IN THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY

COURT OF COMMON PLEAS

DEANDREA G. BENJAMIN, CIRCUIT COURT JUDGE

RECEIVED
FEB 12 2018
S.C. SUPREME COURT

2013-CP-32-3345

Nathaniel McMillian,.....Petitioner.

vs

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

NOTICE OF APPEAL

Nathaniel McMillian appeals the Honorable Deandrea G. Benjamin's February 5, 2018 Order of Dismissal. Undersigned counsel received notice of entry of the order on FEbruary 12, 2018. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

Anna R Browder

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Attorney for the Petitioner.

February 12, 2018.

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PROOF OF SERVICE

I, Anna Browder, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record, Melody Brown, P.O. Box 11549, Columbia, South Carolina 29211-1549. I further certify that all parties required by Rule to be served have been served this 12th day of February 2018.

Respectfully submitted,

Anna R Browder

Anna R. Browder, Esquire
Law Office of Anna Browder, LLC
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Columbia, South Carolina 29202

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) FOR THE ELEVENTH JUDICIAL CIRCUIT
2016 FEB -5 AM 11:35
)
Nathaniel McMillian, #320977,) C/A No. 2013-CP-32-03345
LISA M. COMER
CLERK OF COURT
LEXINGTON SC
ORIGINAL
Applicant,)
)
v.) **ORDER OF DISMISSAL**
)
State of South Carolina,)
)
Respondent.)
)

This matter commenced pursuant to a *pro se* application for post-conviction relief filed September 27, 2013, by Applicant Nathaniel McMillian ("Applicant"). Pursuant to S.C. Code Ann. § 17-27-80, this action came before this Court for an evidentiary hearing at the Lexington County Courthouse on October 14, 2014. Applicant was present and represented by appointed counsel Anna Good, Esquire. Assistant Attorney General Walt Whitmire appeared on behalf of Respondent.

I. Procedural History

a. The Underlying Prosecution

Applicant is presently confined in the Broad River Correctional Institution pursuant to orders of commitment of the Lexington County Clerk of Court. On October 1, 2012, the Lexington County Grand Jury indicted Applicant for attempted burglary, first-degree (2012-GS-32-2543); burglary, first-degree (2012-GS-32-2551); criminal sexual conduct, first-degree (2012-GS-32-2552); armed robbery (2012-GS-32-2553); and possession of a weapon during the commission of a violent crime (2012-GS-32-2559). The charges stemmed from a series of events occurring in West Columbia. They began with a burglary on November 22, 2011, and culminated on December 1, 2011, when Applicant was identified as attempting to break into the

residence of a second burglary victim. (Plea Tr. pp. 12-3). The criminal sexual conduct, first degree, armed robbery, and the possession of a weapon during the commission of a violent crime charges stemmed from a November 27, 2011 incident in which Applicant targeted a college student who was walking home from the library in West Columbia at 1:30 PM on a Sunday afternoon. (Plea Tr. pp. 12, 13-8).

On October 2, 2012, Applicant pled guilty to each crime as charged before the Honorable Roger M. Young, Sr. (Plea Tr. pp. 1-35). At the plea hearing, Robert Madsen of the Eleventh Circuit Public Defender's Office represented Applicant, and L. Suzanne Mayes of the Eleventh Circuit Solicitor's Office appeared on behalf of the State. *Id.* As part of a plea agreement, the State recommended Applicant's sentence be capped at 25 years. (Plea Tr. p. 10).

Judge Young accepted Applicant's plea and sentenced him to 25 years' imprisonment each for one count of burglary, first-degree, one count of attempted burglary, first-degree, one count of criminal sexual conduct, first-degree, and one count of armed robbery. (Plea Tr. p. 34). Applicant received a five-year sentence for the possession of a weapon during the commission of a violent crime conviction. Judge Young issued the sentences to run concurrent. (Plea Tr. p. 34).

Applicant did not appeal his convictions and sentence.

b. The Instant PCR Action

Applicant presented the following initial claims for PCR, supporting each claim in a memorandum attached to the *pro se* application:

(a) Ineffective Assistance of Counsel
    1) failure to adequately communicate with Applicant;
    2) failure to investigate and prepare Applicant's case;
    3) failure to advise Applicant of elements of the offenses for which he was charged;
    4) failure to make a motion to dismiss the burglary, first-degree charge.
(b) Erroneous Advice
(c) Involuntary Guilty Plea

Following the *pro se* PCR application, Respondent filed its Return on April 29, 2014, requesting an evidentiary hearing. Counsel Good, appointed to represent Applicant on November 13, 2013, filed an amended application on May 19, 2014. The amended application included the following claims of ineffective assistance of trial counsel:

(a) Trial counsel failed to properly investigate the case; and
(b) Trial counsel failed to object to prejudicial comments made [by an] investigator during the plea.

II. The PCR Evidentiary Hearing

At the hearing, this Court had before it the Lexington County Clerk of Court records pertaining to Applicant's indictments and sentencing, Applicant's South Carolina Department of Corrections records, the *pro se* and amended PCR applications, the State's Return, and the guilty plea transcript.

When the evidentiary hearing convened, Counsel Good withdrew the claim regarding trial counsel's alleged failure to investigate. (PCR Tr. p. 4). Counsel Good advised that Applicant would pursue the claims raised in his initial application and the claim from the amended application that alleged "trial counsel failed to object to a prejudicial comment made by the investigator during the plea." (PCR Tr. p. 4, ll 8-10).

a. Applicant's Testimony

Applicant testified on his own behalf. (PCR Tr. p. 5). He testified Counsel Madsen represented him through the duration of the prosecution of the charges for which he is now in custody. (PCR Tr. p. 5). Applicant recalled he was arrested on November 1, 2011, and he met with Counsel Madsen three times thereafter including the day of the plea. *Id.* Applicant testified that when he met with Counsel Madsen prior to the plea hearing, Applicant was unsure as to whether he wanted to proceed with a guilty plea. (PCR Tr. p. 7). He testified Counsel Madsen

reviewed the nature of the charges during their first meeting. (PCR Tr. p. 6). During their second meeting, Applicant and Counsel Madsen confirmed Applicant received his discovery, and the two discussed the plea offer made by the State. (PCR Tr. pp. 6-7). Applicant indicated he learned about the first-degree burglary charge in that meeting. (PCR Tr. pp. 7-8). Applicant testified he met with Counsel Madsen again on the day of his plea. During that meeting, he and Counsel Madsen discussed the indictments, and Applicant signed his indictments. (PCR Tr. pp. 7-8).

Applicant recalled the plea offer was for a maximum sentence of 25 years. (PCR Tr. pp. 6, 8). When asked whether he was aware that he was getting potentially 25 years in prison, Applicant answered "[a]t that time I didn't see that in my future." (PCR Tr. p. 8, ll 24-5). Applicant testified he expected to receive "like 10, 15, at the most 20" years' incarceration, and Counsel Madsen told him he would "get no higher than" the 25-year cap. (PCR Tr. p. 9, ll 4, 8-9).

Applicant further testified the prosecution made comments about Applicant having a speech impediment, and a West Columbia investigator commented about Applicant "being a menace" during his residency in West Columbia. (PCR Tr. p. 9, ll 13-7). Applicant concluded by stating he would have proceeded to trial had he known the entirety of the situation surrounding his plea. (PCR Tr. pp. 9-10). He believed Counsel Madsen was ineffective in not correctly advising Applicant about the enhancement of his burglary charge to a charge of first-degree burglary. (PCR Tr. p. 10).

During the State's cross-examination, Applicant recalled confessing to the criminal sexual conduct, armed robbery, and possession of a weapon during the commission of a violent crime charges. (PCR Tr. pp. 10-11). Applicant testified he was not caught inside the house

during the attempted burglary, but he was caught "in the area" because he lived there. (PCR Tr. p. 11). Applicant additionally testified he thought he could beat the second-degree burglary charges, but he "gave in" and agreed to the plea when he actually saw the indictments. (PCR Tr. p. 12). Applicant agreed he was presented with all of his arrest warrants on December 2, 2011. *Id.*

Applicant testified he previously pled guilty to two counts of burglary in Georgetown County. (PCR Tr. p. 12). He stated his plea proceeding for the Lexington County charges was "a little different" than the previous plea he entered, but he "still didn't have an understanding of all the legal terminology." (PCR Tr. pp. 12-13). Applicant also admitted he never stopped the plea judge in either his Georgetown County plea or this plea to ask questions regarding any legal terminology during either plea proceeding. (PCR Tr. pp. 13-14).

b. Counsel Madsen's Testimony

The State called Applicant's plea counsel, Robert Madsen, to testify. (PCR Tr. p. 14). Counsel Madsen stated he had been practicing criminal law for eighteen years. *Id.* Having reviewed Applicant's file, Counsel Madsen testified Applicant was arrested on December 1, 2011, and they had their initial meeting on December 12. (PCR Tr. pp. 14, 16). Counsel Madsen recalled that during that meeting, he reviewed the crimes charged, the elements of those crimes, and the possible penalties. (PCR Tr. p. 16). Because of the criminal sexual conduct charge, Counsel Madsen reviewed the sex offender registry and sexually violent predator act with Applicant. *Id.* Counsel Madsen also went over the lesser included offenses for each charge, as well as the implications of S.C. Code Ann. § 17-25-45, the three-strikes law, which mandates life imprisonment without the possibility of parole for offenders with one or more prior convictions for certain offenses, including burglary. *See Id.* Counsel Madsen also testified he reviewed

Applicant's background with him, and he discussed the requirement that Applicant serve 85% of his sentence as provided for by S.C. Code Ann. § 24-13-150. *See id.*

Counsel Madsen testified that prior to meeting with Applicant, Applicant had made statements to law enforcement regarding the criminal sexual conduct, armed robbery, and the burglary charges, but not on the attempted burglary charge. (PCR Tr. p. 16). Counsel Madsen testified the victim of the criminal sexual conduct charge identified Applicant in a photo lineup, and Applicant was connected to the other incidents through his statements and by a witness who may have identified Applicant from a video from a local convenience store. (PCR Tr. pp. 14-15). Counsel Madsen recalled Applicant admitted from the outset that he committed the criminal sexual conduct, first degree, and the accompanying armed robbery. Accordingly, Counsel Madsen testified that in their discussions Applicant "never indicated that he had anything but a desire to work out a plea." (PCR Tr. p. 17, ll 8-9). Counsel Madsen also indicated Applicant never communicated to him that he would want to go to trial for some of the charges. (PCR Tr. p. 17). In their discussions, it was noted the State had stronger cases on the burglary, criminal sexual conduct, and armed robbery charges than it had on the attempted burglary charge, which Applicant had not confessed to committing. *Id.*

In regards to the progression of the plea bargaining in this case, Counsel Madsen testified he contacted the State about a potential plea to the armed robbery and first degree criminal sexual conduct, which the State rejected. (PCR Tr. pp. 17-8). The State followed-up by notifying Counsel Madsen of its intent to upgrade Applicant's initial second-degree burglary charge to a first-degree burglary charge due to Applicant's two prior convictions for burglary.[1] (PCR Tr. p.

[1] One may commit burglary in the first degree if "the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both." S.C. Code Ann. § 16-11-311(A)(2).

18). The State subsequently offered Applicant a plea for a sentence minimum of 15 years and a maximum of 25 years, which Counsel Madsen relayed to Applicant on August 1, 2012. *Id.* Counsel Madsen testified that at that time, Applicant indicated he would like to accept that plea offer. *Id.* Counsel Madsen reviewed the plea offer with Applicant again on September 19, 2012, a couple of weeks prior to the plea hearing. *Id.*

Counsel Madsen stated that in mitigation, he focused on Applicant's soft-spoken nature. (PCR Tr. p. 19). Counsel Madsen additionally recalled the plea court questioned the State on the plea offer, making "it sound like he didn't think it wasn't a sufficient offer," and "[t]hat the State should have been a little bit harsher." (PCR Tr. p. 19, ll 18-20).

On cross-examination, Counsel Madsen testified he discussed the first degree burglary charge with Applicant as part of the plea deal. (PCR Tr. p. 20). Counsel did not recall at what point during his representation the indictments arose, but Applicant was not charged with first-degree burglary during their first meeting in December 2011. (PCR Tr. pp. 20-21). Counsel met with Applicant a total of seven times, including twice just about the negotiations for the plea agreement with a sentencing range of fifteen to 25 years. (PCR Tr. p. 21).

Counsel Madsen further testified that an investigator from West Columbia spoke at the plea. The investigator indicated Applicant had not lived in the area very long, yet Applicant had incurred three separate sets of charges in a short period of time, including one set for an attack in broad daylight. (PCR Tr. pp. 22-23). When that investigator asked for the maximum sentence at the plea, the request did not necessarily give Counsel Madsen pause. (PCR Tr. p. 23). However, looking back on the statement, and from his employment, Counsel Madsen found it interesting that the investigator intimated West Columbia did not have those kinds of crimes because counsel's experience indicated otherwise. (PCR Tr. p. 23).

III. Findings of Fact and Conclusions of Law

After considering the allegations raised in the initial and amended application, hearing the testimony presented at the evidentiary hearing, considering the record in this action incorporated by way of the State's Return, and after reviewing of the transcript of the PCR proceedings occurring on October 14, 2014, the undersigned denies the application. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

a. Standard of Review

When an applicant "enters a plea on the advice of counsel, [he] may only attack the voluntary and intelligent character of the plea" by fulfilling a two-prong test established regarding proof of ineffective assistance of counsel. *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370 (1985) (adopting seminal ineffective assistance of counsel standard from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984), and applying to cases resolved via guilty plea)). "A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that the applicant was prejudiced by that deficiency." *Stalk v. State*, 383 S.C. 559, 560–61, 681 S.E.2d 592, 593 (2009) (citing *Hill v. Lockhart, supra*). In regards to the first prong, "[t]he proper measure of attorney performance remains reasonableness under prevailing professional norms." *Strickland v. Washington, supra* at 688, 104 S.Ct. at 2065. In order to satisfy the prejudice requirement, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." *Hill v. Lockhart, supra* at 59, 106 S.Ct. at 370.

At all times during the proceeding, the Applicant maintains the burden of establishing that he is entitled to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Moreover, the proceeding is coupled with "a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Morris v. State*, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006). Therefore, Applicant must demonstrate 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.'" *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 441(1985) (quoting *Strickland v. Washington, supra* at 686, 104 S. Ct. at 2064).

b. The Merits of the Allegations

As a matter of general impression, this Court finds Applicant's testimony and assertions were not credible. In contrast, this Court finds counsel's testimony were credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Ineffective Assistance of Counsel Claims

This Court notes that in its review of the initial and amended application, this Court identifies six allegations of ineffective assistance of counsel raised by Applicant. This Court finds all the claims were either voluntary withdrawn or lack merit. They are addressed as follows:

A. Failure to Investigate

This Court finds that at the outset, Applicant withdrew his claims regarding counsel's alleged failure to investigate. Thus, this Court finds Applicant has withdrawn his second

allegation in the initial application for post-conviction relief, and the first allegation in the amended application for post-conviction relief.

B. Failure to Object to Investigator's Comments

Applicant's second claim in the amended application pertains to counsel's alleged failure to object to prejudicial comments made by an investigator during the plea hearing. (Amended App. filed May 19, 2014). This Court finds that claim is without merit.

Detective Scott Neal of the West Columbia Police Department was present during the plea hearing. (Plea Tr. p. 13). During the sentencing phase of the plea hearing, Detective Neal addressed the court. He spoke to the court regarding his experience with the victim of the criminal sexual conduct and armed robbery charges. (Plea Tr. pp. 29-30). He additionally told the court the following regarding Applicant:

> . . . he had only been staying in West Columbia for a short period of time, and as you've heard earlier, he's caused a lot of issues and a lot of problems for us. This is a community that's not used to these kinds of things happening. The attack on Ms. Tucker was in broad daylight at 1:30 on a Sunday afternoon as she was walking to the library. These things don't happen in West Columbia, in particularly in this neighborhood, in this area that all this stuff happened. Everything that he's charged with all occurred within probably a half mile of each other in this neighborhood.
>
> And then Ms. Mack, the other victim in the attempted burglary that lived on Earl Court was actually a relative of Ms. Tucker, so this whole family has been affected in more than just the charges involving Ms. Tucker.
>
> We ask that you give him the maximum sentence possible due to the issues that he's caused us and due to the problems and the pain he has given to this community.

(Plea Tr. p. 30, ll 4-22).

This Court finds credible counsel's testimony that Detective Neal's address, including his request for the maximum negotiated sentence, did not necessarily give counsel pause, even to the extent he may have disagreed with Detective Neal's characterization of the presence or absence

of crime in West Columbia. (*See* PCR Tr. p. 23). This Court finds that Detective Neal's testimony fell within the bounds of testimony appropriate during the sentencing phase of a guilty plea proceeding. Thus, the testimony was not ripe for objection; and, even if counsel had objected, there is no basis upon which counsel could have prevailed in suppressing the Detective's address in support of the victim. Furthermore, as with any testimony presented in support of or in opposition to a recommended sentence, the experienced plea judge in this case was free to give the Detective's testimony whatever weight it deemed appropriate.

This Court additionally finds Applicant was not prejudiced by Detective Neal's address to the court. There is no reasonable probability that had counsel objected to the testimony, that the result of the sentencing proceeding would have been different. There existed ample evidence as presented by the State to support the sentence negotiated and rendered in this case including Applicant's own statements to law enforcement regarding his involvement in the crimes, as well as victims' identifications of Applicant.[23] (Plea Tr. pp. 12-26). This Court further finds that in

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[2] Applicant was charged with one count of first degree burglary; one count of first degree attempted burglary; one count of first degree criminal sexual conduct; and one count of armed robbery. Each of these charges are classified as most serious offenses under S.C. Code Ann. § 17-25-45(C)(1). Applicant also had two prior convictions for second-degree burglary. (Plea Tr. 27). Second-degree burglary is classified as a serious offense by statute. S.C. Code Ann. § 17-25-45(C)(2)(b). Applicant faced life imprisonment without the possibility of parole had he not pled guilty and had instead proceeded to trial on each of the three separate incidents. S.C. Code Ann. § 17-25-45. This Court finds the State could have sought life without parole upon each of these convictions. Further, even without considering the availability of life without parole sentences upon each of his charges, Applicant faced significant prison time. These charges carried sentences ranging from ten years to life, with the burglary charges carrying a mandatory minimum of fifteen years. S.C. Code Ann. § 16-11-311 (first degree burglary, carrying sentence of fifteen to life); S.C. Code Ann. § 16-11-330 (armed robbery, carrying sentence of ten to 30); S.C. Code Ann. § 16-3-652 (first degree criminal sexual conduct, carrying maximum sentence of 30 years); S.C. Code Ann. § 16-1-90 ("A person who commits the common law offense of attempt, upon conviction, must be punished as for the principal offense."). Applicant also faced a weapons enhancement charge of possession of a weapon during the commission of a violent crime which carried an additional five-year sentence. S.C. Code Ann. § 16-23-490.

line with plea counsel's testimony, the plea court did question the State regarding its basis for the plea negotiations. (Plea Tr. p. 30). The State premised the propriety of its recommended fifteen- to twenty-five year sentence for the crimes pled upon Applicant's cooperation with law enforcement and its understanding the charges were no-parole offenses with a requirement of 85% service of sentence. (Plea Tr. p. 31).

Altogether, since Applicant fails to meet his burden of establishing he is entitled to relief upon either prong of this claim of ineffective assistance of counsel under *Hill* and *Strickland*, this claim for relief is denied and dismissed with prejudice.

C. Failure to Adequately Communicate with Applicant; and
D. Failure to Advise of Elements of Offenses for which Applicant was Charged

This Court addresses the first and third claims of ineffective assistance of counsel raised by Applicant in his initial Application for Post-Conviction Relief together and they appear to be related. In the first claim, Applicant asserts plea counsel was ineffective because he did not adequately communicate with Applicant. In his third claim, Applicant contends counsel failed to advise Applicant of the elements of the offenses for which he was charged. This Court finds these two claims are without merit.

At the PCR evidentiary hearing, counsel testified he met with Applicant seven times prior to the guilty plea hearing. (PCR Tr. 21). Counsel Madsen further testified that at the initial meeting, he would have discussed with Applicant his charges, his trial rights, the elements of each charge, and the potential sentences Applicant faced. (PCR Tr. 16). Counsel Madsen also reviewed Applicant's potential parole eligibility and the applicability of the sex offender registry

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[3] S.C. Code Ann. § 17-25-45(A)(2) provides that upon conviction of a most serious offense, a defendant convicted of two prior serious offenses must be sentenced to life without parole. Further, S.C. Code Ann. § 17-25-45(A)(1) provides that upon conviction of a most serious offense, a defendant convicted of a prior most serious offense must be sentenced to life without parole.

in light of Applicant's criminal sexual conduct charge. (PCR Tr. 16). Counsel Madsen testified he had further discussions with Applicant after her was informed by the State that his initial second-degree burglary charge was enhanced to a first-degree burglary charge because of Applicant's prior convictions. (PCR Tr. 18). Counsel Madsen also noted the State had offered Applicant a plea deal at that point in time, and Counsel Madsen and Applicant discussed that plea offer. (PCR Tr. 18).

At the PCR evidentiary hearing, Applicant testified he only met with counsel two or three times. (PCR Tr. 5-7, 11). He acknowledged that in the first meeting, he and counsel had a discussion about the general overview of the nature of his charges. (PCR Tr. 6). Applicant believed the second discussion was a couple of weeks before the guilty plea, and during that meeting they discussed the plea offer and Applicant's receipt of a copy of the discovery that had been provided. (PCR Tr. 6). Applicant testified they met a third time on the day of the guilty plea. (PCR Tr. 7). At that meeting, Applicant stated they discussed the nature of the indictments and Applicant signed the indictments. (PCR Tr. 7). Applicant admitted that counsel told him he would receive a sentence no higher than the cap of twenty-five years. (PCR Tr. 9). Applicant also admitted that counsel discussed the first-degree burglary charge and Applicant's options relating to that charge after that indictment was issued.

This Court finds credible counsel's testimony regarding his seven pre-plea meetings with Applicant, and further finds counsel is an experienced defense attorney who thoroughly reviewed the elements of the offenses charged, the evidence, and the potential outcomes with his client. (*See* PCR Tr. pp. 14-21). This Court also finds Applicant's testimony that he only met with counsel two or three times prior to his guilty plea was not credible. In light of counsel's testimony regarding his meetings with Applicant, this Court finds Applicant fails to show

counsel was deficient in his communications with Applicant. Furthermore, in light of counsel's credible testimony that he discussed the elements of the charges with Applicant, and Applicant's admissions that he and counsel discussed the nature of his charges and later discussed the nature of the first-degree burglary charge and his options relating to it, this Court finds Applicant fails to show counsel was deficient in not advising him of the elements of his charges. Since Applicant fails to meet his burden of establishing the first prong of ineffective assistance of counsel under *Strickland* for these two claims, both claims are denied and dismissed with prejudice.

E. Failure to Move for Dismissal of First-Degree Burglary Charge

In his fourth claim in the initial Application for Post-Conviction Relief, Applicant asserts trial counsel was ineffective in not moving to dismiss the first-degree burglary indictment. This claim is without merit.

Applicant has presented no evidence or argument to support this claim for relief. This Court finds he has failed to meet his burden of showing plea counsel was deficient in not making such a motion. Applicant has not shown counsel had a legal basis for moving to dismiss the indictment for first-degree burglary. Applicant also fails to show he was prejudiced in not moving for dismissal of the indictment. Since Applicant has failed to meet his burden for this allegation, this claim for relief is denied and dismissed with prejudice.

Altogether, Counsel negotiated a plea bargain in which Applicant could resolve charges stemming from three separate incidents in one plea, avoid a mandatory life sentence, and receive a sentence capped at the lower end of all potential sentences faced. Considering the consequences of alternative resolutions, and giving additional consideration to the strength of the

evidence presented by the State during the plea hearing, this Court finds counsel's advice to so plead to be within the range of reasonable assistance under prevailing professional norms.

In sum, this Court finds Applicant has failed to prove his counsel's performance was deficient and additionally finds that counsel rendered adequate assistance within the range of competence required in a criminal case. Counsel did not act below the range of competence required in a criminal case. All of Applicant's claims of ineffective assistance of trial counsel are denied and dismissed with prejudice.

Voluntariness of the Guilty Plea

The undersigned also finds Applicant pled guilty freely, knowingly, and voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. *Boykin v. Alabama,* 395 U.S. 238, 89 S. Ct. 1709 (1969). "In addition to the requirements of *Boykin,* a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Anderson v. State,* 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000).

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 court and defendant, between court and defendant's counsel, or both." *Roddy v. State,* 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000).

A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a defendant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *Dalton v. State,* 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Blackledge v. Allison,* 431 U.S. 63, 97 S. Ct. 1621 (1977)). Therefore, statements

made during a guilty plea should be considered conclusive unless an applicant presents valid reasons why he should be allowed to depart from their truth. *Blackledge v. Allison, supra*; *Crawford v. United States,* 519 F.2d 347 (4th Cir. 1975).

This Court finds meritless any contention by Applicant that he did not plead guilty knowingly and voluntarily. This Court finds very credible Counsel's testimony regarding his preparation and advice concerning the charges and the amount of time Applicant was facing, while finding Applicant's testimony on this topic not credible. This Court also finds the plea court specifically reviewed the potential sentences with Applicant who responded that he understood. (Plea Tr. pp. 4-6). This Court finds the record reflects Applicant was advised of the waiver of his constitutional rights by the plea court. (Plea Tr. p. 7-9). This Court finds the plea court further discussed the breadth of the plea negotiations with applicant, asking him if he understood that the sentence would be capped at 25 years. (Plea Tr. pp. 5-7, 10). Moreover, the State presented its basis for the recommended sentence on the record prior to entry of the sentence. (Plea Tr. p. 31).

Accordingly, this Court finds the plea judge correctly found Applicant's plea was freely, voluntary, and intelligently made. (*See* Plea Tr. p. 11). This Court finds Applicant failed to meet his burden in proving he pled guilty involuntarily and unknowingly. The record reflects Applicant admitted his guilt to the plea court after being fully informed of the nature and consequences of his plea by his attorney and by the plea court. (Plea Tr. p. 10). The record further reflects and this Court further finds Applicant entered his plea on his own accord. (Plea Tr. p. 11). This Court also finds that in regard to the length of sentence received, Applicant cannot prove prejudice for the reasons stated above. This Court therefore denies and dismisses with prejudice any allegation any allegation that Applicant pled guilty involuntarily.

IV. Conclusion

Upon conclusion and consideration of the testimony presented at the evidentiary hearing, a review of the pertinent portions of the file made part of this record by way of attachment to the State's Return, and the applicable case law, the undersigned finds that Applicant has failed to meet his burden of establishing error and prejudice, or that he entered an unknowing, involuntary guilty plea. Even if Applicant had put forth sufficient evidence that plea counsel's performance was unreasonable under prevailing professional norms, which this Court finds he did not, Applicant has failed to present any evidence that would tend to establish that he was prejudiced by some act or omission of counsel, or that had counsel not acted in the manner complained of, that Applicant would not have pled guilty and would have instead proceeded to trial. Applicant additionally failed to put forth any evidence sufficient for this Court to find that he did not have a full understanding of the plea deal into which he entered.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

This Court additionally notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to 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, PCR 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.

AND IT IS SO ORDERED this 30 day of Jan, 2018 ~~2017~~.

DEANDREA G. BENJAMIN
Presiding Judge

Columbia, South Carolina