

# THE BOOZER LAW FIRM, LLC

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November 16, 2017

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

The Honorable James C. Campbell  
Clerk, Sumter County  
215 N. Harvin Street  
Sumter, SC 29150

RECEIVED

NOV 20 2017

S.C. SUPREME COURT

**RE: Derrick Darby, #366339, v. State of South Carolina**  
**2016-CP-43-2011**

Dear Mr. Shearouse and Mr. Campbell:

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. Darby in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Darby in this appeal.

Yours very truly,



Lance S. Boozer

Enclosures

cc: Julie Coleman, AAG  
Loriene French, OAD  
Derrick Darby, #366339

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

NOV 20 2017

The Honorable D. Craig Brown, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2016-CP-43-2011

Derrick Darby, #366339, .....Petitioner,


v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable D. Craig Brown's Order dated September 6, 2017, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on November 14, 2017. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,

  
Lance S. Boozer  
The Boozer Law Firm, LLC  
1400 Laurel Street, Suite 4A  
Columbia, SC 29201  
Tele: 803-608-5543

November 16, 2017

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

NOV 20 2017

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APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable D. Craig Brown, Circuit Court Judge

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Derrick Darby, #366339, .....Petitioner,

v.

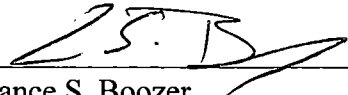
State of South Carolina,.....Respondent.

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**PROOF OF SERVICE**

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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 16th day of November, 2017.

  
Lance S. Boozer  
The Boozer Law Firm, LLC  
1400 Laurel Street, Suite 4A  
Columbia, SC 29201  
Tele: 803-608-5543

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMTER ) THIRD JUDICIAL CIRCUIT

RECORDED  
2017 NOV -9 PM 2:44

Derrick Darby, #366339, ) 2016-CP-43-02011

Applicant )  
SUMTER )

v. )

**ORDER OF DISMISSAL**

State of South Carolina, )

Respondent. )

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on October 24, 2016. Respondent submitted its Return on March 3, 2017. An evidentiary hearing into the matter was convened on July 24, 2017, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

At the hearing, this 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, the record on appeal, and the pleadings.

**I. PROCEDURAL HISTORY**

The records before this Court indicate Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Sumter County Clerk of Court's orders of commitment. Applicant was indicted by the May 2013 term of the Sumter County Grand Jury for murder, unlawful carrying of a pistol, possession of a stolen pistol, and possession of a weapon during the commission of a violent crime (2012-GS-32-00349). Katarzyna K. Timmons, Esquire, represented him on the charges. On December 8, 2015, Applicant pled guilty to the lesser

DCB  
P. 10/8

included offense of voluntary manslaughter before the Honorable R. Ferrell Cothran, Jr. The remaining charges were dismissed. Judge Cothran sentenced Applicant to twenty years in prison.

Applicant filed a timely notice of appeal. An appeal was perfected by Robert Dudek, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Darby, Appellate Case No. 2015-002586 (S.C. Ct. App. 2016). The Remittitur was returned on March 8, 2016.

## II. ALLEGATIONS

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

1. "Ineffective Assistance of Counsel"
  - a. "Trial Counsel gave erroneous advice to take the plea"

At the evidentiary hearing, Applicant orally amended his application to include an allegation of ineffective assistance of counsel for failure to enforce a prior plea agreement. Counsel for Applicant explained that Applicant was not seeking a new trial as relief for his PCR action, but he only wanted to get the original plea offer.

## III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from Katarzyna Timmons, Esquire (hereinafter "Plea Counsel") and Tiffany Butler, Esquire.

### *Applicant's Testimony*

Applicant testified that he was originally represented on these charges by Attorney Tiffany Butler, but Plea Counsel represented him at the plea. He testified that Plea Counsel sent him a letter explaining to him that he had been offered a plea deal for a fifteen year sentence. Her letter and his response to her letter were entered into evidence as Applicant's Exhibit #1 and #2.

Applicant stated that he wanted to accept the fifteen year plea offer, but when Plea Counsel followed up with the Solicitor about the offer, the Solicitor did not recall making such an offer and indicated he would not extend that offer to Applicant. Applicant testified that Plea Counsel should have enforced the original plea agreement to secure his original plea deal. He stated he had nothing in writing from the Solicitor about the plea offer.

Applicant testified that, even though he was unable to secure the original plea offer, he chose to plead guilty to a negotiated sentence for twenty years' imprisonment. He stated he recalled telling the plea court that he was guilty of these crimes and he agreed with the facts of the crime as presented by the Solicitor. He stated he recalled telling the plea court that he was satisfied with Plea Counsel's services at the guilty plea.

*Plea Counsel's Testimony*

Plea Counsel testified that she believed the Solicitor made an initial plea offer of a 0-15 year sentence, with a fifteen year cap. She stated she recalled him making this offer orally and did not have any written documentation of his offer. She testified that, when she approached the Solicitor about the offer later, he did not remember making the offer. Plea Counsel stated that she told Applicant that the Solicitor did not remember offering the original plea deal and that she was upset about it, because he seemed to be implying that she was lying about the offer. Plea Counsel testified that she did not make a motion to enforce the plea offer or bring up the original offer to the court. She stated she chose not to do so because the plea offer could only be enforced if the defendant detrimentally relied on the offer, and she did not believe that Applicant detrimentally relied on this plea offer.

Plea Counsel testified about the State's evidence against Applicant, including multiple eyewitnesses, their testimony that Applicant was the only one at the scene who had a gun and

could have shot the victim, and letters Applicant had written admitting that he shot the victim. She stated she was planning to go to trial. She stated that Tiffany Butler had hired a private investigator when she handled the case, and they had retained a pathologist and crime scene investigator. Plea Counsel stated the investigators they hired reported to her that the wounds were on the same level as Applicant, which did not support their defense that Applicant only shot the gun into the air in order to stop the fight. Based on this evidence against him and the lack of support for a defense, Applicant decided to plead guilty.

#### *Tiffany Butler's Testimony*

Tiffany Butler testified that she was originally appointed to this case by the Public Defender's office not long after Applicant was arrested. She stated the evidence against Applicant included multiple eyewitnesses and statements. She stated that, when she represented him, there were some inconsistencies in witnesses statements, and there were potential issues with the gunshot wounds that she wanted to investigate. Butler stated she hired an investigator, she went to the scene of the crime, and she attempted to locate witnesses in her investigation. She stated that there were no plea negotiations while she represented Applicant.

#### **IV. 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.

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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 plea counsel, the Applicant must show 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, 59 (1985).

#### V. 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).

DLB  
p. 5-18

### INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleges Plea Counsel was ineffective in her representation 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).

In the present case, this Court finds Applicant has failed to meet his burden in proving Plea Counsel was ineffective in any regard. First, Applicant has failed to prove that an original plea offer from the State ever existed. He has provided no written documentation or formal offer from the Solicitor. Plea Counsel credibly testified she truly believed there was a legitimate plea offer for 0-15 years from the State, but the Solicitor did not recall making the offer when asked about it. However, Plea Counsel testified that she did not believe Applicant detrimentally relied on the plea offer, so she chose not to move to enforce the original offer. This Court finds Plea Counsel's actions were reasonable under the circumstances, and nothing about her performance regarding this alleged plea offer was deficient.

Furthermore, Applicant can show no prejudice from the failure to move to enforce the original plea offer. Applicant pled to a negotiated sentence of twenty years, and the testimony

presented and the record clearly show the plea was knowingly and intelligently entered into. Applicant was well aware of the strong evidence against him, and admitted in a written statement that he committed the crime. He further admitted that he knew he pled guilty to a negotiated sentence for 20 years and chose to do so rather than going to trial. This Court finds that Applicant has not shown that he was prejudiced by any of Plea Counsel's actions because he has not proven that he would have accepted the original plea offer, or that he detrimentally relied on an original plea offer. He further failed to prove he did not knowingly or intelligently plead guilty to accept the negotiated 20 year sentence. Accordingly this allegation must be dismissed.

## VI. 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.

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P.

**IT IS THEREFORE ORDERED:**

1. That the application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 6 day of Sept., 2017.

  
D. CRAIG BROWN  
Presiding Judge  
Third Judicial Circuit

Florence, South Carolina

FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF SUMTER  
IN THE COURT OF COMMON PLEAS

RECORDED

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2016CP4302011

Derrick Darby  
2017 MAR 29 AM 9:44  
South Carolina State of

JAMES C. CAMPBELL  
CLERK OF COURT(S)  
SUMTER COUNTY, S.C.

PLAINTIFF(S)

Attorney for:  Plaintiff  Defendant  
 Self-Represented Litigant

Submitted by: Clerk of Court

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order; (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk: Relieving Timothy Griffith as applicant's counsel and appointing Lance Boozer.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

  
Circuit Court Judge

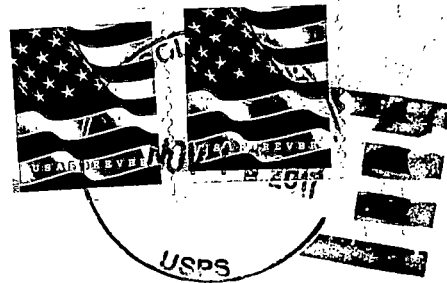
2160  
Judge Code

3/28/2017  
Date

For Clerk of Court Office Use Only

**THE BOOZER LAW FIRM, LLC**

1400 Laurel Street, Suite 4A  
Columbia, SC 29201



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