RICHEY AND RICHEY
ATTORNEYS AT LAW

A PROFESSIONAL ASSOCIATION

RODNEY W. RICHEY
LOLA S. RICHEY

POST OFFICE BOX 10916
GREENVILLE, SOUTH CAROLINA 29603

(864) 467-0503
(864) 467-0646 FAX

April 5, 2018

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

Re: Mitchell Hames, SCDC# 282238 vs. State of South Carolina
Case No: 2017-CP-11-383

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and a Proof of Service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please filed the copies that I have enclosed and return the copies 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

RECEIVED
APR 09 2018
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

HONORABLE GRACE GILCHRIST KNIE

2017-CP-11-383

MITCHELL HAMES, SCDC# 282238

APPELLANT,

against

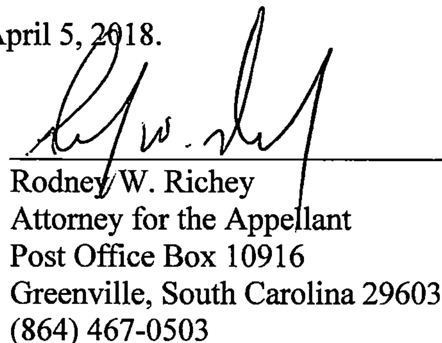
STATE OF SOUTH CAROLINA,

RESPONDENT.

RECEIVED
APR 09 2018
S.C. SUPREME COURT

NOTICE OF APPEAL

Mitchell Hames 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 29, 2018 and Order issued on March 27, 2018 and filed on April 2, 2018. The Appellant received notice of the judgment on April 5, 2018.



Rodney W. Richey
Attorney for the Appellant
Post Office Box 10916
Greenville, South Carolina 29603
(864) 467-0503

Other Counsel of Record:
Valerie Garcia Giovanoli, Esquire
Office of Attorney General State of SC
Post Office Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

HONORABLE GRACE GILCHRIST KNIE

2017-CP-11-383

MITCHELL HAMES, SCDC# 282238

APPELLANT,

against

STATE OF SOUTH CAROLINA,

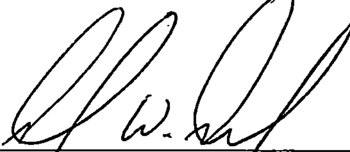
RESPONDENT.

PROOF 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 5, 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: April 5, 2018

RICHEY & RICHEY, P.A.



Rodney W. Richey
Attorney for the Appellant
Post Office Box 10916
Greenville, South Carolina 29603
(864) 467-0503
(864) 467-0646 FAX

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Mitchell Hames, #282283,

Applicant,

v.

State of South Carolina,

Respondent.

2017-CP-11-0383

ORDER OF DISMISSAL WITH PREJUDICE

2018 MAR 30 AM 8:25
CLOCKED IN ERROR
2018 APR -2 AM 4:11

This matter comes before this Court by way of an application for Post-Conviction Relief (PCR) filed on May 8, 2017 by Mitchell Hames (Applicant). The State (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, Don A. Thompson, Esquire, also testified. This Court had before it a copy of the records of the Cherokee 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 the record and the testimony and evidence presented at the hearing, this Court finds Applicant has failed to meet his requisite burden of proof entitling him to relief and is denying and dismissing this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. In August 2015, the Cherokee County Grand Jury indicted Applicant for possession with intent to distribute (PWID)

methamphetamine (2015-GS-11-0712). Applicant was also indicted in January 2016 for trafficking in methamphetamine (2016-GS-11-0076). Don A. Thompson, Esquire, represented Applicant. Assistant Solicitor Christopher Bain, Esquire, prosecuted the case. On March 22, 2016, Applicant appeared in the Cherokee County Court of General Sessions before the Honorable J. Mark Hayes, II, where he pled as indicted to PWID methamphetamine, third offense and to the lesser included offense of PWID, third offense for the trafficking charge. Pursuant to negotiations between Applicant and the State, Judge Hayes sentenced Applicant to imprisonment for concurrent terms of fifteen years for each charge. Applicant did not appeal his convictions or sentences.

ALLEGATIONS RAISED IN PCR APPLICATION

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

1. "Newly Discovered Evidence"
    a. "February 2017, Respondent illegally enhanced 44-53-375(B)"
    b. "That evidence of material facts not previously presented and heard."
    c. "Newly obtained evidence will show that the plea was given under entrapment and duress."
    d. Misadvised on parole eligibility- attorney told him it was 65% at the time of the plea and the Department Corrections later informed him it was an 85% offense.

SUMMARY OF TESTIMONY PRESENTED AT HEARING

I. Applicant testified to the following:

Applicant testified Counsel talked to him the morning of trial about parole eligibility. His trial was set to begin March 22, 2016. Prior to trial, he only watched five minutes of the confidential informant (CI) buy video. Counsel told him he would serve sixty-five percent of any sentence and he would be given credit for any time on home detention or in jail. The South

Carolina Department of Corrections (SCDC) originally classified him as sixty-five percent, but later in February of 2017, SCDC advised him due to the law, he would be required to serve at least eighty-five percent of his sentence before being considered for supervised release. Applicant claims that had he known this, he would not have pled guilty.

Applicant admitted exhibit 1, which was a composite exhibit including a police incident report Applicant found in his discovery and three letters. The letters consisted of a letter dated March 16, 2016 written by Counsel to Applicant indicating he sent Applicant's discovery for his PWID methamphetamine case. Another letter is dated March 17, 2016 written by Counsel to Applicant indicating he sent Applicant's discovery for his trafficking and PWID methamphetamine case. The last letter is dated December of 2016 written by Counsel to the prison warden, and including the copies of the physical CDs in the discovery to be delivered to Applicant.

Based on these exhibits, Applicant testified he did not see his discovery until March 17, 2016. He testified Counsel gave him the discovery, told him to read it, and that Counsel would return to discuss it. Counsel also relayed the State's offer of fifteen years at that time, which Applicant rejected and told Counsel he wanted to see his discovery. Counsel returned March 17, 2016 and again March 19, 2016. Applicant testified there were seven CDs in his discovery, but he only reviewed five minutes of the CI buy video. Counsel told him the video showed a drug sell, but Applicant claims he watched it after his guilty plea and it only showed him giving the CI a cell phone. Applicant claims he pled guilty, without reviewing the entire video. Applicant also claims he did not have adequate time since he only got his discovery five days prior to trial.

II. Counsel testified to the following:

Counsel has been practicing law since 1980. He is currently, and was at the time he represented Applicant, the Chief Public Defender for Cherokee County. He testified he never had any discussions with Applicant regarding parole eligibility from what he recalled. Counsel testified his general he does not discuss parole issues unless asked by the client. In the cases he does talk about parole, he makes a note in his file. Counsel's file for Applicant has no notes regarding discussions about parole eligibility. Further, Counsel explained he is well versed in what crimes are categorized as eighty-five percent crimes and he would not have advised Applicant he would only have to serve sixty-five percent before being parole eligible.

Counsel was appointed on two separate criminal cases: one for PWID and the other for trafficking, both of which were third or subsequent drug offenses. After Counsel was appointed on the PWID charge, Counsel obtained a bond for Applicant. While Applicant was out on bond, he was arrested for trafficking. After he was appointed for the second charge, he met with Applicant and got his story – which was an admission to selling drugs. He had several meetings with Applicant. Counsel received the discovery for the PWID charge in September of 2015. During one meeting, he reviewed the discovery for the PWID. Counsel and Applicant also discussed the weight with regard to the trafficking charge. There were some plea negotiations back and forth that Applicant ultimately rejected. At the time of trial, Applicant wanted to accept the State's offer, but the State refused to reinstate the previous offer. Because of this, there was a conference in chambers in which Judge J. Mark Hayes, II, threatened contempt charges against the Solicitor if the offer was not put back on the table for Applicant to accept. Applicant had also tried to work with the State as a cooperating witness, but nothing ever came of it.

Although Applicant had two separate drug charges, only the trafficking charge was being called for trial. Counsel testified the usual practice in CI buy cases, the State turns over the videos shortly before trial to protect the CI's identity. While Counsel disagrees with this procedure, he concedes it is the regular practice and is lawful. Counsel testified he reviewed all of the discovery with Applicant prior to him pleading guilty.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency. A Post-Conviction Relief application is not a venue for questioning each and every action of counsel. Rather, the Applicant must demonstrate by a preponderance of the evidence that counsel was deficient. Applicant has failed to do so. Initially, this Court notes that there is overwhelming evidence establishing Applicant's guilt to the pled offenses. Moreover, this Court notes plea counsel's testimony was credible and persuasive.

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. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

Misadvice regarding parole eligibility

This Court finds Applicant's testimony not credible that he was misadvised about parole eligibility. Applicant's testimony is self-serving. This Court finds Counsel's testimony on the issue was more credible. It is not Counsel's general practice to discuss parole eligibility. He testified this case was no different. In the instances Counsel does discuss parole eligibility, he annotates his file and there was no such annotation in Counsel's file for Applicant. Furthermore, as Chief Public Defender of Cherokee County, Counsel demonstrated he has a full understanding

of when an offense is categorized as an eighty-five percent offense. The record from the plea proceeding established the plea court questioned Applicant about whether he understood that both of these charges were classified as serious offenses under the law and also asked if Applicant had discussed with his lawyer the consequences and ramifications of these offenses being classified as serious, to which he answered affirmatively.

This Court finds Applicant has failed to meet his burden that Counsel was deficient in this regard. As such, this allegation is denied and dismissed with prejudice.

Involuntary guilty plea due to late discovery

Applicant alleges his guilty plea is invalid because he did not receive his discovery until shortly before the trial and thus was unduly pressured to plead guilty. 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 v. Lockhart, 474 U.S. 52, 56 (1985). Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann v. Richardson, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." Id. at 771.

Despite Applicant's self-serving testimony, the record fully supports the knowing and voluntary nature of Applicant's plea. Applicant has failed to give a sufficient reason to be allowed to depart from the truth of his statements made during his guilty plea. Counsel testified he reviewed with Applicant the discovery for both the PWID charge and trafficking charge for which he was facing trial. The record supports this testimony. Counsel told the plea court he had discussed with Applicant challenging the drug weight on the trafficking charge. Specifically, the evidence showed Applicant sold the CI 6.88 grams of meth, but the CI said Applicant had more drugs on him at the time of the sale. Counsel informed the plea court that

the CI buy video *clearly* showed Applicant had a "fairly decent size baggie" of drugs in his hands at the time of the sale. Counsel explained that the video destroyed their chances of success in arguing against the trafficking weight. (Plea Tr. p. 13, l. 21 – p. 14, l. 13). Even more compelling, Applicant was asked by the plea court, under oath, if he agreed with the statements made by his lawyer, to which he responded, "yes, sir." It's hard to believe Applicant was lying under oath to the plea court, after having insisted the State reinstate the expired plea offer, and is now telling the truth while serving his fifteen year sentence in prison.

The plea court fully apprised Applicant of his rights and the *negotiated* sentence he would face by pleading guilty. This Court further finds that Applicant was fully aware of his rights and those rights that he was waiving. Regardless of the exact dates at which discovery was provided and reviewed, the record also shows that Applicant and his Counsel reviewed discovery and discussed potential defenses. At that point, Applicant had the decision to plead guilty or proceed to trial. Not only did he choose to plead guilty, he insisted the State reinstate the fifteen year offer after he had previously rejected it. Because of this, Judge Hayes even threatened to hold the Solicitor in contempt if they did not reoffer the fifteen year sentence. This Court finds Applicant made the decision to plead guilty on his own accord, freely and voluntarily. Additionally, this Court finds the transcript of record includes a very thorough colloquy by the Court that indicates Applicant made this decision without any undue pressure or coercion. (Plea Tr. p. 8, ll. 6-14).

This Court finds credible Counsel's statements made during the plea hearing and Applicant's assent to those statements, while finding not credible Applicant's claim that the CI buy video did not show him selling any drugs. This Court notes Applicant did not present the actual video to support his contention. The record is clear that during the plea hearing, Counsel

indicated he was aware of a potential argument to present at trial regarding the trafficking weight, but that the CI buy video destroyed any chance of success in that argument. Applicant was also present at this plea hearing and did not rebut anything put forth to the plea court by Counsel.

This Court takes the time to recognize that many defendants are nervous and under pressure during a criminal court proceeding. However, there is no precedent for overturning a conviction or a guilty plea because a party to the action was nervous or under pressure. This Court is reluctant to second-guess a thorough trial court proceeding in favor of self-serving testimony by a PCR Applicant. Finally, this Court also finds Counsel provided effective assistance in this case. Therefore, the allegations of ineffective assistance and involuntary guilty plea are denied and dismissed with prejudice.

CONCLUSION

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

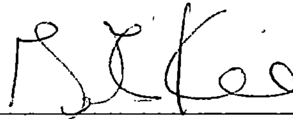
This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. <u>See</u> Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. <u>Austin v. State</u>, 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.

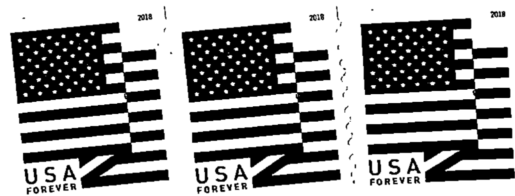
AND IT IS SO ORDERED this 27 day of March, 2018.



GRACE GILCHRIST KNIE
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

RICHEY AND RICHEY, P.A.
POST OFFICE BOX 10916
GREENVILLE, SC 29603



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

29211@1330 B099