised of a mandatory punishment for the offense to which he is pleading." State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980). Despite counsel's alleged failure to advise his or her client regarding the mandatory minimum sentences, the trial judge cures any

misconception by properly advising the defendant of the penalty ranges at the plea hearing. Knox, 340 S.C. at 86, 530 S.E.2d at 889 (citing Moorehead v. State, 329, S.C. 329, 496 S.E.2d 415 (1998)). Cf. Smith v. State, 329 S.C. 280, 284–85, 494 S.E.2d 626, 628–29 (1997) (enumerating collateral consequences of burglary conviction and holding that guilty plea not rendered invalid for counsel's failure to advise of each consequence associated with violent crimes). This Court finds that any alleged deficiencies in the Applicant's personal understanding of the ramifications of his plea were cured during the plea court's colloquy.

The Applicant agreed to proceed with his probation violation hearing after the conclusion of and concurrent to his guilty plea; that he knew his plea to violating a state law constituted a willful violation of his probation; and that he was offering his guilty pleas with the knowledge of his probation violation (Tr. 18:23–25:23–26:21). The Applicant agreed with the facts of his underlying probationary case; agreed that he was still on probation at the time he committed the instant offenses; and agreed that his plea would be a violation of his probation (Tr. 26:8–21). Further, the plea court advised the Applicant twice that it retained the ability to sentence the Applicant to the maximum penalty provided by law (Tr. 15:20–16:15; 16:16–17:13; 17:20–24).

Counsel likewise affirmed to the plea court that he discussed the plea and probation matter with the Applicant; that the Applicant understood that his plea was a violation of his probation; that he was satisfied the Applicant understood their discussions; that the Applicant was able to assist in his defense; and that he agreed with the Applicant's decision to plead guilty (Tr. 19:19–20:24). Further, Counsel affirmed that he and the Applicant agreed to dispose of the Applicant's probationary case concurrently with his plea hearing (Tr. 27:1–4). Counsel also told the court that the Applicant agreed that he had willfully violated the terms of his probation (Tr. 20:4–7).

 13/30/22

Thus, this Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective in this regard.

Improperly "Promised" Sentence

The Applicant alleges that Counsel was ineffective for improperly promising him a sentence he would receive in return for his guilty plea and therefore his guilty plea was rendered involuntary. This Court finds that Counsel's testimony was most credible that he discussed the nature of the offenses, potential sentences, and the fact that the guilty plea would be considered a willful violation of his probation.

This Court finds most compelling the transcript of the Applicant's plea colloquy. The Applicant told the plea court that he understood the potential penalty associated with PWID Marijuana; the drug enhancement scheme; that the State was making no recommendations concerning sentencing; and that the court could impose the maximum penalty (Tr. 15:20–16:15; 17:20–24). The Applicant then told the plea court that he understood the potential penalty associated with PWID Marijuana Proximity; that the offenses were classified as serious; that, under the "three strikes" law, the Applicant could be sentenced to LWOP if he was convicted of other crimes classified as violent, serious, or most serious; that the State was not making a recommendation as to sentencing; and that the Applicant could be imprisoned for the maximum allowable term (Tr. 16:16–17:13; 17:20–24). The Applicant agreed that no one had made any promises, guarantees, or assurances to him about his plea, including pardon, parole, probation, early release, and length of sentence (Tr. 10:10–17; 24:23–25:12).

Therefore, this Court finds the Applicant's plea was not rendered involuntary based on his allegations that he was guaranteed or promised a certain sentence. See Wolfe v. State, 326 S.C. 158, 164–66, 485 S.E.2d 367, 370–71 (1997) (in finding that plea was not rendered

involuntary by the applicant's erroneous assumption that he was promised a deal, the court opined, "[w]ishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made"); see, e.g., Rayford v. State, 314 S.C. 46, 48–49, 443 S.E.2d 805, 806–807 (1994) (transcript of plea hearing refuted applicant's claim that he did not understand the terms of his plea arrangement where plea court cured any possible misapprehensions); Richardson v. State, 310 S.C. 360, 362–63, 426 S.E.2d 795, 797 (1993) (having heard incorrect information regarding plea arrangement, fatal misimpressions were corrected by accurate information from the plea court).

Failure to File Motion for Reconsideration and Appeal

The Applicant asserts that Counsel was ineffective for failing to file a motion to reconsider the Applicant's sentence and failing to perfect an appeal.

"The authority to change a sentence rests exclusively with the sentencing judge and is within his or her discretion." State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) (citing State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981)). "A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." Hicks, 377 S.C. at 325, 659 S.E.2d at 500.

"[A]bsent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995). The South Carolina Appellate Court Rules provide the procedure for appealing a guilty plea and sentence from the Circuit Court:

> If the appeal is from a guilty plea, an Alford plea or a plea of nolo contendere, a written explanation showing that there is an issue which can be reviewed on appeal. This explanation should identify the issue(s) to be raised on appeal and the factual basis for the issue(s) including how the issue(s) was raised below and the ruling of the lower court on that issue(s). If an issue was not raised to and ruled on by the lower court, the explanation shall include argument and citation to legal authority showing how this issue can be reviewed on appeal. If the appellant fails to make a sufficient showing, the notice of appeal may be dismissed

SCACR 203(d)(1)(B)(iv). See Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995); State v. Thrift, 378 S.C. 70, 661 S.E.2d 373 (2008).

Additionally, this Court finds that based on Counsel's credible testimony and a review of the transcript, there is no evidence or indication that the Applicant's timely Motion for Reconsideration would have been successful (Tr. 28:24–29:6; 30:20–31:6). Further, based on the sentencing discretion of the plea court, this Court finds that no evidence indicates that the Applicant would have prevailed on appeal. Rather, it appears that had the Applicant filed an appeal, it likely would have been dismissed pursuant to an Anders brief. Anders v. California, 386 U.S. 738, 741–42, 87 S. Ct. 1396, 1398–99 (1967). Accordingly, this Court finds that Counsel was not deficient in this regard.

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 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

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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).

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. First, the plea court swore the Applicant and explained the plea proceedings, generally (Tr. 5:23–6:19; 7:19–9:4). The Applicant affirmed that he did not suffer from any mental, physical, or nervous condition,

drug problem, or any other condition that would affect his ability to reason, to make good decisions, or to enter his plea (Tr. 9:5–10); that he had not taken or used any drugs or other substances that would affect his ability to reason (Tr. 9:11–15); that no one had threatened, coerced, pressured, or intimidated him to offer his plea (Tr. 9:16–20; 24:23–25:12); that his plea was free and voluntary (Tr. 9:21–10:5; 24:23–25:12); that he had enough time to consider his case and prepare a defense (Tr. 10:6–9); and that no one had made any promises, guarantees, or assurances to him about his plea, including pardon, parole, probation, early release, and length of sentence (Tr. 10:10–17; 24:23–25:12). The plea court advised the Applicant of his constitutional rights, which the Applicant thereafter waived (Tr. 10:18–12:25). The plea court advised the Applicant that he was consistently under oath to tell the truth; that he had the right to appeal his plea and sentence within ten (10) days of his plea; and that the court was not required to sentence the Applicant in accordance with the State's recommendation and had the authority to impose the maximum sentence allowed by the law, if necessary (Tr. 13:1–15; 24:21–22). Thereafter, the court qualified the Applicant's plea (Tr. 13:16–18) and accepted his plea as freely and voluntarily given (Tr. 25:16–20).

The Applicant told the plea court that he understood the potential penalty associated with PWID Marijuana; the drug enhancement scheme; that the State was making no recommendations concerning sentencing; and that the court could impose the maximum penalty (Tr. 15:20–16:15; 17:20–24). The Applicant then told the plea court that he understood the potential penalty associated with PWID Marijuana Proximity; that the offenses were classified as serious; that, under the "three strikes" law, the Applicant could be sentenced to LWOP if he was convicted of other crimes classified as violent, serious, or most serious; that the State was not making a recommendation as to sentencing; and that the Applicant could be imprisoned for the maximum

allowable term (Tr. 16:16–17:13; 17:20–24). The Applicant also affirmed that he had ample opportunity to discuss his case with Counsel and was satisfied with his attorney's services (Tr. 17:25–18:11). The Applicant affirmed that the alleged facts were correct and that he was pleading guilty to all charges (Tr. 19:12–18; 24:13–20).

The Applicant agreed to proceed with his probation violation hearing during his guilty plea; that he knew his plea constituted a violation of his probation; and that he was offering his guilty pleas with the knowledge of his probation violation (Tr. 18:23–25:23–26:21). The Applicant agreed with the facts of his underlying probationary case; agreed that he was still on probation at the time he committed the instant offenses; and agreed that his plea would be a violation of his probation (Tr. 26:8–21).

Counsel likewise affirmed to the plea court that he discussed the plea and probation matter with the Applicant; that the Applicant understood that his plea was a violation of his probation; that he was satisfied the Applicant understood their discussions; that the Applicant was able to assist in his defense; and that he agreed with the Applicant's decision to plead guilty (Tr. 19:19–20:24). Further, Counsel affirmed that he and the Applicant agreed to dispose of the Applicant's probationary case concurrently with his plea hearing (Tr. 27:1–4). Counsel also told the court that the Applicant agreed that he had willfully violated the terms of his probation (Tr. 20:4–7).

The Applicant failed to present any testimony or evidence to support a claim that he would not have pled, but for the handling of the probation revocation matter. Likewise, the Applicant failed to meet his burden of proving that his plea was involuntary.

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.

CONCLUSION

This Court finds in regards to the allegations of ineffective assistance of counsel and involuntary guilty plea, 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 her representation, and that Counsel's conduct did 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.

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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 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:

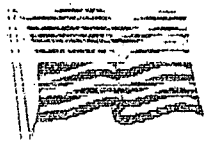
1. That the Application for Post–Conviction Relief must be denied and dismissed with prejudice; and

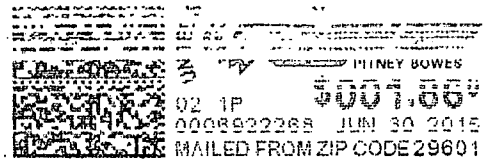
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 31st day of March, 2015.

Deadra L. Jefferson
Presiding Judge
Seventh Judicial Circuit

Charleston, South Carolina
At Chambers





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