



WALLER LAW GROUP

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AUG 06 2018

S.C. SUPREME COURT

August 2, 2018

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

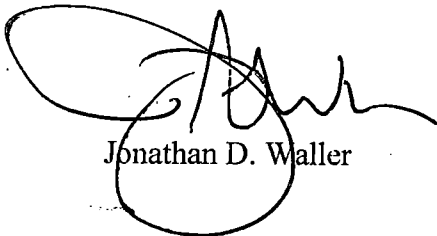
Re: Aryee Henderson vs. State of South Carolina
C/A No: 2016-CP-40-4364

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Henderson in this matter and am also enclosing a copy of the Order. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,



Jonathan D. Waller

Cc: Lindsey A. McCallister, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA
In The Supreme Court

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AUG 06 2018

APPEAL FROM RICHLAND COUNTY
Jocelyn Newman, Circuit Court Judge

S.C. SUPREME COURT

2016-CP-40-4364

Aryee Henderson, # 237887,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Aryee Henderson, # 237887, appeals the Order of Dismissal denying his Motion Pursuant to Rule 60(b), SCRPC filed July 29, 2018, issued by the Honorable Jocelyn Newman, Presiding Judge, Fifth Judicial Circuit.



Jonathan D. Waller

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ATTORNEY FOR PETITIONER

August 2, 2018

Other Counsel of Record:
Lindsey A. McCallister, Assistant Attorney General
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Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Jocelyn Newman, Circuit Court Judge

S.C. SUPREME COURT

2016-CP-40-4364

Aryee Henderson, # 237887,

Appellant,

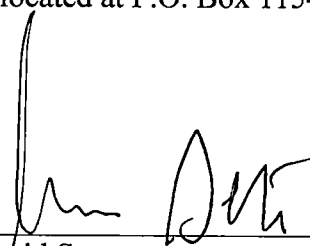
v.

STATE OF SOUTH CAROLINA,

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

August 2, 2018

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2016-CP-40-04364

AYREE HENDERSON (SCDC# 237887)

STATE OF SOUTH CAROLINA

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: NEWMAN, J.

Attorney for : Plaintiff Defendant
 or
 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 or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, COUNTY 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.

Judith Newman
 Circuit Court Judge

2757
 Judge Code

March 20, 2018
 Date

2018 MAR 20 PM 3:14
 FILED
 RICHLAND COUNTY
 JEANETTE W. HICKS
 C.C. & E.S.

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 CP-40-04364

AYREE HENDERSON (SCDC #237887)

STATE OF SOUTH CAROLINA

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: NEWMAN, J.	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <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 or heard and a decision rendered. See Page 2 for additional information.
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- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; 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

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: Applicant's "Motion Pursuant to Rule 60(b), SCRPC" is DENIED. The Court finds that the final judgment itself was not obtained by mistake, inadvertence, surprise, or excusable neglect. Rather, counsel was aware of the dismissal of this action, and it was simply the review (or failure to review) of counsel's email that was the mistake. The Court finds this reason insufficient to warrant relief from judgment as requested.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

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.



Circuit Court Judge

2757

Judge Code

July 26, 2018

Date

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Ayree Henderson (SCDC #237887),

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2016-CP-40-04364

ORDER OF DISMISSAL

This matter comes before the Court upon Application for Post-Conviction Relief filed by Applicant Ayree Henderson ("Applicant") on July 21, 2016. Respondent filed its Return on July 13, 2017. "Applicant's Amendment to Original PCR Application" was filed on August 22, 2017; and an "Amendment to Application for Post Conviction Relief." dated January 18, 2018, was also provided to the Court (although apparently not filed with the Clerk of Court). On January 24, 2018, an evidentiary hearing was conducted at the Richland County Judicial Center. Applicant was present along with his counsel, Jonathan D. Waller, Esquire. The State was represented by Jessica Kinard, Esquire, of the South Carolina Office of the Attorney General.

For the reasons set forth below, the Application for Post-Conviction Relief is DENIED, and this matter is DISMISSED WITH PREJUDICE.

FACTUAL AND PROCEDURAL HISTORY

At the November 2002 term of the Richland County Grand Jury, Applicant was indicted for murder. Beginning on September 21, 2004, Applicant was tried by a jury and was ultimately convicted of murder. He was sentenced to thirty years' imprisonment. Applicant filed for post-conviction relief ("PCR"), which was granted by Order filed July 14, 2010. That decision was affirmed by the appellate court.



In January 2016, Applicant appeared in the Richland County Court of General Sessions *pro se* after having filed a "speedy trial motion." At that time, Applicant expressed his desire to enter a guilty plea, but he also accepted the Court's offer to appoint counsel to represent him. The Richland County Public Defender's Office was appointed, and J. Rhodes Bailey, Esquire ("plea counsel"), was assigned to Applicant's case.

The State ultimately extended a plea offer to Applicant, allowing him to plead guilty to the lesser charge of voluntary manslaughter without the State offering any negotiation or recommendation of what Applicant's sentence should be. Applicant accepted that offer and entered his guilty plea on June 20, 2016. He received a sentence of twenty-five years in the South Carolina Department of Corrections ("SCDC"). Approximately one month later, Applicant filed the instant action in which he alleges (1) that plea counsel coerced him to plead guilty, (2) that plea counsel failed to investigate the allegations of his case, (3) that plea counsel failed to object to the State's breach of the plea agreement, (4) that plea counsel failed to challenge the affidavit upon which his arrest warrant was premised, and (5) that plea counsel failed to contest the improper impaneling of the Richland County Grand Jury.

A. Testimony of Applicant

During the evidentiary hearing, Applicant testified that when he appeared in court in early January 2016 and was appointed counsel, he first spoke with Lucas Hawks, Esquire, of the Richland County Public Defender's Office. The conversation occurred in the courtroom, where Applicant told Hawks that he wanted to plead guilty and asked that Hawks seek a plea offer. Applicant also testified that the prosecutor instructed that he be returned to court on January 19, but that didn't occur.



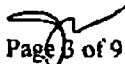
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Order of Dismissal

Ayree Henderson v. State, 2016-CP-40-04364

Instead, according to Applicant, plea counsel appeared at the county jail on January 20 for his first of three visits with him. During that meeting, they discussed the transcript and exhibits from Applicant's previous trial. Applicant also asked plea counsel to retrieve certain documents from the jail's property room and to photocopy them. According to Applicant, plea counsel did as instructed and ultimately discussed the documents with Applicant; however, counsel never gave Applicant a copy of the documents. Applicant also testified that during this meeting, plea counsel informed him that he had rejected the State's initial plea offer on his behalf without having conveyed the offer to Applicant.

Applicant also testified that he pled guilty based on plea counsel's advice that a plea would be better than a trial. Plea counsel told Applicant that even if prosecution witnesses wouldn't appear for a new trial, that their previous trial testimony would be used. Applicant stated that he had also filed a *pro se* motion challenging probable cause to have arrested him, but plea counsel told him that the motion was meritless and that a hearing on the motion would be futile. Applicant also testified that he believed that if he went to trial, plea counsel would restrict Applicant's testimony and not allow him to say what he wanted to say. (Applicant later contradicted this, testifying that plea counsel told him that he wouldn't be able to testify at all during trial.) According to Applicant, he repeatedly asked plea counsel to seek a plea offer for him. He ultimately pled guilty as a choice of "the lesser of two evils."

Applicant contends that immediately prior to the plea, plea counsel told him that the prosecutor would discuss his criminal record, but that it wouldn't hurt his case. However, Applicant was unaware that the prosecutor would apprise the court of his disciplinary history while at the South Carolina Department of Corrections. Applicant was also surprised when the family of the victim of the crime was able to address the court during his guilty plea. Applicant had


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understood that his "straight up" plea to voluntary manslaughter meant that no one connected with the prosecution would make any comment on the sentence that he should receive. Therefore, when both the victim's family and the prosecutor did so, Applicant was surprised and believes that plea counsel should have objected. He contends that if he had known that those statements would be made, that would've impacted his decision to plead guilty.

II. Testimony of Plea Counsel

Plea counsel, J. Rhodes Bailey, also testified at the evidentiary hearing and corroborated many of Applicant's allegations. Specifically, plea counsel admits that he visited Applicant at the county jail on January 20, 2016 and discussed the previous trial of Applicant's case. Plea counsel also agrees that he retrieved certain documents from the jail's property room, photocopied them and reviewed them without providing a copy to Applicant. According to plea counsel, the documents were ultimately the basis of a grievance which Applicant filed against him, but the grievance was deemed unfounded and dismissed.

Plea counsel stated that Applicant asked him about a guilty plea repeatedly and that, therefore, there was never any plan to try his case. He had begun preliminary trial preparation, but he never hired an investigator or took any other steps to prepare because Applicant was adamant that he wanted to plead guilty. No trial was ever even scheduled for Applicant's case. Plea counsel also denied that he ever rejected any plea offer from the State without first discussing it with Applicant.

Finally, plea counsel testified that, like Applicant, he didn't believe that the discussion of Applicant's disciplinary history during the guilty plea was relevant; however, based on his experience, he didn't think that it was objectionable or that objecting to the information would make any difference. Plea counsel denies that he told Applicant that neither the prosecutor nor the


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victim's family would comment on sentencing during the plea. Rather, plea counsel knows that victims' families routinely make statements during guilty pleas. He testified that the subject simply never arose in his conversations with Applicant.

CONCLUSIONS OF LAW

In a PCR action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence." Rule 71.1(e), SCRPC. Specifically, "[a] defendant 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 defendant would not have pled guilty." *Johnson v. Catoe*, 336 S.C. 354, 358, 520 S.E.2d 617, 619 (1999) (citing *Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997) and *Satterwhite v. State*, 325 S.C. 254, 481 S.E.2d 709 (1997)).

I. Involuntary Plea

Applicant alleges that his guilty plea was involuntary because it was coerced by plea counsel, who failed to properly investigate his case, failed to challenge the arrest warrant affidavit, and failed to contest the impaneling of the Richland County Grand Jury. These allegations are without merit.


"Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants." *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). "A defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases." *Richardson v. State*, 310 S.C. 360, 363, 426 S.E.2d 795,

797 (1993) (citing *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 369, 88 L.Ed.2d 203, 209 (1985)).

“[A] guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not ‘a reasonably competent attorney’ and the advice was not ‘within the range of competence demanded of attorneys in criminal cases.’” *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 770 (1970)). “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 687-88.

“Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption 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.’” *Id.* at 689 (citation omitted). Applicant has not done that here.

Having weighed the credibility of the testifying witnesses and having considered the admissions and explanations offered, the Court cannot find that plea counsel was not “a reasonably competent attorney” or that his advice was not “within the range of competence demanded of attorneys in criminal cases.” The Court finds no professional errors on the part of plea counsel; therefore, no prejudice could have resulted from plea counsel’s representation. Further, while Applicant contends that he would have gone to trial but for counsel’s advice, this is not supported by the evidence. Rather, the credible testimony in this case is that Applicant always wanted to plead guilty and repeatedly requested a plea offer. Applicant is in the unique position of having previously elected a trial on the same criminal charges. Thus, he was well aware of his alternatives,



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Ayree Henderson v. State, 2016-CP-40-04364

including the logistics of how a jury trial would occur. He testified that he simply chose "the lesser of two evils." Therefore, the PCR application is denied as to these allegations.

II. Plea Bargain

Similarly, Applicant's contention that counsel was ineffective for failing to act when the "Solicitor's office breached the plea agreement" is meritless.

Although Applicant was charged with murder, the State ultimately extended a plea offer by which Applicant could enter a "straight up" plea to the lesser-included offense of voluntary manslaughter. He did so on June 20, 2016. During the plea the victim's mother, in response to the court's inquiry, requested that Applicant be given a thirty-year sentence. The prosecutor echoed the request of the victim's mother but also apprised the court of Applicant's disciplinary history while he was in SCDC and in the Richland County Detention Center. Applicant complains that those actions amounted to the State breaching the plea agreement, as he interpreted "straight up" to mean that no one would comment on sentencing.

Specifically, Applicant complains that plea counsel should have objected when the prosecutor introduced evidence of his disciplinary history while at SCDC and when the court permitted both the prosecutor and the victim's family to comment on Applicant's potential sentence. Neither amounts to a breach of the "plea agreement" in Applicant's case.

Applicant is correct that, typically, a defendant must be permitted to withdraw their guilty plea when it was induced by a broken promise made by the prosecutor that they wouldn't comment on sentencing, *see, e.g., Santobello v. New York*, 404 U.S. 257 (1971); however, this is not a typical case. Here, Applicant has not proven that the assistant solicitor promised not to comment on sentencing. Even assuming that the promise was made, there has been no real breach of that agreement or negative effect to Applicant. Instead, the victim's mother made a sentencing


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recommendation. While that recommendation was repeated by the prosecutor, she also subsequently said, "Whatever sentence you feel like would be appropriate, Your Honor," which is not a sentencing recommendation at all. Further, all of this discussion occurred *before* the court accepted Applicant's guilty plea. It is clear that, subsequent to those comments, Applicant had a number of opportunities to withdraw his guilty plea. In fact, the court asked several times whether Applicant wished to plead guilty; and each time, Applicant said that he did. Therefore, the PCR application is denied as to these allegations as well.

III. Investigation and Evidence Considered

Finally, Applicant contends that plea counsel failed to investigate the allegations against him or "conduct any pretrial investigation," to challenge the arrest warrant affidavit and to challenge the impanelment of the grand jury. These allegations are also without merit, and Applicant has failed to provide any evidence that would entitle him to relief.

A PCR applicant is not entitled to relief where there is no evidence presented at his PCR hearing to demonstrate how the outcome of his case might've been different if counsel were more prepared. *Skeen v. State of South Carolina*, 325 S.C. 210, 213-15, 481, S.E.2d 129, 131-32 (1997). This is particularly true here, where Applicant pled guilty and always wanted to plead guilty.

Similarly, Applicant has failed to offer evidence of his claims of defects in the arrest warrant and the grand jury. Further, any such claims are obviated by Applicant's guilty plea. Challenges regarding the arrest and indictment are, in essence, claims that Applicant's constitutional rights were violated. However, any related constitutional rights were waived when Applicant pled guilty to the charge. Without evidence that Applicant's waiver of those rights was not knowing, voluntary and intelligent (which Applicant doesn't even allege), Applicant cannot prevail on this claim, and the PCR application is denied as to these allegations as well. *See. e.g.*


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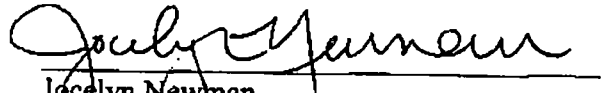
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Pittman v. State of South Carolina, 337 S.C. 597, 524 S.E.2d 623 (1999) (discussing guilty pleas and waiver of constitutional rights).

IT IS THEREFORE ORDERED that the Application for Post-Conviction relief is DENIED and DISMISSED with prejudice.

IT IS FURTHER ORDERED that Applicant Ayree Henderson be REMANDED to the custody of the State of South Carolina.

AND IT IS SO ORDERED.


Jacquelyn Newman
Presiding Judge

March 20, 2018
Columbia, South Carolina.

W

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COLUMBIA, SC 29201

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Clerk of Court
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