STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Kevin C. Casey, #349715, Applicant, v. State of South Carolina, Respondent.	)	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT 2012-CP-42-4389 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 18, 2012. Respondent made a timely Return on or about January 9, 2014. The Court convened an evidentiary hearing into the matter on June 12, 2015, at the Spartanburg County Courthouse. Applicant was present at the hearing and proceeded *pro se*.[1] Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Applicant testified on his own behalf. Richard Warder, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the pleadings in this matter, the plea transcript, and Applicant's Exhibits.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Spartanburg County Grand Jury indicted Applicant in November 2011 for two counts each of felony DUI resulting in death and reckless homicide (2011-GS-42-6361, -6362) and one count of felony DUI resulting in great bodily injury (2011-GS-42-6363). Richard H. Warder, Esquire ("plea counsel"), represented Applicant. On

[1] The Honorable Roger L Couch relieved Applicant's appointed counsel by order filed November 24, 2014.

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February 14, 2012, Applicant pled guilty to two counts of felony DUI resulting in death and one count of felony DUI resulting in great bodily injury. In exchange for the plea, the State dismissed the two counts of reckless homicide. The Honorable J. Mark Hayes II, sentenced Applicant to concurrent terms of twenty-five (25) years for each count of felony DUI resulting in death charges and fifteen (15) years for felony DUI resulting in great bodily injury. Applicant did not appeal his plea or sentences.

ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
   a. Counsel failed to insure that Applicant understood the waiving of his three constitutional rights,
   b. Counsel failed to apprise Applicant of the sentencing consequences of his guilty plea,
   c. Counsel failed to place Applicant's plea agreement on the record,
   d. Counsel failed to use Applicant's medical history as mitigating evidence,
   e. Counsel failed to put the State's case through adversarial testing,
   f. Counsel failed to advise Applicant of the lesser included offenses which the jury would be instructed on if he went to trial,
   g. Counsel failed to challenge the chain of custody of Applicant's blood,
   h. Counsel failed to challenge the fraudulent indictments,
   i. Counsel failed to interview victim & witnesses,
   j. Counsel advised Applicant to plead guilty when valid defenses existed to proceed to trial;
2. Involuntary guilty plea, in that;
   a. Plea was unlawfully induced and not made voluntarily or with a complete understanding of the nature of the charge and the inadequacies of the plea potential.

On November 1, 2012, Applicant filed an amendment to his application vaguely alleging prosecutorial misconduct.

On November 9, 2012, Applicant filed an amendment vaguely alleging after-discovered

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evidence.

On February 13, 2015, Applicant filed an amendment re-alleging his grounds of ineffective assistance of counsel and involuntary guilty plea.

At the outset of the evidentiary hearing before this Court, Applicant made a motion for continuance based upon his desire to subpoena three witnesses and a victim's toxicology report. Respondent objected, noting Applicant's case had been scheduled at least three times following his prior request to relieve appointed counsel and Applicant had ample opportunity to pursue the subpoenas. This Court denied the request for a continuance, but indicated the record would be left open for ten days following the hearing for Applicant or Respondent to supplement the record as needed. The Court received ~~no supplementation within that time frame~~. supplementary materials from the Applicant. RSS.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the 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)). This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the evidentiary 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.

Ineffective Assistance of Counsel

The Court finds Applicant failed to meet his burden to prove plea counsel ineffective. To succeed on a claim of ineffective assistance of plea counsel, 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." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

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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. To meet his burden on this second prong, Applicant must show there is a reasonable probability that, but for plea counsel's actual errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

In support of his allegations, Applicant introduced as Applicant's Exhibit #1 a group of documents received through discovery: (a) SC Highway Patrol report; (b) Report from Greenville Hospital System; (c) Simmons' statement; (d) Simmons' statement; (e) major incident form; (f) transport sheet; (g) position of the vehicle; (h) traffic report indicating Simmons' as the driver.

Applicant testified that he believed plea counsel was ineffective for failing to properly investigate the case, in light of the question regarding the identity of the driver of the vehicle and for failing to interview witness Donald Moore.

Applicant testified that he first met with plea counsel on November 28, 2011, at which time

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plea counsel discussed the possibility of Applicant pleading guilty to a charge for a ten year sentence. Applicant testified that plea counsel indicated he would return to discuss the plea with Applicant on February 1, 2012. Applicant testified that on February 1, he signed a sentencing sheet for a ten year sentence, but then received a sentence of twenty-five years at his plea. Applicant testified that at his plea, the facts of the case were originally presented by the State that Simmons was the driver of the vehicle Applicant hit. However, Applicant testified Simmons informed Judge Hayes at the plea that he was a passenger. Applicant testified that he would not have pled guilty had he known Simmons was not the driver because Applicant believed the driver of the vehicle was partially at fault for the accident. Applicant also testified that he would not have pled guilty had he known he was not going to receive a sentence of ten years.

Plea counsel testified he was retained in November 2011 to represent Applicant and visited with Applicant at least three times before the plea. Applicant introduced a copy of the visitation log as Applicant's Exhibit #2. Plea counsel testified it was possible he met with Applicant four or five times, but could not recall exactly and did not believe the visitation log accurately reflected every visit. Plea counsel testified he received all discovery materials and reviewed them with Applicant. Plea counsel testified the case consisted of bad facts for Applicant because he hit the victims while out on bond for a third charge of driving under the influence. Additionally, plea counsel testified Applicant hit the victims while traveling over ninety miles per hour in a forty-five mile per hour zone and his blood alcohol level was approximately .21. Plea counsel testified he discussed with Applicant the possibility of presenting a defense that showed the driver of the other vehicle was possibly drinking and the vehicle was possibly missing a light, but ultimately advised Applicant it was not a viable defense. Plea counsel testified he did not believe that the inconsistencies regarding whether or not Simmons was the driver or if any of the victims had consumed alcohol would have helped Applicant had they proceeded to trial. Plea counsel testified that there was never an offer of ten years and the State never made any

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offer. Plea counsel testified he shared with Applicant the fact they could present Applicant's job stability and family information to the judge and hope for a lower sentence, so Applicant was aware his sentence was decided by the judge.

Applicant's allegation trial counsel failed to advise him of his rights is without merit. Applicant's testimony as to this issue lacks credibility, while plea counsel's testimony is credible. Plea counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation. Furthermore, Judge Hayes thoroughly reviewed with Applicant the privilege against self-incrimination, the right to a jury trial, and the right to confront his accusers. Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000) (citing Boykin v. Alabama, 395 U.S. 238 (1969)). The record reflects Applicant was fully aware of the rights he waived by pleading guilty.

Also without merit are Applicant's allegations regarding the sentence he expected to receive and his allegation that the State extended a ten-year plea offer. Regarding these allegations, the Court finds plea counsel's testimony credible and gives it great weight. The Court finds Applicant's testimony he was told he would receive a ten year sentence to be not credible. Applicant presented no credible evidence a ten year plea offer existed. Furthermore, plea counsel advised Applicant of the plea negotiations and of the possible sentencing range for his charges. Finally, Judge Hayes informed Applicant of the range of possible sentences, and Applicant acknowledged at the plea colloquy that he understood the terms of his plea. See Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011) (possible misconceptions about the possible sentence cured by plea colloquy (citations omitted)). The record reflects Applicant was fully aware of the possible sentence consequences.

Applicant's allegation plea counsel failed to utilize his medical history in mitigation is without merit. Applicant presented no evidence of his medical history at the evidentiary hearing. Accordingly, the Court will not speculate as to what effect this information would have had on sentencing. Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (finding of prejudice cannot be based on "pure

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conjecture"). Furthermore, plea counsel presented a through and compelling mitigation case at the plea hearing.

The Court finds no merit to Applicant's allegations that plea counsel failed to subject the State's case to adversarial testing and that plea counsel failed to challenge the chain of custody for his blood sample. The record reflects plea counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation. The record further reflects Judge Hayes informed Applicant he was waiving any potential challenges to the evidence by entering his plea. See Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (knowing and voluntary plea waives non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence (citing Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975); State v. Fuller, 254 S.C. 260, 174 S.E.2d 774 (1970))).

Similarly without merit are Applicant's allegation that plea counsel failed to advise on lesser included offenses and encouraged a plea when there were valid defenses. Regarding these allegations, the Court finds plea counsel's testimony credible and gives it great weight, while finding Applicant's testimony not credible. Plea counsel advised Applicant on potential defenses including the victim's intoxication and faulty equipment. Furthermore, Judge Hayes informed Applicant he was waiving any potential defenses by entering his plea. Whetsell, 276 S.C. at 297, 277 S.E.2d at 892. Finally, Applicant failed to demonstrate he would have been entitled to have the jury consider any potential lesser-included offense had he gone to trial. See Hill, 474 U.S. at 59 ("[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial."); see also Arnette v. State, 306 S.C. 556, 557, 413 S.E.2d 803, 804 (1992) (counsel not ineffective for failing to advise of potential defense where no evidence exists to support the defense).

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Applicant's allegation that plea counsel failed to challenge the fraudulent indictments is without merit. Applicant presented no evidence to rebut the presumption of regularity in grand jury proceedings. State v. James, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996) (absent evidence to the contrary, Court must presume a properly returned indictment is valid (citations omitted)). Furthermore, Applicant has not alleged he was not aware of the charges against him. State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005) (indictment is notice document). This Court will not indulge this oft repeated, but never substantiated, claim that the grand jury did not issue a proper indictment.

Finally, the Court also rejects as meritless, Applicant's argument that plea counsel failed to investigate the victim and witnesses. Regarding this allegation, the Court finds credible plea counsel's testimony that he was fully aware of the facts of Applicant's case. Applicant failed to show that any additional investigation would have led Applicant to proceed to trial. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."). Furthermore, Applicant presented no testimony at the evidentiary hearing to support his allegations, and has thus failed to show how these witnesses would have affected his decision to enter a guilty plea. Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005); Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 810 (1998); Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); see also Clark, 315 S.C. at 388, 434 S.E.2d at 267.

Regardless of the above analysis, the Court further finds overwhelming evidence of Applicant's guilt precludes a finding of any prejudice from plea counsel's actions. See Hutto v. State, 387 S.C. 244, 249, 692 S.E.2d 196, 198 (2010) ("No prejudice occurs, despite deficient performance, when there is overwhelming evidence of guilt." (citing Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009))); Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (applicant cannot prove

prejudice where there is overwhelming evidence of guilt). Simply put, Applicant has not shown any alternative actions of counsel would have led him to reject the State's plea offer and proceed to trial. Hill, 474 U.S. at 59; see also Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009) (applicant must show "something that would have affected counsel's advice to [the applicant] to accept the plea bargain offered or that would have caused [the applicant] to decline to accept it").

Involuntary Guilty Plea

The Court finds Applicant failed to meet his burden to show his guilty plea was involuntary. "To knowingly and voluntarily enter a plea of guilty, all that is required is that a defendant have a full understanding of the consequences of his plea and of the charges against him." Simpson v. State, 317 S.C. 506, 508, 455 S.E.2d 175, 176 (1995) (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991)). Furthermore, a defendant must only be informed of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Roddy, 339 S.C. at 33, 528 S.E.2d at 421. Furthermore, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)). An applicant alleging his guilty plea was

induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56.

Based on the testimony at the evidentiary hearing in the plea transcript, Applicant was well aware of the charges and potential sentences he faced. Applicant had several opportunities to review discovery materials and discuss the case with plea counsel. As noted above, Applicant failed to demonstrate deficiency or resultant prejudice from plea counsel's performance.

This Court further finds that the record directly refutes Applicant's claims he was unaware of the consequences of his plea. Applicant informed the plea court that he was aware of the charges and of the potential sentences he faced. Applicant further stated that he wanted to proceed with the guilty plea and waived all of the attendant rights. Applicant failed to credibly demonstrate his plea was not knowingly and voluntarily entered with full knowledge of the consequences thereof.

Prosecutorial Misconduct

Applicant also alleged at the hearing that the State committed prosecutorial misconduct by initially presenting the fact that Simmons was the driver, but then changing course at the plea to indicate Simmons was a passenger. This Court finds this allegation lacks merit. Applicant presented no evidence, other than his own self-serving testimony, to show any misconduct occurred. Furthermore, this information was relayed at the guilty plea, and Applicant voiced no complaints about this information at that time. Finally, the Court agrees with plea counsel's observation that information about who was driving the motorcycle was not relevant to any defense Applicant could have presented.

CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant wholly failed to prove the first prong of the Strickland test – that plea counsel failed to

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render reasonably effective assistance under prevailing professional norms. Applicant has also wholly failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. His plea was entered knowingly, intelligently, freely, and voluntarily, with full understanding of the consequences. No evidence was presented to show the State engaged in any form of misconduct. 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 17 day of July, 2015.

R. SCOTT SPROUSE
Presiding Judge

Walhalla, South Carolina

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July 22, 2015

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Kevin C. Casey #349715

Applicant

VS

Stall

Respondent

IN THE COURT OF COMMON PLEAS

7TH JUDICIAL CIRCUIT

CASE #: 2012CP42-4389

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Order of Dismissal
In this action dated 7-17-2015 on 7-22-15

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Cobb Law Offices

Kevin Casey

7-22-15
(Date)

Kevin Casey
(Signature)