

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

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

Toryast Jermain Johnson, #256772,)

Case No. 2012-CP-02-1423)

Applicant,)

v.)

ORDER OF DISMISSAL)

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of an application for post-conviction relief filed June 11, 2012. Respondent made its Return on September 11, 2012. An evidentiary hearing into the matter was convened on July 10, 2013, at the Aiken County Courthouse. Applicant was present at the hearing and was represented Marsha M. Banks, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

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 Aiken County Clerk of Court. Applicant was true bill indicted at the February 2010 term of the Aiken County Grand Jury for Armed Robbery (2010-GS-02-0296). Applicant was represented by Ola Johnson, Esquire. On August 31, 2011, the Applicant pled guilty as indicted. The Honorable Doyet A. Early, III, sentenced Applicant to confinement for a period of thirty years. Applicant did not appeal his conviction or sentence.

In his original application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following allegations:

8.23.13
~~_____~~
D. J. [Signature]
D.C.P. & S.
Dorann [Signature] 12/10
Deputy Clerk

1. Ineffective Assistance of Counsel.
 - a. "Counsel fail[ing] to object to improperly returned indictments."
2. "Belated Appeals"
 - a. "Failure to inform of the right to appeal."
3. Involuntary guilty plea
 - a. "Plea was given under duress."

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from plea counsel, Ola Johnson, Esquire (Counsel). This Court also had before it a copy of Applicant's plea transcript, the records of the Aiken County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant called Counsel to testify. Counsel testified he was appointed to this case through a contract with the Public Defender's office. Counsel testified that another Public Defender had previously been appointed to the case. Counsel testified according to notes in his file the previous Public Defender had received and reviewed discovery with Applicant. Counsel testified he took over the case in March or April 2010. Counsel testified he meet with Applicant five or six times at the Alvin Glenn detention center in Richland County because Applicant had a pending Murder charge in Richland County. Counsel testified he had a substantial portion of the discovery material with him at his initial meeting. Counsel testified the discovery material included seven various CD's, which Counsel viewed on his laptop with Applicant. Counsel testified he did not initially have a copy of Applicant's first interview with Detective Glover, but did eventually receive a copy and reviewed it with Applicant in detail. Counsel testified that during this interview Applicant admitted to participating in the crime, but denied holding the gun to the Victim's head. Counsel testified he

explained to Applicant the hand of one is the hand of all and that he would be treated the same as his Co-Defendant.

In addition to the confession, Counsel testified Applicant was identified in a photo line-up; several eye witnesses from the Carjacking had previously identified Applicant, his Co-Defendant was his relative. Counsel testified the evidence against Applicant was "overwhelming." Counsel testified Applicant explained he was at a gas station during the time of the robbery; however Applicant could not recall the exact gas station. Counsel testified he attempted to get surveillance videos from several of the gas stations in the surrounding area. When Counsel told Applicant he could not find any such video, Counsel testified Applicant changed his story and admitted he committed the crime. Counsel testified Applicant was facing Armed Robbery, eighteen counts of Kidnapping, Car-jacking, and Possession of a Weapon During a Violent Crime. Counsel testified that the Solicitor could *nolle pross* and re-present indictments at any time. Counsel testified the Solicitor offered a plea deal requiring Applicant to plead to Armed Robbery and the remaining charges would be *nol-prossed*. Counsel testified that the Solicitor indicated in an email that he intended to seek life without parole and "strike [Applicant] out" if he did not accept the plea offer. Counsel testified he recommended that Applicant accept the plea deal because he was facing life without parole. Counsel further testified that he discussed the appellate process with Applicant prior to and after his guilty plea. Counsel testified Applicant never requested an appeal because if Applicant were to be successful he could again face the possibility of life without parole. Counsel testified in his opinion there were no meritorious issues for an appeal.

Following Counsel's testimony, Applicant was called to testify. Applicant testified he met with Counsel three times. Applicant testified that on Counsel's first visit they discussed

Applicant's version of the facts. Applicant testified he told Counsel he was at a gas station during the time of the robbery. Applicant testified he received discovery from Counsel via mail. Applicant testified that the discovery included multiple CD's and the Co-Defendant's statement. Applicant testified that he wrote multiple letters to Counsel requesting him to review discovery, however Counsel failed to review all the evidence in the case. Applicant testified Counsel advised him that he should not proceed to trial based on the evidence in the case. Applicant testified Counsel advised him of the sentencing range and the possibility that he was facing life without parole. Further, Applicant testified he fully understood the plea deal prior to accepting it. Applicant testified that he received a copy of all dismissed indictments from the Aiken County Clerk of Court after he pled guilty. Applicant testified the indictments were dismissed approximately one year prior to his plea. Applicant testified he was not aware that the Carjacking charge and two of the eighteen Kidnapping charges were never indicted. Applicant testified Counsel never reviewed all evidence and if he had, then Applicant would have been able to make a more informed decision on whether to accept the plea deal. Applicant testified that he knew he had appeal rights and he never asked Counsel to file an appeal.

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. Specifically, this Court finds that Counsel's testimony is very credible while Applicant's testimony is not as credible. 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).

Ineffective Assistance of Counsel

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). 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). After careful review based on the standard discussed above, the Applicant has failed to carry his burden in this action.

Counsel was ineffective for failing to object to the improperly returned indictments

This Court finds that Counsel was not ineffective for failing to challenge the Applicant's indictment. Indictments are sufficient when they allege time and place, as required by law, and charge the crime substantially in the language of the statute or the common law which prohibits the crime or so plainly that the offense charged may be easily understood and, if the offense is statutory, that the offense is contrary to the statute involved. S.C. Code Ann. § 17-19-20 (2003). All indictments must be viewed with a "practical eye" to determine whether they fulfill their function to notify the accused of the charge he must answer, notify the court of what judgment and sentence to pronounce, and present a bar to subsequent prosecution. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

This Court finds that Applicant's indictment was sufficient to give Applicant notice of the charge he must answer and to notify the court of what judgment and sentence to pronounce. This Court finds that Counsel provided credible testimony that he did not object to the time frame for the crime listed on the indictment because in his experience the time frame listed was not objectionable. This Court finds that the time frame listed on Applicant's indictment was not objectionable and was sufficient to allege time and place of the crime. Applicant has failed to carry his burden of proving that trial counsel was deficient for failing to object to his indictment.

Counsel was ineffective for failing file a direct appeal.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "There is a strong presumption that counsel rendered adequate

assistance and exercised reasonable professional judgment in making all significant decisions in the case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007), *cert. denied*, 552 U.S. 944, 128 S.Ct. 370, 169 L.Ed.2d 247 (2007).

In a post-conviction relief proceeding, Applicant bears the burden of establishing that he or she is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). “In the context of a guilty plea, the court must determine whether 1) counsel’s advice was within the range of competence demanded of attorneys in criminal cases—i.e. was counsel’s performance deficient, and 2) if there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty.” Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing Hill v. Lockhart, 474 U.S. 52, 56-58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)).

“[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). “Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights.” Id. Absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). “One extraordinary circumstance which would require counsel to advise a defendant of the right to appeal from a guilty plea would arise when the defendant inquires about an appeal.” Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995).

After careful review based on the standard discussed above, Applicant has failed to carry his burden on this issue. Specifically, this Court finds Counsel's testimony credible that Applicant never requested a Notice of Appeal be filed and Counsel had no reason to believe that Applicant wished to file an appeal, as Applicant's sentence was in line with the plea offer Applicant accepted. Additionally, Counsel testified that he did not believe Applicant had any meritorious ground on which an appeal could be sought. This Court finds that Counsel's performance was reasonable and effective. Therefore, this Court finds that this issue must be denied and dismissed.

Involuntary guilty plea

Applicant's third allegation is that his guilty plea was entered involuntarily. To find a guilty plea voluntary and knowingly entered into, the record must establish the Applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the post-conviction relief hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

The transcript reflects that the guilty plea was knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, [an Applicant's] right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621 (1977). Statements made during a guilty plea should be considered conclusively, unless an [Applicant] presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.

1975) *overruled on other grounds by* United States v. Whitley, 759 F.2d 327 (4th Cir. 1985). This Court finds that the Applicant presented no reasons to show that he should be allowed to depart from the truth of the statements he made during his guilty plea hearing. During his guilty plea, Applicant freely admitted his guilt to the plea court and admitted that he committed Armed Robbery at the Burger King by taking money from David Tinsley (Victim). Applicant also told the plea court under oath that he understood his plea was without any negotiations or recommendations from the State, but the State would be dismissing and agreeing not to bring any additional charges against Applicant as a result of this incident. Additionally, during the evidentiary hearing, Applicant testified that he admitted to police that he did in fact commit this crime.

An Applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). This Court finds that Counsel is a trial practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on numerous occasions. During conferences with the Applicant, Counsel discussed the pending charges, the elements of the charges and what the State was required to prove, Applicant's constitutional rights, Applicant's version of the facts, and possible defenses or lack thereof. The record reflects that Applicant's plea was entered freely, voluntarily, knowingly, and intelligently. Applicant acknowledged that he was guilty of these offenses. Applicant told the plea court that no one had threatened him or promised him anything to plead guilty. This Court finds that Applicant

understood the terms of his guilty plea. Therefore, this allegation must be 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, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

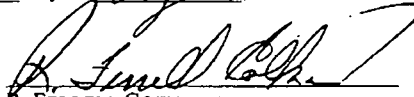
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

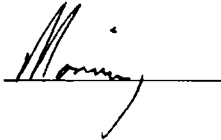
This Court notes that Applicant must file and serve a Notice of Appeal within thirty days from the receipt by Counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for the 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 19 day of Aug, 2013.


R. FERRELL COTHAN
Presiding Judge
Second Judicial Circuit

, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS

Toryast Jermain Johnson, #256772
 Plaintiff

CASE NO.
2012-CP-02-1423

v.)

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

State Of South Carolina
 Defendant.

Plaintiff's Attorney: Marsha M. Banks, Bar No. Address: 319 Park Avenue SE Aiken, SC 29801 phone: fax: e-mail: other:	Defendant's Attorney: Daniel Gourley, Bar No. Address: P.O. Box 11549 Columbia, SC 29211 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 checked="" 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 checked="" type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<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.	
<i>Mary Williams</i> Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	August 14, 2013 Date submitted
SECTION III: Motion Fee	
<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:	
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: _____ <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	Date Filed: 8-23-13 <i>Liz Anderson</i> CC.C.P.&G.S. <i>Orman Salera</i> Deputy Clerk

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF AIKEN
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2012CP0201423

Toryast Jermaine Johnson

South Carolina State of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

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), SCRCP; Rule 41(a), SCRCP (Vol. Nonsuit);
 Rule 43(k), SCRCP (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRCP; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

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

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

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge

Judge Code

8/23/2013

Date

For Clerk of Court Office Use Only

This judgment was entered on 23rd day of August, 2013, and a copy mailed first class or placed in the appropriate attorney's box on 23rd day of August, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Marsha M. Banks 319 Park Avenue SE Aiken, SC 29801

Megan E. Harrigan PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Liz Godard by Shannon Owens

Court Reporter

Liz Godard - 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.
