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RECEIVED

JUL 06 2017

July 3, 2017

S.C. SUPREME COURT

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: Marco Clark v State of South Carolina
Case No. 2013-CP-14-109

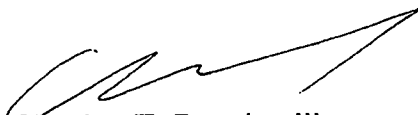
Dear Sir or Madam:

Enclosed herewith you will find the **Notice of Appeal, Order of Dismissal**, along with a **Proof of Service** in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,



Charles T. Brooks, III
CTB/jlb

Enclosed as stated

Cc: Julie A. Coleman, Office of Attorney's General
South Carolina Office of Appellate Defense
Marco Clark, 335713

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas
Honorable Brian Gibbons, Circuit Court Judge

RECEIVED

JUL 06 2017

S.C. SUPREME COURT

Case No: 2013-CP-14-109

Marco Clark..... Appellant
S.C.D.C. No.: 335713

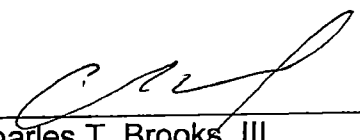
v.

The State..... Respondent

NOTICE OF APPEAL

Marco Clark appeals his Denial for Post Conviction Relief in this case. The Order of Dismissal was imposed and signed by the Honorable Brian Gibbons on June 18, 2017 which I, Charles T. Brooks, III, received on July 3, 2017.

July 3, 2017


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Other Counsel on Record:
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
JUL 06 2017
S.C. SUPREME COURT

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas
Honorable Brian Gibbons, Circuit Court Judge

2013-CP-14-109

Marco Clark.....Appellant
S.C.D.C. No.: 335713

v.

The State.....Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 3rd day of July, 2017, I served the foregoing **Notice of Appeal, Order of Dismissal**, as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on July 3, 2017, addressed to the following as indicated below:

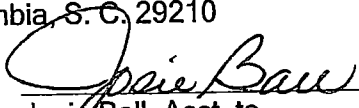
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

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Office of Attorney's General
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Marco Clark, 335713
Kirkland Correctional Institution
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Dated: July 3, 2017


Josie Ball, Asst. to
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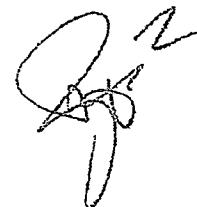
Pursuant to Rule 59(e). A hearing over the motion was held with all parties present on May 3, 2017, at the Clarendon County Courthouse. This Order follows.

After careful deliberation and consideration of the entire record before the Court, and considering applicable law, this Court hereby orders that Respondent's Motion to Alter or Amend Pursuant to Rule 59(e) is GRANTED. The "Order Granting Post Conviction Relief" filed December 1, 2016, is hereby VACATED, and this application for post-conviction relief is DENIED and DISMISSED with prejudice. The Court now 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 Clarendon County Clerk of Court. Applicant was true bill indicted at the March 2009 term of the Clarendon County Grand Jury for Armed Robbery and Possession of a Weapon during a Violent Crime (2009-GS-14-69). He was represented by Harry Leslie Devoe, Jr., Esquire. On September 11, 2012, Applicant pled guilty as indicted without negotiations or recommendations before the Honorable Howard P. King. He was sentenced to twenty-two years' imprisonment for the Armed Robbery charge and five years' imprisonment for the Possession of a Weapon during a Violent Crime charge to run concurrently.

Applicant subsequently appealed to the South Carolina Court of Appeals. The Court of Appeals affirmed Applicant's conviction and sentence. State v. Clark, Op. No. 2012-UP-55 (Ct. App. filed February 1, 2012). The Remittitur was issued on February 21, 2012.

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

1. "Court refusal to approve funds for Defendant's defense."
 - a. "Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed 2nd 53 (1985)"
2. "Ineffective Assistance of Counsel."
 - a. "Defense counsel admitted his ineffectiveness"
3. Plea Counsel failed to order evaluation."
 - a. "Plea counsel admitted he failed to order correct exam."

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, 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 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

At the evidentiary hearing, Applicant testified that he met with Plea Counsel at least three or more times prior to the plea. He stated that he pled guilty to this crime before Judge King. He stated that he was kind of "cloudy" the day of the guilty plea, and he did not know that he was supposed to go to trial that day. Applicant stated that he knew that he did something wrong, but he didn't know what was going on, and his attorney told him that he would not win at trial, so he decided to plead guilty. He stated that Plea Counsel explained the charges to him, but he does not know if he really understood everything. He stated that Plea Counsel did explain some things, but probably not everything.

Applicant testified that he previously used drugs, and the drug use made him weak at times. He stated that he had no mind of his own. He stated that he had turned himself into law enforcement on another crime before this happened, but they should have given him time in prison then instead of leaving him on the streets.

Applicant testified that he was in the passenger seat of his truck when he was pulled over; he had been drinking and he was not on the drugs he was supposed to take at the time. He stated that during the crime, he was under the influence of crack-cocaine, cocaine, marijuana, and

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alcohol. He testified that he admits he did wrong and he knew it, but he was given too much time because he never hurt anybody.

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).

LACK OF M'NAGHTEN EVALUATION

Applicant alleges that he is entitled to post-conviction relief based on the trial court's refusal to approve funds for his defense. This allegation must be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160.

An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20 (1976).



Although the trial court did deny Applicant's request for funds for a M'Naghten evaluation, this fact does not support a cognizable claim for post-conviction relief under any of the statutory grounds. This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973).

Furthermore, Applicant waived his right to challenge the trial court's denial of his request for funds, which is a direct appeal issue, by pleading guilty. "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)). "Furthermore, review of a trial error is unnecessary where a defendant admits in open court after his conviction that he is guilty." Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (citing State v. Sroka, 267 S.C. 664, 230 S.E.2d 816 (1976)).

Finally, Applicant's claim that he was not able to understand criminal responsibility at the time he committed the crime is an affirmative defense that he also waived by pleading guilty. S.C. Code Ann. § 17-24-10 (1976) reads:

Affirmative defense.

(A) It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.



(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the defense of insanity.

Applicant waived his right to raise this affirmative defense by pleading guilty. In South Carolina, a guilty plea has been recognized to be "a confession of guilt, made in a formal manner[.]" and such a plea "has the same effect in law as a verdict of guilty[.]" Sanders v. Leake, 254 S.C. 444, 447, 175 S.E.2d 796, 797 (1970). By entering a guilty plea, a criminal defendant admits all elements of the charged offense, **waives all other non-jurisdictional defects and defenses**, and leaves open for review only the sufficiency of the indictment. State v. Thomason, 341 S.C. 524, 526, 534 S.E.2d 708, 710 (Ct. App. 2000) (emphasis added); see State v. Snowdon, 371 S.C. 331, 333, 638 S.E.2d 91, 92 (Ct. App. 2006) ("Generally, a knowing and voluntary guilty plea waives all non-jurisdictional defects and defenses, including claims of constitutional violations."). As a result, "[a] defendant who pleads guilty usually may not later raise independent claims of constitutional violations." Gibson v. State, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

Applicant solemnly admitted his actions were criminal in nature and sufficient to satisfy the elements of armed robbery and possession of a weapon during the commission of a violent crime. By admitting to the plea court that Applicant was criminally responsible for the crime, he waived any defense he may have had to this crime, including the affirmative defense of competency to understand criminal responsibility. Applicant was found competent to plead guilty, thus he knowingly and intelligently waived this defense by entering a valid guilty plea.

The South Carolina Court of Appeals used this exact reasoning in denying Applicant's direct appeal, citing Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975): "The general rule is that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of



nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea.” State v. Marco Andrea Clark, Unpublished Opinion No. 2012-UP-055 (filed February 1, 2012). Based on this holding by the Court of Appeals, Applicant’s allegation is also barred by the doctrine of *res judicata*.

Therefore, because this allegation fails to state a cognizable claim for post-conviction relief, because Applicant waived his right to challenge this direct appeal issue by pleading guilty, because Applicant waived his right to raise the affirmative defense of lack of criminal responsibility, and because the argument is barred by *res judicata*, the allegation is denied and dismissed with prejudice.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant raises an allegation arguing that Trial Counsel was ineffective in his representation surrounding his trial. 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)). This Court finds that the testimony presented at the PCR hearing satisfies neither prong of the Strickland test; Applicant can show neither ineffectiveness nor prejudice, thus this allegation should be denied and dismissed with prejudice.

Applicant alleges that Plea Counsel was ineffective for failing to order a M’Naghten mental evaluation, and that he admitted his ineffectiveness on the record before the plea. The trial transcript before the Court indicates that Plea Counsel had Applicant mentally evaluated in June of 2009, and he was found competent to stand trial. Motions hearing tr. 3 line 18-19. Plea Counsel moved the plea court on July 7, 2009 for additional funding to have Applicant evaluated in order to determine criminal responsibility, and the plea judge denied his motion. See motions



hearing transcript; ROA 10 line 6-19. During the guilty plea, the plea judge made a determination on the record that Applicant was competent to stand trial and that Applicant understood criminal responsibility at the time he committed the crime. ROA 19 line 2-13.

This Court notes that, although Plea Counsel was not present at the evidentiary hearing to testify, Plea Counsel is presumed to be effective. Courts should presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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).

Deficiency

Based on the record before this Court, it is clear that Plea Counsel made a motion for funding to obtain an independent M'Naghten evaluation for criminal responsibility of Applicant. Plea Counsel explained to the plea court in detail why he believed this evaluation was necessary, and the plea court denied his motion. It was within the trial court's discretion to deny Plea Counsel's motion. State v. Colden, 372 S.C. 428, 641 S.E.2d 612 (2007). Plea Counsel's request for funding for this evaluation was effective assistance of counsel. The plea court's decision to deny his request was out of Plea Counsel's control and does not render him deficient. Plea Counsel requested this evaluation prior to the guilty plea, and the plea court denied his request. There was nothing further that Plea Counsel could have done at this point to obtain the evaluation. Therefore, because Plea Counsel *did* request a M'Naghten evaluation and his request was denied, this Court finds that Plea Counsel was not deficient in this regard.



Prejudice

Applicant has failed to meet his burden of proving prejudice because he did not present evidence to show that (1) Plea Counsel's request to obtain a M'Naghten evaluation would have been granted; and (2) a M'Naghten evaluation would have proven that he did not understand criminal responsibility. Thus Applicant has failed to demonstrate that Plea Counsel's failure to obtain a M'Naghten evaluation changed the outcome of the proceedings, and he cannot prove prejudice.

A defendant must be mentally competent to stand trial to assist counsel in his defense. Drope v. Missouri, 420 U.S. 62 (1975). In every criminal case, it is presumed the defendant is sane. State v. Milian-Hernandez, 287 S.C. 183, 336 S.E.2d 476 (1985). Insanity is an affirmative defense to a prosecution for a crime. *Id.* South Carolina has adopted the M'Naghten test to determine insanity. State v. Lewis, 328 S.C. 273, 277-78, 494 S.E.2d 115, 117 (1997). A defendant is insane if, at the time of the commission of the act constituting the offense, as a result of mental disease or defect, he lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong. *Id.*; see S.C. Code Ann. § 17-24-10(A) (Supp.1996).

First, Applicant has not met his burden in proving that he would have received funding for a M'Naghten evaluation had Plea Counsel requested it. In fact, Plea Counsel did request funding for an evaluation and the court denied his request. Thus, Applicant cannot prove that any further action would have changed the plea court's decision. It is in the discretion of the plea court to determine whether Applicant was entitled to an evaluation. State v. Colden, 372, S.C. 428, 641 S.E.2d 612 (2007). The plea court was within its discretion when it denied the request,

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and Applicant has provided no evidence to prove that any additional argument or information presented to the plea court would have changed its decision.

Second, Applicant has not presented any credible evidence at all to support his assertion that the M'Naghten evaluation would have shown that he did not understand criminal responsibility. South Carolina courts have repeatedly held that a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice for the failure to present that testimony at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

In determining if counsel is ineffective for failing to request a competency hearing, an applicant must show that a reasonable probability exists that he would be found incompetent at the time of this trial or plea. Jeter v. State, 308 S.C.230, 417 S.E.2d 594 (1992). "Under this second prong of Strickland, the petitioner need only demonstrate a 'reasonable probability' that he was either insane at the time of the [crime] or incompetent at the time of the plea. Jeter at 233-34, 417 S.E.2d at 596. "For an insanity defense, the accused must be unable to distinguish moral or legal right from wrong and to recognize the particular act charged as morally or legally wrong." Id. (citing S.C. Code Ann. 17-24-10 (Supp. 1991)). "To show prejudice for failing to pursue this defense, the petitioner must produce some evidence of insanity or a showing that with the exercise of due diligence, an insanity defense could have been developed." Id. (citing State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982), accord Daniel v. State, 282 S.C. 155, 317 S.E.2d 746 (1984)).



Here, Applicant has presented no credible evidence of his incompetency or lack of criminal responsibility. He has not presented expert witness testimony to explain what the results of the M'Naghten evaluation would have been. He has provided no affidavits, evaluation results, or any other form of testimony to meet his burden of proof. Therefore, it is improper for this Court to speculate as to the results of an evaluation and to assume prejudice. Criminal defendants are presumed sane in every criminal case. Milian-Hernandez, supra. Based on this, this Court finds Applicant has failed to meet his burden of proving prejudice.

This Court finds Applicant has failed to show either prong of the Strickland test. Accordingly, 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, 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-

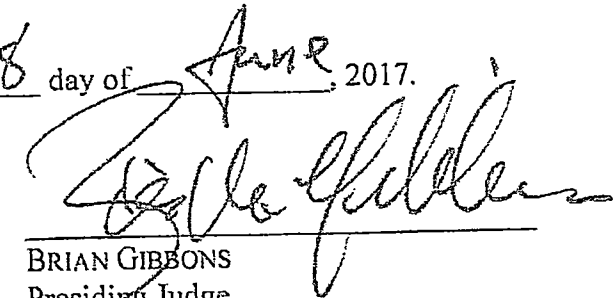


conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

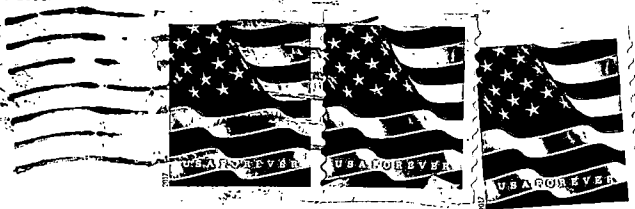
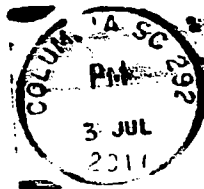
1. That Respondent's Motion to Alter or Amend Pursuant to Rule 59(e) is granted;
2. That the "Order Granting Post Conviction Relief" filed December 1, 2016, is vacated;
3. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
4. That Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 18 day of June, 2017.


BRIAN GIBBONS
Presiding Judge
Third Judicial Circuit


_____, South Carolina

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