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S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

April 13, 2017

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

Re: Eugene A. Gardner, III v. State of South Carolina
2014-CP-16-0672

Dear Mr. Shearouse:

Enclosed are the following:

1. Notice of Appeal
2. Proof of Service of the notice of appeal on the Respondent
3. Copies of the orders which are to be challenged on appeal.
4. A letter ordering the PCR transcript from the court reporter

Sincerely,

Valerie Garcia Giovanoli
Assistant Attorney General

Enclosures

cc: Lance S. Boozer, Esquire
The Honorable Scott B. Suggs, Clerk of Court of Darlington County
The Honorable William B. Rogers, Jr., Fourth Circuit Solicitor
SCCID, Division of Appellate Defense
Vincent J. Barton, Esquire
Trisha Allen, Victims Services

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APR 13 2017

APPEAL FROM DARLINGTON COUNTY
COURT OF COMMON PLEAS

S.C. SUPREME COURT

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2014-CP-16-0672

EUGENE A. GARDNER, III, #357996,

Respondent,

v.

STATE OF SOUTH CAROLINA

Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable G. Thomas Cooper, Jr.'s order dated February 17, 2017 and filed February 24, 2017 granting post-conviction relief to the Respondent and Judge Cooper's order dated March 9, 2017 and filed March 13, 2107 denying the State's Motion to Alter and/or Amend Judgment. The State received notice of entry of the final order on March 16, 2017. Copies of the orders on appeal are attached to this notice.



Valerie Garcia Giovanoli
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Columbia, South Carolina 29211
Telephone: (803) 734-3737

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
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APPEAL FROM DARLINGTON COUNTY
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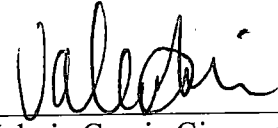
STATE OF SOUTH CAROLINA

Petitioner.

PROOF OF SERVICE

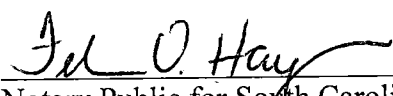
I certify that I have served the Notice of Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on April 13, 2017, to Lance S. Boozer, Esquire, his attorney of record, to the address below.

Mr. Lance S. Boozer, Esquire
1400 Laurel Street, Suite 4A
Columbia, SC 29201



Valerie Garcia Giovanoli
Assistant Attorney General

SWORN to before me this 13th day of April, 2017.



Notary Public for South Carolina.
My Commission Expires: 4-21-2018

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

Eugene A. Gardner, #357996,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
C/A NO: 2014-CP-16-672

**ORDER GRANTING APPLICATION
FOR POST-CONVICTION RELIEF**

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. In February 2013, the Darlington County Grand Jury indicted Applicant for murder (2005-GS-16-452). Julie R. Swilley, Esquire, and J. Richard Jones, Esquire, represented Applicant. Initially, on December 2, 2013, Applicant proceeded to trial. Following the beginning of trial, Applicant pled guilty to voluntary manslaughter. The Honorable J. Michael Baxley sentenced Applicant to twenty (20) years imprisonment. Applicant did not appeal his plea or sentence.

Applicant initially filed an Application for post-conviction relief on May 21, 2014.

Applicant raised the following allegations:

1. "Applicant was denied the right to effective assistance of counsel during the preparation phase of his trial."
 - a. "Trial counsel's performance during the preparation trial was both unreasonable and prejudicial."
 - i. "The defendant has a history of transient psychotic attacks (TIA's)."
 - ii. "The county psychological nurse's statement, 'I know you would not hurt anyone, your actions were normal (panic, scared, confusion) you didn't handle the situation

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DARLINGTON COUNTY, SC

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right - your brother had just died in from of you - you were in 'shock.'"

iii. "Counsel told defendant she was arranging an appointment with a neurologist, which was never done."

iv. "The defendant was actually on sick leave for the 2 weeks prior to the accident."

b. "Loud v. Whitney, 977 F.2d 149, 156 (5th Cir. 1992) (citing Strickland v. Washington supra)."

i. "The defendant and his brother had never been in a physical altercation.

c. "Tisdale v. State, 662 S.E.2d 514 (S.C. 2008) - Counsel found ineffective in murder case for failing to request charges of involuntary manslaughter and accident."

2. "Applicant was denied the right to effective assistance of counsel... during the guilty-innocence phase of his trial."

a. "Supporting facts: trial counsel's performance during the questioning of the trial was both unreasonable and prejudicial."

3. "Applicant was denied the right to effective assistance of counsel during the preparation phase of trial."

a. "Counsel allowed Darlington County Corrections Officer, Purvis, to sit in and assist with defendant's trial preparations and discussions."

4. "Applicant was denied the right to effective assistance by counsel during the guilt-innocence phase of trial was both unreasonable and prejudicial."

a. "Supporting facts: Trial counsel's performance during the guilty-innocence phase of trial was both unreasonable and prejudicial."

i. "Counsel allowed a court office (Scott B. Suggs - clerk of court), who had summoned the defendant into a room in the courtroom to discuss his case, advise counsel and the defendant."

ii. "There were 2 witnesses that heard a shot between 3:00-3:30 PM and Hardee (coroner) said Todd Gardner dies at the same time."

iii. "The defendant never had any intention of a plea at all - he has said over and over "I know I made a mistake by not calling for help. I was scared out of my mind but I am innocent, I would never hurt my brother. We talked every day; sometimes 3 times. He was coming to live with us after I got dad settled. I loved my brother."

iv. "The defendant asked counsel 'when will we go over the details of my case?' She said 'during trial.'"

5. "Applicant was denied the right to effective assistance of counsel during the guilt-innocence phase of his trial."

a. "Supporting facts: Trial counsel's performance during the preparation phase of trial was both unreasonable and prejudicial."

i. "After clerk of court had left and counsel was discussing, again the room was chaos."

ii. "Counsel did not represent her client in a just and professional way."

6. Counsel failed to communicate with and effectively represent Applicant.

7. Applicant denied opportunity to fully discuss plea offers with counsel.

8. Counsel failed to object to lack of factual basis for guilty plea.

The State made its Return on June 11, 2015. An evidentiary hearing was convened on January 10, 2017, at the Marlboro County Courthouse before the Honorable G. Thomas Cooper, Jr. The Applicant was present and represented by Lance S. Boozer, Esq. The State was present and represented by Valerie Giovanoli, Esq. This Court makes the following findings of fact and conclusions of law.

STANDARD OF REVIEW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's

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conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 268 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, 268 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is 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.

Based on the record and testimony presented at the PCR hearing, this Court finds that the Applicant has met his burden of proof.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Involuntary guilty plea/Ineffective assistance of counsel and third party interference.

Applicant testified that the killing of his brother was an accident. Applicant alleged and testified that on December 2, 2013, he was proceeding to trial on the murder charge at the Darlington County Courthouse. Applicant testified it was his desire to have a trial and he would not entertain any plea offers. Applicant further testified that during the second day of trial, a recess

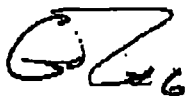
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was taken. During this recess, Applicant stated he was taken from the courtroom to a separate room within the courthouse to wait for the trial to resume. Applicant testified that while waiting in the room, Scott B. Suggs, ("Mr. Suggs") who Applicant knew to be the Darlington County Clerk of Court entered the room. Applicant testified at this point he was alone in the room with Mr. Suggs and counsel was not present. Applicant stated Mr. Suggs indicated to Applicant that he should plead guilty and proceeded to tell Applicant he would get a life sentence if he continued with the trial. Applicant testified Mr. Suggs indicated he was basing this advice on the fact that he had observed approximately 500 trials. Applicant indicated he knew Mr. Suggs simply from living in Darlington his entire life but denied having any sort of close relationship with him. Applicant testified that at this point, he became very frightened and immediately lost trust in the judicial process and his trial. Applicant testified that his attorney, Ms. Swilley, entered the room and found Mr. Suggs present. Applicant indicated it appeared Ms. Swilley was upset that Mr. Suggs was speaking with him. Applicant indicated he told Ms. Swilley that he was extremely frightened about the possible outcome of the trial based on the statements Mr. Suggs had just made to him. Applicant testified his daughter, Taylor Baker ("Ms. Baker") was then brought into the room. Applicant testified he discussed the case with his daughter and the statements Mr. Suggs had made to him. Applicant stated, based on the statements made by Mr. Suggs, he would enter a plea. Applicant indicated that Ms. Swilley told him he would have to admit killing the victim and that he was guilty of voluntary manslaughter. Applicant testified he told Ms. Swilley that was not true and asked whether he needed to lie to the judge. Applicant testified Ms. Swilley told him the judge would not accept the plea if he did not admit to the crime. Applicant stated he then proceeded with the plea and testified that the statements he made during the plea colloquy were false.

Applicant testified he did not want to plead guilty and would have continued forward with the trial had Mr. Suggs not spoken to him during the recess.

The Applicant called Mr. Suggs as a witness at the PCR hearing. Mr. Suggs testified that he knew the Applicant and that they had previously played golf together and would grill out. Mr. Suggs testified that as Darlington County Clerk of Court, he was present and in the courtroom during the Applicant's trial. Mr. Suggs further testified that during a recess, he met alone with the Applicant in a separate room and felt he was giving him advice as a friend. Mr. Suggs stated that during the meeting he told the Applicant that based on his experience as Darlington County Clerk of Court, and what he had seen in past trials, the Applicant should plead guilty. Mr. Suggs testified he felt the Applicant would likely be found guilty at trial and could receive a potential life sentence. He further stated he conveyed to the Applicant his belief that the evidence was stacked against him. Mr. Suggs acknowledged that the Applicant appeared to be very scared following their conversation. Mr. Suggs testified he believes had he not spoken with the Applicant during the recess, Applicant would not have pled guilty and would have instead continued with trial.

Ms. Swilley testified that during her representation of the Applicant, she met and discussed the case with him numerous times. She further testified that Applicant never wanted to enter a guilty plea. She recalled the State making approximately three (3) separate offers for Applicant to plead guilty to voluntary manslaughter in exchange for a twenty (20) year sentence, however, Applicant declined each and insisted on a trial. She testified he was so adamant on having a trial, she felt it was futile to even approach the Applicant with any plea offers, however, she had a duty to convey them to him. Ms. Swilley indicated she along with her co-counsel Mr. Jones and the Applicant prepared the case for trial. She stated that during the second day of trial, a recess was taken. During the recess, she indicated she attempted to speak with the Applicant but did not find



him in the room she expected him to be waiting in but rather he was in another room. Upon entering the room, Ms. Swilley testified she found the Applicant visibly worried, alone and speaking with Mr. Suggs. Ms. Swilley indicated she became upset that Mr. Suggs was speaking with the Applicant and asked one of the court staff why he allowed a third party to speak with her client. Ms. Swilley recalled that when she entered the room, Mr. Suggs was telling the Applicant that it was in his best interest to plead guilty. She indicated Mr. Suggs concluded the conversation and exited the room. At this point, Ms. Swilley testified Applicant appeared to be very frightened and was unsure of what to do. Ms. Swilley stated she then allowed Ms. Baker to come and speak with the Applicant and was present in the room for the conversation. Ms. Swilley indicated that Ms. Baker was extremely emotional and upset while speaking with the Applicant. Ms. Swilley indicated that Applicant asked her if he pled guilty, did she want him to lie to the judge during the court's questioning. She stated she advised Applicant she always wants him to tell the truth and he would have to admit killing the victim, otherwise the judge would not accept the plea.

Ms. Swilley testified that over the course of her representation, she enjoyed meeting with the Applicant and felt she had come to know him. She opined that had Mr. Suggs not spoken with the Applicant during the recess, the trial would have continued and Applicant would not have pled guilty. She did not believe there was any sort of close friendship between the Applicant and Mr. Suggs.

Applicant's daughter, Ms. Baker, also testified at the PCR hearing. Ms. Baker indicated that during the trial recess, she entered the room where the Applicant was waiting. She indicated both she and the Applicant were very emotional. She further testified she recalled Applicant asking Ms. Swilley if she wanted him to lie to the court when entering the plea. Ms. Baker testified Ms.

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Swilley told him "yes." She further testified that although she knew who Mr. Suggs was, she denied Mr. Suggs and Applicant ever maintaining any sort of friendship.

Mr. Jones testified that his involvement in Applicant's trial was limited and he was serving to assist Ms. Swilley as needed for trial. Mr. Jones indicated he was not present in the room during the meeting between Mr. Suggs and the Applicant, however, he recalled Ms. Swilley being upset about the meeting occurring.

Guilty pleas must be entered into voluntarily, knowingly and intelligently. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999). The facts and testimony involving this PCR application are unique. Applicant and Ms. Swilley both testified Applicant was intent on exercising his constitutional right to a jury trial in this case. Ms. Swilley also testified Applicant declined multiple plea offers. The record is also clear Applicant proceeded with a trial and was in the second day of his trial prior to the occurrence of the meeting between Applicant and Mr. Suggs.

This Court finds credible the testimony of the witnesses presented at the PCR hearing. It is uncontroverted that Mr. Suggs met with the Applicant during the trial recess, expressed his opinion as to the outcome of the case and strongly advised Applicant to plead guilty. It is further undisputed that had this meeting not occurred, Applicant would have proceeded with the trial and would not have pled guilty. Although this Court believes Mr. Suggs had nothing but good intentions in advising the Applicant to plead guilty, this Court finds the discussion, and setting in which it occurred, to be quite influential over the Applicant's decision on whether to continue to exercise his constitutional right to a jury trial. The Applicant was represented by counsel and should not have been subjected to outside influence from any source whatsoever regarding his trial or related decisions. This Court finds that this meeting between the Applicant and Mr. Suggs

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rendered his guilty plea involuntary.¹ This Court finds Applicant was not truthful in his responses to the plea court and further finds counsel should have been aware that Applicant intended to falsely testify when he inquired whether he should lie to the court prior to the plea. This Court finds counsel should have made the plea court aware of the circumstances leading to the plea and/or requested that the Applicant be allowed to withdraw his plea. Accordingly, this Court finds counsel was ineffective and this ineffectiveness prejudiced Applicant. This Court further finds the discussion between Mr. Suggs and Applicant rendered Applicant's guilty plea involuntary.

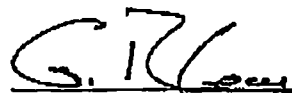
CONCLUSION

Accordingly, this Court grants Applicant's PCR application and finds Applicant's guilty plea was involuntarily entered. This Court denies and dismisses Applicant's remaining allegations.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be granted;
2. Applicant's conviction and sentence are vacated;
3. Applicant is entitled to a new trial; and
4. Applicant is remanded to the custody of Darlington County.

AND IT IS SO ORDERED this 17 day of FEBRUARY, 2017


The Honorable G. Thomas
Presiding Judge
Fourteenth Judicial Circuit

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¹ This Court is not concerned with the existence or nonexistence of any social relationship between Mr. Suggs and the Applicant or Mr. Suggs' official position as Clerk of Court but rather that this type of discussion and advice should only occur between a defendant and counsel or at counsel's request and in her presence.

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON

Eugene A. Gardner, III, #357996,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT

2014-CP-16-00672

**ORDER DENYING MOTION TO
ALTER OR AMEND JUDGMENT**

This matter comes before the Court by way of Respondent's Motion to Alter and/or Amend the Judgment pursuant to Rule 59(e), SCRPC received March 2, 2017. Specifically, Respondent asks this Court to reconsider its Order Granting Post-Conviction Relief that was filed February 24, 2017.


After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or facts not appropriately considered.

Accordingly, this Court hereby **DENIES** Respondent's Motion under Rule 59(e), SCRPC, to reconsider this Court's February 24, 2017, Order Granting Post-Conviction Relief. Furthermore, pursuant to Rule 59(f), SCRPC, the Court is of the opinion that oral argument is not necessary.

IT IS SO ORDERED.

CAULDEN, South Carolina

March 9, 2017


G. Thomas Cooper, Jr.
Presiding Judge

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