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Arthur K. Aiken ***A. Bea Hightower***

July 10, 2018

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

Re: Leon M. Davis v. State of South Carolina
Civil Action No.: 2016-CP-02-01451

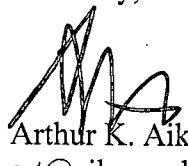
Dear Mr. Shearouse:

I am appointed counsel for the Applicant, Leon M. Davis, in the above captioned post-conviction relief case. I have enclosed, for filing in your office, a Notice of Appeal and Motion to Proceed in Forma Pauperis for this case. Please return file stamped copies to me.

By copy of this letter with the filings enclosed, I have filed these filings with the Clerk of the Aiken County Court of Common Pleas and have served these filings on the Office of the Attorney General for South Carolina. Please call with any questions.

Thank you for your help

Sincerely,



Arthur K. Aiken
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Enclosures as stated

cc: Clerk, Aiken County Court of Common Pleas (w/enclosures)
Office of the Attorney General for South Carolina (w/enclosures)
Leon M. Davis (w/enclosures)

RECEIVED

JUL 11 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2016-CP-02-01451

Leon M. Davis..... Applicant/Appellant

v.

State of South Carolina.....Respondent/Respondent

NOTICE OF APPEAL

This is a post-conviction relief case. Appellant appeals from the Order of Dismissal signed on May 31, 2018 in this case. Appellant's counsel received written notice of the attached Order of Dismissal by Notice of Electronic Filing on June 11, 2018.

July 10, 2018

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ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
Leon M. Davis, #359221, Applicant, v. State of South Carolina, Respondent.	)	2016-CP-02-01451 **ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on June 27, 2016. Respondent was served with the application on February 14, 2017, and submitted its Return on December 19, 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 Arthur Aiken, 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. Respondent presented testimony from Barry Thompson, II, 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 July 2014, the Aiken County Grand Jury indicted Applicant for homicide by child abuse (2014-GS-02-1049). The charge stems from an incident on February 21, 2014 in

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which EMS, first responders, and law enforcement all responded to a residence where they found Applicant and the two-year-old decedent, who was in full cardiac arrest. Tr. p. 15. EMS attempted to perform CPR to revive the child and immediately took the child to Aiken Regional Medical Center. Tr. p. 15. The child was airlifted to Georgia Regents University on February 21, 2014, and was pronounced dead on February 23, 2014. Tr. p. 15. When questioned by the authorities, Applicant indicated that the child was crying for no reason and whining, and that the child was standing between his legs and he stood up, said "why are you crying", came down with both fists, and struck the child on the top of the head. Tr. p. 17. Doctors would liken this to someone being ejected from a vehicle in a high-speed car collision and striking a tree head first. Tr. p. 18.

Barry Thompson, II, Esquire, represented Applicant on the charge. Assistant Solicitor Ashley Hammack, Esquire, prosecuted the case. On November 9, 2015, Applicant pled guilty as indicted to before the Honorable Doyet A. Early, III. Judge Early sentenced Applicant to imprisonment for thirty years for homicide by child abuse, set to run concurrent with Applicant's previous three year sentence for grand larceny. 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. "My attorney denied a manslaughter plea without my consent."
    b. "He also withheld info from my family pertaining to any plea or investigation."
    c. "He never gave me any results from the expert he said he hired."
2. Involuntary Guilty Plea

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Applicant filed an amended application on May 2, 2018, adding the following allegations:

i. Davis' guilty plea was not made with or based on advice of competent counsel.
ii. Davis' guilty plea was not intelligently made.
iii. Plea counsel did not discuss the evidence with Davis.
iv. Plea counsel did not prepare Davis' case for trial, and Davis was left with no choice but to plead guilty.
v. Plea counsel did not advise Davis of the elements of the offense charged and did not discuss potential defenses with Davis.
vi. Plea counsel never reviewed the pretrial discovery with Davis.
vii. Plea counsel never discussed the advantages and disadvantages of a trial versus the advantages or disadvantages of a plea with Davis so that Davis could make an informed choice of whether to enter a plea or try his case.
viii. Plea counsel did not investigate Davis' case.
ix. Plea counsel never discussed the findings of the State's expert witnesses and the defense expert witness with Davis.
x. Plea counsel never advised Davis that he could move to suppress his pretrial statement.

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

Applicant's testimony

At the evidentiary hearing, Applicant testified he met with Plea Counsel twice before his guilty plea, and Plea Counsel never discussed anything about the case with him. He stated Plea Counsel told his mother he was going to hire an expert for his case, but he never saw any results of the investigation. He stated he pled guilty on the day the trial was supposed to start. Applicant testified he had several character witnesses he wished to call at trial, but Plea Counsel gave them notice of the trial too late and the witnesses could not take off work in time, even though Plea Counsel knew months in advance about the trial date and should have told them sooner. He stated Plea Counsel discussed with him that he could get a life sentence if he lost at trial.

Application testified Plea Counsel did not tell him the terms of any plea offers from the State, but he received an offer and Plea Counsel told him it was too much time and they would not take it. Applicant stated Plea Counsel did not review the evidence with him before the plea.

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He stated he had no education at the time and did not understand the things Plea Counsel was explaining to him. He stated he did not get his Rule 5 materials until a year after his arrest. Applicant testified he gave a statement to law enforcement, and no one Mirandized him, but he signed a piece of paper. He stated he told Plea Counsel about the circumstances around the giving of the statement, but Plea Counsel did not tell him they could file a motion to suppress the statement.

Applicant testified he would not have pled guilty if Plea Counsel had gone over the evidence with him and advised him of the risks of pleading guilty. He stated he was not satisfied with counsel at the guilty plea, and he tried to fire him months before the trial. He stated he told the plea court he was satisfied with counsel because he had asked Public Defender Grant Gibbons for another attorney, and he was told he would not get one, so he felt like he had no choice.

Plea Counsel's testimony

At the evidentiary hearing, Plea Counsel testified he had represented Applicant previously on his grand larceny charge, before this incident occurred, and he had built up a relationship with him during that time. He stated he had seen Applicant interact with the child victim before, and although he was not the child's biological father, Applicant and the child had a very close father-son relationship. He stated the incident occurred after the child had been ill for some time. Trial Counsel testified the autopsy results likely showed the child had cancer in his brain that caused headaches, which caused him to cry all the time. He stated Applicant told him that he "snapped" and "lost it" after listening to the child cry for several days, and he admitted to slamming down his fists on the child's head, begging him to stop crying.

Plea Counsel testified he wanted to get a manslaughter charge, which would have allowed for compassion from the sentencing judge with no minimum sentence, but the State would not offer a plea deal for manslaughter when he asked. He stated he and Applicant did not want to go to trial. Plea Counsel testified that the State intended to show at trial that there were multiple strikes on the child by Applicant, not just one. He stated that the statute specifically says crying by the child is not an aggravating factor, and Applicant could not justify his attack on the child because it was crying. Plea Counsel testified Applicant gave two statements to law enforcement saying he did not hit the child, but he fell and hit his head, but he later gave a third statement admitting he struck the child. He testified he could have moved to suppress the statement, but he likely would not have been successful. Plea Counsel stated that even though they did not have a good chance of winning this motion to suppress, he would have argued the motion if Applicant chose to go to trial rather than plead.

Plea Counsel testified he went through all the medical evidence in this case line by line with a doctor looking for something to help their defense, but the doctor believed the evidence favored the State. He stated he did not ask the doctor to write a report because he did not want to create a report that would be used against him to hurt his case. Plea Counsel testified he and Applicant spoke frequently by telephone while he was in jail, and they met in person at least five times. He stated he reviewed the discovery and evidence with Applicant, but there were some upsetting photographs of the child that Applicant did not wish to see. He stated he discussed the elements of the charge and what the State was required to prove with Applicant.

Plea Counsel stated that the evidence against Applicant was very strong, and opined that they did not have a strong chance of winning at trial. He stated he advised Applicant of the potential sentencing range, and he is familiar with Judge Early and could estimate what he might

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sentence. Plea Counsel testified he thought Applicant would get upwards of a fifty year sentence if convicted at trial, but Applicant chose to plead guilty and instead got a thirty year sentence. He testified it was Applicant's decision to plead guilty, and he agreed with that decision.

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

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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).

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

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proving Plea Counsel was ineffective in any regard. Plea Counsel credibly testified he reviewed the discovery with Applicant and explained the elements of the charge and what the State was required to prove. Plea Counsel credibly testified he was preparing the case for trial and would have proceeded to trial and filed a motion to suppress Applicant's statement if Applicant chose to proceed to trial. He testified he investigated the case and consulted with a doctor to review the medical records to establish a defense, but the doctor's findings supported the State's case and harmed Applicant's, so Trial Counsel made a valid strategic decision not to have the doctor generate a report. Plea Counsel credibly testified Applicant did not want a trial and they were hoping to negotiate a plea deal for voluntary manslaughter, but after counsel's negotiations, the State would not offer a plea to a lesser offense.

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

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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 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 failed to review the evidence with him and advise him he could file a motion to suppress his statement to law enforcement. The record and Plea Counsel's testimony clearly show Applicant was not threatened, forced, or coerced to plead guilty. This Court finds very credible Plea Counsel's testimony that he reviewed the evidence and discovery with Applicant and he was prepared to argue a motion to suppress the statement if Applicant chose to proceed to trial, which he did not wish to do. Plea Counsel credibly testified Applicant did not want a trial but wanted a plea offer to voluntary manslaughter, which counsel could not get the State to offer despite his best efforts.

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. 12, line 11-14. 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. 12, line 15 – Tr. 13, line 6. Applicant has failed to prove he was coerced into pleading guilty and would have gone to trial otherwise.

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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.

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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 31 day of May, 2018.

R. SCOTT SPROUSE
Presiding Judge
Second Judicial Circuit

Walhalla, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2016-CP-02-01451

Leon M. Davis..... Applicant/Appellant

v.

State of South Carolina.....Respondent/Respondent

PROOF OF SERVICE AND FILING

I certify that, on July 10, 2018, I served and filed the Notice of Appeal and Motion to Proceed in Forma Pauperis in the above appeal by mailing copies of those filings to the following:

Julia Coleman
Office of the Attorney General for South Carolina
PO Box 11549
Columbia, SC 29201

and

Office of the Aiken County Clerk of Court
PO Box 583
Aiken, SC 29802

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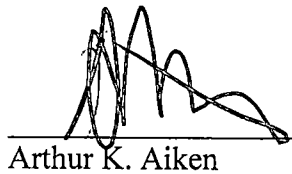

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MOTION TO PROCEED *IN FORMA PAUPERIS*

I, Arthur K. Aiken, hereby Motion the Court to allow Appellant to proceed in this matter without requirement of the filing fee and other applicable fees. I was appointed counsel for the Appellant in this post-conviction relief case. and appellate counsel will be provided by the South Carolina Commission on Indigent Defense due to Appellant's indigence.

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Aiken, SC 29802

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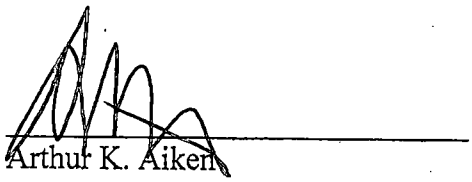

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