

# FALK LAW FIRM, LLC.

James K. Falk

(843) 606-6007

(843) 972-9005 Fax Admitted to practice: KY(1984) S.C. (2010) jfalklaw@gmail.com

March 25, 2016

**RECEIVED**

MAR 28 2016

**S.C. SUPREME COURT**

Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

Re: Greg Green, 2014-CP-26-07332

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Horry County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc: Jessica Kinard, Esq.; Greg Green 196495.

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

MAR 28 2016

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable D. Craig Brown, Circuit Judge

**S.C. SUPREME COURT**

Case No.: 2014-CP-26-7332

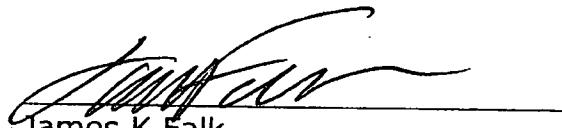
Gregory Green 196495.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Gregory Green appeals the Honorable D. Craig Brown's March 7, 2016, Order of Dismissal. Undersigned counsel received notice of entry of the order on March 25, 2016. A copy of the order on appeal is attached hereto.



James K Falk  
Falk Law Firm  
PO Box 1058  
Charleston, SC 29402

March 25, 2016

Jessica E. Kinard, Esq.  
Office of S.C. Attorney General  
PO Box 11549  
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

MAR 28 2016

APPEAL FROM Horry COUNTY  
Court of Common Pleas

**S.C. SUPREME COURT**

Honorable D. Craig Brown, Circuit Judge

Case No.: 2014-CP-26-07332


Gregory Green 196495.....PETITIONER

V.

State of South Carolina.....RESPONDENT

PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Jessica Kinard, Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this March 25, 2016.

  
James K Falk  
Falk Law Firm  
PO Box 1058  
Charleston, SC 29402

STATE OF SOUTH CAROLINA )  
 COUNTY OF HORRY )  
 Gregory Green, #196495, )  
 Applicant, )  
 v. )  
 State of South Carolina, )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE FIFTEENTH JUDICIAL CIRCUIT  
 Case No. 2014-CP-26-7332

HORRY COUNTY  
 2016 MAR 11 PM 1:21  
 KENNETH HUGHES-WARD  
 CLERK OF COURT

**ORDER OF DISMISSAL  
 (Ends action)**

This matter came before the Court by way of an Application for Post-Conviction Relief filed November 5, 2014. The Court convened an evidentiary hearing into the matter on February 11, 2016, at the Horry County Courthouse. Applicant was present and represented by James K. Falk, Esquire. Jessica E. Kinard, Esquire of the South Carolina Attorney General’s Office, represented Respondent.

Applicant and Applicant’s plea counsel, Stuart Axelrod, Esquire, testified at the hearing. The Court had before it a copy of the plea transcript, the records of the Horry County Clerk of Court regarding the subject conviction, Applicant’s records from the South Carolina Department of Corrections, and the pleadings. 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 Horry County Clerk of Court. In November 2013, the Horry County Grand Jury indicted Applicant for Trafficking in Heroin (2013-GS-26-04803). Stuart Mark Axelrod, Esquire, represented Applicant. On May 29, 2014, Applicant pled guilty to the lesser included offense of Trafficking in Heroin, 4 - 14 grams, 1<sup>st</sup> offense. The Honorable Roger M. Young, Sr., sentenced Applicant to ten (10) years imprisonment and a fine of fifty thousand dollars (\$50,000). Applicant did not appeal his plea or sentence.

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## **II. ALLEGATIONS**

In his Application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Trafficking, first offense, is Not a lesser included offense of trafficking, second offense"
  - a. "S.C. Code Ann. 44-52-370(e)(3)(a)1 is not a lesser included of 44-53-370(e)(3)(a)2"
2. "Violation of Notice requirement guaranteed by U.S & S.C Statues (sic)"
  - a. "There is no indictment alleging a violation of S.C Code Ann 44-53-370(e)(3)(a)1"
3. "Breach of the Plea Agreement"
  - a. "The offense in which Applicant pleaded guilty is not a lesser included offense."

## **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. Summary of Testimony**

At the call of the case, Applicant moved for his application to be summarily granted on the basis that the trial court did not have jurisdiction to accept his plea to trafficking 4-14 grams, first offense, because it is not technically a lesser included offense of trafficking 4-14 grams, second offense. The Court accepted argument from both sides on this notion, with Applicant's contention being that the proper lesser included offense of a trafficking charge is one of possession with intent to distribute. The importance of this distinction, he argued, was that by proceeding on the trafficking charge, Applicant was pleading to a crime for which he was not indicted. Respondent argued that an indictment is merely a notice document and, even without having an indictment specifically for

possession with intent to distribute, the Applicant knew the reason he was in court and the facts of the situation at issue. This Court denied Applicant's motion, and testimony followed.

Applicant took the stand first, and very eloquently described his understanding of the law regarding lesser included offenses. His main contention was that he was deprived of notice of the charge because he was not indicted by the grand jury on that specific charge, nor did he waive presentment. He further testified that he did not know that this charge was an eighty-five percent (85%) offense. On cross examination, Applicant testified that he wanted a non-violent sentence. While the Court appreciates his thorough research and presentation, it finds his testimony not to be credible, as Applicant had already pled to and served time for a trafficking charge, and his testimony contradicts the very credible testimony of plea counsel.

Plea counsel testified second and agreed that, if Applicant's understanding of the law was correct, then he would have erred in his advice with Applicant and potentially thousands of other criminal clients. His understanding of the term "lesser included offense" was anything less than what the defendant was charged with, and he believed that to be the common understanding of the term. Plea counsel further testified that, regardless of the terminology used, Applicant knew he was pleading to a violent offense, getting a strike, and would serve eighty-five percent (85%). Regarding sentencing, plea counsel testified that he thought the sentence would be approximately seven (7) years and Applicant would serve roughly six and a quarter (6 ¼) years.

### **B. Ineffective Assistance of Plea Counsel**

In a 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 v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of plea counsel as a ground for relief, Applicant must prove plea counsel's "conduct so undermined the proper

functioning of the adversarial process” that the plea proceedings “cannot be relied upon as having produced a just result.” Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether plea counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes plea counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove plea counsel's performance was deficient. Id. Under this prong, the Court measures plea counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea counsel's 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. In the context of a guilty plea, Applicant must show there is a reasonable probability that, but for plea 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).

The Court finds Applicant failed to meet his burden to show plea counsel rendered ineffective assistance of counsel. The plea hearing transcript shows no misunderstanding of the charge that Applicant was present for, or of the consequences that he faced. In fact, it was discussed on the record that Applicant had a prior trafficking charge and that this was a second strike on his record. At the plea hearing, Applicant acknowledged that he had been given sufficient time to consider his options with counsel, and that he had done everything requested. Plea counsel spent a great deal of time discussing

Applicant's physical health and how that related to his time served and his addiction that led to trafficking drugs. Accordingly, the Court finds plea counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation.

### **C. Involuntary Guilty Plea**

This Court also finds Applicant's allegation that his guilty plea was involuntary is without merit. A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (citing Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)).

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. Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both. Holden at 573, 713 S.E.2d at 615 (citing Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999)). The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Id.

In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the

guilty plea, and also from the record of the PCR hearing. Roddy, 339 S.C. at 33, 528 S.E.2d at 420.

"[I]n South Carolina, a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013) (citing Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). "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, 654 S.E.2d 870, 874 (2007). Further, "a defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." Brady v. U.S., 397 U.S. 742, 757 (1970).

Based on the guilty plea transcript as well as evidence at the PCR hearing, this Court is firmly convinced that Applicant's guilty plea was entered into freely, voluntarily, knowingly, and intelligently. This is reinforced by Applicant's statements during his plea hearing, when he admitted to the judge that he believed he would be found guilty if he proceeded to trial. Applicant presented no evidence at the PCR hearing that he or anyone else involved thought he was entering an improper plea, or that knowledge of it would have caused him to choose a trial. There can be no question that Applicant was fully aware of his sentence and its collateral consequences at the time of the plea hearing. As a result, he has failed to meet his burden, and this allegation is denied and dismissed.

#### **D. 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.

#### 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. The record shows no prejudice to the Applicant, nor does it show any action by plea counsel that would be deficient under the terms provided by Strickland. Specifically, this Court finds that Applicant's argument regarding this not being a lesser included offense is without merit. The indictment is a notice document to advise a defendant of elements of a crime and advise him of what he must defend. This Court finds that Applicant was properly notified, and that plea counsel was not required to challenge the indictment. Plea counsel was not deficient and did not perform at a level that fell below prevailing professional norms. Even if he had, there is no evidence to show prejudice to this Applicant. Additionally, Applicant has failed to show that his guilty plea was anything other than knowingly, intelligently, and voluntarily entered, and has not shown that, but for the defects he alleges in his plea, he would have proceeded to trial. 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 7 day of March, 2016.

  
\_\_\_\_\_  
The Honorable D. Craig Brown  
Presiding Judge

Florence, South Carolina

FALE LAW FIRM

PO Box 1058

Charleston, SC 29402



Clerk of Court.

Supreme Court of South Carolina

PO Box 11330

Columbia, SC 29211-1549

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