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April 2, 2018

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

Re: Charles Proffitt, Jr. v. State of South Carolina
Case No: 2016-CP-23-7617

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: DeShawn H. Mitchell, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2016-CP-23-7617

CHARLES BENJAMIN PROFFITT, JR, SCDC# 260785

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Charles Benjamin Proffitt appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Robin B. Stilwell, Circuit Judge on December 12, 2017 an Order issued on March 21, 2018 and filed on March 26, 2018. The Appellant received notice of the judgment on April 2, 2018.

Rodney W. Richey, Esquire
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Attorney for Applicant

Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
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HONORABLE ROBIN B. STILWELL

2016-CP-23-7617

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APPELLANT,

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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 April 2, 2018, addressed to their attorney of record, DeShawn Mitchell, Esquire Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: April 2, 2018

Rodney W. Richey, Esquire
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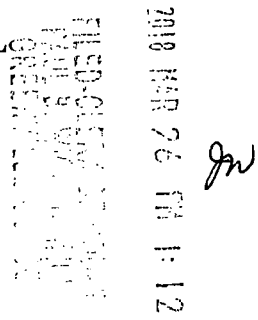
STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Charles Benjamin Proffitt, Jr., #260785, Applicant, v. State of South Carolina, Respondent.	)	2016-CP-23-7617 **ORDER OF DISMISSAL**

ENTERED COMPUTER



This matter comes before the Court by way of an application for post-conviction relief filed on December 28, 2016 by Charles Benjamin Proffitt, Jr (Applicant). Respondent made its Return on or about June 22, 2017. An evidentiary hearing into the matter was convened on December 12, 2017, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by Rodney W. Richey, Esquire. 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 Caroline M. Horlbeck, Esquire also testified. This Court had before it a copy of the records of the Greenville 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 from the Department of Correction. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In October 2014, the

Greenville County Grand Jury indicted Applicant for two counts of shoplifting (2014-GS-23-9503, -9504). Applicant was subsequently indicted in January 2016 for failure to stop for a blue light, second offense (2014-GS-23-11426), two counts of armed robbery and possession of a weapon during the commission of a violent crime (2014-GS-23-11427, -11430), two counts of kidnapping (2014-GS-23-11428, -11432), two counts of conspiracy (2014-GS-23-11429, -11433), and one count of carjacking (2014-GS-23-11431). Caroline M. Horlbeck, Esquire represented Applicant. Solicitors Christine Sustakovitch, Esquire, and Andrew Culbreath, Esquire prosecuted the case. On January 14, 2016, Applicant pled guilty as indicted to both counts of shoplifting, both counts of armed robbery, both counts of kidnapping, both counts of conspiracy, one count of failure to stop for a blue light, one count of carjacking, and one count of possession of a weapon during the commission of a violent crime before the Honorable Edward W. Miller. Pursuant to a negotiated sentence, Judge Miller sentenced Applicant to imprisonment for concurrent terms of twenty-five years each for both counts of armed robbery, twenty-five years each for both counts of kidnapping, twenty years for carjacking, ten each years for both counts of shoplifting, five years each for both counts of conspiracy, five years for failure to stop for a blue light, and five years for possession of a deadly weapon during the commission of a violent crime with credit for time served. Applicant did not appeal his conviction or sentence.

ALLEGATIONS

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

1. "Ineffective Assistance of Trial Counsel," in that:
    a. Counsel "did not bring up issues that pertained to the case;"
    b. Counsel "pushed" Applicant "to plead guilty on 3 charges" Applicant was not guilty of; and
2. "Newly Discovered Evidence."

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. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

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

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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).

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 alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Lockhart, 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.

The record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Further, "[a] guilty

plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, an applicant's right to contest the validity of such a plea is usually foreclosed. Dalton, at 137–38, 654 S.E.2d at 874 (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)). "In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." Id. at 138–39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

Prior to testimony being taken, Applicant moved for continuance alleging he needed more time to produce documents. This Court denied that motion.

Applicant testified he met with Plea Counsel four times during her representation. He testified he was presented with a twenty-five year plea offer which he ended up taking He testified he told his Plea Counsel he was innocent and wanted her to contact witnesses for him who could testify to his whereabouts during the crime. Applicant testified Plea Counsel did contact one witnesses for him. He testified he was under the influence of medication during his guilty plea and it influenced his decision making when he pled guilty. Applicant testified he did not remember the questions the plea judge asked him during his guilty plea. Applicant testified he was served with a notice of life without parole prior to pleading guilty. He testified he tried to have Plea Counsel removed from his case but was unsuccessful. Applicant later testified he was guilty of some of the charges but not the armed robbery.

Plea Counsel testified she was appointed to represent Applicant. She testified she met with him some nineteen or twenty times during her representation. Plea Counsel testified she had Applicant evaluated in 2015 and he was found to be competent. She testified during her meetings with Applicant she went over the discovery in the case, his charges and potential sentences. Additionally, Plea Counsel testified they discussed possible defenses. Plea Counsel testified the State served Applicant with a notice with its intent to seek life without parole on his charges. She testified she entered plea negotiations with the State on behalf of Applicant. Plea Counsel testified the State would only offer large sentences and she was finally able to get them down to twenty-five years. She testified she presented the plea offer to Applicant and he decided to take it. Plea Counsel also testified that she tried to contact two witnesses for Applicant. She testified she got in contact with both and was able to get a statement from one of the witnesses. Plea Counsel testified possibly using the statement at trial could have been helpful but Applicant ultimately decided to plead guilty.

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 or any other constitutional deprivations entitling him to post-conviction relief. Applicant also failed to prove he was prejudiced by the alleged deficiencies.

This Court finds Counsel provided effective assistance in this case and Applicant's decision to plead guilty was made freely and voluntarily. Counsel conferred with Applicant on multiple occasions, during which Counsel discussed the pending charges, the State's evidence, possible defenses and courses of action, and answered all of Applicant's questions. Additionally, Counsel conveyed the State's negotiated plea offer to Applicant which he ultimately tool. This

Court finds credible Counsel's testimony regarding Applicant evaluation and how he was found to be competent.

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. 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.

Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court also finds that the record fully supports the knowing and voluntary nature of Applicant's guilty plea. See Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (holding defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record, and may be accomplished by colloquy between court and

defendant, between court and defendant's counsel, or both."). In addition, Applicant has presented no evidence or valid reasons why he should be allowed to depart from the truth of his statements made at the plea. See Dalton, 376 S.C. at 137, 654 S.E.2d at 874 ("[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."). This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

Newly Discovered Evidence

Applicant alleged in his application that he had newly discovered evidence. The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material facts not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). A defendant requesting a new trial based on after-discovered evidence after a guilty plea must show:

> (1) The newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the 'interest of justice' requires the applicant's guilty plea to be vacated.

Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014). This Court finds there has been no showing of newly discovered evidence. Therefore, this allegation is dismissed and denied.

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. Reefer 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 21st day of March, 2018.

~~ROBIN B. STILWELL~~
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

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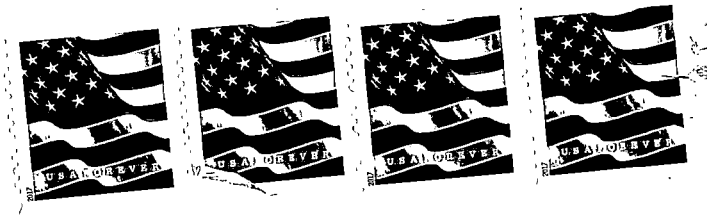

The Honorable Daniel E. Shearouse
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