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February 17, 2017

Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Gibson v. State of SC 2015-CP-26-530
Vanderhorst v. State of SC 2015-CP-22-0787
Bell v. State of SC 2015-CP-26-5512
Johnson v. State of SC 2014-CP-22-1128

Dear Sir or Madam:

Enclosed for filing are Notices of Appeal for the above four (4) cases.

FOWLER LAW FIRM

Patti

Patricia F. Clapper
Advanced Certified Paralegal
NC Certified Paralegal

cc: Ms. Valerie Garcia Giovanoli
Horry County Clerk of Court
Georgetown County Clerk of Court

THE STATE OF SOUTH CAROLINA

In the Supreme Court

RECEIVED

FEB 24 2017

S.C. SUPREME COURT

APPEAL FROM GEORGETOWN

Court of Common Pleas

The Honorable Brooks P. Goldsmith, Circuit Court Judge

Case No. 2014-CP-22-1128

Dwaine L . Johnson, #343186..... Petitioner,

v.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

The Petitioner appeal the Honorable Brooks P. Goldsmith's Order dated December 14, 2016, denying post conviction relief to the Petitioner. The Order was received by the undersigned counsel on February 3, 2017. A copy of the Order on appeal is attached to this notice.

Steven W. Fowler
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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

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APPEAL FROM GEORGETOWN

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The Honorable Brooks P. Goldsmith, Circuit Court Judge

Case No. 2014-CP-22-1128

Dwaine L . Johnson, #343186..... Petitioner,

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PROOF OF SERVICE

I, Steven A. Fowler, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Valerie Garcia Giovanoli, Assistant Attorney General, PO Box 11549, Columbia, SC 29211 I further certify that all parties required by Rule to be served have been served this 17th day of February, 2017.

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STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Dwaine L. Johnson, #343186, Applicant, v. State of South Carolina, Respondent.	2014-CP-22-1128 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 9, 2014. Respondent made its return on February 2, 2016. An evidentiary hearing into the matter was convened on November 16, 2016, at the Horry County Courthouse. Applicant was present at the hearing and represented by Steven W. Fowler, Esquire. Valerie Garcia Giovanoli, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

Applicant testified on his own behalf at the PCR hearing. Also testifying was Applicant's trial counsel, Ronald W. Hazzard, Esquire. The Court had before it the trial transcript, the records of the Georgetown County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the PCR application, and Respondent's return.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. In November 2011, the Georgetown County Grand Jury indicted Applicant for two counts of murder/attempted murder (2011-GS-22-1187) and (2011-GS-22-1186) and armed robbery (2011-GS-22-1185). Ronald W. Hazzard, Esquire, represented Applicant. On April 15, 2014, Applicant pled guilty to the two

charges of murder/attempted murder and the charge of armed robbery. The Honorable Edward B. Cottingham sentenced Applicant to fifteen (15) years imprisonment for each charge of murder/attempted murder and armed robbery, to be served concurrently. Applicant did not appeal his plea or sentence.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel
    a. "Attorney was ineffective"
    b. "[W]arrant invalid, line up was improper, flaws indictment [sic]"
    c. Failure to move to suppress/object to evidence
        i. "Law enforcement tampering with interview"
2. Prosecutorial Misconduct
    a. "Prosecutor lied to the judge"
3. Involuntary Guilty Plea
    a. "[Applicant has] mental health learning disable [sic]"

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

I. Summary of Testimony

Applicant testified to the following: The prosecutor of Applicant's case failed to provide discovery. Some discovery was not given until the day of trial which Applicant felt prejudiced

him. Applicant suffers from autism. He does not remember if or when he was diagnosed. Applicant takes Zoloft to treat his disorder. Applicant did not mention his disorder to his trial counsel, Ronald Hazzard, because he stated that is counsel's job to tell Applicant about that. Applicant stated that the indictment was invalid because the dollar amount was incorrect. There was also an improper identification procedure used in his case. Applicant was also unaware of additional charges that were brought against him. Applicant claims Lieutenant Smalls tampered with evidence and Hazzard never brought that up. Applicant remembers meeting with Hazzard plenty of times. He claims the trial judge violated rules of court, but failed to explain how. Applicant explained that he took over the jury striking process and could not explain his reasoning for using all ten (10) of his strikes against white jurors. Applicant also claimed Hazzard coerced his guilty plea. Applicant seemed confused and disoriented and at times had difficulty conveying his thoughts and answering questions.

State's witness, Ronald Hazzard, testified as follows: Ronald Hazzard was admitted to practice law in 1988 and all of his practice has been devoted to criminal law, with an emphasis on criminal defense. Hazzard has been qualified to defend in death penalty cases since 1993. He has served as Chief Public Defender of Georgetown since April 13, 2012. Hazzard came to represent Applicant on his underlying charges by inheriting the case from his predecessor.

Hazzard first met with Applicant on April 27, 2012, in which they discussed facts of the case and Applicant's personal history and situation. Hazzard represented Applicant from April 2012 through the date of his trial/plea in April 2014 and never had any indication that Applicant had mental health issues or emotional issues. Neither applicant nor parents ever indicated that he suffered from autism or any other mental health issue. Hazzard never had any problem

communicating with Applicant. Furthermore, Judge John held a competency hearing and found that Applicant was competent to stand trial and found no evaluation was necessary.

Upon receipt of discovery, Hazzard reviewed it and discussed it with Applicant for over an hour. He also met with Applicant's parents in the courtroom and in his office and discussed the case with them. Hazzard conveyed to Applicant the State's initial offer which was a guilty plea on the charge of armed robbery in exchange for the dismissal of two counts of attempted murder. Applicant did not want to accept the offer. Over the course of representation, Hazzard and Applicant had 15-20 meetings, all occurring at the detention center and the courtroom. In those meetings, Hazzard advised Applicant of his constitutional rights, including his right to a jury trial, his right to call witnesses to testify on his behalf, his right to confront the witnesses against him, and his right to testify or not to testify.

Hazzard detailed his trial strategy. Because there was no forensic evidence against Applicant, the case essentially hinged on the credibility of the co-defendant who was going to testify against Applicant. Hazzard was prepared to try the case. Hazzard made many pre-trial motions, including a motion to quash the indictments, sequester witnesses, receive criminal records of testifying witnesses, and to clarify what parts of Applicant's criminal history were admissible. He also addressed a potential discovery violation that involved a missing recorded statement by a victim and an improper identification issue. The court addressed or ruled upon every concern or motion raised by Hazzard.

Although the missing recording was provided the day of trial, the Court gave Hazzard and Applicant ample opportunity to review it. The recording was neither inculpatory nor exculpatory and thus was not a substantial or important piece of evidence in the opinion of

counsel. The recording contained the victim's statement to the investigator in which the victim indicated they could not identify the shooter. Nevertheless, Applicant changed his mind after reviewing the recording and decided to plead guilty. Hazzard was shocked at his decision, but made sure he understood a series of things: that Applicant would have to say he was guilty, that Applicant was pleading to one count of armed robbery and two counts of attempted murder, and that these three convictions would constitute three strikes and if convicted of a serious offense again, Applicant could face life without parole. Hazzard did not encourage Applicant to plead guilty.

With regard to the alleged line-up identification issue, Hazzard stated that there was no issue. Only the co-defendant had identified Applicant from a line-up and the co-defendant already knew Applicant.

II. Ineffective Assistance of Counsel

The 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).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386

S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)). When a defendant pleads guilty on the advice of counsel, the plea may only be attacked through a claim of ineffective assistance of counsel. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2002) (citations omitted).

This Court finds that Applicant failed to meet his burden of proving that trial counsel rendered ineffective assistance. To the extent Applicant claims that his warrant was invalid, the line-up was improper, and the indictment flawed, this Court finds that testimony not credible and refuted by the record. During Applicant's plea trial, Hazzard addressed the validity of the indictments (Plea Tr. 46:4-49:11) and the alleged improper identification procedure (Plea Tr. 68:4-69:7). This Court also finds the Applicant failed to meet his burden of proving trial counsel

failed to move to suppress or object to evidence. Hazzard made a motion to the court regarding the Solicitor's failure to produce certain discovery that had been requested (Plea Tr. 63:10-68:3). Hazzard testified that an audio recording of the victim's statement was later provided to him and the court gave him and Applicant ample time to review the recording. Hazzard also testified that there was nothing significant about the recording and did not inculpate nor exculpate Applicant. This Court notes Hazzard is an experienced criminal defense attorney and his testimony is more credible on this point. Regardless, this Court finds the information revealed by the testimony at the PCR hearing would likely not have changed the decision of the Applicant to plead guilty. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial 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 trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174. Accordingly, this Court finds that this allegation must be denied and dismissed with prejudice.

III. Prosecutorial Misconduct

This Court further finds that Applicant is not entitled to post-conviction relief based on his allegations of prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-

conviction relief. Rather, this allegation is 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 an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). This Court finds that the Applicant has not carried his burden of proving actual prosecutorial misconduct as there was no evidence presented to support that claim. Accordingly, this Court finds that this allegation must be denied and dismissed with prejudice.

IV. Involuntary Guilty Plea

This Court finds that the Applicant's guilty plea was entered freely and voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431

U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

This Court finds that Applicant failed to meet his burden of proving that his guilty plea was entered involuntarily. Applicant testified that his trial counsel coerced his guilty plea. Hazzard is a trial practitioner who has twenty-eight (28) years of experience in the trial of serious criminal offenses. Hazzard conferred with the Applicant in which counsel discussed the pending charges, what the State was required to prove, Applicant's constitutional rights, Applicant's concerns and desires. Furthermore, the record demonstrates that Hazzard was fully prepared to proceed to trial on Applicant's case when Applicant abruptly changed his decision to plead guilty.

During Applicant's plea hearing, Applicant acknowledged that he was guilty of these offenses. Applicant told the plea court more than once that he was satisfied with his attorney. The record reflects, and this Court so holds, that Applicant's plea was entered freely, voluntarily, knowingly, and intelligently. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975) overruled on other grounds by U.S. v. Whitley, 450 F.2d 327 (4th Cir. 1985).

A. Competency of Applicant

This Court finds that Applicant was competent to enter his guilty plea. Competency to enter plea is no more stringent than competency to stand trial. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992); Carnes v. State, 275 S.C. 353, 271 S.E.2d 121 (1980). To sustain a claim of incompetency in fact at a plea, applicant in a PCR proceeding must show by the preponderance

of the evidence he was incompetent at the time of the plea. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992). To sustain a claim counsel was ineffective for failing to request a competency hearing, an applicant must show a reasonable probability petitioner would have been found incompetent. Id. Counsel may reasonably rely on his own perceptions in deciding a client is competent to stand trial. Id.

Applicant had difficulty understanding and answering questions asked during the PCR hearing. Applicant was able to testify that he had suffered from Autism since childhood. However, Hazzard testified that he had never had any indication that Applicant suffered from any mental health issues. Hazzard also testified that neither Applicant nor Applicant's parents mentioned autism or any other mental or emotional problems. Hazzard never had any trouble communicating with Applicant over the course of their 15-20 meetings. Not only did Hazzard rely on his own perceptions in deciding his client was competent for trial, Judge John held a competency hearing in which he found Applicant was competent to stand trial and did not require an evaluation.

Therefore, this Court finds Applicant has failed to meet his burden to prove either that he was incompetent at the time of his guilty plea or that Hazzard was ineffective for failing to address any competency issues. Accordingly, this Court finds that this allegation must be denied and dismissed with prejudice.

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, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant

waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

[Remainder of page left intentionally blank]

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his plea and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

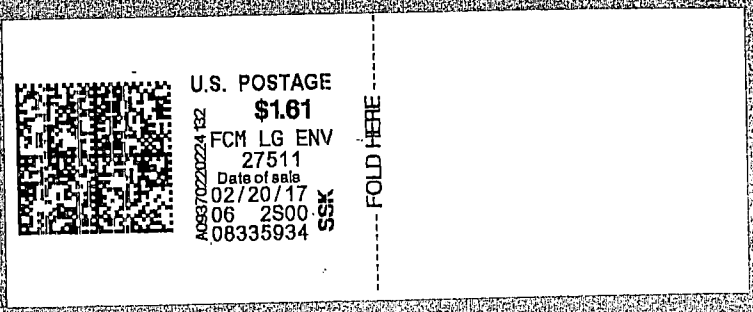
1. That the application for post-conviction relief be denied and dismissed with prejudice; and

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

AND IT IS SO ORDERED this 5 day of December, 2016.

Honorable Brooks P. Goldsmith
Presiding Judge
Fifteenth Judicial Circuit

Conway, South Carolina.



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