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August 11, 2017

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: La'Quan Bryan v State of South Carolina, 2016-CP-10-02024

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Charleston County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc: Megan Harrigan Jameson Esq. .; La'Quan Bryan 365656.

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable Brooks P. Goldsmith, Circuit Judge

Case No.: 2016-CP-10-02024

La'Quan Bryan 365656.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner La'Quan Bryan appeals the Honorable Brooks P. Goldsmith's July 28, 2017 Order of Dismissal. Undersigned counsel received notice of entry of the order on August 9, 2017. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

August 11, 2017

Megan Harrigan Jameson.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

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La'Quan Bryan 365656.....PETITIONER

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PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Megan Harrigan Jameson, Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this August 11, 2017.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
La'Quan Bryan, #365656, Applicant, v. State of South Carolina, Respondent.	Case No.: 2016-CP-10-2024 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed April 18, 2016, by La'Quan Bryan (Applicant) alleging plea counsel was ineffective for failing to properly advise him and involuntary guilty plea for the plea court's refusal to withdraw his plea. Respondent made its Return on July 28, 2016, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened April 21, 2017, at the Charleston County Courthouse. Applicant was present at the hearing and represented by James K. Falk, Esquire. Assistant Attorney General Alicia Olive from the South Carolina Attorney General's Office appeared on behalf of the State. At the conclusion of the hearing, this Court denied the application from the bench. This order follows.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its October 2014 term of court, the Charleston County Grand Jury indicted Applicant for attempted murder (2014-GS-10-5988) and possession of a firearm during

the commission of a violent crime (2014-GS-10-5989). Charles Cochran, Esquire, represented Applicant. Assistant Solicitor Richard Waring prosecuted the case.

On October 13, 2015, Applicant appeared in the Charleston County Court of General Sessions before the Honorable W. Jeffrey Young, circuit court judge, and pled guilty as indicted without negotiations or recommendations. Judge Young sentenced Applicant to twenty years imprisonment for attempted murder and a consecutive five years imprisonment for possession of a firearm during the commission of a violent crime. Applicant did not appeal his guilty pleas or sentences.

FACTUAL HISTORY ADDUCCED AT THE GUILTY PLEA

These charges arise from a shooting at the Dorchester Garden Apartments on the evening of March 11, 2014. At approximately 8:15 p.m., Victim and two co-workers were working to clear out an apartment and ready it for the next tenant. Applicant and his friends arrived, walked by Victim and his co-workers and soon after, began yelling loudly. Victim and his co-workers approached Applicant and his friends and asked them to leave. Applicant and his friends began leaving and Victim took down their license plate number. Applicant and his friends jump out of the vehicle. Applicant's friend began punching and assaulting victim, who began defending himself. Applicant then brandished a firearm and shot at Victim, who dove into a nearby ditch. Applicant fired a second shot and then attempted to fire a third shot, but the weapon was slapped out of his hand by Victim's co-worker. Applicant picked up the gun and pointed it at this co-worker, who similarly dove into a ditch. Applicant and his friends then fled the scene. Two witnesses positively identified Applicant and Applicant gave a full confession to law enforcement. (Plea Tr. p. 6-7).

At his plea proceeding, the plea court inquired as to whether Applicant agreed with these facts and Applicant stated he did. Applicant agreed he knowingly pointed a gun at Victim, shot him, and could have killed him. (Plea Tr. p. 7-9). Applicant stated he understood the plea was without negotiation or recommendation from the State and the court could sentence him to up to thirty-five years imprisonment. (Plea Tr. p. 9-10). Applicant also stated he was aware of his constitutional rights and wanted to waive them to enter his guilty plea. (Plea Tr. p. 10-11). Applicant stated he had not been threatened to induce his guilty plea. (Plea Tr. p. 11). He stated he had not been made any promises, including promises from counsel as to what sentence he would receive. (Plea Tr. p. 12). He stated he was satisfied with his attorney's services. (Plea Tr. p. 13-15). Applicant also stated he understood he had ten days to appeal his guilty plea. (Plea Tr. p. 16).

Counsel informed the plea court that Applicant had been detained for 575 days and Applicant wanted to plead guilty the entire time. (Plea Tr. p. 19). He elaborated Applicant has always accepted responsibility and gave a full confession to law enforcement when he was arrested. (Plea Tr. p. 22). He testified he attempted to negotiate a favorable plea deal on Applicant's behalf and the State was requesting a very significant sentence. (Plea Tr. p.19-20). He testified he spoke with Applicant and Applicant's family at length and advised them Applicant could potentially get the maximum sentence. (Plea Tr. p. 20-21). Counsel testified he also called and spoke with Victim to see what type of sentence he would be asking seeking. (Plea Tr. p. 23). Counsel requested the plea court sentence Applicant to the minimum. (Plea Tr. p. 25).

ALLEGATIONS RAISED

In his application, Applicant alleged he is being held in custody unlawfully based on allegations was ineffective for failing to properly advise him and involuntary guilty plea for the plea court's refusal to withdraw his plea.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant presented plea counsel Charles Cochran (Counsel). Counsel testified he was appointed to represent Applicant, who was eighteen years old at the time of the shooting. (PCR Tr. p. 6). He testified he met with Applicant eight times prior to his guilty plea. (PCR Tr. p. 22). He testified these were Applicant's first General Session convictions, but he did have minor juvenile charges. (PCR Tr. p. 6). Counsel testified the incident giving rise to these charges started when Applicant got into an argument with family members and Victim and co-workers came over to intervene. (PCR Tr. p. 6-7). Counsel testified one of Applicant's friends physically assaulted Victim and Applicant fired multiple shots at Victim, but no one was hit by any of the bullets. (PCR Tr. p. 7-8). Counsel testified he filed for and received discovery in this case and he reviewed the discovery with Applicant. (PCR Tr. p. 24). He testified the evidence included statements from eyewitnesses. (PCR Tr. p.24). He testified Applicant confessed to law enforcement and he did not recall any potential problems with the voluntariness of Applicant's statement. (PCR Tr. p. 30).

He testified the biggest hurdle at trial would have been overcoming Victim's statement that Applicant shifted his direction between the second and third shots, which tended to establish he was aiming to shoot at Victim. (PCR Tr. p. 25). He testified Victim told the plea court he feared for his life and believed Applicant was trying to kill him. (PCR Tr. p. 25-26). Counsel

testified he spoke with Victim prior to and at the plea proceeding. (PCR Tr. p. 25). He testified he was prepared for Victim to testify at trial that h believed Applicant was attempting to kill him. (PCR Tr. p. 27-28). He testified if Applicant had proceeded to trial, the case would have ultimately hinged on whether the jury believed Victim or Applicant. (PCR Tr. p. 29-30). Counsel testified he reviewed all elements of the offenses with Applicant, including possible lesser-included offenses. (PCR Tr. p. 27). He testified Applicant admitted numerous times during the plea proceeding that he attempted to kill Victim. (PCR Tr. p. 27).

Counsel testified Applicant pled after the jury panel had been qualified but before a jury had been selected for trial. (PCR Tr. p. 8). Counsel testified Applicant had previously been prepared to go forward with a guilty plea, but the plea did not go forward when the State recommended a seventeen year sentence. (PCR Tr. p. 8).

Counsel testified he was prepared to go to trial. (PCR Tr. p. 9). He testified the trial strategy would have been that although Applicant did discharge the firearm, he did not have an intent to kill. (PCR Tr. p. 9, 13-14). He testified he advised Applicant about the possibility of being convicted of lesser-included offense of ABHAN at trial and the possible benefits and drawbacks of that approach. (PCR Tr. p. 9-10). He testified he believed the best case scenario at trial would be a twenty to twenty-five year sentence if Applicant was convicted of a lesser-included offense. (PCR Tr. p. 13). He testified he now believes Applicant could have been convicted of first-degree assault and battery, which carries a potential sentence of zero to ten years imprisonment, rather than ABHAN. (PCR Tr. p.14-17). Counsel testified he never advises a client to plead guilty or go to trial, but now knowing Applicant could have been convicted of first-degree assault and battery as a lesser-included offense would drastically change his advice

to Applicant. (PCR Tr. p. 16-18). He testified Applicant's sentence was rare for a teenager with no prior General Sessions record. (PCR Tr. p. 20).

Counsel testified he recalled the plea court asking Applicant to state what he did and acknowledge his guilt to the elements of the offense. (PCR Tr. p. 10-12). He testified this was not uncommon and he had advised Applicant of this. (PCR Tr. p. 12). He testified he never promised Applicant he would receive a five year sentence, but advised him he would ask the plea court to sentence him in that range.(PCR Tr. p. 20, 31). He testified when Applicant hesitated when asked by the plea court if he had intended to kill Victim, he should have stood down and proceeded to trial. (PCR Tr. p. 20-21).

Applicant testified next. He testified counsel was appointed to represent him and they met numerous times. (PCR Tr. p. 35-36). He testified he discussed potential sentences with counsel and counsel advised him he could receive up to thirty years imprisonment. (PCR Tr. p. 36-37).

Applicant testified he recalled the plea court asking him if he intended to shoot the Victim and he recalled telling the plea court he did not shoot in Victim's direction. (PCR Tr. p. 37). However, on cross-examination, Applicant testified he did not recall the plea proceeding. (PCR Tr. p.42). He testified he considered standing down and proceeding to trial, but counsel advised him he would likely be convicted and likely receive a sentence of approximately twenty years. (PCR Tr. 37-38). He testified he did not intend to shoot the Victim, but he pled guilty because he did not want to be convicted at trial. (PCR Tr. p. 39). He later clarified he fired shots in Victim's direction, but did not intend to hit Victim. (PCR Tr. p. 42-43). He testified he admitted to the plea court he could have killed Victim. (PCR Tr. p. 44).

Applicant testified he would have proceeded to trial if he had been advised he could potentially receive a ten year sentence if convicted. (PCR Tr. p. 39-41). He testified counsel advised him he would receive a five year sentence and that counsel asked the plea court to sentence Applicant to five to ten years imprisonment. (PCR Tr. p. 45). He testified counsel never promised him a particular sentence. (PCR Tr. p. 45-46). He testified he never asked the plea court to withdraw his guilty plea. (PCR Tr. p. 41).

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 hearings. 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).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume 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. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, 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 (1985).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice

suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action in regards to his allegations of ineffective assistance of counsel. The Court finds plea counsel adequately conferred with Applicant (including meeting with him eight times), reviewed all pertinent discovery materials with Applicant (including statements of Applicant and various eyewitnesses), was prepared for trial when Applicant elected to forgo trial and enter a guilty plea, and fully advised Applicant of all aspects of his guilty plea. Ultimately, this Court finds plea counsel was thoroughly competent in his representation of Applicant and in his advice to Applicant that a guilty plea was in his best interest.

Applicant alleges plea counsel misadvised him to plead guilty because counsel erroneously advised him would likely receive a sentence in excess of twenty years if convicted at trial, including if he was convicted of a lesser-included offense. Applicant contends he likely would have been convicted of the lesser-included offense of first-degree assault and battery at trial, thereby reducing his potential sentence exposure to up to ten years imprisonment. However, this Court finds this argument is highly speculative and is wholly premised on the assumption that the trial court would have charged the jury with the lesser-included offense of first-degree assault and battery and that Applicant would have been convicted of this lesser-included offense rather than the greater offense for which Applicant was indicted—attempted murder. This Court rejects this argument, finding it unlikely that the trial court would have charged the jury on first-

degree assault and battery and finds Applicant would have likely been convicted of attempted murder if he had proceeded to trial.

"A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Green, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012). "The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tends to show the defendant was guilty only of the lesser offense." State v. Geiger. 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006).

The Omnibus Crime Reduction and Sentencing Reform Act of 2010 substantially overhauled the state's criminal law in regard to assault and battery offenses. It codifies attempted murder in section 16-3-29 and four degrees of assault and battery in section 16-3-600. S.C. Code Ann. §§ 16-3-29 & 16-3-600 (Supp. 2013). The new degrees of assault and battery are, in descending order of severity, assault and battery of a high and aggravated nature, and assault and battery in the first, second, and third degrees. Under the statute, assault and battery of a high and aggravated nature is a lesser-included offense of attempted murder. Id. § 16-3-600(B)(3). Assault and battery in the first degree is a lesser-included offense of both attempted murder and assault and battery of a high and aggravated nature. Id. § 16-3-600(C)(3).

In the present case, Applicant alleges the trial court would have charged the jury on the lesser-included offense of first-degree assault and battery and that he would have been entitled to this lesser-included offense because there was evidence establishing Applicant lacked intent to kill Victim.

S.C. Code Ann. § 16-3-29 provides: "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-600(C)(l) provides: "A person commits the offense of assault and battery in the first degree if the person unlawfully: (a) injures another person, and the act: (i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or (b) offers or attempts to injure another person with the present ability to do so, and the act: (i) is accomplished by means likely to produce death or great bodily injury; or (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft." Assault and battery in the first degree is a lesser included offense of attempted murder. S.C. Code Ann. § 16-3-600(C)(3).

The record before this Court only supports a conclusion Applicant was trying to kill Victim. Applicant admitted he shot in Victim's direction at fairly close range numerous times. At trial, Victim and numerous eyewitnesses would have testified Applicant shot at Victim several times and repositioned his stance before the third shot to better aim at Victim. Based on this evidence, the trial court would have properly rejected any request to charge the jury with the lesser-included offense of first-degree assault and battery and the jury would likely find Applicant committed attempted murder. See State v. Mallory, 270 S.C. 519, 523, 242 S.E.2d 693, 695 (1978) ("[I]t is not error to refuse to submit the question of simple assault and battery to the jury under an indictment for assault and battery of a high and aggravated nature, unless there is testimony tending to show that the defendant is only guilty of a simple assault and battery." (emphasis added)); see also State v. Small, 307 S.C. 92, 94, 413 S.E.2d 870, 871 (Ct. App. 1992)

("The evidence does not warrant the charge of the lesser offense of simple assault. Small was guilty of assault and battery of a high and aggravated nature or not guilty. Accordingly, there is no merit to his claim that the court erred in refusing to give the requested charge."). As no evidence was presented supporting a finding the assault on Victim was anything other than attempted murder, the trial court would decline to instruct the jury on the lesser included offense of first-degree assault and battery.

Therefore, this Court finds counsel was not ineffective for advising Applicant to plead guilty rather than proceed to trial and risk a substantial likelihood of being convicted and receiving a higher sentence. This court finds this application mist be denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes 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 Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record 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 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.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief must be denied and dismissed with prejudice; and

2. Applicant La'Quan Bryan shall remain in the custody of the State.

AND IT IS SO ORDERED this 28 day of July, 2017.

BROOKS P. GOLDSMITH
Presiding Judge
Ninth Judicial Circuit

_____, South Carolina

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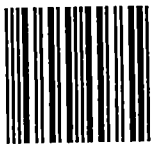

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