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January 19, 2016

Honorable Daniel E. Shearhouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Box 11330
Columbia, SC 29211

RECEIVED

JAN 21 2016

S.C. SUPREME COURT

**RE: Shelton D. Brown, # 345782 v. State of South Carolina
2012-CP-38-0468**

Dear Honorable Shearhouse:

Enclosed for filing is a Notice of Appeal and Proof of Service in the above case. Also enclosed is a copy of Order of Dismissal being appealed. Because this is an appeal from a PCR proceeding, it is my understanding that no fee is required.

Because I was appointed on this case, I am provided a copy of the Notice of Appeal and Order of Dismissal to the Office of Appellant Defense so that they can handle to appeal of this matter.

Sincerely,

C. Bradley Hutto

/vmw
enclosure

cc: J. Clayton Mitchell, Office of Attorney General
Office of Appellate Defense
Orangeburg County Clerk of Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JAN 21 2016

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

SHELTON BROWN, #345782 v. State of South Carolina
CASE NO. 2012-CP-38-0468

SHELTON BROWN, Inmate No.345782 Appellant

v.

STATE OF SOUTH CAROLINA..... Respondent.

NOTICE OF APPEAL

Shelton Brown appeals the Order of Dismissal of the Honorable Frank R. Addy, Jr. dated January 8, 2016. Appellant received written notice of entry of this Order of Dismissal on January 14, 2015, a copy of the Order of Dismissal is attached hereto.



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Attorneys for Appellant

Other Counsel of Record:
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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

RECEIVED

JAN 21 2016

Honorable Frank R. Addy, Jr.

S.C. SUPREME COURT

CASE NO. 2012-CP-38-0468

SHELTON BROWN, Inmate No. 345782... Appellant

v.

STATE OF SOUTH CAROLINA... Respondent.

PROOF OF SERVICE OF NOTICE OF APPEAL

I certify that I have served the Notice of Appeal on the Office of the Attorney General by depositing a copy of it in the United States Mail, postage prepaid on January 19 2016, addressed to this attorney of record J. Clayton Mitchell, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211.

January 19, 2016



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Attorneys for Appellant

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Shelton D. Brown, #345782,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2012-CP-38-00468

ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed April 4, 2012. Respondent made its Return on September 11, 2012, requesting an evidentiary hearing be convened. C. Bradley Hutto, Esquire, was appointed by the Orangeburg County Clerk's Office to represent Applicant. An evidentiary hearing was held on October 27, 2015, at the Dorchester County Courthouse. Applicant was present and represented by Mr. Hutto. The State was represented by J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office.

At the PCR hearing, Applicant declined to testify on his own behalf. Also testifying was Applicant's plea counsel, Mark Wise, Esquire. This Court had before it the Orangeburg County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, and the guilty plea transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant waived presentment to the April 2011 term of the Orangeburg County Grand Jury for two counts of Criminal Sexual Conduct with a Minor – Second Degree and one count of Kidnapping (2011-



GS-38-0456 and was represented by Mr. Wise. On April 18, 2011, Applicant pled guilty before the Honorable R. Ferrell Cothran, Jr. He was sentenced as indicted to twelve (12) years imprisonment for one count of Criminal Sexual Conduct with a Minor – Second Degree. The remaining charges were *nolle prossed* pursuant to the plea agreement. Applicant did not appeal his guilty plea or sentence.

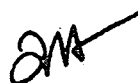
In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Involuntary and unintelligent guilty plea in that Counsel failed to review the nature of the charges, penalties, and constitutional rights with Applicant.
2. Ineffective assistance of counsel in failing to
 - a. file a notice of appeal;
 - b. Ensure that Applicant was placed under oath prior to the plea; and
 - c. Object or otherwise bring to the Court's attention that the State had breach its plea agreement.

III. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the 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, 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).

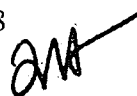


Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced 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 an initial matter, Applicant declined to testify at the hearing. This Court was not presented with any evidence that Applicant would have gone to trial but for any of the alleged errors made by Counsel. See Smith v. State, 369 S.C. 135, 138-39, 631 S.E.2d 260, 261-62 (2006) (An "avertment in a PCR application is insufficient to warrant relief. Respondent's failure to take the stand resulted in a failure of proof . . ." An applicant seeking relief must present

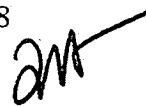


probative evidence to support PCR allegation that a defense attorney's purported deficient performance entitles him to relief). Therefore, Applicant cannot prove prejudice. This Court will address the deficiency prong of Strickland below.

Involuntary and Unintelligent Guilty Plea

Applicant alleges he did not plead guilty knowingly and voluntarily. Specifically, Applicant argues that Counsel failed to review the charges, penalties, and his constitutional rights with him. This Court finds Applicant's guilty plea was freely and voluntarily entered. To find a guilty plea is voluntarily and knowingly entered, 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). 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." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate 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).

Applicant claims he did not plead guilty voluntarily because he was not advised by Counsel of the charges, potential penalties, and of his constitutional rights. This Court finds this



contention meritless. The record reflects Applicant was fully advised that he was pleading guilty and waived all challenges to the evidence against him. The plea court's thorough colloquy with Applicant demonstrates that he understood the charges, penalties, and his rights. Applicant presented no evidence as to why he should be allowed to depart from his statements at the plea hearing. This Court finds very credible Counsel's testimony regarding his preparation and advice concerning the case. The record further reflects Applicant fully admitted his guilt to the plea court. Counsel fully discussed and reviewed the discovery involved in the case. Counsel also did a full and complete investigation of the case including the issue of DNA testing. Therefore, this Court finds the plea judge correctly found Applicant's plea was freely, voluntary, and intelligently made.


Ineffective Assistance of Counsel

Failing to File a Notice of Appeal

Applicant also alleges Counsel was ineffective in failing to file a notice of appeal. This Court finds Applicant has failed to carry his burden of proving Counsel was ineffective for failing to file a notice of intent to appeal. Again, Applicant did not argue these grounds because he did not testify. Accordingly, no evidence was submitted to support these allegations or to demonstrate that Applicant asked Counsel to appeal; accordingly, they are abandoned. Furthermore, upon a full review of the record, the Court finds that no grounds existed for an appeal, so any appeal would have been futile.

Failing to Ensure Applicant was Placed Under Oath

Applicant alleges Counsel was ineffective in failing to ensure he was placed under oath prior to the plea. This Court takes judicial notice of the fact that most judges do place defendants under oath prior to the plea colloquy, and this Court is of the opinion that following this



procedure is preferable in that it provides greater assurances that a defendant's answers to the court's questions are truthful. However, S.C. Code § 17-23-140 (1976) merely requires that a defendant appear before the circuit judge; this Section does not require that the defendant be placed under oath prior to the colloquy. Clearly, the manner in which a plea colloquy is conducted lies in the sound discretion of the presiding judge. Accordingly, the Court finds that Judge Cothran complied with the minimum legal formalities in accepting Applicant's plea and that it was not necessary for Applicant be placed under oath prior to his plea.

Failing to Object to Solicitor's Breach of Plea Agreement

Finally, Applicant alleges Counsel was ineffective in failing to object to the State's alleged breach of the plea agreement. At the plea hearing, Assistant Solicitor Ford informed Judge Cothran that the victim's parents were "ask[ing] that the maximum sentence be given to the Defendant, Mr. Brown." (Plea Tr. p. 6, lines 17-19). The solicitor then immediately agreed with that recommendation: "Your Honor, the State would concur in that . . ." (Plea Tr. p. 6, lines 19-20).

Defense counsel renders ineffective assistance when he or she fails to withdraw the guilty plea once the prosecution disregards a plea agreement. Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988). An applicant is entitled to post conviction relief when a solicitor makes a recommendation in violation of a negotiated plea agreement. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000). The South Carolina Supreme Court has recently reaffirmed these holdings and held that the appropriate remedy in such a case is invalidation of the entire agreement. See Smith v. State, 413 S.C. 194, 195, 775 S.E.2d 696 (2015) (holding that the applicant was entitled to relief when the solicitor's "recommendation of the maximum sentence



was a breach of its agreement . . . and that [the defendant] would not have pled guilty had he known the solicitor was going to breach the agreement.”).

Counsel Wise candidly admitted that he did not object to the solicitor’s recommendation. Normally, under the analysis of Smith v. State, the Court would remand this matter for a new trial. However, as previously noted, Applicant did *not* testify at the hearing. Unlike Smith, wherein the court found that Smith would not have pled guilty had the State not breached its agreement, no testimony or evidence exists in the present case that Applicant would not have entered the plea had the State indicated it was seeking the maximum or a substantial sentence. Accordingly, although the Court finds that Counsel was deficient under Smith for failing to object to Assistant Solicitor Ford’s comments, the Court finds that Applicant has failed to demonstrate any prejudice. Accordingly, relief is denied on this ground.

All Other Allegations

As to any and all allegations that were raised in the application 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

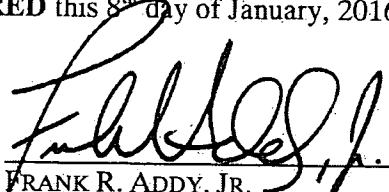
Based on the foregoing, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations which would require this Court to grant his application. Applicant failed to demonstrate counsel’s performance was unreasonable under prevailing professional norms. Cherry, 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), SCRCR, 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 shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 8th day of January, 2016.


FRANK R. ADDY, JR.
Presiding Judge

Greenwood, South Carolina

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JAN 21 2016

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S.C. SUPREME COURT

**RE: Shelton D. Brown #345782 v. State of South Carolina
2012-CP-38-00468**

Dear Office of Appellate Defense:

This is an appeal of a PCR proceeding. It is an Orangeburg County case but the hearing was held in Dorchester County before Judge Addy. I was appointed to represent Mr. Brown who is an inmate at SCDC.

Enclosed and served upon you please find a copy of the Notice of Appeal, Proof of Service, and the Order of Dismissal from the PCR hearing in the above matter. If I need to provide you with anything further in order for you to handle this case, please let me know.

Sincerely,



C. Bradley Hutto

/vmw

enclosure

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