

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUL 11 2018

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

S.C. SUPREME COURT

2015-CP-40-6211

DARNELL KHAN, # 330148,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Darnell Khan, # 330148, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed June 8, 2018, issued by the Honorable G. Thomas Cooper, Jr., Presiding Judge, Fifth Judicial Circuit.



Jonathan D. Waller

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ATTORNEY FOR PETITIONER

July 8, 2018

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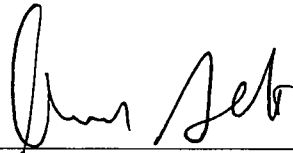
v.

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Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Lindsey A. McCallister, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to her office located at P.O. Box 11549, Columbia, SC 29211.



M. David Scott

9th
July 8, 2018

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2015CP4006211

Darnell #330148 Khan		State of South Carolina	
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> 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 and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 12(b), SCRCPC; Rule 41(a), SCRCPC (Vol. Nonsuit);
 - Rule 43(k), SCRCPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRCPC; Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 - Affirmed; Reversed; Remanded; Other: _____

2015 JUN -8 PM 12:39
 RICHLAND COUNTY
 CLERK OF COURT

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: _____

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.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

	2126	6/8/2018
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

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

Jonathan D Waller 1116 Blanding Street Suite 2B
Columbia, SC 29201

Lindsey Ann McCallister PO Box 11549 Columbia, SC
29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Jeanette W McBride
Jeanette W McBride - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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 RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Darnell Khan, SCDC #330148,)

Case No. 2015-CP-40-6211

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

2018 JUN -8 PM 12:00
JESSICA E. KINARD
MONTGOMERY

This matter comes before the Court by way of an application for post-conviction relief filed on October 14, 2015 by Darnell Khan (Applicant), and amended on July 10, 2017, by his counsel Jonathan D. Waller, Esquire. The State (Respondent) made its return on April 25, 2016, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on July 21, 2017, at the Richland County Courthouse. Applicant was present at the hearing and represented by counsel Waller. Jessica E. Kinard, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant, his plea counsel Mark A. Sawyer, Jr., and sentencing counsel William A. Hodge testified at the evidentiary hearing. The Court had before it a copy of the plea transcript, the sentencing transcript, the records of the Richland County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings in this action. After reviewing the record and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to meet his requisite burden of proof as to any constitutional deprivation and denies this application with prejudice.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant

to orders of commitment of the Richland County Clerk of Court. During its June 2011 term, the Richland County Grand Jury indicted Applicant for attempted armed robbery (2011-GS-40-03251), first-degree burglary (2011-GS-40-03252), and murder (2011-GS-40-03253). These charges stemmed from an incident on January 27, 2009, when Applicant and two co-defendants went to a residence in Richland County armed with firearms with the intention of robbing the residents. During the incident, an occupant of the home, James Willie Smith, was struck with a single gunshot wound to the upper torso and died as a result of the wound. Witnesses eventually implicated Applicant and his co-defendants, who all gave statements implicating themselves.

Assistant Public Defender Mark A. Sawyer, Jr., of the Richland County Public Defender's Office was appointed to represent Applicant. Deputy Solicitor Dan Goldberg of the Fifth Circuit Solicitor's Office prosecuted the case. On May 22, 2014, Applicant appeared in the Richland County Court of General Sessions before the Honorable Brooks P. Goldsmith, circuit court judge, and pled guilty as indicted to attempted armed robbery and first-degree burglary and the lesser-included offense of voluntary manslaughter. By agreement of the parties, sentencing was deferred to allow additional time for victim input and mitigation.

On February 10, 2015, all parties reconvened for a sentencing hearing before the Honorable Alison R. Lee, circuit court judge. Applicant was represented by William A. Hodge, Esquire, who was appointed to represent Applicant shortly after plea counsel Sawyer left the public defender's office. Pursuant to plea negotiations between Applicant and the State for an aggregate sentence between twenty to thirty years imprisonment, Judge Lee sentenced Applicant to twenty years imprisonment for attempted armed robbery, twenty years imprisonment for first-degree burglary, and twenty-five years imprisonment for voluntary manslaughter, with all sentences to be served concurrently. Applicant did not appeal his guilty plea or sentences.

A handwritten signature in black ink, appearing to be 'A. Lee', located at the bottom left of the page.

II. ALLEGATIONS RAISED

In his *pro se* application for post-conviction relief, Applicant alleged he is being held in custody unlawfully based on allegations that his plea was involuntary, his motion to relieve counsel was denied, and counsel was ineffective.

The amendment filed by Applicant's counsel alleged "Counsel was ineffective for failing to object to the Deputy Solicitor breaching the terms of the plea agreement" and seeks "the alternative relief of re-sentencing, with the instruction that the terms of the plea agreement be enforced." Applicant proceeded forward solely on this amended ground at the evidentiary hearing.

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 the witnesses 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.

Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her 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

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that [it] cannot be relied upon as having produced a just result.” Strickland, 466 U.S. 668. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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 plea counsel, the applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption

GT 4

that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 389. "It is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." Bell v. Cone, 535 U.S. 685, 702 (2002) (citing Strickland).

Applicant has alleged the State breached its plea agreement when the Deputy Solicitor recommended the court sentence Applicant to thirty years, which he asserts was in violation of the negotiations for a recommendation of twenty to thirty years imprisonment, and that his counsel was ineffective for failing to object when the Deputy Solicitor made this recommendation for a thirty year sentence. ("And [the victim's father] supports this plea negotiation, and he asked that I relay to the Court – and I agree with him as well – that you sentence Mr. Khan to the maximum sentence under the negotiations of 30 years.").

During the plea proceeding, Applicant informed the court he understood the plea agreement was for a sentence between twenty to thirty years imprisonment. Similarly during the sentencing proceeding, Applicant informed the court the plea negotiations were for a sentence between twenty to thirty years imprisonment. Applicant was sentenced to an aggregate twenty-five years imprisonment—within the negotiated range that Applicant stated numerous times he had agreed to when deciding to enter his guilty plea.

At the evidentiary hearing, Applicant testified he understood the plea agreement with the State was for a sentence within the range of twenty to thirty years imprisonment. He testified this was the negotiation at both his plea proceeding and sentencing proceeding. He testified the Deputy Solicitor departed from this negotiation when he asked the sentencing court to sentence Applicant to the maximum sentence of thirty years. Applicant testified he was sentenced within



the negotiated range which he agreed to in exchange for his guilty plea. However, he testified, "what I am disputing is the simple fact that one co-defendant went home, one got 17, and then I get 25 when he recommended the max." Applicant further clarified that he was not raising any allegations against his sentencing counsel, William A. Hodge, and that his allegations pertained to plea counsel Mark A. Sawyer, Jr.

Sentencing counsel William A. Hodge testified he was appointed to represent Applicant after Applicant had already entered into a negotiation with the State for a sentence within the range of twenty to thirty years imprisonment. He testified he attempted to re-negotiate the plea for a lesser sentence, but the State would not agree to a reduced sentence range or to allow Applicant to withdraw his plea. He testified he and Applicant were both well aware that the negotiated sentence range was between twenty to thirty years when Applicant appeared for his sentencing hearing. He testified he was aware the State intended to ask for the court to impose the maximum sentence of thirty years and that he would ask for the minimum of twenty years, with both being at the outer ranges of the negotiated sentencing range. He testified he did not object when the Deputy Solicitor requested a sentence of thirty years because he believed it was within the terms of the plea agreement for the State to ask for a thirty year sentence.

Plea counsel Mark A. Sawyer, Jr., testified he negotiated the plea agreement with the State on behalf of Applicant and was able to secure a plea to the lesser-included offense of voluntary manslaughter from murder and for a sentencing range of twenty to thirty years. He testified Applicant never wanted to proceed to trial and was always interested in securing the most favorable plea negotiation possible. He testified he understood the plea agreement would allow the State to ask for the maximum sentence of thirty years imprisonment and he would



allow Applicant to request a sentence of twenty years imprisonment, which he conveyed to Applicant.

After a review of the entire record, including the testimony presented at the evidentiary hearing and the transcripts from Applicant's plea and sentencing hearings, this Court finds Applicant has failed to meet his requisite burden of proof and that counsel's performance was in accordance with reasonable professional standards as required under the United States and South Carolina Constitutions. As an initial matter, this Court disagrees with Applicant's assertion that the State breached its plea agreement and finds the Deputy Solicitor's comment to the sentencing court requesting a sentence at the top of the negotiated range did not breach or otherwise violate the plea agreement entered into by Applicant and the State. Moreover, this Court finds counsel's performance was not constitutionally ineffective, as sentencing counsel likewise requested a sentence at the bottom of the negotiated range. Applicant was sentenced to twenty-five years in accordance with the negotiations he entered into with the State, and therefore, received the benefit of his bargain—a sentence within the range of twenty to thirty years imprisonment. Additionally, this Court notes Applicant did not testify he would not have pled guilty but for counsel's alleged failure to object to the State's request for a thirty year sentence. Rather, Applicant testified at the hearing that he was merely upset that his two cooperating co-defendants received more lenient sentences—both which were outside the negotiated range to which Applicant agreed before he entered his guilty plea. This Court finds Applicant has failed to establish any constitutional deprivations entitling him to relief and finds this application must be denied and dismissed with prejudice.

IV. CONCLUSION

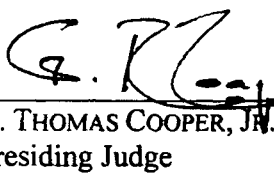
Based on the foregoing, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty 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), SCRPC, 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 must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 5 day of JUNE, 2018.



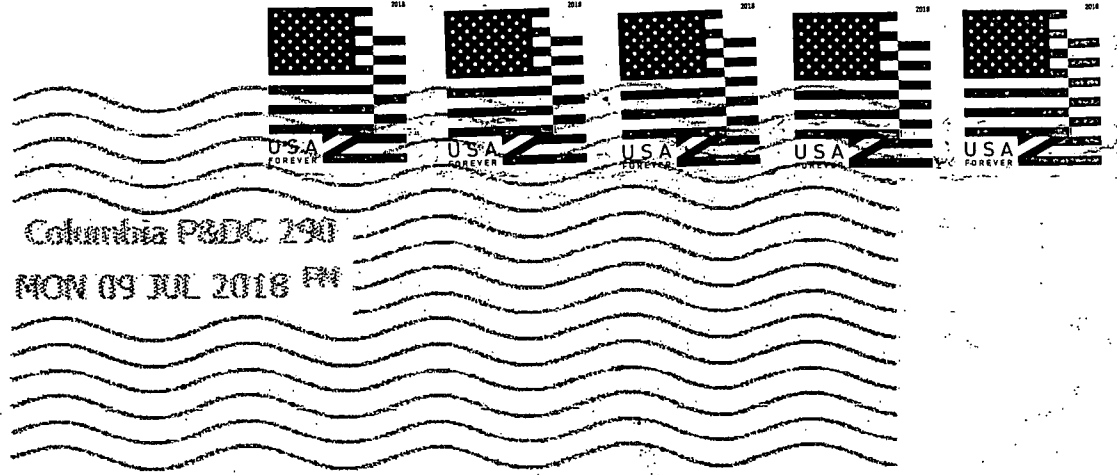
G. THOMAS COOPER, JR.
Presiding Judge
Fifth Judicial Circuit

CANDLER, South Carolina

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