

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

OCT 15 2015

NOTICE OF INTENT TO APPEAL
FROM CHEROKEE COUNTY
COURT OF COMMON PLEAS, 7th. JUDICIAL CIRCUIT

S.C. SUPREME COURT

THE HONORABLE ROGER L. COUCH, CIRCUIT COURT PCR JUDGE
THE HONORABLE J. DERHAM COLE, TRIAL JUDGE

CASE NO: 2013-CP-11-0302

KENNETH HILTON, # 354034

PRO SE, APPLICANT

-VS-

STATE OF SOUTH CAROLINA

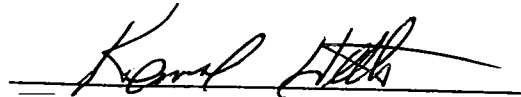
RESPONDENTS

Kenneth Hilton, Appeals the Order Judgment of the Honorable Roger L. Couch, Dated Sept. 24, 2015.

Appellant received Written Order Notice of entry of the Order [Judgment] on October 2, 2015.

Respectfully Submitted,

ON THIS 7 DAY OF October 2015
COLUMBIA, S.C. 29210


Pro Se, Kenneth Hilton, # 354034

BRCI Wateree, 162-A
4460 Broad River Road
Columbia, S.C. 29210

cc:Brandy W. McBee
Clerk of Court, Cherokee County
Post Office Drawer 2289
125 E. Floyd Baker Boulevard
Gaffney, S.C. 29342

Ms. Suzanne H. White
Assistant Deputy Attorney General
P.O. Box 11549
Columbia, S.C. 29211

files

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

C/A NO: 2013-CP-11-0302

Kenneth Hilton, # 354034

Pro Se Applicant

-VS-

STATE OF SOUTH CAROLINA

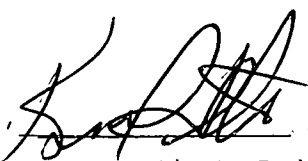
RESPONDENTS

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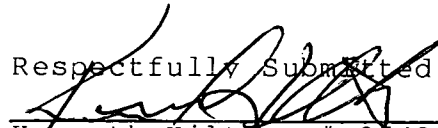
OCT 15 2015

CERTIFICATE OF SERVICE
SCRPC RULE 5 (b)(1)

S.C. SUPREME COURT

I,  Kenneth Hilton, states under the penalty of perjury, that I have on the date cited below, Personally served upon the named Parties, A True Copy of NOTICE OF INTENT TO APPEAL, AND MOTION FOR APPOINTMENT OF COUNSEL. By depositing the same in the Institutional Postal service, to be logged in for Record.

ON THIS 7 DAY OF OCT 2015
COLUMBIA, S.C. 29210

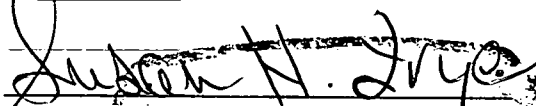
Respectfully Submitted,

Pro Se, Kenneth Hilton, # 354034
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4460 Broad River Road
Columbia, S.C. 29210

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Gaffney, S.C. 29342

Ms. Suzanne H. White
Assistant Deputy Attorney General
P.O. Box 11549
Columbia, S.C. 29211

files

Sworn and subscribed before
me October this 7th day
of October 2015


NOTARY PUBLIC
My Commission Expires
March 5, 2018

My Commission Expires

RECEIVED

OCT 15 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
C/A No 2013-cp-11-0302

S.C. SUPREME COURT

Kenneth Hilton, # 354034

Pro SE Applicant

-VS-

STATE OF SOUTH CAROLINA

RESPONDENTS

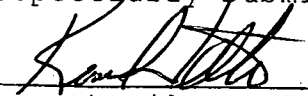
MOTION FOR APPOINTMENT OF APPELLATE DEFENSE COUNSEL

I, Kenneth Hilton does, states under the penalty of perjury, that I have been Pro Se with inmate legal assistant, throughout the Judicial Proceedings in above action, and I have no financial means of obtaining Legal Counsel for the Appellate Process, Nor the Legal capacity to continue through the Appellate proceedings.

Wherefore, Applicant Respectfully Motions this Honorable Court for Appointment of Appellate Defense Counsel.

ON THIS 7 DAY OF Oct 2015
COLUMBIA, S.C. 29211

Respectfully Submitted,



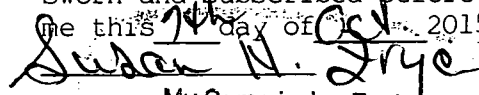
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Ms. Suzanne H. White
Assistant Deputy Attorney General
P.O. Box 11549
Columbia, S.C. 29211
files

Sworn and subscribed before me this 7th day of Oct, 2015



My Commission Expires
NOTARY PUBLIC
March 5, 2018

My Commission Expires

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF CHEROKEE
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2013CP1100302

Kenneth L Hilton #354034

State Of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

FILED IN THE OFFICE OF THE CLERK OF COURT
 2015 SEP 29 A 10:32
 BRANDY W. MCBEE
 CLERK OF COURT
 CHEROKEE COUNTY, SC

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: Order of Dismissal

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

s/ Roger L. Couch

2135

9/29/2015

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

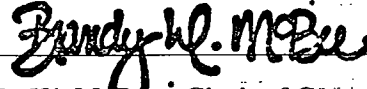
This judgment was entered on the 28th day of September, and a copy mailed first class or placed in the appropriate attorney's box on 29th day of September , to attorneys of record or to parties (when appearing pro se) as follows:

Leah B. Moody 235 E. Main St., Ste 115 PO Box 1015 Rock Hill, SC 29730

ATTORNEY(S) FOR THE PLAINTIFF(S)

Alan McCrory Wilson PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE DEFENDANT(S)



Brandy W. McBee - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHEROKEE)
)
 Kenneth Lee Hilton,)
 S.C.D.C. No. 354034,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

2013-CP-11-0302

ORDER OF DISMISSAL

FILED IN THE OFFICE
 CLERK OF COURT
 2015 SEP 28 P 11:30
 SA
 BRANDY W. HOBBS
 CHEROKEE COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 1, 2013. The Respondent made its return and motion for a more definite statement dated March 17, 2014. An evidentiary hearing was held on March 27, 2015 at the Spartanburg County Courthouse. The Applicant proceeded pro se. Suzanne H. White, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, Don Thompson, Esquire. The Court had before it the guilty plea transcript, the Cherokee County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, the return, and the Applicant's Exhibits.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Cherokee County Clerk of Court. The Applicant was indicted at the March 2012 term of the Cherokee County Grand Jury for kidnapping (2012-GS-11-0226) and the Applicant waived presentment on the charge of assault with intent to commit second-degree criminal sexual conduct (CSC) (2013-GS-11-0017). He was represented by Don

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Thompson, Esquire.

On January 23, 2013, the Applicant pled guilty. He was sentenced by the Honorable J. Derham Cole to consecutive terms of 25 years for kidnapping and 20 years for assault with intent to commit second-degree CSC. The Applicant did not appeal.

ALLEGATIONS

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

1. Ineffective assistance of counsel.

In an "Addendum of More Definite Judicial Factual Information" dated March 18, 2014 and filed July 9, 2014, the Applicant made the following allegations:

1. "With-holding factual evidence & fail to order mental evaluation."
2. Court lacked jurisdiction to accept pleas.
3. Ineffective assistance of counsel.

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This 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).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of plea counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he

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must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted).

A.

The Applicant argued the plea judge did not have jurisdiction to accept his guilty pleas because plea counsel and the assistant solicitor withheld information regarding his mental status. The Applicant argued there were jurisdictional and structural defects in his case. The Applicant argued plea counsel failed to bring the kidnapping indictment to him for his signature.

Plea counsel testified the Applicant was originally indicted for kidnapping and second-degree CSC, but that the Applicant waived presentment on the charge of assault with intent to commit second-degree CSC.

This Court finds the Applicant has failed to substantiate his allegation that the plea judge lacked jurisdiction in his case. The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet. State v. Gentry, 363 S.C. 93, 103, 610 S.E.2d 494, 500 (2005). Indictments are not evidentiary or jurisdictional documents – they are merely notice documents. Id. at 102,

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610 S.E.2d at 500. The kidnapping indictment in this case was true-billed and clearly sufficient to put the Applicant on notice of the charge he was facing. See State v. Tumbleston, 376 S.C. 90, 95-96, 654 S.E.2d 849, 852 (Ct. App. 2007). Further, there is a waiver of presentment for the assault with intent to commit second-degree CSC indictment that was also sufficient to put the Applicant on notice of the charge he was facing. The Applicant's claim that the lack of his signature on the kidnapping indictment somehow voided that indictment is without merit, as there is no such requirement. This Court also finds the Applicant failed to meet his burden of proving either that any party "withheld" his alleged "mental status" from the plea judge or that doing such would have left the judge without jurisdiction to preside over the case. These issues are patently without merit. This Court concludes the Applicant failed to meet his burden of proving plea counsel's actions resulted in the plea judge not having jurisdiction in his case. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (in a PCR proceeding, the applicant bears the burden of proving the allegations in their application).

B.

The Applicant argued he had mental health issues and should have been evaluated. The Applicant argued neither plea counsel nor the assistant solicitor informed the plea judge of his mental illness.

Plea counsel testified an initial interview of his clients' backgrounds is performed. Plea counsel testified the Applicant's form indicated there was no history of mental illness. Plea counsel testified he was not aware of the Applicant having a background of mental health issues. Plea counsel testified there were no problems with the Applicant's competency.

Plea counsel testified the Applicant did not inform him of any history of mental illness and that he did not perceive issues related to competency. This Court finds plea counsel's

testimony is credible. This Court finds the Applicant has failed to meet his burden of proving plea counsel was deficient in not investigating his alleged mental health background. See Lee v. State, 396 S.C. 314, 721 S.E.2d 442 (Ct. App. 2011) (holding plea counsel cannot be found deficient if she has no indication of the defendant's mental health history). Further, the Applicant "bears the burden of proof and is required to show by a preponderance of the evidence he was incompetent at the time of his plea." Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992). To sustain a claim that plea counsel was ineffective for failing to request a competency hearing, the petitioner must show reasonable probability that he would have been found incompetent. Id. at 233, 417 S.E.2d at 596. The Applicant, however, failed to produce either an expert witness to testify about his alleged mental health issues or any documentation on this matter that would have been relevant to the issue. As such, the Applicant failed to meet his burden of proof. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative"); see also Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

C.

This Court finds in regards to the allegations of ineffective assistance of counsel, plea counsel's testimony was credible, while the Applicant's testimony was not credible. This Court further finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that plea counsel's conduct did not fall below the objective standard of reasonableness. ✓

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Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel’s performance. This Court concludes the Applicant has not met his burden of proving plea counsel failed to render reasonably effective assistance. See Frasier 351 S.C. at 389, 570 S.E.2d at 174.

Involuntary Guilty Plea

The Applicant alleges his guilty plea was involuntary. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” See Frasier 351 S.C. at 389, 570 S.E.2d at 174.

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

The Applicant argued plea counsel’s lack of representation forced him to plead guilty to these charges. This Court notes, however, that the Applicant admitted to the plea judge that the facts recited by the solicitor were true. (Plea transcript, p.23). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with



counsel, and had not been coerced in any way. (Plea transcript, pp.11-14). This Court also notes the Applicant's admission prior to sentencing that "I am guilty of what I did." (Plea transcript, p.29). This Court finds the Applicant's testimony is not credible. This Court further finds the plea transcript refutes the Applicant's allegation that his guilty pleas were involuntary. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007). This Court concludes the Applicant entered knowing and voluntary guilty plea and that plea counsel did not coerce him into entering such. See Boykin v. Alabama, 395 U.S. at 243-44, 89 S. Ct. at 1712; see also Frasier 351 S.C. at 389, 570 S.E.2d at 174.

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, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Furthermore, the Applicant's guilty plea was entered knowingly and voluntarily within the mandates of Boykin. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules


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for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

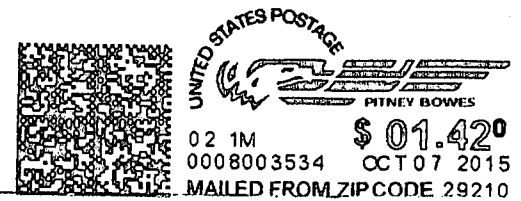
1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 24th day of September, 2015.



Roger L. Couch
Presiding Judge
Seventh Judicial Circuit

Kenneth Hilton #354034
BRCI Waterref Unit, 162-A
4460 Broad River Road
Columbia, S.C. 29210



South Carolina State Supreme Court
Clerk of Court, Daniel Shearouse
P. O. Box 11330
Columbia, S.C. 29211

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OCT 07 2015

**BRCI
MAILROOM**