

LAW OFFICE OF

Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

October 22, 2018

RECEIVED

OCT 25 2018

S.C. SUPREME COURT

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

RE: Stacy Walker, SCDC # 242126, vs. State of South Carolina
Appeal of Case No. 2014-CP-41-066

Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service, a copy of the original court order which is to be challenged on appeal, and a copy of the order denying the motion to reconsider. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal so that they may begin representation of Mr. Walker as I was appointed in this matter. I am also hereby requesting that Appellate Defense obtain a copy of the court transcript within the time required by this court.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,



Kristy Goldberg

CC: William Edgar Salter, III
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Stacy Walker, SCDC # 242126
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

The Honorable Sheri Coleman
Clerk of Court
100 East Church Street
Saluda, South Carolina 29138

Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

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OCT 25 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2014-CP-41-066

Stacy Walker, SCDC # 242126, Appellant

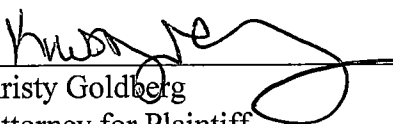
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant Stacy Walker hereby appeals from the Order of the Honorable R. Knox McMahon presiding Judge for the 11th Judicial Circuit, filed July 9, 2018 and the Order denying the motion for reconsideration, filed October 17, 2018 and received by counsel for the Applicant on October 22, 2018 in the matter of Stacy Walker, SCDC # 242126 v. State of South Carolina, Case No. 2014-CP-41-066.

October 22, 2018



Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
Phone (803) 667-6633
kristy@kristygoldberglaw.com

Other Counsel of Record:
Assistant Attorney General, William Edgar Salter, III
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

RECEIVED

OCT 25 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2014-CP-41-066

Stacy Walker, SCDC # 242126, Appellant

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

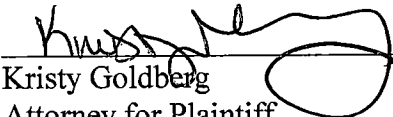
Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes
and states:

She is the counsel of record for Applicant;

Service by mail is proper in this instance; and

She has served the NOTICE OF APPEAL on the following party on October 22, 2018 by
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, William Edgar Salter, III
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211



Kristy Goldberg
Attorney for Plaintiff

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Other Counsel of Record:
Assistant Attorney General, William Edgar Salter, III
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Post Office Box 11549
Columbia, South Carolina 29211

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

CASE NUMBER: 2014-CP-41-00066

FILED

Stacy Walker, #242126

State of South Carolina

2018 OCT 17 AM 11:45

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

CLERK OF COURT
SALUDA CO. S.C.

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.
- 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, 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:

ORDER INFORMATION

This matter came before the court on a motion to reconsider an Order issued by Judge McMahon on June 28, 2018. The motion was timely filed pursuant to Rule 59(e), SCRPC. Judge McMahon retired effective June 30, 2018 prior to the filing of the motion to reconsider. The issues raised in the motion relate to the findings of fact based upon the evidence presented to Judge McMahon. In making those evidentiary findings of fact, Judge McMahon determined the credibility of the witnesses. Based upon those findings, this Court denies the motion for reconsideration.

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC 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
		\$
		\$
		\$

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.

Circuit Court Judge

Alvin Bruce Lee

Judge Code 2118

Date 10/9/2018

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20 ____ to attorneys of record or to parties (when appearing pro se) as follows:

Kristy Goldberg, Esq.

Ed Salter, Esq.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

STATE OF SOUTH CAROLINA
COUNTY OF SALUDA

FILED
2018 JUL -9 PM 12:25
IN THE COURT OF COMMON PLEAS
THE ELEVENTH JUDICIAL CIRCUIT
CLERK OF COURT
SALUDA CO. S.C. 2014-CP-41-066

Stacy Walker, 242126,
Applicant,

v.

State of South Carolina,
Respondent.

ORDER OF DISMISSAL

This matter is before the Court by way of a Post-Conviction Relief (PCR) Application filed on March 31, 2014, and an Amended Application dated November 6, 2017. The Court held an evidentiary hearing into the matter on November 21, 2017, at the Saluda County Courthouse. Applicant was present at the hearing and Kristy Goldberg, Esquire, represented him.¹ Senior Assistant Attorney General William Edgar Salter, III, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing and he presented testimony from Robert Shorter. Respondent presented testimony from plea counsel, Greg Seigler, Esquire, and former Eleventh Circuit Assistant Solicitor Ervin Maye. The Court had before it copies of the transcripts of Applicant's May 21, 2013 guilty plea and his May 31, 2013 sentencing; the records of the Saluda County Clerk of Court regarding Applicant's convictions; Applicant's South Carolina Department of Corrections (SCDC) records; and the pleadings in this action. The Court now denies relief and makes the following findings:

I. PROCEDURAL HISTORY

¹ Ms. Goldberg was appointed to represent Applicant on April 23, 2014.

Applicant is presently confined in Lee Correctional Institution, of the Department of Corrections, as the result of his Saluda County conviction and sentence. The Saluda County Grand jury indicted him in May 2012 for burglary in the first degree (2012-GS-41-254). The Saluda County Grand Jury also indicted him for another burglary in the first degree (2012-GS-41-286), three charges of a burglary in the second degree (2012-GS-41-252, -280, & -281), four counts of grand larceny (2012-GS-41-250, -251, -255 & -284), and one count of breaking and entering a motor vehicle (2012-GS-41-286). The Honorable W. Greg Seigler, who was then the Tri-County Public Defender, represented him on these charges.

Applicant accepted the State's offer to enter a straight-up guilty plea to the charge of burglary in the first degree in 2012-GS-41-254, with no recommendation as to sentence. In exchange, the State agreed to *nolle prosequere* the remaining charges. On May 21, 2013, Applicant pled guilty before the Honorable Thomas A. Russo. However, sentencing was deferred at that time. On May 31, 2013, he appeared before the Honorable William P. Keesley, who sentenced him to thirty years imprisonment.

Applicant did not appeal his sentence or conviction. However, he filed a PCR Application March 31, 2014. He raised the following claims in his *pro se* Application:

1. Ineffective Assistance of Counsel:
 - a. failure to object to plea judge's deviation from the plea agreement that purportedly stipulated to a fifteen (15) year term of imprisonment; and
 - b. failure to move to withdraw Applicant's plea.

The State filed its Return on March 9, 2015. Applicant thereafter filed his Amended Application, with counsel's assistance.

II. ALLEGATIONS

Applicant alleged the following grounds for relief in his Amended Application:

- a. ineffective assistance of trial counsel - counsel was ineffective for failing to object when the State deviated from their relied upon plea agreement;
- b. ineffective assistance of trial counsel - counsel was ineffective for failing to move to compel the State to go along with their relied upon plea agreement;
- c. ineffective assistance of trial counsel - counsel was ineffective for failing to file a motion to withdraw the plea;
- d. ineffective assistance of trial counsel - counsel was ineffective for failing to file a motion to reconsider sentence; and
- e. counsel was ineffective in that he failed to properly explain the sentencing hearing procedure and potential outcome to client, which resulted in the Applicant entering an involuntary, unknowing, and unintelligently entered guilty plea.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

A. The proffer of evidence at Applicant's plea and sentence

Assistant Solicitor Maye proffered the following facts in support of Applicant's May 21, 2013 guilty plea to burglary in the first degree:

MR. MAYE: Your Honor, this occurred here in Saluda County [at] [t]he [residence] of Sherry McIntosh Hedgepath.

Your Honor, her home was burglarized on that day, January 10, 2012, and taken from the residence, Your Honor, was computer equipment, household goods, jewelry and other items to include two firearms, Your Honor. A Llama .45 caliber automatic and a Glock 9 millimeter automatic pistol, Your Honor.

The basis of the burglary first, would be that either upon entering or leaving the residence he became armed with the handguns, Your Honor. That would be the basis for the burglary first conviction. That and that it was a residence of Sherry Hedgepath and it all occurred here in Saluda County.

As to that charge of burglary in the first degree, Your Honor, that's basically the facts. That he entered, along with a co-defendant, the residence of Ms. Hedgepath with the intent to commit the crime of grand larceny, which was carried out.

5/21/2013 Tr. p. 8, line 20 – p. 9, line 14. Petitioner agreed that these facts were essentially correct. *5/21/2013 Tr. p. 9, lines 15-18.*

The Assistant Solicitor went into further detail at the sentencing proceeding before judge Keesley:

MR. MAYE: Yes, sir, Your Honor. To give you some background in this case, Your Honor, ... the way the whole thing broke resolving these and other counties, back in March of 2012, Saluda County made an arrest against an individual named Thomas Tolen {phonetic}. He had some stolen firearms and electronics that were in his possession at that time and he cooperated with law enforcement. Based on the information and the combining of resources with Saluda, Greenwood and Newberry Counties, along with the information provided by Thomas Tolen, Greenwood authorities obtained a court order to place a GPS tracking system on Stacy Walker's vehicle.

Your Honor, between 3/12 of '12 and 3/16 of '12, Stacy Walker's activities were monitored by this GPS. They basically tracked him breaking into residences over in Greenwood County. They executed search warrants.

Saluda deputies took Mr. Pace, his co-defendant, into custody on 3/19 of '12. At that point in time, Tonnie Pace began to cooperate with law enforcement, according to the notes from Investigator Shorter that I have here. They were able basically, Your Honor, to resolve a number of cases in a number of different counties. And I think it ended up that they took Mr. Pace and Mr. Walker around just all over Saluda County and basically resolved a number of outstanding burglaries, Your Honor, and larcenies in Saluda County.

I know that there are victims here that would like to be heard. I know that, for the record, and I'm going to pass up to the Court a listing of all of the victims in this case, the first, Ty Bouknight, that had a thousand dollars in materials, radios, T.V.s and VCRs, stolen; Brandon Morris had \$4,690, computers, jewelry, T.V., merchandise; Sherry Hedgepath had \$3,425 that included firearms, computers, household items, jewelry; George Wheeler had \$4,850 in loss, computers, firearms, farm equipment, jewelry, money; Dan Wheeler had, I believe, \$2300.

The figure that I have here, the grand total of the restitution on all these indictments, the one for which he's pleading and the ones we're [nolle] [prossing], is \$16,315, Your Honor. And I know that Mr. Pace was made jointly and severally liable for that amount, \$16,315, Your Honor. And I'm going to hand up this listing of those. And the victim advocate for the sheriff's department is going to recognize the victim that would like to speak to you.

5/31/2013 Tr. p. 5, line 17 – p. 7, line 19.

The Assistant Solicitor thereafter informed the plea judge of Applicant's very extensive prior criminal history:

MR. MAYE: Your Honor, prior to sentencing, he's got a '96 theft by taking that he got a probationary sentence for back in '96. He then subsequently violated his probation. He's got a DUS conviction contemporaneous with that, a possession of stolen motor vehicles. He got three counts of assault on a female in 1993; he got two years suspended on two years probation. He then got a grand larceny of a motor vehicle, got four years suspended on six months in 1993. Then had bad checks, DUS or DUI in 1997, petit larceny, breaking into automobiles four counts, he got five years at that time. He then got three counts of grand larceny and two counts of burglary second.

Your Honor, over in Greenwood County, in 1997, he got charged with 11 counts of burglary second, four counts of burglary third, 11 counts of petit larceny and two counts of grand larceny. He was actually convicted of ten counts of burglary, Your Honor, burglary second nonviolent and two counts of burglary second violent. Your Honor, and he got 7 years.

He then comes back after, apparently he gets out from serving that. Your Honor, and gets another round of burglaries and ends up inexplicably from the progression of upward -- I don't know what these charges were, but he ended up getting three years suspended on three years probation for a whole [other round of burglaries in 2000, Your Honor.

He's just a career burglar in the truest sense of the word. This is about the third round he's had ... where he comes before a judge with just a succession of burglaries.

5/31/2013 Tr. p. 12, line 11 – p. 13, line 19.

B. *Ineffective Assistance of Plea Counsel*

The Supreme Court has held that *Strickland*'s two-pronged test "applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370 (1985). In order to prevail, a PCR Applicant must first establish " 'that counsel's representation fell below an objective standard of reasonableness.' " *Lafler v. Cooper*, 566 U.S. 156, 162-63, 132 S.Ct. 1376, 1384 (2012) (quoting *Hill*, 474 U.S. at 57, 106 S.Ct. 366). *See also Hill*, 474 U.S. at 56, 106 S.Ct. at 369 ("Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases' "); *Strickland*, 466 U.S. at 687-88, 104 S.Ct. at 2064.

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. 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.*, 104 S.Ct. 2052 (citation omitted).

Even if an Applicant can establish deficient performance, he must still show prejudice from counsel's performance. To establish *Strickland* prejudice in the context of guilty pleas, an Applicant must prove "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 52, 106 S.Ct. 366. *See also Lafler*, 132 S.Ct. at 1384 (" 'a defendant must show the outcome of the plea process would have been different with competent advice' ") (citing *Missouri v. Frye*, 132 S.Ct. 1399 (2012)).

C. Involuntary Guilty Plea.

The test for determining the validity of a guilty plea is “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 164 (1970). See also *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711 (1969). “[A] [guilty] plea’s validity may not be collaterally attacked merely because the defendant made what turned out, in retrospect, to be a poor deal.” *Bradshaw v. Stumpf*, 545 U.S. 175, 186, 125 S.Ct. 2398, 2407 (2005). Rather, “[w]here, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel’s advice ‘was within the range of competence demanded of attorneys in criminal cases.’ ” *Hill*, 474 U.S. at 56, 106 S.Ct. at 369 (quoting *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970)). *Accord Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602 (1973). “In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. *Harres v. Leeke*, 282 S.C. 131, 318 S.E.2d 360 (1984).” *Wolfe v. State*, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997).

Applying this standard to the claims raised by Applicant, the Court finds that he has not met his burden of proof.

- 1. Counsel was not ineffective for failing to object when the State deviated from their relied upon plea agreement or for failing to move to compel the State to go along with their relied upon plea agreement. (Amended claims 10.a & 10.b).**

Applicant’s first two claims concern plea counsel’s failure to enforce a “relied upon plea agreement.” The Court finds that this claim is without merit and that the only credible evidence is that the plea that Applicant entered complied with the agreement reached between the defense and the State.

Applicant testified before this Court that he is serving a thirty year sentence for the burglary in Saluda County, and that he also has convictions from Aiken, Newberry and Greenwood Counties. On March 12, 2012, he was arrested on his Greenwood County charges and he has been incarcerated since that time. On March 30, 2012, Inv. Robert Shorter, who was then employed by the Saluda County Sheriff's Department, picked him up at the Greenwood County Jail. Inv. Shorter and Applicant then went to various places he had burglarized, where the burglaries were unsolved. Inv. Shorter did not ask him if he wanted to go, but he went willingly, on the advice of counsel.

Based upon his conversation with Inv. Shorter, Applicant claimed that his understanding was that if he cooperated with law enforcement, he would receive concurrent sentencing on all of the Saluda County charges and that he would receive a fifteen year sentence. They then went to the Saluda County Sheriff's Office, where he spoke to some people to whom he had sold stolen items and he was served with the Saluda arrest warrants. He claimed that he cooperated based upon the promised fifteen year sentence. Afterwards, Inv. Shorter returned him to the Saluda County Jail. Inv. Shorter subsequently transported Applicant and his co-defendant, Tonnie Pace, to a bond hearing. When Applicant asked if he was going to receive a fifteen year sentence for his charges of burglary in the first degree, Inv. Shorter replied he would.

Applicant entered his plea on May 21, 2013. Applicant testified that he never had any contact with plea counsel Seigler, until he was transported to Saluda County. Counsel met with him at the jail and advised him to take the plea. In their meeting, counsel likewise told him that counsel thought he would receive a fifteen year sentence. Applicant claimed that he only pled guilty because he thought that he would receive a fifteen year sentence based on his cooperation with the Sherriff's Department, and that he would not have pled guilty without this "deal."

Following his sentencing, counsel did not file a motion for the sentencing judge to reconsider the thirty year sentence and counsel did not move to withdraw his plea.

Mr. Robert Shorter testified that he was an investigator, with the Saluda County Sheriff's Department at the time of Applicant's arrest and plea. However, he no longer is employed by the Sheriff's Department and he did not have access to any documents he generated in this case. He remembered dealing with the Applicant but he did not remember specific conversations. He testified that it was his typical practice to tell an individual he arrested that if they cooperate they "will get a better deal." However, he emphatically testified that he could not have made a deal with Applicant and he would not have made any promise as to a sentence because the policy in Saluda County was that only the Solicitor had the authority to make a promise as to what sentence an accused could receive.

The Honorable Greg Seigler testified that he has been a family court judge in the Eleventh Judicial Circuit for the past three and one-half years. Prior to his appointment to the bench, he was the Tri-County Public Defender² for seven years, and he had tried many major felonies during those seven years. While he did not have any independent recollection or knowledge about the case, he agreed that the plea and sentencing transcripts would accurately reflect any negotiations that were had. Also, he testified that he would never promise his clients a specific sentence if there was a straight-up plea.

Ervin Maye, Esquire, testified that he is currently employed as an Assistant Solicitor in the Eighth Judicial Circuit. He was an Assistant Solicitor in the Eleventh Judicial Circuit from August 1994 until July 2017. In that capacity, he was responsible for prosecuting Applicant. He explained that he coordinated this case with prosecutors in other jurisdictions because Applicant

² The three counties he was responsible for were Saluda, McCormick and Edgefield Counties.

had a number of charges in other counties. Consistent with his representations to the plea judge and to the sentencing judge, he testified that the agreement he reached with plea counsel was for straight-up plea to burglary in the first degree. Walker agreed to be jointly and severally liable for restitution to all of the victims (both the victim in the burglary indictment for which he was pleading guilty and the victims covered by the other indictments). Although the State would not make a recommendation of sentence, the State agreed to *nolle prosequere* the remaining Saluda County charges. The State ultimately *nolle prossed* the other charges, as promised.

Mr. Maye never told plea counsel or Applicant that he would agree to a fifteen year sentence or make any recommendation of sentence. Instead, he told counsel that if Applicant did not agree to the plea bargain that was ultimately reached, the case was going to trial. He also denied the claim that Inv. Shorter would have promised a fifteen year sentence to Applicant. He explained that the policy in place while he was the Assistant Solicitor in Saluda County was that only the Solicitor's Office had the authority to negotiate a plea with an accused and make any promises as to what sentence an accused would receive if he or she pled guilty. Mr. Maye had worked thousands of cases with Inv. Shorter by the time of the charges against Applicant, Inv. Shorter was well aware of this policy, and he had never violated it in the other cases.

The Court finds that Applicant has failed to prove counsel rendered deficient performance under *Strickland* because the Court finds that there is no credible evidence that anyone promised Applicant that he would receive a fifteen year sentence on a guilty plea to the charge of burglary in the first degree if he cooperated with law enforcement. Applicant is asking the Court to accept, as plausible, that both counsel and former Inv. Shorter promised him that he would receive the minimum punishment for burglary in the first degree³ if he cooperated with

³ See S.C. Code Ann. § 16-11-311(B) (Supp. 2017).

law enforcement, despite his extensive criminal history and even though in Saluda County, alone, he had pending charges of another burglary in the first degree, three counts of burglary in the second degree, four counts of grand larceny and one count of breaking and entering a motor vehicle. Additionally, his co-defendant was cooperating with the State and had agreed to testify against Applicant. The Court does not find Applicant's claim credible.

To the contrary, the Court finds that there is no credible evidence that counsel promised Applicant that he would receive a fifteen year sentence if he cooperated with law enforcement. Although counsel had no specific recollection of the plea negotiations in this case, the Court finds that the plea transcript reflects that counsel did not correct the Assistant Solicitor when he informed the plea judge of the parameters of the agreement that the parties had reached, including that it was a straight-up plea to burglary in the first degree and that the State was not making a sentencing recommendation. *5/21/2013 Tr. p. 3, line 6 – p. 6, line 18*. Also, the Court accepts as credible that, consistent with his standard practice, Mr. Seigler would not have promised a specific sentence, since Applicant was entering a straight-up plea.

The Court likewise finds that Applicant's claim former Inv. Shorter promised him a fifteen year sentence if he cooperated is simply not credible. Initially, the Court finds that it would have been unnecessary for Inv. Shorter to make such a promise because the credible evidence is that Applicant was arrested on the Saluda charges based upon information provided by his co-defendant, Tonnie Pace, and that Mr. Pace had agreed to testify against him. Further, the Court finds that the testimony of Assistant Solicitor Maye and Mr. Shorter is credible and that the policy in Saluda County at the time Applicant was prosecuted was that law enforcement lacked the authority to promise a sentence to an accused. Rather, only the Eleventh Circuit Solicitor's Office had the authority to enter into plea negotiations. The Court further finds that

Inv. Shorter was well aware of this policy and would not have made a promise to Applicant that he knew he did not have the authority to make.

Based upon Assistant Solicitor Maye's testimony and the record from Applicant's guilty plea and sentencing, the Court finds that the only agreement between the parties was that Applicant would enter a straight-up plea to the charge of burglary in the first degree in indictment 2012-GS-41-254, he agreed to be jointly and severally liable for restitution to all of the victims (both the victim in the burglary indictment for which he was pleading guilty and the victims covered by the other indictments), and the State would not make a recommendation of sentence. Additionally, the State agreed to *nolle prosequere* the remaining Saluda County indictments. Whatever subjective hope for a fifteen year sentence that Applicant may have had, the Court finds that neither the Solicitor's Office, law enforcement, nor counsel promised him that he would receive a fifteen year sentence on a plea to burglary in the first degree if he cooperated with law enforcement.

The Court further finds that Applicant received the benefit of the plea bargain to which the parties had agreed. Therefore, the Court finds that his plea was freely, voluntarily and intelligently entered, with a full understanding that there was no guarantee as to the sentence he would receive. Also, the Court rejects Applicant's reliance on *Custodio v. State*, 373 S.C. 4, 11, 644 S.E.2d 36, 39 (2007). In *Custodio*, the petitioner had been "charged with numerous counts of burglary and grand larceny in connection with a string of at least seventy-five burglaries in Richland and Kershaw Counties." *Id.* at 7, 644 S.E.2d at 37. The evidence presented at the PCR hearing was that plea counsel and the State had negotiated a plea agreement that if petitioner cooperated and returned items that he had stolen, there would be a fifteen year cap on his sentence. The petitioner cooperated with law enforcement. *Id.* at 9-10, 644 S.E.2d at 38.

However, he received an aggregate term of forty-five years' imprisonment for the burglaries and concurrent five year terms for the grand larcenies at sentencing. *Id.* at 7, 644 S.E.2d at 37.

The Supreme Court found that “[b]ecause petitioner could have enforced the plea agreement under the detrimental reliance exception and counsel failed to take this action, counsel failed to render reasonably effective assistance. Accordingly, counsel was ineffective in failing to have the plea agreement enforced based on the detrimental reliance exception.” *Id.* at 12-13, 644 S.E.2d at 40. In the present case, however, there was no credible evidence before the Court that Applicant was promised a fifteen year sentence in exchange for his cooperation with law enforcement. Accordingly, the Court finds that *Custodio* is inapposite.

In denying relief on these claims and the remaining allegations raised by Applicant, the Court is mindful of the United States Supreme Court’s decision in *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621 (1977), where the Court explained that “the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system.” The advantages that guilty pleas provide to all concerned “can be secured ... only if dispositions by guilty plea are accorded a great measure of finality.” *Id.* at 71, 97 S.Ct. at 1627-28. Accordingly, the Court in *Blackledge* explained that:

... [T]he representations of the defendant, his lawyer, and the prosecutor at such a hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.

Blackledge, 431 U.S. at 73-74, 97 S.Ct. at 1629. *See also Christian v. Ballard*, 792 F.3d 427, 444 (4th Cir. 2015).

In sworn responses to questioning at the time of his plea, Applicant assured the plea judge that:

- He understood that indictment 2012-GS-41-054 as a true billed indictment for burglary in the first degree and that the punishment for burglary in the first degree was “not less than 15 years, up to life in prison, and it is classified as a violent and most serious offense under South Carolina law;”
- He understood that under South Carolina's strike rules that under South Carolina law if somebody receives a three serious offense convictions or two most serious offenses, the State could seek life without parole, and he understood that he receives another most serious offense, then the state could seek life without parole on that charge;
- Understanding the nature of the charge against him and the possible punishment that was associated with burglary in the first degree, he was pleading guilty.

5/21/2013 Tr. p. 4, line 21 – p. 5, line 23.

The plea judge briefly addressed counsel, who stated that he had reviewed the charge and Applicant's constitutional rights with Applicant. *5/21/2013 Tr. p. 5, line 25 – p. 6, line 5.* The plea judge then resumed his colloquy with Applicant, who indicated that:

- He was forty-three years old;
- He was married and had three children;
- That before his arrest, he was employed as a tow truck driver and he detailed cars;
- He had been incarcerated on the current charges for fourteen months;
- He was present when the plea judge had reviewed his constitutional rights;
- He understood those rights as they were explained and he did not have any question about those rights
- He understood that by pleading guilty, he was giving up his constitutional rights and that he would not receive a jury trial;
- He swore that the plea judge correctly understood that the charges against him included four counts of grand larceny, three counts of burglary in the second degree, one count of breaking and entering a motor vehicle and

one count of burglary in the first degree. The State was going to dismiss these other charges “as a result of this plea to the charge of burglary first;”

- Other than the dismissal of those charges no one had promised him anything, held out any hope of reward or threatened him in any way to get him to enter his plea;
- He was satisfied with the representation and advice that counsel had provided to him;
- He did not have complaints against counsel or any person in counsel’s office;
- He had shared with counsel everything that he knew about the charge against him, so that counsel could “look at these matters on [his] behalf;”
- He was not under the influence of any substance that would affect his ability to understand what he was doing;
- He was pleading guilty to the charge of burglary in the first degree because he was guilty of the charge;
- His plea was of his own free will; and
- He agreed that the Assistant Solicitor’s proffer of facts was essentially correct.

5/21/2013 Tr. p. 6, line 6 – p. 9, line 18.

Based upon these sworn responses, the plea judge found as follows:

THE COURT: All right. I find that the state has provided a substantial factual basis for the charge that Mr. Walker has pled guilty to. I find that his decision to enter this plea, that it has been done freely and voluntarily and intelligently. He has had the advice of counsel, an outstanding attorney in Mr. Seigler, and Mr. Walker has indicated to the Court that he is satisfied with that representation. I am going to accept his plea.

5/21/2013 Tr. p. 9, line 19 – p. 10, line 1.

This Court finds that Applicant has not presented sufficient reason for allowing him to depart from these sworn responses or from the plea judge's finding that he entered his guilty pleas freely, voluntarily, and intelligently. *Blackledge*, 431 U.S. at 73-74, 97 S.Ct. at 1629.

Finally, the Court finds that Applicant cannot meet the prejudice prong under *Hill*. The United States Supreme Court has also explained that "... to obtain relief on this type of claim, [an] [applicant] must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372, 130 S.Ct. 1473, 1485 (2009). "The challenger's subjective preferences, therefore, are not dispositive; what matters is whether proceeding to trial would have been objectively reasonable in light of all of the facts." *United States v. Fugit*, 703 F.3d 248, 260 (4th Cir. 2012), *cert. denied*, 134 S. Ct. 999 (2014). The Court finds that going to trial in this case "would [not] have been objectively reasonable in light of all of the facts," *id.*, since he faced the possibility of a sentence of life without the possibility of parole (LWOP) if convicted on the charge in 2012-GS-41-254. Additionally, even assuming that he was convicted but did not receive an LWOP sentence on this charge, he faced a possible mandatory LWOP sentence upon conviction for the burglary in the first degree in 2012-GS-41-286. See S.C. Code Ann. § 17-25-45(A) & (C)(1) (Supp. 2017). Further, there was overwhelming evidence of Applicant's guilt and no contention that he had a plausible defense to the charges against him.

2. Counsel was not ineffective for failing to move for reconsideration of sentence or for failing to move to withdraw Applicant's plea. (Amended claims 10.c & 10.d).

The Court further finds that counsel was not ineffective under *Strickland* for failing to move for reconsideration of sentence or for failing to move to withdraw Applicant's plea. "The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable

to later attack if the defendant did not correctly assess every relevant factor entering into his decision.” *Brady v. United States*, 397 U.S. 742, 757, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). “A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.” *Id.* As a result, “[t]he withdrawal of a guilty plea is generally within the sound discretion of the trial judge.” *State v. Riddle*, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982); *State v. Thomason*, 355 S.C. 278, 283, 584 S.E.2d 143, 146 (Ct. App. 2003) (“[O]nce a defendant enters a guilty plea, whether to allow withdrawal of the plea is left to the sound discretion of the circuit court.”); *State v. Gilliam*, 274 S.C. 324, 325-26, 262 S.E.2d 923, 924 (1980) (“It is a well established rule in this State that the granting of a motion to withdraw a guilty plea is a matter within the discretion of the trial judge before whom the plea is entered”). Also, “[a] judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed.” *State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008).

Again, the Court finds that the credible evidence in this case - including Applicant's sworn admissions to the plea judge, *see Blackledge*, 431 U.S. at 73-74, 97 S.Ct. at 1629 - Applicant received the benefit of the plea agreement that counsel and the State had reached, and that he freely and voluntarily entered his guilty plea with an understanding that it was a straight-up plea without any recommendation as to the sentence that he would receive. Also, “a [guilty] plea's validity may not be collaterally attacked merely because the defendant made what turned out, in retrospect, to be a poor deal.” *Bradshaw v. Stumpf*, 545 U.S. at 186, 125 S.Ct. at 2407. Further, the plea judge heard counsel's emphatic argument that Applicant deserved to receive a

fifteen year sentence because (1) he had fully cooperated with law enforcement in Saluda and Greenwood Counties, by taking officers to every home or business he had burglarized; (2) it was unnecessary for Pace to testify against him because he had admitted his crimes and taken Inv. Shorter to the various locations; (3) he and Pace had committed the crimes together; (4) the State had given Pace a deal for a fifteen year cap, even though Pace had not taken officers to the crime scenes; (5) he had agreed to make full restitution and planned to do so when released from custody; and (6) he was sorry for the he had committed. *5/31/2013 Tr. p. 14, line 12 – p. 16, line 14.*

Under these circumstances, there was no good faith basis on which plea counsel could have moved for either reconsideration of the sentence imposed or for withdrawal of Applicant's guilty plea. *Strickland* does not require counsel to make a frivolous objection or motion and, at worst, reviewing courts have found no prejudice from counsel's failure to make a frivolous objection. *See United States v. Wright*, 573 F.2d 681, 684 (1st Cir. 1978) ("Counsel is not required to waste the court's time with futile or frivolous motions"); *Werts v. Vaughn*, 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"); *Krist v. Foltz*, 804 F.2d 944, 946-47 (6th Cir. 1986) (trial counsel is not required to make frivolous objections to avoid a charge of ineffective representation); *Hough v. Anderson*, 272 F.3d 878, 897 (7th Cir.2001) ("If evidence admitted without objection was admissible, then the complained of action fails both prongs of the *Strickland* test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted"). Indeed, the Court in *United States v. Cronin*, 466 U.S. 648, 657 n. 19, 104 S.Ct. 2039, 2046 n. 19 (1984), explained that "... the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense

to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade.”

3. **Applicant’s guilty plea was not involuntary based upon counsel’s failure to properly explain the sentencing hearing procedure and potential outcome to Applicant. (Amended claim 10.e).**


Finally, the Court finds that Applicant’s guilty plea was not involuntary based upon counsel’s failure to properly explain the sentencing hearing procedure and potential outcome to Applicant. Counsel has a duty to independently investigate the facts, circumstances, pleadings, and law, in order to offer his or her client an informed opinion as to what plea should be entered. *Von Moltke v. Gillies*, 332 U.S. 708, 721, 68 S.Ct. 316, 322 (1948) (“Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered”). However, the credible evidence before this Court supports the inescapable conclusion that counsel satisfied that requirement here. As discussed, the credible evidence - including Applicant’s sworn admissions to the plea judge, *see Blackledge*, 431 U.S. at 73-74, 97 S.Ct. at 162 - is that Petitioner was fully aware of his right to a jury trial and the rights inherent therein, he understood the possible sentence that he could receive, and he understood the plea agreement that counsel had reached with the State. Understanding all of this, he freely and voluntarily made the decision to avail himself of the plea bargain, even though there was no recommendation as to sentence. Finally and for the reasons stated in connection with his Grounds 10.a & b, the Court finds that he cannot satisfy *Hill*’s prejudice prong because he has failed to prove that going to trial in this case “would have been objectively reasonable in light of all of the facts.” *Fugit*, 703 F.3d at 260. Therefore, the Court denies relief on each of Applicant’s claims.

The Court notes that Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on his behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.


IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant is remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 29 day of June, 2018.



R. KNOX MCMAHON
Presiding Circuit Court Judge


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