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June 7, 2017

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

RECEIVED
JUN 09 2017
S.C. SUPREME COURT

The Honorable Sharon W. Staggers
Clerk of Court
125 W Main St.
Kingstree, SC 29556

RE: Roger Fortune, #301471, v. State of South Carolina
2015-CP-45-343

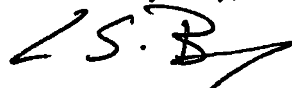
Dear Mr. Shearouse and Ms. Staggers:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

(1) Proof of Service of the Notice of Appeal;
(2) A copy of the Order which is to be challenged on appeal; and
(3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Fortune in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Fortune in this appeal.

Yours very truly,



Lance S. Boozer

Enclosures
cc: Julie Coleman, AAG
Loriene French, OAD
Roger Fortune, #301471

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUN 09 2017
S.C. SUPREME COURT

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

Case No. 2015-CP-45-343

Roger Fortune, #301471, ...Petitioner,

v.

State of South Carolina,..Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable D. Craig Brown's Order dated April 25, 2017, and filed May 4, 2017, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on June 7, 2017. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,

Lance S. Boozer
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Tele: 803-608-5543

June 7, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUN 09 2017
S.C. SUPREME COURT

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

Case No. 2015-CP-45-343

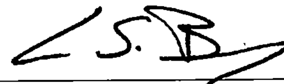
Roger Fortune, #301471, ...Petitioner,

v.

State of South Carolina,..Respondent.

PROOF OF SERVICE

I, Lance S. Boozer, 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 Assistant Attorney General Julie Coleman, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 7th day of June, 2017.



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STATE OF SOUTH CAROLINA COUNTY OF WILLIAMSBURG	)	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT
Roger Leon Fortune, #301471, Applicant, v. State of South Carolina, Respondent.	)	2015-CP-45-343 **ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on July 17, 2015. Respondent made its Return on October 28, 2015. An evidentiary hearing was convened on March 27, 2017, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Lance Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Marshall Weaver, Esquire ("Plea Counsel") also testified. The Court had before it a copy of the guilty plea transcript, the records of the Sumter County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. Applicant was true bill indicted at the July 2014 term of the Williamsburg County Grand Jury for trafficking crack cocaine (28-100 grams) (3rd or subsequent offense); trafficking cocaine (10-28 grams) (3rd or subsequent offense); possession

with intent to distribute heroin (3rd or subsequent); possession with intent to distribute marijuana; possession of schedule I to IV controlled substance (3rd or subsequent offense). Marshall Weaver, Esquire represented Applicant. On October 15, 2014, Applicant pled guilty as indicted before the Honorable Clifton Newman. Judge Newman sentenced Applicant without negotiations or recommendations to five year term of imprisonment for possession of scheduled I, II, or III drugs, one year term of imprisonment for possession of Schedule IV drugs –first offense, ten year term of imprisonment for trafficking in methamphetamine or cocaine base – 28 grams or more but less than 100 grams, eleven year term of imprisonment for possession with intent to distribute heroin, and ten year term of imprisonment for trafficking in cocaine ten grams or more – second offense with all sentences running concurrently. Applicant did not appeal his guilty plea or sentence.

II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

1. Ineffective assistance of counsel
    a. Initial stop of the vehicle was not justified
    b. I wrote a false statement out of hope and fear in which the police officer used a question first Miranda warnings later tactic
    c. My lawyer did not go through with the pre-trial motions we discussed.
    d. The police officer made up the reason for the stop and probable cause.
    e. After telling him over and over I didn't no (sic) about the drugs, he told me the only way he could help is if I told him something about the drugs, so I made up a story and told him….

III. APPLICABLE LAW

In a post-conviction relief action, the 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, 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, 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 been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, 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).

V. SUMMARY OF RELEVANT TESTIMONY

Applicant testified that he is currently serving an eleven year sentence. He stated that he was originally charged with trafficking crack, trafficking cocaine, possession with intent to distribute cocaine, possession of pills, and possession of marijuana. He testified that they were about to go to trial on his charges, but his attorney made a motion to reopen the State's plea offer of fifteen years for all charges. Applicant stated that the trial court granted his motion and he

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accepted the offer and chose to plead guilty. He stated that he pled guilty to all charges, but he pled down to trafficking, second offense, rather than trafficking, third offense, and he received an eleven year sentence.

Applicant testified that he went into a room in the middle of the pre-trial hearings to discuss a plea. He stated that he did not want to accept the plea offer, but Plea Counsel talked him into it. He stated that he wanted to go to trial but Plea Counsel lacked confidence and he would not have represented him to the best of his ability.

Plea Counsel testified that the State extended a plea offer before Applicant's trial, but it had a finite deadline, and the day after the offer closed, the State turned over a new piece of evidence—a videotape of Applicant in the police car telling the person with him to take the fall for the drugs. Plea Counsel stated that he argued to the trial court before the trial began that the State should reopen their plea offer because it was not fair to close the offer without offering all discovery, and the trial court granted his motion and reopened the offer. He stated that, at that point, he and Applicant discussed the plea offer, and Applicant chose to accept the offer instead of proceed to trial.

Plea Counsel testified that he intended to argue his motion to suppress the videotape before the trial began, but Applicant chose to plead guilty before he argued them. He stated that if he had argued his motions before the trial court, the State would have revoked their offer, so he could not argue his pre-trial motions if Applicant wanted to accept the plea deal. He stated that Applicant was charged with trafficking, third offense, but he pled down to trafficking, second offense in exchange for his guilty plea. Plea Counsel testified that Applicant had the proper prior convictions to enhance his trafficking charge; Applicant was convicted of possession of methamphetamine/cocaine in 2010 and trafficking ice in 2004. He stated that he explained to

Applicant the drug enhancement statute, but he did not believe him, so he specifically asked the plea judge to explain the enhancement statute to Applicant on the record.

Plea Counsel testified that if he had seen anything on the videotape or in the discovery indicating that the stop of the vehicle was illegal, he would have noticed and argued that to the trial court, but he did not. He stated that the evidence against Applicant was very strong and included a written confession, the videotape of his interaction in the police car with the person he was arrested with, and a very large amount of drugs. He testified that it was Applicant's decision to plead guilty.

VI. 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 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 (1985).

As a matter of general impression, this Court finds Applicant's testimony to be not credible. In contrast, this Court finds Plea Counsel's testimony to be very credible. These findings are applied to the specific findings below.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleges Counsel was ineffective in his advice surrounding his guilty plea. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by

showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985).

Applicant has failed to meet his burden in proving Plea Counsel was ineffective in any regard. This Court finds that Plea Counsel properly relayed the State's plea negotiations and went over the discovery with Applicant, as well as fully explained the possible outcomes in sentencing. This Court finds that Plea Counsel's representation did not fall below the standards of professional norms in any manner. Based on the testimony presented and the record before the court, this Court finds that Plea Counsel's representation was not ineffective in any regard.

Applicant alleges that Plea Counsel was ineffective for failing to argue the pre-trial motions that they discussed. Plea Counsel credibly testified, and the transcript clearly shows, that if Plea Counsel had gone forward and argued the pre-trial motions he had filed, the State would withdraw their plea offer. The trial court granted Plea Counsel's motion to reopen the State's offer, but it was understood by all parties that Applicant needed to accept or reject that offer before they moved forward to any other motions. Applicant intelligibly chose to plead guilty rather than proceed to trial, so there was no reason for Plea Counsel to argue his motions.

Plea Counsel went above and beyond the standards of representation in this case, and he did everything he could to represent Applicant in the face of very strong evidence against him. Plea Counsel was not deficient in any regard, and there was no prejudice to Applicant from any

of Plea Counsel's actions or inactions. Therefore, this allegation is denied and dismissed with prejudice.

INVOLUNTARY GUILTY PLEA

To the extent that Applicant argues his plea was not given freely and voluntarily, this Court finds otherwise and concludes that Applicant's 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 the record reflects that Applicant was fully advised of the rights he was giving up by pleading guilty. Applicant presented no credible evidence as to why he should be able to depart from his statements at the plea hearing. This Court finds very credible Plea

Counsel's testimony that he advised Applicant of all facts and risks of pleading guilty, and that it was Applicant's decision to plead guilty.

The record reflects Applicant fully 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. Accordingly, this allegation must be denied and dismissed with prejudice.

UNDERLYING EVIDENCE

This Court finds that the remaining allegations Applicant argues in his application are attempting to challenge the sufficiency of the underlying evidence in his case, and he waived his right to challenge this evidence by pleading guilty. A guilty plea generally acts as a waiver of all non-jurisdictional defects and defenses. State v. Munsch, 287 S.C. 313, 338 S.E.2d 329 (1985). The plea admits all elements of the offense charged, "leaves open for review only the sufficiency of the indictment and waives all other defenses." Id. at 314, 338 S.E.2d at 330; cf. United States v. Broce, 488 U.S. 563, 569, 109 S.Ct. 757 (1989). Applicant waived his right to challenge the

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stop of the vehicle and the State's evidence against him by pleading guilty. Therefore, these allegations are 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 testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

VII. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. 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 appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

[signature page to follow]

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IT IS THEREFORE ORDERED:

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

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 25 day of April, 2017.

D. CRAIG BROWN
Presiding Judge
Third Judicial Circuit

Florence, South Carolina

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STATE OF SOUTH CAROLINA

County of Williamsburg

Roger Leon Fortune, 111.

Petitioner

vs.

STATE OF SOUTH CAROLINA

Defendant

IN THE COURT OF COMMON PLEAS

3rd Judicial Circuit

NOTICE OF APPOINTMENT FOR LEGAL COUNSEL

Case Number 2015-CP-45- 343

To: Boozer,Attorney at Law

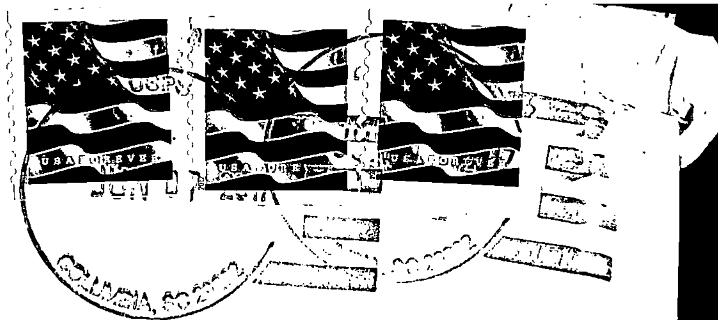
By order of the Chief Administrative Judge and pursuant to Rule 608, SCACR, you are hereby appointed to act as attorney for Roger Leon Fortune, 111, the Petitioner, in this action.

This 9th day of Sept, 2015.

Sharon W. Staggers

~~Judge/~~Clerk of Court

THE BOOZER LAW FIRM, LLC
1400 Laurel Street, Suite 4A
Columbia, SC 29201



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