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September 21, 2018

The South Carolina Supreme Court
Clerk, Daniel Shearouse
P.O. Box 11330
Columbia, SC 29211

RE: Desmond Mayo #359416 v. State of South Carolina

Dear Sir or Madam:

Enclosed please find for filing an original and copy of a Notice of Appeal and Certificate of Service.

Kindly return the clocked copies to me in the enclosed envelope. Please feel free to contact me should you have any questions.

Yours truly,

Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Lindsey McCallister, Esq.
Desmond Mayo #359416
Appellate Defense

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
SEP 27 2018
S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post-Conviction Relief

Jean H. Toal, Circuit Court Judge

Case No.: 2015-CP-40-1165

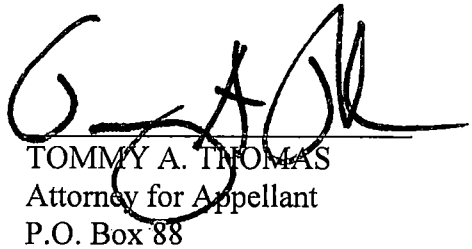
Desmond Mayo #359416,..... Appellant,

vs.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

Desmond Mayo #359416 appeals the Order of the Honorable Jean H. Toal, dated August 22, 2018 and filed on August 28, 2018. Appellant received written notice of entry of this order on September 6, 2018.



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Irmo, South Carolina
September 24, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
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Post-Conviction Relief

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vs.

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CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant hereby certify that I placed in the United States Mail, a copy of a Notice of Appeal, with postage prepaid and the return address clearly shown on said envelope to:

Lindsey McCallister, Esq.
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Irmo, SC
September 24, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Fifth Judicial Circuit
COUNTY OF RICHLAND	)	
Desmond Mayo, #359416,	)	Case No. 2015-CP-40-1165
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed February 24, 2015, by Desmond Mayo (Applicant). Respondent (the State) made a "Return and Motion for More Definite Statement" on June 25, 2015, and also requested that an evidentiary hearing be held on the allegation of ineffective assistance of counsel. Thereafter, on November 3, 2015, Applicant, through his counsel Tommy Thomas, Esquire, filed an "Amendment to Application for Post Conviction Relief." An evidentiary hearing into the matter was convened on December 5, 2016, at the Richland County Courthouse before the Honorable Jean H. Toal. Applicant was present at the hearing and was represented by Tommy Thomas, Esquire. Assistant Attorney General Jessica E. Kinard of the South Carolina Attorney General's Office represented the State.

Applicant and his plea counsel, Nicole Singletary, Esquire, testified at the hearing. This Court also had before it a copy of the guilty plea transcript, the records of the Richland County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the application, the State's return, and the amended application.

I. PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. In December 2011, the Richland County Grand Jury indicted Applicant for attempted murder (2011-GS-40-5683). Nicole L. Singletary, Esquire, ("Counsel") represented Applicant on this charge. Assistant Solicitor Hans W. Pauling of the Fifth Circuit Solicitor's Office prosecuted the case on behalf of the State. On April 1, 2014, Applicant appeared before the Honorable R. Ferrell Cothran, Jr., and pleaded guilty as indicted. Pursuant to a recommendation by the State of a cap of sixteen years, Judge Cothran sentenced Applicant to twelve years' imprisonment. Applicant did not appeal his guilty plea or sentence.

II. ALLEGATIONS

In his application and amended application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"

   a. "That the Applicant is informed and believes that he had the defense of mere presence and that he never discussed this issue with defense counsel."

2. "Involuntary Guilty Plea"

   a. "That the Applicant is informed and believes that his guilty plea was not freely, voluntarily, intelligently and knowingly given for the following reasons."

      i. "The Applicant was detained in the Richland County Detention Center for a period of 34 months prior to his plea. That as a result of the length of incarceration in the Detention Center he believes he was forced, or coerced in accepting the plea."

ii. "That the Applicant had a viable defense of mere presence. That there was evidence that he was in a vehicle when the alleged shooting took place."

iii. "That he had no knowledge that the co-defendant had possession of a weapon, nor did he have any knowledge that the co-defendant intended to shoot the victim."

At the evidentiary hearing, Applicant went forward on these allegations, testifying on his own behalf. He also called Counsel to the stand. At the conclusion of the hearing, this Court ruled from the bench, finding the application must be dismissed for failure to prove Counsel was ineffective or that the guilty plea was involuntary. This written order now follows.

III. 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 PCR hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Guilty Plea

At the guilty plea proceeding, the solicitor described the facts of the attempted murder as follows:

> The incident date was May 5, 2011, approximately 2:25 in the morning, at in [sic] Columbia. That's in Richland County, South Carolina. The Defendants, Mayo and Davis, were driven to the incident by the girlfriend of Desmond Mayo. Her name is April Morning. Both April Morning and the victim, Rondon Brown, along with Desmond Mayo, worked at Fort Jackson in the soldiers' cafeteria. Earlier in the day, April Morning and Mr. Brown had gotten into a verbal altercation at work. April Morning then asked Defendant Mayo to "handle" Victim Brown. Morning took Mayo to pick up Mr. Jarquis Davis. Davis brought his gun. Both Mayo and Davis confronted Brown once they arrived at the incident location. According to the victim, Defendant Mayo ordered

> Defendant Davis to shoot the victim. Defendant Davis fired no less than four times striking the victim, and according to the investigative report, Defendant Davis said that his gun had jammed. Both Defendant Mayo and Davis then fled the scene in the vehicle that they arrived in driven by Morning. Mayo was the front seat passenger and Davis was in the back seat. According to April Morning, Davis admitted to shooting Victim Brown and the Columbia Police Department interviewed the victim at the hospital. The victim stated that he could identify both subjects and that he did so without hesitation.
>
> The victim, Your Honor, Mr. Brown, has had extensive medical injuries. He also suffers from lifelong paralysis from the chest down. He is here in attendance, but his mother would choose to address the Court at the appropriate time.

The plea judge asked Applicant if the facts recited were correct. Both Applicant and his codefendant testified they were. Applicant further testified he was pleading guilty to the crime because he was guilty. (Tr.p.7-p.8). The court found there was a factual basis for the plea and Applicant had entered the plea voluntarily with the advice of competent counsel. (Tr.p.8). Counsel then presented mitigating information, focusing on the claim that Applicant was in the back of the vehicle when the shots were fired. She said: "my client strongly disagrees with the fact that he ordered his co-defendant to actually shoot the victim in this case; however, he is accepting responsibility here today, Your Honor." (Tr.p.10-p.11). Applicant then offered a lengthy apology, stating in part: "I would like to extend my deepest, sincere apology to [Victim] and [Victim's] family and my family as well. . . . I have come to understand that my actions did not only hurt my family, but it hurt my victim and my community as well." (Tr.p.13-p.15).

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PCR Hearing

At the evidentiary hearing, Applicant testified on his own behalf. He acknowledged he was in court for a PCR hearing, said he was aware of the crime to which he pled guilty and the sentence he received, and said that despite the possible exposure if he was granted relief he still

wished to proceed. In regard to the facts of the offense, Applicant testified he did not have a gun and was back at the car when the shooting took place. He complained about having to spend approximately three years in the detention center prior to his plea, and claimed that though he eventually got a copy of the discovery, Counsel did not sit down and go over it with him. He also claimed Counsel never really went over possible defenses. Applicant insisted his position prior to the plea was always that he was not guilty of the crime, and the whole situation was caused by his girlfriend, April, who had been stirring the pot between him and the victim. He repeated his claim that he did not have a gun. He said had no intention to bring any harm to victim, noting he had walked away from the house and back to the car during the argument. Applicant said he had no idea his cousin was going to shoot the victim and did not even know he had a gun. He claimed he did not feel like his plea was freely and voluntarily given or that it was knowing and intelligent. Applicant complained Counsel said she might be able to get him a sentence of five years when that did not turn out to be true. (Tr. pp. 4-16).

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On cross-examination, Applicant acknowledged talking to Counsel about his version of the events and believed she understood his position. He admitted he understood the terms of the plea offer and the State's recommendation of sixteen years when he pled guilty, but claimed he felt like he was forced to take it because Counsel said the only other option was to go to trial. Applicant admitted he chose to plead guilty rather than go to trial and admitted he testified at the plea proceeding that he was not threatened or coerced or promised anything in exchange for his plea. Finally, Applicant admitted he told the plea judge he was satisfied with the services of Counsel. (Tr. pp.16-20). On redirect Applicant described how emotionally excruciating it was to be in the detention center for so long and claimed he would have done anything to get out. (Tr. pp. 20-21). Under further examination by this Court, Applicant acknowledged Counsel's efforts

at the plea to give the judge his version of events, including the idea that his codefendant did the shooting and he was merely present. Applicant ultimately admitted to this Court that his primary complaint was simply that he feels like he got too much time and believes Counsel could have done more to get him a better plea deal. (Tr.p.21-26).

Next, Applicant called Counsel to the stand. Counsel testified she has been practicing law since 2006 and all of her practice involved criminal defense. Upon reviewing her file, she testified she met with Applicant seven times prior to the plea. She recounted the dates of each meeting and the specific topics discussed. She testified they first discussed the fact that he was willing to take five years for a plea. Counsel further testified she and Applicant discussed the facts of the offense, including his version of those facts, and the actions of his codefendant during the incident. Counsel testified they reviewed discovery, including Applicant's statement to the police. She testified they discussed the concept of "the hand-of-one-is-the hand-of-all," the defense of mere presence, and possible mitigation. Counsel detailed her plea negotiations with the solicitor and the ultimate offer of a cap of sixteen years. She testified she felt she did a full and thorough investigation of the case, and Applicant never told her he wanted to go to trial. Counsel explained, however, that they discussed possible defenses should the case go to trial, including mere presence. Counsel then described her discussions with Applicant about his girlfriend and her relative culpability, which she tried to use as a negotiating point with the solicitor to no avail. She testified the decision to plead guilty was ultimately Applicant's decision, but she supported that decision. (Tr. pp. 28-35).

On cross-examination, Counsel testified she believed there were sufficient facts to support the charge of attempted murder against Applicant even though his codefendant was the one who pulled the trigger. She said the case was "triable," but she believed Applicant

ultimately would have been found guilty by a jury. (Tr. pp. 35-39). At the conclusion of the hearing, this Court ruled from the bench, finding the application must be dismissed for failure to prove counsel was ineffective or that the guilty plea was involuntary. (Tr. pp. 39-40).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant 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." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Id. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. In order to satisfy the prejudice prong of this test following a guilty plea, the applicant "must show that there is a reasonable probability that, but for counsel's errors, [s]he

would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

After careful review based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

A. Counsel's alleged failure to investigate the defense of mere presence and to discuss this defense with Applicant

Applicant alleges Counsel was ineffective for failing to investigate the possible defense of mere presence. Applicant further contends Counsel was ineffective for failing to discuss this possible defense with him prior to the guilty plea. This Court disagrees and finds Counsel rendered effective assistance.

"'Although counsel should conduct a reasonable investigation into potential defenses, Strickland does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client.'" Tucker v. Ozmint, 350 F.3d 433, 442 (4th Cir. 2003) (quoting Green v. French, 143 F.3d 865, 892 (4th Cir. 1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). Here, Counsel testified she did, in fact, investigate whether or not Applicant would have a viable defense based on mere presence. Further, Counsel discussed this defense with Applicant on more than one occasion. Her testimony in this regard is credible. This Court finds Applicant has wholly failed to establish any deficiency on the part of Counsel in regard to the defense of mere presence.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. Because Applicant did not produce any evidence beyond his own version of the incident, a version shared with Counsel prior to the plea, any claim about what additional evidence might have been or how it would have helped establish mere presence is "purely speculative." Bannister v. State, 333 S.C. 298, 304, 509 S.E.2d 807, 810 (1998). This Court finds this allegation must be denied and dismissed with prejudice.

B. Involuntary Guilty Plea

Applicant further alleges his guilty plea was not freely and voluntarily made for three reasons. First, he claims being held in the Richland County Detention Center without being able to make bond for 34 months effectively forced or coerced him into taking the plea. Second, he claims his plea was involuntary because he had a viable defense of mere presence. Third, he claims his plea was involuntary because he had no knowledge his codefendant had possession of a weapon or that his codefendant intended to shoot the victim. This Court finds Applicant's claims are entirely without merit, that his guilty plea was freely and voluntarily made, and that his testimony suggesting it was not voluntary is simply not credible. The record of the guilty plea proceeding itself establishes the intelligent and voluntary nature of the plea. Further, the testimony at the PCR hearing reveals the plea was knowing and voluntary.

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In evaluating issues concerning guilty pleas, this Court will consider the entire record, including the transcript of the guilty pleas and the evidence presented at the post-conviction relief hearing. Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000). Voluntariness of a guilty plea is not merely determined by an examination of a specific inquiry by the plea court alone but rather is determined by the record of both the guilty plea proceeding and the post-conviction relief hearing. Id. In order to find a guilty plea was knowingly and voluntarily entered into, the

record must establish the defendant had a full understanding of the consequences of her plea and the charges against her. Boykin v. Alabama, 395 U.S. 238 (1969). Further, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, an applicant's right to contest the validity of such a plea is usually foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 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).

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.

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This Court finds Applicant's allegations in regard to voluntariness are without merit. Applicant has failed to carry his burden of proving that his guilty plea was involuntarily made. The record before this Court reflects that the plea court thoroughly reviewed all of Applicant's constitutional rights with him, including his right to a jury trial. Upon explanation of each constitutional right, Applicant indicated he understood and waived his constitutional rights. Applicant further indicated he understood he was giving up his right to raise defenses. Finally, Applicant testified no one had promised him anything, threatened him, or forced him to plead

guilty. This Court finds Applicant's testimony at the plea conclusive. He has failed to present valid reasons why he should be allowed to depart from their truth.

This Court finds Counsel's testimony at the PCR hearing concerning this allegation credible, whereas Applicant's testimony is not credible. While this Court accepts as true Applicant's claim that he felt pressure to either plead guilty under the terms offered by the State or go to trial, this is the same pressure felt by all criminal defendants in similar circumstances and it does not render his plea involuntary. Similarly, the length of Applicant's incarceration in the detention center prior to his informed decision to plead guilty is of no moment where, at the plea, he was given the opportunity to explain whether any factor or circumstance was causing him to feel forced or coerced to plead, yet he testified he was not suffering from any threat.

As to Counsel, she testified she reviewed all discovery materials with Applicant and reviewed the charge he was facing, possible defenses available in the event of a trial, and his version of the incident. Again, this Court find's Counsel's testimony credible. Appellant entered the plea knowingly and voluntarily.

Therefore, this Court finds Applicant had a full understanding of the consequences of his plea and the charges against her, and the plea court correctly found Applicant's plea was freely, voluntarily, and intelligently made. Consequently, this allegation must be denied and dismissed with prejudice.

CONCLUSION

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

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if an applicant wishes to seek appellate review, post-conviction relief 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:

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and

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2. The Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED this 22nd day of August, 2018.

THE HONORABLE JEAN H. TOAL
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina

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