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STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
JoAnna Marsh, #338813, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2014-CP-26-1836 **ORDER OF DISMISSAL** **(Ends action)**

This matter came before the Court by way of an Application for Post-Conviction Relief filed March 26, 2014. The Court convened an evidentiary hearing on February 8, 2016, at the Horry County Courthouse. Applicant was present and represented by Tristan M. Shaffer, Esquire. Jessica E. Kinard, Esquire of the South Carolina Attorney General's Office, represented Respondent.

At the call of the case, Applicant moved for a continuance based on her desire to hear an audio recording of her plea proceeding. Applicant alleged that there were things stated at the plea hearing that were not captured in the written transcript. After consideration of case law and the Court Reporter's Manual, this motion was denied. Such a recording would only be a backup, and the court reporter would not be required to keep this backup once a transcript had been produced. Furthermore, pursuant to McCrary v. State, 249 S.C. 14, 152 S.E.2d 235 (1967), "[i]n case of such conflict between a litigant's recollection and the official court record, the latter must prevail. Like considerations impel us to accept the court reporter's transcript rather than appellant's uncorroborated 'verbatim' recollections reduced to writing more than three years after his trial." (internal citations omitted)

Applicant and Applicant's plea counsel, William Thomas Floyd, Esquire, testified at the hearing. The Court had before it a copy of the plea transcript, the records of the Horry County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In November 2011, the Horry County Grand Jury indicted Applicant for attempted murder (2011-GS-26-3838) and ill treatment of animals (2011-GS-26-3839). W. Thomas Floyd, Esquire, represented Applicant. On May 13, 2013, Applicant pled *nolo contendere* as indicted. The Honorable Edward B. Cottingham sentenced Applicant to concurrent terms of ten (10) years imprisonment for attempted murder and one (1) year imprisonment for ill treatment of animals. Applicant did not appeal her plea or sentence.

II. ALLEGATIONS

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

1. "My sentence reports states that I pled guilty[;] that I was found guilty[;] that I have a felony & not eligible for parole"
    a. "I did not plead guilty. It's on the transcript. I have served 32 months[;] S.C. Code of Laws 16-25-20(d) states that I am eligible for parole after a yr."

These allegations were interpreted as claims of involuntary guilty plea, ineffective assistance of counsel, and a challenge to Applicant's parole eligibility.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The 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.

A. Summary of Testimony

Applicant was called first, and began by stating her main contention, which is that she thought that she was pleading to a crime that was not a guilty plea, not a felony, and would be parole eligible. She testified that the fact that her crime would not be considered a felony was stated at least twice during the hearing, but that it is not reflected in the transcript. Applicant stated that she wanted a trial, but kept being delayed by plea counsel. She further testified that plea counsel stated she was a battered woman, which would reduce the time she had to serve, and that her ex-boyfriend, who was the victim in this case, would be arrested. However, she also testified that the only evidence of battery against her was one police report that did not result in an arrest, and that the concept of a battered woman was never brought up at the plea hearing. Applicant was questioned about her competence and state of mind upon entering her plea, as she had been hospitalized for several months after her arrest and since a *Blair*[1] hearing was held before her plea. She stated that she felt quite competent and clearheaded, and understood that she was taking a good deal. She testified repeatedly that she understood what she was doing that day, but insisted during testimony that the deal she pled to is not what was reflected in the transcript. When asked if she had considered going against plea counsel's advice and not take the plea, Applicant testified that there was no need to go against his advice because she was very happy with the plea as she understood it.

Plea counsel testified that the transcript before him encompassed the entirety of his understanding of the plea. He testified that he believed Applicant understood what she was entering into, the concept of a *nolo contendere* plea, and the extent of the punishment she was facing, as well as all collateral consequences. Plea counsel testified that there was no discussion of Applicant being a battered woman at the hearing because there was simply no evidence to prove that statement. When asked about the Applicant's competence, plea counsel testified that she may not have known that the

Blair hearing was going to occur that day, but it did not change the result of the plea or the hearing. He further testified that the plans regarding a trial changed during a conversation when he met with the judge and attorneys whom presented different options that were very favorable to applicant. On cross examination, plea counsel testified that he did not go over the option of a plea pursuant to North Carolina v. Alford[2] because, during the course of his practice, he had never seen that particular plea judge accept one. Furthermore, plea counsel did not believe that his chances of waiting for another judge to accept this plea were very good, or that it was worth pursuing.

B. Ineffective Assistance of Plea Counsel

In a post-conviction relief action, Applicant bears the burden of proving the allegations in her application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of plea counsel as a ground for relief, Applicant must prove plea counsel's "conduct so undermined the proper functioning of the adversarial process" that the plea proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether plea counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes plea counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). 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).

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[1] State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).
[2] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove plea counsel's performance was deficient. Id. Under this prong, the Court measures plea counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea counsel's deficient performance must have prejudiced 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. In the context of a guilty plea, Applicant must show there is a reasonable probability that, but for plea counsel's alleged errors, she would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

The Court finds Applicant failed to meet her burden to show plea counsel rendered ineffective assistance of counsel. At the plea hearing, Applicant acknowledged that she had been given sufficient time to consider her options with counsel, and that he had done everything she requested. Regarding Applicant's PCR allegations, the Court finds plea counsel's testimony credible, and Applicant's testimony not credible. Accordingly, the Court finds plea counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation.

Applicant's allegations are without merit. Plea counsel demonstrated he was thoroughly familiar with Applicant's case. He was familiar with all of the evidence and the circumstances surrounding Applicant's arrest, as well as the relative risks and rewards of entering a plea versus going to trial. The Court finds credible plea counsel's testimony that Applicant understood what she was doing, what she was pleading to, and that the plea transcript is accurate. Accordingly, Applicant fails to meet her burden in demonstrating that plea counsel was ineffective, and this allegation is denied and dismissed.

C. Involuntary Guilty Plea

This Court also finds Applicant's allegation that her guilty plea was involuntary is without merit. A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (citing Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)).

To find that a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of her plea and the charges against her. Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both. Holden at 573, 713 S.E.2d at 615 (citing Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999)). The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. Id.

In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the guilty plea, and also from the record of the PCR hearing. Roddy, 339 S.C. at 33, 528 S.E.2d at 420. "[I]n South Carolina, a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013)

(citing Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). "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 such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (2007). Further, "a defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." Brady v. U.S., 397 U.S. 742, 757 (1970).

Based on the guilty plea transcript as well as evidence at the PCR hearing, this Court is firmly convinced that Applicant's guilty plea was entered into freely, voluntarily, knowingly, and intelligently. This Court is further convinced that Applicant's decision to plead *nolo contendere* to attempted murder was not the result of coercion, but rather a well-reasoned choice - in light of her poor trial prospects and the very favorable offer available - designed to mitigate the risk of spending up to thirty (30) years in prison. This is reinforced by Applicant's statements during her plea hearing, when she admitted to the judge that she did not wish to challenge the charges against her. Though she contended at the PCR hearing that she did not understand that a *nolo contendere* plea would function as a guilty plea, this was discussed several times during the plea, and she signaled her understanding each time. Furthermore, the judge stated during sentencing, after the victim spoke, that Applicant would be in jail for ten (10) years and would serve every day of that time.[3] There can be no question that Applicant was fully aware of her sentence and its collateral consequences at the time of the plea hearing. As a result, she has failed to meet her burden, and this allegation is denied and dismissed.

D. 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, the Court finds Applicant failed to present any evidence

regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant her application. The record shows no prejudice to the Applicant, nor does it show any action by plea counsel that would be deficient under the terms provided by Strickland. 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), SCRCP, 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.

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[3] Plea transcript, p. 14:11.

IT IS THEREFORE ORDERED THAT:

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

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of her sentence.

AND IT IS SO ORDERED this 7 day of March, 2016.

The Honorable D. Craig Brown
Presiding Judge

Florence, South Carolina