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"Success is all that matters"

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November 25, 2015

Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

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RE: Vondell Malachi, #351776 v. State of South Carolina
Case No.: 2013-CP-34-145

S.C. Supreme Court

Dear Clerk of Court:

Enclosed please find an original and one copy of a Notice of Appeal, along with the Order we are appealing in the above referenced matter. If you would, please file the Notice of Appeal and return a clocked copy to me in the envelope provided.

Please be advised that I have been court appointed to represent Mr. Malachi in this matter.

Thank you for your assistance in this matter. If you have any questions or concerns, please feel free to contact my office.

With kind regards,



Tristan M. Shaffer
Attorney at Law

TMS/kmg
Enclosures

cc: Jessica E. Kinard, Esquire
Marlboro County Clerk of Court
Appellate Defense
Vondell Malachi

SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM MARLBORO COUNTY
In The Court of Common Pleas

Honorable Thomas A. Russo,
Common Pleas Judge of the Fourth Judicial Circuit

Case No.: 2013-CP-34-145

Vondell Malachi, #351776,

Petitioner,

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v.

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State of South Carolina,

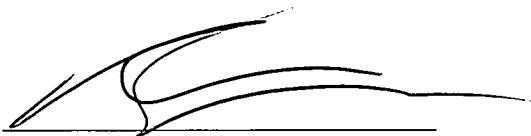
Respondent.

S.C. Supreme Court

NOTICE OF APPEAL

Petitioner appeals the Order of Dismissal of the Honorable Thomas A. Russo dated October 7, 2015, filed October 16, 2015 and received by Petitioner on November 9, 2015.

November 24, 2015


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Attorney for Petitioner

Respondent's Attorney:
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Columbia, SC 29211

SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM MARLBORO COUNTY
In The Court of Common Pleas

Honorable Thomas A. Russo
Common Pleas Judge of the Fourteenth Judicial Circuit

Case No.: 2013-CP-34-145

Vondell Malachi #351776,

Petitioner,

v.

State of South Carolina,

Respondent.


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CERTIFICATE OF SERVICE **S.C. Supreme Court**

I, Kris Gunnell, do hereby certify that I am an employee of Axelrod & Associates, P.A., in Myrtle Beach, South Carolina, and that I have this date served the Petitioner's Notice of Appeal upon the Respondent, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

| | |
|--|---|
| Jessica E. Kinard, Esquire S.C. Office of the Attorney General Post Office Box 11549 Columbia, SC 29211 | Vondell Malachi #351776 Lee Correctional Institution 990 Wisacky Highway Bishopville, SC 29010 |
| Marlboro County Clerk of Court P.O. Drawer 996 Bennettsville, SC 29512-0996 | Appellate Defense 1330 Lady Street Columbia, SC 29201 |



Kris Gunnell
Paralegal to Tristan M. Shaffer

November 25, 2015
MYRTLE BEACH, SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF MARLBORO)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

Vondell Malachi, #351776,)

Case No. 2013-CP-34-145

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)
_____)

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 24, 2013. Respondent made a timely Return on or about May 30, 2014. The Court convened an evidentiary hearing into the matter on July 27, 2015, at the Darlington County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsels, Wade R. Crow, Esquire, and Harry R. Easterling Jr., Esquire, also testified. The Court had before it a copy of the plea transcript, the records of the Darlington County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the pleadings, and the exhibits introduced at the hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marlboro County Clerk of Court. In August 2007, the Marlboro County Grand Jury indicted Applicant for assault and battery with intent to kill (2007-OS-34145).

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MARLBORO COUNTY

807). In July 2011, the Grand Jury indicted Applicant for murder (2011-GS-34-529), failure to stop for a blue light (2011-GS-34-530), and unlawful conduct towards a child (2011-GS-34-531). Wade R. Crow, Esquire, and Harry R. Easterling Jr., Esquire, (collectively, "plea counsel") represented Applicant. On July 30, 2012, Applicant pled guilty to assault and battery with intent to kill, voluntary manslaughter, failure to stop for a blue light, and unlawful conduct towards a child. The Honorable Edward B. Cottingham sentenced Applicant to concurrent terms of ten years for assault and battery with intent to kill, twenty-five years for voluntary manslaughter, two years for failure to stop for a blue light, and two years for unlawful conduct towards a child. Applicant did not appeal his plea or sentence.

II. ALLEGATIONS

In his application, Applicant alleged he is being held in custody unlawfully based on ineffective assistance of counsel. At the evidentiary hearing, Applicant alleged his guilty plea was not knowingly and voluntarily entered because plea counsel misadvised him about possible defenses and because plea counsel misadvised him about the facts of his case.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

A. Involuntary Guilty Plea

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin

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v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Although Applicant asserts his guilty plea was involuntary, he must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)). Accordingly, Applicant may collaterally attack the plea only by showing (1) plea counsel's advice was deficient and (2) there is a reasonable probability that, but for plea counsel's deficient advice, 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) (citing Hill v. Lockhart, 474 U.S. 52 (1985); 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)). Applicant must prove plea counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56 (quoting McMann v. Richardson, 397 U.S. 759 (1970)). However, the Court strongly presumes plea counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

Furthermore, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against Applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "made during a guilty plea should be considered conclusive unless [Applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

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The Court finds Applicant's allegation his plea was induced by the mis-advice of plea counsel to be without merit. Applicant testified he met with plea counsel approximately six times. He recalled reviewing the evidence against him. Applicant testified he explained to plea counsel that he accidentally shot the victim while they were fighting over the weapon. He recalled plea counsel telling him the evidence did not support an accident defense. He did not recall discussing the possibility of seeking an involuntary manslaughter charge at trial, nor did he recall discussing any other possible defenses he could present at trial. Applicant testified plea counsel threatened to stop representing him if he did not accept a plea offer. However, he admitted he did not make any complaints about plea counsel's representation when questioned about it at the plea hearing.

Mr. Crow testified he met with Applicant at least fifty times. He testified he discussed the charges with Applicant. He recalled reviewing the State's evidence with both Applicant and Applicant's mother. Crow testified he sought assistance from Mr. Easterling because there were several text messages between Applicant and the victim that needed to be reviewed. Crow testified Applicant did not inform him there was a struggle over the gun. He also testified the evidence otherwise did not support a theory of accident or self-defense. Regardless, Crow testified he possible defenses with Applicant. He further testified he never threatened to stop representing Applicant if he did not plea. Instead, he testified he explained Applicant's options, and Applicant made the decision to enter a plea. Crow did not recall Applicant ever asking for a trial. Crow also testified Applicant completed a plea affidavit prior to the plea (Resp. Ex. No. 1).

Mr. Easterling testified Crow sought his assistance with Applicant's case because of the technology involved in the text messages. Easterling recalled reviewing discovery with

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Applicant. He recalled discussing with Applicant several scenarios of how the victim may have been shot. He testified each alternative scenario Applicant gave him was not supported by the evidence. Easterling testified Applicant did not indicate he wanted a trial. Easterling also recalled Applicant completing the plea affidavit.

The Court finds the testimony of Mr. Crow and Mr. Easterling credible on this issue, while also finding Applicant's testimony not credible. Plea counsel fully discussed with Applicant the evidence in the case. They reviewed many possible scenarios of how the victim was shot. They also discussed the potential defenses to these charges.¹ Based on these discussions, they advised Applicant of his likelihood of success at trial. The Court finds not credible Applicant's allegation plea counsel threatened to stop representing him if he did not accept the plea offer. Instead, the Court finds credible Crow's testimony that he explained to Applicant the decision to enter a plea was Applicant's only. The Court also finds credible Crow's and Easterling's testimony that Applicant never indicated he wanted a trial on these charges. Plea counsel conducted a proper investigation, adequately conferred with Applicant, and were thoroughly competent in their representation.

Applicant failed to demonstrate plea counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56. Applicant also failed to demonstrate that, but for plea counsel's advice, he would not have entered a guilty plea. Id. at 59; see also Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009) (applicant must show "something that would have affected counsel's advice to [the applicant] to accept the plea

¹ Based on a review of the record, the Court agrees with plea counsel's assessment that the evidence would not have supported theories of accident, self-defense, or involuntary manslaughter. See Arnette v. State, 306 S.C. 556, 557, 413 S.E.2d 803, 804 (1992) (counsel not ineffective for failing to advise of potential defense where no evidence exists to support the defense). The Court further notes plea counsel negotiated a favorable offer to plea to the lesser-included offense of voluntary manslaughter.

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bargain offered or that would have caused [the applicant] to decline to accept it"). Furthermore, the record before the Court shows Applicant entered his plea freely and voluntarily with a full understanding of the evidence against him. See Simpson v. State, 317 S.C. 506, 508, 455 S.E.2d 175, 176 (1995) ("To knowingly and voluntarily enter a plea of guilty, all that is required is that a defendant have a full understanding of the consequences of his plea and of the charges against him." (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991))). Because Applicant entered his plea after being fully advised of possible defenses, his plea waived his right to raise any defenses to his crimes. See Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (knowing and voluntary plea waives non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence (citations omitted)). Applicant admitted at his plea and in his plea affidavit that he was satisfied with the services of plea counsel, and he has presented no credible evidence to justify his recantation of that admission. See Kolle v. State, 386 S.C. 578, 597 n.7, 690 S.E.2d 73, 83 n.7 (2010) (Kittredge, J., dissenting) (an inmate should not be able to collaterally attack a plea where counsel's alleged deficiency was known at the time of the plea and the inmate lied about counsel's performance at the plea). Accordingly, the Court finds Applicant failed to meet his burden to prove his guilty plea was induced by the mis-advice of counsel.

B. 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.

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IV. CONCLUSION

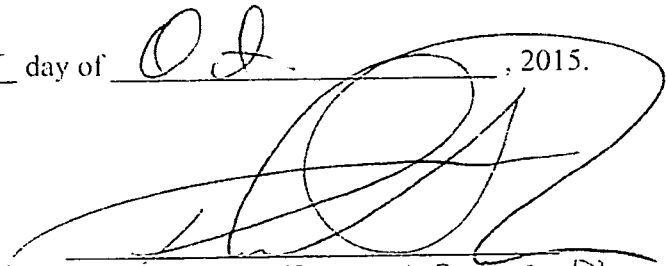
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from 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 must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 7th day of Oct., 2015.



THE HONORABLE THOMAS A. RUSSO
Presiding Judge
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STATE OF SOUTH CAROLINA
COUNTY OF MARLBORO
IN THE COURT OF COMMON PLEAS

VONDELL MALACHI, 351776

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Applicant, NOV 30 2015

v.

S:O: Supreme Court

STATE OF SOUTH CAROLINA,

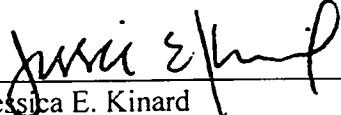
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

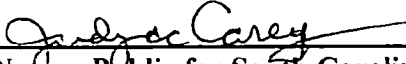
**Tristan M. Shaffer, Esquire
Axelrod & Associates, PA
4701 Oleander Drive
Myrtle Beach SC 29577**

This 6th day of November, 2015.



Jessica E. Kinard
Assistant Attorney General
Attorney for Respondent

SWORN to before me this 6th day of November, 2015.



Notary Public for South Carolina.
My Commission Expires: May 14, 2024

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ASSOCIATES
ATTORNEYS AT LAW

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KMG

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