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27 2017
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Honorable Doyet Early, Circuit Court Judge

FRANK MIDDLETON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001524

APPENDIX

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Appellate Defender

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Attorney General

South Carolina Commission on Indigent
Defense
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ATTORNEYS FOR RESPONDENT

ATTORNEY FOR PETITIONER

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INDICTMENT 62

State of South Carolina) In General Sessions Court
County of Charleston) Ninth Judicial Circuit

State of South Carolina) Transcript of Record
Vs.) 2012-GS-10-5895
Frank Middleton)
Defendant.)

April 9, 2014

Charleston, South Carolina

B E F O R E:

The Honorable Thomas L. Hughston, Jr., Presiding
Judge

A P P E A R A N C E S:

Greg Voigt, Assistant Solicitor
Attorney For the State

Rhett Dunaway, Assistant Public Defender
Attorney For the Defendant

SHARON L. VIZER
CIRCUIT COURT REPORTER

I N D E X

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****NO EXHIBITS WERE INTRODUCED****

1

Wednesday, April 9, 2014

2

THE COURT: Frank Middleton, is that your name?

3

THE DEFENDANT: Yes, sir, it is.

4

THE COURT: Mr. Middleton, I have here in my hands an indictment. The State claims that you did on or about April 29, 2012 commit what is called a strong armed robbery. Actually, it started out as a charge of armed robbery but the State is willing to let you plead guilty to a lesser charge of strong armed robbery. That means by means of force or intimidation you did steal something from Joseph Hodges. Do you understand that charge?

12

THE DEFENDANT: Yes, sir, I do.

13

THE COURT: What does that carry, up to 10?

14

MR. VOIGT: Strong armed robbery, up to 15, Your

15

Honor.

16

THE COURT: Up to 15. It used to be 10, now it's 15. Do you understand that?

18

THE DEFENDANT: Yes, sir, I do.

19

THE COURT: You don't have to plead guilty to this charge. You have an absolute right to a jury trial, put the State to the test to see if they can convince 12 jurors that you are guilty beyond a reasonable doubt. You don't have to prove you are innocent. They have to prove you are guilty beyond a reasonable doubt. Do you understand that?

25

1 THE DEFENDANT: Yes, sir, I do.

2 THE COURT: Would you like to have a jury trial?

3 THE DEFENDANT: No, sir.

4 THE COURT: How do you wish to plead then, guilty
5 or not guilty?

6 THE DEFENDANT: Guilty, sir.

7 THE COURT: Are you really guilty?

8 THE DEFENDANT: Yes, sir, I am.

9 THE COURT: Has anybody promised you anything or
10 threatened you in any way to get you to plead guilty?

11 THE DEFENDANT: No, sir.

12 THE COURT: Are you pleading guilty then on your
13 own free will?

14 THE DEFENDANT: Yes, sir, I am.

15 THE COURT: I believe you and I will accept your
16 plea.

17 Solicitor?

18 MR. VOIGT: May it please the Court, Your Honor.

19 On April 29th of 2012, a person with a bandanna over his
20 face entered the Five Guys on Savannah Highway with a
21 firearm and asked the cashier to put money into the bag.
22 He left the Five Guys with approximately \$680.

23 As he was leaving the Five Guys some local children
24 from the neighborhood who were going to Five Guys to get
25 themselves a drink, as the gunman was walking out with

1 the bandanna over his face the children were walking in
2 and several of the children noticed Mr. Middleton from
3 the neighborhood as someone they knew from the
4 neighborhood, and they said, Hi, Frank, and he turned
5 around. He was later apprehended at the house where they
6 anticipated him being.

7 He has a fairly extensive record, and I know
8 Mr. Dunaway and I talked about this a bit on the phone
9 today. It's one I have to read to you given the severity
10 of it.

11 THE COURT: All right.

12 MR. VOIGT: The reason for the offer from a -- and
13 after you hear this record you'll wonder why I'm offering
14 what I'm offering, but the reason for the offer was
15 partially due to Mr. Middleton's cooperation in a recent
16 high-end-profile murder case.

17 THE COURT: Well, that's good to learn.

18 MR. VOIGT: He testified on behalf of the State
19 with really nothing much to gain, at least nothing
20 promised. But I've got to go back a few years for
21 Mr. Middleton.

22 THE COURT: Has he been in jail ever since this
23 happened?

24 MR. VOIGT: He has.

25 THE COURT: April 29, 2012.

1 MR. DUNAWAY: It's 709 days, Your Honor.

2 THE COURT: All right.

3 MR. VOIGT: In 1966 he received an 18-year sentence
4 on assault with intent to ravish. In 1973 he was
5 convicted of leaving the scene of an accident. In 1974
6 he was convicted of rape and armed robbery and received a
7 40-year sentence. In 1995 he was convicted of three
8 counts of burglary second nonviolent and received a
9 three-year sentence. In 2002 he was convicted of strong
10 armed robbery and received a 15-year sentence.

11 THE COURT: All right. We'll switch now to the
12 other side. What would you like to tell me on behalf of
13 your client?

14 MR. DUNAWAY: Thank you, Your Honor.
15 Mr. Middleton, Frank Middleton is Beattie Butler's client
16 and I stepped in today trying to take care of this plea.
17 Frank is 66 years --

18 THE COURT: Well, have you had enough time?

19 MR. DUNAWAY: I have. I have.

20 THE COURT: Do you agree with that, Mr. Middleton?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: All right. Go right ahead.

23 MR. DUNAWAY: Frank is 66 years old. He's single.
24 He has no children. He grew up in downtown, in West
25 Ashley. He went through the 10th grade and then obtained

1 his GED in 1987. He's done construction work and he
2 hopes to go back to find construction work.

3 He says he's in pretty good shape. He suffers from
4 high blood pressure but he's been eating the right foods
5 and drinking a lot of water and he said his pressure now
6 -- his pressure now -- I said to Frank, You may live
7 another 66 years, because he's doing great with it, very
8 compliant.

9 His problem in the past has been an alcohol -- I'm
10 sorry, drug use, and while he's been in jail I passed up
11 to the Court a number of different certificates, programs
12 he's participated in. The one that's most significant is
13 this Turning Leaf Program run by Amy Barch.

14 One of the things that Amy does is something that
15 Martha used to do with clients, is try to make them more
16 empathetic about victims. And, Judge, I tell you, when I
17 was handed this file, said see what you can do on this
18 case, I saw armed robbery and my heart just sort of
19 dropped and I thought, Well, what am I supposed to do?

20 When I spoke to Mr. Voigt this morning is before I
21 met Mr. Middleton and I heard his record, and I've got to
22 say, I created a picture in my mind of who I thought I'd
23 meet. And, you know, not being a novice at this
24 sometimes what I picture in my head is accurate.

25 I thanked Mr. Middleton downstairs because in an

1 otherwise scary unpleasant day he made my day. I'm not
2 saying I can't be fooled by somebody but I think I'm less
3 likely to be fooled by some, and Mr. Middleton spoke so
4 well and so from the heart. It was not rehearsed.

5 Plenty of times I get people that just recite sort
6 of the standard lies, and Mr. Middleton -- we had a
7 wonderful conversation and it was very -- a real shot in
8 the arm to me to hear what Amy Barch, who I'm fond of, to
9 hear what Amy Barch had done in Mr. Middleton's life, and
10 I'd ask the Court to take a moment so that Mr. Middleton
11 can speak to that.

12 THE COURT: I'll be glad to hear from
13 Mr. Middleton. Anything you'd like to say?

14 THE DEFENDANT: Yes, Your Honor. As my attorney
15 just stated I have been in trouble most of my life.

16 THE COURT: That's true.

17 THE DEFENDANT: And I have not really had a chance
18 to sit and think about the problem that I created for my
19 victim, my community, and myself and --

20 THE COURT: Well, let's back up a minute and stop
21 there and just think about it. What's the longest time
22 you've ever been in prison?

23 THE DEFENDANT: Eleven years and eight months, sir.

24 THE COURT: All right. Go ahead.

25 THE DEFENDANT: And since I've been in the

1 Charleston County Detention Center I took advantage of
2 most of the programs that they had --

3 THE COURT: Good.

4 THE DEFENDANT: -- to rehabilitate you and give you
5 outlook on your life and some of the things you've done.
6 And one of the things that I truly enjoyed and was glad I
7 took a part in was the Turning Leaf Program.

8 THE COURT: Good. I've heard some good things
9 about that program.

10 THE DEFENDANT: It is a very good program. It's a
11 program that lets you understand that what you do to your
12 fellow man has a direct affect on you. We had a chance
13 to sit and watch victims of various violent crimes come
14 before us and state how the crime took some of their
15 lives and it helped me to understand that it is not my
16 right to take what is not mine. I truly regret my action
17 and I'm very sorry for what I did.

18 But most of all, I'm glad that I got a chance to
19 learn something about myself that I never really did
20 before. And I know that it's easy for me to say that if
21 I get out I will not do drugs, I understand that it's
22 easy to say that while you are in jail but the true test
23 is when you put your feet outside.

24 THE COURT: That's true.

25 THE DEFENDANT: And, you know, it's depending on

1 which direction you take, whether you turn right or you
2 turn left, and I pray and hope that, you know, some
3 consideration would be given to some of the things that
4 I've done to try to help myself and to be a better man
5 when I get out of here.

6 MR. DUNAWAY: Judge, I asked Mr. Middleton about
7 some of his plans if he's released. He said -- he
8 volunteered, he said, Well, I'll go to N. A. meetings.
9 I'm going to continue with that because that's been a
10 problem in the past.

11 I asked about family, where he might live. He says
12 he's got a sister he will live with. His mother and his
13 sister have apparently been to court before and it was
14 through no fault of his. I don't know if it was
15 Mr. Butler's schedule or what happened but he was unable
16 to have the case heard in the past. And his mother is 89
17 and not in good health and what Mr. Middleton told me, he
18 said, I asked my mother -- I asked my sister not to bring
19 my mother back down. I just didn't want her to go back
20 through this. I appreciated that.

21 THE COURT: I do, too.

22 MR. DUNAWAY: Unfortunately, I hear the opposite
23 too often. During the Turning Leaf Program he was
24 introduced to a preacher, I don't have his name, he's a
25 Summerville preacher who approached Mr. Middleton about

1 speaking to at-risk youth. He was so moved by him and so
2 impressed by his change that he wants to use him in some
3 capacity. Not as an employee but as, I guess a mentor to
4 try to turn at-risk youth into something more positive.

5 So, Judge, it's a tall order to ask for but if I'm
6 wrong the solicitor can correct me, I don't believe the
7 solicitor is asking for active time. I think the time
8 that he's done is sufficient, according to the solicitor,
9 but if a period of probation might be granted I don't
10 think we'll be seeing Mr. Middleton back.

11 THE COURT: Let me just go over that record one
12 more time.

13 MR. VOIGT: All right, Your Honor. In 1966 assault
14 with the intent to ravish. There was an 18-year sentence
15 given there. In 1976 leaving the scene of an accident.
16 In 1974 rape and armed robbery, a 40-year sentence was
17 given for those charges. In 1995 three counts of
18 burglary second nonviolent, a three-year sentence
19 concurrent was given on those. In 2002 a 15-year
20 sentence for strong armed robbery.

21 THE COURT: All right. Unfortunately, that record
22 is just so overwhelming, Mr. Middleton, that all the good
23 things you're doing now just dwarf, go very small in
24 comparison to that. I hope you understand that.

25 The sentence on this is that you be confined to the

1 South Carolina Department of Corrections for a period of
2 14 years. You get credit for your jail time toward that.
3 Good luck to you.

4 (WHEREUPON, the hearing was concluded.)

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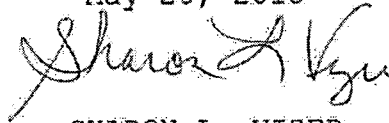
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C E R T I F I C A T E

I, Sharon L. Vizer, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 9th day of April 2014.

I do further certify that I am neither of kin, counsel nor have an interest to any party hereto.

May 28, 2015



SHARON L. VIZER

CIRCUIT COURT REPORTER

FORM 5

STATE OF SOUTH CAROLINA)

County of Charleston S.C.)

2014-CP-10-5043
IN THE COURT OF COMMON PLEAS

FRANK MIDDLETON # 284177)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR
POST-CONVICTION RELIEF

FILED
2014 AUG 20 AM 10:04
JULIE J. HAYSTRONG
CLERK OF COURT

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Kershaw Correctional Inst 4848 Gold Mine Hwy, Kershaw, SC 29067 (MB-15)
2. Name and location of Court which imposed sentence Court of General Sessions, Charleston, SC 29401
3. Name(s) of co-defendant(s) (if any) NONE
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2012-BS 100-5895 Armed Robbery

(b) N/A

(c) N/A

5. The date upon which sentence was imposed and the terms of the sentence:

(a) 04-09-2014

(b) 14 Years

(c) None Violent

6. Check whether a finding of guilty was made:

(a) after a plea of guilty TO Verbal Agreement For Time Served

(b) after a plea of not guilty Also To Recommendation with no Additional Time.

(c) after a plea of nolo contendere N/A

7. Did you appeal from the judgment of conviction or the imposition of sentence?

The Lawyer Knew To Appeal But Did Not?

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. NONE

ii. NONE

iii. NONE

(b) the result in each such Court to which you appealed:

i. NONE

ii. NONE

iii. NONE

(c) the date of each such result:

i. NONE

ii. NONE

iii. NONE

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. NONE

ii. NONE

iii. NONE

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) Im now Applying for PCR. August 5-2014

(c) N/A

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of Counsel.

(b) The Court proceed accepting guilty plea without advising defendant of the consequence.

(c) The Solicitor office did not honor the verbal plea agreement with Counsel.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Counsel informed defendant to take plea deal of time served and recommendation of 20 sentence.

(b) Had defendant known he was going to get 14 years he would not have took the plea.

(c) By not honoring plea deal the Solicitor office reneged on promised to defendant.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? NO

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO

(d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(b) the name and location of the Court in which each was filed:

i. N/A

ii. N/A

iii. N/A

iv. N/A

iv. N/A

(c) the disposition thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(d) the date of each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

N/A

N/A

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. N/A

iii. N/A

(b) the proceedings in which each ground was raised:

i. N/A

ii. N/A

iii. N/A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) N/A
- (b) N/A
- (c) N/A

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? YES
- (b) your trial, if any? N/A
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

- i. Mr. Beattie I. Butler
O.T. Wallace County Building 101 Meeting St. 5th Floor, Charleston, SC 29401
- ii. Mr. Rhet Dannaway
O.T. Wallace County Building 101 Meeting St. 5th Floor Charleston, SC 29401
- iii. N/A
N/A

(b) the proceedings at which each such attorney represented you:

- i. Preliminary hearing.
- ii. Guilty Plea.
- iii. NA
N/A

19. State clearly the relief you seek in filing this application:

Vacate sentence of 14 years. and the original plea deal
of time served be honored.

20. Are you now under sentence from any other court that you have not challenged?

NO
NO

Revised 3/2003

STATE OF SOUTH CAROLINA)
)
County of Charleston, SC)

VERIFICATION

I, Frank Middleton # 284177, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Frank Middleton

SWORN to and subscribed before me this 13
day of August, 2014.

Cathrine A. Amorese (L.S.)
Notary Public

My Commission Expires: My Commission Expires December 22, 2016

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Frank Middleton # 284177, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Frank Middleton
Applicant

SWORN or affirmed to and subscribed before me this
13 day of August, 2014.
Catherine A. Orner
Notary Public

My Commission Expires ~~My Commission Expires~~ December 22, 2018

STATE OF SOUTH CAROLINA)
 COUNTY OF CHARLESTON)
)
)
)
 Frank Middleton, #284177,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

2014-CP-10-5043

RETURN

The Respondent, making its Return to the application for post conviction relief (PCR) filed August 20, 2014, would respectfully show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Charleston County Clerk of Court's order of commitment. The Applicant was indicted at the October 2012 term of the Charleston County Grand Jury for Armed Robbery (2012-GS-10-5895). Beattie Butler, Esquire, represented the Applicant at his preliminary hearing, and Rhett Dunaway, Esquire, represented the Applicant during pleading. On April 19, 2014, the Applicant pled guilty before the Honorable Thomas L. Hughston, Jr. and was sentenced to fourteen (14) years for each charge to run concurrently. The Applicant received credit for time served in the amount of one year and three-hundred and fifty three (353) days. The Applicant did not appeal his convictions or sentences.

Attached herewith and incorporated herein are the records of the Charleston County Clerk of Court regarding the subject conviction(s), the application and the guilty plea transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. "Ineffective Assistance of Counsel"
 - a. "Counsel informed defendant to take plea deal of time served and recommendation of no sentence."
2. "The court erred in accepting guilty plea without advising defendant of the consequence"
 - a. "Had defendant known he was going to get 14 years he would not have take [sic] the plea"
3. "The Solicitor office did not honor the verbal plea agreement with Counsel"
 - a. "By not honoring plea deal the Solicitor Office reneged on promise to defendant"

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at evidentiary hearing. All amendments should be made well in advance of hearing and should be filed as required by Rule 11, SCRCP(a).

III.

Respondent construes these allegations as ineffective assistance of plea counsel. Respondent submits plea counsel rendered effective assistance of counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (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. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that 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, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

This remaining allegation raise a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal.

Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, the Court should summarily dismiss this allegation.

V.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

June 2, 2015.

I N D E X

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POST-CONVICTION RELIEF HEARING 3

WITNESS DIRECT BY MR. FALK 8

Frank Middleton

CROSS BY MR. JOHNSON 17

Rhett Dunaway DIRECT BY MR. FALK 21

CERTIFICATE OF REPORTER 28

NO EXHIBITS INTRODUCED

1 (The following proceedings were held
2 April 20, 2016, Charleston County, South Carolina,
3 @ 9:50 a.m.)

4 THE COURT: Good morning, Mr.
5 Middleton. This is Frank Middleton and his
6 post-conviction relief action, 14-CP-10-5043. Mr.
7 Johnson.

8 MR. JOHNSON: May it please the Court,
9 Your Honor, this is Frank Middleton versus State of
10 South Carolina. As you said it's 2014-CP-10-5043.
11 Mr. Middleton was indicted at the October 2012 term
12 of the Charleston County grand jury for armed
13 robbery. Mr. Beattie Butler represented him, but
14 then Mr. Rhett Dunaway did represent him during his
15 pleading of guilt on April 19th, 2014. He did
16 plead guilty before the Honorable Thomas L.
17 Hughston, Jr. and was sentenced to I believe he
18 pled down to attempted armed robbery or strong
19 armed robbery and was sentenced to 14 years. He
20 received credit for time served. He did not appeal
21 this conviction of his sentence. He filed this
22 immediate action August 20th, 2014. The State
23 filed its return on June 2nd, 2015. He is
24 represented here today by Mr. Jim Falk.

25 THE COURT: So he pled down from armed

1 robbery to?

2 MR. JOHNSON: Strong armed robbery.

3 THE COURT: Strong armed robbery.

4 Strong armed robbery carries up to 15?

5 MR. JOHNSON: Zero to 15, Your Honor.

6 THE COURT: Mr. Middleton, let me ask
7 you a couple of questions before we start. Make
8 sure we're all on the same page. Listen to me
9 carefully. If you don't understand me, ask me to
10 please repeat it. You are being brought on what is
11 called a post-conviction relief action. And that's
12 an action that is available to people who have been
13 through the criminal system like you and do you
14 understand that if I grant your post-conviction
15 relief the only thing I can do -- do you know the
16 only thing I can do?

17 THE APPLICANT: Well, I didn't know
18 whether that was the only thing that you can do,
19 Your Honor, because --

20 THE COURT: Well, let me just tell you
21 the only thing I can do.

22 THE APPLICANT: That's the only thing
23 that you can do.

24 THE COURT: The only thing I can do is
25 grant you a new trial. If I grant your relief, if

1 I give you the relief that you are asking for, it
2 is a new trial. Okay? And at the new trial that
3 would be for the offense of armed robbery, okay?

4 THE APPLICANT: Okay.

5 THE COURT: And then a couple of things
6 can happen if you go through the new trial and not
7 plead guilty. If you go to trial, if you are found
8 not guilty obviously you go home. If you are found
9 guilty of armed robbery that's one thing that can
10 happen and that is ten to 30.

11 MR. JOHNSON: Yes, sir.

12 THE COURT: That carries a minimum of
13 ten years up to 30 years. So whoever is trying,
14 whatever judge is, he has that discretion of
15 sentencing you from ten years to 30 years. If he
16 sentences you to the upper end, 20, 25 or 30,
17 that's also what we call a no parole sentence so
18 you would have to do 85 percent of that before you
19 are released.

20 So if you got a 20-year sentence you'd
21 have to do about 17 years of it before you are
22 eligible for release. You pled guilty to a lesser
23 included offense of strong armed robbery, got a
24 14-year sentence, that is not a no parole sentence.
25 I'm not sure what your max out date is on that. It

1 would be a lot less than if it were an 85 percent
2 no parole sentence. So that's the only thing I can
3 do to give you a new trial. And you might be
4 getting -- may end up being a lot more than what
5 you got now. Could be. Could be a lot less. I
6 don't know.

7 That's a big chance you are running. I
8 want to make sure you know that. And if you're
9 fully advised of that and aware of that, we will
10 proceed here today, or if you want to withdraw it
11 you can withdraw it. That's up to you.

12 THE APPLICANT: I would like to proceed
13 with it, Your Honor.

14 THE COURT: Very well.

15 MR. JOHNSON: Your Honor, just for the
16 Court's information, looks like according to the
17 Department of Corrections he is already eligible
18 for parole and he has a projected max out date
19 August of 2019, so only three more years.

20 THE COURT: You got three more years
21 before you max out.

22 THE APPLICANT: Yes, sir.

23 THE COURT: Do you understand all that?

24 THE APPLICANT: Yes.

25 THE COURT: So --

1 MR. FALK: Your Honor, do you want him
2 to testify from the chair or from the table?

3 THE COURT: From up here.

4 MR. FALK: I call my first witness, Mr.
5 Middleton.

6 THE COURT: Mr. Middleton, if you would
7 go up to the witness stand.

8 FRANK MIDDLETON

9 who, after being first duly sworn, testified as
10 follows:

11 THE CLERK: Please state your full name
12 and spell your last name for the record.

13 THE WITNESS: My name is Frank
14 Middleton, that's M-I-D-D-L-E-T-O-N.

15 THE COURT: Mr. Middleton, listen to
16 your lawyer. He will be asking you certain
17 questions. Please respond to those questions. The
18 court reporter has to take everything down. If you
19 don't understand his question ask him to repeat it,
20 fair enough?

21 THE APPLICANT: Yes, sir.

22 THE COURT: If you have a question you
23 need to ask me just tell me I need to ask you
24 something, Judge.

25 THE APPLICANT: Yes, sir.

1 THE COURT: You got some water?

2 THE APPLICANT: I am comfortable right
3 now, sir.

4 DIRECT EXAMINATION

5 BY MR FALK:

6 Q. Mr. Middleton, you pled guilty on
7 April 9th?

8 A. Yes, sir, I did.

9 Q. You might not remember the date, but --

10 A. It was April the 9th.

11 Q. And who was representing you at that
12 plea?

13 THE COURT: April 9th or 19th? The
14 return says 19.

15 MR. FALK: I am looking --

16 THE APPLICANT: April 9th.

17 MR. FALK: I am looking at the
18 transcript which says the 9th.

19 THE COURT: The return must be wrong.
20 April 9, 2014. We all are on the same page.

21 BY MR. FALK:

22 Q. April 2014, who was representing you at
23 that time?

24 A. At the plea deal it was Mr. Rhett
25 Dunaway from the public defender office.

1 Q. And had he been representing you
2 through the whole case?

3 A. No, sir, he was not.

4 Q. Who was representing you prior to that?

5 A. Mr. Beattie Butler from the public
6 defender office.

7 Q. And had you had an opportunity to talk
8 to the solicitor's office about another case?

9 A. I was brought to the solicitor office
10 to see if I could identify a person that had
11 comitted a murder.

12 Q. That's not one that you were connected
13 with, correct?

14 A. I was in county jail three months
15 almost when that had occurred.

16 Q. And who did you have conversations
17 with?

18 A. I spoke with Ms. Wilson, the solicitor,
19 and Mr. DuRant.

20 Q. And why did you do that?

21 A. Somehow I was -- someone told the
22 solicitor -- I mean told a sergeant on the police
23 force if anybody could identify the person it would
24 probably be me.

25 Q. And who was the victim in this case?

1 A. A young man by the name of Marley Lion.

2 Q. Okay. Were there any promises made to
3 you?

4 A. Not from the solicitor office, sir.

5 Q. Okay. Did you testify in court in the
6 Marley Lion case?

7 A. Yes, sir, I did.

8 Q. And do you know if that case resulted
9 in a conviction?

10 A. It was a conviction.

11 Q. You testified on behalf of the State in
12 that case?

13 A. Yes, sir, I did.

14 Q. Okay. When Mr. Dunaway -- so Mr.
15 Dunaway came to speak with you on the morning of
16 the day that you pled?

17 A. Yes, sir, he did.

18 Q. And what was based on -- without
19 telling me what he said, what was your expectation
20 of what kind of sentence it was going to be? Did
21 he tell you there was a deal?

22 A. When Mr. Dunaway and I met first --
23 when he and I first met he told me that Mr. Butler
24 had a medical -- indefinite medical leave of
25 absence from the office and that he was

1 representing me with my case. We spoke for a few
2 minutes and discussed some things that I had
3 participated in at the county jail, including what
4 we just got through talking about.

5 At the conclusion of these things he
6 informed me that the solicitor was willing to let
7 me plead guilty to strong armed robbery time served
8 with the recommendation of no new sentence.

9 Q. Okay. And that -- he had already told
10 you what your prior -- did you have an
11 understanding what the sentencing range was for
12 armed robbery, for what you were originally
13 indicted with?

14 A. I don't believe we discussed a
15 sentencing range. It was just discussed that if I
16 were to plead guilty to strong armed robbery that I
17 wouldn't get no time.

18 Q. Was it your understanding that was
19 less?

20 A. Yes, sir.

21 Q. So you had less exposure?

22 A. Yes, sir.

23 Q. Did he explain to you whether or not
24 you could have gotten probation on a strong armed
25 robbery?

1 A. He informed me that the judge may grant
2 me four or five years probation. He asked if I
3 could deal with that and I said yes, I could.

4 Q. Did he tell you anything about armed
5 robbery, whether or not you could get probation on
6 that?

7 A. No, sir, he didn't.

8 Q. I am sorry, did he not tell you
9 anything or --

10 A. No, he did not tell me anything.

11 Q. So what was the recommendation?

12 A. Strong armed robbery plea with time
13 served with the recommendation of no new time,
14 maybe four or five years probation.

15 Q. So then you went before the judge?

16 A. Yes, sir, I did.

17 Q. And at some point in that plea colloquy
18 the judge asked you whether -- and the judge asked
19 you whether or not you were promised anything?

20 A. Yes, he did.

21 Q. And what was your response to that?

22 A. My response was no, there was no threat
23 or promise made. And if I may, the reason why I
24 had answered that way, when Mr. Dunaway and I were
25 talking downstairs prior to the plea agreement I

1 asked him how should I answer the question if the
2 judge were to ask me because I have pled guilty on
3 other occasions. And the plea attorney told me
4 that if the judge were to ask me this for me to
5 answer no. And there were -- from the Court of the
6 plea. And to be honest with you, Mr. Dunaway did
7 not tell me to say no, but he said to me that if I
8 were to tell the Court of the plea deal that the
9 judge may not take the plea.

10 Q. So just -- I believe your testimony
11 just was that you have been through this process
12 before?

13 A. Yes, sir.

14 Q. And so you were -- you had pled guilty
15 before?

16 A. Yes, sir.

17 Q. You have been through the whole plea
18 colloquy before?

19 A. Yes.

20 Q. And just so -- I know who you're
21 talking about, you said your prior plea counsel at
22 that time told you to answer no; is that right?

23 A. Yes, sir.

24 Q. Were you ready to go to trial on this
25 case?

1 A. Yes, sir, I was.

2 Q. But you knew that you could have gotten
3 a ten-year minimum up to 25; is that right?

4 A. Yes, sir.

5 Q. So you obviously had a significantly
6 higher exposure, sentence exposure, if you would
7 have gone to trial?

8 A. Yes, sir.

9 Q. Okay. Were you aware of any other kind
10 of exposure that you had; do you know if you have
11 any strikes?

12 A. Yes, sir.

13 Q. Okay. So why would you be willing to
14 risk that much going to trial knowing that you
15 could face a significantly longer time in prison?

16 A. During that time, sir, at the county
17 jail I began to have problems with other inmates
18 because of an article that was printed in the
19 newspaper about my participating in Marley Lion
20 murder case.

21 Q. Did you ever see the article?

22 A. Yes, sir, I have.

23 Q. How did you get access to it if you
24 were in the jail?

25 A. It was a Google from a friend of mine

1 that was sent to me.

2 Q. And what was your recollection of what
3 the article said?

4 A. It was in reference to --

5 Q. Excuse me. Was it your understanding
6 that you were named in the article?

7 A. By name, sir, Frank Middleton at
8 Charleston County Detention Center.

9 Q. And did they mention anything else
10 about you?

11 A. Yes, sir. I was labeled as a snitch
12 and a rat according to Sergeant Osborne of the
13 Charleston detective division.

14 MR. JOHNSON: I am going to object to
15 hearsay on that, Your Honor, move to strike that.

16 THE COURT: I'll sustain that. And it
17 will be stricken. Move on.

18 BY MR. FALK:

19 Q. But you had a concern that -- about
20 going to prison then?

21 A. Yes, sir, I did.

22 Q. What was your concern specifically?
23 Other than serving time what was your concern?

24 A. My concern was, sir, I have done some
25 time and I have seen what happened to people who

1 testify in court against someone. You know your
2 life is basically zero. You have to always be on
3 guard 24 hours a day and sometime that doesn't
4 help.

5 Q. So in some of your prior stints have
6 you witnessed some of this?

7 A. Yes, sir, on many occasions.

8 Q. Okay. And it's your testimony that
9 your concern why you didn't want to go to trial --
10 I mean why you didn't want to risk going to prison?

11 A. Yes, sir.

12 Q. It was your understanding that you were
13 going to get time served?

14 A. Yes, sir, it was.

15 Q. But there was no written offer; is that
16 right?

17 A. No, sir, it was not. And if I may,
18 when Mr. Dunaway informed me of the plea deal
19 normally that is something that from my experience
20 I should have asked for it in writing. But because
21 he and I had such a wonderful conversation and he
22 seemed to be very interested in some of the things
23 I was doing in the county jail as far as
24 rehabilitating myself and getting myself together,
25 I thought it would be like disrespecting him by

1 telling him to have the solicitor put it in writing
2 because I believed what he was saying and I
3 accepted it off the word, but I should have asked
4 for it in writing.

5 Q. Had you known that you were going to
6 get an active sentence would you have pled guilty?

7 A. No, sir, I would not. Sir, Mr. Beattie
8 Butler brought me a ten years plea and I had
9 rejected. And he brought me two to 15 that I had
10 rejected. And I wrote Mr. Butler a letter
11 informing him the reason why I was rejecting these
12 plea offers. I don't know if you received them or
13 not.

14 MR. FALK: I have no further questions.

15 CROSS-EXAMINATION

16 BY MR. JOHNSON:

17 Q. May it please the Court, Your Honor,
18 Mr. Middleton, you do have quite a lengthy record,
19 do you not?

20 A. Yes, sir.

21 Q. Do you realize that if you are
22 successful here today you can actually be sentenced
23 to life without parole based on this armed robbery
24 conviction?

25 A. Correct.

1 Q. You are willing to risk that?

2 A. Yes, sir.

3 Q. You admitted your guilt in this case,
4 correct?

5 A. Yes, sir, I did.

6 Q. You actually apologized for your
7 actions to the victim, did you not?

8 A. Yes, sir, I did.

9 Q. And nobody threatened you to plead
10 guilty?

11 A. There was no threats, sir.

12 Q. Nobody forced you to plead guilty?

13 A. No, sir.

14 Q. Nobody promised you anything to plead
15 guilty?

16 A. There was a promise from the attorney
17 for me to plead guilty.

18 Q. That was for the time served, correct?

19 A. Yes, sir.

20 Q. But nowhere did you ever stop the judge
21 and ask or tell him that I was supposed to get time
22 served in your plea deal or in your plea colloquy,
23 correct?

24 A. No, sir, I didn't.

25 Q. You pled on your own free will?

1 A. Yes, sir.

2 Q. Once again because you are guilty?

3 A. Well, because I was guilty and because
4 of the fact that there was a plea offer for me to
5 plead guilty.

6 Q. Once again, you never told the judge
7 about that plea offer, correct?

8 A. No, sir, I did not.

9 MR. JOHNSON: No further questions,
10 Your Honor.

11 THE COURT: Redirect?

12 MR. FALK: Nothing, Your Honor.

13 THE COURT: You may step down, Mr.
14 Middleton. Thank you. I can certainly see where
15 there was a little confusion. I can see why he is.
16 I have looked at the transcript.

17 MR. FALK: I would also call Mr.
18 Dunaway.

19 THE COURT: Let me put this on the
20 record. On page 5 of the transcript the solicitor
21 is talking, Mr. Voigt; is that correct?

22 MR. JOHNSON: Yes, Your Honor.

23 THE COURT: He advises the Court that
24 the Defendant has a fairly extensive record, but I
25 know Mr. Dunaway and I have talked about this a bit

1 on the phone today. And the reason for the offer,
2 after you hear this record you'll wonder why I am
3 offering what I'm offering, the reason for the
4 offer was partially due to Mr. Middleton's
5 cooperation in a recent high end murder case. But
6 I don't ever see what the offer was. From the plea
7 sentencing sheet says it was without recommendation
8 of offer. But then on page 11 of the transcript
9 Mr. Dunaway says so, judge, it's a tall order I am
10 asking for, but if I am wrong the solicitor can
11 correct me. I don't believe the solicitor is
12 asking for active time. I think the time that he
13 has done is sufficient. According to the solicitor
14 it's sufficient. And then the judge gives him a
15 14-year sentence.

16 So I can see where he is confused a
17 little bit. Anyway, call Mr. Dunaway.

18 MR. FALK: Well, actually I won't call
19 him after this, he was to talk about the confusion.

20 THE COURT: I think you probably ought
21 to let him tell his side of the story.

22 MR. FALK: Mr. Dunaway, please.

23 THE CLERK: Please state your name and
24 spell your last name for the record.

25 THE WITNESS: Rhett Dunaway,

1 D-U-N-A-W-A-Y.

2 DIRECT EXAMINATION

3 BY MR. FALK:

4 Q. Mr. Dunaway, the plea in this case was
5 in April 2014?

6 A. Yes, sir.

7 Q. Do you have a recollection of when you
8 first met with my client, Mr. Middleton?

9 A. I met with him either the day before or
10 the day of the plea.

11 Q. Okay. That would be for the first
12 time?

13 A. Correct.

14 Q. Okay. And had you spoken with Mr.
15 Voigt what -- did you have conversation with Mr.
16 Voigt prior to talking to Mr. Dunaway?

17 A. Prior to talking to Mr. Middleton?

18 Q. Excuse me. Yes, I am sorry. You had
19 conversation with the solicitor about a plea?

20 A. I did.

21 Q. Okay. And what was your understanding
22 of what they were offering?

23 A. If I could step back just slightly.
24 Mr. Butler had represented Mr. Middleton for some
25 period of time. Mr. Butler got sick and was going

1 to be out on sick leave. I can't remember if it
2 was Mr. Butler or my boss Mr. Pennington who -- I
3 think it was Mr. Pennington who approached me and
4 said can you handle this plea. And I saw what the
5 charge was. I said well, I will do what you want,
6 but he said well, this is kind of wired up and
7 there is a great offer and Beattie is out sick. I
8 don't know if I spoke to Mr. Butler or not, but I
9 became aware of the case, I read through the file,
10 saw what we had.

11 When I spoke to Mr. Voigt, and I think
12 the reason Mr. Pennington asked me to do it was Mr.
13 Pennington was involved in the Marley Lion trial
14 and he saw that potentially there could be a
15 conflict.

16 So when I spoke to Mr. Voigt, he said,
17 you know, Mr. Middleton was a big help to us in the
18 Marley Lion trial. I want to do what I can for
19 him. It's an armed robbery, there's two weapons
20 charges, one was possession of a weapon during the
21 commission of a violent crime, the other was
22 possession of a weapon by convicted felon. He said
23 I will get rid of the gun charges, I will even
24 knock it down to a strong arm. And at that time,
25 really up until this day, a reduction from armed

1 robbery to a strong armed robbery with Scarlett
2 Wilson is almost unheard of. Used to be kind of
3 the way that's how we used to operate, but not
4 anymore. So I am willing to do that. He said
5 Rhett, frankly, I don't really care if he gets
6 time. I really appreciate what he did. I said
7 that sounds great.

8 So armed with that when I met with Mr.
9 Middleton, you know, it's not the kind of case you
10 would step into this quickly, but with that kind of
11 an offer it was a sweetheart of a deal. So the
12 offer, as I understood it, and what I told Mr.
13 Middleton was just that. We got a great judge. We
14 got a great offer, I can ask for time served, but I
15 don't know that that's what we will get. I can ask
16 for it. The solicitor is not going to say I think
17 you need time, I think you need five years, ten
18 years, 15. I said I don't know what the judge is
19 going to do.

20 The problem Mr. Middleton had and that
21 we talked about was his record. It was a
22 horrendous record. But the deal was armed robbery,
23 gun charge is gone down to strong armed. So an 85
24 percent case to a parolable case, violent, but not
25 85 percent.

1 So that was the deal and I think that's
2 how Judge Hughston sentenced him. Your deal was
3 the reduction in charge. So --

4 Q. Did you relay Mr. Voight's comment to
5 you that the solicitor didn't really care if he got
6 active time?

7 A. I think that's what I said in the plea
8 and I wouldn't have remembered it without reading
9 the transcript, but that's an accurate reflection.
10 That's kind of a tall order because I didn't know
11 if Judge Hughston would take this as, which I think
12 is how he did it, your deal was the reduction, but
13 I'm not going to -- I forget who the judge was,
14 Hicks Harwell or somebody used to say I am giving
15 you a ham, I'm not giving you the whole hog. And
16 what I was asking for when I said tall order, I
17 could have just easily said the whole hog, which it
18 was.

19 THE COURT: That's basically what the
20 judge said when he sentenced him. He said not
21 withstanding all that you have done good, your
22 record is so overwhelming, all the good things you
23 have done now just dwarf, are very small in
24 comparison to that, and he sentenced him based on
25 taking into consideration the extensive prior

1 record as a lot of judges do. Not withstanding
2 what the deal was, i.e., reduction from armed
3 robbery to strong armed robbery and you asked for
4 time served and the solicitor basically inferred
5 that he wasn't going to oppose that and the judge
6 is well aware of that. But it was in his
7 discretion because it was not a negotiated sentence
8 nor -- he sentenced him within the range.

9 THE WITNESS: Correct, Your Honor. I
10 think that's why the judge probably gave him 14 and
11 not 15. He still gave him something slightly
12 better than what he could have given him.

13 THE COURT: But not what you asked for.

14 THE WITNESS: No, sir.

15 THE COURT: That's not the first time a
16 judge has given you something that you didn't ask
17 for.

18 THE WITNESS: Second time, yes, sir.

19 THE COURT: I understand. I can see
20 where Mr. Middleton is concerned as well, but I
21 mean it is what it is. Unfortunately for him. I
22 didn't mean to cut you off.

23 BY MR. FALK:

24 Q. I just want to make -- do you think
25 Mr. -- my question to you before was when you were

1 down in the cell talking to him before you walk up,
2 do you think you conveyed to him that the solicitor
3 was not looking for an active sentence?

4 A. I'm sure I did.

5 Q. You are sure you did?

6 A. I'm sure I did do that.

7 THE COURT: And that was, in fact,
8 true. He said that on the record, he wasn't
9 looking for an active sentence. The solicitor
10 inferred that.

11 MR. FALK: I have no further questions.

12 MR. JOHNSON: No cross, Your Honor.

13 THE COURT: You may step down, Mr.
14 Dunaway. Thank you. Any additional witnesses by
15 the applicant?

16 MR. FALK: No, Your Honor.

17 THE COURT: Anything by the State?

18 MR. JOHNSON: No, Your Honor. We ask
19 Mr. Dunaway be released from the subpoena.

20 THE COURT: Mr. Dunaway, nice seeing
21 you again.

22 THE WITNESS: Thank you, Judge.

23 THE COURT: I will take it under
24 advisement and get you all a decision here shortly.
25 Mr. Middleton, anything you need to say?

1 THE APPLICANT: Yes, sir, Your Honor, I
2 would like to say if Mr. Dunaway had informed me
3 the fact that he just did on the stand, I would not
4 have pled guilty. There's no way I would have
5 plead guilty to a sentence that would got me
6 15 years or 14 years when Mr. Butler had offered to
7 try to get me a sentence of ten years. I would not
8 have taken that plea.

9 THE COURT: Thank you.

10 THE APPLICANT: It was my understanding
11 from him that I was not going to get active time.
12 And he also stated that according to the solicitor
13 the amount of time that I have done was sufficient
14 which led me to believe that is what I was going to
15 get.

16 THE COURT: I will review the
17 transcript in full and other documents and
18 pleadings in the matter and I will get a decision
19 out here shortly. Thank you very much.

20 (These proceedings were concluded at
21 11:30 a.m., April 20, 2016, Charleston County,
22 South Carolina.)
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CERTIFICATE OF REPORTER

I, Ruth C. Weese, Registered Diplomate Reporter for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 23rd day of August, 2016 at Charleston, Charleston County, South Carolina.

Ruth C. Weese

Ruth C. Weese
Registered Diplomate
Reporter

STATE OF SOUTH CAROLINA)
 COUNTY OF CHARLESTON)
)
 Frank Middleton, #284177,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

2014-CP-10-5043

ORDER OF DISMISSAL

FILED
 2016 JUL -5 PM 2:03
 JULIE K. HARRIS
 CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 20, 2014. Respondent made its Return on June, 2015. An evidentiary hearing into the matter was convened on April 20, 2016 at the Charleston County Courthouse. James K. Falk, Esquire represented Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Rhett Dunaway, Esquire also testified. This Court had before it a copy of the records of the Charleston County Clerk of Court, records from the South Carolina Department of Corrections, the application, the State's Return and the guilty plea transcript.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Charleston County Clerk of Court's order of commitment. The Applicant was indicted at the October 2012, term of the Charleston County Grand Jury for Armed Robbery (2012-GS-10-5895). Beattie Butler, Esquire, represented the Applicant at his preliminary hearing, and Rhett Dunaway,

DREI

Esquire, represented the Applicant during pleading. On April 19, 2014, the Applicant pled guilty before the Honorable Thomas L. Hughston, Jr. and was sentenced to fourteen (14) years for each charge to run concurrently. The Applicant received credit for time served in the amount of one year and three-hundred and fifty three (353) days. The Applicant did not appeal his convictions or sentences.

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

1. "Ineffective Assistance of Counsel"
 - a. "Counsel informed defendant to take plea deal of time served and recommendation of no sentence."
2. "The court erred in accepting guilty plea without advising defendant of the consequence"
 - a. "Had defendant known he was going to get 14 years he would not have take [sic] the plea"
3. "The Solicitor office did not honor the verbal plea agreement with Counsel"
 - a. "By not honoring plea deal the Solicitor Office reneged on promise to defendant"

SUMMARY OF TESTIMONY

At the evidentiary hearing, Applicant testified that Counsel represented him at his plea, however, Beattie Butler, Esquire had represented him throughout the case before Mr. Butler fell ill. Applicant then testified he spoke with the Solicitor's office on the Marley Lyons' case in order to offer assistance because he knew the identification of the shooter. There were no promises made

from the solicitor; however, Applicant testified at the trial on behalf of the State, which resulted in a conviction.

Concerning Counsel, Applicant testified he and Counsel discussed Applicant's county jail activities. Applicant claimed the solicitor was going to offer a strong arm robbery plea with a sentence of time served. Applicant stated that Counsel said the judge "may" grant Applicant five years' probation. Applicant then stated he and Counsel did not discuss the armed robbery charge. Applicant stated he told the judge there were no promises made in his case because of the discussions he had with Counsel. He also claimed if he answered "no" to certain questions during his plea, the plea judge may not accept the plea deal. Applicant claimed he was ready to go to trial. Applicant then testified he knew there was a 10-30 year exposure if he pursued a trial and that he had prior strikes. Applicant's main claim was that he pled guilty because other inmates knew he cooperated with police and was scared of being labeled "a snitch." Applicant did not want to get a prison and thought he was getting a sentence of time served. Applicant admitted there were no written offers in this case, but should have asked for this so-called offer for time served in writing. Applicant then claimed if he knew he was getting prison time than he would not have pled guilty. Applicant lastly admitted that he rejected plea offers of 10 years and 0 to 15 years.

On cross-examination, Applicant admitted that he knew if he were successful in this post-conviction relief action, he would be eligible for a sentence of life without parole based on his prior criminal history. Applicant admitted he was guilty of this crime. Applicant further admitted there were no threats or promises made to get him to plead guilty. Lastly, Applicant admitted he apologized for his actions in this case.

Counsel testified that he met with the Applicant a day before or the day of the plea for the first time. Counsel stated he had spoken to the solicitor on the case and the solicitor had admitted that Applicant was a huge help in the Marley Lyons case. Counsel stated he attempted to get an offer from the State for a strong arm robbery charge instead of armed robbery. Counsel said the solicitor on the case expressed, "I do not care if [Applicant] gets time." Counsel thought this was a great offer because he could ask for a sentence of time served but did not know what the plea judge was going to do. Counsel then testified that the final plea offer was for Applicant to plea to strong arm robbery and for the solicitor to *nol prosee* the gun charges. During Applicant's plea, Counsel, during mitigation, stated, "I do not believe the Solicitor's asking for active time. I think the time that he's done is sufficient, according to the solicitor, but if a period of probation might be granted I don't think we'll be seeing Mr. Middleton back." (p. 11 lines 6-10). However, at the end of Applicant's plea, the plea judge stated, "[u]nfortunately, that record is so overwhelming, Mr. Middleton, and that all the good things you are doing now just dwarf, go very small in comparison to that." (p. 11 lines 21-24).

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 at the post conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Counsel

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) (citing Rule 71.1(e), SCRPC). 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, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that 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, 106 S.Ct. 366 (1985).

This Court finds the Applicant's testimony regarding Counsel's ineffectiveness is not credible while also finding Counsel's testimony is credible.

This Court also finds Counsel provided effective assistance of counsel in this case. Counsel advised Applicant of the charges and the sentences the charges carried. Counsel negotiated with the State in Applicant's best interest, namely that Counsel negotiated a sentence in which he could argue for a time served-sentence. However, the plea judge, in his proper discretion, decided that based on Applicant's prior criminal history, he would serve an active prison sentence. Applicant testified he pled because Counsel promised him a sentence of time served and because he was afraid of being labeled a snitch by other inmates; this Court does not find this credible as Applicant certainly could have asked the plea judge to clarify any plea offers from the State. Applicant admitted nobody threatened him to plead guilty, and there were no promises other than the negotiations to entice him to plead guilty. This Court finds Applicant made the decision to plead guilty on his own accord with the help of learned, prepared counsel. Additionally, this Court finds Applicant made this decision freely and voluntarily without any threats or promises from anyone else. Furthermore, this Court finds that it was ultimately the Applicant's decision to plead guilty.

This Court also finds the guilty plea transcript dispositive of this case as it is a contemporaneous recording of the proceedings. This Court finds the Applicant waived his rights to a jury trial. This Court further finds Counsel made a strategic decision to negotiate a strong arm robbery charge for dismissal of the gun charges as Applicant contributed to the solving of a murder case.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, these allegations are denied.

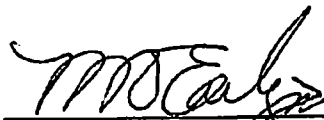
CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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 also finds as to all other allegations that Applicant failed to present evidence of such claims and thus, this Court deems them abandoned.

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 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 Respondent.

AND IT IS SO ORDERED!

Doyet A. Early, III
Presiding Circuit Court Judge
Ninth Judicial Circuit

June 15, 2016

Bamberg, South Carolina

2014-CP-10-5043

CKV20120403278

WITNESSES

Charleston City Police Department

AGENCY CASE NUMBER

1207032

ARREST WARRANT NUMBER

M997781

DATE OF ARREST

April 30, 2012

ACTION OF GRAND JURY

Em Lee
Foreperson of Grand Jury

Date:

DEC 6 2012

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2012GS1005895

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

October Term 2012

THE STATE

vs.

FRANK MIDDLETON

DOB [REDACTED]

B/M

Indictment for

Armed Robbery

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT

At a Court of General Sessions, convened on October 8, 2012 the Grand Jurors of Charleston County present upon their oath:

Armed Robbery

That on or about April 29, 2012, in Charleston County, South Carolina, at [redacted] Savannah Highway by use of force, threats or intimidation and while armed with a deadly weapon, to wit: a handgun, the Defendant, FRANK MIDDLETON, did take and carry away goods and/or monies from the person or immediate presence of Joseph [redacted] with the intent to permanently deprive him of possession thereof, in violation of Section 16-11-330(A) of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



GREGORY VOIGT
ASSISTANT SOLICITOR