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**RECEIVED**

JUN 02 2017

S.C. SUPREME COURT

May 27, 2017

Daniel E. Shearouse, Clerk  
The Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

Re.: James Starnes v. State  
2016-CP-29-00373

Dear Clerk Shearouse:

Please find enclosed the following documents in reference to the above listed case:

- 1- Notice of Appeal
- 2- Proof of service
- 3- Order Denying PCR Relief

Thank you and please feel free to contact me with any additional questions or concerns. Please note that I have also sent all of this information to the South Carolina Commission on Indigent Defense and have asked them to handle this appeal from here forward.

Sincerely Yours,

Nathan Sheldon  
The Law Office of Nathan J. Sheldon

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM LANCASTER COUNTY  
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2016-CP-29-00373

State of South Carolina,

Respondent,

v.

James Nicholas Starnes,

Applicant.

NOTICE OF APPEAL

James Nicholas Starnes appeals the order of the Honorable W. Jeffrey Young dated May 10, 2017 denying his request for post-conviction relief. Applicant received written notice of entry of this order on May 18, 2017.

May 30, 2017



Nathan J. Sheldon  
SC Bar #: 0074943  
331 E. Main St., Suite 200  
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(803) 909-9343  
Attorney for Applicant

Other Counsel of Record:  
DeShawn Mitchell, Esquire  
Assistant Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211-1549  
Attorney for Respondent  
(803) 734-3970

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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LANCASTER COUNTY  
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W. Jeffrey Young, Circuit Court Judge

Case No. 2016-CP-29-00373

State of South Carolina,

Respondent,

v.

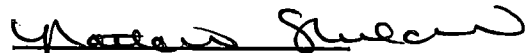
James Nicholas Starnes,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on DeShawn Mitchell with the Attorney General's Office by depositing a copy of it in the United States Mail, postage prepaid, on May 30, 2017 mailed to Post Office Box 11549, Columbia, South Carolina 29211-1549.

May 30, 2017



Nathan Sheldon

SC Bar #: 0074943

331 E. Main St., Suite 200

Rock Hill, SC 29730

803-909-9343

Attorney for Appellant

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

James Nicholas Starnes,  
S.C.D.C. No. 364264

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS

) SIXTH JUDICIAL CIRCUIT

) C.A. No. 2016-CP-29-0373

**RECEIVED**

JUN 02 2017

S.C. SUPREME COURT

**ORDER OF DISMISSAL  
(with prejudice)**

FILED  
OFFICE OF CLERK  
OF COURT  
2017 MAY 15 PM 3:32  
CLERK OF COURT  
LANCASTER, SC

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on March 31, 2016. Respondent filed its responsive pleadings on or about November 23, 2016. An evidentiary hearing into the matter was convened on January 10, 2017, at the Lancaster County Courthouse. The Applicant was present and testified in his defense. The Applicant's plea counsel, Michael H. Lifsey, Esquire, also testified. The Applicant was represented by Nathan J. Sheldon, Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office.

**PROCEDURAL HISTORY**

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Lancaster County Clerk of Court's orders of commitment. Applicant was indicted by the November 2011 term of the Lancaster Grand Jury for one count of trafficking in cocaine, 28-100 grams (2011-GS-29-1279), one count of possession with intent to distribute marijuana (2011-GS-29-1280), one count of possession of a schedule I, II, III, IV, and V controlled substance (2011-GS-29-1281), and one count of possession or display of a firearm or knife during the commission of a violent crime (2011-GS-29-1282). Mike Lifsey, Esquire, represented

Applicant. On June 3, 2015, Applicant proceed to trial and was convicted as indicted to possession with intent to distribute marijuana, possession of a schedule I, II, III, IV, and V controlled substance, and possession or display of a firearm of knife during the commission of a violent crime. Applicant was also convicted of the lesser included offense of trafficking in cocaine, 10-28 grams. The Honorable Brian Gibbons sentenced Applicant to a five (5) years' for each charge of trafficking in cocaine, possession with intent to distribute marijuana, and possession or display of a firearm of knife during the commission of a violent crime. Applicant was sentenced to six (6) months for the possession of a schedule I, II, III, IV, and V. controlled substance. The sentences are set to run concurrently. Applicant did not appeal his convictions or sentences.

#### **Allegations**

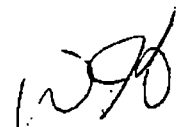
In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reason:

1. "The Department of Corrections has altered my sentence as handed down by the court and is trying to make applicant do a total of five years day for day."  
(sic)
2. "The applicant's sentence is illegal and exceeds the statutory amount authorized by law." (sic)
  - a. "The Department of Corrections has also altered Applicant's sentence and is trying to make the Applicant do a hundred percent of five years on the weapons charge."

At the evidentiary hearing, the Applicant proceeded solely on the allegation that counsel was ineffective in failing to inform him that the sentence for possession of a weapon during the commission of a violent crime was required to be served day for day.

#### **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, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court has made the following findings of fact and conclusions of law based upon all of the probative evidence presented.

### **Ineffective Assistance of Counsel**

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; 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 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, 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, 286 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 a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. Because Applicant pled guilty, he must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have instead insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Where an applicant alleges his attorney's deficient performance led him to reject an offer, he must show that but for the ineffective advice of counsel there is a "reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Lafler v. Cooper, 132 S.Ct 1376, 1385 (2012).

#### **Failure to Adequately Advise of Day for Day Nature of Sentence**

The Applicant's sole allegation at the evidentiary hearing was that counsel was ineffective for failing to advise him that the offense of possession of a weapon during the commission of a violent crime was required to be served day for day. He testified that if he had known the sentence was a minimum five year day for day sentence, then he would have accepted a previous plea offer rather than proceed to trial.

Counsel conceded at the evidentiary hearing that he was not aware that the five year sentence for possession of a weapon during the commission of a violent crime was a day for day sentence. Counsel testified that the solicitor's initial offer was for the Applicant to plead guilty and receive ten years. The Applicant did not express any interest in this deal. Counsel explained that immediately prior to trial, the Applicant was offered a deal of five years. Counsel said the



intention was that the Applicant would have been a "parole eligible five years." Counsel said he did not remember whether the gun charge would have been included in that offer, but the intention was that it would have been a five year, parole eligible sentence if accepted. The Applicant rejected that plea offer.

Counsel testified that during the trial, there was another plea offer from the solicitor's office. While not entirely sure of the details, counsel testified that it was either a cap of five years, with the trial judge indicating he would sentence the Applicant to three years, or a recommended three years. The Applicant rejected that plea offer as well. Counsel ultimately testified that the Applicant rejected the "parolable" five and three year offers "because he didn't want to go to jail."

#### *Discussion*

This Court finds the Applicant has failed to meet his burden to prove ineffective assistance of counsel. Specifically, he has failed to convince this court that but for counsel's purportedly deficient performance, he would have accepted any of the previous offers rather than proceed to trial. See Lafler v. Cooper, 132 S.Ct. 1376, 1385 (2012). Counsel's characterization of the Applicant's desire to avoid jail is both probative and credible. The Applicant chose to reject multiple beneficial offers, including a potential three year sentence, and instead proceeded on a charge that carried a maximum of **twenty-five years** imprisonment.<sup>1</sup> Even assuming, as discussed during the hearing, that the Applicant felt he would at most be convicted of the lesser included offense of trafficking between ten and twenty-eight grams, the maximum sentence on that offense was still up to ten years imprisonment. Accordingly, under either scenario, the

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<sup>1</sup> The Applicant proceeded to trial on the charge of trafficking between twenty-eight and one hundred grams of cocaine, a crime punishable for a first offense of between seven and twenty-five years imprisonment.



Applicant's self-serving testimony that he would have pled guilty if he had known that upon conviction five of those years would have had to be served day for day is entirely unbelievable, especially when taking into account that he had already *rejected* a potential three year offer during trial.

Having determined that the Applicant's testimony is not credible, this Court finds he has failed to meet his burden to prove ineffective assistance of counsel. This allegation is therefore denied and dismissed.

#### **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.

A handwritten signature in black ink, appearing to be the initials 'WJ' followed by a stylized flourish.

**CONCLUSION**

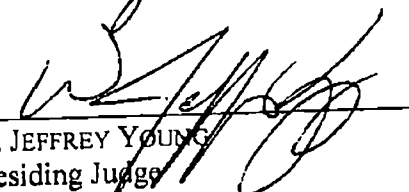
Based on the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

**IT IS THEREFORE ORDERED**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 10<sup>th</sup> day of May, 2017.

  
W. JEFFREY YOUNG  
Presiding Judge  
Sixth Judicial Circuit

Sumter, South Carolina