Kellum W. Allen, Esq.*
Kellum@TheAllenLawFirm.org

David K. Allen, Esq.
David@TheAllenLawFirm.org

Mailing Address:
P.O. Box 3241
West Columbia, SC 29171

Physical Address:
519 Meeting Street
West Columbia, SC 29169

Office: (803) 764-2328
Toll Free: (844) 839-5170
Fax: (803) 764-2548

THE ALLEN LAW FIRM, P.A.

August 23, 2016

The Supreme Court of South Carolina
ATTN: Daniel Shearouse, Clerk of Court
PO Box 11330
Columbia, SC 29211

Re: Notice of Intent to Appeal from:
Brice Di'Von Coley, #363771, v. State of South Carolina;
Case Number: 2015-CP-40-06253

Dear Sir or Madam:

I was Court Appointed, and I expect appellate defense will probably handle the appeal. Enclosed please find a Notice of Appeal along with a Proof of Service and a copy of the Order being appealed. Also enclosed is a copy which I respectfully ask you to stamp as "Received" and return to me in the enclosed stamped envelope.

Thank you for your assistance.

Sincerely:

David K. Allen, Esq.

DKA/idi
Enclosures

cc: Mr. Brice Coley
Jessica Kinard, Esq.

ORIGINAL

THE SOUTH CAROLINA SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No.
(2015-CP-40-06253)

RECEIVED

AUG 26 2016

S.C. SUPREME COURT

Brice Di'Von Coley,.....Appellant

v.

State of South Carolina, ...Respondent.

NOTICE OF INTENT TO APPEAL

Appellant appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed August 16, 2016, sent by the Clerk of Court on August 17, 2016 and received by Counsel on August 22, 2016. Appellant hereby files and serves this Notice of Intent to Appeal by regular mail today, August 23, 2016.

THE ALLEN LAW FIRM, P.A.

David K. Allen
Attorney for Applicant
3241 P.O. Box (29171)
519 Meeting Street
West Columbia, SC 29169
(803) 764-2328
(803) 764-2548 (fax)

Jessica Kinard, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

ORIGINAL

THE SOUTH CAROLINA SUPREME COURT

APPEAL FROM RICHLAND COUNTY
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S.C. SUPREME COURT

Brice Di'Von Coley,.....Appellant

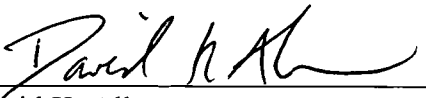
v.

State of South Carolina, ...Respondent.

PROOF OF SERVICE

I certify that the foregoing was served on the persons listed below by placing same in the U.S. Mail postage prepaid this day, August 23, 2016.

THE ALLEN LAW FIRM, P.A.



David K. Allen
Attorney for Applicant
3241 P.O. Box (29171)
519 Meeting Street
West Columbia, SC 29169
(803) 764-2328
(803) 764-2548 (fax)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	2015-CP-40-06253
Brice Di'Von Coley, S.C.D.C. No. 363771	)	
	)	**ORDER OF DISMISSAL**
v.	)	
	)	
State of South Carolina	)	
	)	
Defendant.	)	
	)	

This matter comes before the Court by way of an application for post-conviction relief filed October 15, 2015 ("the Application"). Respondent made its return on or about February 17, 2016. The Court convened an evidentiary hearing into the matter on July 14, 2016, at the Richland County Courthouse. Applicant was present at the hearing and represented by David Kellum Allen, Esquire. Johnny E. James Jr., Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's counsel, Joanna Delany, Esquire and Robert Bank, Esquire, also testified. The Court had before it a copy of the plea transcript, the records of the Richland 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 Richland County Clerk of Court. On January 18, 2013, the Richland County Sheriff's Department sought and obtained an arrest warrant against Applicant for the crime of Murder (2013 A40 10200201). In July 2013, the Richland County Grand Jury

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indicted Applicant for the same (2013-GS-40-04237). Joanna Delaney ("Delaney"), Esquire, initially represented Applicant, but resigned from the Richland County Public Defender's Office prior to the resolution of Applicant's charges. Robert Bank, Esquire ("Bank") thereafter represented Applicant. On April 21, 2015, Applicant entered a straight plea of guilty to the charge as indicted. The Honorable Alison Renee Lee sentenced Applicant to a term of fifty (50) years of incarceration. Applicant did not appeal.

Present Allegations

In his application for post-conviction relief, Applicant alleges he is being held unlawfully for the following reasons:

1. "Ineffective Assistance of Plea Counsel & Counsel"
    a. "Was given new lawyer without notification"
    b. "[N]o time to prepare for plea/trial"
2. "Unduly Harsh Sentence"
    a. "Immaturity, incompetencies associated with youth, negative influence"
3. "Failure to Psychiatric examination"
    a. "Failure to investigate Psychiatric report, investigate medical examiners report"

II. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual, and an applicant's right to contest the validity of a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Therefore, statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975) (overruled on other grounds by U.S. v.Whitley, 759 F.2d 327 (4th Cir. 1985)).

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An applicant "who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial 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." Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993) (Applicant must show advice received from plea counsel was not within the range of competence demanded of attorneys in criminal cases). The Applicant must prove that the "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, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. 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).

III. 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 has reviewed the Clerk of Court's records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

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As a matter of general impression, this Court finds the testimony of Delaney and Bank to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Counsel Failed to Adequately Investigate Applicant's Mental Health

Applicant alleges that Delaney and Bank were ineffective for failing to adequately investigate his mental health history and records. A criminal defense attorney has a duty to investigate, but this duty is limited to a reasonable investigation, which includes, at a minimum, the interviewing of potential witnesses and an independent investigation of the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007). To establish counsel was inadequately prepared for trial due to a failure to investigate, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); 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"); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (relief denied where applicant failed to present witnesses or specific testimony establishing applicant 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) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation could have had any possible effect on the result at trial).

Applicant testified that he had previously seen counselors and psychiatrists for the treatment of behavioral issues; that he spent two (2) months in an inpatient facility in Houston, Texas at around the age of six (6) or seven (7) years of age for the treatment of said behavioral

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issues; and that he had for a time taken prescription medication for the treatment of his behavioral issues. Applicant was unable to remember a diagnosis or the name of his prescriptions. Applicant testified that he suffers from poor sleep and intermittent blackouts where he continues to function but without control or subsequent memory of his actions. Applicant was not using any prescription medication at the time of his arrest, but admitted to using marijuana prior to his arrest as a means to stay calm. Applicant acknowledged that his attorneys had him evaluated by a doctor, but Applicant was unable to explain the purpose or results of that evaluation. Applicant did not call Dr. Knight as a witness at the PCR hearing.

Bank testified that Applicant was evaluated by Dr. Susan C. Knight, a forensic psychologist with the Medical University of South Carolina. Though neither he nor Delaney requested a formal report from Dr. Knight, she clearly communicated her findings that Applicant was criminally competent, though he was likely suffering from marijuana-induced paranoia. Delaney testified that she ordered the mental evaluation of Applicant due to his stated fear of the victim, though Applicant was unable to articulate a reason for his fear. Delaney corroborated the testimony of Bank as to Dr. Knight's findings.

Bank also testified that a private investigator, Joseph Bust, attempted to acquire records and locate persons from Applicant's past that could elaborate upon his mental health or otherwise provide evidence for mitigation. Bank testified that due to Applicant's unfortunately nomadic upbringing, Bust's efforts were fruitless—records could not be found and individuals familiar with Applicant who could be reached were not willing to appear in a way that would benefit his defense.

This Court finds Counsel effectively and adequately investigated Applicant's mental health. Counsels' investigation of Applicant's mental health fell within prevailing professional

norms and demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. The testimony of both attorneys Bank and Delaney demonstrated their knowledge of the findings of Dr. Knight and her conclusion that Applicant was criminally competent. Testimony and the plea transcript show that Bank understood and effectively delivered to the court the useful findings of Dr. Knight's evaluation during his mitigation efforts. Therefore, Applicant has failed to meet his burden of proving that Counsel's performance was deficient in this regard. Furthermore, Applicant did not call Dr. Knight at the evidentiary hearing and thus has failed to show any prejudice rising from the deficiency alleged. Accordingly, this allegation shall be dismissed.

Counsel Failed to Call Expert Witness Dr. Susan Knight at Plea

Applicant also alleges that Bank was ineffective for failing to call Dr. Knight during his guilty plea proceeding. In order to show ineffective assistance of counsel due to counsel's failure to call a witness or witnesses, an Applicant must "produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Dalton v. State, 376 S.C. 130, 142-43, 654 S.E.2d 870, 876-77 (Ct. App. 2007) (quoting Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998)). "Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR." Id. at 143, 654 S.E.2d at 877 (citing Porter v. State, 368 S.C. 378, 386-87, 629 S.E.2d 353, 358 (2006)).

Bank testified that he did not call Dr. Knight to appear at the plea proceeding and that her testimony may have provided some beneficial context, but that he did present her findings to the

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Court in the course of offering mitigation. Delaney agreed that Dr. Knight may have been able to make a more convincing presentation. Dr. Knight was not present at the hearing, did not testify, and no other evidence was introduced to show what her testimony would have been had she testified at Applicant's guilty plea.

This Court finds Counsel's failure to call Dr. Knight as a mitigation expert does not fall below prevailing professional norms. To the contrary, Counsel demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. As previously stated, Bank clearly and effectively delivered Dr. Knight's findings to the court as part of his mitigation efforts. Furthermore, Applicant did not present Dr. Knight at the PCR hearing, nor did Applicant offer any other valid and compelling evidence to show what her mitigation testimony might have been, only the speculation of Bank and Delaney. Therefore, Applicant has failed to meet his burden of proving that Counsel's performance was deficient in this regard. Furthermore, Applicant has failed to show any prejudice rising from the deficiency he alleges. Accordingly, this allegation shall be dismissed.

Inadequate Time to Prepare for Trial

Applicant alleges ineffective assistance of counsel on grounds that that he "[w]as given a new lawyer without notification" who had "no time to prepare for trial[.]" The "brevity of time spent in consultation, without more, [does] not establish that counsel was ineffective." Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980)). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time to prepare. Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878

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(2006) (discussing U.S. v. Cronic, 466 U.S. 648 (1984)); U.S. v. LaRouche, 896 F.2d 815, 823 (4th Cir. 1990). In order to show that counsel was ineffective for failing to move for a continuance, applicant must show what benefits would accrue from additional preparation. Skeen, 325 S.C. at 214, 418 S.E.2d at 131 (discussing Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1992)).

The testimony of every witness at the evidentiary hearing and the records before the Court consistently show that Applicant was appointed counsel through the Richland County Public Defender's Office. Delaney served as Applicant's counsel in that capacity for roughly two years, at which time she resigned in order to accept employment elsewhere. Bank then assumed representation of Applicant shortly before a February 2015 trial date; the trial date was moved to May 2015 shortly thereafter. Bank met with Applicant three (3) times prior to the plea, in addition to Delaney's nine (9) visits, about which she left extensive notes.

Bank testified that neither he nor Applicant believed a trial was likely to end in a favorable outcome, either in terms of guilt or sentencing, and that the focus from early on in Bank's representation was preparing for a plea. Bank retained the notes and materials prepared by Delaney during her time representing Applicant and discussed the case with Delaney. Bank further testified that he explained to Applicant that the reassignment was due only to a personnel change in the Public Defender's Office and not due to any aspect of his case. According to Bank, Applicant's only concern was the upcoming trial date and voiced no complaint or concern about Bank serving as his attorney. Bank admitted that Applicant's case was his first time defending against a murder charge in a leading role, and that he spent longer than usual reviewing the voluminous amount of discovery in the file.

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This Court finds that Applicant has not met his burden of proving ineffective assistance of counsel on either grounds that Bank's assumption of representation was inadequately communicated or on grounds that Bank had inadequate time to prepare for trial. Bank's testimony shows that he did communicate the reason for the change in representation and committed himself to adequate preparation to proceed with representation. Applicant has made no showing of what, if any, additional defenses Bank could have prepared given additional time. Applicant has demonstrated no specific prejudice nor has he identified any specific benefit he could have received given more time. Applicant has not demonstrated that he would have proceeded to trial but for Applicant's failure to request more time to prepare. Therefore, Applicant has failed to meet his burden of proving that Counsel's performance was deficient in this regard. Furthermore, Applicant has failed to show any prejudice rising from the deficiency he alleges. Accordingly, this allegation shall be dismissed.

Applicant Believed He Might Plead to Voluntary Manslaughter

At the evidentiary hearing, Applicant briefly alleged that he hoped to plea to the lesser charge of voluntary manslaughter.[1] Where an Applicant seeks relief from a guilty plea entered upon advice of counsel, he must show that counsel's advice fell below established objective standards and that, but for that error, he would have insisted on proceeding to trial. Roscoe at 20, 546 S.E.2d at 419. Though a defendant must have full understanding of the consequences of his plea and of the charges against him, his own silent error or ignorance, unsupported by the error of either his counsel or the court, is not a ground adequate for relief. See Id., n.6; State v. Lambert, 266 S.C. 574, 579, 225 S.E.2d 340, 342 (1976) (low intelligence or limited education does not preclude a valid guilty plea).

[1] The Court notes that Applicant did not raise this allegation in his original application for post-conviction relief, nor in any subsequent amendment.

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Applicant testified that he understood the plea judge to be lenient and hoped that she would reduce his charge from murder to voluntary manslaughter as part of his straight plea. Bank, during State's cross-examination, indicated that he never suggested such a possibility with Applicant, nor did Applicant ever communicate such an expectation to him. Bank's testimony indicated that negotiations with the solicitor were anything but fruitful and that the only offer available was a plea of guilty to murder with a sentencing range of sixty (60) to eighty (80) years. Neither Bank nor Delaney indicated any willingness of the solicitor to permit Applicant to plead to voluntary manslaughter.

Testimony and the plea transcript show that counsel, as well as the plea judge, advised Applicant of the elements of murder, the potential sentence range of thirty (30) years to life imprisonment, and advised him of all his constitutional rights. During the evidentiary hearing, Applicant could clearly recall his plea proceeding and his statements made at that time. Applicant concurred with both Banks and Delaney that the State's case against him was extremely strong, and this Court agrees.

The Court finds that Applicant knowingly, voluntarily, and intelligently entered a plea of guilty to murder. The Court finds that argument to the contrary based upon Applicant's hope for a reduction in his charge is without merit—no evidence exists in the record to justify that expectation or impute it to erroneous advice of counsel. Counsel demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. Therefore, Applicant has failed to meet his burden of proving that Counsel's performance was deficient in this regard. Furthermore, Applicant has failed to show any prejudice rising from the deficiency he alleges. Accordingly, this allegation shall be dismissed.

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Unduly Harsh Sentence

Applicant alleges that his sentence of fifty (50) years for murder was unduly harsh in light of his immaturity, his youth, and the negative influences in his life. PCR is not a substitute for appeal and issues that could have been raised at trial or on direct appeal are not permitted in an action for post-conviction relief. S.C. Code Ann. § 17-27-20(b); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). Trial court error is not a cognizable claim for PCR. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Thus, this allegation shall be dismissed.

Failure to Investigate Medical Examiner's Report

Lastly, Applicant alleged in his application that Counsel failed to investigate a medical examiner's report. However, no testimony was offered at the evidentiary hearing to precisely identify the report to which Applicant referred, nor is there any evidence regarding any deficiency or prejudice related thereto. To the extent that Applicant was referring to anything other than the findings of Dr. Knight previously discussed, the Court must find that Applicant has abandoned his allegation in this regard and failed to offer any evidence to support either prong of *Strickland*. Thus, this allegation shall be dismissed.

CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the

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appropriate appellate review. *See* Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

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

AND IT IS SO ORDERED this 2 **day of** August**, 2016.**

D. CRAIG BROWN
Presiding Judge
Fifth Judicial Circuit

Florence, South Carolina

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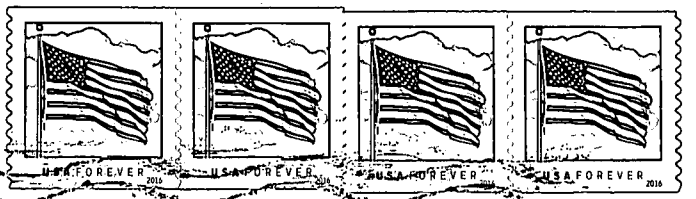

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David K. Allen, Esq.
The Allen Law Firm, P.A.
P.O. Box 3241
West Columbia, SC 29171

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