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May 5, 2016

Daniel E. Shearouse
Clerk of Court – SC Supreme Court
Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: Gerard Watts, #222851 v. State of South Carolina
2014-CP-26-3106

Dear Mr. Shearouse:

Enclosed please find the original Notice of Appeal in the above-entitled action and one copy. Please file and return the copy to me in the self addressed stamped envelope enclosed.

If you should have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Daniel A. Selwa, II

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable D. Craig Brown, Circuit Court Judge

Case No.: 2014-CP-26-3106

Gerard Watts #222851,..... Petitioner,

v.

State of South Carolina,..... Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable D. Craig Brown, March 7, 2016, order, denying the Applicant's Petition for post-conviction relief. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

Daniel A. Selwa, II
1053 London Street, Suite A
Myrtle Beach, SC 29577
Attorney for the PCR Applicant

May 5, 2016

Other counsel of record:
Alan Wilson, Attorney General
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Post Office Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Honorable G. Craig Brown, Circuit Court Judge

Case No.: 2014-CP-26-3106

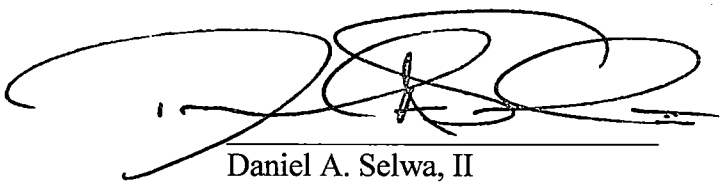
Gerard Watts #222851,..... Petitioner,

v.

State of South Carolina,..... Respondent.

PROOF OF SERVICE

I, Daniel A. Selwa, II, certify that I have served the within Notice of Appeal on the Respondent, the State of South Carolina, by depositing a copy of the same in the United States Mail, postage prepaid, addressed to his attorney of record, Alan Wilson, Attorney General, Post Office Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this 5th day of March, 2016.



Daniel A. Selwa, II
1053 London Street, Suite A
Myrtle Beach, SC 29577
Attorney for the PCR Applicant

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Gerard Watts, #222851, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2014-CP-26-3106 **ORDER OF DISMISSAL** **(Ends action)**

This matter came before the Court by way of an Application for Post-Conviction Relief filed May 15, 2014. Respondent filed a return and motion for more definite statement on or about December 18, 2014. The Court convened an evidentiary hearing into the matter on February 10, 2016, at the Horry County Courthouse. Applicant was present and represented by Daniel A. Selwa, II, Esquire. Jessica E. Kinard, Esquire of the South Carolina Attorney General's Office, represented Respondent.

Applicant and Applicant's plea counsel, Jonathan D. McCoy, 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 May 2013, the Horry County Grand Jury indicted Applicant for attempted murder (2013-GS-26-1828) and possession of a weapon during the commission of a violent crime (2013-GS-26-1829). Jonathan David McCoy, Esquire, represented Applicant on those charges. In September 2013, the grand jury indicted Applicant for possession with intent to distribute heroin (2013-GS-26-3988) and threatening the life of public employee (2013-GS-26-3990). J. M. Long,

III, Esquire, represented Applicant on those charges. On September 5, 2013, Applicant pled guilty as indicted to possession with intent to distribute heroin, threatening the life of public employee, and possession of a weapon during the commission of a violent crime. He also pled guilty to assault and battery of a high and aggravated nature as a lesser included offense of attempted murder. The Honorable Larry B. Hyman, Jr. sentenced Applicant to concurrent sentences of five (5) years for possession of a weapon during the commission of a violent crime, thirteen (13) years for assault and battery of a high and aggravated nature, ten (10) years for possession with intent to distribute heroin, and ten (10) years for threatening the life of public employee.

Applicant filed a timely notice of appeal, but voluntarily dismissed his appeal. The South Carolina Court of Appeals dismissed the appeal on May 6, 2014. The remittitur was returned to the circuit court on May 22, 2014.

II. ALLEGATIONS

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

1. "Ineffective Assistant of Counsel"
2. "Involuntary Guilty Plea"
3. "Due Process Violation"

At the call of the case, no amendments had been made to the PCR application in order to resolve the motion for more definite statement. PCR counsel stated that Applicant wished to go forward on the three stated grounds, as well as failure to investigate. Though the hearing at issue involved several charges on which Applicant was represented by either Mr. McCoy or J.M. Long, III, Applicant only found issue with Mr. McCoy's performance. The hearing proceeded on all of these grounds against Mr. McCoy.

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

Applicant was called to testify first, and began by saying that he did not shoot the victim in the underlying case. He thought that the victim would say something to that effect, but the victim was not interviewed to Applicant's knowledge. Further, he thought that the solicitor may not have allowed people to speak to the victim. Applicant testified that plea counsel stated he would need more money for an investigator, but none was ever hired. Applicant lastly testified that the victim spoke to his family and told them that Applicant should not be in jail. This Court does not find Applicant's testimony to be credible, as it is nearly all contradicted by other testimony, either of plea counsel or at the plea hearing.

Plea counsel (Mr. McCoy) was called next, and spoke about the desire of all involved to dispose of these charges concurrently with the charges on which Mr. Long represented the Applicant so that all could avoid the hassle of several trials. He testified that the solicitor was "dead set" for ten years on those charges, and they had negotiated twenty years on the attempted murder if pled as assault and battery of a high and aggravated nature. Plea counsel testified that there were issues to consider, particularly that Applicant confessed before being mirandized, and stated that he didn't want to get shot, so he shot first. This led plea counsel to carefully review the elements of self-defense with the Applicant. Plea counsel concurred with Applicant that there were difficulties in finding and speaking to the victim – he understood that he was using false names and moving around. In essence, it is hard to

find someone that does not want to be found. This led to the discussion of the possibility of hiring a private investigator, which would involve money, and was not tried because the recall of the witnesses' accounts matched so closely. He further testified that, based on the totality of the evidence, pleading was in the Applicant's best interest. This Court finds plea counsel's testimony to be very credible.

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. 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 spoke eloquently and at length during the sentencing phase about the trajectory this case had taken. This testimony was echoed and bolstered during the PCR hearing, with nothing from Applicant to contradict it. This Court finds plea counsel adequately conferred with Applicant and was thoroughly competent in his representation. For these reasons, the request for relief on this ground is denied and dismissed.

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 convinced that Applicant's guilty plea was entered into freely, voluntarily, knowingly, and intelligently. There is no evidence in the transcript or presented at the PCR hearing to show otherwise. 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, Applicant has failed to meet his burden, and this allegation is denied and dismissed.

D. Due Process Violation

This Court also finds that Applicant's challenge of his receipt of the promises of the due process of law is without merit. As a threshold matter, the Applicant failed to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). This matter was scheduled for a motion hearing for a more definite statement pursuant to Rule 12 (e) of the South Carolina Rules of Civil Procedure; however, this Court ordered the case to proceed on its merits, and this particular allegation was never amended to present a more definite statement. Furthermore, no specific allegations of due process violations were made at the hearing on the merits. Since the Applicant has failed to make even a *prima facie* showing that his due process and other constitutional rights were violated, whether in his application or at the hearing, this Court orders that this allegation is denied and dismissed.

E. Failure to Investigate

This Court further finds that Applicant's allegation that plea counsel failed to conduct an adequate investigation is without merit. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). Failure to conduct an independent investigation does not constitute ineffective

assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

Both witnesses testified to discussions had regarding the difficulty of contacting the victim, and plea counsel explained in detail how he dealt with this situation strategically. Further, both witnesses stated that the possibility of hiring a private investigator was discussed and ultimately abandoned. Plea counsel was certainly familiar enough with this case to be able to explain the circumstances to the court, and to be able to craft a beneficial plea deal for the Applicant. For these reasons, any relief sought for this allegation is denied and dismissed.

F. 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. 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. Applicant has failed to show that there was any violation of due process, or that plea counsel failed to investigate any aspect of this case. 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

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	2014-CP-22-3106
COUNTY OF HORRY	)	
	)	
GERARD WATTS, #222851	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a filed copy of the Order of Dismissal, in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Daniel A. Selwa, II, Esquire
1053 London St., Suite A
Myrtle Beach, SC 29577

DATED this 23rd day of March, 2016.

Norma Bigbee, Legal Assistant
For Respondent

DANIEL A. SELWA, II
ATTORNEY AT LAW, L.L.C.

1053 London Street, Ste. A
Myrtle Beach, S.C. 29577

Daniel E. Shearouse
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