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November 29, 2016

VIA U.S. POSTAL

Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Michael A. Weatherspoon vs. State of South Carolina
Case No.: 2015-CP-23-5719

Dear Supreme Court Clerk:

I am writing to you regarding the above referenced case. Please find enclosed the Notice of Appeal, Proof of Service, and Order of Dismissal.

If you wish to discuss the foregoing or need additional information please contact me at 864-331-1630.

Thank you.

Sincerely,

Brian P. Johnson

BPJ/lf
cc: Patrick Schmeckpeper, Esquire
Michael A. Weatherspoon

RECEIVED
DEC -2 2016
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE GEORGE C. JAMES, JR.

Case No.: 2015-CP-23-5719

MICHAEL A. WEATHERSPOON, PETITIONER,	)	
vs.	)	**NOTICE OF APPEAL**
STATE OF SOUTH CAROLINA, RESPONDENT.	)	

The Petitioner, Michael A. Weatherspoon, hereby appeals the Honorable George C. James, Jr's November 4, 2016, order denying post-conviction relief to the Petitioner.

A copy of the order on appeal is attached to this notice.

Respectfully submitted,

Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner
SC Bar: 73996

Date: November 29, 2016
Other counsel of record: Patrick Schmeckpeper
P.O. Box 11549/Columbia, SC 29211

STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE GEORGE C. JAMES, JR.

Case No.: 2015-CP-23-5719

MICHAEL A. WEATHERSPOON,

PETITIONER,

vs.

STATE OF SOUTH CAROLINA

RESPONDENT.

PROOF OF SERVICE

I, Brian P. Johnson, Esq., certify that I have today served the within notice of appeal upon the Respondent by depositing a copy in the United States Mail, postage prepaid, addressed to the attorney of record, Patrick Schmeckpeper, at P.O. Box 11549 Columbia, SC 29211.

Respectfully submitted,

Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner
SC BAR: 73996

Greenville, SC
November 29, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Michael A. Weatherspoon, S.C.D.C. No. 352593	)	**C.A. No. 2015-CP-23-5719**
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL** **(with prejudice)**
	)	
State of South Carolina,	)	ENTERED COMPUTER
	)	
Respondent.	)	

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on September 17, 2015. Respondent filed its Return on February 3, 2016. An evidentiary hearing into the matter was convened on June 14, 2016, at the Greenville County Courthouse. Applicant was present and testified in his defense. Applicant's plea counsel, Alex R. Stalvey, Esquire, also testified. Applicant was represented by Brian P. Johnson, Jr., Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The Applicant is incarcerated in the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the October 2013 term of General Sessions for Murder (2013-GS-23-004778), and Attempted Armed Robbery (2013-GS-23-004779). Alex R. Stalvey, Esquire represented the Applicant.

On November 12, 2014, the Applicant pled guilty to voluntary manslaughter and attempted armed robbery. The Honorable Edward W. Miller sentenced the Applicant to concurrent

terms of 15 years for attempted armed robbery and 15 years for voluntary manslaughter. The Applicant did not appeal.

Allegations

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

1. Ineffective assistance of counsel.
   a. "Failure to investigate, prepare for trial, request continuance"
      i. "Fail to object sufficiency of indictment."
   b. "Failure to inform of the right of appeal"
   c. "Failure to ask for a directed verdict"
   d. Failure to offer a proper Instruction of Accomplice liability"
      i. "The court erred in failing to give a mere presence charge as part of that instruction."
2. "Actual Innocence and Insufficiency of Evidence"
   a. "The State doesn't have enough evidence to even come up with a indictment. Never produce my statement they said I gave to them. That statement were used to come up with the arrest warrant."
3. "Prosecutor Misconduct"

At the evidentiary hearing, Applicant proceeded on the allegation that his guilty plea was involuntary and on the allegation that his plea counsel was ineffective for failing to move to quash the indictment and failing to file a direct appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I have 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, I have 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), I have made 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 v. State, 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 instead insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Voluntariness of Plea

The applicant was indicted for murder and armed robbery. After his trial began, he pled to voluntary manslaughter and attempted armed robbery. The applicant claims the plea was involuntary because the plea judge referred to the manslaughter charge as involuntary manslaughter instead of voluntary manslaughter. The penalties for these two offenses are certainly much different, but it is clear from reading the record that the applicant was advised by the court that the maximum time he faced was 30 years, which is the maximum sentence for voluntary manslaughter. Additionally, the negotiated sentence was 15 years, which is far in excess of the 5 year maximum for involuntary manslaughter. It is abundantly clear that whatever label was put on the offense by the plea judge, the applicant knew exactly what he was pleading to. Additionally, the record establishes that the applicant entered a plea to attempted armed robbery, which carries a maximum of 20 years. The negotiated plea was to 15 years, to be served concurrently with the voluntary manslaughter sentence. Therefore, even if the plea judge misstated the voluntary manslaughter offense as involuntary manslaughter, that did not affect the voluntariness of the applicant's plea to attempted armed robbery.

Page 5 of the transcript reflects the applicant pled guilty to both offenses. He was advised that he could continue with his jury trial, that he had the right to confront witnesses, and that he had the right to remain silent; the applicant testified to the plea judge that he understood those rights and wanted to give them up and plead guilty. The plea judge asked the applicant if he was satisfied with his attorney and he said he was.

The case against the applicant was based on accomplice liability (hand of one hand of all). There was no real dispute that the applicant drove his sister to the victim's residence at approximately 9:00 a.m. on the day of the incident. The applicant stayed in the car while his sister

went inside. Once inside the residence, gunplay ensued and both the victim and sister were shot and died of their wounds. The State contended the applicant gave a statement to law enforcement that he and his sister were planning to "hit a lick", i.e., rob the victim of money and guns and that he gave his sister the loaded gun and waited for her in the car. An eyewitness would have testified that the sister attempted to rob the victim and the shooting occurred. There were text messages from the defendant to his sister and several others that he needed money and wanted to hit a lick.

Trial/plea counsel testified that once the trial began, he discovered that the State had not produced some photographs that should have been produced during discovery. He testified that he saw an opportunity to get a pretty good plea deal or get a mistrial. There is no evidence the case would have been dismissed with prejudice for discovery abuse.

During the plea colloquy, the solicitor went over the above facts. The judge asked the applicant if the facts were substantially true, and the applicant replied "[n]o, sir." He stated that he had given his sister a gun that morning and drove her to the victim's residence to sell drugs. He stated that he had no idea that his sister was going to try to rob the victim. At this point during the plea, the judge asked the applicant if he believed there was a substantial likelihood that the jury would believe the State's case. The applicant replied on page 10, lines 9-10, "I would say no, Your Honor, but that's just my opinion." In the response to the same question, the applicant replied on page 12, "I have no idea, sir." A few lines down, he stated in response to the same basic question, "I guess so."

The plea judge then stated that he would accept the plea under North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970), and sentenced the applicant to two concurrent 15 year terms. At that point, the applicant asked if he would get credit for time served, the judge said he would, and the plea was concluded.

The applicant claims he had no idea what an Alford plea was. Trial counsel testified that he never discussed Alford with the applicant and that the applicant probably did not understand what an Alford plea was. In Alford, the U.S. Supreme court recognized the right of someone who is accused of a crime to negotiate with the State. If an Alford plea is entered, the defendant tells the court he is not guilty but that he wants to plead guilty to get the benefit of a deal. The defendant is sentenced as if he had admitted guilt.

In this case, it is clear that the applicant was not formally admitting he was guilty of a crime. It is clear that he wanted to plead guilty to get the benefit of a very good sentencing deal, i.e., the avoidance of a 30 year to life sentence for murder I exchange for a negotiated sentence of only 15 years. While the plea colloquy does not reflect the plea was initially presented as an Alford plea, it is abundantly clear that the applicant wanted to plead guilty and avoid a potential 30 year to life sentence.

I conclude that while the applicant was ignorant as to what an Alford plea was, he received the exact plea bargain he sought. Trial counsel performed extremely effectively in securing this deal for the applicant. When it became apparent that the State had not complied with discovery rules, counsel saw and took advantage of the opportunity to get a good result for his client. I conclude that counsel would have been ineffective if he had **not** sought this deal for the applicant and that he would have been ineffective had he tried to have the plea vacated based on his client's ignorance of Alford. Even if trial counsel was ineffective for not explaining Alford to the applicant, there is absolutely no credible evidence that the applicant would not have pled guilty had he known exactly what an Alford plea was. See Kolle v. State, 386 S.C. 578, 588, 690 S.E.2d 73, 78 (2010) ("A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the 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.").

The applicant testified that trial counsel never told him what he was pleading to or how much time he would get. I disagree, as I find credible trial counsel's testimony that he explained to the applicant that the plea was for two concurrent 15 year sentences for voluntary manslaughter and attempted armed robbery. Trial counsel's performance met and exceeded the objective standard of reasonableness. Even if it did not, there is no credible evidence that (1) had the applicant known what an Alford plea was or (2) had the plea judge used the term "voluntary" instead of "involuntary" when reviewing the manslaughter charge, that the applicant would not have pled guilty.

Failure to Move to Quash Indictment

The applicant claims the indictment was deficient in that it did not allege that he killed the victim. This allegation has no merit, as the indictment sufficiently alleged accomplice liability. He also alleges that trial counsel should have moved to quash the indictment because it was not filed within 90 days of his arrest. This is an apparent reference to Rule 3(c), SCRCrimP. South Carolina's appellate courts have held in State v. Culbreath[1] and State v. Edwards[2] that this rule is administrative and not jurisdictional and does not invalidate a warrant or prevent subsequent prosecution.

[1] 282 S.C. 38, 316 S.E.2d 681 (1984).
[2] 374 S.C. 543, 649 S.E.2d 112 (S.C. Ct. App. 2007) *rev'd on other grounds by* 374 S.C. 504, 682 S.E.2d 820 (2009).

Failure to Appeal

The applicant maintains that he wanted to appeal after the plea was entered. I find credible trial counsel's testimony that he does not recall that the applicant asked him to appeal. I also find credible trial counsel's testimony that if the applicant had asked him to appeal, he would have filed an appeal. Since trial counsel did not file an appeal, I conclude the applicant did not ask him to.

Since there was no objection made at the time of the plea that the plea was not entered freely and voluntarily, the proper mode of attack is through the channel of post-conviction relief proceedings. State v. McKinney, 278 S.C. 107, 292 S.E. 2d 598 (1982).

Even if the applicant wished to appeal from his plea on an issue other than whether the plea was entered freely and voluntarily, the application must still be denied. After a trial, counsel is required to make sure a defendant is made fully aware of his right to appeal. "However, the standard for a guilty plea differs. Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995); Turner v. State, 380 S.C. 223, 670 SE2d 373 (2008).

An extraordinary circumstance requiring counsel to advise his client of the right to appeal from a guilty plea may arise when the defendant inquires about an appeal. The court has concluded that the applicant did not inquire about an appeal, so there is not such an extraordinary circumstance here.

Another extraordinary circumstance may exist in any given case when plea counsel legitimately believes that an appeal would have merit. Here, it is not likely that an appeal from the pleas would have had any merit. The court concludes that there was no reason for trial counsel "to think a rational defendant would want to appeal." See Turner, cited above.

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, I find Applicant failed to present any evidence regarding such allegations. Accordingly, I find Applicant has abandoned any such allegations.

CONCLUSION

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

The 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.

November 4, 2016
Sumter, S.C.

GEORGE C. JAMES, JR.
Presiding Judge
Thirteenth Judicial Circuit

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2015CP2305719

Michael Weatherspoon *vs.* **South Carolina State Of**

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - John C Hayes, III

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

Brian P. Johnson 522 North Church Street Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

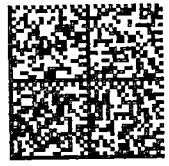
Karen Christine Ratigan PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

Law Office of Brian P. Johnson

522 North Church Street
Greenville, SC 29601



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