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April 17, 2018

The Supreme Court of South Carolina
ATTN: Daniel Shearouse, Clerk of Court
PO Box 11330
Columbia, SC 29211

RE : Henry Antonio Burgess v. State of SC
2016CP3201838

Dear Mr. Shearouse:

Enclosed please find a Notice of Appeal along with a Certificate of Service and a copy of the Order being appealed. Also enclosed is a copy which I request you stamp as "filed" and return to me in the enclosed stamped envelope.

Thank you for your assistance in this matter.

Yours very truly,

Christina A. Metze

Christina Metze
Paralegal

cc: Melody J. Brown, Office of The Attorney General
Lisa Comer, Lexington County Clerk of Court
Henry Antonio Burgess

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APR 20 2018

S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Case No.: 2016-CP-32-01838

State of South Carolina,

Respondent,

v.

Henry Antonio Burgess,

Appellant.

NOTICE OF APPEAL

Henry Antonio Burgess, #294411, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed April 6, 2018, and received by counsel on April 13, 2018.

April 17, 2018

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Counsel for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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v.

Henry Antonio Burgess,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Melody Brown by depositing a copy of it in the United States Mail, postage prepaid, on April 17, 2018, addressed to her office at:

PO Box 11549
Columbia, SC 29211

April 17, 2018

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ORIGINAL

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
Henry Antonio Burgess, #294411, Applicant, v. State of South Carolina, Respondent.	)	2016-CP-32-01838 **ORDER OF DISMISSAL**

FILED
2018 APR -6 AM 11:10
LISA M. COKER
CLERK OF COURT
LEXINGTON SC

This matter comes to the Court by way of an application for post-conviction relief (PCR) filed May 20, 2016. Respondent made its return dated September 22, 2017. An evidentiary hearing was held December 14, 2017. Applicant was present and represented by Aimee J. Zmroczek, Esquire. Senior Assistant Deputy Attorney General Melody J. Brown represented Respondent. This Court heard testimony from Applicant and also from plea counsel Sally J. Henry, Esquire. At the conclusion of the proceedings, the undersigned took the matter under advisement. Having considered the pleadings in this matter and supporting documents (including specifically all the documents provided by way of the State's return), along with the testimony received at the hearing, this Court denies relief and dismisses the application as Applicant has failed to carry his burden of proof.

Procedural History

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the March 2015 term of the Lexington County Grand Jury for one (1) count possession of tools capable of being used in a crime (2015-GS-32-00544), one (1) count of burglary, second degree (violent)(2015-GS-32-00545), and one (1) count of malicious injury to electric utility lines (2015-GS-32-00546). Sally J. Henry, Esquire, represented him.

On November 16, 2015, Applicant pled guilty as indicted to all charges. The Honorable Clifton Newman sentenced Applicant, without negotiations or recommendations, to concurrent sentences of five (5) years for possession of tools capable of being used in a crime, fifteen (15) years for burglary, second degree, and ten (10) years for malicious injury to electric utility lines. Applicant was also on probation at the time he committed these crimes. Judge Newman found Applicant violated his probation, and revoked five (5) years of his probation. That sentence was run concurrent with the sentences on the above mentioned indictments. Applicant did not appeal his convictions or sentences.

Current PCR Allegations

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

1. "Denial of Effective Assistance of Counsel"
    a. "Counsel failed to provide adequate assistance"
    b. "Guilty due to counsel's ineffectiveness"
2. "Involuntary Guilty Plea"
    a. "Did not make informed decision of plea"

Findings of Fact and Conclusions of Law

Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented in light of the controlling legal precedent.

Standard of Review: Allegation of Ineffective Assistance

When an applicant "enters a plea on the advice of counsel, [he] may only attack the voluntary and intelligent character of the plea" by way of the long established two-prong test to show ineffective assistance of counsel. *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985)). "A claim of ineffective assistance of guilty plea

counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that the applicant was prejudiced by that deficiency." *Stalk v. State*, 383 S.C. 559, 560–61, 681 S.E.2d 592, 593 (2009) (citing *Hill v. Lockhart, supra*). In regards to the first prong, "[t]he proper measure of attorney performance remains reasonableness under prevailing professional norms." *Strickland v. Washington, supra* at 688, 104 S.Ct. at 2065. In order to satisfy the prejudice requirement, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." *Hill v. Lockhart, supra* at 59, 106 S.Ct. at 370.

At all times during the proceeding, an applicant maintains the burden of establishing that he is entitled to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Moreover, an applicant must overcome "a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Morris v. State*, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006). An applicant must demonstrate 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.'" *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 441(1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

Discussion: Ineffective Assistance Claim

Applicant's PCR hearing testimony indicated, basically, that he felt pressured to plead guilty, felt he did not have sufficient assistance, and wanted his counsel to do more in obtaining a lenient sentence. Though in his direct testimony he appeared to indicate there was no identification evidence, and counsel should have fashioned a defense based on lack of identification evidence, on cross-examination he agreed that he had agreed with the facts read by the solicitor and agreed he

waived his right to a trial so he could plead guilty. Though he indicated agreement at least in part that he understood his plea, he asserted he did not recall admitting guilt. He also appeared at one point to admit guilt again, (the record showing he specifically admitted "I broke into that store." See Guilty Plea Tr. p. 10, lines 15-16), but asserted he wanted less time on his sentence, *i.e.*, "a better sentence."

Plea counsel testified she met with applicant "many, many times," reviewed the available evidence which included a confession and a video of the crime that showed applicant in the store, and was prepared to go to trial the day of the plea. However, on the day they were to start the trial, applicant informed her that he wished to plead guilty. He provided a hand written letter to the court which she would later present to the court in sentencing. (See Guilty Plea Tr. p. 18, lines 6-14). Her testimony indicated she made preparations for trial and mitigation, had witnesses available, argued applicant's medical limitations, and generally for leniency. She indicated the evidence was supportive of guilt – particularly the confession and video tape.

The record supports plea counsel's testimony and I find that testimony credible. Applicant's testimony is in tension with the plea, is inconsistent in critical part, and I find his testimony not credible as to the allegations of deficient representation and involuntary plea.

According to the guilty plea transcript, the State was about the call the case for trial and select a jury. (Guilty Plea Tr. p. 13). Rather than proceed to trial, Applicant chose to waive his right to a jury trial and all accompanying rights and plead guilty. Applicant was facing a total possible sentence of 30 years of convicted of all charges, and applicant had a lengthy prior criminal record. Rather than receiving a possible sentence of 30 years, Applicant pled guilty and asked for mercy from the trial judge and received a sentence of 15 years concurrent on all charges, and his probation

violation was even run concurrent.

The record shows Applicant was guilty beyond any doubt of the crimes with which he was charged and he would have been convicted he proceeded to trial. Applicant used burglary tools to cut the power to the El Cheapo gas station in Lexington County. Applicant then took a hammer and knocked a hole in the wall of the store and entered the store unlawfully at night. Applicant had at least 2 prior convictions for burglary at the time of this crime. Once inside, Applicant took money from near a cash register, and cigarettes and candy and placed them in a black garbage bag. Applicant then attempted to exit the store with the bag but the bag of stolen goods was too large to go through the hole Applicant made in the wall. The entire burglary and Applicant were captured on store surveillance cameras. Applicant then fled the store when police arrived and entered a wooded area. A police officer viewed the surveillance video and then drove down the road and met Applicant coming out of the same wooded area. Applicant was wearing the exact same clothes seen in the store surveillance video of the burglary. Applicant also had cement dust on his clothes consistent with him previously knocking out the cider block wall to enter the store. Applicant was arrested in possession of burglary tools. Applicant was arrested because he matched the person seen in the store surveillance video. After being read his Miranda rights, Applicant confessed to a police investigator and gave police additional details of the burglary. (Guilty Plea Tr. pp. 3-7; pp. 13-16; pp. 26-27). The record fully and fairly supports Applicant would have been convicted had he proceeded to trial.

At his guilty plea, Applicant admitted to Judge Newman he was guilty of breaking into the store. (Guilty Plea Tr. p. 10, lines 12-16). He admitted he was guilty of each of the indictments. (Guilty Plea Tr. p. 12, lines 2-17). He admitted the facts as recited by the Solicitor were true.

(Guilty Plea Tr. p. 16, lines 4-9). Petitioner agreed had no defense to the charges. (Guilty Plea Tr. p. 11, lines 20-22). He provided a letter to Judge Newman in which he threw himself on the mercy of the court. (Guilty plea Tr. pp. 18, line 3 – p. 20, line 20). Further, Applicant had an extensive prior criminal record.

Applicant was convicted in 1987 of burglary 2nd degree and grand larceny. In 1990, he was convicted of trespassing and failure to stop for a police command. In 1992, he was convicted of burglary 2nd degree. In 1995, he was convicted of use of car without owner's consent and possession of a stolen vehicle. In 1998, his probation or parole was violated. In 2001, he was convicted of enticing a child from attendance in public school. In 2002, he was convicted of public disorderly conduct, simple assault, and aggravated assault and battery. In 2003, he was convicted of receiving stolen goods and aggravated assault and battery. In 2005, he was convicted of burglary 2nd degree violent and petit larceny and another attempted burglary. In 2010, he was convicted of burglary 2nd degree violent. The victim in that burglary was the same victim as in the present case. And, Applicant committed the crime in the same fashion. As previously stated Applicant was on probation for that burglary at the time he committed the present burglary. (Guilty Plea Tr. p. 6, line 13 – p. 7, line 7; p. 13, line 21 – p. 15, line 25; p. 16, line 22 – p. 17, line 11).

Applicant has not shown counsel was deficient in her representation of him, and there is no credible evidence of any undue or improper pressure on Applicant to plead guilty to the charges. Rather, the plea transcript shows a knowing and voluntary plea on facts that well-support the crime and the sentence handed down. In particular I note the overwhelming evidence of guilt including the video evidence and confession of guilt, along with the fact that "the State could have straight indicated for first degree burglary in this case because of the two priors..." (Guilty Plea Tr. p. 7,

lines 2-4). The record supports Applicant was already receiving a benefit from the charging decisions, and made the decision to plead guilty in hopes of a lesser sentence on the lesser charge, not from any ineffective assistance. This Court finds Applicant has failed in his burden of proof.

Standard of Review: Involuntary Plea Allegation

"It is beyond dispute that a guilty plea must be both knowing and voluntary." *Parke v. Raley*, 506 U.S. 20, 29 (1992). *See also Boykin v. Alabama*, 395 U.S. 238, 242 (1969) ("a guilty plea should only be accepted where the record evidences 'an affirmative showing that it was intelligent and voluntary.'"). What is key to the analysis in reviewing the plea for voluntariness is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Raley*, 506 U.S. at 29 (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). However, as noted above, "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel" was incompetent. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

To find a guilty plea is voluntarily and knowingly made, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969); *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. *Harris v. Leeke*, 282 S.C. 131, 318 S.E.2d 360 (1984).

Further, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, [an applicant's] right to contest the validity of such a plea is usually, but not invariably, foreclosed. *Blackledge v. Allison*, 431 U.S. 63 (1977). Statements 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. *Crawford v. U.S.*, 519 F.2d 347 (4th Cir. 1975) *overruled on other grounds by U.S. v. Whitley*, 759 F.2d 327 (4th Cir.1985).

Applicant has presented no reason to support that he should be allowed to depart from the truth of the statements he made during his guilty plea hearing – particularly those responses indicating that he was guilty of the offenses and that he knowingly, voluntarily, and intelligently entered his pleas of guilty to the above indictments. Moreover, the totality of the guilty plea transcript reflects that the guilty pleas were knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. In particular, the record reflects the plea judge carefully questioned Applicant on his understanding that he was not then suffering any impairment that would prevent his understanding of the proceedings, that he, in fact, did understand the proceedings; that he understood the charges; understood the presumption of innocence, the right to cross-examination, the right to present witnesses, the State's burden of proving guilt beyond a reasonable doubt; that he was pleading guilty voluntarily, without promise of anything, because he was actually guilty of the crimes; and, that he was satisfied with counsel. (See Guilty Plea Tr. p. 7, line 21 – p. 12, line 22).

Given Applicant's burden of proof and the analysis to be applied to this claim, Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and should be treated as such. As resolved above, Applicant has failed in his burden of showing ineffective

assistance. Thus, Applicant has failed to show ineffective assistance such as would undermine the voluntary nature of his plea, which is otherwise supported by the plea record. Applicant is not entitled to any relief.

Conclusion

Applicant has not carried his burden of proof to show a reasonable probability he would not have pleaded guilty but would have proceeded to trial. Rather, the evidence before the Court indicates the State was about to call the case for trial and draw a jury when Applicant decided to plead guilty and throw himself on the mercy of the Court. This Court denies relief.

THEREFORE, for all the foregoing reasons:

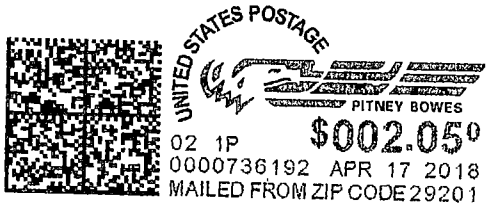
1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant is remanded to the custody of the Department of Corrections to complete service of his sentence.

IT IS SO ORDERED this 30 day of March, 2018.

The Honorable J. Cordell Maddox, Jr.
Presiding Circuit Court Judge

Anderson, South Carolina.



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