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July 13, 2018

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

RECEIVED
JUL 26 2018
S.C. SUPREME COURT

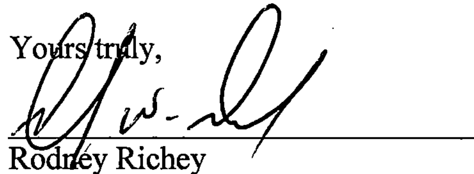
RE: Marcus Willis Thames, SCDC# 223272 vs. The State
Case No: 2016-CP-11-0806

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,



Rodney Richey

RWR/
enclosures
cc: Valerie Garcia Giovanoli, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

HONORABLE MICHAEL G. NETTLES

2016-CP-11-0806

MARCUS WILLIS THAMES, SCDC# 223272

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

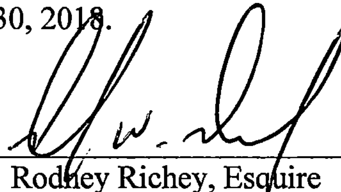
RECEIVED

JUL 26 2018

S.C. SUPREME COURT

NOTICE OF APPEAL

Marcus Willis Thames appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Michael G. Nettles, Circuit Judge on February 21, 2018 and Order issued on June 13, 2018 and filed on June 26, 2018. The Appellant received notice of the judgment on June 30, 2018.



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Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

HONORABLE MICHAEL G. NETTLES

2016-CP-11-0806

MARCUS WILLIS THAMES, SCDC# 223272

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RECEIVED

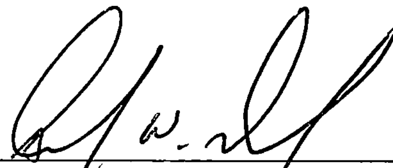
JUL 26 2018

S.C. SUPREME COURT

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on July 23, 2018, addressed to their attorney of record, Valerie Garcia Giovanoli, Esquire Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: July 23, 2018



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STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Marcus Willis Thames, #223272,

Applicant,

v.

State of South Carolina,

Respondent.

2016-CP-11-0806

ORDER OF DISMISSAL WITH PREJUDICE

FILED IN OFFICE OF CLERK OF COURT CHEROKEE COUNTY, S.C.
2018 JUN 25 AM 8:40
BRANDY W. MCBEE

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Marcus Willis Thames (Applicant) on December 6, 2016. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on February 21, 2018 at the Spartanburg County Courthouse. Applicant was present and represented by Rodney W. Richey, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Tracy Racine, Esquire, (Counsel) also testified. This Court had before it a copy of the Cherokee County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the plea transcript, the PCR application, and Respondent's return.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Cherokee County Clerk of Court's orders of commitment. Applicant was indicted at the August 2016 term of the Cherokee County Grand Jury for two (2) counts of grand larceny (2016-GS-11-01018, -01020) and two (2) counts of burglary, second degree (2016-GS-11-01019, -01021). Tracy Racine, Esquire, represented Applicant. On October 10, 2016, Applicant appeared before the

Honorable Roger L. Couch. Applicant pled guilty as indicted to all charges. Judge Couch sentenced Applicant to incarceration for ten (10) years for each count of grand larceny, to run concurrently, and fifteen (15) years for one count of burglary, second degree to run consecutive to the grand larceny sentences. Judge Couch also sentenced Applicant to fifteen (15) years' imprisonment, suspended upon the service of time served and five years' probation, to be served consecutively to all other sentences. Applicant did not appeal his convictions or sentences.

ALLEGATIONS

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
   a. "The evidence shown for two of the charges did not support a conviction with the time that was given."
   b. "My lawyer withheld information from me pertaining to the case."
   c. "She was incompetent I was told would be given credit in my plea agreement"
   d. "The store cameras did not show in anyway nor state evidence that I was involved in the Boose outlet burglary."
   e. "My lawyer told me the cameras did not work. She said she would negotiate a better plea but only insisted I take the plea because of my record."
   f. "The State of South Carolina served me with a life sentence pursuant to Section 17-25-45."

At the start of the hearing, Applicant delineated the allegations he would be pursuing at the hearing. Those allegations include: that his plea was involuntary because he was coerced into pleading guilty by way of the notice of intent to seek life without parole ("LWOP"); Counsel misadvised him to plead guilty; and Counsel promised him credit for time he was serving while arrested in North Carolina and that promise induced his plea.

SUMMARY OF TESTIMONY AT PCR

I. Applicant testified to the following:

Applicant testified he wanted a trial and he told Counsel that. Counsel's response was that trial was not in Applicant's best interest. Applicant claimed his guilty plea was not voluntary because Counsel told him he would be risking a life sentence because of his record and advised him he should plead guilty. Applicant believed this advice was only based on his record and not because he was actually guilty. Applicant further believes the LWOP notice was unlawful because his prior conviction for conspiracy to commit armed robbery was not a "most-serious" offense. However, Applicant admitted to having the following criminal convictions: four counts of robbery with a dangerous weapon from 2005; common law robbery and conspiracy to commit armed robbery from 2010; breaking and entering and felony larceny from 2015; and two breaking and entering, two larceny after breaking, and possession of a weapon by a felon from 2016.

Applicant testified the two burglary charges arose from two incidents: one occurring at Michael Kors outlet store and the other at the Bose outlet store. Applicant conceded the stores were in the same shopping center and the burglaries happened at 1:40 AM and 2:00 AM, respectively. Applicant testified he did not know until his guilty plea when the solicitor stated the cameras in the Bose store were not working, that there was not video evidence of that burglary charge. Applicant claimed Counsel never reviewed the discovery involving the second burglary. Applicant testified Counsel met with him three times and at the second meeting she only briefly reviewed his discovery from the first burglary.

Applicant testified Counsel did not sufficiently investigate and did not express any confidence in pursuing a jury trial for him. Applicant testified Counsel promised him a number

of things in order to plead. He alleged Counsel promised he would not have to pay restitution, he would get credit for time he served in North Carolina and he would be pleading to only non-violent offenses. Applicant admitted he was arrested in North Carolina for the same thing, burglarizing a Michael Kors store and that he was serving time in North Carolina for that charge. Applicant also admitted that when he was arrested, two ipods that were of the type stolen from the Bose store were found in the car he was in. However, he denied that the car was rented in his name. Applicant admitted there were various photos in his cell phone of Michael Kors merchandise he was attempting to sell.

Applicant admitted he never tried to contact Counsel after the plea regarding the things he was promised he would receive but did not. Applicant testified he was not going to do anything about it, until a family member told him to file a PCR.

II. Counsel testified to the following:

Counsel has been practicing criminal law exclusively for seven years. Counsel was appointed to represent Applicant. Applicant never told her if he was or was not guilty and she did not ask him. Counsel simply explained to Applicant the evidence against him, the consequences he faced, the likelihood of conviction, and his option to either plead guilty or go to trial. Counsel testified she told Applicant it was solely his decision on what to do. Counsel testified they may have discussed trial in the beginning, but after the State served the LWOP notice, Applicant wanted to plead guilty.

Counsel testified she believes they met approximately three times and went over the discovery in detail with Applicant. She reviewed each sheet of paper, showed it to him and she believed she provided him his own copies, but was not absolutely sure. It is her general practice to provide her clients with their own copy. She also had evidence on discs, which she offered to let him

review, but could not recall if he actually reviewed them or not. Counsel also testified she went over the violent and non-violent categorization of his offenses and Applicant even signed the sentencing sheets prior to the plea with the categorization annotated. Counsel also testified they discussed the restitution and Applicant signed the restitution order prior to his guilty plea. With regard to the credit for time from his North Carolina sentence, she explained to him that it was up to the South Carolina Department of Corrections to determine what time he's entitled to. Applicant never indicated that receiving credit for his NC time was of importance, nor did Counsel ever promise him he would receive the credit.

Counsel recalled the Bose store cameras having problems, possibly producing a grainy video in which you could not positively identify Applicant. However, she believed there was enough other evidence to convict him of the Bose burglary too. That evidence included two ipods that had been stolen from the Bose store found on Applicant at the time of his arrest, Applicant wearing the same clothes when he was caught burglarizing the Michael Kors in NC that he wore the night of the instant burglaries, the temporal proximity of the burglary at Michael Kors and Bose, and a text found in his phone shortly after the Bose burglary, at 2:25 AM, stating, "the Bose store didn't have what you were looking for, maybe the next store will."

Counsel testified she did not coerce Applicant to plead guilty. She did not use the LWOP notice to threaten him, but rather explained to Applicant that the State could have two shots at trying him on the two burglaries and both would give him a life sentence. Counsel reemphasized she always tells her clients it is their decision because it is their lives and they are the one who has to serve the sentence, not Counsel.

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 had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency.

I. Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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 (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. With respect to guilty plea counsel, 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, 88 L.Ed. 2d 203 (1985).

Applicant also asserts his plea was involuntary because Counsel coerced him. The record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton, 376 S.C. 138, 654 S.E.2d at 874 (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). A 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 the court and defendant, between the 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)). Further, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton, 376 S.C. at 137–38, 654 S.E.2d at 874 (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)). "In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." Id. at 138–39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

In PCR cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citations omitted). An applicant who pleads guilty on the advice of counsel may collaterally

attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant 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). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985). Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann v. Richardson, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." Id. at 771.

The record fully supports the knowing and voluntary nature of Applicant's plea. Applicant has failed to give a sufficient reason to be allowed to depart from the truth of his statements made during his guilty plea. Applicant testified during the plea that no one did anything in an effort to force him to plead guilty, no one promised him anything to get him to plead guilty and that he made the decision to plead of his own free will. (Tr. p. 12). He also testified he had a chance to consult with Counsel and was satisfied with her services. (Tr. p. 9-10). With regard to Applicant's allegation he was promised credit for time served in North Carolina, this Court finds that allegation wholly without merit or credibility. Not only was the issue addressed during Applicant's guilty plea, Counsel testimony, that she did not promise him he would receive the credit and that SCDC would determine that, to be credible.

This Court further finds Counsel's testimony credible that she explained to Applicant that some of his charges were violent, which is corroborated by the notations on the sentencing sheet

Applicant signed. Counsel's testimony, that she explained restitution to Applicant, is also credible and corroborated by the signed restitution order. This Court finds Counsel received and reviewed all the discovery in the case with Applicant. Even if she had not, the transcript recites all of the facts which Applicant agreed with and to which he admitted guilt. (Tr. p. 15; 20).

This Court further finds the State was entitled to seek LWOP based on the circumstances of this case and this was not coercive, but rather, lawful. Furthermore, Counsel did not coerce Applicant by advising him of the potential life sentence he faced. It was incumbent upon Counsel to inform Applicant of the potential life sentence and had she not done so, Applicant's decision to plead or go to trial would have been uninformed and involuntary.

This Court finds Applicant's plea was voluntary and knowing. This Court further finds Counsel's advice to plead guilty was sound in light of the evidence the State had against him and the life without parole sentence he was facing.

Applicant has failed to meet his burden of proving his guilty plea was involuntary, that Counsel was deficient or that he was prejudiced by any such deficiencies.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

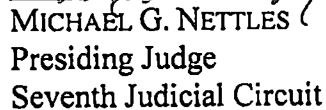
This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate

review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

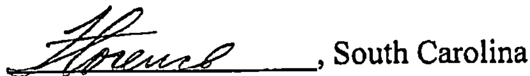
IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
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 13 day of June, 2018.



MICHAEL G. NETTLES
Presiding Judge
Seventh Judicial Circuit



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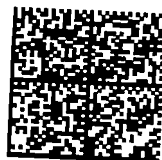

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