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July 30, 2018

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

AUG 03 2018

S.C. SUPREME COURT

Re: Billy Alford v State, 2016-CP-10-0359

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Horry County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc:

Johnny James Jr., Esq.

Billy Alford

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

AUG 03 2018

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable Larry B Hyman Circuit Judge

Case No.: 2015-CP-26-07716

Billy Alford.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Billy Alford appeals the Honorable Larry B Hyman's July 17, Order of Dismissal. Undersigned counsel received notice of entry of the order on July 30, 2018. A copy of the order on appeal is attached hereto.



James K Falk
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PO Box 1058
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July 30, 2018

Johnny James Jr., Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable Larry B Hyman, Circuit Judge

Case No.: 2016-CP-10-0359

Billy Alford.....PETITIONER

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CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Johnny James Jr., Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this July 30, 2018.



James K. Falk
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Charleston, SC 29402

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE JUDICIAL CIRCUIT
 COUNTY OF HORRY)

Billy L. Alford,) Case No.: 2015-CP-26-07716
)

Applicant,)
)

v.)

ORDER OF DISMISSAL

State of South Carolina,)
)

Respondent.)
)

Horry County
 2018 JUL 20 PM 1:35
 KENNETH L. ELMIS
 CLERK OF COURT
 HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed by Billy L. Alford (“Applicant”) on October 27, 2015. Respondent made its return on or about May 5, 2016. The Court convened an evidentiary hearing into the matter on Thursday, May 24, 2018, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by James K. Falk, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General’s Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant’s plea counsel, Paola C. Pinzon, Esq. (“Counsel”) also testified. The Court had before it Applicant’s records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant’s direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant was confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the June 2011 term of the Horry County Grand Jury for assault and battery, second degree (2011-GS-26-02121). Paola C. Pinzon, Esq. represented Applicant, and J. Stephen Grooms, Esq., of the

Fifteenth Circuit Solicitor's Office, prosecuted the case. On November 9, 2011, Applicant pled guilty as indicted. The Honorable Edward B. Cottingham sentenced Applicant to imprisonment for a term of 18 years.

Applicant filed a notice of appeal on December 2, 2011; the South Carolina Court of Appeals subsequently dismissed that appeal as untimely. Applicant filed a letter on February 21, 2012, requesting his appeal be reinstated, which was denied by the Court on March 26, 2012. The Remittitur was issued on June 12, 2012.

First PCR Application: 2012-CP-26-05785

Applicant filed his first application for post-conviction relief on July 27, 2012 (2011-GS-26-02121). He alleged the following grounds for relief in his application:

1. "Rule 2 S.C.R.C.P."
 - a. "Filed for Preliminary Hearing, never granted through Public Defender"
2. "Rule 3(c) S.C.R.C.P. 1.2 File Stamping"
 - a. "Indictment Never filed through Clerk of Court"
3. "Ineffective Assistance of Representation"
 - a. "My attorney failed to contact my witnesses of which would have confirmed my defense of not being in Conway at the River-walk where the alleged incident was suppose to have occurred."
 - b. "My attorney tampered with evidence pertaining to my case which was in fact a copy of my cell phone records. The date of March 29th was complete deleted from the requested copy that was sent from [Verizon] Wireless, who was the provider of my phone service."
 - c. "My attorney failed to file motions of which I requested to be filed pertaining to my case. (A). I requested a motion to be filed for a dismissal of charges due to the fact my charge was upgraded from Simple Assault and Battery to Assault and Battery 2nd Degree, without any evidence or police report as to why the charge was enhanced. (B). I requested a motion e filed due to the fact I wasn't given a Preliminary Hearing of which I requested as is my right to Due Process of Law guaranteed me through the South Carolina Constitution as well as the United States Constitution. 1.9.2 Preliminary Hearings. To be held within 10 days of the dates of demand except for good cause shown."

- d. "My attorney was to inform the court, of my not being legally indicted as defined in the SCRCR Rule 3. (a)-(d) and Article 1 section 11 of the U.S. Constitution."
- e. "My attorney failed to represent me as defined in the law Client-Lawyer Relationships and was therefore ineffective in her representation in regards to my criminal defense. Based upon the above facts I had no option but to plead guilty, due to the fact my attorney ineffectively represented me in allowing the prosecution to maliciously prosecute me through her not filing the proper motions through the courts after discovering that the State tampered with requested evidence pertaining to my defense."

Respondent made its return on October 2, 2012, and an evidentiary hearing into the matter was convened on December 16, 2013, before the Honorable Steven H. John. Russell B. Long, Esq., appeared on behalf of Applicant, and Joshua L. Thomas, Esq., of the South Carolina Attorney General's Office, represented Respondent. Applicant did not appear at the hearing. Judge John continued the matter to permit Respondent to file a motion to dismiss for failure to prosecute, and Respondent so filed on February 21, 2014.

A hearing into Respondent's motion to dismiss was convened on March 20, 2014, before the Honorable George C. James, Jr. Mr. Long and Mr. Thomas again appeared representing their respective parties. Applicant was not present. Applicant's attorney informed the Court that Applicant failed to contact him regarding the action, and further informed the Court of his numerous efforts to contact Applicant. Respondent moved to dismiss the matter due to Applicant's failure to prosecute. Judge James, by written order dated April 2, 2014, and filed April 10, 2014, dismissed the application for failure to prosecute.

Applicant filed a notice of appeal on April 15, 2015, but dated it April 9, 2014. Upon request for clarification from the South Carolina Supreme Court, Applicant submitted another certification of service dated May 7, 2015. On May 20, 2015, the Supreme Court denied the

appeal as untimely. Alford v. State, S.C. Sup. Ct. Order dated May 20, 2015. The remittitur was returned on June 5, 2015.

Present Application

Applicant filed his second application for post-conviction relief on October 27, 2015. Respondent made its return and motion to dismiss on May 5, 2016, arguing the application should be dismissed as untimely and successive. The Honorable William H. Seals, Jr., issued a Conditional Order of Dismissal filed May 23, 2016, giving Applicant 20 days from the date of service to show why the Order should not become final. Applicant was served on June 16, 2016, and timely filed a reply on July 6, 2016. In that reply, Applicant claimed he was transported to the Horry County Courthouse for the March 20, 2014, hearing, but was detained in the holding cells at the courthouse until he was told his hearing was canceled and he was to be transported back to local detention.

A hearing was briefly convened before the Honorable Steven H. John on March 23, 2018. Applicant appeared *pro se*¹ and Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented the State. Respondent indicated evidence supported Applicant's response to the Conditional Order of Dismissal—to wit: a photographic copy of a log book from J. Reuben Long Detention Center indicating Applicant was transported to court on March 20, 2014, as claimed by Applicant. Respondent requested the Conditional Order be vacated and new counsel be appointed for Applicant. Applicant did not object. By written order signed March 15, 2018, and filed March 23, 2018, Judge John vacated the Conditional Order of Dismissal and directed the Horry County Clerk of Court appoint counsel to Applicant for this action.

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

¹ Applicant was present with counsel for a separate post-conviction relief matter, Daniel A. Selwa, II, Esq.

1. "Ineffective Assistance of PCR Counsel"
 - a. "Failure to protect my rights pursuant to South Car. PCR Act, 12-27-20 - 120. Specifically S.C. Code ann. § 17-27-90 Right to present all grounds in a PCR"

At the evidentiary hearing, Applicant proceeded forward on certain allegations set forth in his original application for post-conviction relief in 2012-CP-26-05785, namely:

1. Ineffective Assistance of Counsel, in that:
 - a. Counsel failed to file a motion to dismiss for being indicted on a greater offense than was originally charged; and
 - b. Counsel failed to properly acquire phone records in order to present an alibi defense.

II. 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 records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

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 at 117, 386 S.E.2d at 625 (citing Strickland at 688). 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 at 117-18, 386 S.E.2d at 625 (citing Strickland at 694). 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 pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

1. Failure to Move for Dismissal of Charges

Applicant alleges Counsel was ineffective in failing to seek dismissal of his indictment on the basis that he was indicted for more severe offenses than were originally charged by law enforcement. The basis for determining the sufficiency of the indictment is set forth by statute:

Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

S.C. Code Ann. § 17-19-20. Generally, "guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses[.]" Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

Applicant did not present any legal authority to support his claim that a variance between the indictment and the original arrest warrant is a fatal defect, nor is this Court aware of any authority to support his proposition. To the contrary, "[b]oth the South Carolina Constitution and South Carolina case law place the unfettered discretion to prosecute solely in the prosecutor's hands." State v. Thrift, 312 S.C. 282, 291-92, 440 S.E.2d 341, 346 (1994). "Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety." Id., 312 S.C. at 292, 440

S.E.2d at 346-47. In fact, upon investigation subsequent to arrest and in the exercise of professional legal judgment, it is entirely common for prosecutors to bring additional charges against defendants by way of direct presentment to the grand jury, or to determine an act charged violates a more severe statute or common law than originally identified by law enforcement. In short, the premise of Applicant's allegation is without merit as a matter of law.

In any event, Counsel testified she moved to dismiss the indictment, and did everything Applicant asked of her. Counsel asserted nobody made Applicant plead guilty. The Court finds Counsel's testimony credible. Applicant testified at the hearing that he purposefully pled guilty in order to take his case to the appellate level.² Applicant additionally testified he did not wish to spend any more time in jail. Whichever strategic reasoning was the real motivator, this Court finds Applicant's plea was knowingly, intelligently, and voluntarily entered. As such, for all of these reasons, Applicant's demand for relief by way of this allegation is **DENIED**.

2. Failure to Investigate Phone Records

Applicant alleges Counsel was ineffective for failing to properly acquire accurate phone records which could have placed him in Surfside Beach at the time the victim was attacked in western Myrtle Beach. In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as

² Counsel denied ever being told of this strategic reasoning.

to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.*, 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Applicant claimed at the evidentiary hearing that he was on the phone with the victim at the time of the alleged crime. Applicant testified he was in Surfside Beach, and later Socastee while the victim was in western Myrtle Beach. Applicant asserted he did not have cell phone records at the time of his plea, and that the records provided to him were missing the date in question: March 29, 2011.

Counsel testified that records were subpoenaed from Verizon Wireless by one of the public defenders who represented Applicant prior to her taking the case;³ the telecom responded by providing 46 pages of call data (“Verizon Records”). The Verizon Records in Counsel’s file were introduced as an exhibit and, when asked why they conspicuously did not include any data from the date in question, Counsel testified she did not know. Counsel denied tampering with the Verizon Records. Counsel further denied extracting or manipulating data from the Verizon Records for trial purposes. Counsel was shown a separate set of call logs by Applicant’s PCR counsel, but professed that it was the first time she had ever seen that call log.⁴ Counsel testified she reviewed all matters in discovery with Applicant.

The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. First, the reasoning and conclusion set forth in II.A.1, above, is of equal force here—Applicant, for his

³ Applicant was initially represented by J. Andrew Ritner, Esq., and then Chief Public Defender Orrie West, Esq., before Counsel was appointed to his case.

⁴ A portion of the hearing revolved around competing sets of phone records: the Verizon Records and a printout produced by Applicant purporting to be a record of his phone activity from his *aunt’s* Verizon Wireless account. Respondent moved the Verizon Records into evidence after Applicant repeatedly referenced them on direct examination of Counsel. This Court admitted those records not for the truth asserted, but as materials relied upon by Counsel in the course of her representation of Applicant. Applicant thereafter attempted to introduce the second set of logs, but in light of Counsel’s professed unfamiliarity with the records, and the lack of any other foundation (neither Applicant’s aunt nor any records custodian appeared at the hearing), this Court declined to admit the second set of logs from the record.

own reasons, knowingly, intelligently, and voluntarily entered his plea of guilty. Second, the Court finds Counsel *did* possess the Verizon Records demanded by Applicant, and reviewed them with Applicant prior to his guilty plea. Third, the Court finds Applicant has failed to present *competent* evidence to show what, if anything, additional investigation into Applicant's phone history would have revealed, leaving this Court with mere speculation as to what might have been discovered. For all these reasons, Applicant's demand for relief by way of this allegation is **DENIED**.

3. Improper Enticement to Plead Guilty

Although not raised in *any* prior filing before the Court, Applicant claimed at the very end of the evidentiary hearing that he was enticed to plead guilty by way of a promise by counsel to take him to dinner, resulting in a brief relationship. Excuse from procedural default in PCR matters is rare, but the courts are encouraged to exercise its own discretion to reach the merits of *substantial* issues within the flexibility of the Rules of Civil Procedure. Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017). Counsel was not recalled to testify to this improperly presented allegation, but was visible in the gallery and involuntarily reacted with tremendous, incredulous dismay. Those present, including attorney witnesses to other matters, court staff, and Applicant himself, struggled to maintain professional composure. The Court finds Applicant's claim lacks even a scintilla of credibility. The Court further finds this is not an appropriate case to excuse procedural default—desperate, outlandish claims launched in the final moments of a second trip to the witness stand, after adverse rulings and testimony, are not the appropriate basis for procedural flexibility. Accordingly, the Court declines to consider this allegation as not properly pled and presented.

III. CONCLUSION

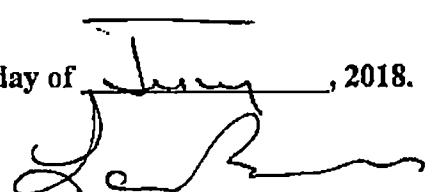
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) 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 PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

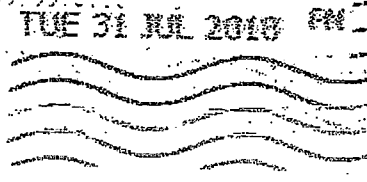
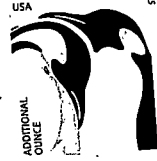
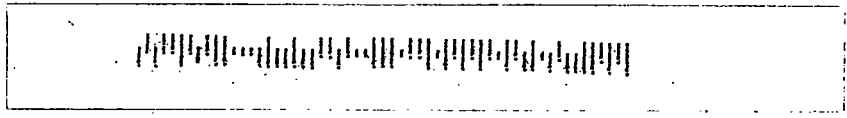
IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 17 day of July, 2018.


LARRY B. HYMAN, JR.
Presiding Judge
Fifteenth Judicial Circuit

Cowley, South Carolina



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