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STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )  
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Kevin E. Herriott, #313862, )  
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Applicant, )  
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v. )  
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State of South Carolina, )  
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)  
Respondent. )  
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IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

2013-CP-10-1084

**ORDER OF DISMISSAL**

2016 MAR 30 PM 4:02  
FILED  
JULIE L. ARISTON  
CLERK OF COURT  
BY \_\_\_\_\_

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed February 25, 2013. Respondent made its Return on March 24, 2015. An evidentiary hearing into the matter was convened on January 19, 2016, at the Charleston County Courthouse. Applicant appeared *pro se*. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Plea counsel, Mary Ford, Esquire, and Arthur DeGiovine also testified. This Court has before it a copy of the records of the Charleston County Clerk of Court, records of the South Carolina Department of Corrections, the application, the State's return, and the guilty plea transcript.

**PROCEDURAL HISTORY**

Applicant is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Applicant was indicted at the January 2011 term of the Charleston County Grand Jury for murder (2011-GS-10-0043), assault and battery of a high and aggravated nature (ABHAN) (2011-GS-10-0044), and possession of a weapon during the commission of a violent crime (2011-GS-10-0045). Applicant was represented by Mary Ford, Esquire, and Jason King, Esquire.

Applicant's case proceeded to trial and after the commencement of trial, on September 5, 2012, Applicant pled guilty under North Carolina v. Alford to the lesser included offense of voluntary manslaughter, ABHAN, and possession of a weapon during the commission of a violent crime. The Honorable Stephanie P. McDonald sentenced Applicant to confinement for a period of eighteen years for voluntary manslaughter, fifteen years for ABHAN, and five years for the possession of a weapon charge. The sentences are to be served concurrently. The Applicant did not appeal his convictions or sentences.

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

1. Ineffective assistance of counsel.

At the hearing, Applicant proceeded on his claim of ineffective assistance of plea counsel.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This 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 (2003).

#### **Ineffective Assistance of Counsel/Involuntary Guilty Plea**

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

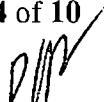
Applicant stated that plea counsel was ineffective because she did not disclose witness statements. Applicant states plea counsel erroneously advised him to plead guilty because plea counsel said there was no evidence to refute the State's case. Applicant states plea counsel did not investigate critical evidence. Applicant states that plea counsel failed to communicate with him regarding important discovery documents, that had he been provided these documents, he would not have pled guilty.

Applicant testified plea counsel failed to disclose discovery to him, specifically, witness statements. Applicant claimed plea counsel denied one witness gave a statement. Applicant then testified that plea counsel failed to file seven or eight motions on his behalf, including a Brady motion, related to discovery and motions to compel in August. Applicant states that plea counsel knew of the documents he was seeking and failed to disclose these materials to him. Next, Applicant alleged that plea counsel erroneously advised him to plead guilty, because she did not know the number of shots fired, whether or not there were witnesses to corroborate his side of the story, and not knowing of there were witnesses that could corroborate the fact that there were

weapons involved other than then gun. Applicant then testified that plea counsel failed to investigate critical evidence in the case, such as why the party was held, why the male victim was at the party, and the number of shots fired. Lastly, Applicant alleged that plea counsel failed to communicate and explain to Applicant the theory of transferred intent and self-defense; and this lack of communication affected his decision to plead guilty.

On cross examination, Applicant admitted that his case had gone to trial and then he decided to plead guilty under Alford. Applicant also admitted that the judge explained to him that he had a right to a jury trial, the right to confront his accusers, and a right to present evidence. Applicant also admitted that he agreed with the facts as presented by the solicitor during the guilty plea. Applicant also testified that he was not threatened or coerced to plead guilty, but that it was his own choice. Finally, Applicant stated that he had no witnesses to present at this hearing who could corroborate his version of the facts.

Plea counsel testified that she was appointed to the Applicant's case in August of 2010. She was the second attorney who had represented the Applicant on these charges. Plea counsel stated that she received discovery from the State and that her private investigator conducted an independent investigation. Plea counsel also testified that she spoke with the doctor that conducted the autopsy on the female victim. Plea counsel also testified that the male victim initially believed that he had been shot and that the bullet had grazed his head, but it was later determined that he was simply hit in the head with the pistol. Plea counsel testified this discovery was the reason that the attempted murder charge was reduced to the lesser included offense of ABHAN. Plea counsel stated that Applicant had given her his version of the facts and that the State's version of the facts were similar. Plea counsel related what the State was claiming to Applicant.



Plea counsel testified that the State had made an offer of eighteen years, that Applicant had initially rejected this offer, and that the State agreed to keep the offer open. Plea counsel testified that after the start of the trial, Applicant indicated that he wished to accept the plea offer and that he seemed at peace. Plea counsel stated that she was in agreement with Applicant's decision to plead guilty. Plea counsel stated that this was a legally difficult case and that the solicitor had case law he planned to use to defeat a claim of self-defense along with the argument that Applicant had left the scene earlier to go get a gun. Plea counsel stated that she believed there was a factual basis for the plea.

Plea counsel testified that she discussed with Applicant his version of the facts—that Applicant hit the male victim over the head with a gun in self-defense and that the female victim was shot and killed as a result of an accident when the gun went off. Plea counsel stated that there were some facts on which they did not agree with the State and had subpoenaed witnesses for trial. Plea counsel stated that the defense was that there was an intervening action between the altercation that resulted in the charges and an earlier altercation; however, witness accounts varied. Plea counsel testified that she discussed all of this with Applicant. Plea counsel further testified that she always told Applicant that she did not know if the judge would charge self-defense or if a jury would accept a self-defense claim; however, had they proceeded with the trial, plea counsel testified she would have submitted a defense of accident and self-defense.

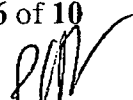
As to her investigation of the facts and evidence, plea counsel testified that the male victim did not give a statement to police, but that her private investigator obtained a statement from him. Plea counsel shared this information with Applicant. Plea counsel testified that told Applicant that initially police believed that the male victim was grazed with a bullet, but told Applicant that they did not have any medical evidence yet. Once additional discovery was



received and it was clear that the male victim was not shot, but hit in the head with the gun, she immediately relayed this information to Applicant. Plea counsel stated that there were an unknown number of shots fired and that witness statements on this point varied. However, it was clear that only the female victim was hit by a bullet. Plea counsel stated that she did not hire a reconstruction expert in this case. Plea counsel reiterated that she met with Applicant over thirty times and sent him numerous letters. Plea counsel stated that although she did not receive the evidence list until shortly before trial, she went and viewed the evidence and relayed all information to Applicant and sent him a copy of everything she received.

On cross examination, plea counsel again stated that she turned over all of the discovery to Applicant and discussed these documents with him. Plea counsel stated that she discussed self-defense, accident, and voluntary manslaughter with Applicant. After the start of the trial, Applicant decided to plead guilty. Plea counsel testified she believed there was a factual basis for the plea. Plea counsel testified that she did not threaten or coerce Applicant to plead guilty, but she was in agreement with the decision. Plea counsel stated that instead of receiving a sentence of thirty year to life if found guilty after trial, Applicant received a negotiated eighteen year prison sentence.

Arthur DeGiovine, investigator for the Public Defender's Office in Charleston, testified that all of the investigation that he conducted was under the supervision of plea counsel. His job included writing and taking reports, viewing the crime scene, and talking to witnesses. Mr. DeGiovine testified that he interviewed all of the witnesses that he could find and served them with subpoenas; however, most of the witnesses were not cooperative. None of these witnesses testified at trial because Applicant pled guilty. Mr. DeGiovine also testified that he interviewed the male victim, but was unable to obtain his medical reports because of HIPPA laws, that this

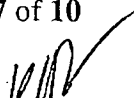


information if received would have to come from the solicitor's office or by court order. Mr. DeGiovine stated that he made reports and submitted them to plea counsel, and that he completed the case file when Applicant pled guilty on September 5, 2012. He stated that he gave the file to the paralegal and closed his file. Lastly, Mr. DeGiovine testified that he relayed all of this information to plea counsel and that this information should be in a written report.

Initially, this Court notes Applicant pled guilty after the start of his jury trial. This Court finds credible plea counsel's testimony after the start of the trial Applicant decided to accept the plea deal and felt at peace with the decision. Applicant told the plea judge that he understood the trial rights he was waiving in pleading under Alford and was satisfied with counsel.

This Court finds Applicant failed to meet his burden of proving plea counsel did not provide him with discovery materials. As to Applicant's specific allegation that plea counsel failed to disclose a witness statement, plea counsel testified that the male victim did not give a statement to the police, but that her investigator was able to obtain a statement from him. Plea counsel stated that while she did not give Applicant her attorney work product, she did share all information she obtained with him. Plea counsel testified she sent a copy of everything she received in discovery to Applicant. Plea counsel stated the exhibit list was received shortly before trial and while she was not sure if she sent the actual list to him at the time, he was made aware of the information it contained. This Court finds plea counsel's testimony is credible. This Court finds the Applicant failed to provide any evidence of discovery materials that were not disclosed to him by plea counsel.

This Court finds Applicant failed to meet his burden of proving plea counsel erroneously advised him to plead guilty. Plea counsel testified that she met with Applicant over thirty times and reviewed the charges, sentence ranges, possible defenses, and discovery with Applicant. Plea



counsel advised Applicant of the State's position on the self-defense and accident defenses and that she did not know if a judge would give a charge for self-defense or accident. Plea counsel testified that it was Applicant's decision to plead guilty and that she did not coerce or threaten him to plead guilty. This Court finds plea counsel's testimony credible. The plea transcript further refutes Applicant's argument. This Court also finds the Applicant failed to demonstrate plea counsel coerced or pressured him to plead guilty. Applicant stated he was satisfied with counsel and had no complaints to make against anyone. Applicant also agreed with the facts as recited by the assistant solicitor. While Applicant may not have been satisfied with the likely potential application, or lack thereof, of various defenses to the facts of his case, plea counsel advised him of this, the charges he was facing, and the possible sentences. See Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (finding that, before a defendant can enter a guilty plea, he "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived"). Applicant has failed to articulate how plea counsel erroneously advised him to plead guilty.

This Court find Applicant failed to prove that plea counsel did not investigate critical evidence. Plea counsel testified that she received and reviewed all discovery materials. Plea counsel also testified that she had her investigator, Arthur DeGiovine, conduct an independent investigation. Mr. DeGiovine testified that he interviewed all of the witnesses he could find and served them with subpoenas for trial. This Court finds plea counsel and Mr. DeGiovine's testimony to be credible. This Court finds Applicant has failed to articulate what more plea counsel could or should have done in preparing or investigating his case. See Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for



trial); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds Applicant has failed to prove that plea counsel did not adequately communicate with him. Plea counsel testified that she met with applicant over thirty times prior to the start of trial, which turned into a guilty plea. Plea counsel testified that she reviewed all of the discovery with Applicant, discussed with him his version of the facts and the State's version, updated Applicant immediately when it was learned that the male victim had not been shot, but was instead hit by the gun itself, and communicated to him the contents of the exhibit list. Plea counsel also reviewed with Applicant the charges and possible defenses. This Court finds plea counsel's testimony credible. Applicant has failed to prove plea counsel failed to communicate with him concerning the charges, discovery, or other matters relevant to Applicant's case.

Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel's performance. This Court concludes Applicant has not met his burden of proving plea counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### **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, this Court finds Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.

**CONCLUSION**

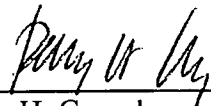
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Plea counsel was not deficient and Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 14<sup>th</sup> day of March, 2016.

  
\_\_\_\_\_  
Perry H. Gravely  
Presiding Judge  
Ninth Judicial Circuit

Charles, South Carolina.



ALAN WILSON  
ATTORNEY GENERAL

March 28, 2016

The Honorable Julie J. Armstrong  
Clerk of Court, Charleston County  
100 Broad St. Ste. 106  
Charleston, SC 29401-2210

**Re: Kevin E. Heriott, #313862 v. State of South Carolina**  
**2013-CP-10-1084**

Dear Ms. Armstrong:

Enclosed please find the signed original **Order of Dismissal** in the above captioned case for filing in your office. If you have any questions or concerns, please contact me at (803) 734-3737.

Sincerely,

J. Rutledge Johnson  
Assistant Deputy Attorney General

JRJ/jyb

cc: Kevin E. Heriott, #313862