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June 13, 2018

RECEIVED

JUN 25 2018

S.C. SUPREME COURT

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

RE: Wayne Michael Smith, 365770 v. State of South Carolina
2016-CP-24-1089

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal along with the accompanying Order for the above-referenced matter. By way of this letter I am copying the Office of Appellate of Defense, as I was appointed to represent Mr. Hyatt.

Best regards,

Ashley A. McMahan
Attorney at Law

AAM/qpk

cc: Wayne Michael Smith
Megan Harrigan Jameson, Sr. Deputy Asst. Attorney General
Greenwood County Clerk of Court
Office of Appellate Offense

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

JUN 25 2018

S.C. SUPREME COURT

The Honorable J. Mark Hayes, II, Circuit Court Judge

Case No. 2017-CP-24-1089

Wayne Michael Smith, #365770Petitioner,

v.

State of South Carolina,Respondent.

NOTICE OF APPEAL

Applicant, Wayne Michael Smith, appeals the order of the Honorable J. Mark Hayes, II, dated April 20, 2018, filed on May 7, 2018 and received by the undersigned on May 30, 2018.

June 22, 2018


ASHLEY A. MCMAHAN, ESQUIRE

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SC Bar No. 71676

ATTORNEY FOR APPLICANT

Opposing Counsel:

Megan H. Jameson, Sr. Asst. Dep. Attorney General

S.C. Attorney General's Office

PO Box 11549

Columbia, SC 29211-1549

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

JUN 25 2018

The Honorable J. Mark Hayes, II, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2017-CP-24-1089

Wayne Michael Smith, #365770 Petitioner,

v.

State of South Carolina, Respondent.

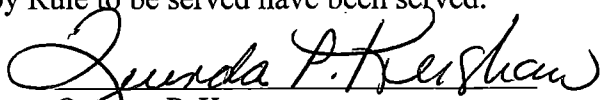
PROOF OF SERVICE

I, Quinda P. Kershaw, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Megan H. Jamieson, Sr. Assistant Deputy Attorney General
Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

I further certify that all parties required by Rule to be served have been served.

June 22, 2018



QUINDA P. KERSHAW
PARALEGAL

MAC | VANCE ATTORNEYS, LLC
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West Columbia, SC 29171
803-219-1110

STATE OF SOUTH CAROLINA)
 COUNTY OF GREENWOOD)
)
 Wayne Michael Smith,)
 S.C.D.C. No. 365770,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
OF THE EIGHTH JUDICIAL CIRCUIT

2016-CP-24-1089

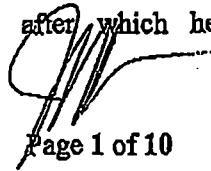
ORDER OF DISMISSAL

FILED COMMON PLEAS
 8TH JUDICIAL CIRCUIT
 GREENWOOD, S.C.
 2018 MAY -7 AM 9:53

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed June 3, 2016. Respondent made its Return on or about February 16, 2017. An evidentiary hearing into the matter was convened on February 27, 2018, at the Laurens County Courthouse in Laurens County, South Carolina. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Eighth Circuit Public Defender Janna Nelson, Esquire, testified. This Court had before it a copy of Applicant's records from the Greenwood County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the trial and plea transcript, Applicant's PCR Application, and Respondent's Return.

I. PROCEDURAL HISTORY

Applicant was indicted at the October 2015 term of the Greenwood County Grand Jury for strong arm robbery (2015-GS-24-1485). He was represented by Janna Nelson. On October 19, 2015, he pled guilty before the Honorable Frank R. Addy, Jr., to strong arm robbery and sentencing was deferred until after a related trial. After the plea, Applicant proceeded to a jury trial for murder (2015-GS-24-1485), after which he was found guilty of involuntary



manslaughter, and on October 22, 2015, he was sentenced to imprisonment for fifteen years for strong arm robbery and five years for involuntary manslaughter. Both sentences were set to run consecutively. Applicant did not file a notice of appeal. In his current PCR application, Applicant only challenges the guilty plea to strong arm robbery.

PCR Application

In his application for post-conviction relief, Applicant alleged the following grounds of relief:

1. Conflict of interest
 - a. "A man that wrote statements on me also was represented by the same lawyer as me. My lawyer told me going to trial would hurt me and I would not win."
2. Ineffective Assistance of Counsel

Applicant filed an Amended PCR Application, dated September 27, 2017, adding the following allegations:

1. Ineffective Assistance of Counsel as to Circuit Public Defender Janna A. Nelson:
 - a. "Conflict of interest - Ms. Nelson represented the individual that wrote a statement against the Applicant. The charges against that individual were ultimately dismissed."
 - b. "Applicant wanted to plead guilty straight away to the strong armed robbery charge but trial counsel would not let him do so."
 - c. "Applicant only received one offer for 25 years and that was 2 days before the guilty plea and trial. No other plea offers were ever communicated to the Applicant."
 - d. "Counsel did not move to request a reconsideration of the sentence. Judge punished the Applicant in sentencing because the Applicant exercised his right to a trial. See Castro v. State, 417 SC 77, 789 SE2d 44 (2016)."

II. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must

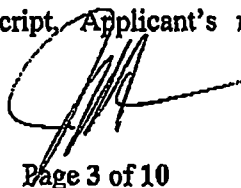
prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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. 668. Applicant must overcome this presumption in order 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. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show 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, 59 (1985).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial and plea transcript, Applicant's records from the South Carolina



Department of Corrections, the application for post-conviction relief and amendment, the exhibits received at the PCR hearing, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

Conflict of interest – Ms. Nelson represented the individual that wrote a statement against the Applicant.

Applicant alleged Counsel was ineffective because a conflict of interest existed due to Counsel representing Josh Ritter, an individual who wrote a statement against Applicant. Applicant alleged pending charges against Mr. Ritter were ultimately dismissed. Applicant testified Mr. Ritter wrote a statement saying Applicant told Mr. Ritter that Applicant committed the crimes. Applicant testified Counsel represented Mr. Ritter on drug charges.

Counsel testified she did not remember representing Mr. Ritter. She testified if she had represented Mr. Ritter, she would have said something. She testified Mr. Ritter's testimony put Applicant at the scene of the crime.

"An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). This Court has further stated that a conflict of interest occurs when "a defense attorney places himself in a situation inherently conducive to divided loyalties." Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)); see also Burger v. Kemp, 483 U.S. 776, 783 (1987)). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364

S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005). A defendant need not demonstrate prejudice if there is an actual conflict of interest." Id., 364 S.C. at 153, 612 S.E.2d at 450.

This Court finds Applicant has failed to meet his burden of proving Counsel was ineffective for failing to raise the issue of a conflict of interest. This Court finds Applicant has failed to show an actual conflict of interest existed as he has failed to show that Counsel did in fact represent Mr. Ritter, the case on which she represented him, and how Counsel represented conflicting interests. This Court finds Counsel's testimony credible that if a conflict was present she would have been aware and said something about it. As Applicant has failed to meet his burden of proving an actual conflict existed, he has failed to prove Counsel's performance was deficient. Furthermore, Applicant has failed to show he was prejudiced by Counsel's actions and this allegation must be dismissed.

Applicant wanted to plead guilty straight away to the strong armed robbery charge but trial counsel would not let him do so

Applicant alleged Counsel was ineffective for failing to let him plead guilty to strong arm robbery sooner than his eventual plea. Applicant testified he wanted to plead guilty to strong arm robbery and wrote letters to Counsel but did not hear a response. He testified Counsel told him not to worry about the strong arm robbery charge because his murder charge would be a bigger problem. Applicant testified he thought if he had pled guilty earlier, he would have received a lower sentence than he eventually received because he believed the trial judge punished him for exercising his right to trial on his murder charge.

Counsel testified she did not receive any plea offers from the State on the strong arm robbery charge. She testified pleading to strong arm robbery was Applicant's idea. She testified she did not remember Applicant wanted to plead guilty until right before his trial started. Counsel testified she did not recall talking to Applicant about pleading guilty to only the strong

arm robbery charge. Counsel testified if she had thought about the possibility of Applicant pleading earlier to strong arm robbery or if Applicant had mentioned doing this, then they would have done so.

This Court finds Applicant has failed to meet his burden of proving Counsel was ineffective for failing to allow Applicant to plead guilty. This Court finds there is no evidence that Counsel prevented Applicant from pleading guilty at an earlier date or that her performance affected his ability to plead guilty. Counsel appeared very credible at the PCR hearing. Counsel acknowledged at the PCR hearing that Applicant helped develop the plan for handling his cases. The plan was to have Applicant plead to the strong arm robbery charge (not violent or serious) and then proceed to trial on the murder charge and argue to the jury Applicant had already pled to crime which he is guilty of committing. The record reflects the strategy was successful and rejected the murder charge in favor of the lesser-included offense of involuntary manslaughter. Although Applicant's combined twenty-year sentence is significant, the sentences are not violent or serious, and applicant avoided the eighty-five percent mandatory time imposed on violent and serious crimes. Applicant has failed to meet his burden of proving Counsel's actions were deficient in this regard.

Furthermore, Applicant has failed to meet his burden of proving he was prejudiced by Counsel's actions. This Court finds there is no evidence the length of Applicant's sentence was a direct result of Counsel's conduct or that the timing of Applicant's plea affected his sentence. The trial judge's remarks at the time of sentencing indicate the reason for the sentence. The reasons do not suggest, in any way, that the twenty year sentence was due to his trial attorney's action or conduct. The judge's remarks relate solely to the facts underlying the case. If the trial judge was "mad" at the time of sentencing, nothing suggests it was Counsel who made him mad.

Accordingly, this allegation must be dismissed.

Applicant only received one offer for 25 years and that was 2 days before the guilty plea and trial. No other plea offers were ever communicated to the Applicant.

Applicant alleged Counsel was ineffective for failing to work out a plea offer with the State. He alleges he only received one plea offer that was given two days before the plea and trial. Applicant testified his first plea offer was for twenty-five years combined for both charges. Counsel testified she received no offers to strong armed robbery charge. She testified she made an offer for Applicant to plead guilty to voluntary manslaughter as a lesser included offense of murder, but the solicitor would not take it. She testified it was ultimately his idea to plead guilty to strong arm robbery so they could argue to the jury that he had already pled guilty to the crime of which he was guilty.

This Court finds Applicant has failed to meet his burden of proving Counsel's actions were ineffective. This court finds there is no evidence Counsel failed to relay plea offers. This Court finds the State would not make offers for the strong arm robbery charge and Counsel attempted to work out a plea offer on the murder charge. This Court finds Applicant has failed to prove Counsel was deficient in her plea negotiations or that she caused any plea offers to lapse, or that she failed to relay plea offers. Applicant has failed to show there were offers not relayed to him or that he did not accept an offer due to Counsel's performance. Accordingly, Applicant has failed to prove Counsel was ineffective in this regard, and this allegation must be dismissed.

Counsel did not move to request a reconsideration of the sentence

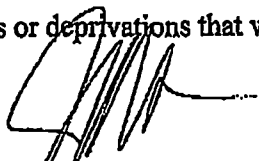
Applicant alleged Counsel was ineffective for failing to request a reconsideration of his sentence. He testified he believed the trial judge punished him for exercising his jury trial rights. Applicant testified he did not know about a motion to reconsider until he got to SCDC. Counsel testified Applicant sent her a letter asking her to file a motion to reconsider the sentence. Counsel

sent a letter back informing Applicant the time to file a motion to reconsider had passed and she believed it was highly unlikely the trial judge would change his sentence. In the letter, Counsel also informed Applicant she believed the judge's sentencing was a result of the jury writing "max sentence" on the verdict form and because the judge was aggravated with Applicant passing a note to someone during trial. Counsel testified she did not think the trial judge was mad that Applicant was convicted of involuntary manslaughter because the trial judge allowed the charge over the State's objection.

This Court finds Applicant has failed to meet his burden of proving Counsel was ineffective for failing to file a motion to reconsider the sentence. This Court finds Applicant has failed to meet his burden of proving he timely requested this motion be filed and Counsel failed to do so. This Court finds there is no evidence the length of Applicant's sentence was a direct result of Counsel's conduct. Applicant has failed to meet his burden of proving he was prejudiced by Counsel's actions. This Court finds there is no evidence the trial judge punished Applicant for exercising his right to trial. As stated above, the trial judge indicated reasons for his sentence. The comments from the deceased's family to the judge prior to sentencing were powerful and clearly had an influence in the judge. In fact, the transcript reflects that the judge, too, was very articulate as to the reasons behind the sentence he imposed when he addressed Applicant. Nothing in the judge's remark can be seen by this Court as a reflection of deficient representation by trial counsel. As Applicant has failed to meet his burden of proving Counsel's actions were deficient or that he was prejudiced, this allegation must be dismissed.

IV. CONCLUSION

Based on the foregoing facts, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his



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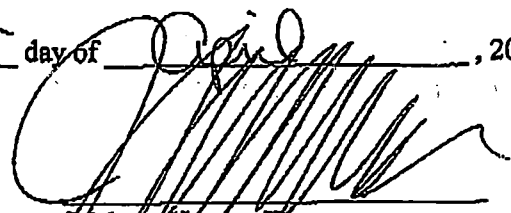
application for post-conviction relief. Applicant failed to demonstrate that Counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction 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 PCR counsel's 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), SCRCF, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is 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 shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 20th day of April, 2018.



Y/MARK HAYES, II
 Presiding Judge
 Eighth Judicial Circuit

Dorchester, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENWOOD)
)
WAYNE MICHAEL SMITH, #365770)
 Plaintiff,)
 vs.)
STATE OF SOUTH CAROLINA)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 EIGHTH JUDICIAL CIRCUIT
 CASE NO.: 2016-CP-24-1089
 MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET

FILED COMMON PLEAS
 8TH JUDICIAL CIRCUIT
 GREENWOOD, S.C.
 2018 MAY -7 AM 9:53

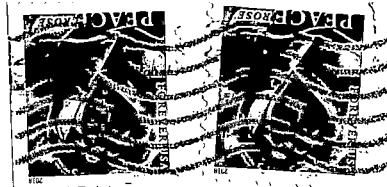
Plaintiff's Attorney: Ashley A. McMahan, Bar No. _____ Address: Post Office Box 5501 West Columbia, South Carolina 29169 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: Justin J. Hunter, Bar No. _____ Address: Post Office Box 11549 Columbia, South Carolina 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input checked="" type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
<i>Ashley A. McMahan</i> Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	April 18, 2018 Date submitted
SECTION III: Motion Fee	
<input type="checkbox"/> PAID - AMOUNT: \$ _____ <input type="checkbox"/> EXEMPT: (check reason)	
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other: _____	
JUDGE'S SECTION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____	



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COLUMBIA SC 290

22 JUN 2018 PM 2 L



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

29211-133030

