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March 20, 2018

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

Re: Johnny Hemphill vs. The State of South Carolina
Case No: 2017-CP-42-100

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

Rodney Richey

RWR/
enclosures

cc: Valerie Garcia Giovanoli, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

HONORABLE GRACE GILCHRIST KNIE

2017-CP-42-1000

JOHNNY JAMES HEMPHILL SCDC# 141723

APPELLANT,

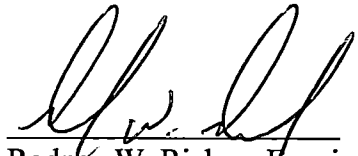
against

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Johnny James Hemphill appeals the denial of his Post Conviction Relief. The Post Conviction Relief action was heard and denied by the Honorable Grace Gilchrist Knie, Circuit Judge on January 20, 2018 an Order issued on March 16, 2018 and filed on March 19, 2018. The Appellant received notice of the judgment on March 20, 2018.



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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

HONORABLE GRACE GILCHRIST KNIE

2017-CP-42-1000

JOHNNY JAMES HEMPHILL SCDC# 141723

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on March 20, 2018, addressed to their attorney of record, Valerie Garcia Giovanoli, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: March 20, 2018

Rodney W. Richey, Esquire
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Attorney for Applicant

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	SEVENTH JUDICIAL CIRCUIT
Johnny James Hemphill, #141723,	2017-CP-42-1000
Applicant,	**ORDER OF DISMISSAL WITH PREJUDICE**
v.	
State of South Carolina,	
Respondent.	

This matter comes before the Court by way of an application for post-conviction relief filed on March 27, 2017 by Johnny James Hemphill (Applicant). Respondent made its Return requesting an evidentiary hearing be convened. An evidentiary hearing into the matter was convened on January 29, 2018, at the Spartanburg County Courthouse. Rodney W. Richey, Esquire, represented Applicant. Valerie Garcia Giovanoli, Esquire, of the South Carolina Office of the Attorney General, represented Respondent.

Applicant testified on his own behalf. Applicant's plea counsel, J. Roger Poole, Esquire, also testified. This Court had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the Department of Corrections, the transcript from Applicant's guilty plea, the PCR application, and Respondent's Return. Following a review of all materials, testimony, and evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In December 2015, the

Spartanburg County Grand Jury indicted Applicant for six counts of discharging a firearm into a dwelling (2015-GS-42-5205, -5206, -5207, -5208, -5209, -5210), six counts of attempted assault and battery in the first degree (2015-GS-42-5211, -5212, -5213, -5214, -5215, -5216), and one count of stalking (2015-GS-42-5217). Assistant Public Defender Roger Poole represented Applicant. Deputy Solicitor Derek Bulsa prosecuted the case. On March 29, 2016, Applicant pleaded guilty as indicted, pursuant to Alford[1], to one count of discharging a firearm into a dwelling (2015-GS-42-5208), one count of attempted assault and battery in the first degree (2015-GS-42-5214), and one count of stalking (2015-GS-42-5217) in exchange for all other counts being dismissed (2015-GS-42-5205, -5206, -5207, -5209, -5210, -5211, -5212, -5213, -5215, -5216) before the Honorable J. Mark Hayes, II. Judge Hayes sentenced Applicant to imprisonment for concurrent terms of ten years for assault and battery in the first degree and five years for stalking with a consecutive term of ten years for discharging a firearm into a dwelling.

Applicant filed a timely notice of appeal. On August 11, 2016, the South Carolina Court of Appeals dismissed Applicant's appeal for failing to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. The Remittitur was returned to the circuit court on August 31, 2016.

In his current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Ineffective Assistance of Counsel"
   a. Plea counsel's "performance during Alford Plea was both unreasonable and prejudicial.
   b. There was a conflict of interest between Applicant and plea counsel because plea counsel was sympathetic toward saving the court and the State money by entering an Alford Plea.
   c. Plea counsel was sympathetic to the State's case.
   d. Applicant plead guilty on the bad advice of plea counsel
   e. Plea counsel failed to advocate on Applicant's account concerning

[1] North Carolina v. Alford, 400 U.S. 25 (1970).

circumstantial evidence and failed to challenge the State's circumstantial evidence.

f. Plea counsel failed to subject the State's case to adversarial testing.
g. Plea counsel showed toward Applicant deficient duty of loyalty, trustworthiness, "the guiding hand of counsel," and failure to advocate on Applicant's behalf.
h. Plea counsel showed through ineffective assistance of counsel that he felt Applicant should be convicted no matter what the law said or which of Applicant's rights he violated.
i. "The totality of conflict of interest in the Seventh Judicial Circuit Public Defender Office."
    i. There is no true bill stamp on indictments Applicant plead guilty to, even though the State proceeded with true billed indictments, showing that the public defender office was sympathetic with the State's case.
j. Plea counsel did not uphold duty of loyalty by not upholding duties to act as an adversary and to operate free of conflict of interests.
k. Seventh Judicial Circuit Public Defender Office failed to act as a reasonable, diligent, and professional advocate by showing "sympathy and assistance for the State's case."
l. Plea counsel failed to present to the court Applicant's motion for speedy trial, which Applicant wrote when he was represented pro se.
m. Plea counsel failed to present Applicant with indictment 2015-GS-42-5217 (stalking).
n. Plea counsel failed to have a competency hearing when there was reasonable grounds to question Applicant's competency at the time of trial.
o. Applicant was denied the right to a speedy trial.
    a. Plea counsel failed to present to the court Applicant's motion for speedy trial, which Applicant wrote when he was represented pro se.

2. "Involuntary guilty plea Counsel"
    a. If plea counsel had told Applicant of due process and equal rights protections, Applicant would have gone to trial.
    b. If plea counsel had told Applicant that indictment 2015-GS-42-5214 (assault and battery, first degree) had two different dates and no "true bill" stamp, even though Applicant did not waive presentment to the grand jury, Applicant would have gone to trial.

3. Due Process Violation Involuntary guilty plea Counsel"
    a. The prosecutor appeared as the sole witness before the grand jury, which is not allowed.

4. Brady violation Violation
    a. The State did not disclose a motion of discovery or any evidence for indictment 2015-GS-42-5217 (stalking).

b. Plea counsel failed to present Applicant with indictment 2015-GS-42-5217 (stalking).

5. Failure to Appeal from a Guilty Plea
   a. Plea counsel failed to file a direct appeal.

At the start of the hearing, Respondent request Applicant clarify what allegations he would be pursuing. Applicant indicated he would be pursing his claims of ineffective assistance of counsel, that his guilty plea was involuntary and unreasonable, and that he was never arraigned on the direct indictment for stalking.

SUMMARY OF TESTIMONY

I. Applicant testified to the following:

Applicant testified the case against him was a circumstantial evidence case because there were no eye witnesses to the incidents. He discussed the circumstantial evidence with Counsel before deciding to plead pursuant to Alford. The discussions with Counsel involving probation were a basis for his decision to plead guilty. He was charged with stalking eight months later after his original arrest. He was directly indicted for stalking and claims he was never arraigned on that charge. Applicant claims he is innocent and now believes he would have won a jury trial. He asserts he only pled guilty based on discussions he had with Counsel. He acknowledged he potentially faced 125 years.

II. Counsel testified to the following:

Counsel has been practicing criminal law for 38 years. He is currently, and was at the time he represented Applicant, an Assistant Public Defender. Counsel testified he discussed the "whole spectrum" of sentencing with Applicant prior to him pleading under Alford. He discussed the minimum probation sentence as well as the maximum time he was facing, which if ran consecutively was 125 years. Counsel did not, in any way, promise Applicant probation or

get his hopes up that he would likely receive probation. Counsel advised Applicant to plead under Alford because he was receiving the benefit of Alford, many charges would be dismissed, and the circumstantial evidence was overwhelming and would lead to a likely conviction at trial. Counsel explained that although the evidence was all circumstantial, it was a strong case of circumstantial evidence. The evidence included Applicant's cell phone being pinged off of cell towers in Spartanburg at the time of the shootings, although Applicant lived in Greenville. The victims in the case had actually moved to Spartanburg from Greenville in an effort to get away from Applicant. Additionally, the victim received threatening text messages from Applicant which were found on Applicant's cell phone. Lastly, the shell casings from the six different shooting incidents all matched a gun found in Applicant's possession. Although security cameras captured someone during one shooting incident that was not Applicant, the State's theory was Applicant sent others to shoot up the victim's house at his direction.

Although Counsel did not recall if Applicant was formally arraigned on the stalking charges, he did review the indictments and the charge with Applicant. The charge arose from the same evidence and set of facts. After discussing the pros and cons of pleading under Alford, Applicant made the decision to plead.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Specifically, this Court finds Counsel's testimony was credible. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was

prejudiced by any deficiency. A post-conviction relief application is not a venue for questioning each and every action of counsel. Rather, an applicant must demonstrate by a preponderance of the evidence that counsel was deficient. Applicant has failed to do so.

Ineffective Assistance of Counsel

In his amended application filed by PCR counsel, Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (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. Id. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18. With respect to guilty plea counsel, an 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 (1985).

The record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton, 376 S.C. 138, 654 S.E.2d at 874 (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Further, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton, 376 S.C. at 137–38, 654 S.E.2d at 874 (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

In PCR cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citations omitted). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal

cases." Hill, 474 U.S. at 56. Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann v. Richardson, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." Id. at 771.

Applicant alleged Counsel had some conflict of interest that prevented him from adequately representing him. Applicant also claimed Counsel was sympathetic to the State's case. Applicant has failed to meet his burden on these claims. Applicant has provided no evidence of any true conflict of interest or evidence of Counsel's sympathy for the State's case.

Applicant also alleged Counsel failed to have Applicant arraigned on his charges. An arraignment consists of calling the defendant to court, reading the indictment to the defendant so that the defendant may understand the charge against the defendant, and requesting that the defendant enter an initial plea of guilty or not guilty. See State v. Brock, 61 S.C. 141, 39 S.E. 359 (1901). Arraignment is neither a constitutional nor a statutory right, but merely a formality. Thus, arraignment is subject to waiver. State v. Ariail, 311 S.C. 35, 426 S.E.2d 751 (1993) (by proceeding to trial, defendant waived any objections to the lack of his arraignment). "[T]he United States Supreme Court has held that arraignment is a "mere formality" so that the failure to arraign does not result in a due process violation "so long as it appears that the accused had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution." Garland v. Washington, 232 U.S. 642, 645 (1913).

Because the discovery rules ensure that a defendant has notice of the charge or charges and the docket management system insures proper notification of court appearances, the

necessity for formal arraignment is obviated. In fact, it is quite common for a defendant to waive arraignment. Aside from not finding Applicant's claims credible that he was unknowingly denied arraignment, the underlying purpose of arraignment was served by alternative means; namely, Applicant was represented by Counsel who reviewed the indictments, evidence, and discovery surrounding the stalking charge with Applicant and discussed his options. Most importantly, Applicant was on notice of the accusations and evidence against him. Therefore, this Court cannot find Applicant was either denied due process of the law or that Counsel was ineffective for failing to ensure Applicant was formally arraigned. As noted above, waiver is common and an attorney's performance is based on a standard of reasonableness in light of professional norms. Therefore, it would have been reasonable to waive formal arraignment and ensure Applicant was aware of the charges and had a sufficient opportunity to defend himself.

Applicant also alleged Counsel failed to bring Applicant's *pro se* motion for a speedy trial to the court's attention, failed to challenge the State's case, failed to present Applicant with a stalking indictment, and failed to request a competency evaluation. However, Applicant has wholly failed to prove these allegations by a preponderance of evidence. In fact, this Court has reviewed the entire record and finds it discredits Applicant's claims. Based on the record and the testimony from the hearing, this Court finds Counsel represented Applicant diligently. Counsel believed the case against Applicant was strong, despite being made up of circumstantial evidence. Counsel reviewed each indictment with Applicant and thoroughly discussed the case and Applicant's options with him.

This Court also finds the record further supports Applicant's plea was made knowingly, voluntarily and upon the sound advice from Counsel. This Court finds the transcript of the plea hearing is thorough as to the Applicant's understanding of his right to a trial and his willingness

to forgo the trial, and further, Applicant stated that he understood the potential sentence on each offense, and stated that he agreed with the factual recitation of the offenses by Deputy Solicitor Bulsa. Applicant has failed to give a sufficient reason to now be allowed to depart from the truth of his statements from his plea hearing. Counsel advised Applicant to plead under Alford because he was receiving the benefit of Alford, many charges would be dismissed, and the circumstantial evidence was overwhelming and would lead to a likely conviction at trial.

Likewise, Applicant has failed to present any evidence to meet his burden of proving the remainder of his allegations of prosecutorial misconduct, due process violations, and failure to appeal a guilty plea.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, this application is denied and dismissed with prejudice.

This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 16 day of March, 2018.

GRACE GILCHRIST KNIE
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

CLERK OF COURT
SPARTANBURG COUNTY
2018 MAR 19 PM 12:04
M. HOPE BLACKLEY

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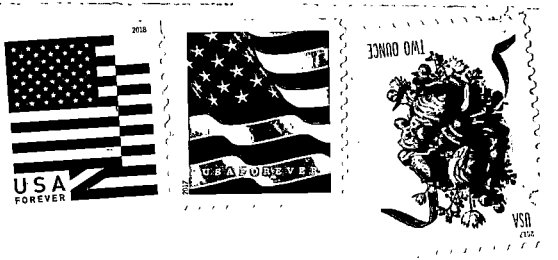

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