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April 12, 2018

The South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

RE: Lewis Chisolm #196380 v. State of South Carolina
Docket No.: 2016-CP-07-1560

Dear Sir or Madam:

Enclosed please find for filing an original and a copy of a Notice of Appeal and Certificate of Service regarding the above referenced matter.

Please note that I have been retained to represent Mr. Chisolm in this matter.

Kindly return a clocked copy of the Notice to me in the enclosed envelope. Thank you.

Yours truly,

Tommy A. Thomas,
Attorney at Law

TAT/jem

cc: Christian Saville, Esq.
Lewis Chisolm #196380

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
APR 13 2018
S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Post-Conviction Relief

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2016-CP-07-1560

Lewis Chisolm #196380,..... Appellant,

vs.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

Lewis Chisolm #196380 appeals the Order of the Honorable R. Lawton McIntosh dated March 10, 2018 and filed on March 15, 2018. Appellant received written notice of entry of this order on March 19, 2018.

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Christian Saville, Esq.
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Irmo, South Carolina
April 12, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM BEAUFORT COUNTY
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Lewis Chisolm #196380,..... Appellant,

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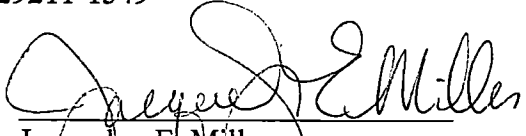
CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Secretary to Tommy A. Thomas, Esq., certify that I have served a copy of a Notice of Appeal by depositing a copy of it in the United States Mail, postage prepaid and the return address clearly shown on said envelope to:

Christian Saville Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549



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April 12, 2018

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Lewis Chisolm, #196380, Applicant, v. State of South Carolina, Respondent.	)	2016-CP-07-1560 **ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on July 11, 2016, and later amended on May 30, 2017. Respondent submitted its return on April 17, 2017. An evidentiary hearing into the matter was convened on January 29, 2018, at the Beaufort County Courthouse. Applicant was present at the hearing and was represented by Tommy A. Thomas, Esquire. Respondent was represented by Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office.

Before this Court are the records of the Beaufort County Clerk of Court regarding the subject convictions, Applicant's appellate records, Applicant's records from the South Carolina Department of Corrections, the plea transcript, the State's Return, and the application. Based on these records and the testimony presented, the Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate that Lewis Chisolm ("Applicant") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Beaufort County. During their September 2015 term, the Beaufort County Grand Jury indicted Applicant for criminal sexual conduct with a minor, second-degree. (2015-GS-07-1529). Jared Newman, Esquire ("Plea Counsel"), represented Applicant. Assistant

Solicitor Julie Kate Keeney prosecuted the case. Applicant pleaded guilty as indicted before the Honorable Eugene C. Griffith, Jr. On November 9, 2015, Judge Griffith sentenced Applicant to imprisonment for ten years.

Applicant filed a timely notice of appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on June 6, 2016. The Remittitur was returned on May 23, 2016.

II. ALLEGATIONS

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

1. Ineffective Assistance of Counsel
    a. That trial Counsel was ineffective for the following additional reasons:
        i. Failure to adequately investigate the case.
        ii. Failure to adequately explain the State's evidence against Applicant.
        iii. Failure to investigate and/or use the fact that the Police threatened to take his son away from him unless he admitted to the crime.
    b. Failure to adequately investigate and use inconsistent descriptions by the victim of the alleged incident.
    c. Failure to adequately present and argue the Motion to suppress the statements at pre-trial hearing. However, there is no evidence that a Pretrial Motion to Suppress was ever held.
    d. Failure to perfect an appeal.[1]
2. Involuntary guilty plea
    a. That the Applicant is informed and believes that his guilty plea was not free, voluntarily.
    b. That the Applicant is informed and believes that he lacked sufficient knowledge to enter the plea knowingly or intelligently.

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. Applicant's Plea Counsel also testified.

[1] Applicant further amended his application at the PCR hearing to include the allegation that Plea Counsel failed to perfect an appeal.

Applicant's testimony

Applicant testified he pled to criminal sexual conduct, second-degree with no recommendations or negotiations and was sentenced to ten years. He stated he was unsure how much time the charge carried. Applicant testified he gave an inculpatory third statement to a Detective Kelleher after Detective Kelleher threatened to have Applicant's son put in the custody of Department of Social Services. While Applicant pled guilty after this statement was unsuccessfully challenged at a Jackson v. Denno hearing, Applicant testified at the PCR hearing he would have taken the case to trial. Applicant recalled the plea judge advising him of his sentence and his rights. He testified he did not recall telling the judge he was indeed guilty. However, Applicant testified he did recall taking responsibility for his actions and giving an apology at the plea hearing.

Plea Counsel's testimony

Plea Counsel testified he met a fair number of times with Applicant, and he believed Applicant understood what was said to him about the case. Plea Counsel believed they waived presentment on the criminal sexual conduct, second-degree charge.[2] He testified he investigated by looking into the statements Applicant made to police, personally inspecting the location of the incident, and looking at the forensic interview. Plea Counsel also testified Applicant did not inform him of any potential alibi witnesses. He stated Applicant's version of the facts were that Applicant offered a fourteen year-old girl a ride to school but then stopped at Applicant's house before taking her to school. Plea Counsel testified Applicant had told him nothing happened at his residence, though the victim's account was Applicant performed oral sex on her and attempted to penetrate her.

[2] The record indicates criminal sexual conduct, second-degree was actually a true billed indictment.

Plea Counsel recalled Applicant had made three different statements to police. The third statement concerned him because he believed Applicant had retained an attorney (Bruce Marshall, Esquire) prior to making the third statement. Plea Counsel testified he contacted Mr. Marshall, who recalled speaking with Applicant but did not recall that Applicant retained him. Plea Counsel also testified he believes Detective Kelleher went to Applicant's house the day of the third, inculpatory statement to "put the heat on." He recalled Applicant had told him DSS was mentioned to convince him to write the statement. Plea Counsel testified he was able to cross-examine this detective about his tactics and argue the statement was not voluntary at the Jackson v. Denno hearing. Moreover, Plea Counsel testified he was also able to argue the issue about whether Applicant had retained counsel before his third statement to police at the Jackson v. Denno hearing. Plea Counsel believed the voluntariness of the statement was an appealable issue. Plea Counsel also testified he believed if the third statement was admitted it was "game over" for Applicant.

Plea Counsel testified not only was he concerned about their case due to Applicant's confession to police, but also the potential strength of the victim's testimony. He described the victim as an articulate, believable young woman who would have been a valuable witness for the State. He was also concerned with the immediacy of the victim's report of the incident. He recalled the victim was crying when she finally arrived at school and told a friend what happened.

Plea Counsel testified he effectively filed an appeal on behalf of Applicant by completing a form from the South Carolina Court of Appeals and sending it to Applicant for him to file. Plea Counsel testified his arrangement with Applicant did not include an appeal, but he did this for Applicant nonetheless.

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, 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 counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart , 474 U.S. 52, 106 S.Ct. 366 (1985).

V. 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 further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleges Plea Counsel was ineffective in his representation surrounding his guilty plea. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant 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) (citations omitted). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985).

In the present case, this Court finds Applicant has failed to meet his burden in proving Plea Counsel was ineffective in any regard. Plea Counsel credibly testified he met with Applicant many times before the plea, and Plea Counsel's testimony described a more than adequate investigation into the facts of this case. This Court heard testimony regarding Applicant's allegation that a detective threatened to call DSS if he did not provide a statement.

The record reveals Counsel thoroughly challenged the admission of Applicant's self-incriminating statements at the Jackson v. Denno hearing and raised the same, among other, arguments.

Notwithstanding Applicant's failure to present any evidence of alleged deficiency of Plea Counsel, this Court finds Applicant cannot meet his burden to show that he was prejudiced by any alleged deficiencies. Plea Counsel credibly testified the victim would have been an articulate, convincing witness for the State. Plea Counsel further testified the victim reported upon returning to school, leaving no argument regarding the timeliness of her claims against Applicant. Moreover, Applicant's confession to police was found to be freely and voluntarily given at the Jackson v. Denno hearing, and Plea Counsel believed it was "game over" if the confession was admitted. Applicant failed to prove he would have chosen to proceed to trial rather than plead guilty but for Plea Counsel's alleged deficiencies.

FAILURE TO PERFECT AN APPEAL

Applicant alleges he received ineffective assistance of counsel for failure to perfect an appeal, which deprived him of the right to appellate review of his conviction. See White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974) (holding that where an accused establishes in a post-conviction relief hearing that he was unconstitutionally deprived of his statutory right to a direct appeal, the South Carolina Supreme Court may grant a belated review of direct appeal issues). However, the record before this Court establishes that Applicant did receive a full appellate review of his guilty plea conviction. Accordingly, this Court finds Applicant was not deprived of his right to a direct appeal and Plea Counsel was not ineffective in his representation on appeal.

At the evidentiary hearing, Plea Counsel credibly testified Applicant only retained him to represent Applicant at the trial level, and not on appeal. The record indicates Applicant filed a

pro se Notice of Appeal with the South Carolina Court of Appeals after his guilty plea. Thereafter, the Court of Appeals informed Applicant and Plea Counsel of deficiencies that needed correcting in order to perfect the appeal. Plea Counsel was directed by the Court of Appeals to provide an explanation for Applicant's appeal from the guilty plea pursuant to Rule 203(d)(1)(B)(iv). Plea Counsel then submitted an explanation to the Court of Appeals on January 29, 2016. After review of the explanation, the Court of Appeals dismissed the matter pursuant to Rule 203(d)(1)(B)(iv) on May 4, 2016. The remittitur was issued May 23, 2016.

Because Plea Counsel did perfect Applicant's appeal and Applicant did receive an appellate review of his guilty plea, this Court finds Applicant has failed to satisfy his burden of proving he was deprived of his right to an appeal, and this allegation is dismissed with prejudice.

OVERWHELMING EVIDENCE

Applicant cannot meet his burden to show that he was prejudiced by any alleged deficiencies because there is overwhelming evidence of his guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of the defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt).

Applicant gave a written statement to police admitting to the sexual misconduct with the fourteen year-old victim. This statement was challenged by Plea Counsel at a Jackson v. Denno

hearing, but found to be given freely and voluntarily. Plea Counsel testified it was "game over," if Applicant's confession to police was admitted. Moreover, the victim's own testimony could have corroborated Applicant's statement at trial, as Plea Counsel credibly testified he believed the victim would have been an articulate, convincing witness for the State, and she reported her attack in a timely manner. Furthermore, circumstantial evidence existed of Applicant offering the fourteen year-old victim a ride to school but then driving her back to his residence before eventually taking her to school late and emotionally distraught.

Therefore, Applicant can show no prejudice from any of the allegations raised in his PCR application as no alleged deficiency on behalf of trial counsel could have reasonably induced Applicant to plead guilty rather than proceed to trial. This Court finds Plea Counsel represented Applicant well within the bounds of professional norms, and none of his actions were ineffective. This Court finds neither deficiency nor prejudice on any ground, and the allegation of ineffective assistance of counsel is denied and dismissed with prejudice.

INVOLUNTARY GUILTY PLEA

Applicant argues his plea was not entered freely and voluntarily. This Court disagrees and finds the record and testimony establishes that his plea was free and voluntary. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (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 court and defendant, between 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)). A guilty plea is a solemn,

judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

The guilty plea transcript reveals a more than adequate plea colloquy. The transcript shows Applicant was fully advised of his rights and the consequences of pleading guilty. Applicant testified on the record at the plea that he was not promised anything or threatened to plead guilty, and he had the opportunity to address the court with any concerns about the plea arrangement. Applicant testified he was guilty of the charges and he gave a statement to law enforcement admitting that he was guilty. This Court finds that there was no coercion affecting Applicant's decision to plead guilty, the record reflects that Applicant was fully advised of the rights he was waiving by pleading guilty, and that his plea was entered into knowingly and intelligently. Applicant presented no credible evidence as to why he should be able to depart from his statements at the plea hearing and this Court finds Applicant's testimony that he pled guilty involuntarily and unaware of the possible sentence for the charge not credible. Applicant has failed to present any probative or credible evidence that he did not knowingly and voluntarily plead guilty. As a result, he has failed to meet his burden, and this allegation is denied and dismissed.

VI. CONCLUSION

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

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice in regard to all allegations; and

2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 10 day of March, 2018.

R. LAWTON MCINTOSH
Presiding Judge
Fourteenth Judicial Circuit

Anderson, South Carolina

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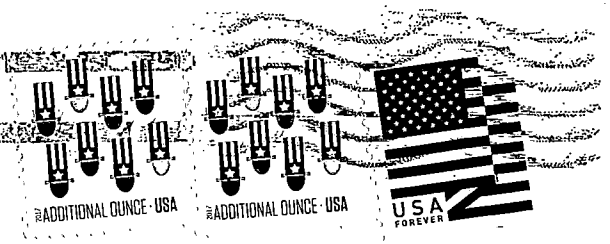

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