ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

November 10, 2017



Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Thomas E. Foster v. State
2016-CP-42-2707

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,

Susannah Ross
Attorney at Law

enclosure

cc: Office of the Attorney General
Office of Appellate Defense
Spartanburg County Clerk of Court

330 E. COFFEE ST.• GREENVILLE/SC • 29601
PHONE: (864) 242-0029
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RECEIVED

NOV 14 2017

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilcrest Knie, Circuit Court Judge

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2016-CP-42-2707

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Thomas E. Foster, ..... Appellant,
v.
The State, ..... Respondent.

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NOTICE OF APPEAL

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Thomas E. Foster appeals the Honorable Grace Gilcrest Knie's Order of Dismissal filed November 1, 2017.

This 10 day of November, 2017.

Susannah Ross, Attorney at Law
330 E. Coffee St.
Greenville, SC 29601
(864) 242-0029
Attorney for Appellant

Other Counsel of Record:
Valerie Giovanoli, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for Respondent

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| **STATE OF SOUTH CAROLINA** | ) | |
| | ) | **IN THE SUPREME COURT** |
| **COUNTY OF GREENVILLE** | ) | |
| | ) | |
| THOMAS E. FOSTER, | ) | |
| APPELLANT, | ) | |
| | ) | |
| | ) | |
| VS. | ) | **CERTIFICATE OF SERVICE** |
| | ) | **BY MAIL** |
| | ) | |
| | ) | |
| THE STATE OF SOUTH CAROLINA, | ) | |
| RESPONDANT. | ) | |
| | ) | |

1. I am the attorney for the Applicant in the above-captioned matter.

2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Notice of Appeal** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

**Attorney General**
**Alan Wilson**
**P.O. Box 11549**
**Columbia, SC 29211**

Attorney for Defendant

**This** 10 **day of** November, **2017**

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF SPARTANBURG<br>Thomas E. Foster, #269961,<br>Applicant,<br>v.<br>State of South Carolina,<br>Respondent. | IN THE COURT OF COMMON PLEAS<br>SEVENTH JUDICIAL CIRCUIT<br>2016-CP-42-2707<br>**ORDER OF DISMISSAL WITH PREJUDICE** |



This matter comes before the Court by way of an application for Post-Conviction Relief (PCR) filed on July 21, 2016. Respondent made its Return requesting an evidentiary hearing be convened. An evidentiary hearing into the matter was convened on September 19, 2017, at the Spartanburg County Courthouse. Applicant was present and represented by Susannah Ross, Esquire. Valerie Garcia Giovanoli, Esquire, of the South Carolina Office of the Attorney General, represented Respondent.

Applicant testified on his own behalf. Applicant's plea counsel, Michael Morin, Esquire, ("Counsel") also testified. This Court had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, the transcript from Applicant's guilty plea, the PCR application, Respondent's Return and Applicant's records from the Department of Corrections.

## PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the May 2015 term of the Spartanburg County Grand Jury for child neglect (2015-GS-42-1846).

Michael Morin, Esquire, represented Applicant. On March 30, 2016[1], Applicant pled guilty before the Honorable J. Mark Hayes, II, as indicted[2]. Pursuant to a recommendation by the State, Judge Hayes sentenced Applicant to imprisonment for ten (10) years[3]. Applicant did not appeal his conviction or sentence.

In his PCR application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel, in that;
   i. "My lawyer Michael Morin told me I was going to get 3 to 6 years and it was not case and all my charges run concurrent. I have one charge consecutive to probation violation."



At the start of the hearing, Applicant orally made an additional allegation that Counsel was ineffective for failing to investigate the custody of the child in Applicant's vehicle when he fled from law enforcement and began a high speed chase. Applicant was fully equipped to argue the allegation and provided copies of supporting case law to the Court. However, no notice of an amendment or additional allegation was ever given to the State until the start of the hearing. Respondent objected to the late amendment on the basis of § 17-27-50, S.C. Code Ann., Rule 71.1, SCRCP and rule 15(a), SCRCP. This Court allowed Applicant to proceed on his new allegation.

## SUMMARY OF TESTIMONY

I. Applicant testified to the following:

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[1] Applicant's probation was also revoked for failure to stop for blue lights (2008-GS-42-1229), breaking into motor vehicle (2008-GS-42-2656), use of vehicle without permission (2011-GS-42-2202), and malicious injury to personal property (2012-GS-42-1649). However, Applicant does not appear to be attacking his probation revocation in this application.

[2] At the same time, Applicant also pled guilty to two counts of failure to stop for blue lights (2015-GS-42-1224, 1845), resisting arrest (2015-GS-42-1225) and financial transaction card fraud (2015-GS-42-1847). However, Applicant does not list these charges in his application.

[3] Judge Hayes ran the ten (10) year sentence for child neglect consecutive to Applicant's probation revocation sentence.

Applicant testified he was only contesting his conviction for unlawful child neglect. Applicant claimed his paper work for the charge indicated that it was a misdemeanor, however, the magistrate court transferred it to General Sessions. Applicant testified the basis for the charge was his wife's child was in his vehicle when he attempted to flee from law enforcement. However, Applicant claimed the child was not his biological child and the child did not live with him. Applicant explained that when the Assistant Solicitor gave his recitation of the facts and stated specifically, "Mr. Foster's wife was in the passenger's seat and *his one year old baby* was in the back seat of the car during this transaction," (emphasis added) he agreed with the facts as presented and did not object because based on Counsel's advice, Applicant believed he would only get 3-6 years.[4] (Plea Tr. p. 8, ll. 23-25; p. 10, ll. 15-17). However, contrary to the facts presented in the record, Applicant testified at the PCR hearing that the child in the car was his wife's six year old son, Marquis. Applicant claimed his wife's child did not live with him and his wife, but he did not know who the father was. Applicant admitted he had six children and one of those children with his wife who was in the car, but claimed the child in the car was not his.



Applicant also testified his lawyer misinformed him about how much time he had left to serve on his probation revocation before his consecutive sentence for unlawful child neglect would begin. Applicant claims Counsel promised him he would only get 3-6 years and had he known he would be subject to 14 years, he would not have pled guilty. Applicant also complained that the Assistant Solicitor brought up an incident in which he broke a grandmother's

[4] Applicant did not provide an explanation for his failure to object when the Assistant Solicitor also stated "he shows he has no regard for *his own* family that was in the car with him. A *one year old baby* could have been injured as a result of this." (Plea Tr. p. 15, ll. 3-5). The Assistant Solicitor also stated "the car chase with *his* baby in it," with no objection from Applicant. (Plea Tr. p. 19, l. 16). (Emphasis added).

arm while throwing her out of her car and stealing it during his guilty plea to enlighten the judge as to what type of person Applicant was.

II. Counsel testified to the following:

Counsel has been practicing law for 25 years; 80% of which has been criminal law. Applicant retained Counsel in this case. Counsel recalled Applicant was being investigated for scrapping stolen cars. When police pulled Applicant over and approached his car to talk to him, a child was seen in the back seat. Applicant sped off to run away from the police once the police started asking questions regarding the crime. When Applicant met with Counsel to discuss his case, Applicant never mentioned the child was not his or did not live with him. Counsel recalled Applicant saying "my wife" and "my child," which never gave him reason to ask otherwise. Counsel's notes also indicated Applicant lived with his wife and three children. Counsel reviewed the discovery with Applicant.

Counsel testified Applicant wanted to plea to the best deal he could get. Applicant wanted Counsel to ask for probation, but Counsel explained to Applicant that such a request would be unreasonable and that asking for 3-6 years was more reasonable. Counsel recalls investigating how much time Applicant had to serve for his probation revocation by reviewing Applicant's records and determined he had one year left. However, because of Applicant's misconduct that led to him violating his probation, serving time for the violation, being released from detention, then being arrested again, the amount of time he had left to serve was affected. When Counsel realized Applicant actually had four years left to serve, he informed him via letter after his guilty plea. Counsel advised Applicant that his probation revocation sentence could be run consecutive to all other sentences, since there was no recommendation from the State as to the probation revocation.

## 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 had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency. A Post-Conviction Relief application is not a venue for questioning each and every decision of trial counsel. Rather, the Applicant must demonstrate by a preponderance of the evidence that trial counsel was deficient. Applicant has failed to do so.

### I. Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 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, Id. The Applicant must overcome this presumption to receive

relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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 (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. 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 pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant 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). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985). Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann v. Richardson, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." Id. at 771.

The record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874

(Ct. App. 2007) (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). A 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 the court and defendant, between the 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)). Further, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton, at 137–38, 654 S.E.2d at 874 (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)). "In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." Id. at 138–39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).



*Counsel promised 3-6 year sentence*

Applicant only contests his sentence for unlawful child neglect, for which he received the most time (ten years) during his global plea to five total charges and probation revocation from four previous charges. Applicant specifically alleged Counsel promised him he would receive a 3-6 year sentence. This Court finds Applicant's testimony not credible. Counsel credibly testified he advised Applicant, who wanted Counsel to request only probation, that it would be more reasonable to ask for 3-6 years. This Court agrees with Counsel's assessment in light of

the number of charges Applicant faced, the seriousness of those charges, the fact Applicant was already on probation for other crimes when he committed the offenses, and his criminal history.

Additionally, during Applicant's guilty plea, the plea judge advised him he could sentence him up to ten years for unlawful child neglect. (Tr. p. 11, ll. 9-12). After advising him of the possible sentence, he asked Applicant if he still wished to plead guilty, to which Applicant responded, "yes, sir." (Tr. p. 11, ll. 18-20). Applicant also admitted he was in fact guilty of unlawful child neglect. (Tr. p. 12, ll. 7-9). In addition to being under oath at his guilty plea hearing, he also told the plea judge all of his answers were truthful and honest. (Tr. p. 12, ll. 22-24).

This Court finds Applicant's self-serving and contradictory testimony offered at the PCR hearing has not established a valid reason to allow him to depart from the truth of his statements made at the guilty plea proceeding. See Dalton; Crawford; Edwards. Applicant intelligently and voluntarily pled guilty based upon the sound and competent advice from his experienced and learned counsel. Applicant has failed to prove Counsel was either deficient in his representation or that absent any alleged deficiency, he would not have pled guilty. Therefore, this allegation is denied and dismissed with prejudice.



*Failure to investigate*

Applicant alleged counsel failed to investigate the custody of the child present in his car when he fled from law enforcement. See State v. Fowler, 322 S.C. 157, 470 S.E.2d 393 (1996) (Limiting the definition of "legal custody" as required in unlawful child neglect statute.). To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he been more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could

have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

This Court finds Applicant's assertion that the child in his vehicle when he attempted to flee law enforcement was not biologically his and that he did not have custody over the child is simply not credible. Evidence of this lack of credibility can be found in the record. Not only did Applicant agree to the accuracy of the Assistant Solicitor's recitation of the fact, which included, "Mr. Foster's wife was in the passenger's seat and *his one year old baby* was in the back seat of the car during this transaction," (emphasis added), but he did not object at various other statements made during the proceeding that the baby was his. (Tr. p. 8, l. 23; p. 15, ll. 3-5; p. 19, l. 16). Applicant's assertion that he did not correct the statements by the Assistant Solicitor because based on Counsel's advice, Applicant believed he would only get 3-6 years is again, not credible. This Court finds Counsel's testimony credible that Applicant made statements like, "Why would I endanger *my* wife or *my* child?" which led Counsel to have no reason to believe Applicant did not have legal custody of the child. Counsel kept notes which also indicated Applicant told him he lived with his wife and three children.

Credibility aside, Applicant has simply failed to meet his burden of proving by a preponderance of the evidence that Counsel was deficient in this regard. Aside from his self-serving testimony, Applicant presented no other evidence to prove the child in the car at the time he fled from law enforcement was not his or he had no legal custody of the child. This Court was not presented with any police reports showing the child in the car was a six year old, as

Applicant testified, rather than a one year old baby as represented to the plea court by the State during the plea proceedings. And Counsel testified Applicant gave him no indication custody was an issue that needed to be explored – especially in light of the fact that Applicant never expressed a desire to pursue trial, rather he wanted to plead guilty to the best possible deal he could get. Therefore, this Court finds Counsel was not deficient and Applicant was not prejudiced by any alleged deficiency. This allegation is denied and dismissed with prejudice.

## CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED THAT:**

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

**AND IT IS SO ORDERED** this 31st day of October, 2017.

GRACE GILCHRIST KNIE
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

# Spartanburg County

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M. Hope Blackley
Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Thomas E. Foster # 269161

Applicant

VS

[redacted]

Respondent

IN THE COURT OF COMMON PLEAS

7TH JUDICIAL CIRCUIT

CASE# 2016 CP 42-2707

CERTIFICATE OF SERVICE

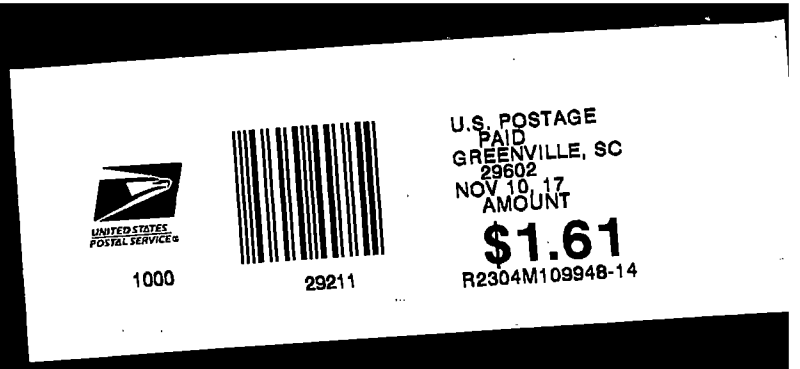
I certify that, on this date, I served a copy of the Order Dismissal w/ prejudice
In this action dated 10-31 2017 on 11-3-17

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Valerie Cerbacchi
Lindsey McCoy
Jessamine Ross

11-3-17
(Date)

(Signature)

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