

RECEIVED

APR 13 2018

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Paul M. Burch, Circuit Court Judge

MICHAEL AUSTIN SPENCER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001594

APPENDIX

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
Attorney General Office
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX..... i

GUILTY PLEA TRANSCRIPT DATED FEBRUARY 26, 20141

APPLICATION FOR POST-CONVICTION RELIEF28

RETURN AND MOTION TO DISMISS.....35

CONDITIONAL ORDER OF DISMISSAL40

MOTION TO AMEND APPLICATION FOR POST-CONVICTION RELIEF44

ORDER GRANTING MOTION TO AMEND APPLICATION FOR POST-CONVICTION
RELIEF45

POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED SEPTEMBER 19, 2016...46

ORDER OF DISMISSAL.....82

INDICTMENTS92

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA,
PLAINTIFF,
vs.
MICHAEL AUSTIN SPENCER,
DEFENDANT.

TRANSCRIPT
OF
RECORD
2013-GS-42-5027
2012-GS-42-2042

February 26th, 2014
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE ROGER L. COUCH, Judge.

A P P E A R A N C E S:

HAYES HOLLIDAY
ASSISTANT SOLICITOR
Attorney for the State

ALBERT SMITH
ESQ.
Attorney for the Defendant

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX OF WITNESSES

(There were no exhibits marked during this hearing.)

P R O C E E D I N G S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Yes, sir, you may call the case.

SOLICITOR HOLLIDAY: Your Honor, this is the State versus Michael Austin Spencer. He's up here on two indictments.

The first is 2012-GS-42-2042. That's a true billed indictment for possession with intent to distribute methamphetamine. Your Honor, he is entering a plea to possession with intent to distribute third offense with a negotiated sentence of 30 years suspended to ten years with five years probation. He's entering that plea pursuant to North Carolina versus Alford.

He's also here on 2013-GS-42-5027. True billed indictment for trafficking in methamphetamine. He is entering a plea to the lesser included offense of PWID methamphetamine third with a negotiated sentence of 30 years suspended to ten years and five years probation concurrent. Your Honor, he is also entering that plea under North Carolina versus Alford.

THE COURT: Thank you.

(WHEREUPON, the defendant was placed under oath at this time.)

THE COURT: Sir, your name is Michael Austin Spencer?

THE DEFENDANT: Yes, sir.

1 THE COURT: Mr. Spencer, you're in front of me today on
2 two charges. I'll go over these with you. I understand
3 that the State has entered into a negotiated sentence in
4 your case. I will advise you that, since I wasn't a party
5 to those negotiations, I retain the right that it, once I've
6 heard all the facts and circumstances, that I have the right
7 to either accept the negotiation or not accept the
8 negotiation.

9 I will advise you that, if I determine I can not accept
10 the negotiation, I will advise you of that fact and I will
11 give you an opportunity, at that time, to withdraw your
12 plea.

13 Do you understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And is that how you expected me to handle
16 this matter?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: All right, sir. Now, Mr. Spencer, the two
19 charges you're here on meth -- possession with intent to
20 distribute methamphetamine third offense. Those carry a
21 minimum of ten years up to thirty years and/or a fine of up
22 to \$50,000 each. So that means you're facing a possible 60
23 years and/or fines of up to \$100,000.

24 Do you understand that, sir?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: And I will tell you that both of these are
2 drug offenses. Since these are your third offenses, I'm
3 sure you realize that, in drug offenses, the more you get
4 the higher the sentences go.

5 Do you understand that, sir?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. Now, both cases have been
8 indicted by the Grand Jury.

9 Case Number 2013-5027 was indicted at a trafficking
10 level. The State's accepting your plea to a lesser included
11 offense on that charge.

12 Has your lawyer explained that to you?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Do you understand what that means?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Now, both of these charges carry with them
17 a designation of a violent and a serious offense. That
18 means that they qualify for what is commonly known as a
19 strike under the law. That means, in the future, if you
20 were to plead guilty to or be found guilty of other
21 similarly classified crimes, such as violent, serious, or
22 most serious offenses, these pleas could be used in the
23 future to make sentences in those types of cases much more
24 severe. It could result in a sentence of life imprisonment
25 without ever being eligible for parole.

1 Do you understand that that would be a possibility if
2 that kind of conviction occurred?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Okay. You've discussed that with your
5 lawyer too I would think?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. Now, also -- are these no
8 parole?

9 SOLICITOR HOLLIDAY: Your Honor, they -- I believe that
10 they are parole eligible.

11 THE COURT: They're parole eligible---

12 SOLICITOR HOLLIDAY: Yes, sir.

13 THE COURT: ---eligible?

14 Okay. I hadn't looked that up. Just wanted to be
15 sure.

16 All right. Now, Mr. Spencer, do you suffer from any
17 mental, physical, or nervous conditions, anything that would
18 affect your ability to reason or to make good decisions
19 today?

20 THE DEFENDANT: No, sir.

21 THE COURT: Have you taken or used any drugs,
22 medications, or other substances that might have that
23 effect?

24 THE DEFENDANT: No, sir.

25 THE COURT: So do you know what you're doing today?

1 Are you able to handle your plea?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: You're here with, with your attorney,
4 Mr. Smith.

5 Are you satisfied with what he's done?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Is there anything that you'd want him to do
8 at this time?

9 THE DEFENDANT: No, sir.

10 THE COURT: Do you need to consult with him any
11 further?

12 THE DEFENDANT: No.

13 THE COURT: All right. Now, as to these two charges
14 you have the right to plead either guilty or not guilty.
15 How do you choose to plead?

16 MR. SMITH: Your Honor, under Alford, he's pleading
17 guilty.

18 THE COURT: Oh, he's pleading under Alford. I'm sorry.

19 MR. SMITH: Yes, sir.

20 THE COURT: Excuse me. I didn't, I didn't remember
21 that.

22 MR. SMITH: Yes, sir.

23 THE COURT: You're right.

24 Mr. Spencer, it appears that you're entering a no
25 contest plea.

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Is that correct?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Okay. Now, Mr. Spencer, what that means to
5 me, and you listen to me and see if I'm correctly stating
6 your position, what that means to me is that you and your
7 lawyer have reviewed the evidence that the State has, and
8 based upon your review of that evidence, it's your belief or
9 opinion that, if that evidence were presented to a jury
10 during a trial, that it would more than likely result in a
11 conviction. Therefore, while you're not admitting guilt in
12 these cases, you are not contesting the charges.

13 Is that -- am I correct in my understanding of where we
14 are?

15 Is that true?

16 THE DEFENDANT: (Nods affirmatively.)

17 THE COURT: You have to answer me verbally.

18 THE DEFENDANT: Yes, sir.

19 THE COURT: You can't just shake your head.

20 Okay. She's taking everything down. So, you got to
21 speak to me.

22 All right. Thank you, Mr. Spencer.

23 I will advise you of two other things about an Alford
24 plea. An Alford plea does appear as a conviction on your
25 record.

1 Do you understand that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Do you also understand that an Alford plea
4 carries the same sentencing possibilities as a guilty plea?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: All right. Now, as to this plea,
7 Mr. Smith, have you had an opportunity to discuss it fully
8 with your client?

9 MR. SMITH: We have, Your Honor.

10 THE COURT: And are you satisfied that he understood
11 the advice you gave him?

12 MR. SMITH: He does.

13 THE COURT: And he tells me he's made a decision.
14 That's to plead no contest.

15 Based on your knowledge of his case, and the review of
16 the evidence that we're talking about, do you agree with his
17 decision?

18 MR. SMITH: Yes, sir.

19 THE COURT: Has he been able to assist you in his
20 defense?

21 THE DEFENDANT: He had, Your Honor.

22 THE COURT: Now, Mr. Smith -- excuse me.

23 Mr. Spencer, you are 32 years of age according to my
24 paperwork.

25 Is that right?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: How far did you go with your education?

3 THE DEFENDANT: I just---

4 MR. SMITH: Your Honor, we have something to present.

5 THE COURT: Oh, pass---

6 MR. SMITH: He's finished his GED.

7 THE COURT: You got your GED?

8 THE DEFENDANT: I made valedictorian.

9 THE COURT: Well, congratulations. That's good. It
10 shows you could of done it all along, doesn't it?

11 That's a good thing. I tell people, Mr. Spencer, that
12 that's one thing that, once you get it, nobody can ever
13 steal it from you or take it from you.

14 THE DEFENDANT: I just got it. That's the reason I
15 don't have the -- they haven't sent it in the mail yet.

16 THE COURT: That's all right, but I'm, I'm proud that
17 you got it. That's a good thing.

18 THE DEFENDANT: My teachers printed that out for me.

19 THE COURT: Good.

20 Are you married?

21 THE DEFENDANT: No, sir.

22 THE COURT: Any children?

23 THE DEFENDANT: I got one child.

24 THE COURT: And what age is that child?

25 THE DEFENDANT: She's nine.

1 THE COURT: Does he live at your home or somewhere
2 else?

3 THE DEFENDANT: I'm, I'm in prison, Your Honor.

4 THE COURT: well, I understand that.

5 But if you were out of prison and living---

6 THE DEFENDANT: Oh.

7 THE COURT: ---in your home---

8 THE DEFENDANT: Yeah.

9 THE COURT: ---would he be living with you?

10 THE DEFENDANT: Yeah, she would live with me.

11 THE COURT: Okay. Now, what kind of employment did you
12 have?

13 THE DEFENDANT: On the street?

14 THE COURT: On the street when you're out.

15 THE DEFENDANT: Oh, I worked on small engines. That's
16 what I do in prison now. I work -- I'm under the yard, a
17 whole, whole yard --

18 THE COURT: Okay.

19 THE DEFENDANT: -- working at Turbeville.

20 THE COURT: All right. I understand. That's a good,
21 that's a good, good skill to have.

22 THE DEFENDANT: It's gas engines.

23 THE COURT: Yeah, people are always running lawn mowers
24 or doing something. So, they got to have those engines.

25 All right. Now, Mr. Spencer, has anyone done anything

1 to you to try to force you or make you offer a plea in your
2 case?

3 THE DEFENDANT: No, sir.

4 THE COURT: All right. Are you doing this of your own
5 free will?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Have you had enough time to consider this
8 case or these cases?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And have you had enough time to prepare a
11 defense if you wanted to do that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Now, has anyone promised you or guaranteed
14 you anything about your cases, including such matters as
15 pardon, parole, probation, early release, or length of
16 sentence, other than the negotiation of the sentence?

17 Has anybody promised you anything else, guaranteed you
18 anything else, or offered you anything else other than the
19 negotiated sentence?

20 THE DEFENDANT: No.

21 THE COURT: All right. Now, Mr. Spencer, when you
22 plead no contest you also give up your Constitutional
23 rights. It's my job to be sure that you understand what
24 you're doing in that regard. So, I have to be sure you
25 understand what your rights are.

1 So, I'm gonna explain them to you. Then I'll give you
2 a chance to ask questions if you don't understand these
3 rights.

4 okay?

5 THE DEFENDANT: Okay.

6 THE COURT: First of all, you have a Constitutional
7 right to an attorney and your attorney is available to you.

8 You have a further Constitutional right to have your
9 case considered by a Grand Jury before it comes to this
10 Court. That happened in both of your cases. They issued

11 true bills. So, those requirements have been taken care of.

12 You have a right to a trial by a jury. Now, at a jury
13 trial, under the law, you would be presumed to be innocent.

14 That presumption would continue until such as the State
15 proved your guilt at the trial, and they would have to prove
16 that guilt beyond a reasonable doubt.

17 You would not be required to prove anything at a trial
18 because you would be presumed to be innocent.

19 You understand how a trial and the proof would work?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: All right. Now, also, at a trial, you
22 would have a right to have the clerk issue subpoenas to
23 require your witnesses for you or any witness to attend and
24 possibly they could be made to testify.

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Also, you would have the right to question
2 or confront anyone who testified during your trial. You'd
3 have the right to present all the defenses you have to the
4 charges at the trial.

5 THE DEFENDANT: Yes, sir.

6 THE COURT: You have a right, at the trial, to try to
7 suppress any and all evidence the State may have against you
8 including statements you might have made.

9 THE DEFENDANT: Yes, sir.

10 THE COURT: You also have the right, Mr. Spencer, at
11 every stage of a criminal proceeding, to remain silent.

12 THE DEFENDANT: Yes, sir.

13 THE COURT: If you chose to remain silent at a trial,
14 the judge conducting the trial is required to instruct the
15 jury that your silence could not be used against you in any
16 manner whatsoever.

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Now, do you understand all of those rights?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Have any questions about any of them?

21 THE DEFENDANT: No, sir.

22 THE COURT: Do you understand that, when you plead no
23 contest, and I accept the plea, you would have given up
24 those rights?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: All right. Does that make you want to
2 change or withdraw your plea?

3 THE DEFENDANT: No, sir.

4 THE COURT: If you need to talk to Mr. Smith you can.

5 THE DEFENDANT: No, sir, I was -- no, I'm good. All

6 I---

7 THE COURT: No, go ahead. You got a right to talk to
8 him.

9 (Pause.)

10 SOLICITOR HOLLIDAY: Your Honor, I apologize.
11 Mr. Hunter approached during the plea and informed me that a
12 PWID third offense is, in fact, non-parolable.

13 THE COURT: I was thinking that it might not be.

14 SOLICITOR HOLLIDAY: Yes, sir.

15 MR. SMITH: I had it before me today---

16 THE COURT: In fact, I pulled up my computer to look it
17 up just to be sure.

18 MR. SMITH: I was hoping that it was.

19 THE DEFENDANT: I was too.

20 THE COURT: Yeah.

21 Now, now, do you understand that?

22 THE DEFENDANT: Yes, sir, I'm, I'm the one that pointed
23 that out, yes, sir.

24 THE COURT: Okay. Now -- well, at any rate, that means
25 that your parole would be limited in this case.

1 You understand that?

2 THE DEFENDANT: So that---

3 THE COURT: It's called a no parole offense, 85 percent

4 --

5 THE DEFENDANT: Right, sir.

6 THE COURT: -- right now is what you'd have to serve,
7 but I can tell you they can change that. The Parole Board
8 can not grant you parole at 85 percent. So, all of those
9 things are subject to the Parole Board and how they handle
10 it.

11 You understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: But you would not be eligible until 85
14 percent of your service.

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Okay. And you understand that in making
17 this plea?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: All right. Now, I'm gonna ask that the
20 solicitor go over the facts in your case with you. Listen
21 to what he has to say --

22 THE DEFENDANT: Yes, sir.

23 THE COURT: -- cause I'm gonna ask you about those.

24 SOLICITOR HOLLIDAY: Thank you, Your Honor.

25 On November 23rd, 2011, Chesnee police observed this

1 defendant driving on South Alabama Avenue here in
2 Spartanburg County with a tampered tag. Officers initiated
3 a blue light to attempt a traffic stop. The defendant did
4 not stop. The defendant made several turns before fleeing
5 into a field along with a codefendant, codefendant, Crystal
6 Bellue.

7 They jumped out of the vehicle and fled on foot into a
8 wooded area. A K-9 unit responded to the scene and located
9 the defendant hiding in the woods.

10 A search of the defendant's vehicle revealed three
11 digital scales, multiple plastic baggies, and money pouches
12 containing 25 one hundred dollar bills, 25 twenty dollar
13 bills, 14 ten dollar bills, 30 five dollar bills, and 107
14 one dollar bills along with 4.49 grams of methamphetamine,
15 methamphetamine, Your Honor.

16 Later that day, a concerned citizen came to the Chesnee
17 Police Station and brought a bag of drugs that he had found
18 in his front yard near the incident location. The drugs
19 were tested and found to be methamphetamine with a weight of
20 61.93 grams. Investigators determined that the defendant
21 had thrown the drugs out of the window of his vehicle while
22 fleeing police.

23 THE COURT: Did you hear what they told me about the
24 facts, Mr. Spencer?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Is that the information that you and your
2 lawyer reviewed, and based upon your review of that
3 information, you've determined you should plead no contest?

4 THE DEFENDANT: well, Your Honor, I wasn't driving, but
5 they say that I was driving. I was, I was in the passenger
6 seat.

7 THE COURT: I'm not asking you to admit that that's
8 true.

9 THE DEFENDANT: Oh.

10 THE COURT: Listen to my question.

11 Is that the information that you and Mr. Smith
12 reviewed, and based upon your review of that information,
13 you made a decision to plead no contest?

14 I'm not asking you to admit it. I'm asking you whether
15 or not that's what you based your no contest plea on.

16 Talk to your lawyer about that a minute. It's an
17 important question I have to ask him.

18 (Pause.)

19 THE DEFENDANT: Yes, sir, Your Honor.

20 THE COURT: Okay. Are you sure that's what you --
21 that's what you reviewed, is that right, Mr. Spencer?
22 Sir?

23 THE DEFENDANT: Yes, sir, Your Honor.

24 THE COURT: Okay. Have you told me the truth today,
25 Mr. Spencer?

1 THE DEFENDANT: Yes, sir, Your Honor.

2 THE COURT: Anybody tell you how to answer my
3 questions?

4 THE DEFENDANT: No, sir, Your Honor.

5 THE COURT: I'm gonna accept the plea as having been
6 freely and voluntarily given. You're aware of the charges.
7 You're aware of the penalties. You've had the advice of an
8 attorney. You're satisfied with the plea. There's a
9 factual basis for that plea.

10 Now, I'm gonna ask the attorney, just for a moment, to
11 approach the bench.

12 (WHEREUPON, a bench conference was held at this time.)

13 THE COURT: Sir, I'm gonna let you step down, talk to
14 your lawyer a minute. There's a question about the proper
15 sentence in this case and I want to be sure you understand
16 what we're doing.

17 (WHEREUPON, a short recess was taken in this case.)

18 THE COURT: All right. We're back on the record in the
19 Spencer case.

20 I had called the counsel to -- up to the bench because
21 there was some problems with the CDR code listed on one of
22 the sentencing sheets and also I had some questions
23 concerning the possible sentence that I could, could impose.

24 As a result of our conversations it's my understanding
25 that the attorneys have met again and have gone over this

1 plea and have decided to make certain changes to the
2 charges, and I'll ask, first of all, Mr. Holliday, if you'll
3 put on the record how the plea stands at this point in time.

4 Mr. Spencer, I want you to listen carefully to what he
5 says because I'll be asking you about this in just a moment.

6 Yes, sir.

7 SOLICITOR HOLLIDAY: Yes, sir, Your Honor.

8 The State has agreed to reduce these charges and allow
9 the defendant to enter his pleas as PWID second offenses.
10 Those would then be nonviolent and parole eligible with the
11 same negotiated sentences, Your Honor.

12 THE COURT: All right. Now, Mr. Spencer, is that your
13 understanding of the change to the plea negotiations?

14 THE DEFENDANT: Nonviolent.

15 THE COURT: Yeah. Well, yes, sir, and, and they're
16 reducing the charge to a second, which makes it a nonviolent
17 offense, which does make the charge parole eligible as it
18 was not parole eligible before, but the negotiated sentence
19 remains the same. That was that it's 30 years suspended to
20 ten years with five years probation.

21 Is that your understanding of the, of the new plea
22 arrangement?

23 MR. SMITH: Yes, sir.

24 THE DEFENDANT: Yes, sir.

25 THE COURT: You got to answer verbally.

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Thank you.

3 And, Mr. Smith, have you discussed this new plea
4 arrangement with Mr. Spencer?

5 MR. SMITH: I have, Your Honor.

6 THE COURT: Are you satisfied he understood those
7 discussions?

8 MR. SMITH: I am.

9 THE COURT: Do you agree with his decision to accept
10 the new plea arrangement?

11 MR. SMITH: I do, Your Honor.

12 THE COURT: And has he been able to assist you in those
13 discussions?

14 MR. SMITH: He has.

15 THE COURT: Now, Mr. Spencer, you remain under oath.
16 I'd gotten to the point where I had accepted your plea
17 earlier. I'd asked you a series of questions earlier.
18 My question to you is if I were to go back over those
19 questions again concerning this new arrangement, would I get
20 any different answers or would I get the same answers?

21 THE DEFENDANT: You'd get the same answers.

22 THE COURT: Okay. So you're doing this freely and
23 voluntarily?

24 Is that right?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: And you understand the arrangement?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Is that correct?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: And you're asking me to accept it?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. Well, given the changes to it,
8 I will -- and, and his answers to my previous questions,
9 I'll make the same findings. That it's a voluntary Alford
10 plea, that he's aware of the charges now. He's aware of the
11 penalties and he's had the advice of any attorney. He's
12 satisfied with that advice and I find there's a factual
13 basis for him to offer that plea.

14 So, at this time, Mr. Smith, I'll let you speak on
15 behalf of your client, and then I'll give him a chance to
16 speak at the conclusions.

17 MR. SMITH: Please the Court, Your Honor.

18 There's been a lot of confusion in the case as the
19 Court can see today. Some of this was the -- back in, I
20 think, was the latter part of 2013.

21 Mr. Spencer was before the Court or getting close to
22 being before the Court and there was a negotiated
23 arrangement then that he turned down, and initially, during
24 the week, but before the week ended, he did accept it, but
25 that was not communicated to the Court.

1 THE COURT: Uh-huh. (Affirmative.)

2 MR. SMITH: And that's part of the confusion here
3 today.

4 This is a little bit different plea than what he was
5 offered then. He knows that. He's willing to accept it now
6 on the terms presented to the Court.

7 Your Honor, as he's told the Court biographically that
8 what he's -- he's 32 years old. He's got a nine year old
9 child. He's not married. He is, Your Honor, trained, a
10 small engine mechanic. He's now been in prison 352 days.
11 We're asking the Court to give him credit for that time
12 served and accept the recommendation from the Solicitor's
13 Office.

14 SOLICITOR HOLLIDAY: Your Honor, those 352 days are
15 part of the negotiation.

16 MR. SMITH: That's correct.

17 THE COURT: 352 days.

18 All right. Now, Mr. Spencer, your opportunity to talk
19 with me.

20 Is there anything you want to tell me?

21 THE DEFENDANT: Yes, sir, just thank you, Your Honor,
22 for accepting the plea.

23 THE COURT: Yes, sir.

24 THE DEFENDANT: I want to apologize to Mr.---

25 SOLICITOR HOLLIDAY: Holliday.

1 THE DEFENDANT: ---Holliday because they have been a
2 lot of confusion.

3 THE COURT: Well -- and, and I think we have it right
4 at this point in time from what I can tell.

5 THE DEFENDANT: Yes, sir. Yes, sir. I want to---

6 THE COURT: And I think we're in agreement.

7 THE DEFENDANT: I want to thank you for dropping it to
8 nonviolent so I have a chance to get out there and show my
9 people that's standing behind me that I can be the person
10 that they know I can be before they gone --

11 THE COURT: I hope---

12 THE DEFENDANT: -- because I know I can.

13 THE COURT: I hope you're able to do that.

14 THE DEFENDANT: Me too.

15 THE COURT: His prior offenses?

16 SOLICITOR HOLLIDAY: Your Honor, he's got 2000,
17 distribution and possession of methamphetamine.

18 2002, shoplifting.

19 2005, two counts of PWID of meth, receiving stolen
20 goods.

21 2006, possession of marijuana. 2006, trespassing and
22 DUS. 2006, possession of meth.

23 2013, possession of meth.

24 THE COURT: This meth has been your demon, hasn't it,
25 Mr. Spencer?

1 THE DEFENDANT: Yes, sir, it has.

2 THE COURT: I hope you're able to break that demon and
3 get away from it.

4 THE DEFENDANT: I believe I've -- I believe it's done
5 broken.

6 THE COURT: I hope so.

7 I've accepted the negotiation.

8 The sentence in both cases is run concurrently, thirty
9 years, suspended to ten, with probation for five. I gave
10 credit for 352 days.

11 Do you think he would benefit from the Addiction
12 Treatment Unit, Mr. Smith?

13 MR. SMITH: Your Honor, I think he could, but I'll
14 leave that up to him though.

15 THE DEFENDANT: ATU you talking about?

16 THE COURT: Yes, sir.

17 THE DEFENDANT: I done been through it.

18 THE COURT: You been there. So, you know what I'm
19 talking about then.

20 All right. I'll leave it off there since you've been
21 to it.

22 Good luck to you, sir.

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Yes, sir.

25 SOLICITOR HOLLIDAY: Thank you, Your Honor.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. SMITH: Thank you, Your Honor.

THE DEFENDANT: Thank you.

* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

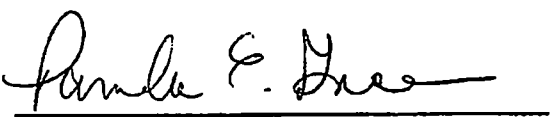
C E R T I F I C A T E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 26th day of February, 2014.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

February 19, 2015



PAMELA E. GREEN, Court Reporter

2014-CP-42-4008

FORM 5

STATE OF SOUTH CAROLINA)
)
 COUNTY OF Spartanburg)
)
Michael Austin Spencer)
 Full name and prison number (if any) of Applicant.)
)
#315380)
 v.)
)
 State of South Carolina)

IN THE COURT OF COMMON PLEAS

APPLICATION FOR
POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Tyger River C.I.
2. Name and location of Court which imposed sentence Spartanburg CO
3. Name(s) of co-defendant(s) (if any) Crystal Blue
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2012-65-42-2042
 - (b) 2013-65-42-5027
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 2-26-2014
 - (b) _____
30 years suspended to 10 years
5 years Probation Run concurrent

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2014 FEB -5 AM 3:04
 S. HOPE BLACKEY

- (c) _____
- 6. Check whether a finding of guilty was made:
 - (a) after a plea of guilty _____
 - (b) after a plea of not guilty _____
 - (c) after a plea of nolo contendere
- 7. Did you appeal from the judgment of conviction or the imposition of sentence?
No
- 8. If you answered "yes" to (7), list:
 - (a) the name of each Court to which you appealed:
 - i. _____
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. _____
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. _____
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. _____
 - ii. _____
 - iii. _____

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2014 NOV -5 AM 3: 04
 M. HOPE BLACKLEY

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) It was a negotiated 30 years suspended to 10
- (b) years 5 Year Probation the Judge stated on record
- (c) that it was Non-Violent 65 Percent

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: when i Returned to S.C.D.C

was 85 Percent Violent

- (a) _____
- (b) _____
- (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) on 2-26-2014 Judge Couch stated on record
- (b) that my sentence was Non violent 65 percent
- (c) with Prole.

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
 - i. _____
 - ii. _____
 - iii. _____

CLERK OF COURT
 SPARTANBURG COUNTY
 2014 NOV -5 AM 3:06
 M. HOPE BLACKLEY

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) I have file a inmate Grievance Form

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

Yes

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2014 NOV -5 AM 3: 04
M. HOPE BLACKLEY

- (a) your arraignment and plea? yes
- (b) your trial, if any? _____
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

- i. Albert Smith 819 John B White Sr 1310v Spartanburg S.c
29306
- ii. _____
- iii. _____

(b) the proceedings at which each such attorney represented you:

- i. _____
- ii. _____
- iii. _____

19. State clearly the relief you seek in filing this application:

I would like to get my sentence to 65 Percent +

20. Are you now under sentence from any other court that you have not challenged?

No

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2014 NOV -5 AM 3:04
 M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)

County of Spartanburg)

VERIFICATION

I, _____, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Michael A Spencer

SWORN to and subscribed before me this 31st day of OCTOBER, 2014

[Signature] (L.S.)
Notary Public of SC

My Commission Expires: 1-14-2019

CLERK OF COURT
SPARTANBURG COUNTY
2014 NOV -5 AM 3:04
M. HOPE BLACKLEY

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Michael A Spencer
Applicant

SWORN or affirmed to and subscribed before me this
31st day of October, 2014
Herbert Jones
Notary Public of SC

My Commission Expires: 1-14-2019

CLERK OF COURT
SPARTANBURG COUNTY
2014 NOV -5 AM 3:04
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
)
 Michael Austin Spencer, #315380,)
)
 Applicant,)
)
 v.)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2014-CP-42-4608

RETURN AND MOTION TO DISMISS

Respondent, making its Return to the application for post-conviction relief (PCR) filed November 5, 2014, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the March 2012 term of the Spartanburg County Grand Jury for possession with intent to distribute (PWID) methamphetamine (2012-GS-42-2042); he was subsequently indicted in the November 2013 term of the Spartanburg County Grand Jury for trafficking in methamphetamine (2013-GS-42-5027). The Applicant was represented by Albert Smith, Esquire. On February 26, 2014, the Applicant entered an Alford¹ plea to two counts of PWID methamphetamine, second offense, and was sentenced by the Honorable Roger L. Couch to concurrent negotiated sentences of thirty (30) years, with the balances to be suspended upon the service of ten (10) years imprisonment to five (5) years of probation. The Applicant did not appeal his pleas or sentences.

II.

In his current Application, the Applicant alleges that he is being held in custody

¹ North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 S.Ed.2d 162 (1970)

unlawfully for the following reasons:

1. "It was a negotiated 30 years suspended to 10 years 5 years probation. The Judge stated on record that it was non-violent 65 percent. When I returned to S.C.D.C. it was 85 percent violent. On 2-26-2014 Judge Couch stated on the record that my sentence was non-violent 65 percent with parole."

For the purpose of this Return, the Respondent incorporates the Spartanburg County Clerk of Court records and the South Carolina Department of Corrections' records. The Respondent reserves the right to amend this Return upon receipt of any relevant material.

III.

The Respondent submits that this Application for Post-Conviction Relief should be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160 (2003). An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. PCR relief is only proper when the application collaterally attacks the validity of the conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). Claims that affect only the duration of the sentence or quality of the inmate's confinement do not affect the validity of the conviction or sentence and therefore are considered *non-collateral* attacks on the conviction. Cooper v. State, 338 S.C. 202, 525 S.E.2d 886 (2000). A credit-related claim or challenge to other conditions of confinement does not fall into that category. Id. A claim for time served is a *non-collateral* attack of a conviction and must be pursued through Administrative Procedures Act (APA). Id. In Cooper the South Carolina Supreme Court stated that by challenging the duration of the sentence, as here, Applicant is in fact trying to enforce the sentence and is therefore is *not* making a collateral attack on the sentence.

Pursuant to Rule 12(b)(6), SCRCP, this Court should dismiss this allegation because it does not state a claim for which relief may be granted.

V.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, the respondent moves for summary dismissal pursuant to South Carolina Code Ann. §17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that these allegations should be dismissed as a matter of law.


Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

May 22 2015.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
)
 MICHAEL AUSTIN SPENCER, #315380)
)
 Applicant,)
)
 vs)
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

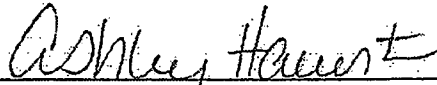
2014-CP-42-4608

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mr. John Brandt Rucker, Esquire
Brandt Rucker Attorney At Law
522 North Church Street
Greenville, SC 29601

DATED this 22ND day of May, 2015.


 Ashley Haworth, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Michael Austin Spencer, #315380,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2014-CP-42-4608

CONDITIONAL ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief filed November 5, 2014. Respondent made its Return and Motion to Dismiss on or about May 15, 2015.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the March 2012 term of the Spartanburg County Grand Jury for possession with intent to distribute (PWID) methamphetamine (2012-GS-42-2042); he was subsequently indicted in the November 2013 term of the Spartanburg County Grand Jury for trafficking in methamphetamine (2013-GS-42-5027). The Applicant was represented by Albert Smith, Esquire. On February 26, 2014, the Applicant entered an Alford¹ plea to two counts of PWID methamphetamine, second offense, and was sentenced by the Honorable Roger L. Couch to concurrent negotiated sentences of thirty (30) years, with the balances to be suspended upon the service of ten (10) years imprisonment to five (5) years of probation. The Applicant did not appeal his pleas or sentences.

2015 MAY 25 PM 4:25
 CLERK OF COURT
 SPARTANBURG COUNTY

¹ North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 S.Ed.2d 162 (1970)



RKK

es

Applicant's Current PCR Application

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

1. "It was a negotiated 30 years suspended to 10 years 5 years of probation. The Judge stated on record that it was non-violent 65 percent. When I returned to S.C.D.C. it was 85 percent violent. On 2-26-2014 Judge Couch stated on the record that my sentence was non-violent 65 percent with parole."

Before this Court are the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's PCR application and Respondent's Return and Motion to Dismiss.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

S.C. Code Ann. § 17-27-70(c) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

The Court has reviewed the pleadings and all relevant supporting documents in this case. Pursuant to S.C. Code Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law in ruling on Respondent's motion to dismiss:

Failure to State a Claim

This Court finds that this Application for Post-Conviction Relief should be summarily dismissed because the Applicant failed to state a cognizable claim under the Uniform Post-Conviction Procedure Act. An applicant may commence a post-conviction relief action based on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;

RKK

2015 MAR 26 PM 4: 24
 CLERK OF COURT
 SPARTANBURG COUNTY

3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20 (1976).

Aside from two matters specifically mentioned in the statute, post-conviction relief is a proper avenue of relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000). Claims that affect only the duration of the sentence or quality of the inmate's confinement do not affect the validity of the conviction or sentence and therefore are considered *non-collateral* attacks on the conviction. Cooper v. State, 338 S.C. 202, 525 S.E.2d 886 (2000).

The Applicant claims that the State has increased his sentence, requiring him to serve 85% the sentence before becoming parole-eligible. Applicant mounts a non-collateral attack that cannot be challenged in an application for post-conviction relief. Rather, non-collateral attacks like Applicant's must be pursued through the Administrative Procedures Act (APA). See, Al-Shabazz. Even if the facts alleged by Applicant are true, they do not support a cognizable claim for post-conviction relief under any of the statutory grounds. Therefore, the Court finds that summary dismissal is appropriate.

III. CONCLUSION

Pursuant to S.C. Code Ann. §17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the

RKK

RECEIVED
 STATE OF SOUTH CAROLINA
 2005 MAY 26 PM 4:24
 THE COURT OF APPEALS

Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Spartanburg County Clerk of Court and shall serve opposing counsel at the following address:

Suzanne H. White, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 26 day of May, 2015.

R. Keith Kelly
R. Keith Kelly
Chief Judge for Administrative Purposes
Seventh Judicial Circuit

Goffney, South Carolina

CLERK OF COURT
SPARTANBURG COUNTY
2015 MAY 26 PM 4:24
M. HORN

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Michael Austin Spencer Inmate #315380,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)


IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2014-CP-42-4608

Motion to Amend Application

The Applicant, hereby moves, through his below listed counsel, to amend his application, to add the following ground(s):

- 1.) The Applicant alleges that his plea counsel, Albert Smith, Esq., provided constitutionally ineffective assistance of counsel in advising him that his guilty plea was to a crime that was qualified as non-violent. But for this erroneous advice, the Applicant would have proceeded forward to trial.



Brandt Rucker, Esq.
 SCBAR # 0069403
 522 North Church Street
 Greenville, S.C. 29601
 t-864-271-9925

SPARTANBURG COUNTY
 2016 FEB - 1 PM 3:41
 W. HOPE BLACKLEY



STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Michael Austin Spencer, #315380,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
IN THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2014-CP-42-4608

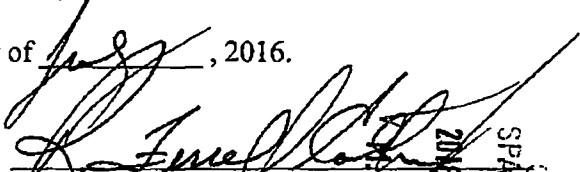
**ORDER GRANTING MOTION
TO AMEND PCR APPLICATION**

This matter comes before the Court by way of an application for Post-Conviction Relief filed November 5, 2014. A Conditional Order of Dismissal was filed May 26, 2015. A hearing was convened on June 14, 2016, at the Spartanburg County Courthouse, on Applicant's motion to amend his application. Applicant was present and represented by J. Brandt Rucker, Esquire. Alicia Olive, Esquire, of the South Carolina Attorney General's Office represented Respondent. Applicant asked the Court for leave to amend the application. Respondent did not oppose the motion, but requested that the amended application be filed within thirty days.

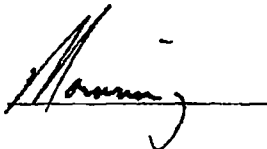
IT IS THEREFORE ORDERED:

1. That Applicant shall amend the application within thirty days; and,
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 12 day of July, 2016.


 THE HONORABLE R. FERRELL BOTHERAN,
 Presiding Judge
 Seventh Circuit

CLERK
 SPARTANBURG COUNTY
 2016 JUL 18 AM 10:28
 HOPE BLACKLEY

, South Carolina

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

COURT OF COMMON PLEAS NONJURY

MICHAEL AUSTIN SPENCER,)
APPLICANT,)
vs.)
THE STATE OF SOUTH CAROLINA,)
DEFENDANT.)

TRANSCRIPT
OF
RECORD
2014-CP-42-4608

September 19th, 2016
Spartanburg, South Carolina

B E F O R E :

THE HONORABLE PAUL M. BURCH, Judge.

A P P E A R A N C E S :

J. BRANDT RUCKER
ESQ.
Attorney for the Applicant

RUSTON W. NEELY
ASSISTANT ATTORNEY GENERAL
Attorney for the Defendant

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X O F W I T N E S S E S

<u>WITNESSES</u>	<u>PAGE</u>
MICHAEL SPENCER	
Direct examination by Mr. Rucker	4
Cross-examination by Mr. Neely	13
Redirect examination by Mr. Rucker	21
Motion	23
ALBERT SMITH	
Direct examination by Mr. Neely	23
Cross-examination by Mr. Rucker	27
Redirect examination by Mr. Neely	32
Certificate	36

P R O C E E D I N G S

1

2

3 THE COURT: Okay.

4 MR. NEELY: Your Honor, the next case is Michael

5 Spencer versus State of South Carolina.

6 The applicant is presently confined in South Carolina

7 Department of Corrections due to Orders of Commitment at

8 Spartanburg County Clerk of Court. Indicted in March, 2012

9 term of Court in Spartanburg County Grand Jury for

10 possession of -- with intent to distribute methamphetamine

11 third offense. Subsequently indicted November, 2013 term of

12 Spartanburg County Grand Jury for trafficking

13 methamphetamine. He was represented by Mr. Albert Smith.

14 On November 26th, 2014, applicant entered an Alford

15 plea to two counts of PWID methamphetamine second offense

16 and was sentenced by the Honorable Roger, Roger Couch to

17 concurrent negotiated sentences of 30 years. The balance to

18 be suspended upon the service of ten years imprisonment to

19 five years, five years probation. The applicant did not

20 appeal his pleas or sentences.

21 MR. RUCKER: Your Honor, I call my client, Michael

22 Spencer, to the stand.

23 MICHAEL SPENCER, being first duly

24 sworn, testified as follows:

25 MR. RUCKER: May it please the Court?

Michael Spencer - Direct examination
by Mr. Rucker

1 THE COURT: Yes, sir.

2 DIRECT EXAMINATION

3 BY MR. RUCKER:

4 Q Mr. Spencer, what is your current sentence just to be
5 clear about that?

6 A Thirty years suspended to ten. Five years probation.

7 Q So, it was as the assistant attorney general announced
8 it---

9 A It was.

10 Q ---as to your actual sentence?

11 A It was.

12 Q Do you -- what are you asking for the judge to do for
13 you in this case?

14 A I'm asking him to give me the same thing as my
15 codefendant in the, in the, in the -- my case got it.

16 Q All right. Do you understand that all that this judge
17 can do---

18 A Yes.

19 Q ---sitting as a PCR judge is remand it for a new trial?

20 A Remand for a new trial.

21 Q Okay. Is that what you're actually asking for?

22 A Yes, sir.

23 Q Okay. Specifically say what -- first of all, who was
24 your -- did you have more than one attorney in this case?

25 A I did.

Michael Spencer - Direct examination
by Mr. Rucker

1 Q Who was your first attorney?

2 A I'm trying to think of his name.

3 Q Was it a public defender?

4 A No, it was a, it was a private lawyer. It was a --
5 his, his office is right across the street. I'm trying to
6 think.

7 Q Well, are -- you're not making any claims against him
8 today?

9 A No. I mean no.

10 Q Okay. Who was the, who was the follow-up attorney?

11 A Albert Smith.

12 Q How long did you -- first of all, was he a, a public
13 defender or did y'all pay him---

14 A Paid.

15 Q ---to represent you?

16 And do you recall how much that was?

17 A \$10,000.

18 Q Okay. Did you meet with Mr. Smith before your guilty
19 plea?

20 A Not with Mr. Smith. I met with, with somebody in his
21 office. They, they -- the solicitors give me a timeline
22 that they only give me five days or they was gonna, or they
23 was gonna go to trial for the, for the trafficking. And I
24 felt like that the lawyer that I had wasn't doing the job.
25 So, I tried to get Mr. Smith and that's when he sent, he

Michael Spencer - Direct examination
by Mr. Rucker

1 sent his representative I think in to talk to me.

2 Q How many times did you actually meet with Mr. Smith
3 yourself?

4 A Just, just the day in the courtroom. Just, just when
5 we come in.

6 Q Did y'all discuss the case?

7 A He, he -- yeah, we, we -- well, I discussed it with
8 his, with his, with his, with his, I guess, law staff or
9 whatever. His staff. It was a, it was another lady and a
10 man that come.

11 Q All right. So -- but you actually talked to Albert
12 Smith about your case the day of the plea?

13 A The day of the plea, yes, sir.

14 Q And, and no other time?

15 A No other time, no.

16 Q To your knowledge, did he go over the discovery that
17 was provided by the solicitor's office?

18 A I asked for my discovery a couple times and -- from
19 what, from what I know that -- see, we went to, we went, we
20 went -- we took the plea three days after, after, after we
21 decided to drop the other lawyer and get with him. I went
22 ahead -- they went ahead and had me plead.

23 Q Did you plead off the trial docket or was it a plea,
24 regular plea date?

25 A Trial docket.

Michael Spencer - Direct examination
by Mr. Rucker

1 Q Okay. Had y'all sworn a jury or anything like that?

2 A No, sir.

3 Q Okay. To your knowledge, has Albert Smith ever gone
4 over the discovery in your case?

5 A No, sir.

6 Q Has he ever provided you a copy of the discovery?

7 A No, sir.

8 MR. NEELY: Your Honor, I'm gonna object. The only
9 allegation that's before the Court is that Albert Smith
10 provided constitutional -- ineffective assistance of counsel
11 in advising that his guilty plea was to a crime that was
12 qualified as a nonviolent.

13 MR. RUCKER: Well, that, that is our amended claim.
14 The actual claim is that he didn't do enough discovery to
15 determine what the codefendant got. That's the just,
16 just -- I'm just trying to build up foundation with that
17 question.

18 THE COURT: All right. Go ahead.

19 Q Did you ever -- you never went over discovery with him?

20 A Never went over it.

21 Q And did he make a motion for continuance or anything
22 before the Court?

23 A He told me that it -- I was running out of time, that
24 they wasn't gonna be no more -- that, that, you know, it was
25 either now or, you know what I mean, or that I had to give

Michael Spencer - Direct examination
by Mr. Rucker

1 him \$30,000 and go for trial.

2 Q All right. well, did -- let's go back a little bit.

3 Did you have a codefendant in this case?

4 A I did.

5 Q who was that codefendant?

6 A Crystal Bellue.

7 Q Did she plead guilty before the day you pled guilty?

8 A She did.

9 Q How long---

10 A A year.

11 Q How long---

12 A A year.

13 Q How long before?

14 A A, a year before.

15 Q Okay. Did you inform Mr. Smith about that?

16 A I did.

17 Q All right. Did he -- did you know him -- what her
18 sentence was?

19 A I did.

20 Q what was the sentence?

21 A It was ten years. No probation. Just ten years
22 nonviolent, which would, which will be a 65 percent sentence
23 in the Department of Corrections. And I asked him, I said,
24 I said, I said she got a ten nonviolent. why are they
25 trying to give me so much time and he, he couldn't answer

Michael Spencer - Direct examination
by Mr. Rucker

1 it. When, when she -- she was the driver. I wasn't nothing
2 but the passenger in a vehicle.

3 Q Okay. What was your prior record at the time of your
4 guilty plea?

5 A I mean I had a couple drug charges.

6 Q And do you understand the courts got a very full file
7 to include any of that?

8 A Yes, I do.

9 Q What was her record if you know?

10 A Same thing. Drug charges. Been to prison.

11 Q Did -- during the plea, did Mr. Smith argue to the
12 judge that the other defendant got a different sentence?

13 A No, sir.

14 Q Okay. And you heard the assistant attorney, attorney
15 general announce to the court that it was a negotiated
16 sentence.

17 Do you know the difference between a negotiated
18 sentence and a non-negotiated sentence?

19 A Yes, sir, I do.

20 Q What is that difference?

21 A That means that, that it, that it don't have no -- that
22 it's already set in stone. The only thing he can do is just
23 agree or disagree with it. That he don't actually sentence
24 me and it's already negotiated between my lawyer and the
25 solicitors.

Michael Spencer - Direct examination
by Mr. Rucker

1 Q why did you go forward with that negotiated sentence?

2 A I didn't have no choice. I mean, I mean they didn't
3 give me no choice.

4 Q Did you understand, when you agreed on the record, that
5 you were getting a different sentence then your codefendant?

6 A No, sir, because I actually asked on record will this
7 be a nonviolent 65 percent sentence, and Mr. Smith asked the
8 judge, and the judge asked the solicitor, and the
9 solicitor -- cause the judge said you can't give him
10 probation and a violent sentence. Said you either gonna
11 have to make a violent sentence and give him a non -- and
12 give him probation or, or, or, or make it a violent 85, you
13 know, with a two year supervised release. He said, he said,
14 well, okay, in that case, we gonna make it a nonviolent
15 sentence but, when I got to SCDC, it wasn't. It was violent
16 85.

17 Q Do you believe that was done because they were trying
18 to give you a particular sentence and they just did not
19 successfully---

20 A Absolutely.

21 Q ---do that?

22 A That's the only way I was gonna plead.

23 Q why did you not appeal your case?

24 A I, I did. I mean I PCR'ed it. I didn't know that
25 you---

Michael Spencer - Direct examination
by Mr. Rucker

1 Q Well, did you ever file a direct appeal?

2 A No, I didn't. I, I thought that was the only way that
3 we, we could do it was PCR. I mean I didn't --.

4 Q Did you discuss an appeal with Mr. Smith?

5 A No, I never -- he, he didn't -- I stood up there with
6 him. He -- for about two minutes and it was over with.
7 Never seen him again.

8 Q You never met with him again after that?

9 A Never met with him again.

10 Q Did you write a letter to him asking what happened with
11 the sentence?

12 A I, I -- well, actually, when I got to Court, I -- I
13 mean I got to, when I got back to SCDC and found out that my
14 sentence was, was a 85 percent sentence, actually got in
15 touch with Mr. Smith several times about trying to get it
16 fixed and that -- and then I -- and then he told me that it,
17 it was up to the Clerk of Court or whatever. So, I ended up
18 writing the Clerk of Court. But, anyway, to make a long
19 story short, it was -- it ended up, it ended up going to 65
20 but not -- it was through SCDC. Well, SCDC changed
21 everybody's about three months ago and let, you know, and
22 that's what -- SCDC changed everybody's that had a
23 possession or possession with intent or a manufacturing that
24 was 85. They made them 65.

25 Q Okay. Did that affect your case?

Michael Spencer - Direct examination
by Mr. Rucker

1 A Very little because of my suspended sentence that
2 they -- see, they didn't give me the same thing as my
3 codefendants. If they would of -- it would of affected it
4 if I'd of got a ten year but, with my 30 years with five
5 years probation, no, it don't affect it cause it don't give
6 me no parole date. It's just like I'm just doing -- you
7 know, I don't have no parole or no -- you know what I mean?
8 None of that.

9 Q Okay. Is there anything else you believe Mr. Smith did
10 incorrectly as we stand here today?

11 A Well, I feel like, I feel like that, that he should
12 of -- I feel like that he should of fought for me harder on
13 the trafficking considering that they, that he seen that,
14 that the only reason they was bringing the trafficking
15 charge to me is because I wouldn't plead to the possession
16 charge that the trafficking charge -- that the drugs that
17 they tried -- they charged me with trafficking for they
18 found, that's been over a year, and they found it on the
19 side of 221 a day after, a day after the, the -- this
20 incident happened.

21 And it looks like, to me, that he could of said, him
22 being my lawyer, that he wouldn't of let me plead to that
23 not knowing that it, it -- he should of said listen, them
24 drugs was found. Anybody who rode down 221 could of throwed
25 them drugs out.

Michael Spencer - Cross-examination
by Mr. Neely

1 Q All right. No further questions.

2 MR. NEELY: May it please the Court?

3 THE COURT: Yes, sir.

4 CROSS-EXAMINATION

5 BY MR. NEELY:

6 Q Now, Mr. Spencer, your attorney covered this just a
7 little bit but I want to go over it again.

8 what was your release date initially whenever you were
9 sentenced?

10 Do you know?

11 Was it, was it September 7th, 2021?

12 Does that sound about right?

13 A I, I mean I guess that could be right, yeah.

14 Q Okay. And your release now, do you, do you know what
15 that is?

16 A Since SCDC changed it, I think it's in '18. Somewhere
17 in '18.

18 Q Does May 28th, 2018, sound about right?

19 A I think so.

20 Q Okay.

21 A I mean I don't, I don't know. I hadn't went up yet
22 because they just done that. They just done it for us.
23 SCDC changed everybody's. So, I had went up from my
24 classification yet. It only goes once a year. So, I'm not
25 exactly sure what they done for me at this time.

Michael Spencer - Cross-examination
by Mr. Neely

1 Q Okay. But that, that sounds all right to you?

2 You wouldn't dispute that?

3 A No.

4 Q Okay. So, your sentence has actually been changed to a
5 65 percent sentence?

6 Is that correct?

7 A Right. Yes, sir.

8 Q Okay. And you're aware that the offense you pled to,
9 which was possession with intent to distribute
10 methamphetamine second offense, is not a violent offense?

11 A Right. I, I -- yes, I do know. I did know that but
12 the third offense trafficking one was.

13 Q Okay. But you -- but -- and that's what you were
14 charged with originally was the third offense trafficking,
15 correct?

16 A No, I was -- originally I was charged with a possession
17 with intent to distribute second offense, but when I
18 wouldn't take the plea because my codefendant took the plea,
19 and when I wouldn't take it, they said -- this was over a
20 year now. I done been in prison a year. He said so, you're
21 gonna take the possession with intent to distribute plea. I
22 said no. I said my codefendants done took it. She was
23 driving the car and everything. I didn't even know she had
24 dope on her.

25 He said well, if you don't take it, then we found some

Michael Spencer - Cross-examination
by Mr. Neely

1 drugs on the side of the road the next day. If you don't
2 take this plea right now, then, then we're gonna bring you
3 back down here and we gonna charge you third offense
4 trafficking for this drugs we found on the side of the road.

5 Q Well, you were indicted for trafficking, correct?

6 A No, that's what -- I mean I was, I was indicted after I
7 didn't take the plea, yes, sir.

8 Q Okay.

9 A After I didn't take the plea.

10 Q This solicitor's office indicted you for trafficking in
11 methamphetamine third offense, correct?

12 A They indicted me a year later after the -- a year
13 later, yes, sir. A year later. Not, not when it happened.

14 Q But you were indicted, right?

15 A Yes, sir.

16 Q And do know what the minimum sentence is in that?

17 A I, I do. He did say that. He, he -- his, his staff
18 did tell me that. He said it would be 30 years, and, you
19 know, I need to take the plea. It'd be 30 years if they --
20 25.

21 Q And whenever you were at the plea, the judge went over
22 what, what meant -- what a negotiated sentence was and
23 you -- he explained it to you.

24 Is that correct?

25 A Yes, sir.

Michael Spencer - Cross-examination
by Mr. Neely

1 Q And you understood, at that time, that you were
2 pleading to a negotiated sentence?

3 A Yes, sir.

4 Q Okay. And you understand that any mitigation that your
5 attorney would put before the judge would not matter at that
6 point in time, correct?

7 A At that point in time?

8 At that point in time, yes, sir, I mean I, I understand
9 that it wouldn't matter what he, what he -- but what I'm
10 saying is before, before he got the negotiated plea, the
11 only reason that they come up with the negotiated plea is
12 cause I wasn't gonna, I wasn't gonna go -- I wasn't going no
13 other way. You know what I'm saying?

14 They said well, listen we gonna give you the same thing
15 as your codefendant. Here's what he said. Said we gonna
16 get you the same thing as your codefendant. So, you can go
17 ahead and take this negotiated plea.

18 Q Well -- and let's go back over that too.

19 You said your codefendant got ten years active?

20 A Ten years.

21 Q Ten years active sentence?

22 A Right.

23 Q Sixty-five percent?

24 A Yeah, she's out now.

25 Q Correct.

Michael Spencer - Cross-examination
by Mr. Neely

1 Sixty-five percent nonviolent?

2 A Yes, sir.

3 Q Okay. And she took that plea you said a little over a
4 year before, before you took your plea?

5 A Yes, sir.

6 Q Okay. So, in the end, y'all, y'all have the exact same
7 amount of active time?

8 A No, sir, we don't. We don't.

9 Q You sure about that?

10 A Yes, I'm positive because, because she -- listen, if,
11 if, if we have -- if we had -- at 30 years, see the 30's
12 suspended is the reason we don't have the same time because,
13 see, SCDC goes off your sentenced sentence.

14 Q Now, you realize that May 28th, 2018, is less than a
15 year and a half away---

16 A Yes.

17 Q ---at this current date?

18 A Yes, but I also resize -- they five years probation
19 tacked on too that nobody else got but me too.

20 Q So, it's just, just the probation that you got that she
21 didn't get?

22 A And -- well, I mean the suspended -- here -- here's
23 what would of happened if they would of give me the same
24 sentence that she got. Then, then I would be eligible for
25 parole -- I would be eligible -- see, you saying I got a

Michael Spencer - Cross-examination
by Mr. Neely

1 nonviolent sentence, but the way that the sentence is
2 structured, it's not nonviolent. It's like I'm doing an 85
3 percent sentence cause I don't have no parole date. I don't
4 have no -- you know what I'm saying?

5 My good time don't work, don't won't -- it works
6 towards the 30 years. Not towards my time.

7 You see what I'm saying?

8 MR. NEELY: Well, may I approach, Your Honor?

9 THE COURT: Sure.

10 A You get furloughs and stuff like that when you don't
11 have a suspended sentence.

12 Q Well, do you recognize this?

13 A Yeah.

14 Q What is that?

15 A It's inmate search.

16 Q All right. And what does it say right here?

17 A 8/6/2009.

18 What, what is that?

19 Q This is your parole eligibility.

20 You have parole eligibility, correct?

21 A Projected parole eligibility.

22 Q And then you have a projected release date that's May
23 28th, 2018, correct?

24 A '18, yeah.

25 When, when does it say the parole -- my, my, my probate

Michael Spencer - Cross-examination
by Mr. Neely

1 is -- 2019?

2 Q Yeah.

3 A So, that means that I would be going to parole after
4 I'm out?

5 Q I'm, I'm just reading SCDC printout.

6 A That's my point.

7 Q It is parole eligible, correct?

8 A I'm -- if, if I would of got the same thing that she
9 got it would of been parole eligible.

10 Q well, if you had pled a year and a -- before this,
11 before this date, you'd be out by now, correct?

12 A well, I made bond. I made bond. So, I mean I had to
13 wait on my Court date. She didn't make no bond.

14 Q Now, I'm gonna get the transcript.

15 Okay. Your Honor, approach again?

16 (WHEREUPON, the Court nods affirmatively.)

17 Q This is the transcript of your guilty plea.

18 If you wouldn't mind, would you publish to the Court
19 Lines 5 through 11?

20 A Are you satisfied with what he's done?

21 The defendant: Yes, sir.

22 The Court: Is there anything you want him to do at
23 this time?

24 The defendant: No, sir.

25 Do you need to consult with him any further?

Michael Spencer - Cross-examination
by Mr. Neely

1 No.

2 Q Okay. So, when the, when the judge asked you are you
3 satisfied with what your attorney has done, you said yes?

4 A Yes.

5 Q And when the Court asked you is there anything you want
6 him to do more, you said no?

7 A Yeah, because I didn't know. Listen, because they
8 took -- because if you'll go back on that transcript, they
9 said they give me the same thing as my codefendant got.
10 When I got to SCDC, if, if you'll back that transcript up,
11 you'll see where I asked him is this an 85 percent sentence,
12 Your Honor, or 65 percent sentence. And he told me it was a
13 65 percent sentence. So, then I get to SCDC and it's not.

14 Q But it is now.

15 A Yeah, but it still ain't the same. It is now but not
16 because it was then. It is now because SCDC done it but it
17 still ain't because I would of -- if it was, then I would be
18 out now. I done done the sentence. I done done the same
19 amount of time as my codefendant.

20 How, how does, how does that not -- I'm not parole
21 eligible. I'm not -- I mean I am parole eligible but I
22 don't have no parole date.

23 Q How is it possible for you to have done the same amount
24 of time as your codefendant when she pled a year and a half
25 before you did?

Michael Spencer - Cross-examination
by Mr. Neely

1 A She got out -- I'm gonna tell you why. I'm glad you
2 asked because with her, her sentence, with it being not a
3 suspended sentence, they got a thing they call now where
4 they let them go six months earlier where it's called a
5 furlough or whatever. See, I'm not eligible for none of
6 that because of the suspended sentence, because of the
7 probation. That's how she's out.

8 Q But she did, she did plead guilty a year and a half
9 before you?

10 A She did.

11 Q Okay. And your sentence --.

12 A And, and she -- hers was a failure to stop for a blue
13 light and possession with intent to distribute second
14 offense. I didn't even have the failure to stop for a blue
15 light.

16 Q And your release date's less than a year and a half
17 from this date, correct?

18 A Right.

19 MR. NEELY: No further questions, Your Honor.

20 MR. RUCKER: Just brief response.

21 REDIRECT EXAMINATION

22 BY MR. RUCKER:

23 Q Michael, you were happy with what your lawyer did
24 because you thought he was having, getting a sentence that
25 would conform to the other defendant's sentence?

Michael Spencer - Redirect examination
by Mr. Rucker

1 A I -- that -- yes, sir. Yes, sir, I did. And, and also
2 it -- they had put -- they had kept me -- they had put so
3 much pressure on me, I'm gonna, I'm gonna -- just to be
4 honest, he told me it was gonna be -- if we -- I was gonna
5 go to trial for the trafficking cause I knowed for a fact
6 that the drugs wasn't mine, that they couldn't -- you know
7 what I mean?

8 But the thing was I didn't have \$30,000. I didn't want
9 to put my people through that to give him \$30,000 to go to
10 trial. I didn't have the money.

11 You know what mean?

12 I done spent -- we done spent fifty, sixty thousand
13 dollars to get to where we was at and then he was talking
14 about thirty more thousand dollars. See -- you know what I
15 mean?

16 I couldn't -- I just said well, we'll do, you know, do
17 whatever you got to do.

18 MR. RUCKER: All right. No further questions.

19 THE COURT: Anything else?

20 MR. NEELY: No, sir.

21 MR. RUCKER: That's all. I have no further witnesses.

22 MR. NEELY: And if -- nothing, nothing from the State,
23 Your Honor.

24 THE COURT: Thank you, sir. You may step down.

25 MR. NEELY: And if, if the defense has no further

Albert Smith - Direct examination
by Mr. Neely

1 witnesses, Your Honor, at this time, I'd ask for summary
2 judgment. Under Cooper v. State, claims that affect only
3 the duration of the sentence or quality of inmate's
4 confinement do not affect the validity of the conviction or
5 sentence, and, therefore, are considered non-collateral
6 attacks on the conviction.

7 MR. RUCKER: Your Honor, he's not arguing just because
8 of the sentence he ended up getting. He's arguing that the
9 lawyer misinformed him about the sentence he was gonna get
10 and he wouldn't have pled guilty but for that misstatement
11 of fact.

12 THE COURT: That motion is denied at this point.
13 Let's hear what Mr. Smith has to say.

14 MR. NEELY: State would call Mr. Smith.

15 THE COURT: Good morning.

16 THE WITNESS: Good morning.

17 ALBERT SMITH, being first duly
18 sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. SMITH:

21 Q Mr. Smith, how you doing today?

22 A Fine, sir.

23 Q Just let me go over a few matters with you preliminary.

24 How long have you been barred in the state of South
25 Carolina?

Albert Smith - Direct examination
by Mr. Neely

1 A Thirty-five years. Almost 36.

2 Q And what is your primary areas of law?

3 A Primary areas of law would be personal injury, workers'
4 comp, Family Court, and criminal.

5 Q Okay. How long you been practicing, practicing
6 criminal law?

7 A Thirty-five years.

8 Q And, over, over that time, have you been to trial?

9 A Oh, yes, Federal Court and State Court.

10 Q And you heard the defendant say that you never met with
11 him personally before the date of the guilty plea.

12 Is that correct?

13 A That, that may well be but he said that my associates,
14 which would of been Jamia Foster and Darryl Bush, met with
15 him.

16 Q And is that, is that your common practice?

17 A No, that's not the common way to do it. I found out
18 about the plea -- this was a hurry-up event and he got in
19 touch with my office. Those two went to see him and then I
20 found out about it. We had to work within a timeframe of
21 days, not hours, not weeks, but days, and we did the best
22 job we could based upon being substituted as counsel for Mr.
23 Spencer.

24 Q And, you know, basically you said a matter of days.

25 In those days, were you able to negotiate with the

Albert Smith - Direct examination
by Mr. Neely

1 Solicitor's office?

2 A We were.

3 Q And was the end of the negotiation the sentence he
4 received?

5 A The negotiation was that he would plead to 30 and he'd
6 be sentence suspended to ten. Negotiated plea. Explained
7 to him that if the court denied accepting, he would go back
8 to zero and we could try it. And he was being threatened
9 with a trial on -- he was indicted for distribution of --
10 possession with intent to distribute methamphetamine, and he
11 was also charged with trafficking methamphetamine, which was
12 reduced to the lesser charge.

13 Q And when, when, when you went over with him what the
14 plea was going to be and what the plea meant, did he
15 understand what it meant?

16 A Sure did. Stated that on the record.

17 Q And, at that time -- he's alleging that his codefendant
18 got a lesser sentence without probation.

19 Do you know about his codefendant's sentence?

20 A I know nothing about his codefendant or his
21 codefendant's record but I do know what his record was as it
22 relates to drugs and other criminal offenses.

23 Q So, your negotiation with the solicitor's office was
24 based on his record and the facts that would be alleged
25 against him?

Albert Smith - Direct examination
by Mr. Neely

1 A That's correct. And the fact they were trying him --
2 going to try him for trafficking and they reduced that,
3 which it carried a mandatory sentence. They reduced it. If
4 he'd gone to trial, we never want you to face jeopardy
5 unless you have to -- absolutely have to and we make that
6 clear to our clients.

7 Q So, you made it clear that he was facing 25 to 30 year
8 sentence if he went to trial?

9 A That's correct.

10 Q And he, he accepted the plea offer, negotiation that
11 you had done, based on that knowledge?

12 A He did and I never heard anything at all about he
13 wanted the same plea as the codefendant because we would
14 have to compare a lot of things in order for that to happen.
15 I don't know what the record was of the codefendant but we
16 look at his record and I guess they did too because that's
17 why they were threatening him with trafficking in
18 methamphetamine.

19 Q Okay. But he never brought that up to you?

20 A I don't recall that he did. He may have but I don't
21 recall that he did.

22 Q Okay. And---

23 A It's not one of the things I know I considered. I know
24 I didn't do that.

25 Q Is it something that you normally consider?

Albert Smith - Direct examination
by Mr. Neely

1 A If he wanted me and insisted on it, we would of looked
2 at that, yes.

3 Q Okay. And you talked a matter of days before he was
4 put on the trial docket?

5 A He was on the trial docket. They were threatening to
6 go to trial with trafficking. If he didn't accept that,
7 then they were going to take him to trial.

8 Q And he had wanted to plead based on that fear of a
9 trial and 30 year sentence?

10 A That's correct.

11 MR. NEELY: All right. No further questions, Your
12 Honor.

13 MR. RUCKER: May it please the Court?

14 CROSS-EXAMINATION

15 BY MR. RUCKER:

16 Q Mr. Smith, did you review your file before you came
17 today?

18 A I did.

19 Q Did you do discovery in this case?

20 A Discovery was done.

21 Q Okay. Is that with you in your file today?

22 A My file's back there. It's --.

23 Q well, I'm not gonna make you drag it out.

24 A Yeah.

25 Q what was the quality of that trafficking case?

Albert Smith - Direct examination
by Mr. Neely

1 Did you analyze that?

2 A What was the quality of it?

3 Q Yeah.

4 How strong was that trafficking case?

5 A It, it -- let me, let me say this to you. I'm not a
6 juror. I don't know and I don't sit over there in that jury
7 box and who knows what a jury will do and how strong it was.
8 I don't know. He said it wasn't his but law enforcement
9 officers said it was. A jury could of believed them,
10 believed him, believed nobody.

11 Q But isn't it---

12 A And we tell them that.

13 Q It's a little more narrow than that.

14 As a professional attorney, you can advise your client
15 whether it's a strong case or a weak case, can't you?

16 A This is what I advise my clients. If you're facing a
17 25 year sentence and they're willing to reduce it down to
18 something less than that so you don't spend a pretty good
19 time in prison, I would, I would recommend that.

20 Q Do you recall the facts of the trafficking case?

21 A I don't recall right off the top of my head, no.

22 Q Do you recall where the drugs were found?

23 A I do not.

24 Q Do you recall if he was found in possession of the
25 drugs?

Albert Smith - Direct examination
by Mr. Neely

1 A I do not, no.

2 Q Did you analyze those things before you went to the
3 plea or did you just decide he's facing this time, we got to
4 get it knocked down?

5 A If we did not analyze it with Mr. Spencer, then why
6 would Mr. Spencer then say he was going to take the plea?

7 I don't know of anything that my staff or I could have
8 done otherwise to get the kind of deal that we did get for
9 him. Now, if he'd rather do 25 years, tell him to go to
10 trial on it.

11 Q If that trafficking case couldn't be met, all he had
12 was a possession with intent to distribute second, how much
13 time was he looking at?

14 A A second?

15 Q A second.

16 A Ten years.

17 Q Okay. So, if you got the -- if you informed the
18 solicitor's office they or, in your view, they couldn't make
19 their trafficking case, you're now, now negotiating ten
20 years or less?

21 A Well, I can tell you this. They were not in a
22 negotiating mood with Mr. Spencer.

23 Q Well, normally they're not in a negotiating mood up
24 here.

25 Is that correct?

Albert Smith - Direct examination
by Mr. Neely

1 A They were not in a negotiating mood with Mr. Spencer.
2 They were threatening. That's what they were doing.

3 Q Okay. You don't have any independent recollection of
4 reviewing the trafficking case in this case?

5 A I do not.

6 Q Trafficking portion.

7 A I do not, no.

8 Q And you don't know if you actually looked at it?

9 A 2014, no, I don't.

10 Q They're no notes in the file that you actually looked
11 at the trafficking case?

12 A I don't think we did, no.

13 Q Okay. Do you recall that he had a codefendant in the
14 case?

15 A Ms. Bellue.

16 Q Isn't it normal -- isn't it practice here in
17 Spartanburg County, if there's a codefendant, you check out
18 the sentence to see if they're similar so you can argue that
19 to the judge?

20 A If you want to do that based on the codefendant's
21 record and his record, that would be fine. But I think what
22 they were working off was the record of Mr. Spencer and his
23 record was cited into the record. He had 2000 distribution
24 and possession methamphetamine. Shoplifting in 2002. 2005,
25 two counts of PWID of meth, receiving stolen goods. 2006,

Albert Smith - Direct examination
by Mr. Neely

1 possession of marijuana. 2006, trespassing and DUS. 2005,
2 possession of meth again. 2013, possession of meth. And
3 the Court said to him this meth has been your demon, hasn't
4 it, Mr. Spencer, and he said yes, sir, it has.

5 Q Read off the codefendant's record.

6 A Don't have it.

7 Q Read that off.

8 why didn't you look for it?

9 A Don't need it.

10 Q why don't you need it?

11 A We're dealing with a deal for Mr. Spencer.

12 Q But that could affect the determination by the Court --
13 I mean the judge -- Judge Couch actually is trying to
14 confirm a sentence to the codefendant's sentence, wasn't he?

15 A It was a negotiated plea, sir.

16 Q Right.

17 But you never looked to see what that previous record
18 was for the defendant who had already pled?

19 A It was a negotiated plea. Either Judge Couch accepted
20 it or he refused it. He was not going to deviate from what
21 was presented to the Court.

22 Q Were you not part of the negotiations for that
23 negotiated sentence?

24 A Yes, sir, we were.

25 Q You didn't just take what they offered?

Albert Smith - Direct examination
by Mr. Neely

1 You looked into it?

2 A We worked it down from 25 years to ten. Thirty
3 suspended to ten.

4 Q How much time did you spend working this case?

5 A I don't recall.

6 Q Did you meet with my client ever before you got to the
7 plea?

8 A I don't recall that I did. I may not have.

9 Q Were you on---

10 A My staff did.

11 Q I'm sorry. Go ahead.

12 A My staff did.

13 Q were you on the trial docket that day?

14 A I don't recall whether we were or not.

15 MR. RUCKER: All right. No further questions.

16 MR. NEELY: Just some brief redirect, Your Honor.

17 REDIRECT EXAMINATION

18 BY MR. NEELY:

19 Q Just want to clarify.

20 Possession intent to distribute third offense would be
21 what he would of received if the trafficking offense had not
22 been found guilty, right?

23 A Yes.

24 Q It would of been a third offense, not a second offense?

25 A He had, according to what I read here, yes.

Albert Smith - Redirect examination
by Mr. Neely

1 Q Correct.

2 And possession with intent to distribute
3 methamphetamine third offense carries ten years to thirty
4 years.

5 Isn't that correct?

6 A He would of been looking at---

7 Q It would be a minimum of ten years?

8 A Minimum of ten.

9 Q Not ten or less.

10 And whenever your associates pick up a case, they would
11 of read through the facts and discovery of the case,
12 correct?

13 A Darryl Bush -- I had two lawyers on this case and they
14 met with Mr. Spencer. They were not -- I mean -- and they
15 were capable lawyers and still are. And one of them is
16 still with me. Jamia Foster is still with me. And they met
17 with Mr. Spencer and I'm confident that they went over every
18 piece of his case that could of been gone over.

19 Q And it's your practice to go over the discovery to
20 determine the strength of the case?

21 A When we get discovery in, if they're out of jail, we
22 send for them immediately. If they're in jail, we go to
23 them including now they're sending it on disk. We have CDs,
24 DVDs. We have to get permission from the Sheriff's Office
25 to take a computer into the jail and we do that. And we

Albert Smith - Redirect examination
by Mr. Neely

1 take as much time with them as we need to review every item
2 on that disk.

3 MR. NEELY: All right. Thank you, Your Honor. No
4 further questions.

5 THE COURT: Thank you.

6 MR. RUCKER: No further questions from us.

7 THE COURT: You may step down.

8 THE WITNESS: Thank you.

9 MR. RUCKER: I have, I have no objection to him being
10 released if the Court deems that proper.

11 MR. NEELY: No objection.

12 THE COURT: The witness is free to leave.

13 MR. NEELY: I believe that's the State's case, Your
14 Honor.

15 THE COURT: Anything else?

16 MR. RUCKER: No, sir, not from us.

17 MR. NEELY: Not from the State.

18 THE COURT: I don't think that I need to hold this
19 under advisement. I've already looked at the transcript.
20 It was a negotiated plea. Based on what the applicant has
21 had to say, it seems like it centers around this
22 codefendant's sentence. I'm not gonna be able to help him
23 any.

24 The petition is denied.

25 Attorney General, please provide a proposed order.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

MR. NEELY: I certainly will, Your Honor.

* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

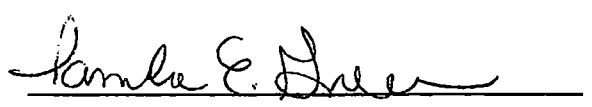
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 19th day of September, 2016.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

September 18th, 2017



PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA)
 COUNTY OF SPARTANBURG)
)
 Michael Austin Spencer, #315380)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2014-CP-42-4608

RECEIVED

JUL 26 2017

ORDER OF DISMISSAL S.C. SUPREME COURT

H. HOFFER
 CLERK OF COURT
 2017 JUL -8 AM 10:14

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 5, 2014. Respondent made a Return and Motion to Dismiss on May 15, 2015. On May 26, 2015, the Honorable R. Keith Kelly issued a Conditional Order of Dismissal. Thereafter, Applicant, through counsel, moved to amend his application. The Honorable R. Ferrell Cothran, Jr., granted the motion to amend on July 18, 2016. Thereafter, this Court convened an evidentiary hearing into the matter on September 19, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by J. Brandt Rucker, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Albert Smith, Esquire ("Counsel") also testified. The Court had before it a copy of the plea transcript, the records of the Spartanburg County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the pleadings in this matter, and the exhibits introduced at the hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the March 2012 term of the Spartanburg County Grand Jury for possession with intent to distribute (PWID) methamphetamine (2012-GS-42-2042); he was subsequently indicted in the November 2013 term of the Spartanburg County Grand Jury for trafficking in methamphetamine (2013-GS-42-5027). The Applicant was represented by plea counsel. On February 26, 2014, pursuant to a negotiated plea, Applicant entered an Alford¹ plea to two counts of PWID methamphetamine, second offense, and was sentenced by the Honorable Roger L. Couch to concurrent terms of 30 years for each, with the balances to be suspended upon the service of 10 years imprisonment to five years of probation. The Applicant did not appeal his plea of guilty or his sentence.

II. ALLEGATIONS

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

1. "It was a negotiated 30 years suspended to 10 years 5 years of probation. The Judge stated on record that it was non-violent 65 percent. When I returned to S.C.D.C. it was 85 percent violent. On 2-26-2014 Judge Couch stated on the record that my sentence was non-violent 65 percent with parole."

On February 1, 2016, PCR counsel amended the application to add the following ground:

2. "The Applicant alleges that his plea counsel, Albert Smith, Esq. provided constitutionally ineffective assistance of counsel in advising him that his guilty plea was to a crime that was qualified as non-violent. But for this erroneous advice, the Applicant would have proceeded forward to trial.

At the evidentiary hearing, Applicant proceeded on the following ground:

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

3. Applicant's codefendant received a sentence of 10 years non-violent time with a parole eligible sentence. Applicant alleges that his attorney should have used this information to negotiate the same deal for Applicant.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court reviewed the record in its entirety and heard the testimony and arguments presented at the evidentiary hearing. The Court further had the opportunity to observe each witness who testified at the hearing, and to closely appraise his individual credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

A. Summary of Testimony

Applicant stated he hired plea counsel while his case was on the trial docket with five days until the trial was to begin. Applicant stated he met with plea counsel's associates and they went over the discovery and Applicant's case with him. Applicant met with Counsel the day of the trial and made the decision to plea. Applicant stated his codefendant received a non-violent parole-eligible 10-year active sentence with no probation to follow.

Counsel testified he negotiated with the solicitor's office to the best of his ability given the time constraints before the case went to trial. Counsel went over discovery with Applicant and did not recall him mentioning his codefendant or his sentence. Counsel testified he was not as concerned with mitigation evidence considering he was able to obtain a negotiated sentence as part of Applicant's plea deal. Counsel believed the deal was in Applicant's best interest. Furthermore, Counsel testified that the process of negotiating a plea deal with a solicitor includes a number of indeterminable factors and he was only concerned with Applicant's plea deal not Applicant's codefendant's plea deal.

B. Ineffective Assistance of Plea Counsel

In this post-conviction relief action, 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) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of plea counsel as a ground for relief, Applicant must prove plea counsel's "conduct so undermined the proper functioning of the adversarial process" that the plea proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether plea counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes plea counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). 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 Court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove plea counsel's performance was deficient. Id. Under this prong, the Court measures plea counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. Because Applicant pled guilty, he must show there is a reasonable probability that, but for plea 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, 59 (1985).

Counsel was ineffective for advising Applicant to Plead Guilty

Counsel's advice for Applicant to plead guilty was reasonable under the circumstances. Counsel testified that Applicant's case was on the trial docket and due to be called for trial within a matter of days. Had Applicant proceeded to trial, his exposure was 25 to 30 years for Trafficking Methamphetamine, third offense, and 10 to 30 years for PWID Methamphetamine, third offense. Applicant would have faced a minimum of 25 years and a maximum of 60 years of incarceration had he been convicted of the indicted charges and the sentences been stacked consecutively. Counsel conducted a proper investigation into the case through his associates, adequately conferred with Applicant, and advised Applicant that the risk was too great to go to trial. Counsel testified that the 10 year active sentence with probation to follow was a good deal, in his estimation, and he advised his client to take the deal. Counsel's advice to Applicant to plead guilty and was reasonable under the circumstances. Counsel's advice was within the wide range of professional norms. Given the impending trial date and Applicant's exposure had he proceeded to trial, in addition to Applicant's lengthy criminal history, Applicant received a significant benefit by accepting the plea offer. Applicant has presented no evidence that Counsel's advice was deficient or that there is a reasonable probability that but for the alleged deficiency, he would not have pleaded guilty but would have insisted on going to trial. Therefore, this allegation is denied and dismissed.

Failure to Advise Sentence was Classified as an 85% Offense

Applicant's allegation that Counsel was ineffective for failing to advise his sentence was classified as 85% is without merit.

"[P]arole eligibility has been held to be a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea. However, if [Counsel] undertakes to advise [a] defendant about parole eligibility and gives erroneous advice, then the plea may be collaterally attacked." Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). At the guilty plea, Counsel stated he believed the offenses were parole eligible. Applicant denied that anyone had promised or guaranteed him anything including parole. The Court then advised Applicant the offense was an 85%, "non-parolable" offense. Tr. at 15-16.

Regardless, Applicant's contention is moot pursuant to the ruling set forth in Bolin v. S. C. Dep't of Corrs., 415 S.C. 276, 280, 781 S.E.2d 914, 916 (Ct. App. 2016), reh'g denied (Feb. 24, 2016). Pursuant to that decision, the offense Applicant pleaded to has is now classified as a 65% parole eligible offense. Id. (holding offenses under section 44-53-375(B), which addresses the possession, manufacture, or trafficking of methamphetamine, "are no longer considered non-parole offenses by virtue of the 2010 amendment to [that statute].") This Court finds Applicant's sentence has been and his current sentence is parole eligible according to the most recent records of the South Carolina Department of Corrections. Applicant's assertion that he should be granted a new trial because his parole-eligible sentence was not parole-eligible upon his arrival in the Department of Corrections is without merit. Given that Applicant's sentence is now parole eligible pursuant to the ruling in Bolin, this Court finds Applicant has failed to show either deficiency or prejudice with respect to this allegation and it is therefore denied and dismissed.

Failure to Advise Sentence was Classified as Violent

This allegation is wholly without merit. Applicant pleaded to a non-violent offense. S.C. Code Ann. 16-1-60. Therefore, the Applicant's second ground that Counsel failed to advise him that the crime was violent is summarily dismissed with prejudice.

Failure to Investigate Mitigation Evidence

At the evidentiary hearing, Applicant asserted Counsel should have investigated the plea deal his codefendant received in order to properly negotiate Applicant's plea deal. Applicant has failed to demonstrate that Counsel was deficient for using Applicant's co-defendant's sentence as a bargaining chip in negotiating a plea offer. "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)). "A defendant who pleads guilty upon the advice of counsel may attack the voluntary and intelligent character of the guilty plea only by showing the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases." Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998). When the record clearly reflects an appropriate basis for a disparate sentence, the sentencing judge may impose a different sentence on a co-defendant in a criminal trial. State v. Follin, 352 S.C. 235, 257, 573 S.E.2d 812, 824 (Ct. App. 2002). The decision whether to offer a plea bargain is within the solicitor's discretion. State v. Johnson, 287 S.C. 171, 337 S.E.2d 204, 205 (1985).

Counsel's advice to take a plea deal that did not strictly conform to his codefendant's plea deal was well within the bounds of professional norms. Applicant's plea deal was a negotiated plea to two counts of PWID Methamphetamine, second offense, for 30 years

suspended to 10 years active time and 5 years of probation. Tr. at. 4. Applicant testified that his co-defendant pleaded over a year prior to his plea and was sentenced to 10 years non-violent parole-eligible active time with no probation to follow. At the time the offer was accepted, Applicant had to either proceed to trial or accept the plea deal within a matter of days. Applicant would have faced a minimum of 25 years and a maximum of 60 years of incarceration had he been convicted of the indicted charges and the sentences been stacked consecutively. Counsel testified he believed it was in Applicant's best interest to accept the offer for 30 years suspended to 10 years of active time with five years of probation. The Court finds incredible Applicant's testimony he would not have taken the plea deal if he had known it did not strictly conform to his codefendant's plea deal. Both Applicant and his co-defendant received a 10 year sentence; the only difference was that Applicant's sentence was followed by five years of probation. His codefendant's plea deal to straight active time with no probation was irrelevant to counsel's advice it was in Applicant's best interest to take his plea deal. In addition, Applicant had seven prior convictions, several of which were for drug offenses. Tr. at 24. Furthermore, the plea offer was for a negotiated sentence, leaving no room for mitigation evidence to be presented to the judge. This further devalues codefendant's sentence as a mitigation tool as it had no bearing on the judge's sentence of Applicant. Because Counsel's actions were within the wide range of acceptable professional norms, the Court finds Applicant failed to meet his burden under the first prong of the Strickland test. Additionally, given Applicant's incredible testimony that he would not have taken the plea, and given the significant benefit in sentencing that he received by pleading guilty rather than proceeding to trial, this Court finds Applicant likewise failed to demonstrate prejudice. Therefore, this allegation is denied and dismissed.

C. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the 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.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

- 1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
- 2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 24th day of May, 2017.



PAUL M. BURCH
Presiding Judge
Seventh Judicial Circuit

Dillon, South Carolina

2017 JUN -8 AM 10:14
H. HOPE BLACKLEY

DOCKET No. 19-GS-42-2042

The State of South Carolina
County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

TERM

THE STATE
vs.

MICHAEL AUSTIN SPENCER

Indictment for
POSSESSION WITH INTENT TO DISTRIBUTE
CRACK COCAINE OR METHAMPHETAMINE

SC Code: 44-53-375
CDR Code:
Class MIS/A

2012 APR -5 PM 4:39
M. HOPE BULLLEY

SCANNED

Sgt. R. [unclear]

CHESNEE POLICE DEPT

1. SENTENCE MADE

2. REPORT FILED

3. CARD PULLED

ARREST WARRANT NUMBER

M756736

4. CHECKER SIGNATURE

7. ASSESSMENT AND
FINE CARD MADE

8. TRAFFIC VIOLATION COPY

ACTION OF GRAND JURY

John [unclear]
True Bill

Foreperson of Grand Jury
Date:

MAR 29 2012

VERDICT

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on _____ the
 Grand Jurors of Spartanburg County present upon their oath:

POSSESSION WITH INTENT TO DISTRIBUTE

That Michael Austin Spencer did on November 23, 2011, manufacture, distribute, dispense, deliver, purchase, or otherwise aid, abet, attempt or conspire to manufacture, distribute, dispense, deliver or purchase, or possess with intent to manufacture, distribute, dispense, deliver, or purchase a quantity of Methamphetamine, a schedule II controlled substance under provisions of § 44-53-375, *THE CODE OF LAWS OF SOUTH CAROLINA, (1976), as amended.*

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



 ASSISTANT SOLICITOR

WITNESSES

CHESNEE PD

1. SENTENCE MADE

2. REPORT FINED

3. CARD FILLED

4. INDEXED

5. CHECKED FOR WARRANTS

ARREST WARRANT NUMBER

DIRECT INDICTMENT

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date:

NOV 01 2013

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 13-GS-42-5027

The State of South Carolina

County of Spartanburg

Barry J. Barnette
Solicitor

COURT OF GENERAL SESSIONS

TERM

THE STATE
vs.

MICHAEL AUSTIN SPENCER

Indictment for
TRAFFICKING IN METHAMPHETAMINE

SC Code: 44-53-375

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 NOV -5 PM 3:01
M. HOPE BLACKLEY

SCANNED

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on _____, the
Grand Jurors of Spartanburg County present upon their oath:

TRAFFICKING IN METHAMPHETAMINE

That Michael Austin Spencer did in Spartanburg County on or about November 23, 2011, knowingly sell, manufacture, deliver, purchase or bring into this State, or did provide financial assistance or did otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or did knowingly actually or constructively possess, or did knowingly attempt to actually or constructively possess more than (28) twenty-eight grams of Methamphetamine, a schedule II controlled substance, in violation of §44-53-375, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR