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March 16, 2018

RECEIVED

MAR 20 2018

S.C. SUPREME COURT

Via US Mail

Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

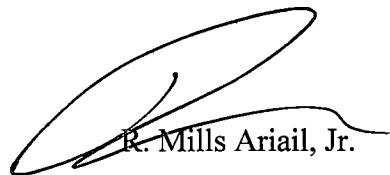
***Re: Notice of Intent to Appeal from State of SC v. John Ziegler
C.A. No.: 2015-CP-39-1575***

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable Daniel D. Hall's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Pickens County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law



R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAR 20 2018

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Daniel D. Hall, Circuit Court Judge

Case No. 2015-CP-39-1575

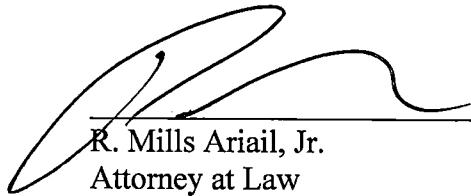
John Adrian Ziegler,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable Daniel D. Hall's Order of Dismissal dismissing Appellant's application for post-conviction relief. On February 13, 2018, the Honorable Daniel D. Hall signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on March 2, 2018. A copy of the Honorable Daniel D. Hall's Order of Dismissal is attached.



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Attorney for John Ziegler

Greenville, South Carolina
March 16, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Case No. 2015-CP-39-1575

RECEIVED
MAR 20 2018
S.C. SUPREME COURT

John Adrian Ziegler,..... Appellant,

v.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this March 16, 2018, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

DeShawn Mitchell, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

Pickens County Clerk's Office
Pickens County Courthouse
214 East Main Street
Pickens, SC 29671

John Ziegler SCDC# 365214
Allendale Correctional Facility
1057 Revolutionary Trail
Fairfax, SC 29827

SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

March 16, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF PICKENS)

IN THE COURT OF COMMON PLEAS)
THIRTEENTH JUDICIAL CIRCUIT)

John Adrian Ziegler, #365214,)

2015-CP-39-1575)

Applicant)

v.)

State of South Carolina,)

Respondent)

2018 MAR -6 A @ 51)
CLERK OF COURT)
PICKENS COUNTY)
GREENVILLE, SC)
ORDER OF DISMISSAL)

This matter comes before the Court by way of an application for Post-Conviction Relief filed on December 30, 2015. Respondent made its Return on or about June 29, 2016. An evidentiary hearing into the matter was convened on June 28, 2017 at the Greenville County Courthouse in Greenville, SC at which time the Applicant was present in court and represented by R. Mills Ariail Jr., Esquire. The Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's plea counsel, John DeJong, Esquire also testified as did Daniel Buckner, Esquire, Assistant Solicitor for the Thirteenth Judicial Circuit. This Court had before it a copy of the records of the Pickens County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's guilty plea, the PCR application, Respondent's Return, and Applicant's records for the Department of Corrections.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Pickens County Clerk of Court. Applicant was indicted by the

August 2014 term of the Pickens County Grand Jury for one (1) count of Kidnapping (2014-GS-39-00087), one (1) count of Assault and Battery, Third Degree (2014-GS-39-00088), and one (1) count of Pointing and Presenting a Firearm (2014-GS-39-00089). John DeJong, Esquire represented Applicant. On August 24, 2015, Applicant pled guilty as indicted. The Honorable Perry H. Gravely sentenced Applicant, without negotiation or a recommendation from the State, to incarceration for nine (9) years for the count of Kidnapping, thirty (30) days for the count of Assault and Battery, Third Degree, and three (3) years for the count of Pointing and Presenting a Firearm. The sentences are set to run concurrently. Applicant did not appeal his conviction and sentence.

ALLEGATIONS

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

1. "Brady Violation"
 - a. "The Solicitor in the investigation leading to their indictment was guilty of flagrant misconduct for failure to provide exculpatory evidence to the indicting Grand Jury and the questionable tactics employed during the course of the investigation"
2. "Due Process Violation"
 - a. "The holding that the suppression of exculpatory evidence violated Brady's right to due process"
3. "Constructive Fraud"
 - a. "The Solicitor conspired with both Deputy to creat (sic) a scheme of perjury and failure to produce documents perpetuated by both"
4. "The record of the guilty plea does show that the trial judge provided an explanation of the constitutional rights applicant was waiving, thus rendering the pleas invalid"

5. "Duress cause (sic) the victim to act or force into a plea (sic)"
6. "Manufactured Indictment"
 - a. "Solicitor unlawfully impaneled its Grand Jury outside the jurisdiction of the Court of General Sessions, and then willfully printed and published false and misleading information in its indictment in order to deep (sic) secret its violations of Statutor (sic) law"
7. "Prosecutorial Misconduct"
 - a. "Failure to provide to provide exculpatory evidence to the indicting Grand Jury and for questionable tactics employed during the cause (sic) of the investigation"
8. Ineffective Assistance of Counsel

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Applicant

Applicant testified he was previously represented by a different attorney prior to Mr. DeJong (plea counsel) representing him. He testified he really wanted to go to trial but did not believe the court system was reliable. He testified he met and discussed his case with plea counsel while also going over the evidence in the case. Applicant further testified he did not think he had enough time to make a reasonable decision on the case. He testified there was some exculpatory evidence the solicitor never turned over to him. Applicant testified there was a house key missing which would have shown he was a resident of the home and could not have kidnapped the victim. Applicant also testified the solicitor did not turn over cell phone records from the victim which would have shown she was on the phone and could not have been kidnapped. He also testified he was not notified he had a right to appeal. Applicant also testified plea counsel talked to a potential alibi witness in preparation for trial but did not subpoena that

witness. He testified there was newly discovered evidence of 911 tapes that were never presented to the court system. Applicant testified at the guilty plea proceeding there was a recommendation that he receive a seven year plea but he got a nine year sentence and plea counsel should have objected to that. Applicant testified he never received an indictment with his discovery materials and that he was not indicted in a timely manner after being arrested.

Daniel Graham Buckner

Daniel Buckner, an Assistant Solicitor for the 13th Circuit Solicitor's Office testified. Mr. Buckner testified he was not the original solicitor assigned to Applicant's case but when that solicitor left the office he took over the case. Mr. Buckner testified that a dispute arose at the home of the victim and the Applicant. He testified Applicant pulled a gun on the victim and held her at gunpoint on the couch while the victim's son was in the home and would not allow her to leave for a period of time. Mr. Buckner testified the victim was cooperative and willing to testify in this case had it gone to trial. Mr. Buckner also testified he received a Rule 5 request for discovery and turned over all appropriate discovery to defense counsel. Mr. Buckner testified he also provided a copy of the 911 call of the victim to defense counsel prior to trial. He also testified plea counsel was trying to get some phone calls for his client that his office did not have in its investigation file. Mr. Buckner also testified the original prosecutor in the case had offered Applicant a seven year plea deal and Applicant turned the offer down. He testified once he took over the case all previous recommendations were off and he placed the case on the trial roster. He testified they actually picked a jury in this case and went through pretrial motions before Applicant decided to plead guilty. Finally, Mr. Buckner testified at the guilty plea hearing there was no recommendation or negotiated plea and that it was a straight up plea.

John William DeJong

Mr. DeJong (plea counsel) testified he had been practicing law since 1975. He testified he was appointed to represent Applicant after a different attorney was relieved from the case. Plea counsel testified he met with Applicant several times and Applicant called him several times as he had access to a phone. He also testified he went down to the jail and went over the discovery in the case with Applicant while also going over the charges and possible punishments with Applicant. He testified he received a seven year plea offer but Applicant did not desire to plead guilty and wanted a trial. Plea counsel testified they had struck a jury and was surprised when Applicant informed him he wished to plead guilty. Plea counsel testified he went out to the location of the incident and took pictures. He testified the issue regarding a house key was not material to the Applicant's case. He further testified as far as he knew he had access to all of the discovery from the solicitor's office. Plea counsel testified he discussed Applicant's version of events and got the victim's phone records. Plea counsel testified that Applicant wanted him to contact a potential witness named Cynthia Tyler. He testified he talked to her on more than one occasion. He testified he did not subpoena her and that she was not an eye witness adding that she would not have been able to testify to anything that transpired during the time frame of the kidnapping. Plea counsel testified it was definitely Applicant's decision to plead guilty. He testified he did not recall Applicant asking him to appeal his case and if Applicant would have he would have told him in his opinion there was no basis for an appeal.

On cross examination, plea counsel testified that the issue of the key and him being allowed in the house had no bearing on the case as this was a kidnapping case and not a burglary.

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 can weigh 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). This Court finds the testimony of Counsel to be credible. This Court further finds that the testimony by Applicant is not credible.

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (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 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. 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. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel’s performance was deficient. Id. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Id. (quoting Strickland v. Washington, 466 at 688). 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, Applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 (1985).

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel. Applicant also failed to prove he was prejudiced by the alleged deficiencies. As a matter of general impression, this Court finds the testimony of Applicant’s counsel to be credible and persuasive on all matters. These credibility findings have been applied to the Court’s findings and conclusions set forth below.

Prosecutorial Misconduct/Brady violation

Applicant alleges that prosecutor in this case failed to turn over exculpatory evidence to him. Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Under this requirement, “favorable” evidence includes both exculpatory evidence and impeachment evidence. State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998). “Determining whether evidence withheld by the state is ‘material’ under Brady turns on whether the cumulative effect of the withheld evidence results in

a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” State v. Hill, 368 S.C. 649, 661, 630 S.E.2d 274, 280–81 (2006). Put another way, to establish a Brady violation, the aggrieved party must show “that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” Kyles v. Whitley, 514 U.S. 419, 434 (1995). At the PCR hearing the assistant solicitor testified he turned over all materials in discovery to Applicant. Plea counsel also testified he believed he received all discoverable information during this process. Applicant testified there was a house key missing that should have been turned over as well as cell phone records. Plea counsel testified the house key was not material to the Applicant’s case and he had obtained the victim’s phone records. Because of this, the Applicant had failed to demonstrate that there was prosecutorial misconduct or a likewise a Brady violation. Accordingly, this Court finds that this allegation is denied and dismissed.

Guilty Plea Invalid

Applicant also alleges that he was under duress during the guilty plea proceeding making his guilty plea invalid. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the Applicant had a full understanding of the consequences of her plea and the charges against him. See Boykin, 395 U.S. at 243. In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. See Harris v. Leeke, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant’s right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge, 431 U.S. at 73-74. Statements made during a guilty plea should be considered conclusively, unless an

Applicant presents valid reasons why he should be allowed to depart from the truth of her statements. See Crawford, 519 F.2d at 350.

An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness, and there is a reasonable probability, but for trial counsel's errors, he would not have pleaded guilty, but would have insisted on going to trial instead. See Roscoe, 345 S.C. at 20, 546 S.E.2d at 419. Given the Applicant's burden of proof and the analysis to be applied to this claim, the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it will be treated as such.

This Court finds the record reflects Applicant's plea was entered freely, voluntarily, knowingly, and intelligently. The plea judge explained the charges to Applicant, including the maximum penalties for each. The plea judge also went through Applicant's constitutional rights and questioned Applicant as to whether he understood those rights and wished to give them up to plead guilty. Applicant agreed that he did. Applicant admitted he was guilty of these offenses and did not challenge the facts presented by the State at the plea. Applicant told the plea judge that he was satisfied with his attorney, that Counsel had done everything Applicant had asked of him, and he did not need any more time to discuss this matter with Counsel. Applicant further told the plea judge no one had threatened him or made him any promises to get him to plead guilty, and he was doing so of his own accord. Additionally, Applicant told the plea judge he did not have any physical or mental issues which would prevent him from understanding the proceeding, and Applicant indicated he understood all of the plea judge's questions and had answered them honestly. This Court therefore finds that Applicant understood the terms of the

plea and the possible sentences he could receive. Accordingly, this Court finds that this allegation is denied and dismissed.

Manufactured Indictment

Applicant also alleges that his indictment was manufactured. More specifically, Applicant testified at the PCR hearing he never received an indictment with his discovery materials and that he was not indicted in a timely manner after being arrested. Rule 3(c) of the South Carolina Rules of Criminal Procedure state;

Within ninety (90) days after receipt of an arrest warrant from the Clerk of Court, the solicitor shall take action on the warrant by (1) preparing an indictment for presentment to the grand jury, which indictment shall be filed with the Clerk of Court, assigned a criminal case number, and presented to the Grand Jury; (2) formally dismissing the warrant, noting on the face of the warrant the action taken; or (3) making other affirmative disposition in writing and filing such action with the Clerk of Court. Rule 3(c), SCRCrimP

In State v. Culbreath, 282 S.C. 38, 316 S.E.2d 681 (1984) the South Carolina Supreme Court interpreted the rule requiring solicitors to act on a warrant within ninety days of its issue. The court agreed with and affirmed the trial court's holding that such a rule was administrative not jurisdictional. *Id.* Furthermore, the court stated a solicitor's delay does not within itself invalidate a warrant or prevent subsequent prosecution. *Id.* at 40, 316 S.E.2d at 681. This Court finds that Applicant has failed to show any irregularities with respect to the indictments. Accordingly, this Court finds that this allegation is denied and dismissed.

Failure to File Notice of Appeal

Applicant alleges plea counsel was ineffective for failing to file a notice of appeal after his guilty plea. Though counsel is required to make certain that a defendant is made fully aware of his or her right to appeal after a *trial*, a different standard applies to a guilty plea:

Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.

Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (citations omitted).

At the evidentiary hearing, plea counsel testified he did not recall Applicant asking him to appeal his case. He testified if Applicant had asked him he would have advised him in his opinion there was no basis for an appeal.

The Court finds no deficiency on the part of plea counsel or prejudice therefrom. The Court relies upon the credibility findings already set forth above, and finds Applicant never asked for an appeal and no other reason existed for plea counsel to believe Applicant wanted or would want an appeal. Accordingly, Applicant's request for relief by way of this allegation is denied and dismissed.

CONCLUSION

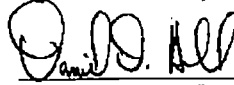
Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies Applicant that 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. Refer to 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 13th day of February, 2018.

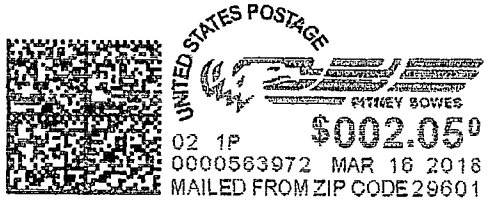
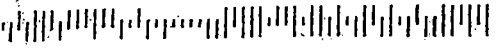


DANIEL D. HALL
Presiding Judge
Thirteenth Judicial Circuit

York, South Carolina

CLERK OF COURT
SOUTH CAROLINA

2018 MAR -6 A 9 51



MILLS ARIAIL, JR.



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