THOMPSON DEFENSE FIRM

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August 23, 2016

Daniel Shearouse
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

RE: Eli J. Torrence #00356338 v. State of South Carolina
Case No.: 2014-CP-39-0397

Daniel,

Enclosed is the order of dismissal, notice of appeal, and request for transcript. I have enclosed an extra copy of the notice and request. Please file the Notice of Appeal and request, and return a clocked copy of each in the envelope provided.

Please feel free to contact our office should you have any questions.

Lacey Thompson
Attorney at Law

CC: Patrick Schmeckpeper

Enclosure

RECEIVED

AUG 26 2016

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
SUPREME COURT

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2014-CP-39-0397

The State, ...Respondent.

v.

Eli Torrence.....Appellant.

NOTICE OF APPEAL

Eli Torrence appeals the denial of post-conviction relief in this case. The Order of Dismissal was served on Appellant on August 16, 2016.

Lacey Thompson
516 29th Ave. North
Myrtle Beach, SC 29577
Phone: 843-444-6122
Attorney for Appellant

Other Counsel of Record:
Patrick Schmeckpeper, Esquire
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent

RECEIVED

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S.C. SUPREME COURT

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THE STATE OF SOUTH CAROLINA
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The State, ...Respondent.

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal and copy of the request for transcript to the following recipients by depositing a copy of it in the United States Mail, postage prepaid, on August 23, 2016, addressed to:

Other Counsel of Record:
Patrick Schmeckpeper, Esquire
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent

Pickens County Commons Pleas
Clerk of Court
PO Box 215
Pickens, SC 29671

Daniel Shearouse, Clerk of Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

Mindi Ellison

August 23, 2016

ALAN WILSON
ATTORNEY GENERAL

July 26, 2016

The Honorable Harold P. Welborn, Jr.
Clerk of Court, Pickens County
Post Office Box 215
Pickens SC 29671-0215

Re: **Eli James Torrence v. State of South Carolina**
2014-CP-39-0397

Dear Mr. Welborn:

Enclosed please find the original **Order of Dismissal** signed by the Honorable R. Knox McMahon in the above-captioned case. Upon filing, please serve a copy of the order on the applicant and return a clocked copy to me for our files.

Sincerely,

Patrick Schmeckpeper
Assistant Attorney General

PLS/ah
Enclosure(s)

STATE OF SOUTH CAROLINA COUNTY OF PICKENS Eli James Torrence, S.C.D.C. No. 356338 Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT **C.A. No. 2014-CP-39-0397** **ORDER OF DISMISSAL** **(with prejudice)**

2016 AUG 8 AM 11 25
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on April 2, 2014. Respondent filed its Return on August 25, 2014. An evidentiary hearing into the matter was convened on April 18, 2016, at the Pickens County Courthouse. Applicant was present at the hearing and was represented by Bobby G. Frederick, Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Pickens County Clerk of Court's orders of commitment. The Pickens County Grand Jury indicted the Applicant at the December 2012 term of General Sessions for three counts of first-degree burglary (2012-GS-39-2704, -2705, -2712) and grand larceny (2012-GS-39-2713); and at the January 2013 term for two counts of second-degree burglary (2013-GS-39-0065, -0068) and two counts of grand larceny (2013-GS-39-0066, -0067). The Applicant also waived presentment to the Grand Jury on the charges of escape (2013-GS-39-2052) and willful injury to courthouse or jail (2013-GS-39-2053). John W. DeJong, Esquire represented the Applicant. On July 29,

2013, the Applicant pled guilty to three counts of second-degree burglary (non-violent), two counts of second-degree burglary (violent), three counts of grand larceny ($2000-$10,000), escape, and willful injury to courthouse or jail. The Honorable Letitia H. Verdin sentenced the Applicant to ten years on each count of second-degree burglary (non-violent), fifteen years on one count of second-degree burglary (violent),[1] five years on each count of grand larceny ($2000-$10,000), ten years for escape, and three years for willful injury to courthouse or jail. Judge Verdin levied a sentence of fifteen years suspended with five years of probation for the second count of second-degree burglary (violent) and ordered it to be consecutive to the sentence for the first count of second-degree burglary (violent). The Applicant did not appeal.

Allegations

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

1. Ineffective assistance of counsel.
   a. "Counsel failed to wait on Rule 5 Brady Documents before advising defendant to take plea."
   b. "Legal counsel didn't fully inform me of the decisions being made on my case."
   c. "Counsel advised defendant to take a plea of guilty on charges where 'no' evidence of Brady documents had been viewed by the defendant or counsel."
2. Involuntary guilty plea.
   a. "Time exceeded the agreement of 0-15 year open plea arrangement."
3. "[N]ever knowing, voluntarily, or intelligently enter a plea of guilty to the escape charge."

Applicant subsequently submitted through counsel an amended application raising the following additional allegations:

1. Counsel was ineffective for failing to object to the amendment of Applicant's charges to burglary second degree under subsection (B), where Applicant had no prior notice of the change and did not waive

[1] 2012-GS-39-2705.

indictment as to burglary second degree, subsection (B), and plea counsel was ineffective for failing to communicate with Applicant to explain that he was pleading guilty to un-indicted offenses that was [sic] not a lesser-included offense of the charges for which he had been indicted.

2. Counsel was ineffective for failing to object to the State's recommendation to the judge that Applicant's sentence be at least fifteen years, followed by probation.

At the evidentiary hearing, Applicant waived all allegations other than ineffective assistance of counsel for allowing Applicant to plead guilty to burglary, second degree (violent), and that he was serving an unlawful sentence for escape.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject guilty pleas, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court makes the following findings of fact and conclusions of law based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test 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, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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, 386 S.E.2d at 625. Because Applicant pled guilty, he must show 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, 59 (1985).

Sufficiency of Indictment

This Court first finds Applicant has failed to meet his burden to show counsel ineffective for failing object to the sufficiency of the indictment. Applicant has failed to show any actual deficiency or otherwise meritorious reason for objecting to the indictment. Burglary, second degree, is a lesser included offense of burglary, first degree. See State v. Wright, 354 S.C. 48, 54, n.2, 579 S.E.2d 538, 541, n.2 (Ct. App. 2003) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); see also State v. Burton, 356 S.C. 259, 264, 589 S.E.2d 6, 8

(2003) (when an offense has traditionally been considered a lesser included offense of the greater offense charged, it will continue to be construed as a lesser included offense).

Accordingly, Applicant was not required to waive indictment with respect to his guilty plea for burglary, second degree, because it was a lesser included offense of burglary, first degree – for which he was validly indicted. See State v. Myers, 313 S.C. 391, 393, 438 S.E.2d 236, 237 (1993) (waiver of indictment not required where the charge is a lesser included offense of the crime charged in the indictment). Applicant has therefore failed to show counsel was deficient in failing to challenge the sufficiency of the indictment, where there was no reasonable basis on which to base an objection. This Court would also point out that, even assuming there were objectionable issues with the indictment, Applicant received the benefit he bargained for. See Rollison v. State, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001) (plea agreements are governed by contract principles). Accordingly, counsel's actions were objectively reasonable – the reduced offense was significantly less serious than the original.

Applicant has also failed to meet the second prong of the Strickland analysis and show that he suffered any resulting prejudice from counsel's purported deficiency. In order to prove prejudice in the context of a guilty plea, an applicant must show that but for counsel's alleged unprofessional errors, he would have refused to plead guilty and insisted on going to trial. After reviewing the record and listening to testimony presented at the evidentiary hearing, this Court finds Applicant has failed to make such a showing. In spite of the fact that Applicant's conduct – as admitted during the plea hearing[2] – warranted the charge of first degree burglary, he was

[2] The facts as recited by the solicitor indicated Applicant and several co-defendants broke into eight houses and stole a number of objects, including firearms. Plea Tr., p. 7, l. 4-11. Applicant admitted that he "did break into some homes and steal some stuff." Plea Tr., p. 17, l. 21-22. Applicant further stated that he "did admit to what [he had] done and notify who else is also involved in the case to help further the investigation." Plea Tr., p. 18, l. 2-4. Counsel testified at the evidentiary hearing that Applicant gave a confession to law enforcement.

offered a deal that allowed him to avoid a potential life sentence.[3] In fact, counsel testified that the potential sentence on first degree burglary was the reason Applicant ultimately pled guilty. This Court finds counsel's testimony credible.

Applicant's contrary testimony – that he would have insisted on going to trial if he had only known that he was pleading to entering a building, rather than a dwelling, is nonsensical. The primary benefit of Applicant's plea deal was that he was allowed to plead to entering a building rather than a dwelling. Given the aggravating circumstances involved and potential for a life sentence, this benefit was substantial. After taking into account that substantial benefit, as well as the fact that Applicant confessed and cooperated with police before pleading guilty, this Court finds his testimony is also not credible. As there is nothing else in the record to support this allegation, it is hereby denied and dismissed.

UNLAWFUL SENTENCE

Applicant's next allegation appears to be that because the plea judge did not make an oral pronouncement of his sentence for escape, his guilty plea should be vacated on that charge.[4] This argument is entirely without merit. The sentencing sheet for escape clearly states what the sentence is, and is signed by the judge, counsel, **and Applicant**. See Tants v. South Carolina Dept. of Correction, 408 S.C. 334, 344, 759 S.E.2d 398, 403 (2014) (the sentencing sheets were signed by the judge and both attorneys without objection and are assumed to memorialize the judge's intention no less than what was pronounced from the bench); see also Finley v. State, 219 S.C. 278, 284, 64 S.E.2d 881, 883 (1951) ("A sentence should be so complete as to need no construction of a court to ascertain its import"). The sentencing sheet clearly memorializes the

[3] "Burglary in the first degree is a felony punishable by life imprisonment," although "[t]he court, in its discretion, may sentence the defendant to a term of not less than fifteen years." S.C. Code Ann. § 16-11-311 (2010).
[4] Applicant also appears to be alleging he was "affirmatively misled" by the plea judge with respect to the escape charge. Applicant has not presented any credible evidence that he was misled by the plea judge.

judge's intent to sentence Applicant to ten years, concurrent to his other offenses, for escape. Applicant has not made any other actual claim or allegation that his sentence was otherwise unlawful.[5] Accordingly, this allegation is denied and dismissed with prejudice.[6]

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.

[Signature follows]

[5] Applicant has not alleged any other deprivation or constitutional violation as a result of the judge's failure to make an oral pronouncement of his sentence. C.f. Tant at 344, 759 S.E.2d at 403 (applicant's constitutional right to be present at every stage of his proceeding not implicated where no allegation that his sentence was increased in the sentencing sheets). Nor has Applicant alleged his sentencing sheets were ambiguous. C.f. Bordeaux v. State, 410 S.C. 495, 500, 765 S.E.2d 143, 143 (2014) (unambiguous sentencing pronouncement will control over an ambiguous sentence, whether oral or written, so long as giving effect to that pronouncement does not result in an illegal sentence or a deprivation of a defendant's constitutional rights); see also Tant, at 337, 759 S.E.2d at 399 (Department of Corrections generally confined to the face of the sentencing sheets in determining the length of a sentence, but may refer to the sentencing transcript if there is an ambiguity in the sentencing sheets).

[6] This Court would also note that the remedy Applicant is requesting is inappropriate due to the nature of his allegation. Because Applicant's only argument is an error in sentencing regarding escape, the correct remedy is not that the offense be vacated, but rather that the matter be remanded for resentencing. See Boan v. State, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010).

CONCLUSION

Based on the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 29 day of July, 2016.

R. Knox McMahon
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

Thompson Defense Firm
519 29th Ave. North
Myrtle Beach, SC 29577

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