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ROSS AND ENDERLIN, PA APR 23 2018  
ATTORNEYS AT LAW

S.C. SUPREME COURT

April 19, 2018

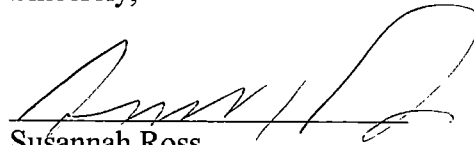
Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: Brandon Schmaus v. State  
2017-CP-23-3733

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,



Susannah Ross  
Attorney at Law

enclosure

cc: Office of the Attorney General  
Office of Appellate Defense  
Greenville County Clerk of Court

330 E. COFFEE ST. • GREENVILLE/SC • 29601

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APR 23 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

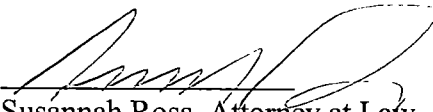
2017-CP-23-3733

Brandon Schmaus, ..... Appellant,  
v.  
The State, ..... Respondent.

NOTICE OF APPEAL

Brandon Schmaus appeals the Honorable Robin B. Stilwell's Order of Dismissal filed March 26, 2018.

This 19 day of April, 2018.

  
Susannah Ross, Attorney at Law  
330 E. Coffee St.  
Greenville, SC 29601  
(864) 242-0029  
Attorney for Appellant

Other Counsel of Record:  
DeShawn Mitchell, Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-3970  
Attorney for Respondent



STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )  
Brandon Schmaus, #339083, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT

2017-CP-23-3733

**ORDER OF DISMISSAL**

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This matter comes before the Court by way of an application for post-conviction relief filed on June 8, 2017 by Charles Benjamin Proffitt (Applicant). Respondent made its Return on or about November 3, 2017. An evidentiary hearing into the matter was convened on December 13, 2017, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by Susannah C. Ross, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's Plea Counsel Richard H. Warder, Esquire also testified as did Applicant's mother Tamara Church Well. This Court had before it a copy of the records of the Greenville County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's guilty plea, the PCR application, Respondent's Return and Applicant's records from the Department of Correction. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

**PROCEDURAL HISTORY**

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

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*[Handwritten signature]*

distribute (2015-GS-23-3098) and possession of marijuana with intent to distribute (2015-GS-23-3099). Richard H. Warder, Esquire represented Applicant. Assistant Solicitor Justin Holloway, Esquire prosecuted the case. On August 8, 2016, Applicant pled guilty as indicted before the Honorable Edward W. Miller. Judge Miller sentenced Applicant to imprisonment for fifteen years for the possession of cocaine with intent to distribute provided that upon the service of six years the balance would be suspended with three years' probation and five years imprisonment for possession of marijuana with intent to distribute. Applicant did not appeal his conviction or sentence.

### **ALLEGATIONS**

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

1. "Ineffective Assistance of Counsel"
  - a. Trial Counsel failed to adequately investigate nor prepare for the agreed negotiated sentence.
  - b. Counsel failed to withdrawal the plea agreement.
  - c. Counsel failed to timely file for motion for resentencing.
  - d. Counsel failed to file any motions to dismiss, motion to quash or even fundamental Brady v. Maryland.

### **SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING**

#### **Applicant's Testimony**

Applicant testified Plea Counsel represented him on his charges. He testified he believed he received a harsher sentence because of his attorney. Applicant testified Plea Counsel told him he had a three year plea offer but Plea Counsel told him not to take it and wait. Applicant testified Plea Counsel did not go over his discovery with him. He testified Plea Counsel told him to wait on making a decision about the offer because he needed to get the video of the incident as Applicant had a camera outside of his residence where the crime occurred. Applicant testified

Plea Counsel eventually received the video footage and reviewed it. Applicant testified he thought the search leading to his arrest was illegal after viewing the video. He testified he ended up pleading guilty because his lawyer told him he could get twenty years if he did not plead guilty. Applicant testified the sentencing sheet was inaccurate. He testified he was never told by Plea Counsel he could get more time if he did not take the initial plea and waited. Applicant testified he wanted to request a resentencing hearing but Plea Counsel did not request one.

#### Applicant's Mother's Testimony

Applicant's mother, Tamara Church Well, testified she tried to get in contact with Plea Counsel after her son's guilty plea. She testified she wanted Plea Counsel to appeal her son's guilty plea or file a motion for reconsideration. On cross-examination Ms. Well testified she could not remember how long after her son pled guilty that she reached out to Plea Counsel.

#### Plea Counsel's Testimony

Plea Counsel testified he had practiced law for over forty years and most of that time had been dedicated to criminal defense. He testified he was retained to represent Applicant. Plea Counsel testified to the facts of the case and stated he had met with Applicant numerous times in which he discussed Applicant's charges and sentences. He testified he presented Applicant with the three year plea offer but Applicant rejected it. Plea Counsel testified he filed discovery motions in this case and received discovery which he reviewed. He testified Applicant believed the search of his residence was an illegal search but he believed the search was not illegal. Plea Counsel testified Applicant's mom contacted him later about filing a motion for reconsideration but he did not remember being asked to file the motion by Applicant. He testified he reviewed the video footage from the camera outside of Applicant's residence. Plea Counsel testified his position did not change after viewing the footage as he still believed the search was legal.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 at 688). Second, counsel's deficient performance must have prejudiced the

applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 (1985).

In PCR cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citations omitted). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel’s advice was not “within the range of competence demanded of attorneys in criminal cases.” Lockhart, 474 U.S. at 56. Further, “[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant’s lawyer withstand retrospective examination in a post-conviction hearing.” McMann v. Richardson, 397 U.S. 759, 770 (1970). Rather, “whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel’s advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.” Id. at 771.

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

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

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel or any other constitutional deprivations entitling him to post-conviction relief. Applicant also failed to prove he was prejudiced by the alleged deficiencies. Below are this Court’s specific finding regarding Applicant’s allegation of ineffective assistance of counsel:<sup>1</sup>

**Ineffective Assistance of Counsel/Involuntary Guilty Plea**

As an initial matter this Court finds Plea Counsel provided effective assistance in this case and Applicant’s decision to plead guilty was made freely and voluntarily. Counsel is a trial practitioner who has extensive experience in the trial of criminal offenses. Counsel conferred

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<sup>1</sup> Prior to testimony being taken, Applicant made a Motion for Summary Judgement pursuant to S.C. Code Ann. §17-27-70 arguing that Respondent’s Return was untimely filed as Applicant’s Application was filed on June 8, 2017 and Respondent’s Return was not filed until November 3, 2017. This Motion was denied pursuant to Rule 55 (e) SCRPC.

with Applicant on multiple occasions, during which Counsel discussed the pending charges, the State's evidence, possible defenses and courses of action, and answered all of Applicant's questions. Additionally, Counsel conveyed the State's plea offer to Applicant, who rejected it.

This Court finds the record reflects Applicant's plea was entered freely, voluntarily, knowingly, and intelligently. The plea judge explained the charges to Applicant, including the maximum penalties for each. The plea judge also went through Applicant's constitutional rights and questioned Applicant as to whether he understood those rights and wished to give them up to plead guilty. Applicant agreed that he did. Applicant admitted he was guilty of these offenses and did not challenge the facts presented by the State at the plea. Applicant told the plea judge that he was satisfied with his attorney, that Counsel had done everything Applicant had asked of him, and he did not need any more time to discuss this matter with Counsel. Additionally, Applicant told the plea judge he did not have any physical or mental issues which would prevent him from understanding the proceeding, and Applicant indicated he understood all of the plea judge's questions and had answered them honestly. This Court therefore finds that Applicant understood the terms of the plea and the possible sentences he could receive.

The Applicant complains that his plea was involuntary pursuant to Missouri v. Frye, 132 S.Ct. 1399 (2012), because he did not receive the benefit of a lenient plea offer that had been previously extended by the State. The instant case is clearly distinguishable from Missouri v. Frye. The record indicates that the plea offer had been clearly and unequivocally communicated to the Applicant. Applicant elected not to accept the plea offer in hopes of getting a better deal. Applicant is an intelligent, and indeed calculating, individual. He personally assumed a risk in not accepting the original plea offer extended. The results were certainly not of his liking; however, dissatisfaction with one's own decision cannot support an application for Post-

Conviction Relief. Furthermore, even if a recommendation for sentencing had been extended by the State, the Applicant was not guaranteed that sentence from the Court.

Moreover, the Applicant complains that Plea Counsel did not fully articulate his position to the Court which the record would reflect he did. Notwithstanding, the Applicant did have the opportunity to address the Court himself and, in fact, did. Furthermore, the Applicant has failed to show by a preponderance of the evidence that Plea Counsel's failure to make a Motion for Reconsideration was prejudicial. In fact, this Court finds it is more likely than not, that a Motion to Reconsider would have had no effect.

The Applicant further complains that there is no evidence that motions for discovery were filed by his counsel. However, the Applicant fails to show how he has been prejudiced by the lack of any motions having been filed. The record reflects that the Defense did in fact receive any and all discovery that was available, including any exculpatory evidence. Furthermore, members of the Defense Bar routinely decide not to file discovery requests to avoid the requirement of reciprocity under the Rules. That is a tactical decision made often by defense counsel and does not rise to the level of incompetence.

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

established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both."). In addition, Applicant has presented no evidence or valid reasons why he should be allowed to depart from the truth of his statements made at the plea. See Dalton, 376 S.C. at 137, 654 S.E.2d at 874 ("[Admissions] made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements."). This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

### **CONCLUSION**

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

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

### **IT IS THEREFORE ORDERED THAT:**

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;

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- 2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 21st day of March, 2018.



ROBIN B. STILWELL  
Presiding Judge  
Thirteenth Judicial Circuit

Greenville, South Carolina

