THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE COUNTY OF HORRY

Court of Common Pleas

The Honorable Circuit Court Judge, BROOKS P. GOLDSMITH

Case No. 2015-CP-26-04185

CHRISTOPHER E. SMITH, SCDC # 362308..... Petitioner,

v.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Judge BROOKS P. GOLDSMITH'S Order filed on October 1, 2018, denying post conviction relief to the Petitioner.

The Order was received by the undersigned counsel on October 2, 2018. A copy of the said Order on appeal is attached to this Notice.

This is the 9nd day of October, 2018.

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PROOF OF SERVICE

I, Steven W. Fowler, court- appointed attorney for Petitioner, certify that I have today served within Notice of Appeal and Copy of the Order signed by the presiding Judge upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the following:

1) Assistant Attorney General, PO Box 11549, Columbia, SC 29211 and
2) Clerk of the South Carolina Supreme Court , 1231 Gervais St, Columbia, SC 29201
3) SCCID Appellate Defense, PO Box 11433, Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served on this below named date.

This is the 9th day of October, 2018.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Christopher E. Smith, S.C.D.C. No. 362308,	)	Case No.: 2015-CP-26-04185
Applicant,	)	
	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief filed by Christopher E. Smith ("Applicant") on June 5, 2015. Respondent made its return on or about February 18, 2016. The Court convened an evidentiary hearing into the matter on Tuesday, November 15, 2016, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Jessica E. Kinard, Esq. Steven W. Fowler, Esq., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Alex B. Hyman, 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, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is 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 February 2014 term of the Horry County Grand Jury for murder (2014-GS-26-00935), attempted murder

(2014-GS-26-00936). Alex B. Hyman, Esq., and Jordan Hyman, Esq., represented Applicant. J. Stephen Grooms, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On December 2, 2014, Applicant pled guilty as indicted for attempted murder, and to the lesser-offense of voluntary manslaughter. The Honorable Steven H. John sentenced Applicant to imprisonment for concurrent terms of 30 years. Applicant did not appeal his plea or sentence.

Present Application

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

1. "Ineffective Assistance of Counsel"
    a. "Ineffective assistance of counsel for failing to file an Appeal which would have enabled me to challenge trial court's admission of statement which was involuntarily made."
2. "Involuntarily Plea"
    a. "My plea was involuntarily entered because my attorney coerced me to stop trial and plead guilty."
3. "5th, 6th, and 14th Amendment United States Constitution Violations"

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, 300 S.C. 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, 300 S.C. 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.

Applicant further claims his plea was not entered knowingly or voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish Applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. See Harris v. Leeke, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he should be allowed to depart from the truth of his statements. See Crawford v.

United States, 519 F.2d 347, 350 (4th Cir. 1975) (overruled on other grounds by United States v. Whitley, 759 F.2d 327 (4th Cir.1985)).

An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial instead. See Roscoe v. State, 345 S.C.16, 20, 546 S.E.2d 417, 419 (2001); see also Richardson v. State, 310 S.C. 360, 362 426 S.E.2d 795, 797 (1993). Given Applicant's burden of proof and the analysis to be applied to this claim, Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it will be treated as such.

1. Failure to File a Notice of Appeal

Applicant alleges Counsel was ineffective by failing to file a notice of appeal. Though counsel is required to make certain that a defendant is made fully aware of his or her right to appeal after a *trial*, a different standard applies to a guilty plea:

> Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.

Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (citations omitted). Therefore, in a collateral action attacking a guilty plea, the "bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief." Jones v. State, 382 S.C. 589, 598, 677 S.E.2d 20, 23-24 (2009) (quoting Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)).

Applicant was informed during his plea proceeding that he had the right to appeal his guilty plea within ten days. (Tr. 9, ll. 20-22). At the evidentiary hearing, Applicant merely

acknowledged the allegation was in his application for relief. Applicant offered no substantive testimony on the subject, nor was Counsel asked about the issue by either party. Applicant at no point indicated a desire for a belated appeal in either his application for relief, or in the evidentiary hearing before this Court. Applicant has failed to meet his burden of proof, and further failed to demonstrate *any* desire in the relief that would be available if he had met his burden.[1] Accordingly, Applicant's demand for relief by way of this allegation is **DENIED**.

2. Coerced Guilty Plea

Applicant broadly alleges Counsel coerced him to plead guilty. At the plea proceeding, Applicant denied that anybody promised him anything, threatened him, or otherwise forced him to plead guilty. (Tr. 6, ll. 19-21). At the evidentiary hearing, Applicant asserted his family was used against him at least twice prior to his pleading guilty: during an interrogation by law enforcement and while determining whether to accept a late plea offer.

a. Coerced Interrogation

First, Applicant testified that during an interrogation by law enforcement, the interviewing detective received a phone call which turned out to be Applicant's wife. Applicant recalled his wife was crying, upset by the allegation that Applicant had killed somebody, and that law enforcement wanted him to disclose what happened. Nonetheless, Applicant recalled that he replied to her that he didn't know anything, though he did ultimately confess. Applicant conceded he was not represented by Counsel at the time of the interrogation. Counsel agreed with Applicant that he felt the interrogation was coercive, but conceded that Applicant's explanation to him was consistent with the confession.[2] Counsel set out to try and exclude the

[1] Applicant only requests this Court "vacate conviction and remand for new trial."
[2] However, Counsel opined that Applicant was not entirely forthcoming in either his confession or in his consistent disclosure to Counsel. Counsel theorized that Applicant was covering for others who had been in the car at the time

confession, but also determined that the trial strategy would need to focus on arguing he was coerced if the confession came in at trial. Counsel challenged the confession in a Denno[3] hearing, but the motion to exclude was denied by the trial judge. Applicant pled guilty after the Denno hearing.

An application for post-conviction relief does not serve as a substitute for direct appeal, and an issue that could have been raised at applicant's trial or on appeal is not cognizable in an application for PCR. S.C. Code Ann. § 17-27-20(b); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). Trial court error is not a cognizable claim for PCR. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). To the extent Applicant contests he was coerced into pleading guilty by the interrogation, the allegation constitutes a direct appeal issue not here cognizable, and the request for relief by way of this allegation is **DENIED**.

b. Coerced by Family to Plead Guilty

Second, Applicant testified that he initially rejected the 30 year plea offer when Counsel communicated it to him at trial. Counsel then stated that Applicant should not make the decision alone and organized a meeting including Applicant, Counsel, Applicant's wife, and Applicant's mother. Applicant testified Counsel declared the trial court would sentence Applicant to a total of 45 years if he didn't take the plea. Applicant's wife and mother thereafter began to cry and insisted Applicant take the plea offer. Applicant felt Counsel used emotional distress to cause him to take the plea offer. On cross-examination, Applicant asserted that once he refused the plea offer, Counsel should not have thereafter drawn his family into the matter.

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of the killing, and noted that they had discussed the possibility of Applicant cooperating with law enforcement even after his plea and sentence.

[3] Jackson v. Denno, 378 U.S. 368 (1964).

Counsel recalled that Applicant's chief concern was his family—namely his wife and newborn son. Counsel similarly had a newborn son at the time of his representation and the men found common ground on the subject. After a plea offer was put back on the table, the trial judge cleared the courtroom, excepting a single deputy law enforcement officer, to permit Applicant an opportunity to speak candidly with both Counsel and his family. Counsel denied ever telling Applicant he would get any specific amount of time if he went to trial, but rather he explained the possible exposure if Applicant were convicted. Counsel denied using Applicant's family against him, but instead testified he included them in the conversation about the plea offer based on Applicant's long-established concern for his wife and her opinion on the subject. Pressed on cross-examination, Counsel additionally offered the family was brought in simply to console Applicant.

The Court finds Applicant has failed to meet his burden of proving either deficiency on the part of counsel, or prejudice. To the extent the testimony at the evidentiary hearing conflicts, the Court finds Counsel's testimony credible and Applicant's testimony not credible. The Court reaches this credibility finding based upon its opportunity to closely listen to and observe the witnesses at the evidentiary hearing, and is particularly relevant or potentially relevant on two points: the nature of Counsel's discussion of Applicant's sentencing exposure during consideration of the late plea offer, and the nature of how Applicant's family came to be present during the conversation. The Court finds Counsel did not tell Applicant he would receive 45 years, but rather properly explained the relevant sentencing ranges at issue if Applicant were convicted at trial as compared to if he accepted the opportunity to plead to voluntary manslaughter. The Court additionally finds Counsel did not summon Applicant's family in response to Applicant's refusal of the plea offer, but rather they were retained in the courtroom

from the start of the conversation as all other parties were excluded, excepting a single deputy. As such, Applicant's family was not summoned in response to a firm refusal of a plea offer, that he might be browbeat into accepting a plea he did not want—they were properly included in the process from the outset with Applicant's consent, and with a mind to Applicant's desires and priorities.

Indeed, there is no evidence to show Applicant ever wished to refuse or exclude his family, or that he did not wish to speak with them. Nor is there any evidence that their inclusion misled Applicant from a proper understanding of the nature of the charges against him or the potential sentence he faced. Ultimately, Applicant's allegation devolves to that his plea was involuntary in light of the considerable emotional strain he was under after Counsel's efforts to exclude inculpatory evidence were defeated. Facing criminal prosecution for a serious felony is understandably a highly stressful circumstance, loaded with emotional tumult and grave consequences, but that distress is not a basis for concluding a guilty plea was not voluntarily entered. See, e.g. Meachem v. Keane, 899 F.Supp. 1130, 1141-42 (S.D.N.Y. 1995) ("Emotional turmoil from being accused of a crime does not give rise to a finding of coercion."); State v. Leyva, 389 P.3d 1266, 1271-72 (Ariz. Ct. App. 2017) ("'Distress' and 'nervousness' are the characteristics of most persons facing immediate trial under a criminal prosecution, and to accept such a normal emotional reaction as a ground to vitiate a plea would make a shambles of the guilty plea procedure") (quotations omitted); Wojtowicz v. United States, 550 F.2d 786, 791-92 (2d Cir. 1977) ("[A]dvice [or] even strong urging by those who have an accused's welfare at heart, based on the strength of the State's case and the weakness of the defense, does not constitute undue coercion.") (quotations omitted). Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

3. Failure to Communicate Plea Offer, Judicial Interference With Plea Offer

Not properly alleged in the application, but raised by Applicant in the course of his testimony, is an allegation that Counsel was ineffective in failing to properly communicate an offer to plead to voluntary manslaughter in exchange for a 25 year sentence, and that the offer was thereafter adjusted by the trial court without objection by Counsel. Failure of counsel to communicate a plea offer constitutes deficient performance, and prejudice may be established by evidence to show that but for counsel's failure the applicant would have accepted the proposed bargain and benefitted from the offer. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)). That stated, defendants have no constitutional right to plea bargain, and a trial judge is not required to accept a plea. Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). The prosecution has broad discretion in plea bargaining, and may choose to pursue a case to trial, or bargain the matter down to a lesser offense, or decide against prosecuting at all. Id., 333 S.C. at 684-85, 511 S.E.2d at 400-01 (quoting State v. Thrift, 312 S.C. 282, 291-92, 440 S.E.2d 341, 346-47 (1994). As to judicial engagement in the plea bargaining process, it is explicitly permitted, if not encouraged, subject to guidelines adopted by the Supreme Court. Medlin v. State, 276 S.C. 540, 540-43, 280 S.E.2d 648, 648-49 (1981) (quoting Harden v. State, 276 S.C. 249, 277 S.E.2d 692 (1981)). In particular, "the judge may indicate what charge or sentence concessions would be acceptable or whether the judge wishes to have a pre-plea report before rendering a decision." Harden, 276 S.C. at 254, 277 S.E.2d at 694.

At the evidentiary hearing, Applicant testified he first heard about a 25 year plea offer around November 10, 2014, but that Counsel advised he would try to get a better deal. Applicant testified he was offered a second, different deal on December 2, 2014, and that Counsel advised

the solicitor[4] would not give the 25 year offer again and that the trial judge added five years to make the solicitor happy. On cross-examination, Applicant insisted the judge offered the plea, not the solicitor.

Counsel testified that the initial offer he received from the State was an oral offer from Donna Elder, Esq. The solicitor communicated the offer to Counsel at a bond hearing or roll call, and additionally informed Counsel that she was departing the office and would no longer be responsible for prosecuting the case. Counsel recalled he and Applicant decided to decline the offer, keep working on the case, and wait to see which solicitor was assigned in Elder's stead. The initial offer ceased to be available after it was turned down.

Counsel recalled that after Applicant's pre-trial motions were denied, Judge John called the attorneys into his chambers, where he suggested the solicitor re-open the offer to plead to voluntary manslaughter. The solicitor expressed his opposition, but offered that he would consider it for a sentence of 30 years. Counsel thereafter asked to have the courtroom to consult with his client, which Judge John cleared as discussed in Section II.A.2.b., above. Counsel then communicated the offer to Applicant, who accepted it and pled guilty. Counsel testified he begged to get the 25 year offer back, but was unsuccessful. Counsel noted the Fifteenth Circuit Solicitor's Office has a policy of typically not re-offering or lowering plea offers once they have been rejected and the case has proceeded to trial.

The Court finds no deficiency on the part of Counsel, nor any prejudice to Applicant. The Court finds the trial judge did not change the plea, as Applicant asserted, but that the original plea offer was rejected and a new one offered upon consultation with Judge John. The Court finds, as both parties agree, that the original 25 year offer was communicated to Applicant.

[4] The exact words reported by Applicant at the evidentiary hearing are unclear if he is referring to the trial judge or the solicitor, but context and other testimony strongly suggests he meant the solicitor.

Applicant has failed to meet his burden as to either prong of Strickland, and accordingly his request for relief by way of this allegation is **DENIED**.

4. Failure to Play Entire Tape

Not properly alleged in the application, but raised by Applicant in the course of his testimony, is an allegation that Counsel was ineffective in failing to properly prepare and utilize the recording of his confession during the pre-trial hearing on his motion to suppress. 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 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)).

The Court permitted some testimony on this allegation, but will not belabor it—Applicant has not met his burden. This ground was neither properly raised to the Court in the application, nor in any amendment. Applicant did not present the recording at the evidentiary hearing.[5] As such he cannot meet his burden and his request for relief by way of this allegation is **DENIED**.

[5] This Court acknowledges Applicant, by and through PCR counsel, orally requested a continuance at the outset of the PCR hearing for the purposes of obtaining the tape and an additional transcript. The tape was known to Applicant at the time of his plea. The application was filed June 5, 2015, and the evidentiary hearing did not occur until November 15, 2016. Taking notice of the Court's schedule, the evidentiary hearing had already been continued once before. Applicant and PCR counsel enjoyed ample time to procure a copy of the recording and failed to do so. This Court, in its discretion, denied Applicant's motion to continue.

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, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP 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 25 **day of** September**, 2018.**

BROOKS P. GOLDSMITH
Presiding Judge
Fifteenth Judicial Circuit

_____, South Carolina