

STATE OF SOUTH CAROLINA )

COUNTY OF ORANGEBURG )

IN THE COURT OF COMMON PLEAS

Tony Belton, 340217 )

Plaintiff )

CASE NO. )

2010-CP-38-1758 )

v. )

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

State Of South Carolina )

Defendant. )

Plaintiff's Attorney: Thomas R. Sims, Bar No. Address: Post Office Box 2016 Orangeburg SC 29116 phone: (803) 533-0177 fax: e-mail: other:	Defendant's Attorney: Mary S. Williams, Bar No. Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
<b>SECTION I: Hearing Information</b>	
Nature of Motion: Estimated Time Needed: Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO	
<b>SECTION II: Motion/Order Type</b>	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
<u>Mary S. Williams</u> Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	February 28, 2012 Date submitted
<b>SECTION III: Motion Fee</b>	
<input type="checkbox"/> PAID - AMOUNT: <input checked="" type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
<b>JUDGE'S SECTION</b>	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	_____ JUDGE CODE: _____ Date: _____
<b>CLERK'S VERIFICATION</b>	
Collected by: _____ <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	Date Filed: _____ ATTEST: TRUE COPY <u>Wynne B. Clark</u> CLERK OF COURT ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA )  
COUNTY OF ORANGEBURG )

IN THE COURT OF COMMON PLEAS )  
FOR THE FIRST JUDICIAL CIRCUIT )

2010-CP-38-1758 )

Tony Belton, # 340217, )

Applicant, )

v. )

ORDER OF DISMISSAL )

State of South Carolina, )

Respondent. )

**PROCEDURAL HISTORY**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 17, 2010. The Respondent made its Return on May 3, 2011. An evidentiary hearing into the matter was convened on Tuesday, November 29, 2011, at the Dorchester County Courthouse. The Applicant was present at the hearing and was represented by Thomas Sims, Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was Applicant's plea counsel, Peggy Hinds, Esquire ("counsel"). This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Orangeburg County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. The Applicant was indicted for Assault and Battery with Intent to Kill ("ABWIK") (2008-GS-38-0688) and Burglary - 1<sup>st</sup> Degree (Dwelling) (2008-GS-38-0689). He

ATTEST: TRUE COPY

*Wynne B. Clark*

CLERK OF COURT  
ORANGEBURG COUNTY, SC

was represented by Margaret Peggy Hinds, Esquire. On April 5, 2010, the Applicant plead guilty as indicted before the Honorable James C. Williams, Jr., to ABWIK and the lesser offense of Burglary – 2<sup>nd</sup> Degree (Non-Violent). Applicant was sentenced to nine (9) year on each charge, sentences to be served concurrently. Applicant did not appeal his conviction and sentence.

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

1. Ineffective assistance of counsel.

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

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). 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, 546 S.E.2d 417 (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 (4<sup>th</sup> Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4<sup>th</sup> Cir. 1976).

*Failure to Request a Preliminary Hearing*

Applicant's first allegation of counsel's ineffective assistance is counsel failed to request Applicant be given a preliminary hearing despite Applicant's requests for such. Applicant testified that after being arrested on February 19, 2008, after which time he was appointed counsel to represent him on the charges. Applicant testified he repeatedly requested counsel file for a preliminary hearing, but that he was never afforded such a hearing prior to his plea entered January of 2010. Counsel testified that she was appointed to represent Applicant in March, 2008, and first met with Applicant at the jail in May. She went on to articulate that, as in this case, the first thing she does upon receiving her appointment is request a preliminary hearing and file a motion for discovery.

Based on a review of the record, I find Applicant's allegation to be without merit in this regard. Every criminal defendant is entitled to notice of his right to a preliminary hearing "to determine whether sufficient evidence exists to warrant [his] detention and trial." Rule 2(a), SCRCrimP. If a defendant makes a timely request for a hearing, one should be held within ten days. Rule 2(a)-(b), SCRCrimP. However, the hearing "shall not be held ... if the defendant is indicted by a grand jury ... before the preliminary hearing is held." Rule 2(b), SCRCrimP; see also State v. Hawkins, 310 S.C. 50, 54-55, 425 S.E.2d 50, 53 (Ct.App.1992) (holding trial court did not err in refusing to quash defendant's indictments because he did not receive a requested preliminary hearing because he was indicted before a preliminary hearing was held). Furthermore, a defendant has no constitutional right to a preliminary hearing. State v. Keenan,

278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982). Thus, although the Applicant may have timely requested a preliminary hearing from counsel, his right to have the hearing ended with the grand jury's indictment. The Orangeburg County Grand Jury returned true bill indictments to both charges on May 7, 2008, thereby foreclosing Applicant's request for a preliminary hearing. Therefore, counsel was not deficient in her performance in this regard.

*Failure to Develop/Present Alibi Defense*

Applicant's second allegation of ineffectiveness stems from counsel's alleged failure to investigate, develop and present an alibi defense on Applicant's behalf. Applicant testified he had an alibi defense to the charges as he was being treated in Columbia for a gunshot wound he had sustained as a result of a drive-by shooting off of Garner's Ferry Road. Applicant contends counsel was ineffective in failing to investigate and develop this potential defense on his behalf. Counsel testified conversely that she was aware of the shooting incident and Applicant's subsequent treatment, and that she had investigated the matter in depth in an attempt to develop an alibi defense. Counsel stated that based on her investigation, she ultimately concluded the records from the shooting did not provide a sufficient alibi defense to present at trial. Specifically, the hospital records<sup>1</sup> show Applicant was treated for a gunshot wound to the right thigh in Columbia on January 3, 2008 at roughly 11:40 am. The records reflect Applicant was released roughly one hour later. According to police report and victim affidavit incorporated as part this record, the robbery from which these charges arise took place at roughly 10:05 a.m., and officers were dispatched to the scene at 10:22 a.m.

I find Applicant has failed to carry his burden in proving counsel's ineffectiveness based on this alibi defense. First, he has failed to prove counsel's performance was deficient as counsel

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<sup>1</sup> These documents, along with the incident report, victim affidavit and correspondence between Applicant and counsel, were all introduced as exhibits and are incorporated into the record before this Court.

credibly testified that she did properly investigate Applicant's claim of an alibi. Further, Applicant has failed to prove resulting prejudice as he has failed to present a sufficient alibi existed. "[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (S.C. 1980). Based on the records produced at the hearing, there was roughly a one hour and fifteen minute time frame in which Applicant could have fled the scene to Orangeburg, where he was later involved in a shooting. Therefore, Applicant has failed to establish a sufficient alibi defense to prove prejudice as well.

*Failure to Request/Have Applicant Appear for Bond Hearing*

Applicant contends counsel was ineffective in failing to request a bond hearing on Applicant's behalf, thereby forcing him to remain in jail roughly twenty-two (22) months before appearing for his plea. Applicant testified he requested counsel file for bond which she never did. Counsel again credibly testified that she did request and appear at a bond hearing before the Honorable Edgar W. Dickson, at which time Applicant's request for bond was denied. This testimony is supported by the documentation incorporated into this record, showing Applicant's request for bond was denied by Judge Dickson by order dated and filed with the clerk February 9, 2010. Therefore, I find this allegation to be without merit.

*Failure to Challenge/Suppress Photo Lineup Identifications*

Applicant's final complaint is counsel failed to challenge or otherwise suppress the victim and co-defendant photo lineup identifications of Applicant. Applicant stated counsel should have convened a suppression hearing pursuant to Neil v. Biggers to challenge the reliability and accuracy of the photo identifications of Applicant.

Counsel testified that she reviewed the discovery materials in depth with Applicant, including the photo lineups, as part of her preparation of the case for trial. She went on to say she personally met with the victim and was aware of the damaging testimony he would present at trial, concluding the state would very likely be able to prove Applicant's guilty beyond a reasonable doubt at trial. Counsel said the photo lineups were given to both the victim and the admitted co-defendant, both of whom picked out Applicant's photo and identified him as "Tommy Wilson". Counsel also noted Applicant's co-defendant was prepared to testify at trial against Applicant, placing him as the second perpetrator involved. Counsel finished by stating she would have filed a motion to suppress the photo lineups had Applicant decided to proceed to trial.

This Court finds Counsel's testimony to be credible. Counsel advised Applicant of all relevant issues regarding the charges he was facing, including the facts giving rise to the charges, the indictments, the elements of the offenses, potential sentences he was facing, and the consequences of rejecting this plea to proceed to trial. Additionally, counsel relayed all plea offers from the state to Applicant, and gave him all of the information and advice necessary to make an intelligent and voluntary decision on whether to waive his constitutional rights and enter this plea. Applicant made the voluntary, knowing decision to waive his right to challenge the photo lineup identifications in order to take advantage of an advantageous plea offer. Counsel had vigorously investigated Applicant's case, including the identifications, and readily stated she would have made a motion to suppress the identifications had the case gone to trial. Therefore, her performance was not unreasonable. Further, Applicant has failed to establish any grounds upon which the lineup would have been suppressed had the motion been made, and has failed to consider the cumulative nature of the photo lineups as there would have been subsequent in-court

identifications made at trial by both the victim and co-defendant according to counsel's credible testimony. Accordingly, Applicant has failed to prove resulting prejudice.

Based on the facts above, I find that Applicant did not prove by a preponderance of the evidence that counsel was deficient in her representation. Further, I find that Applicant's guilty plea was entered knowingly and voluntarily after being fully and adequately advised by competent counsel acting within the range of competence demanded of attorneys in criminal cases. Finally, Applicant failed to prove prejudice based on the alleged deficiencies. Therefore, Applicant has failed to carry his burden in this regard.

### CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

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

This Court advises 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 (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. Your 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 2 day of April, 2012.



Diane S. Goodstein  
Presiding Judge  
First Judicial Circuit

Charleston, South Carolina.

