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February 15, 2016

The Honorable Daniel E. Shearouse
Clerk of Court, The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

FEB 19 2016

S.C. SUPREME COURT

RE: Broderick E. Culp v. State of South Carolina
2014-CP-46-03141

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Proof of service of the notice of appeal on the respondent.
- (2) A copy of the order which is to be challenged on appeal.

Sincerely Yours,

Nathan J. Sheldon
331 E. Main St., Suite 200
Rock Hill, South Carolina 29730
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Attorney for Appellant

J. Rutledge Johnson
Assistant Attorney General
PO Box 11549
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Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2014-CP-46-03141

State of South Carolina,

Respondent,

v.

Broderick E. Culp,

Appellant.

NOTICE OF APPEAL

Broderick E. Culp appeals the order of the Honorable John C. Hayes, III dated February 9, 2016 denying his request for post-conviction relief. Appellant received written notice of entry of this order on February 11, 2016.

February 16, 2016



Nathan J. Sheldon
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Attorney for Appellant

Other Counsel of Record:
J. Rutledge Johnson, Esquire
Assistant Attorney General
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S.C. SUPREME COURT

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Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on J. Rutledge Johnson with the Attorney General's Office by depositing a copy of it in the United States Mail, postage prepaid, on February 16, 2016 mailed to Post Office Box 11549, Columbia, South Carolina 29211-1549.

February 16, 2016



Nathan Sheldon
331 E. Main St., Suite 200
Rock Hill, SC 29730
803-909-9343
Attorney for Appellant

RECEIVED

FEB 19 2016

S.C. SUPREME COURT

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2014CP4603141

Brodrick E Culp	South Carolina State Of
-----------------	-------------------------

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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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 (Vol. Nonsuit);
 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; 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: ORDER

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.

s/ John C. Hayes, III.

Circuit Court Judge

2049

Judge Code

2/9/2016

Date

For Clerk of Court Office Use Only

This judgment was entered on **February 10, 2016**, and a copy mailed first class or placed in the appropriate attorney's box on **February 10, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

Nathan James Sheldon PO Box 36682 Rock Hill, SC 29732

James Rutledge Johnson PO Box 11549 Columbia, SC
29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - 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.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 Broderick Culp, #175645,)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent,)
)
 _____)

IN THE COURT OF COMMON PLEAS
 SIXTEENTH JUDICIAL CIRCUIT

C.A. No.: 2014-CP-46-3141

FILED-RECEIVED
 2016 FEB 10 PM 4:19
 DAVID PERKINSON
 C.C.P. & GS
 YORK COUNTY, SC

ORDER

Applicant filed his Post-Conviction Relief application on September 23, 2014. The case was heard before the late Judge Ernest J. Kinard on April 14, 2015. Applicant was represented by Nathan Sheldon, Esquire; the Respondent was represented by J. Rutledge Johnson, Assistant Attorney General.

Due to the untimely death of the Honorable Ernest J. Kindard, the undersigned assigned this case to himself pursuant to Rule 63, South Carolina Rules of Civil Procedure. The undersigned did not receive the Transcript of the April 14, 2015 hearing until January 27, 2016, or the judge's packet until February 1, 2016. Based on the information received, there is no reason for an additional hearing.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. The York County Grand Jury indicted the Applicant at the February 2011 term of General Sessions for two counts of Armed Robbery (2011-GS-46-0447, 2011-GS-46-0449), Criminal Conspiracy (2011-GS-46-0450) and Possession of a Firearm During the Commission of a Violent Crime (2011-GS-46-0451). The Applicant was represented by Phil Smith, Esquire. On September 16, 2013, the



Applicant pled guilty to all charges as indicted. The Honorable Lee S. Alford sentenced the Applicant, pursuant to a negotiated sentence, to confinement for fourteen (14) years for each Armed Robbery, five (5) years, concurrent, for Criminal Conspiracy, and five (5) years, concurrent, for the possession charge. The Applicant did not timely appeal his conviction or sentence.

A notice of appeal was filed on Applicant's behalf, and it was dismissed for failure to provide a sufficient legal explanation, as provided by Rule 203(d)(1)(b)(4) of the South Carolina Rules of Appellate Procedure. The Remittitur was issued on November 22, 2013. Though the Respondent's Return indicates Applicant untimely filed this PCR application, the State did acknowledge at the hearing it was timely filed.

In his application for post-conviction relief, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel

Applicant raises two claims of ineffective assistance of counsel—failure to investigate and pretrial functions. This Court will review both claims as one issue. A review of the Transcript of Applicant's Post-Conviction Relief hearing indicates Applicant claims trial counsel was ineffective for failing to investigate the possibility of an alibi and perform interrogatives (sic) of investigators and victims. Applicant further claims Counsel was ineffective in other pretrial functions involving suppression of evidence.

A two-pronged test is used 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 v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland v. Washington, 466 U.S.

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668, 104 S.Ct. 2052 (1984)). 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. at 690. The applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118.

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." Id. at 117-18 (quoting Strickland, 466 U.S. at 694). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997). In other words, where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 691; see also Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). With respect to a guilty plea, 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).

Applicant testified there were two potential alibi witnesses he wished counsel to investigate. The first potential witness was an employee at the scene of the crime where the cigarette butt containing Applicant's DNA was found. (PCR Tr. p. 22, LL 10-22). Counsel testified he searched for the witness but was unsuccessful in locating her for questioning. (PCR, Tr. p. 7, LL 10-12). The record establishes counsel attempted to investigate according to his professional requirements by driving to the location and searching for the potential witness. An

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unsuccessful search does not show counsel was deficient in his duty. Additionally, Applicant did not present this alleged witness to support his claim the witness would have provided Applicant an alibi defense.

Applicant testified the second witness, the mother of his child, would have testified Applicant was dropped off at her house prior to the crime occurring. (PCR, Tr. p. 26, LL 7-12). Counsel admits he was told about other possible witnesses who were at a party in which this witness was attending, but that the Applicant himself did not believe those people would testify. (PCR Tr. p. 7, LL 16-17). There is further testimony that, while counsel was given information involving Applicant by the second witness two days before the plea, counsel did not believe the information was definitive to exculpate the Applicant. (PCR Tr. p. 40, LL 7-14). Counsel indicated it was not a foolproof alibi defense in his professional opinion (PCR Tr. p. 40, LL 18-19), and that he was not aware of any other alibi witnesses that would actually testify. (PCR Tr. p. 10, LL 6-8). Additionally, though Applicant did present this witness at the PCR hearing, her testimony does not support an alibi defense, and Applicant presented no other witnesses to provide a defense. It appears counsel made a reasonable professional judgment in determining the significance of this particular witness to Applicant's case.

There is nothing in the record that shows counsel's actions were unreasonable or deficient in the effort put into locating the first witness or assessing the effect of the second witness's testimony. Further, there is nothing to suggest the first witness had any relevant information. Counsel's testimony also indicates the unlikelihood, rather, that the second witness's testimony would do much to help Applicant's case. Therefore, Applicant has not proved he was prejudiced in anyway. To the contrary, the record supports the conclusion counsel

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was not ineffective as to the Applicant's claim counsel did not properly investigate possible alibis.

Applicant also claims ineffective counsel based on pretrial functions. Applicant testified he never felt as though all the pretrial motions were given consideration by counsel. (PCR Tr. p. 28, LL 4-5). Counsel, however, testified he and Applicant spoke about all of the potential pretrial motions in the case, and listed them for the court during the hearing. (PCR Tr. p. 9, LL 19-25). There is no further discussion in the record to establish a lack of consideration by counsel, or that he did not properly reflect on the potential arguments and outcomes of said motions. Additionally, there is nothing in the record to indicate these motions would have resulted in the Applicant's favor had they been addressed if the case moved forward. As such, Applicant does not persuade this Court that counsel was ineffective in his representation of pretrial motions.

Applicant then claims ineffective counsel because counsel did not perform interrogatives (sic) of investigators or victims. There is nothing in the record to support this allegation aside from previous discussion. Therefore, to the extent this claim differs from prior arguments, it will be deemed abandoned.

Finally, during the PCR hearing Applicant's counsel raised the issue of ineffective assistance of counsel due to coercion. Assuming the issue is properly before the court, the claim asserts counsel and counsel's assistant coerced Applicant into pleading guilty against his will. (PCR Tr. p. 17, LL 17-25—p. 18, LL 1-3). Applicant further testified that he could not function under the coercion and stress to properly plea. (PCR Tr. p. 28, LL 21-22).

During the PCR hearing, Applicant stated he did not wish go forward with the plea, but counsel's assistant insisted he would likely serve a life sentence if he did not plead guilty. (PCR

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Tr. p. 17, LL 19-25). Counsel testified that, though he was not present for the assistant's conversation with the Applicant, there was never any indication Applicant was threatened, and Applicant never acted unusual. (PCR Tr. p. 41, LL 5-11). In addition, counsel testified he never threatened the Applicant himself or forced Applicant to take the plea. (PCR Tr. p. 41, LL3-4). The court finds it reasonable that counsel would inform his client of the possible consequences of going to trial, including the potential sentencing should he be found guilty. Rather than being deficient in his duty, counsel was entirely proper in informing his client of the risk of getting life without parole should Applicant choose to move forward with a jury trial.

Further, Judge Alford specifically questioned Applicant during his plea as to whether or not he was promised anything other than removing life without parole from the sentencing options in order to get him to plead guilty. (Plea Tr. p. 8, LL 16-22). Applicant stated no. (Plea Tr. p. 8, L 23). Judge Alford also asked if Applicant was satisfied with his counsel's representation and advice, and Applicant stated he was. (Plea Tr. p. 8, L 24-25—p. 9, L 1-2). If Applicant felt coerced or felt there was a problem with his counsel's representation, the proper time to bring it to the Court's attention would be during the plea when unambiguously asked.

This Court finds counsel to be credible. Reviewing trial counsel's representation of Applicant, I find, by a preponderance of the evidence, that Applicant has not proven trial counsel represented Applicant ineffectually. Applying the Cherry and Strickland tests, it is clear to the Court that trial counsel's representation of Applicant was not deficient, was reasonable when examined under the rubric of professional norms, and was well within the range of competence required in criminal cases. I find trial counsel rendered adequate assistance and made all significant decisions, including those based on trial strategy in the exercise of reasonable professional judgment.

A handwritten signature in black ink, appearing to be "J. H. C.", located in the bottom right corner of the page.

2. Excess of jurisdiction by judge

Applicant's claim here is ambiguous, and can be read to mean either the court lacks subject matter jurisdiction, or the court erred in denying his request to withdraw his guilty plea. Assuming Applicant's claim is Judge Lee Alford lacked jurisdiction to impose the sentence, this claim is without merit. A circuit court has subject matter jurisdiction to hear criminal matters. State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005).

Applicant claims Judge Lee Alford surpassed his jurisdiction by continuing with the sentencing phase when Applicant asked to withdraw his plea. The record shows Applicant entered his plea freely, voluntarily, and intelligently September 13, 2013 (Plea Tr. p. 15, LL 22-25—p. 16, LL 1-7), and at the request of the Applicant, Judge Alford deferred sentencing until September 16, 2013 so that Applicant could visit with his family over the weekend (Plea Tr. p. 17, LL 7-8). At sentencing, Applicant informed the court he wished to withdraw his plea, but Judge Alford would not allow him to do so. (Sentencing Tr. p. 4, LL13-25).

The Court had proper jurisdiction to hear the plea, and Applicant entered the plea freely and voluntarily. The plea was accepted on September 13, and therefore, Applicant was no longer in a position to withdraw his plea, except at the discretion of the court. The only reason he was not sentenced on September 13 was because Applicant asked to defer sentencing. Therefore, because the plea was entered and accepted, the Court had jurisdiction to continue with sentencing and properly did so.

Applicant also claimed his plea was not voluntary because he was medicated at the time. (Sent. Tr. p. 5, LL 15-17). However, Judge Alford asked Applicant if he was under the influence of any mind-altering substance such as prescription medications at the time of the plea. (Plea Tr. p. 9, LL 21-23). When Applicant told him he was taking certain medications, Judge Alford then

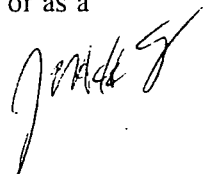
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specifically asked if those medications “interfere[d] in any way with [his] ability to understand what [he was] doing in court.” (Plea Tr. p. 10, LL 5-8). Applicant said no. (Plea Tr. p. 10, L 9).

Judge Alford further asked Applicant if there was any other condition which interfered with his judgment or understanding. (Plea Tr. p. 10, LL 10-13). Applicant stated he was bipolar, but when Judge Alford asked if he understood what he was doing in court, the Applicant stated he did. (Plea Tr. p. 10, LL 15-24). Counsel also stated Applicant had taken his bipolar medication as prescribed that day. (Plea Tr. p. 10, L 25-p. 11, L 1). Though Applicant does appear to have been medicated, Judge Alford acknowledged that Applicant could function quite well if medicated for his bipolar condition. (Plea Tr. p. 11, LL 2-6). Applicant then admitted he was pleading guilty of his own free will. (Plea Tr. p. 11, LL 7-9).

Even though Applicant was on medication, the record establishes that the medication did not interfere with his ability to know what he was pleading to, and his plea was knowingly made. The record fails to establish that Applicant’s plea was not freely and voluntarily made. As such, the court had jurisdiction to proceed with the sentencing phase of the Applicant’s guilty plea.

To the extent Applicant’s claim is the Court’s refusal to allow him to withdraw his guilty plea, this issue could have been raised, and should have been raised as a direct appeal. Errors in court proceedings may not be asserted in post-conviction relief hearings if they could have been reviewed on appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975). Applicant was given notice of his right to appeal the guilty plea, and appears to have filed an appeal in the matter. However, the appeal was dismissed for failure to provide a sufficient legal explanation. (PCR Tr. p. 3 14-17). This matter could have been heard on direct appeal, but was dismissed. As such, he may not now raise the issue of plea withdrawal in his post-conviction relief petition as a substitute. Additionally, even if the issue had been raised on appeal, or as a



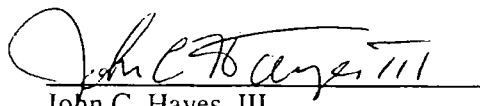
question of ineffective assistance of appellate counsel instead of judicial review, Applicant's claim would not have been successful because "once a defendant enters a guilty plea, whether to allow withdrawal of the plea is left to the sound discretion of the circuit court. State v. Riddle, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982).

Wherefore, I find Applicant has not carried his burden of proof, and has neither proved trial counsel ineffective, nor an excess of jurisdiction by the judge.

Therefore, Applicant's application for Post-Conviction Relief is denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. See Rules 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.


John C. Hayes, III
Judge

#9

February 9th, 2016
York, South Carolina

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The Honorable Daniel E. Shearouse
Clerk of Court, The Supreme Court of South
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