



# The Brough Law Firm



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May 5, 2015

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, SC 29211

**RECEIVED**

MAY - 8 2015

**S.C. Supreme Court**

RE: THE STATE VS. Addie Thilavanh

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Original Proof of Service upon opposing counsel.
- (2) Order of Dismissal.

If I can be of any further assistance please feel free to call me.

Sincerely,

Christopher D. Brough

Enclosure

cc: South Carolina Office of the Attorney General  
Addie Thilavanh

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

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MAY - 8 2015

Case No.: 2012-CP-42-4713

**S.C. Supreme Court**

The State,

Respondent,

v.

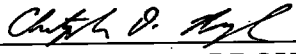
Addie Thilavanh,

Appellant.

**NOTICE OF INTENT TO APPEAL**

Addie Thilavanh appeals the denial of his application for Post-Conviction Relief in this case. The Order of Dismissal was imposed by the Honorable Roger L. Couch on April 23, 2015. Appellant received notice of the same on that date.

May 5, 2015

  
CHRISTOPHER D. BROUGH  
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(864) 585-3088  
ATTORNEY FOR APPELLANT

Other Counsel of Record:  
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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

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MAY - 8 2015

The Honorable Roger L. Couch, Circuit Court Judge

S.C. Supreme Court

Case No.: 2012-CP-42-4713

The State, Respondent,


v.

Addie Thilavanh, Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers and that a copy of the **Notice of Intent to Appeal**, was served upon the following person(s) on the State, by depositing copies of the same in the United States Mail, with sufficient postage affixed thereto, on May 6, 2015, addressed as follows:

The Honorable Alan Wilson  
SC Attorney General  
Rembert Dennis Building  
1000 Assembly Street, Room 519  
Columbia, S.C. 29201

  
Kirby Lanford

SWORN BEFORE ME THIS

6 DAY OF May, 2015.



NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: Aug. 3, 2019

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

Addie Thilavanh, #347337,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT

2012-CP-42-4713

**ORDER OF DISMISSAL**

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This matter comes before this Court by way of an application for post-conviction relief filed November 12, 2012. Respondent filed its Return on March 3, 2014. Applicant filed an amended application on March 21, 2014. A hearing was convened at the Spartanburg County Courthouse on September 19, 2014, at which time Applicant was present in court and represented by Christopher D. Brough, Esquire. J. Clayton Mitchell of the South Carolina Attorney General's Office represented Respondent. Applicant testified on his own behalf. Also testifying was Applicant's plea counsel, Richard H. Whelchel, Esquire, and Trooper J.M. Seibel. The Court had before it the Spartanburg County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, Respondent's Return, Applicant's appellate records, and the guilty plea transcript.

### I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the November 2010 term of the Spartanburg County Grand Jury for felony DUI – death and reckless homicide (2012-GS-42-7712, count 1 and count 2). Applicant was represented by

Counsel Whelchel. On December 5, 2011, Applicant pleaded guilty to felony DUI – death<sup>1</sup>. Applicant was sentenced by the Honorable J. Mark Hayes II to twenty (20) years' imprisonment.

Applicant filed a timely Notice of Appeal. The South Carolina Court of Appeals dismissed Applicant's appeal for failure to show any issue ruled upon by the trial court on November 23, 2011. The Court also construed several filings as a Petition for Rehearing, which they also denied on February 3, 2012. The Remittitur was returned on October 31, 2012.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel in failing to move to dismiss the felony DUI charge pursuant to S.C. Code Ann. § 56-5-2953.
2. Ineffective assistance of counsel in failing to investigate and pursue Applicant's contention that the victim stepped into the roadway in front of Applicant's vehicle and thus caused the accident.
3. Involuntary guilty plea.

## II. SUMMARY AND EVIDENCE PRESENTED AT THE PCR HEARING

### Applicant's Testimony

Applicant testified he pled guilty to felony driving under the influence and was sentenced to twenty years' imprisonment. Applicant testified the victim was impaired and walked right into the road. Applicant proclaimed he was not drunk despite registering a .23 blood alcohol level after a blood test was conducted at Spartanburg Regional Medical Center. Applicant testified there was no video taken from the scene of him performing field sobriety acts. Applicant took issue with the three eyewitness statements admitted at the guilty plea hearing ultimately disagreeing with their accounts of the incident.

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<sup>1</sup> The charge of reckless homicide was *not* proessed.

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**Trooper J.M. Seibel's Testimony**

Trooper Seibel testified he was the primary investigating officer of the incident. He testified he received the call that there had been a serious accident. He testified he arrived to a chaotic scene where several Emergency Medical Service (EMS) personnel had already arrived. Trooper Seibel testified EMS was dealing with what at that time was a potential fatality. Numerous firefighters were on the scene assisting EMS and other troopers. Trooper Seibel testified that the scene had not been secured as many eyewitnesses had pulled off of the road directly after the incident to provide help. He also testified that traffic from the adjacent road was still flowing which was a safety concern.

Trooper Seibel testified he made the determination that the incident was alcohol related after his discussions with the eyewitnesses and his interactions with Applicant. He testified he performed a field sobriety test at what he determined was a safe location near the accident. Trooper Seibel testified he did not record the field sobriety tests because he believed valid exigent circumstances existed to excuse him from the recording requirement. He testified he submitted an affidavit where he stated that exigent circumstances existed and explained that Applicant was transported to Spartanburg Regional Medical Center for blood alcohol testing to further his investigation. Trooper Seibel also testified his video recording equipment was not operational at the time of this incident.

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**Counsel Richard H. Whelchel's Testimony**

Counsel testified he represented Applicant on the charges currently before the Court. Counsel testified he was appointed to represent Applicant through his position with the Seventh Circuit Public Defender's Office. Counsel testified he reviewed the discovery with Applicant and discussed the lack of a video capturing Applicant's field sobriety tests. Counsel testified he

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thoroughly advised Applicant of the strength of a motion to dismiss the charges and ultimately decided not to file this motion as it was unlikely to be successful. Counsel testified it was likely the trial court would find that exigent circumstances existed and that the charges would not be dropped because the trooper would likely be free from his requirement to produce a video recording of the field sobriety tests.

### III. APPLICABLE LAW

In a post-conviction relief action, 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, 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. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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

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been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show 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, 59 (1985).

#### IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the appellate records, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

##### Failure to Move for Dismissal of Charges

Applicant alleges Counsel was ineffective in failing to move for dismissal of the felony DUI charge because the responding officer did not videotape Applicant's arrest. Applicant argues that even though Trooper Seibel submitted an affidavit justifying his failure to produce a video recording, Counsel was deficient in failing to move to dismiss the charges. The plain text of the statute at the time Applicant was charged is as follows:

Failure by the arresting officer to produce the video recording required by this section is **not alone a ground for dismissal of any charge** made pursuant to

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Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, **submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed.** In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.

S.C. Code Ann. § 56-5-2953 (emphasis added).

This Court finds Trooper Seibel's testimony credible and persuasive. Trooper Seibel testified he believed exigent circumstances existed and excused his use of the video recording requirement. Trooper Seibel described a hectic scene as the victim was severely injured and was being examined by medical personnel, several eyewitnesses had stopped to offer help, several EMS personnel and fire fighters were on the scene, all while traffic was still running on the scene. This Court finds Applicant has failed to meet his burden in proving counsel's testimony was ineffective in failing to move to dismiss the charges. Counsel's testimony that he chose not to challenge the charges because the affidavit was likely to excuse the absence of a video recording is a valid strategic decision. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

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This Court further finds Applicant failed to meet his burden of proof in establishing that had Counsel moved to dismiss the felony DUI charge, that the motion would have been granted. This Court finds a motion to dismiss the charges would have been denied because numerous exigent circumstances existed. It is also of significant note that Trooper Seibel testified his video recording equipment was not operational at the time of the incident. This Court finds Trooper Seibel's testimony credible and convincing. The trial court would also have viewed the situation based upon the totality of the circumstances. See S.C. Code Ann. § 56-5-2953 (providing nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape *based upon the totality of the circumstances.*") (emphasis added). This allegation is denied and dismissed with prejudice.

#### Failure to Investigate

This Court finds Applicant failed to meet his burden to prove that counsel's performance was either deficient or ineffective for failing to investigate Applicant's claim that the victim caused the accident. "Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 399 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted). In light of Counsel's credible testimony that he evaluated and apprised Applicant on the matter, Applicant has produced no reliable testimony that would even remotely diminish his culpability in the felony driving under the influence charge. Regardless, the allegation rests entirely on speculation. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."). Applicant failed to present any evidence that the victim was

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at fault other than his own self-serving, non-credible testimony. This Court finds all the evidence before it supports the State's contention that Applicant was clearly at fault, tested well over the legal alcohol limit to drive, and was therefore responsible for the death of the victim. Thus, this allegation is readily denied and dismissed.

### Involuntary Guilty Plea

Applicant argues he did not plead guilty knowingly and voluntarily. This Court finds otherwise and concludes that 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).

Applicant vaguely claims he did not plead guilty voluntarily because he was not aware he could challenge the charges and move for them to be dismissed. This Court finds this contention

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meritless. This Court finds the record reflects Applicant was fully advised that he was pleading guilty and therefore waiving any challenges to the evidence against him. The plea court's very thorough colloquy with Applicant demonstrates that he understood the consequences of pleading guilty. This Court finds very credible Counsel's testimony regarding his preparation and advice concerning the case. The record reflects Applicant admitted his guilt to the plea court. "A guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 129 (2014) (citing State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013); Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Notably the South Carolina Supreme Court has held "[a] guilty plea represents a break in the chain of events which has preceded it in the criminal process." Id (citations omitted). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Id (citing Rice, 401 S.C. at 332, 737 S.E.2d at 486). Therefore, this Court finds the plea judge correctly found Applicant's plea was freely, voluntary, and intelligently made. This allegation is 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, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

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V. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

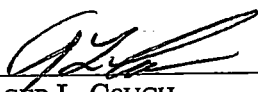
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.


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**IT IS THEREFORE ORDERED THAT:**

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

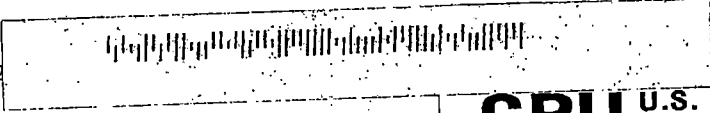
AND IT IS SO ORDERED this 23rd day of April, 2015.

  
\_\_\_\_\_  
ROGER L. COUCH  
Presiding Judge

 \_\_\_\_\_, South Carolina

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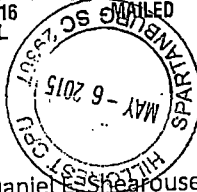
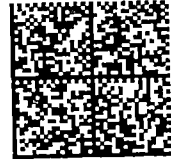
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The Honorable Daniel L. Shearouse  
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