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Aimee J. Zmroczek, Attorney
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October 8, 2015

RECEIVED

OCT 13 2015

The Supreme Court of South Carolina
ATTN: Daniel Shearouse, Clerk of Court
PO Box 11330
Columbia, SC 29211

S.C. SUPREME COURT

RE : David Onley v. State of SC
2013-CP-32-2147

Dear Mr. Shearouse:

Enclosed please find a Notice of Appeal along with a Certificate of Service and a copy of the Orders being appealed. Also enclosed is a copy which I request you stamp as "filed" and return to me in the enclosed stamped envelope.

Thank you for your assistance in this matter.

Yours very truly,



Christina Metze
Paralegal

cc: J. Clayton Mitchell
Beth Carrigg, Lexington County Clerk of Court
David Onley

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Case No.: 2013-CP-32-2147

State of South Carolina,

Respondent,

v.

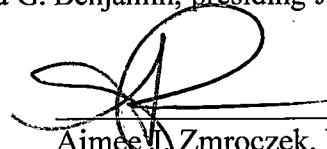
David Onley,

Appellant.

NOTICE OF APPEAL

David Onley, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed June 25, 2015, and received by counsel on July 7, 2015, and the Order Denying Rule 59(E) Motion filed September 14, 2015, and received by counsel on September 29, 2015, issued by the Honorable DeAndrea G. Benjamin, presiding Judge.

October 8, 2015



Aimee J. Zmroczek, Esq.
P.O. Box 11961
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ajzlawfirm@gmail.com
Attorney for Appellant

Other Counsel of Record:
J. Clayton Mitchell
PO Box 11549
Columbia, SC 29211
Counsel for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge--

Case No.: 2013-CP-32-2147

State of South Carolina,

Respondent,

v.

David Onley,

Appellant.

RECEIVED

OCT 13 2015

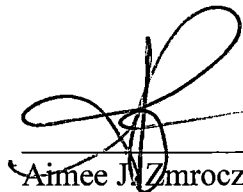
S.C. SUPREME COURT

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on J. Clayton Mitchell by depositing a copy of it in the United States Mail, postage prepaid, on October 8, 2015, addressed to his office at:

SC Attorney General's Office
PO Box 11549
Columbia, SC 29211

October 8, 2015



Aimee J. Zmroczek, Esq.
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Columbia, South Carolina 29211
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Fax: 803-403-8005
ajzlawfirm@gmail.com
Attorney for Appellant

ORIGINAL
KPK

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

David C. Onley, #277671

2015 SEP 14 P 1:36

2013-CP-32-2147

Applicant,

BETH A. BARRIG
CLERK OF COURT
LEXINGTON SC

v.

ORDER RECEIVED

State of South Carolina,

OCT 13 2015

Respondent.

S.C. SUPREME COURT

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed June 21, 2013. Respondent made its Return on December 27, 2013, requesting an evidentiary hearing be convened. Aimee J. Zmroczek, Esquire, was appointed by the Lexington County Clerk of Court. An evidentiary hearing was held on October 14, 2014, at the Lexington County Courthouse. Applicant was present and represented by Counsel Zmroczek. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent. After the hearing, the Court took this matter under advisement. The parties, over the State's objections, supplemented the record with the original incident and MAIT reports relating to the underlying case during a subsequent hearing held on March 19, 2015, at the Richland County Courthouse. Applicant and Counsel Zmroczek were both present. By written Order signed June 11, 2015, and filed June 25, 2015, this Court denied and dismissed Applicant's post-conviction relief action with prejudice. On July 10, 2015, Applicant filed a "Motion to Reconsider." Respondent made its return to the motion, requesting that it be denied.

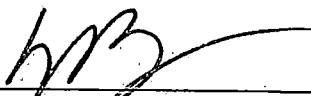
Based upon careful reconsideration of the evidence in this case, including Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend its judgment. This Court further finds oral argument would not aid in the reconsideration of the original



judgment. The Order of Dismissal issued by this Court contains the required findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2014) and Rule 52(a) of the South Carolina Rules of Civil Procedure.

IT IS THEREFORE ORDERED that Applicant's motion be denied and dismissed.

AND IT IS SO ORDERED this 9 day of September, 2015.


DEANDREA G. BENJAMIN
Presiding Judge

Columbia, South Carolina

2015 SEP 14 PM 1:36
BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

FILED

This judgment was entered on _____, and a copy mailed first class or placed in the appropriate attorney's box on _____, to attorneys of record or to parties (when appearing pro se) as follows:

Aimee Jendrzewski Zmroczek
A.J.Z. Law Firm, LLC PO Box 11961 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

Patrick Schmeckpeper
PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/mh

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ORIGINAL

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

David C. Onley, #277671

2015 JUN 25 A 11: 28

2013-CP-32-2147

Applicant
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed June 21, 2013. Respondent made its Return on December 27, 2013, requesting an evidentiary hearing be convened. Aimee J. Zmroczek, Esquire, was appointed by the Lexington County Clerk of Court. An evidentiary hearing was held on October 14, 2014, at the Lexington County Courthouse. Applicant was present and represented by Counsel Zmroczek. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent. After the hearing, the Court took this matter under advisement. The parties, over the State's objections, supplemented the record with the original incident and MAIT reports relating to the underlying case during a subsequent hearing held on March 19, 2015, at the Richland County Courthouse. Applicant and Counsel Zmroczek were both present. The parties waived venue to allow the hearing to proceed in Richland County.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's plea counsel Matthew C. Buchanan, Esquire. The Court had before it the Lexington County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, and the guilty plea transcript.

NB

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. On June 6, 2013, Applicant waived presentment to the grand jury and pleaded guilty without negotiations or recommendations to felony DUI, resulting in death (2012-GS-32-3276). The Honorable Roger M. Young sentenced Applicant to twenty-five (25) years imprisonment. A Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals dismissed the appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR. State v. David Onley, Appellate Case No. 2012-213656 (S.C. Ct. App. filed April 18, 2013). The Remittitur was issued on May 15, 2013.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel in failing to investigate whether Applicant was the driver of the automobile; and
2. Prosecutorial misconduct/Brady violation.

II. SUMMARY AND EVIDENCE PRESENTED AT THE PCR HEARING

Applicant's Testimony

Applicant testified he did not have any recollection of the night the incident happened and was flown to a hospital for treatment due to his injuries. He testified he also did not remember pleading guilty. Applicant testified Counsel did not meet with him or explain his rights to him. He alleged there were discrepancies as to who was driving the vehicle involved in the accident. He testified he was told to be remorseful at the plea hearing. Applicant acknowledged that the car involved was his, that it did not have insurance, and that he had multiple DUI convictions.



Counsel Matthew C. Buchanan's Testimony

Counsel testified he has been practicing law for about ten (10) years. He testified he is currently General Counsel at the South Carolina Department of Probation, Parole, and Pardons and was formerly a public defender with the Lexington County Public Defenders Office. Counsel testified he met with Applicant numerous times. Counsel testified he handled a wide array of cases including DUI. Counsel testified he received discovery in this case with Applicant which included the MAIT report and 911 call. Counsel believed all relevant materials were included in the solicitor's disclosures. Counsel testified the incident was tragic and that Applicant did not have a strong recollection of the events leading up to the incident. Counsel testified Applicant did not remember why he and the victim were traveling that direction on the road. Counsel testified he did not question whether Applicant was driving because the evidence pointed to that conclusion. It was Applicant's truck and he did not have any prior relationship with the victim. Counsel testified Applicant had a substantial prior record including numerous convictions for DUI and driving under suspension (DUS). Counsel testified that Applicant was remorseful and really broken up about the incident at the plea hearing. Counsel testified he believed Applicant's chances at trial were not good and that he would likely be convicted. He noted that there were bottles of liquor found in the car at the scene.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application 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, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order 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. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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. With respect to guilty plea counsel, the Applicant must show 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, 59 (1985).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the



attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Ineffective Assistance of Counsel

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). To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969).

Failure to Investigate

This Court finds Applicant failed to meet his burden to prove that counsel's performance was either deficient or ineffective for failing to investigate whether Applicant was the driver of



the vehicle involved in the accident. "Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted). Regardless, the allegation rests entirely on speculation. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."). This Court finds that there was never a question as to whether Applicant was the driver of the vehicle, and therefore, Counsel's representation was not deficient. The Court finds that the documents produced in discovery, such as the MAIT and the incident reports indicate that Applicant was the driver of the vehicle. Secondly, the Court finds Applicant was not prejudiced by any error by Counsel. Thus, this allegation is readily denied and dismissed as Applicant has failed to meet his burden in proving deficiency and resulting prejudice.

Prosecutorial Misconduct/Brady Violation

This Court finds Applicant's allegation that the solicitor failed to turn over any required evidence is without merit. An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268.

This Court finds Applicant failed to prove that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose exculpatory material that would indicate that Applicant was not the driver. In fact, Applicant failed to produce *any* evidence tending to show that Applicant was not the driver of the vehicle. Therefore, this allegation is denied and dismissed with prejudice.

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.

V. 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. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). 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 PCR counsel's 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), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf.

Applicant is 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 will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 11 day of June, 2015.



DEANDREA G. BENJAMIN
Presiding Judge

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-32-2147

DAVID C. ONLEY, #277671

FILED

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

vs.

Plaintiff

JUN 25 A 11:28

STATE OF SOUTH CAROLINA

DETHA CARRIGG
CLERK OF COURT
LEXINGTON SC
Defendant

Plaintiff's Attorney: Aimee Zmroczek, Bar No. 77193 Address: PO Box 11961 Columbia SC 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: J. Clayton Mitchell, Bar No. 101443 Address: PO Box 11549 Columbia SC 29211 Phone: _____ Fax _____ 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)	
SECTION I: Hearing Information	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES/ <input type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
_____ Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	June 5, 2015 Date submitted
SECTION III: Motion Fee	
<input type="checkbox"/> PAID - AMOUNT: \$ _____ <input type="checkbox"/> EXEMPT: (check reason) <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <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 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, SCRPC) <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: _____	
JUDGE'S SECTION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____	

CASE NO. 2013CP3202147

David C Onley

State of SC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
---------------	--

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
 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;
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

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 Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

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
For Clerk of Court Office Use Only		

This judgment was entered on July 6, 2015 and a copy mailed, emailed or placed in the appropriate attorney's box on this July 6, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Aimee Zmroczek

Clay Mitchell

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Beeth Carrigg /mh



COLUMBIA SC 299

THU 08 OCT 2015 PM



A. J. Z. Law Firm, LLC
P.O. Box 11961
Columbia, SC 29211

The Supreme Court of South Carolina
ATTN: Daniel Shearouse, Clerk of Court
PO Box 11330
Columbia, SC 29211