ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

February 7, 2018

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

Re: Courtney Lamont Pauling v. State
2016-CP-42-2102

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

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

2016-CP-42-2102

Courtney Lamont Pauling ..... Appellant,

v.

The State, ... Respondent.

NOTICE OF APPEAL

Courtney Lamont Pauling appeals the Honorable G. Thomas Cooper's Order of Dismissal filed December 14, 2017.

This 7 day of February, 2018.

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
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Attorney for Respondent

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
COURTNEY LAMONT PAULING ,)
APPELLANT,)
)
)
)
VS.)
)
)
)
THE STATE OF SOUTH CAROLINA,)
RESPONDANT.)
)

IN THE SUPREME COURT

CERTIFICATE OF SERVICE
BY MAIL

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 7 **day of** February, **2018**

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Courtney Lamont Pauling, #314748 Applicant, v. State of South Carolina, Respondent.	2016-CP-42-2102 **ORDER OF DISMISSAL WITH PREJUDICE**

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Courtney Lamont Pauling (Applicant) on June 2, 2016. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on November 14, 2017 at the Spartanburg County Courthouse. Applicant was present and represented by Susannah Ross, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Matthew W. Shealy, Esquire, (Counsel) also testified. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the plea transcript, Applicant's direct appeal records, the PCR application, Respondent's return, and Applicant's supplemental application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted at the November 2013 term of the Grand Jury for Spartanburg County for two counts of armed robbery (2013-GS-42-4816, -4817). Applicant was indicted at the August 2014 term of the

Grand Jury for Spartanburg County for assault and battery of a high and aggravated nature (ABHAN) (2014-GS-42-3536), use of a vehicle without owner's permission (2014-GS-42-3538), and kidnapping (2014-GS-42-3539). Matthew W. Shealy, Esquire, represented Applicant.

On February 11, 2015, Applicant pleaded guilty before the Honorable Letitia H. Verdin to two counts of armed robbery, operating a motor vehicle without a permit, kidnapping and the lesser offense of assault and battery, second degree.[1] Judge Verdin sentenced Applicant to imprisonment for a term of twenty-five years for both counts of armed robbery and kidnapping to be served concurrently and time served for assault and battery and operating a motor vehicle without a permit.

Applicant filed a timely notice of appeal. The South Carolina Court of Appeals dismissed Applicant's appeal pursuant to Rule 203(d)(1)(B)(iv). State v. Pauling, Appellate Case No. 2015-000573 (S.C. Ct. App. Order dated May 15, 2015). The Remittitur was returned on June 2, 2015.

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

1. Ineffective Assistance of Counsel

The State made a motion for more definite statement in its return. A hearing was scheduled September __, 2017 before the Honorable Grace Gilchrist Knie at the Spartanburg County Courthouse. The State asserted Applicant failed to present any specific allegations of ineffective assistance of counsel as required by S.C. Code Ann. § 17-27-50 (1985) and Rule 8(a), SCRCP. Applicant requested a continuance. Judge Knie granted Applicant's continuance and ordered an

[1] In exchange for Applicant's guilty pleas, the State dismissed four other robbery charges, an intimidating a witness charge, and an attempted murder charge arising from an incident in which Applicant fired shots at police officers while attempting to flee.

amended application to be filed. Thereafter, on September 22, 2017, Applicant filed a supplemental application alleging the following as grounds for relief:

1. "Ineffective assistance of trial counsel in the failure to investigate and look into multiple robberies in Spartanburg occurring after his arrest with similar descriptions as the one in his cases."

2. "Due Process violations due to the plea not being knowingly and voluntarily made."

SUMMARY OF TESTIMONY AT PCR

I. Applicant testified to the following:

Applicant testified Counsel advised him to plead guilty. Applicant testified he pled guilty pursuant to Alford v. North Carolina. He believes Counsel was ineffective for failing to challenge the charges and evidence against him. Applicant testified that when he was arrested for the robberies, four other people had also been charged and cleared of the same crimes. He learned about this from his discovery he received from Counsel prior to pleading guilty. He brought it to Counsel's attention but Counsel explained it wouldn't help his case. Applicant also read a newspaper clipping saying that other suspects had been arrested for the robberies. Applicant also brought this to Counsel's attention. Applicant also explained that after he was arrested, robberies continued to occur. Applicant believes all of this evidence proved his innocence.

Applicant testified he had alibi witnesses for the robberies and gave those names to Counsel. However, according to Applicant, Counsel did not do anything with them. Applicant testified he received his discovery a couple months after being charged, but before his guilty plea. He complained he was not given a preliminary hearing and when he asked Counsel about a preliminary hearing, Counsel told him it was too late because he had already been indicted.

Applicant testified he knew he could be sentenced to no more than 30 years, but that Counsel told him he was fighting for 10-15 years. Applicant testified that was why he decided to take the plea and not pursue defenses. Applicant testified Counsel never discussed with him the ability to have a suppression hearing to suppress evidence against him. Applicant also complained he didn't believe there was reasonable suspicion or probable cause to search a car and residence of another female he knew. Applicant also testified the female who gave consent to search the apartment was not on the lease and therefore did not have the right to consent to a search.

Applicant did not recall if he had any discussion with Counsel regarding pleading to a violent offense which would require community supervision. Applicant named multiple alibi witnesses, but could not provide their last known addresses so that PCR Counsel could contact them.

II. Counsel testified to the following:

Counsel has been practicing criminal law exclusively for eight years. Counsel was an Assistant Public Defender at the time he represented Applicant, but has since moved on to private practice. Counsel testified he did not have the file at this hearing, but had it when the case was previously scheduled for hearing. He attempted to retrieve the file from the Public Defender's Office for this hearing, but they were unable to locate it. Therefore, Counsel testified based on his memory.

Counsel recalled meeting Applicant about 6-8 times. He received all the discovery and reviewed all of it with Applicant. Counsel also received some late discovery which consisted of letters Applicant had written to the victim of the assault and battery/kidnapping case in which he threatened her to drop charges and expressed his motive for having attacked her. The State intended to use the letters at trial. Counsel was concerned because Applicant's handwriting was

very distinctive and he did not believe there was any basis upon which he could get the incriminating letters suppressed.

Originally, Counsel was preparing to go to trial on the case involving Applicant firing gun shots at police when they were following his car. Counsel went to the scene to familiarize himself in preparation for trial. Counsel explained they were going to pursue a theory that the police were in an unmarked car and Applicant was fearful so he fired shots to scare them. However, it became evident the State was going to try the assault and battery and kidnapping case first in order to seek a life without parole (LWOP) sentence based on his prior criminal history. The victim was not cooperative with the defense and Counsel does not recall if he actually spoke to the other witness.

Counsel also investigated the evidence the State had with regard to the multiple robberies. Counsel was aware there were other people implicated in the robberies and he believed Applicant may have defenses to some of them, but not others. Applicant initially wanted a trial and Counsel was preparing for same. However, after Applicant sat in a courtroom in which Judge Verdin was accepting guilty pleas and imposing sentences, Applicant told Counsel he wanted to plead guilty before her. Counsel arranged for him to plead before Judge Verdin shortly thereafter. Because the likelihood of conviction was high on the other charges and the risk of facing LWOP, Counsel tried to negotiate a global resolution for Applicant. Counsel asked for 10-15 years, but he always made sure his client understood his potential exposure. Counsel testified he always addresses the ramifications of pleading, including violent versus non-violent offenses, parolable and non-parole offenses, maximum sentences and parole issues with his clients.

Counsel recalled Applicant had been indicted by the time he represented him and he could not request a preliminary hearing. Counsel remembered Applicant mentioning multiple names as "alibi witnesses" which he was planning to pursue had Applicant not decided to plead guilty and ask for a trial instead. One of the names Applicant claimed was an alibi witness to one of the robberies was the victim of the kidnapping and assault case. Without his notes, Counsel could not specifically recall if he had met with the victim/alibi witness, but he believed he did. However, he was preparing to go to trial on the first case to be tried – the assault and battery/kidnapping case – and there were no alibi witnesses in that case. Counsel testified Applicant had many charges, but only pled to 5 of them. The rest were dismissed as part of the plea. Among the dismissed charges were the charges arising from him shooting at police.

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 in hindsight. Rather, the Applicant must demonstrate by a preponderance of the evidence that trial counsel was deficient and that the deficiency prejudiced the outcome of his trial. 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 pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Failure to investigate

First, this Court notes any claims surrounding the failure to investigate alleged alibi witness assumes the testimony from the alleged alibi witnesses would have been favorable to the defense and therefore affected the outcome of the trial. However, this contention is based on pure conjecture and speculation. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Because Applicant failed to produce the testimony of the alleged alibi witness, any prejudiced derived from any of Counsel's actions leading to her not testifying is purely speculative.

Additionally, this Court finds Counsel's testimony with regard to his investigation of Applicant's multiple criminal charges more credible than that of Applicant's self-serving testimony. Counsel testified he was first preparing for trial on the charges arising from Applicant shooting at the police. During his investigation and preparation, the State informed him they would try Applicant on the kidnapping and assault incident first in order to secure a LWOP sentence. Counsel shifted focus and began preparing for trial on these charges. Counsel and his investigator went to the scene of the crime to determine if the witness who gave a statement that she had seen Applicant drag the victim into her apartment could actually see such

events unfold. Counsel vaguely recalled speaking to the witness and recalled the victim not being cooperative. Counsel also reviewed all of the State's evidence with Applicant. It was during trial preparations that Applicant informed Counsel he wanted to plead guilty before the Honorable Judge Verdin. Counsel also worked hard to arrange a global plea arrangement so Applicant could dispose of all of his pending charges. As part of the plea arrangements, Counsel was able to get four of the burglary charges, an intimidating a witness charge, and an attempted murder charge dismissed.

This Court finds Counsel's investigation and preparation for trial to be reasonable in light of the circumstances in which Applicant found himself. Furthermore, any cessation in the investigation can be attributed to Applicant's change of heart in wanting to plead guilty before Judge Verdin rather than pursue trial with an LWOP notice on the kidnapping and assault case. Interestingly, Applicant takes issue with his armed robbery convictions, but the sentences for those are the same as and concurrent to the sentence for kidnapping. Therefore, Applicant has failed to meet his burden of proving either deficiency or prejudice.

II. Involuntary Guilty Plea

Applicant also asserts his plea was involuntary. 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)).

In PCR cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citations omitted). 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 fully supports the knowing and voluntary nature of Applicant's plea. Applicant has failed to give a sufficient reason to be allowed to depart from the truth of his statements made during his guilty plea. To the extent Applicant is attacking his guilty plea based on ineffective assistance of counsel, this Court finds Counsel was in no way ineffective, as more fully addressed above. This Court further finds Counsel's advice to plead guilty was sound in light of the LWOP sentence Applicant faced on the kidnapping charge alone as well as the evidence the State had against him and the benefit he received by way of the dismissal of various other criminal charges and concurrent sentences. Applicant has failed to meet his burden of proving his guilty plea was involuntary.

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 12 day of December, 2017.

G. THOMAS COOPER, JR.
Presiding Judge
Seventh Judicial Circuit

Camden, South Carolina

FILED
CLERK OF COURT
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2017 DEC 14 PM 4:54
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M. Hope Blackley
Clerk of Court

January 9, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH JUDICIAL CIRCUIT

Courtney Lamont Fowling #314748
Applicant

CASE # 2016-CP-42-7102

CERTIFICATE OF SERVICE

VS

Respondent

I certify that, on this date, I served a copy of the Ord. of Dismissal w/ prejudice
In this action dated 12-12, 2017 on 1-9-18

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 Orlando
Lindsey McCoy
Susannah Ross

1-9-18
(Date)

(Signature)