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JUN 13 2018

THE BOOZER LAW FIRM, LLC

S.C. SUPREME COURT

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June 12, 2018

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

The Honorable Robert J. Harte
Clerk of Court
P.O. Box 583
Aiken, SC 29802-0583

**RE: Leon Simmons, #366048 v. State of South Carolina
2016-CP-02-1133**

Dear Mr. Shearouse and Mr. Harte:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Simmons in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Simmons in this appeal.

Yours very truly,



Lance S. Boozer

cc: Julie Coleman, AAG
Office of Appellate Defense
Leon Simmons, #366048

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JUN 13 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Case No. 2016-CP-02-1133

Leon Simmons, #366048,Petitioner,

v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable R. Scott Sprouse's Order dated June 1, 2018, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on June 11, 2018. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,


Lance S. Boozer

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June 12, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JUN 13 2018

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable R. Scott Sprouse, Circuit Court Judge

Case No. 2016-CP-02-1133

Leon Simmons, #366048,Petitioner,

v.

State of South Carolina,.....Respondent.

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Julie Coleman, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 12th day of June, 2018.



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| | | |
|--------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA |) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF AIKEN |) | SECOND JUDICIAL CIRCUIT |
| |) | |
| Leon Simmons, #366048, |) | 2016-CP-02-1133 |
| |) | |
| Applicant, |) | |
| |) | |
| v. |) | ORDER OF DISMISSAL |
| |) | |
| State of South Carolina, |) | |
| |) | |
| Respondent. |) | |
| |) | |

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on May 13, 2016. Respondent was served with the application on February 7, 2017, and submitted its Return on October 17, 2017. An evidentiary hearing into the matter was convened on May 7, 2018, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from Brian Z. Morton. Respondent presented testimony from Kevin Molony, Esquire ("Plea Counsel"). This Court had before it the records of the Aiken County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the plea transcript, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. In November 2013, the Aiken County Grand Jury indicted Applicant for murder (2013-GS-02-1727), armed robbery (2013-GS-02-1728), and first-degree burglary (2013-GS-02-

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1729). The charges resulted from Applicant's involvement in a late-evening home invasion on May 28, 2013, in Aiken County that left a victim dead as a result of three gunshot wounds. (Tr. p. 26). Kevin Molony, Esquire represented Applicant. Deputy Solicitor John William Weeks, Esquire prosecuted the case. On November 12, 2015, Applicant pled guilty as indicted to all charges before the Honorable Doyet A. Early, III. Pursuant to a negotiated sentence, Judge Early sentenced Applicant to imprisonment for thirty years each for murder, armed robbery, and first degree burglary, to be served concurrently. Applicant did not appeal his conviction or sentence.

II. ALLEGATIONS

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

1. Ineffective Assistance of Counsel
 - a. "Applicant received ineffective assistance of counsel prior to and during his plea in violation of his rights pursuant to the 6th Amendment and 14th Amendment to the U.S. Constitution, as well as Article I of the U.S. Constitution."
 - b. "Judgment and sentence against Applicant were in violation of his rights to due process law and assistance of counsel."
2. Involuntary Guilty Plea
 - a. "Applicant's pleas of guilty were not voluntarily and intelligently entered."
 - b. "Counsel failed to provide client effective assistance of counsel prior to and during his guilty plea proceeding. Applicant's pleas of guilt were coerced by counsel's failure to provide adequate representation."

Applicant filed an amended application on January 10, 2018, adding the following allegations:

- (a) Applicant believes he was misled to believe a co-defendant was entering a statement against him, ultimately prejudicing his case.
- (b) Applicant believes counsel manipulated Applicant into entering plea.
- (c) Applicant believes counsel failed to investigate and pursue possible defenses and otherwise present or review legal challenges to evidence.
- (d) Applicant alleges counsel failed to prepare for trial.

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III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

Applicant's testimony

At the evidentiary hearing, Applicant testified he had four co-defendants in this case. He stated he was arrested on May 29, 2013, and his original attorney, Andy Smith, was appointed three months later. He stated Mr. Smith represented him at his preliminary hearing, but he was later relieved as counsel, and Kevin Molony, Plea Counsel, was appointed to represent him. He testified he met with Plea Counsel a total of five times. Applicant testified he told Plea Counsel he wanted a trial, but Plea Counsel never progressed in preparing for a trial, but kept suggesting a guilty plea instead. He stated Solicitor Weeks offered a plea deal for a thirty year sentence that would require them all to testify to their involvement in the crime, but he rejected the offer. He said he did not give a statement to law enforcement before this, and he did not intend to give one.

Applicant testified Plea Counsel brought him a letter addressed to his co-defendant, Brian Morton, in October of 2015 after they had had some discussion about the possibility of him giving a statement to law enforcement. The letter was introduced into evidence as Applicant's Exhibit One. Applicant stated he told Plea Counsel he was not giving a statement, and he did not ask Plea Counsel to put this letter together and had no knowledge that it was put together to send to Morton. He stated the letter was meant to be a mere suggestion, and he did not really mean what the letter said. Applicant testified that his condition was that in order for him to give a statement, all of them—he, Plea Counsel, Morton, and Morton's attorney—would meet to discuss what they were going to testify. He stated he made this request to Plea Counsel and Plea Counsel told him the meeting would take place, but it did not. Applicant stated he was then transported downtown to give a statement, but he did not know why he was being transported at the time.

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Applicant testified Plea Counsel told him he would not represent him at trial if he did not give a statement, so Applicant gave a false confession to law enforcement. Applicant stated he gave a statement only because Plea Counsel told him that his co-defendant, Brian Morton, had already given a statement, but in reality he had not yet given his statement. Applicant stated he never intended to give a statement, and he would not have given one if he did not think Morton had already given one. He stated that if Plea Counsel had not presented him with the letter to Morton and coerced him, he would not have pled guilty. Applicant testified he still intended to go to trial even after he gave his false statements, but Plea Counsel had done nothing to prepare for a trial and had never discussed a defense for trial with him.

Brian Morton's testimony

Brian Morton testified at the evidentiary hearing that he was Applicant's co-defendant, and he pled guilty at the same time as Applicant. He stated he was represented on his pending PCR action by an attorney who was present and had spoken to him before he chose to testify. He stated that, before the guilty plea, he received a copy of the letter from Applicant on October 22, 2015. He stated he thought they were all going to meet together to discuss giving statements, but they never did. Morton testified that when he gave his statement to law enforcement he was under the impression that Applicant had already given a statement. He stated he only gave his statement because of the promises and threats his lawyer made to him. He stated his statement to law enforcement and the testimony he gave at the plea were false.

Plea Counsel's testimony

At the evidentiary hearing, Plea Counsel testified that he was appointed to this case on September 16, 2014 after Andy Smith was relieved due to a conflict. He stated he met with Applicant ten to fifteen times at the jail, and he did review the discovery with him. He stated they

were getting new evidence continuously up until the trial date, as recently as October before the plea. Plea Counsel testified that there were multiple co-defendants in this case, and three of them gave statements to law enforcement; two of those statements implicated Applicant in the crime. He stated that Applicant admitted his guilt to him after they received the cell phone records from the State, which showed Applicant text messaging his codefendants to plan the armed robbery.

Plea Counsel testified he was preparing the case for trial, and he would have proceeded to trial if Applicant had chosen to. He stated Applicant wanted a trial up until October, and their strategy was to impeach the co-defendant's testimony based on the multiple different statements Markese East had given. Plea Counsel testified that everything changed in October when they received the cell phone records. He stated the records showed text messages sent from Morton's cell phone, and he would have trouble arguing that he had standing to move to suppress based on an any illegal search or seizure because it was not Applicant's phone. Plea Counsel opined that the text messages were extremely damaging evidence because they showed Applicant and his codefendants planning the robbery and accidental murder of the victim. He stated Applicant knew it was all over after he saw the State had this evidence.

Plea Counsel testified that, in light of the evidence against Applicant before he gave his statement, their likelihood of success at trial was next to none. He stated the plea offer they were given previously had expired in July, but he knew that he might be able to negotiate a new offer from the State if Applicant agreed to give a statement of his involvement in the crime to law enforcement. He testified that Applicant and Morton were friends and had played football together in high school, and Applicant wanted to let Morton know he was going to give a statement, but he was concerned Morton would not believe a letter was coming from him. Plea Counsel stated there was no way both co-defendants would be allowed to meet together in the

jail, so he wrote the letter to Morton because it was what Applicant wanted to tell him. He stated he got personal information from Applicant to use in the letter to show it was truly sent from Applicant, such as the pictures of the two in their high school football uniforms.

Plea Counsel testified the letter was not intended to be a question, but it was Applicant telling Morton what he was going to do—give a statement to law enforcement. He stated Applicant was going to give a statement one way or another, but he wanted Morton to know what he was going to do. Plea Counsel testified Applicant was not surprised when they took him to give his statement because he was adamant that he would give a statement.

Plea Counsel testified he reviewed Applicant's constitutional rights before the guilty plea, and it was Applicant's decision to plead guilty, which he agreed with. He stated there was no discussion following the plea about filing a motion to reconsider the sentence or an appeal of the plea, and Applicant was happy when he left the guilty plea hearing.

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must

overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

As a matter of general impression, this Court finds Applicant's testimony to be not credible. In contrast, this Court finds Plea Counsel's testimony to be credible. These findings apply to the specific findings laid out below.

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INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleges Plea Counsel was ineffective in his representation surrounding his guilty plea. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985).

After considering the testimony, judging the credibility of the witnesses, and reviewing the materials presented to the court, this Court finds Applicant has failed to meet his burden in proving Plea Counsel was ineffective in any regard. Plea Counsel credibly testified he reviewed the discovery with Applicant and prepared the case for trial until Applicant chose to plead guilty. This Court finds Applicant's testimony that Plea Counsel told him he would not represent him if he went to trial to be not credible. The testimony presented at the evidentiary hearing shows Plea Counsel investigated the case and was preparing a defense for trial based on the inconsistencies in the co-defendant's statements, and this Court finds credible Plea Counsel's testimony that the State's evidence against Applicant was strong and their likelihood of success at trial was low, which led to Applicant's choice to plead guilty.

This Court finds credible Plea Counsel's account of the letter sent from Applicant to Morton. Applicant was aware of the letter and chose to send it to inform Morton of his decision to give a statement to law enforcement, regardless of whether Morton chose to give a statement or not. Applicant has failed to present any credible evidence that he was coerced or tricked into giving a statement to law enforcement or pleading guilty. Plea Counsel's representation conformed with reasonable professional norms and was not ineffective in any regard.

This Court finds Plea Counsel's representation and advice was reasonable under the circumstances and nothing he did was outside the scope of reasonable professional norms. Plea Counsel thoroughly investigated the case and fully represented his client and advised him based on his best interests in light of the evidence against him, which was to plead guilty. Accordingly, Applicant has failed to prove that Plea Counsel was deficient or that he would have gone to trial but for these deficiencies, and post-conviction relief is denied.

INVOLUNTARY GUILTY PLEA

Applicant alleges his guilty plea was not given freely and voluntarily. This Court finds otherwise and concludes Applicant's plea was entered freely and voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of

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

Applicant alleges he was coerced into pleading guilty because his attorney tricked him into giving a statement to law enforcement. The record and Plea Counsel's testimony clearly show Applicant was not threatened, forced, or coerced to give a statement or to plead guilty. This Court finds very credible Plea Counsel's testimony that he thoroughly discussed the evidence, the statement, and his option to plead or go to trial with Applicant and he was prepared to argue a defense if Applicant chose to proceed to trial, which he did not wish to do. It was clearly Applicant's decision to plead guilty after receiving the very damaging evidence of the records of his text messages with Morton planning the crime.

At the guilty plea, the plea court asked Applicant if anyone had threatened him or promised him anything to get him to plead guilty, and Applicant responded "No, sir." Tr. 14, line 24. Applicant testified at the plea hearing that he was satisfied with his attorney and he did not need more time to consider his decision before pleading. Tr. 15, line 6; Tr. 22, line 8; Tr. 21, line 16. Applicant has failed to prove he was coerced into pleading guilty and would have gone to trial otherwise.

Notably the South Carolina Supreme Court has held "[a] guilty plea represents a break in the chain of events which has preceded it in the criminal process." Id. (citations omitted). "When 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." Id. (citing Rice, 401 S.C. at 332, 737 S.E.2d at 486). This Court finds Applicant has not presented any credible evidence that he should be allowed to depart from the truth of the statements he presented to the plea court. Therefore, this Court finds the plea court correctly found Applicant's plea was freely, voluntary, and intelligently made. Accordingly, this allegation must be denied and dismissed.

VI. CONCLUSION

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

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


[signature page to follow]

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IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent.

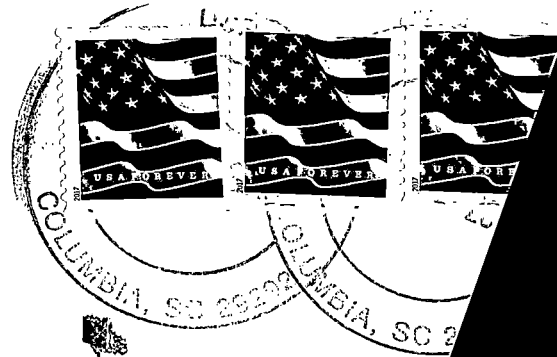
AND IT IS SO ORDERED this 1 day of June, 2018.


R. SCOTT SPROUSE
Presiding Judge
Second Judicial Circuit

Waltham, South Carolina

THE BOOZER LAW FIRM, LLC

1419 Pendleton Street
Columbia, SC 29201



The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
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