

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

RECEIVED

DEC 28 2012

S.C. Supreme Court

WALTER DURHAM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212399

APPENDIX

WANDA H. CARTER
Deputy Chief Appellate Defender
South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS

COUNTY OF SPARTANBURG

2009-GS-42-6325,
2010-GS-42-0412 & 1701-1702

_____)
THE STATE of SOUTH CAROLINA)
)
-vs-)
)
WALTER DURHAM,)
)
Defendant.)
_____)

TRANSCRIPT OF RECORD

July 27, 2010
Spartanburg, South Carolina

Ordered: November 17, 2010
Delivered: November 24, 2010

B E F O R E:

THE HONORABLE R. LAWTON MCINTOSH, Presiding Judge.

A P P E A R A N C E S:

MS. JENNIFER JORDAN, Esquire
Assistant Solicitor for the State

MR. JAMES CHEEK, Esquire
Public Defender for the Defendant

Pamela Faucette
Circuit Court Reporter

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

I N D E X

(No witnesses were called by the State or the Defense.)

State's Exhibits:	Marked:	Received:
(None)		

Defendants' Exhibits:	Marked:	Received:
(None)		

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Reporter's Note: This transcript may contain quoted material. Such material is reproduced as read or quoted by the speaker.

1 July 27, 2010

11:52 a.m.

2 MS. JORDAN: Walter Durham?

3 (The Defendant stepped forward with his attorney.)

4 (Whereupon,

5 WALTER DURHAM

6 first being duly sworn, testified as follows:)

7 MS. JORDAN: Your Honor, this is Walter Durham. He
8 stands before the Court on four separate indictments.
9 All of the indictments have gone -- two of the
10 indictments have gone to the grand jury; two of them have
11 not.

12 The indictments that have gone to a grand jury are
13 09-GS-42-6325 and 2010-GS-42-412. Those are charges for
14 shoplifting third or subsequent.

15 The other two charges have not been presented to the
16 grand jury, that's under 2010-1701; he has initialed
17 waiving presentment. And 2010-1702; he has also initialed
18 waiving presentment.

19 There is restitution in the amount of five hundred
20 and ninety-nine dollars (\$599.00) to HH Gregg and two
21 hundred and two dollars (\$202.00) to Food Lion.

22 He is pleading with a recommendation of concurrent
23 sentencing. He is represented by Mr. Cheek from the
24 public defender's office.

25 THE COURT: And the other two charges that he is

1 waiving presentment on are for...?

2 MS. JORDAN: They are also shoplifting third or
3 subsequent.

4 (Brief Pause)

5 THE COURT: Are you Walter A. Durham (phonetic)?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: How old are you, Mr. Durham?

8 THE DEFENDANT: Fifty-five (55).

9 THE COURT: How far did you go in school?

10 THE DEFENDANT: I graduated, Your Honor.

11 THE COURT: Before you went to jail, were you
12 employed?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Doing what?

15 THE DEFENDANT: I am a licensed electrician and I
16 also do HVAC and carpentry work.

17 THE COURT: How --

18 THE DEFENDANT: I was working for a hotel chain in
19 Greenville doing maintenance.

20 THE COURT: So, when you say you're licensed, are
21 you licensed through ALO (phonetic) in Columbia?

22 THE DEFENDANT: No, sir. I was actually licensed
23 through the city of Spartanburg under a grandfather
24 under the license.

25 THE COURT: Oh, you -- you were there before you had

1 to get a license?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: All right. Are you married?

4 THE DEFENDANT: No, sir, I'm divorced.

5 THE COURT: Do you have any children?

6 THE DEFENDANT: Yes, sir, I have four children.

7 They are all over the age of eighteen (18).

8 THE COURT: Okay. Are you under the influence of
9 any medications, drugs, or alcohol today?

10 THE DEFENDANT: No, sir.

11 THE COURT: Mr. Durham, under indictment 2010-1701,
12 shoplifting third or subsequent, and 2010-1702,
13 shoplifting third or subsequent, neither have been
14 presented to the Spartanburg County grand jury.

15 And you have a right to have both of those
16 indictments presented to the grand jury, in which event
17 at least twelve (12) of eighteen (18) grand jurors would
18 have to vote to find probable cause to go forward on
19 either one of those indictments. Do you understand?

20 THE DEFENDANT: Yes, sir, Your Honor.

21 THE COURT: When you plead guilty, you are giving up
22 the right to have those indictments presented to the
23 grand jury. Do you understand that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Do you wish to go forward with your

1 guilty plea today and waive your right of presentment of
2 both indictments to the Spartanburg County grand jury?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Do you understand that you have the
5 right to a jury trial on all four of the indictments?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And, in that trial or trials, you would
8 be presumed to be innocent. And the State would have to
9 prove each and every element of all charges pending
10 against you beyond a reasonable doubt. Do you understand
11 that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: By pleading guilty, you give up your
14 right to jury trial. Do you understand?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Do you wish to go forward with your plea
17 on all four indictments and waive your right to a jury
18 trial on those indictments?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Do you understand that you have the
21 constitutional right -- rights, with regard to each one
22 of these indictments, to confront any witnesses that
23 testify against you and to cross examine those witnesses,
24 the right to present competent evidence in your defense,
25 as well as the right to remain silent?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: If you went to trial, on any indictment,
3 or all four of the indictments, and you did not testify,
4 the judge would instruct the jury that they could not
5 hold the fact that you didn't testify against you in any
6 form or fashion. Do you understand?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: When you plead guilty, you are telling
9 the Court that you waive or are giving up these
10 constitutional protections. Do you understand that?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Do you wish to go forward with your
13 guilty plea and waive these constitutional rights?

14 THE DEFENDANT: Yes, sir, I do.

15 THE COURT: If you contend that you have any
16 defenses, to any of these four indictments, you will
17 waive those defenses by pleading guilty.

18 THE DEFENDANT: Yes, sir.

19 THE COURT: You also are saying I agree that with
20 -- with the allegations contained in all four of those
21 indictments against you as being true.

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Knowing all that, do you want to go
24 forward with your plea?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do you understand that I could sentence
2 you today to forty (40) years in prison?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: And I can make those -- those charges or
5 sentences consecutive?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Such that you serve out your time on one
8 before you get into the service on the other?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Knowing all of that, you want to go
11 forward with your plea today?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Under indictment 209-6325 [sic], are you
14 guilty of shoplifting third or subsequent offense?

15 THE DEFENDANT: Yes, sir.

16 (Brief Pause)

17 THE COURT: And it says on or around October 12th,
18 two thousand and nine (2009), that you went into Bi-Lo
19 and carried away merchandise from that establishment. Is
20 that correct?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: What did you carry away?

23 THE DEFENDANT: Beer and meat and beef products.

24 (Brief Pause)

25 THE COURT: Under indictment 2010-412, are you

1 guilty of shoplifting third or subsequent offense?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: And it says that on October 10th you went
4 into the Food Lion and took away merchandise from that
5 establishment; is that correct?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: What did you take?

8 THE DEFENDANT: Beer and meats.

9 THE COURT: Under indictment 2010-1701, are you
10 guilty of shoplifting third degree?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: And it says that around February 4th, two
13 thousand, ten (2010), you took items -- well, you took
14 computers and merchandise from Sam's; is that correct?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: What else other than the computers?

17 THE DEFENDANT: Nothing, sir.

18 THE COURT: Just computers?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: And they're valued at greater than a
21 thousand dollars (\$1000); is that correct?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Under indictment 2010-1702, are you
24 guilty of shoplifting third or subsequent offense?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: It says on February 4th you went into HH
2 Gregg and took a 32-inch t.v. with the intention of
3 depriving HH Gregg of ownership of that property; is that
4 correct?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Did you take anything else other than
7 the 32-inch t.v.?

8 THE DEFENDANT: No, sir.

9 THE COURT: Are you satisfied with the services of
10 your attorney?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Has he reasonably done everything you've
13 asked him to do on each one of these indictments?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: As we stand here in court today, is
16 there anything that you contend that your attorney has
17 not done, on any of these indictments, to either
18 investigate the case or to prepare the case, that he
19 should have done prior to coming to court today?

20 THE DEFENDANT: No, sir.

21 THE COURT: Are you fully satisfied with your
22 attorney on each one of these indictments?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Mr. Cheek, have you met with Mr. Durham
25 on each one of these indictments to explain the elements

1 of the charges pending against him, the time he could
2 get, whether or not he has any defenses to the charges,
3 as well as explained to him his constitutional rights?

4 MR. CHEEK: Yes, sir, I have.

5 THE COURT: Do you believe that there is a
6 substantial factual basis for Mr. Durham's decision to
7 plead guilty on each one of these four indictments?

8 MR. CHEEK: Yes, sir, I do.

9 THE COURT: Do you agree with his decision to plead
10 guilty on each one of these four indictments?

11 MR. CHEEK: I do, Your Honor.

12 THE COURT: Okay. Tell me about Mr. Durham, please.

13 MS. JORDAN: Thank you, Your Honor. I'll start with
14 the incident that goes with indictment 09-6325.

15 On October 12th, two thousand, nine (2009), he went
16 to the Bi-Lo located here in Spartanburg at [REDACTED]
17 [REDACTED] (phonetic), took multiple cases of beer,
18 a package of meat, toilet paper, and a bag of chips.

19 The items were returned. There is no restitution.

20 The next case, Your Honor, is to indictment
21 2010-412. That happened on October the 10th, two thousand
22 and nine (2009).

23 The defendant went into the Food Lion located at [REDACTED]
24 [REDACTED] and took beer and food. The
25 restitution is two hundred and two dollars (\$202.00) as

1 outlined on the restitution order form.

2 As to the remaining indictments from two thousand
3 and ten, 1701 occurred when he went to Sam's Club and
4 took electronics on February the 4th of two thousand and
5 ten (2010).

6 The same day, as to indictment 1702, he went to HH
7 Gregg at [REDACTED] (phonetic) and took a 32-
8 inch television. Judge, the restitution in that case is
9 the five hundred and ninety-nine dollars (\$599).

10 We would, on behalf of all of the stores, request a
11 no contact provision. He has two or more prior property
12 crimes that elevate all of these to third or subsequent.

13 The Defendant did admit to the officer on the last
14 set of shopliftings that he has a crack problem and that
15 he had been smoking crack that day.

16 THE COURT: All right.

17 (Brief Pause)

18 MS. JORDAN: Your Honor, I don't know if I stated it
19 earlier, but our recommendation in the case was for
20 concurrent sentencing. I -- I don't recall if I did or
21 not.

22 THE COURT: You did.

23 MS. JORDAN: Okay.

24 THE COURT: All right. Mr. Cheek?

25 MR. CHEEK: Your Honor, we respectfully ask the

1 Court to consider that the State has made a
2 recommendation of concurrent sentencing. All of these
3 charges, while they are egregious, are of the same
4 nature.

5 My client has otherwise done very well with
6 educating himself and getting himself skills, but
7 acknowledges he fell into a substance abuse problem
8 related to crack.

9 He initially was in an accident, was on pills. And,
10 then, medicating with pills, getting the pills. And,
11 then, the pills led to crack cocaine.

12 Your Honor, we would just ask the Court to look at
13 the cycle here and -- and ask the Court to consider any
14 mercy and leniency in sentencing.

15 He certainly appreciates that this interferes with
16 his ability to -- to carry out his trade. He knows that
17 he has -- while he is not married right now, he does have
18 a woman who has been here with him several times in the
19 past.

20 She tried to help move this case forward. He cares
21 about her. She wants to have a family with him. We just
22 ask the Court to allow him to do that sooner than later,
23 Your Honor.

24 THE COURT: What type of prior record does he have?

25 MS. JORDAN: Your Honor, '76, reckless driving,

1 assault on a officer, ABHAN; '79, fraudulent check;
2 '80 ---

3 THE COURT: Slow that -- slow down. Okay, it's
4 reckless, ABHAN, assault on an officer...?

5 MS. JORDAN: Yes, Your Honor. '79, fraudulent
6 check; '80, petit larceny, DUI; '81, DUI; '82, DUI, DUS;
7 '84, DUI, DUS times two -- I'm sorry, DUS, habitual
8 traffic offender and another DUI; '85, habitual traffic
9 offender, two counts of obtaining drugs by fraud; '87,
10 CDV; '91, two counts of petit larceny; '92, two DUSes,
11 three (3) counts of distribution of Valium, seven (7)
12 counts fraudulent check;

13 In '94 from Georgia, three (3) counts of theft by
14 deception, obstructing police, and giving false
15 information; '95, possession of pills, CDV; '96,
16 shoplifting;

17 '97, trespassing, possession of pills, third or
18 subsequent property offense; '98, shoplifting third or
19 subsequent;

20 1999, four (4) counts shoplifting; 2001, two counts
21 grand larceny; 2007, shoplifting, obtaining property by
22 false pretense, and petit larceny.

23 THE COURT: Mr. Durham, do you have anything you
24 would like to say?

25 THE DEFENDANT: Yes, Your Honor. I can offer no

1 excuses for my acts and I take full responsibility.

2 I would like to apologize to the victims and to the
3 Court and to my family. I do realize that I owe a small
4 amount of restitution and I'm willing to pay that in
5 full.

6 I've had several months to reflect on my situation
7 and my actions and with a clear head I've done this. And
8 I wanted to say that I've got my priorities in order --
9 just give me time to get my priorities in order.

10 And regardless of the sentencing that I receive
11 today, Your Honor, I intend to enter into a inpatient
12 rehab and complete that and to complete a course with
13 SEDAC.

14 And, then, after those two steps, to receive
15 continued counseling to help me overcome these problems
16 that have plagued me the latter part of my life -- or all
17 through my life.

18 I feel that is going to be my key to getting back
19 into society and becoming a productive member of society.

20 (Brief Pause)

21 THE COURT: I am listening to you.

22 THE DEFENDANT: That's -- that's -- that's all. I
23 just ask for mercy of the Court and ask for that
24 opportunity to get my life back on track and to become a
25 productive member.

1 (Brief Pause)

2 THE COURT: All right. I'm going to accept Mr.
3 Durham's plea as knowingly, intelligently, and
4 voluntarily made with the advice of competent counsel
5 with whom he is well satisfied and find that there is a
6 substantial factual basis for his plea.

7 What -- how many days credit is he entitled to?

8 MR. CHEEK: One, sixty-three (163), Your Honor.

9 THE COURT: All right. I'm going to accept the
10 recommendation and sentence you to a concurrent sentence
11 on all four indictments.

12 Under 2009-GS-42-6325, I'm sentencing you to ten
13 (10) years suspended on eight (8) years actual service.
14 You will be on probation for five (5) years. I'm giving
15 you a hundred and sixty-three (163) days credit.

16 I am signing the restitution order in the amount of
17 eight hundred and one dollars (\$801.00).

18 I'm providing that, on each one of these
19 indictments, you shall have no contact with the victims.
20 I am recommending the ATU unit when he gets into prison.
21 Whether or not you'll get it is another story, but I am
22 recommending it.

23 Also, when you get out on probation, that you shall
24 attend such treatment counseling as required by probation
25 on each one of those.

1 All right. Under indictment 2010-44-412 [sic],
2 1701, and 1702, the sentence is ten (10) years suspended
3 to eight (8) years. Good luck to you.

4 MR. CHEEK: Thank you, Your Honor.

5 MS. JORDAN: Thank you, Your Honor. Was restitution
6 also ordered on the other order form?

7 THE COURT: I did restitution on indictment 6325 and
8 signed the restitution order. And my -- according to my
9 math, it's eight hundred and one dollars (\$801.00).

10 MS. JORDAN: Thank you, Your Honor.

11 THE COURT: Is that correct? Okay.

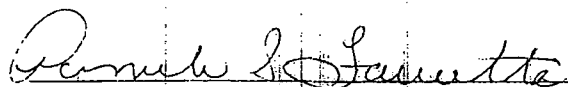
12 (Whereupon, the proceeding concluded at 12:10 p.m.)
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25

REPORTER'S CERTIFICATE

I, the undersigned **PAMELA FAUCETTE**, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that I acted as the Court reporter at the foregoing proceeding; that the foregoing pages, numbered 1 through 17, were transcribed by me and represent a complete and accurate transcription of said proceeding to the best of my knowledge and belief.

I do further certify that I am not of counsel for or in the employment of either of the parties to this action, nor am I interested in the results of this action.

November 23, 2010



Pamela S. Faucette
Official Court Reporter
Seventh Judicial Circuit

2010-CP-42-5833

FORM 5

STATE OF SOUTH CAROLINA)
)
 COUNTY OF) IN THE COURT OF COMMON PLEAS
)
)
 Full name and prison number (if any) of Applicant.)
)
 v.) APPLICATION FOR
)
 State of South Carolina) POST-CONVICTION RELIEF
)

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

CLERK OF COURT
 SPARTANBURG COUNTY
 NOV - 11 AM 8:59
 1101 NORTH MAIN STREET
 SPARTANBURG, SC 29162

1. Place of detention STEVENSON C.I.
2. Name and location of Court which imposed sentence 7TH CIRCUIT SPARTANBURG SC
3. Name(s) of co-defendant(s) (if any) NONE
4. ~~The indictment number or numbers (if known) upon which and the offenses for which~~
 sentence was imposed:
 (a) 2009-GS-42-6325 (D) 2010-GS-42-1702
 (b) 2010-GS-42-412
 (c) 2010-GS-42-1701
5. The date upon which sentence was imposed and the terms of the sentence:
 (a) July 27, 2010
 (b) JULY 27, 2010

(c) July 27, 2010 (D) July 27, 2010

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty
- (b) after a plea of not guilty
- (c) after a plea of nolo contendere

7. Did you appeal from the judgment of conviction or the imposition of sentence?

NO

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

- i. NONE
- ii. _____
- iii. _____

(b) the result in each such Court to which you appealed:

- i. NONE
- ii. _____
- iii. _____

(c) the date of each such result:

- i. NONE
- ii. _____
- iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. NONE
- ii. _____
- iii. _____

FILED
 CLERK OF COURT
 SPARTANBURG DISTRICT
 2010 NOV - 2 AM 8: 59
 M. HOPE BLANKENHORN

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) ATTORNEY FAILED TO APPEAL
- (b) _____
- (c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) See ATTACHED SHEET
- (b) _____
- (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) See ATTACHED SHEET
- (b) _____
- (c) _____

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. NONE
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. NONE
 - ii. _____
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
 - i. NONE
 - ii. _____
 - iii. _____

CLERK OF COURT
 SPARTANBURG COUNTY
 2018 NOV -2 AM 8:59
 M. HOPKINS

iv. _____
(d) the date of each such disposition:

- i. NONE
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. NONE
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. NONE
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. NONE
- ii. _____
- iii. _____

CLERK OF COURT
 SPARTANBURG COUNTY
 2018 NOV -2 AM 8:59
 H. HOFFMAN

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) THIS IS THE FIRST OPPORTUNITY TO PRESENT GROUND
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? yes
- (b) your trial, if any? none
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? none
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? none

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. James Cheek Spartan Public Def. Office
 - ii. Same 366 N. Church St., Suite 3000
 - iii. Same Spartanburg, SC - 29303
- (b) the proceedings at which each such attorney represented you:
 - i. PLEA
 - ii. SENTENCING
 - iii.

19. State clearly the relief you seek in filing this application:

RESENTENCING OF THE APPLICANT

20. Are you now under sentence from any other court that you have not challenged?

NO

M. HOFFMAN
 2010 NOV -2 AM 8:59
 CLERK OF COURT
 SPARTANBURG COUNTY

ATTACHMENT (1)

WALTER Lee DURHAM

Ques 10. STATE CONCISELY THE GROUNDS ON WHICH YOU BASE YOUR ALLEGATION THAT YOU ARE BEING HELD IN CUSTODY UNLAWFULLY.

(a) INEFFECTIVE ASSISTANCE OF COUNSEL.

(b) THE SENTENCE ISSUED IN THE LOWER COURT EXCEEDED THAT AUTHORIZED BY LAW

(c) THE COURT EXCEEDED JURISDICTION IN SENTENCING APPLICANT.

CLERK OF COURT
SPARTANBURG COUNTY
NOV - 2
AM 8:58
S

ATTACHMENT (2)

WALTER Lee DURHAM

Ques. II. State concisely AND IN THE SAME ORDER THE FACTS WHICH SUPPORT EACH OF THE GROUNDS SET OUT IN (10):

(a) (1) Counsel FAILED to OBJECT to Court IMPOSING AN Improper Sentence WHICH exceeded STATUTORIAL LIMITATIONS

(2) Counsel FAILED to OBJECT to Court exceeding ITS JURISDICTION By IMPOSING A Sentence IN excess of THE MAXIMUM Allowed By LAW.

(b) Statute 16-1-57 UNDER WHICH APPLICANT WAS SENTENCED CARRIES A MAXIMUM OF 10 YEARS. THE Court exceeded THIS MAXIMUM By SENTENCING APPLICANT to 10 years SUSPENDED to 8 years AND 5 years PROBATION.

ATTACHMENT (3)

WALTER Lee DURHAM

Ques. 11. (c) UNDER STATUTE 16-1-57 THE COURT RETAINS JURISDICTION TO SENTENCE APPLICANT FROM 0 TO 10 YEARS. BY SENTENCING APPLICANT IN EXCESS OF THIS SENTENCING RANGE THE COURT EXCEEDED ITS JURISDICTION.

FILED
CLERK OF COURT
SPARTANBURG, S.C.
2010 NOV -2 AM 8:59
H. HOPE DUNN, CLERK

DEAR A.S.

10-26-10

PLEASE FIND enclosed my PCR FOR FILING IN COURT.

AS I AM INDIGENT I AM UNABLE TO INCLUDE A SASE TO RECEIVE A Clock Stampex Copy Back.

IF YOU CAN PLEASE SEND me ONE ANYWAY.

THANK you FOR your TIT

CONSIDERATION.

I LOOK FORWARD TO A Reply

258320

WALTER DURHAM
STEVENSON W-4-1,
4546 Broad River Rd
COL., S.C.

CLERK OF COURT
MILITARY DIVISION
2010 NOV 22 AM 8:59

DEAR CLERK OF COURT,

On July 27, 2010. I WAS SENTENCED IN SPARTANBURG CO. COURT. AT THIS TIME I WOULD LIKE TO FILE A PCR CONCERNING MY SENTENCING. PLEASE FORWARD TO THE BELOW ADDRESS (2) TWO BLANK PCR FORMS IN ORDER FOR ME TO FILE.

I WOULD ALSO INFORM YOU THAT I AM INDIGENT AND WILL BE FOR THE FORESEEABLE FUTURE.

THANK YOU FOR YOUR TIME & COOPERATION IN THIS MATTER,

Sincerely,
Nellie Davis

WALTER L. WATSON JR
KIRKLAND BEE
1344 BROADWAY
COLUMBIA, S.C.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2010 AUG 12 PM 4:15
M. HOPE BLAWLEY

8-20-10

Dear Clerk of Court

On July 11, 2010 I was sentenced by Judge Michael H. Smith to 35 months in prison.

At this time I would like to file a PCR concerning my sentence.

Please return to the address below 2 PCR forms so I may file.

I am an indigent inmate and therefore cannot pay for these forms. Secondly, I would like to request that you return the forms to me at the prison address.

Thank you for your time and consideration.

Paul L. Duke

Walter L. Durham 258320

Waterloo, GA 31788

PO Box 189

Rembert, S.C. 29128

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2010 AUG 24 AM 9:12
M. HOPE BLACKLEY

Dear A.S.,

11-8-2010

Please FIND enclosed AN
Amendment to My PCR Filed
Nov. 2, 2010 (2010-CP-42-5833).

Please Send me A Clock STAMPED
copy when you send copies to all
OTHER PARTIES INVOLVED

THANK you FOR your TIME & CONSIDERATION
I LOOK FORWARD to A Reply,

Sincerely,
Walter Durham

WALTER DURHAM 258320
STEVENSON W-4-1A
4546 BROAD RIVER RD
Col., S.C. 29210

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2010 NOV 15 AM 11:57
M. HOPE BLACKLEY

Computer

WALTER Lee DURHAM

QUESTION 4. THE INDICTMENT NUMBERS UPON WHICH AND THE OFFENSE FOR WHICH SENTENCE WAS IMPOSED:

(a) 2009-GS-42-6325 SHOPLIFTING 16-1-57

(b) 2010-GS-42-412 SHOPLIFTING 16-1-57

(c) 2010-GS-42-1701 SHOPLIFTING 16-1-57

(d) 2010-GS-42-1702 SHOPLIFTING 16-1-57

QUESTION 5. THE DATE UPON WHICH SENTENCE WAS IMPOSED AND THE TERMS OF THE SENTENCE:

(a) July 27, 2010

10 years suspended to 8 years AND 5 years PROBATION
CONCURRENT W/ ALL CHARGES

OTHER:

DEFENDANT SHALL HAVE NO CONTACT WITH VICTIM

RECOMMEND ATU

DEFENDANT SHALL ATTEND SUCH TREATMENT
COUNSELING AS REQUIRED BY PROBATION

Computer

FILED
CLERK OF COURT
SPARTANBURG COUNTY
NOV 15 AM 11:57
HOPE BLACKLEY

(2) AMENDMENT TO
PCR 2010-CP-42-5833

QUESTION 5 CONTINUED:

(b) JULY 27, 2010
10 YEARS SUSPENDED TO 8 YEARS
CONCURRENT W/ EXISTING CHARGES
OTHER:
See - 2009-GS-42-6325

(c) JULY 27, 2010
10 YEARS SUSPENDED TO 8 YEARS
CONCURRENT W/ EXISTING CHARGES
OTHER:
See - 2009-GS-42-6325

(d) JULY 27, 2010
10 YEARS SUSPENDED TO 8 YEARS
CONCURRENT
OTHER:
See - 2009-GS-42-6325

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FILED
CLERK OF COURT
SPARTANBURG COUNTY
2010 NOV 15 AM 11:57
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
)
 Walter Durham, #258320,)
)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
)
 Respondent,)
)
 _____)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2010-CP-42-5833

RETURN

The Respondent, making its Return to the application for post conviction relief (PCR) filed November 2, 2010, and an amendment filed November 15, 2010, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the November 2009 and January and February 2010 terms of the Spartanburg County Grand Jury for shoplifting (09-GS-42-6325, 2010-GS-42-0412, 2010-GS-42-1701, -1702). He was represented by James A. Cheek, Esquire. On July 27, 2010, the Applicant pled guilty to all charges. He was sentenced by the Honorable R. Lawton McIntosh to confinement for concurrent sentences of ten years suspended upon service of eight years to five years of probation on each charge.

Attached herewith and incorporated herein are the records of the Spartanburg County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to object to the court imposing an improper sentence which exceeded statutory limitations,
 - b. Counsel failed to object to the court exceeding its jurisdiction by imposing a sentence in excess of the maximum allowed by law ,
2. The sentence issued exceeded that authorized by law, in that, in that;
 - a. Statute 16-1-57 carries a maximum of 10 years, but the court exceeded this maximum by sentencing Applicant to 10 years suspended to 8 years and 5 years probation,
3. The court exceeded its jurisdiction in sentencing the Applicant, in that;
 - a. Under statute 16-1-57, the court retains jurisdiction to sentence Applicant from 0-10 years, but court exceeded its jurisdiction by sentencing Applicant in excess of this sentencing range.

III.

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.

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. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the 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).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Applicant also claims that the trial court made errors in sentencing beyond the statutory maximum and exceeded its jurisdiction in sentencing. Any allegations of trial court error presented by Applicant raise direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have

been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised these issues at his plea or on appeal. His failure to do so has waived these allegations as grounds for relief.

Additionally, the court has broad discretion in imposing criminal sentences. State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976). Absent a showing of partiality, prejudice, oppression or corrupt motive by the sentencing court, or absent a showing that the statutory punishment in and of itself constitutes cruel and unusual punishment, the post-conviction relief court has no authority or jurisdiction to review or change a sentence falling within statutory limits. State v. Cogdell, 273 S.C. 563, 257 S.E.2d 748 (1979). Respondent submits that the Applicant is incorrect in his argument and that the Applicant is only serving an eight year active sentence and the five year probation sentence does not count towards the statutory sentence maximum.

Furthermore, the Applicant did not object to the sentence handed down by the trial court. The Applicant's failure to object has waived any allegation that his sentence was excessive or otherwise improper. Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981).

Therefore, the Court should summarily dismiss these claims in Applicant's application for post-conviction relief.

V.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.


Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

November 1, 2011.

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STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)	
Walter Durham,)	
)	TRANSCRIPT OF RECORD
Applicant,)	2010-CP-42-5833
-vs-)	
)	
State of SC,)	
)	April 2, 2012
Respondent.)	Spartanburg, South Carolina

B E F O R E:

HONORABLE J. DERHAM COLE, JUDGE

A P P E A R A N C E S:

GARY M. FRAZIER, ESQ.
Attorney for the Applicant

SUZANNE H. WHITE, ESQ.
Attorney for the Respondent

Margaret A. Woods
Circuit Court Reporter

ORIGINAL

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WALTER DURHAM

Direct examination by Mr. Frazier

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Cross-examination by Ms. White

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Certificate of reporter

14

NO EXHIBITS INTRODUCED

MOTIONS AND MATTERS

1 MS. WHITE: Your Honor, this is the case of Walter Durham
2 vs. the State, 2010-CP-42-5833, he's represented today by Gary
3 Frazier. He was indicted in November of '09 and then waived
4 presentment for January and February 2010 for four counts of
5 shoplifting third or subsequent, ultimately pled guilty before
6 Judge McIntosh, received sentences concurrent of 10 years
7 suspended to 8 years and 5 years probation on July 27th 2010,
8 no appeal was file, filed this application and a subsequent
9 amendment November 2010 alleging ineffective assistance of
10 counsel all related to the fact that he says counsel failed to
11 object to the improper sentence and is alleging that the
12 sentence he received violates the maximum allowed by law and
13 that the Court abused its discretion in that as well so I will
14 turn it over to Mr. Frazier at this time.

15 THE COURT: Mr. Frazier.

16 MR. FRAZIER: Thank you, Your Honor. Your Honor, it's
17 the, it's the applicant's position that, and and I've outlined
18 this in my brief I put up there you, that his whole
19 justification or for petitioning for post-conviction relief is
20 revolves around the fact that the judge sentenced him to more
21 than the statutory maximum 10 years and but just to establish
22 that fact I'll put him on the stand and question him about
23 what what took place at the hearing and then the rest of it is
24 just outlined in my brief.

25 THE COURT: Oh, so you're seeking relief on more than one

WALTER DURHAM - DIRECT EXAMINATION BY MR. FRAZIER

1 ground?

2 MR. FRAZIER: No, no, Your Honor, only on the, only on
3 the ground that that ---

4 THE COURT: Exceeded the ---

5 MR. FRAZIER: --- the sentence imposed ---

6 THE COURT: --- maximum sentence?

7 MR. FRAZIER: --- exceeded the maximum allowed by law.

8 THE COURT: Okay. And do you wanna call him to testify?

9 MR. FRAZIER: Yes, Your Honor.

10 THE COURT: Alright, Mr. Frazier come around. Excuse me,
11 Mr. Durham come around.

12 (Whereupon, the applicant came forward.)

13 WALTER DURHAM, having been
14 first duly sworn, testified as follows:

15 DIRECT EXAMINATION BY MR. FRAZIER:

16 Q. Mr. Durham, at your plea hearing in July of 2010, do you
17 recall the the judge that presided at that hearing first
18 telling you that -- asking you if you understood that he could
19 sentence you to 40 years that day?

20 A. Yes, I do.

21 Q. And what did you understand him to mean by that?

22 A. That I would be sentenced to 10 years on each count.

23 Q. So you had four counts.

24 A. Oh, and I had four counts which would be a total of
25 40 years I could be sentenced

WALTER DURHAM - DIRECT EXAMINATION BY MR. FRAZIER

1 Q. And there was a recommendation from the solicitor that
2 that you be sentenced concurrently.

3 A. Yes, there was a recommendation for the sentences to run
4 concurrent, that's correct.

5 Q. And at that same hearing the judge ultimately sentenced
6 you to 10 years suspended on 8 years actual service on one
7 indictment and then 8 years on the remaining three, is that
8 correct?

9 A. That's correct.

10 Q. Alright, and he also sentenced you to 5 years of
11 probation.

12 Q. That's correct?

13 A. Alright.

14 Q. Did, uh, when that sentence was handed down by by the
15 judge, did your counsel raise any kind of objection to that
16 sentence?

17 A. No, he did not.

18 Q. Did you say anything to him about that sentence at the
19 time?

20 A. Yes, sir, I tried mid-sentence I asked him if I could
21 talk to him about my sentence, that I needed to have it it
22 amended or somethin' done to it.

23 Q. Wh -- was that right there at the hearing or as ya'll
24 were leaving the courtroom ---

25 A. No, ---

WALTER DURHAM - CROSS-EXAMINATION BY MS. WHITE

1 Q. --- or what?

2 A. --- after I sentenced and was sentenced and went to
3 the, signed the probation papers and I sat there and thought
4 about what had happened and and I was still waiting in the
5 courtroom to be taken out and he was standing near me.

6 Q. Oh, but as far as you're aware and and is is shown in the
7 transcript there was, there was no objection made to the
8 sentence ---

9 A. No, ---

10 Q. --- that was ---

11 A. --- there was not, no. I was the one that just mentioned
12 to him that I needed to talk to him about it.

13 Q. Was it your un -- did you feel at that time that the
14 se -- that his sentence was in excess of what the judge had
15 said he would could ---

16 A. I was actually unsure. I knew it just didn't sound
17 right, that's all, I was unsure about what to do.

18 MR. FRAZIER: Nothin' further, Your Honor.

19 CROSS-EXAMINATION BY MS. WHITE:

20 Q. Just briefly, Mr. Durham. So the judge did tell you you
21 could get up to 40 years because he could sentence you to
22 10 years on each charge and run 'em consecutive, right?

23 A. Yes, ma'am.

24 Q. Okay, and you you pled guilty knowing that you could get
25 potentially 40 years on the charges.

WALTER DURHAM - CROSS-EXAMINATION BY MS. WHITE

1 A. Yes, ma'am. He told me I could get a total of 40 years
2 but he didn't tell me that I could get 40 years and 20 years
3 probation.

4 Q. Well and you didn't get that, right?

5 A. That's correct.

6 Q. Right, but you were pleading guilty knowing that you
7 could potentially get 40 years of incarceration, right?

8 A. Correct.

9 Q. And you ultimately got 8 years of incarceration and 5
10 years probation?

11 A. That's correct.

12 Q. Okay. Alright. And you said you asked your attorney to
13 do somethin' about that?

14 A. Yes, I did.

15 Q. Did he tell you that anything could be done?

16 A. He said, I'm not gonna do anything to your sentence, that
17 you coulda got a lot more time and I said, Well could I just
18 show you somethin'; he said that you have anything to say to
19 me, write me a letter.

20 Q. Okay, and did you write him a letter?

21 A. Yes, I did. When I went back to the jail that afternoon,
22 I wrote a request and asked him to do somethin'. I realized
23 then I thought about it more and asked him to ask for a
24 reconsideration or a amendment of some type. I have a copy a
25 my request.

WALTER DURHAM - CROSS-EXAMINATION BY MS. WHITE

1 Q. But again, you said you didn't know if there was any
2 legal basis, you just thought that it wasn't right?

3 A. I'm a layman and I'm not familiar with legal so I can't
4 say for sure.

5 Q. Okay.

6 A. I knew somethin' wasn't right.

7 Q. Okay.

8 MS. WHITE: That's all I have, Your Honor.

9 THE COURT: Well what did you know wasn't right?

10 THE APPLICANT: The fact that the maximum that I could
11 have gotten was on a concurrent sentence was 10 years ---

12 THE COURT: Okay.

13 THE APPLICANT: --- and that this 8 years, 10 years
14 suspended to 8 plus the -- a 5-year probation would totals
15 13 years to me because even though I would just serve 8 years,
16 the 5 years probation I would be in jeopardy for 5 more years
17 of havin' to go back and serve the remainder of the, ---

18 THE COURT: The remainder of what?

19 THE APPLICANT: --- of the 10-year sentence.

20 THE COURT: Yeah, two more.

21 THE APPLICANT: Yes.

22 THE COURT: Alright, so what's excessive about that? How
23 does that violate the law?

24 THE APPLICANT: Because in my opinion ---

25 THE COURT: Well let me ask you this: Is that what I

MOTIONS AND MATTERS

1 understand, you believe that the sentence that the judge
2 imposed it exceeds what he can do under the law? Well maybe I
3 misunderstood your complaint. What is your complaint?

4 THE APPLICANT: I believe that the Court erred in
5 extending my probation past the time of my original sentence
6 exceeding my original sentence with the time and probation and
7 that amounts to a an excessive sentence ---

8 THE COURT: Oh, you think it's an excessive sentence,
9 not that it's exceeds ---

10 THE APPLICANT: That it -- I'm ---

11 THE COURT: --- what's permitted under the law.

12 THE APPLICANT: --- I'm I'm corrected, that it does
13 exceed that's what's allowed by statute.

14 THE COURT: Alright, so you think the error that the
15 judge made is that the sentence he imposed exceeds what is
16 permitted by law?

17 THE APPLICANT: Yes.

18 THE COURT: Okay. Mr. Frazier, do you have anything else
19 you need to ask him?

20 MR. FRAZIER: Your Honor, that is what I've argued in in
21 my brief that that that this, and and I've cited two cases and
22 they're from the Supreme Court and the Court of Appeals that
23 support that, that the dec ---

24 THE COURT: Well do you have things you wanna ask him?

25 MR. FRAZIER: No, Your Honor.

MOTIONS AND MATTERS

1 THE COURT: Okay, step down.

2 (Whereupon, the applicant left the stand.)

3 THE COURT: Alright, now, Mr. Frazier, you say there's
4 some cases in the Court of Appeals and the Supreme Court that
5 say that what the judge did in this case exceeded the the
6 sentence that was permitted under the law?

7 MR. FRAZIER: Well, Your Honor, that the statutes that
8 Mr. Durham was was convicted under state that for a third or
9 subsequent quench [sic] for the term of, term of imprisonment
10 is contingent on the value of the property involved that he
11 must be punished as prescribed for a Class E felony and in the
12 statute 16-1-20(A)(5) stipulates that the term of imprisonment
13 for a person convicted of a Class E felony shall not be more
14 than 10 years, alright, so we've established that the maximum
15 sentence that he could be sentenced to is 10 years.

16 THE COURT: Well it's 40 in this case 'cuz he's got four
17 different ---

18 MR. FRAZIER: I understand.

19 THE COURT: --- charges ---

20 MR. FRAZIER: Ten years, ---

21 THE COURT: --- but ---

22 MR. FRAZIER: --- ten years if it's gonna be
23 concurrent.

24 THE COURT: Okay.

25 MR. FRAZIER: Okay. Alright. The, uh, ---

MOTIONS AND MATTERS

1 THE COURT: So how did the Court exceed that?

2 MR. FRAZIER: Our using the ruling in *Thompson vs. the*
3 *State Department of Public Safety*, Your Honor, and I've
4 attached those cases to my brief, his position hinges on the
5 fact that any period of suspended sentence, any period of
6 probation is all encompassed in that maximum term in prison so
7 in other words, if you're, if you're sentenced to 10 years and
8 that and this is what the Court says, it says that probation
9 which is a suspension of the period of incarceration is
10 clearly part of a criminal defendant's term of imprisonment as
11 his actual incarceration, parole and the suspended portion of
12 the sentence, that's, uh, that's the *Thompson* case and then
13 the Court of Appeals referring to the *Thompson* case states
14 unequivocally that, it says, According to *Thompson*, referring
15 to that case, the phrase "term of imprisonment" includes
16 actual incarceration, parole, the suspended portion of the
17 sentence, probation and supervised furlough.

18 THE COURT: What was the context of that?

19 MR. FRAZIER: Well, Your Honor, that's that's the key.
20 There it was they were dealin' with the issue of probation but
21 but the issue and what's key in that is that their ruling on
22 defining the term "term of imprisonment" wasn't contingent
23 upon the particular statute they were dealing with, it's
24 the -- it's and that's wh -- and and that's the language that
25 the Supreme Court used in there, it's it's long held law in in

MOTIONS AND MATTERS

1 South Carolina that term of imprisonment means not just the
2 actual term of incarceration but it means the active sentence,
3 the suspended portion of a sentence, probation, parole or
4 whatnot so Mr. Durham's position is that by giving him a
5 10-year sentence suspended to 8 and then 5 years of probation
6 he has in effect been sentenced to 15 years or even if you
7 want to say it's just the actual period of incarceration, it's
8 8 years and 5 years, that's a sentence of 13 years. The the
9 adding that 5 years of probation is what kicked it over the
10 10-year maximum based on what the Supreme Court and the, and
11 the Court of Appeals have held as the definition of the word
12 "term of imprisonment" and the statutes that he was convicted
13 under state that the maximum term of imprisonment is 10 years.

14 THE COURT: Okay. Ms. White, would you like to be heard?

15 MR. BOGGS: No, sir.

16 THE COURT: Ms. White.

17 MS. WHITE: Okay.

18 MR. BOGGS: Oh, I'm sorry.

19 MS. WHITE: Oh. Your Honor, I, ya know, I think if
20 you're asking for argument on on our side --

21 THE COURT: I'm not asking for any, I'm just ---

22 MS. WHITE: No, ---

23 THE COURT: --- asking do, I said do you ---

24 MS. WHITE: Do I agree?

25 THE COURT: --- wish to be heard?

MOTIONS AND MATTERS

1 MS. WHITE: Oh, I would just say from the *Thompson* case I
2 believe it was in a a frame of reference of a felony DUI
3 statute specifically and I think it was referencing suspending
4 of a driver's license and some things so I think that the
5 context of it plays a large part in that, on that but, Your
6 Honor, the State would make a motion that that the applicant's
7 failed to to meet his burden of proof as to this as that there
8 any any violations that could afford him post-conviction
9 relief and and move for this to be dismissed as a matter of
10 law.

11 THE COURT: Okay. Mr. Frazier, does your client have any
12 other grounds he wishes to present on which he thinks he's
13 entitled to relief?

14 MR. FRAZIER: No, Your Honor, that was all that was in
15 his petition.

16 THE COURT: Okay. Mr. Durham, that's the only ground
17 that ya have?

18 THE APPLICANT: Yes.

19 THE COURT: Okay, I'll review Mr. Frazier's brief and
20 then issue an order. You wanna present any testimony?

21 MS. WHITE: I don't think it's necessary, Your Honor.

22 THE COURT: Okay. Okay.

23 MR. FRAZIER: Thank Your Honor.

24 MS. WHITE: Thank Your Honor.

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CERTIFICATE OF REPORTER

I, Margaret A. Woods, Court Reporter in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on April 2, 2012 at the time and place heretofore set forth; and that the foregoing pages numbered from 3 through 13, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

August 3, 2012

Margaret A. Woods

Margaret A. Woods, Court Reporter
in and for the State of South Carolina at Large.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

COUNTY OF SPARTANBURG)

Walter Durham, #258320,)

2010-CP-42-5833

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 2, 2010, and an amendment filed November 15, 2010. The Respondent made its Return on or about November 1, 2011. An evidentiary hearing into the matter was convened on April 2, 2012, at the Spartanburg County Courthouse. The Applicant was present and represented by Gary M. Frazier, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject conviction. Applicant's records from the South Carolina Department of Corrections, the Return, the guilty plea transcript, and Applicant's Brief in Support of the Petitioner for Post Conviction Relief.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 JAN 15 AM 11:43
K. HOSE BEACHEY

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the November 2009 and January and February 2010 terms of the Spartanburg County Grand Jury for shoplifting (09-GS-42-6325, 2010-GS-42-0412, 2010-GS-42-1701, -1702). He was represented by James A. Cheek, Esquire. On July 27, 2010, the Applicant pled guilty to all

charges. He was sentenced by the Honorable R. Lawton McIntosh to confinement for concurrent sentences of ten years suspended upon service of eight years to five years of probation on each charge.

ALLEGATIONS

In the current application, the Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to object to the court imposing an improper sentence which exceeded statutory limitations;
 - b. Counsel failed to object to the court exceeding its jurisdiction by imposing a sentence in excess of the maximum allowed by law;
2. The sentence issued exceeded that authorized by law, in that, in that;
 - a. Statute 16-1-57 carries a maximum of 10 years, but the court exceeded this maximum by sentencing Applicant to 10 years suspended to 8 years and 5 years probation,
3. The court exceeded its jurisdiction in sentencing the Applicant, in that;
 - a. Under statute 16-1-57, the court retains jurisdiction to sentence Applicant from 0-10 years, but court exceeded its jurisdiction by sentencing Applicant in excess of this sentencing range.

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

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Ineffective Assistance of Counsel

The 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), SCRPC). 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, 80 L.Ed.2d 674, 692 (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, 385 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

The Applicant testified that Counsel was ineffective for failing to object to the sentence

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received by the Applicant. Applicant testified that because the maximum sentence that he could receive by statute was ten years on each charge, the lower court improperly sentenced Applicant to eight years of confinement and five years of probation, which he testified amounts to a sentence of thirteen years. However, Applicant also testified that he understood that he could have received a total of four, ten year sentences if the court had chosen to run the sentence consecutively, which would have amounted to a sentence of forty years.

In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court held that the two-part standard adopted in Strickland v. Washington, *supra*, for evaluating claims of ineffective assistance of counsel applies, as well, to guilty plea challenges based on ineffective assistance of counsel. To meet the Court's "prejudice" requirement, a criminal 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. This Court finds that the Applicant was aware of and informed of the charges to which he was pleading guilty. The plea court carefully reviewed the charges and potential sentences with the Applicant. The record reflects that the Applicant did not indicate during his plea that he had any problems with Counsel or representation. This Court finds that Counsel is an experienced attorney who was prepared and effectively represented Applicant at his guilty plea. This Court finds that the Applicant failed to meet his burden of proof as to this claim; therefore, this claim is denied and dismissed.

In addition to his claim of ineffective assistance of counsel, the Applicant also alleged in his application that the sentence he received exceeded the maximum allowed by law and that the court exceeded its jurisdiction to sentence the Applicant as it did. The court has broad discretion in imposing criminal sentences. State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976). Absent a showing of partiality, prejudice, oppression or corrupt motive by the sentencing court, or

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absent a showing that the statutory punishment in and of itself constitutes cruel and unusual punishment, the post-conviction relief court has no authority or jurisdiction to review or change a sentence falling within statutory limits. State v. Cogdell, 273 S.C. 563, 257 S.E.2d 748 (1979). This Court finds that these claims lack merit because the sentence imposed by the lower court was well within the statutory guidelines. Therefore, this Court finds that the Applicant has failed to meet his burden of proof as to these claims and they are denied and dismissed.

Summary

This Court finds counsel adequately conferred with the Applicant, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test - that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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.

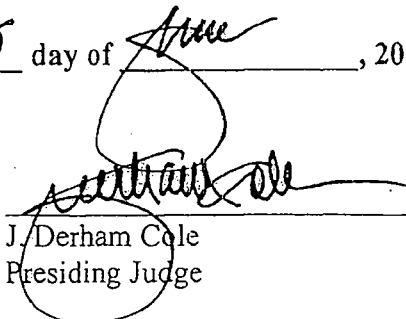
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SARASOTA COUNTY
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This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the 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 PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 15 day of June, 2012.



J. Derham Cole
Presiding Judge

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SPARTANBURG COUNTY
2012 JUN 15 AM 11:43
M. HOPE BLACKLEY

6

WITNESSES

Spartanburg County Sheriff's Office

T.H. Tillotson

1. SENTENCE MADE

2. REPORT ENDED

3. CARD PULLED

ARREST WARRANT NUMBER

089865 5. CHECKED WARRANTS

6. CHECKED SIGNATURE

7. ASSESSMENT AND FINE CARD MADE

8. TRAFFIC VIOLATION COPY

ACTION OF GRAND JURY

Tom Bill

Andy

Foreperson of Grand Jury

Date:

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO.

09-GS-42-6325

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

NOV 30 2009

TERM

THE STATE

VS.

Walter Lee Durham

Indictment for

SHOPLIFTING/ENHANCEMENT FOR 3RD OR SUBSEQUENT OFFENSE

SC Code: 16-13-110 (B) (1): 16-1-57

CDR Code: 2367

Class E

CLERK OF COURT
SPARTANBURG COUNTY

7039 DEC 10 AM 12:59

MARC KITCHENS

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT


NOV 24 2009

At a Court of General Sessions, convened on _____ the
Grand Jurors of Spartanburg County present upon their oath:

SHOPLIFTING/ENHANCEMENT FOR 3RD OR SUBSEQUENT OFFENSE

That Walter Lee Durham did, in Spartanburg County on or about October 12, 2009, take possession of or carry away merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of the merchandise without paying the full retail value being less than One Thousand Dollars, to-wit: merchandise for sale by BiLo. Further, that the Defendant has at least two or more convictions for Property Crimes, in violation of §16-13-0110 (B)(1); §16-1-57, THE CODE OF LAWS OF SOUTH CAROLINA, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR

WITNESSES

11-13-110-42-1101

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CLERK OF COURT
SPARTANBURG, SOUTH CAROLINA

2010 JUL 27 PM 4:08

M. HOPE BLACKLEY

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

FEB 22 2010

TERM

THE STATE

v.

Walter Lee Durham

Indictment for
SHOPLIFTING

SC Code: 16-13-110 (B) (1) & 16-01-0057
CDR Code: 2367
Class FEL/E

Spartanburg County Sheriff's Office

1. SENTENCE MADE

2. REPORT ENDED

3. CARD PULLED

4. INDEXED

ARREST WARRANT NUMBER

M-421542

6. CHECKED SIGNATURE

7. ASSESSMENT AND FINE CARD MADE

8. TRAFFIC VIOLATION COPY

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date:

VERDICT

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT


FEB 18 2010

At a Court of General Sessions, convened on _____ the
Grand Jurors of Spartanburg County present upon their oath:

SHOPLIFTING

That Walter Lee Durham, did in Spartanburg County on or about February 4, 2010, take possession of, carry away, transfer from one person to another or from one area of a store or other retail mercantile establishment to another area, or caused to be carried away or transferred merchandise displayed, held, stored, or offered for sale by a store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use, or benefit of the merchandise without paying the full retail value; to-wit: two desktop computers merchandise valued at greater than \$1000, merchandise of Sam's Club; that the Defendant has at least (2) two or more prior convictions for property crimes; all in violation of S.C. CODE ANN. §16-1-57 and §16-13-110 (Law Co-op. 1976).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR

WITNESSES

Spartanburg City Police

[Handwritten signature]

1. SENTENCE MADE

2. REPORT ENDED

Computer

3. CARD PULLED

4. INDEXED

ARREST WARRANT NUMBER

M116895

6. CHECKED SIGNATURE

7. ASSESSMENT AND FINE CARD MADE

Computer

8. TRAFFIC VIOLATION COPY

ACTION OF GRAND JURY

Tome Bill

Foreperson of Grand Jury

Date: 1-15-10

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO.

10-GS-42-0412

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

JAN 18 2010

TERM

THE STATE
vs.

Walter Lee Durham

Indictment for

SHOPLIFTING/ENHANCEMENT FOR
3RD OR SUBSEQUENT OFFENSE

SC Code: 16-13-110 (B) (1); 16-1-57

CDR Code: 2367

Class E

MARC MITCHELL
2010 JAN 27 PM 2:39

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on JAN 15 2010, the
Grand Jurors of Spartanburg County present upon their oath:

SHOPLIFTING/ENHANCEMENT FOR 3RD OR SUBSEQUENT OFFENSE

That Walter Lee Durham did, in Spartanburg County on or about October 10, 2009, take possession of or carry away merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of the merchandise without paying the full retail value being less than One Thousand Dollars, to-wit: beer and food for sale by Food Lion. Further, that the Defendant has at least two or more convictions for Property Crimes, in violation of §16-13-0110 (B)(1): §16-1-57, THE CODE OF LAWS OF SOUTH CAROLINA, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

WITNESSES

Spartanburg County Sheriff's Office

1. SENTENCE MADE

2. REPORT ENDED

3. CARD PULLED

4. INDEXED

5. CHECKED WARRANTS

ARREST WARRANT NUMBER

M-421548 7

7. ASSESSMENT AND FINE CARD

8. TRAFFIC VIOLATION COPY

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date:

VERDICT

Foreperson of Petit Jury

Date:

BOOKED - 7/27/10

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

FEB 22 2010

TERM

THE STATE

VS.

WALTER LEE DURHAM

Indictment for

PETIT LARCENY

SC Code: 16-13-0030(A) / 16-01-0057

CDR Code: 2367

Class FEL/UNC

FILED
CLERK OF COURT

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M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

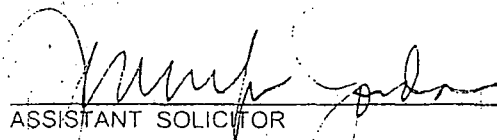
INDICTMENT

At a Court of General Sessions, convened on FEB 18 2010 the
Grand Jurors of Spartanburg County present upon their oath:

PETIT LARCENY

That Walter Lee Durham, did in Spartanburg County on or about
February 4, 2010, feloniously take and carry away the personal goods of
HH Gregg, Spartanburg, SC, with the value of less
than One Thousand Dollars, described as follows: one 32" TV, with the
intent to deprive the owner permanently of such property. Further, that the
Defendant has at least (2) two or more prior convictions for Property
Crimes, all in violation of §16-13-30 (A), 16-01-0057, *THE CODE OF
LAWS OF SOUTH CAROLINA*, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case
made and provided.


ASSISTANT SOLICITOR