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March 15, 2017

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

Re: Greg Green, 2015-CP-22-07770

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Georgetown PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc: Valerie Giovanoli, Esq.; Elijah Brown 304631.

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Honorable Michael G. Nettles, Circuit Judge

Case No.: 2015-CP-22-00770

Elijah Brown 304631.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Elijah Brown appeals the Honorable Michael G. Nettles March 1, 2017, Order of Dismissal. Undersigned counsel received notice of entry of the order on March 14, 2017. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

March 15, 2017

Valerie Giovanoli, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY

Court of Common Pleas

Honorable Michael G Nettles, Circuit Judge

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Elijah Brown 304631.....PETITIONER

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PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Valerie Giovanoli Esq, Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this March 15, 2017.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)	IN THE COURT OF COMMON PLEAS FIFTHTEEN JUDICIAL CIRCUIT
Elijah A. Brown, #304631 Applicant, v. State of South Carolina, Respondent.	)	2015-CP-22-0770 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for Post-Conviction Relief filed August 11, 2015. Respondent made its Return on October 24, 2016. An evidentiary hearing into the matter was convened on February 10, 2017 at the Horry County Courthouse. James J. Falk, Esquire represented Applicant. Jane Diange, supervised by J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

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

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. Applicant was indicted at the July 2014 term of the Georgetown County Grand Jury for possession of marijuana less than one ounce (2014-GS-22-00651) and possession with intent to distribute heroin (2014-GS-22-00652). Applicant was also indicted at the November 2014 term of the Georgetown County

Grand Jury for trafficking in illegal drugs (heroin), second offense (2014-GS-22-00347). Applicant was represented by Charles D. Barr, Esquire.

On March 31, 2015, Applicant pled guilty as indicted to possession with intent to distribute heroin and possession of marijuana, less than one ounce. The Honorable George C. James sentenced Applicant to confinement for a period of twelve (12) years for possession with intent to distribute heroin and a period of one (1) year for possession of marijuana, less than one ounce. On May 12, 2015, Applicant pled guilty to the lesser included offense of trafficking in illegal drugs (heroin), first offense. The Honorable Paul M. Burch sentenced the Applicant to confinement for a period of twelve (12) years. The sentences were to be served concurrently. Applicant did not appeal his convictions or sentences.

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

1. Involuntary Guilty Plea
2. Ineffective Assistance of Counsel
3. Due Process Violation

At the hearing, Applicant proceeded on his claim of ineffective assistance of counsel and that his guilty plea was involuntary.

SUMMARY OF TESTIMONY

At the evidentiary hearing Applicant testified that he retained Charles D. Barr as counsel. Applicant stated that while he was in custody, he met with Counsel at least one time per month at either the courthouse or detention center. Applicant testified that Counsel did not discuss a plea offer for ten (10) years nor did he ask Applicant if he wanted to accept that plea offer. A document was presented by PCR counsel and was identified as a plea offer for ten (10) years. PCR counsel moved the document into evidence. This Court admitted the document into

evidence as Applicant's Exhibit A, over Respondent's objection. Applicant testified that he pled guilty, thinking the sentence would be ten (10) years, but Applicant also testified that he knew the open plea could yield a sentence of zero (0) to thirty (30) years.

On cross examination, Applicant admitted that he pled guilty to possession or marijuana less than one ounce and possession with intent to distribute heroin. Applicant also admitted that there were no promises made to him to entice him to plead guilty. Additionally, Applicant admitted that he had adequate time with Counsel to discuss his case and make his decision. Applicant further admitted that he knew he was going to trial and that he had adequate time to consult with Counsel, and that he was satisfied with Counsel's representation. Finally, Applicant admitted that that he was aware he was facing a sentence of zero (0) to thirty (30) years.

Counsel testified that he received discovery materials. Applicant's Exhibit A was presented to Counsel for review and was identified as a plea offer for ten (10) years. Counsel reviewed the document for the plea offer for ten (10) years and testified that he had never before seen the document. Counsel further stated that it is his common practice to discuss and review all plea offers with clients. Counsel testified that there was not a firm offer for ten (10) years. Counsel testified that he attempted to work out a plea deal with the Solicitor for a minimum sentence.

Counsel stated the evidence in the case included a video of Applicant at the convenience store involved in a drug transaction and a recorded statement made to the police. Counsel also testified the he discussed the evidence and all discovery with Applicant. Counsel further testified that Applicant did not accept a plea offer because he had other charges pending, which included a drug trafficking charge. Counsel testified that it would not have made sense to plead to one charge while leaving unresolved the other outstanding charges. On cross-examination,

Counsel testified that he would have discussed every offer with Applicant. Counsel testified that Applicant did not accept a plea offer.

FINDINGS OF FACT AND CONCLUSION 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), SCRCP). 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 or 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, 300S.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. Applicant admitted his guilt on the jail tape recording. Counsel negotiated with the State in the Applicant's best interest. Applicant admitted there were not promises made 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 counsel. Additionally, this Court finds Applicant made this decision freely, voluntarily and knowingly without any threats, coercion, or promises from anyone else. Furthermore, the Court finds that it was ultimately the Applicant's decision to plead guilty.

This Court also finds Counsel effectively represented Applicant with respect to discussing the plea offer of ten (10) years. Counsel testified that he discussed any and all plea offers and recommended to the Applicant that he not accept the offer because it would have left him vulnerable to the other outstanding charges. Counsel testified that he discusses all plea offers with clients. This Court has observed Counsel and heard his testimony, and this Court

finds Counsel is credible. This Court notes that Counsel is a very experienced criminal defense attorney with many years of practice experience.

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

Involuntary Guilty Plea

Applicant alleges that his plea was involuntary. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant 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 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial's errors, the defendant would not have pled guilty, but would have insisted on going to trial. See Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish

the applicant had a full understanding of the consequences of his plea and the charges against him. See Bovkin v. Alabama. 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969). In Bovkin the United States Supreme Court held that before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. Id. at 243, 89 S.Ct. at 1712. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. Moreover, a criminal defendant entering a guilty plea "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State. 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citation omitted). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "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).

This Court finds that Applicant's plea was entered into freely, voluntarily and knowingly. This Court further finds that Applicant was given plenty of contact with Counsel, in which Counsel discussed the evidence the State had against Applicant and pursuing a plea deal. Applicant was also fully aware of his rights, as the record demonstrates a thorough review of those rights by the plea court. Applicant indicated that he was aware of his rights and understood that by pleading guilty he was waiving those rights. 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 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.

Accordingly, this Court finds the Applicant has not met the burden of proof to illustrate that his plea was made involuntary. Therefore, these allegations are denied and dismissed with prejudice.

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 applicant 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 the applicant that he must file and serve 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 for appeal.

[*Remainder of page left blank intentionally*]

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;

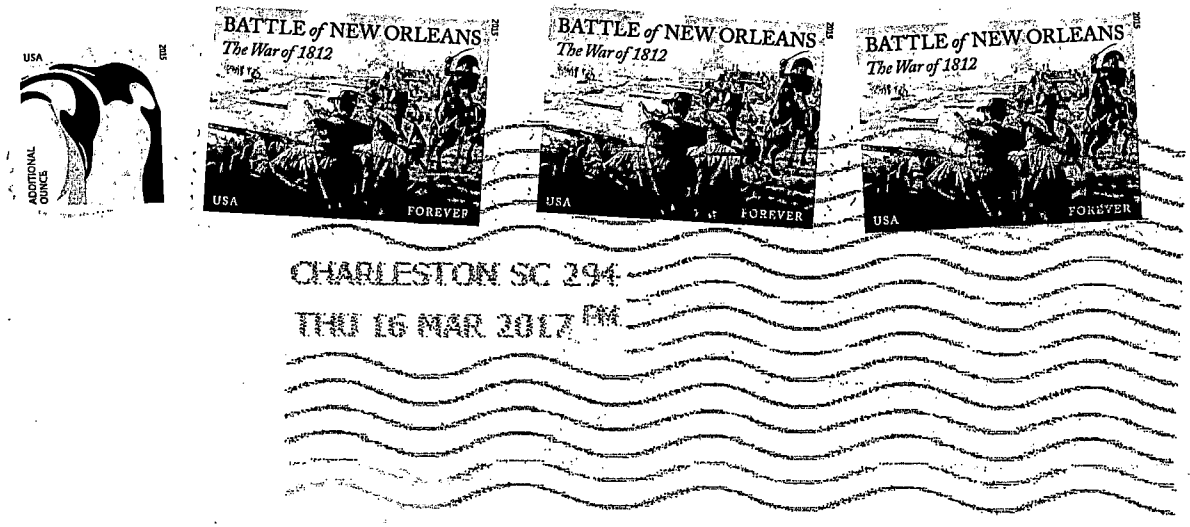
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 1 day of March, 2017.

MICHAEL G. NETTLES
Presiding Judge
Fifteenth Judicial Circuit

Florence, South Carolina

2015-CP-22-0770



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