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November 7, 2018

The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

NOV 13 2018

S.C. SUPREME COURT

RE: James White v. State of South Carolina, Case No.: 2017-CP-10-3199

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post Conviction Relief (PCR) case. Also enclosed are the following:

(1) Proof of service of the Notice of Appeal on the respondent;

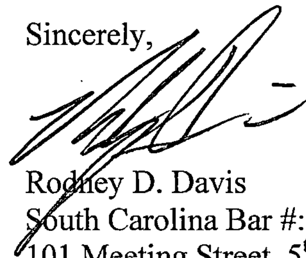
(2) The Order of Dismissal &

(3) A Request for Representation on Appeal.

The Applicant-Appellant was represented by me as an indigent pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR cases. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support thereof are signed by me as attorney for Applicant-Appellant. If you need anything further, do not hesitate to contact me. Thank you for your time and attention to this matter.

Sincerely,



Rodney D. Davis
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CC: Kelly Oppenheimer
Assistant Attorney General

Kimberly McCall
Appellate Division, SCCID

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No.: 2017-CP-10-3199

RECEIVED
NOV 1 3 2018
S.C. SUPREME COURT

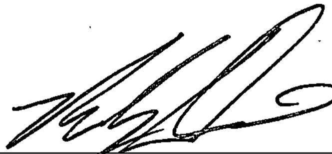
James White, Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

James White appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable Michael G. Nettles on October 3, 2018.



November 7, 2018

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NOV 1 3 2018

S.C. SUPREME COURT

2018 NOV -8 AM 11:38
FILED
JULIE J. ARMSTRONG
CLERK OF COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

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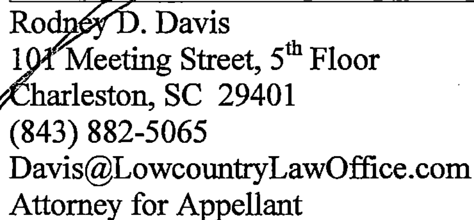

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S.C. SUPREME COURT

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No.: 2017-CP-10-3199

James White, Appellant,

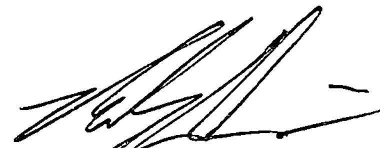
v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy of it to the address of record, Kelly Oppenheimer, P.O. Box 11549, Columbia, South Carolina 29211-1549, on May 19, 2014.

November 8, 2018



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AT 46 S02 @S

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
James D. White, #232496,	)	Case No. 2017-CP-10-3199
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

FILED 2018 OCT 24 AM 11:29 JULIE J. ARMSTRONG CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed June 22, 2017, by James D. White (Applicant). The State (Respondent) made its Return, Partial Motion to Dismiss, and Motion for a More Definite Statement on August 22, 2017, requesting an evidentiary hearing be held on Applicant's allegations of ineffective assistance of counsel. An evidentiary hearing into the matter was convened on October 3, 2018, at the Charleston County Courthouse before the Honorable Michael G. Nettles. Applicant was present at the hearing and represented by Rodney D. Davis, Esquire. Assistant Attorney General Kelly Oppenheimer of the South Carolina Attorney General's Office represented Respondent.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations and denied this application with prejudice.

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 Charleston County Clerk of Court. During its January 2017 term, the Charleston County Grand Jury indicted

Applicant for armed robbery (2017-GS-10-00028)[1]. Charles W. Cochran, Esquire, represented Applicant on this charge. Assistant Solicitor E. Culver Kidd, IV, of the Ninth Circuit Solicitor's Office, prosecuted the case. On April 6, 2017, Applicant appeared before the Honorable R. Markley Dennis, Jr. and pled guilty as indicted. Pursuant to a negotiated sentence, Judge Dennis sentenced Applicant to a term of imprisonment of ten years. Applicant did not appeal his plea or sentence.

CURRENT APPLICATION

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

1. In-effective assistant [sic] of counsel;
   a. Counsel did not assist [Applicant] to the full extent.
2. Not having the rights to less offense; [and]
   a. The state did not give [Applicant] the right to the less.
   b. Charge was upgraded to high offense, but no new warrant.
3. Violation of due process.

At the evidentiary hearing, Applicant proceeded forward on allegations plea counsel was ineffective for failing to explain the charge of armed robbery, in that counsel failed to explain how the original charge was upgraded to armed robbery, for failing to prepare for trial, and failing to convey a plea offer. Applicant also proceeded on an allegation his plea was involuntarily made.

STATEMENT OF FACTS

On April 21, 2016, at approximately 9:40 at night, Applicant entered the Kohl's department store in West Ashley. Tr. 6. Applicant went straight to the electronics department and grabbed two fifty-five inch Samsung televisions. Tr. 6. He then proceeded out the

[1] Applicant was initially arrested for and charged with a property crime enhancement (shoplifting less than $2,000), but the solicitor later sought and obtained an indictment on armed robbery after meeting with the victim. Tr. 7.

emergency exit located at the back of the store. Tr. 6. The loss prevention officer, Andrew Gerten (Victim), chased Applicant out of the emergency exit and observed Applicant placing the televisions in the back of a grey Chevrolet Tahoe. Tr. 6. Applicant then jumped in the car and started to leave. Tr. 6. The tailgate, however, was not closed; so, Victim grabbed the televisions as the car was pulling away. Tr. 6.

The car then stopped, and Applicant got out the passenger side, opened the backdoor, and retrieved an object from under the seat. Tr. 6. Applicant held the object in his waistband, acting as though the object were a gun. Tr. 6. He then looked at Victim and stated: "What now?" Tr. 6. Victim believed the object to be a gun and backed away. Tr. 6. Applicant retrieved the televisions, placed them back in the car, and left. Tr. 6.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented the testimony of Charles W. Cochran, Esquire (Counsel) and Assistant Solicitor Kidd. This Court also had before it a copy of Applicant's plea transcript, the records of the Charleston County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified on his own behalf. Applicant testified he was originally arrested for shoplifting, and he was out on bond for that offense. He further testified he never met Counsel in person, he never went to the Public Defender's Office to meet with Counsel, and Counsel never sent him a letter. Applicant testified he was arrested while he was out on bond. He also testified he met with Counsel at least three times via video conference at the jail. He elaborated each of these meetings was for approximately ten minutes, and the

television would turn off automatically. He further elaborated he and Counsel did not have a chance to discuss his situation at the time of these video conferences. Applicant testified the jail is in charge of turning the television on and off for video conferences, and he did not know how long the meetings would last. He further testified the only time he met Counsel face-to-face was the day of his plea.

Applicant also testified he and Counsel never reviewed the elements of shoplifting or property crime enhancement nor reviewed what the State would be required to prove at trial. He testified Counsel did explain the hire charge and explained the solicitor was attempting to enhance the charge. He elaborated at the time, he already had one armed robbery charge. He further elaborated Counsel told him if he did not plead to armed robbery, then the solicitor would enhance his property crime charge to an armed robbery. Applicant testified he did not believe Counsel when he told him this. He also testified he was unaware how the armed robbery charge happened, and Counsel did not explain it to him. He elaborated when he asked Counsel how his charge was upgraded to armed robbery, Counsel told him the solicitor can do what he wants to do. He further elaborated there was no proof of a weapon. He testified he knew he was facing armed robbery, but Counsel did not explain armed robbery to him. Applicant testified, however, he indicated to the plea court Counsel had explained the nature of the charged in the indictment.

He testified he and Counsel reviewed potential sentences for shoplifting, but they did not discuss the potential sentences for armed robbery. He explained he was aware shoplifting carried between zero and ten years. He further explained Counsel told him on the day of his guilty plea the potential sentence for armed robbery. He also testified he told the plea court Counsel had explained the potential sentence for armed robbery to him, and Counsel had

negotiated a plea on his behalf. He elaborated he informed the plea court he wanted the court to accept the negotiated sentence.

Applicant also testified he was aware armed robbery was more serious than the property crime enhancement prior to the plea. He testified he thought the solicitor could choose whether or not the crime was classified as violent or non-violent. He further testified he asked Counsel about the classification, and Counsel told him on the day of the plea he would serve eighty-five percent of his sentence. He explained Counsel did not inform him of this prior to the plea. Applicant also testified he and Counsel never discussed the possibility of a lesser-included offense to armed robbery or shoplifting. He elaborated he and Counsel did not discuss strong arm robbery.

Applicant testified he and Counsel did not discuss most serious offenses or strikes. He testified they also did not discuss life without the possibility of parole. He further testified on the day of the plea, they discussed the eighty-five percent rule and no parole offenses, but did not discuss it before. He testified, however, he informed the plea court most serious offenses had been explained to him, and he understood the significance of those offenses. He explained he did not understand the effect of a most serious offense. He further testified he informed the plea court he understood what a no parole offense was. He explained a no parole offense means he would not be going home and he would not get parole. Applicant also testified he recalled the plea court reviewing community supervision with him, and he understood what he was told.

He further testified he and Counsel did not discuss the plea until Applicant's court date. He testified on the day of his plea, he and Counsel discussed his right to a jury trial, but did not discuss the process. He elaborated Counsel did not discuss his right to remain silent nor his right

to testify with him. He further elaborated he was unaware he could explain his side of the story to the jury. Applicant also testified he and Counsel did not discuss any potential defenses. He further testified he and Counsel did not discuss any trial strategies. He testified they did not discuss his statement to law enforcement and did not discuss suppressing that statement. He explained he had never been to trial before. He testified he and Counsel never discussed his prior record and never discussed how the jury might be able to hear his record at trial. He elaborated he has a lengthy record, of approximately thirty prior offenses, so he was slightly aware of the criminal process. He further elaborated, however, he has never been to trial before on any of those prior offenses. He also testified none of his prior charges were as serious as armed robbery.

He also testified Counsel did not give the indication he was preparing for trial. He elaborated he obtained a copy of his discovery materials, but he and Counsel did not review it. He further elaborated he reviewed his discovery on his own. He explained he received the discovery on his first armed robbery charge and on the property crime enhancement. He testified he did not see the video from the surveillance camera at Kohl's prior to his guilty plea. Applicant also testified Counsel did not indicate he met with potential witnesses, and they did not discuss the testimony of any potential witnesses at trial. Applicant further testified, however, he did not give Counsel any leads or witnesses to investigate.

Applicant testified at the time of the plea, he was charged with another armed robbery that "dealt with someone up the street." He testified he was offered ten years in exchange for a plea to this armed robbery, which he turned down. He explained this offer was for ten years imprisonment with the service of eighty-five percent in exchange for a plea to armed robbery.

He further explained this offer was not in relation to the armed robbery at Kohl's, but rather the first armed robbery. He also testified he turned down another plea offer. He elaborated the second offer he receive was for a plea to the property crime enhancement. He further elaborated he rejected this offer. He further testified he received the third plea offer on the day of his plea.

He further testified Counsel told him he did not think Applicant should proceed to trial. He explained Counsel told him because of his prior record, the jury would think he was guilty of armed robbery. He further explained, however, he and Counsel did not review his prior record. He also testified he was brought to court on April 4, 2017, where he attempted to relieve Counsel. He elaborated he was told if he fired Counsel, he would need to hire a new attorney by Monday. He further elaborated he decided to keep Counsel, but Counsel was not ready for trial and did not ask for a continuance. Applicant further testified he was again brought to court on April 6, 2017, and he did not believe he had any other option but to plead guilty. He explained he would have gone to trial had he known everything, and he was aware he would be on trial for armed robbery. He recalled, however, the plea court reviewing each of his rights at trial with him, and he understood he was waiving those rights by pleading guilty. He testified he informed the plea court it was his decision to plead guilty, and no one had made him any promises or forced him in order to get him to plead guilty. Applicant also testified he was aware he faced between ten and thirty years imprisonment at the time of his guilty plea.

Following Applicant's testimony, Respondent presented the testimony of Counsel. Counsel testified he has been practicing law for ten years; and at the time of Applicant's case he was working at the Charleston County Public Defender's Office. He further testified he is

currently working at the Federal Public Defender's Office in Charleston. Counsel also testified his entire practice has involved criminal law.

Counsel testified he was appointed to represent Applicant shortly after Applicant's arrest on November 25, 2015. He testified he had no specific records from meetings with Applicant at the jail, but he had documentation from phone calls with Applicant. He explained he spoke with Applicant on the phone on December 29, 2015; January 7, 2016; February 23, 2016; March 29, 2016; June 21, 2016; and July 28, 2016. He further explained his normal practice is to visit a client in person within the first week of his or her arrest, then have routine visits every sixty days at least. Counsel also testified it is a possibility he would have met with a client via video conference a few times. He further testified he had a specific recollection of meeting with Applicant and was very familiar with Applicant. He explained he and Applicant had frequent exchanges.

He also testified he was assigned this case because he was assigned to Applicant's original armed robbery charge. He explained that initial armed robbery was a weaker case than the armed robbery in this case. He further explained Applicant was arrested in November 2015, and was in jail for two to three months before he was released on bond in February 2016. Counsel testified it was during the time Applicant was out on bond that he was arrested for this property crime enhancement.

Counsel further testified he filed *Brady*[2] and Rule 5, SCRCrimP, motions, and he reviewed the discovery with Applicant. He testified initially, he only had the discovery materials associated with the initial armed robbery charge, which included witness statements. Counsel also testified that initial armed robbery charge was ultimately dismissed. He further testified he

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[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

later got the discovery materials associated with this case. He explained in those materials there were law enforcement reports, video from the Kohl's department store, and witness statements. He further explained the video showed Applicant taking the televisions. Counsel also testified after Applicant was confronted by Victim, Applicant flashed or threatened the use of a weapon. Counsel testified they reviewed the witness statements, but he did not specifically remember showing Applicant the video.

He testified he reviewed the elements of the offenses with Applicant and also reviewed potential punishments. Counsel testified he reviewed the consequences of the plea with Applicant, and Applicant was very aware he was facing between zero and ten years imprisonment for the property crime enhancement and ten to thirty years for armed robbery. He further testified he and Applicant discussed potential defenses, specifically highlighting they would argue this was a mere shoplifting, which they were not contesting. Counsel did not specifically recall discussing lesser-included offenses with Applicant, but it would have been at the heart of any discussion about trial, as it would have been a defense. He also testified he did not recall specifically discussing a *Biggers*[3] hearing, but he typically would when there was going to be an eyewitness identification.

He explained the reason to review most serious offenses would be if Applicant were facing life without the possibility of parole, which he was not. Counsel did not recall Applicant's record, but he testified he does not typically review prior criminal records with his clients. He explained most of the time, his clients do not testify at trial. He also testified he would have discussed Applicant's prior record with him in terms of the plea or conviction at trial. He further testified he never got the indication Applicant did not understand something.

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[3] *Neil v. Biggers*, 409 U.S. 188 (1972).

He also testified he explained the enhancement to Applicant. He testified he informed Applicant the enhancement was always a possibility because of the accusation of Victim. Counsel explained the threat of armed robbery was serious, and the solicitor would not come off of armed robbery once it was charged. He further testified he was comfortable with proceeding to trial on the initial armed robbery; however, he wanted to get Applicant into court to plead to the property crime enhancement in order to avoid the enhancement to armed robbery. Counsel testified, however, Applicant did not want to plead guilty at that time. He explained Applicant had an opportunity to plead straight up to the property enhancement crime in order to avoid armed robbery, but Applicant did not want to plead.

He testified the goal early on was for Applicant to plead guilty to the property enhancement crime, and he did not anticipate this case proceeding to trial, as Applicant had no interest in going to trial. Counsel also testified had Applicant indicated he wanted to proceed to trial, Counsel would have been prepared.

He testified he spoke with the solicitor, who offered a plea to two counts of strong arm robbery. He further testified Applicant rejected that offer. Counsel also testified he did not specifically recall if there was ever an offer to plead to the property enhancement crime. He testified Applicant was scheduled to appear in court for pleas on August 8, 2016, and November 14, 2016, and Counsel reviewed the offers with Applicant prior to those dates. He further testified on each of those dates, Applicant rejected the State's offers. He explained Applicant rejected offers to plead to lesser-included offenses. He explained the offers were not what they hoped for, and Applicant did not want to plead at that time. He further explained Applicant's rejection of the offers put him at risk for an open plea.

Counsel testified it was ultimately Applicant's decision to plead guilty, and he never indicated he wanted to proceed to trial. He explained Applicant exhibited the "regular back and forth." He further explained Applicant wanted to work everything out, but he was not receiving the offer he wanted. Counsel testified Applicant had to choose between proceeding to trial on an armed robbery charged or agreeing to the mandatory minimum.

Following Counsel's testimony, Assistant Solicitor Kidd testified. He testified he has been practicing law since 2007 and has been employed with the Ninth Circuit Solicitor's Office for ten years. He also testified the video from the Kohl's department store was, in his opinion, very good. He explained the video showed Victim tracking Applicant through the store and also showed Applicant grabbing two televisions and exiting out the back of the store. He further explained the video showed close-ups of Applicant's face. He further testified a vehicle was waiting for Applicant with the hatch open, and Applicant put the televisions in the back of the vehicle and got in the car. Assistant Solicitor Kidd testified, however, Victim was able to grab the televisions out the back, at which point Applicant got out of the car. He further testified Applicant then reached in the back door of the car, grabbed what was believed to be a gun, and stated: "what you going to do now?" He explained based on these facts, he was unsure why Applicant was charged with a property crime to begin with.

Assistant Solicitor Kidd also testified Applicant had a pending armed robbery from November 2015. He explained he met with the victim in that case, who had a change of heart and was no longer willing to cooperate. He further explained he offered Applicant ten years imprisonment on the first armed robbery, which Applicant rejected.

He also testified on October 24, 2016, he offered a negotiated plea of ten years imprisonment in exchange for a plea to two strong arm robberies. He testified he explained the case was set for the November 14, 2016, trial docket, and if Applicant did not accept that plea, then he would seek an indictment for armed robbery. He explained this case associated with the robbery at the Kohl's department store was his strongest case, and this offer was the best he could make. Assistant Solicitor Kidd testified Applicant rejected this offer on November 14, 2016. He further testified on November 15, 2016, he brought the indictment for armed robbery to the Grand Jury, and he did not believe a new warrant was necessary. He also testified he made no new offers at that time, but it was going to have to be a plea to armed robbery at that time. He testified prior to the guilty plea, communicated to Counsel that Applicant could plead to the armed robbery for the Kohl's and he would dismiss the other pending armed robbery charge and the weapons charge. He explained this offer was for a negotiated ten years imprisonment.

Following Respondent's case, Applicant again testified in reply. He testified Counsel never told him of the October 2016 plea offer from the State. He elaborated he was never told he could plead to two counts of strong arm robbery, and he was never told he could plead down to strong arm robbery. He further elaborated had he known about this offer, he would have taken it, as he was guilty of shoplifting.

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 post-conviction relief 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).

Applicant's allegations are two-fold: (1) ineffective assistance of counsel for failing to prepare for trial, failing to explain the new indictment for armed robbery, and failing to convey a plea offer and (2) involuntary guilty plea. On these claims, this Court finds Applicant has wholly failed to meet his burden.

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).

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." *Cherry*, 300 S.C. 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." *Cherry*, 300 S.C. 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, 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.

Counsel's alleged failure to prepare for trial

Applicant alleges Counsel was ineffective for failing to prepare for trial. In particular, Applicant alleges Counsel was ineffective for failing to advise Applicant of the elements of the offense, for failing to discuss potential defenses with Applicant, for failing to discuss the evidence with Applicant, for failing to explain his constitutional rights at trial, and for failing to meet with Applicant. "There is a strong presumption counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Moreover, when there is evidence that counsel met with Applicant in preparation for trial and there is no evidence additional preparation on the part of counsel would have affected the outcome at trial, counsel cannot be said to have been ineffective. *Harris v. State*, 377 S.C. 66, 659 S.E.2d 140 (2008), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

Applicant testified he never met with Counsel in person, but rather met with him twice via video conference for approximately ten minutes each time. He further testified Counsel never reviewed the elements of the offenses with him, never reviewed discovery with him, and never reviewed his constitutional rights at trial with him. Applicant also testified although Counsel discussed the potential sentences with him, Counsel never explained the significance of a most serious offense. On the other hand, Counsel testified he had a specific recollection of numerous phone calls with Applicant. He further testified although he had no specific recollection of in person meetings with Applicant, his typical practice is to meet with his clients shortly after their arrest, with routine meetings with them approximately every sixty days. Moreover, Counsel testified he reviewed the elements of each offense with Applicant, potential sentences, possible defenses at trial, and Applicant's constitutional rights. Counsel also testified he reviewed the discovery for each case with Applicant. He testified Applicant never had any interest in proceeding to trial; but if Applicant had indicated he wished to exercise his right to a jury trial, Counsel would have been prepared. This Court finds Counsel's testimony very credible, whereas Applicant's testimony is not credible.

Counsel had numerous exchanges with Applicant in which they would discuss various aspects of Applicant's case, particularly reviewing potential defenses and the discovery. Based on the foregoing, this Court finds Counsel exercised reasonable professional judgment in making all significant decision in Applicant's case. *Harris*, 377 S.C. at 75, 659 S.E.2d at 145. This Court, therefore, finds Applicant has failed to establish any deficiency on the part of Counsel.

This Court similarly finds Applicant has presented no evidence which would establish any prejudice on the part of Applicant. When an applicant fails to offer any evidence or

argument as to how counsel's lack of preparation for trial prejudiced him, "it is merely speculative that counsel's alleged deficient performance was prejudicial to [the applicant]." *Id.* Indeed, Applicant admitted he did not provide Counsel with any leads or witnesses to investigate. Here, Applicant has wholly failed to provide this Court with any evidence as to what benefit could have been realized from additional preparation by Counsel. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to explain to Applicant the new indictment for armed robbery

Applicant further contends Counsel was ineffective for failing to explain the new indictment for armed robbery and how the enhancement came about. Applicant testified Counsel never explained the circumstances around the new indictment for armed robbery, particularly stating Counsel never told him how the armed robbery happened. Applicant admitted, however, Counsel told him a new indictment for armed robbery was possible, but he did not believe Counsel when he told him. Applicant also testified when he asked Counsel how the property crime enhancement charge was upgraded to armed robbery, Counsel told him the solicitor could do whatever they wanted. Counsel, however, testified explained the enhancement to Applicant, specifically indicating a new indictment for armed robbery was always a possibility due to the accusations by Victim. Indeed, Assistant Solicitor Kidd testified he was unsure why Applicant was initially charged with a property crime enhancement, based on the fact Victim stated Applicant indicated he had a weapon at the time of the robbery. He further testified he informed Counsel should Applicant reject the plea offer to two counts of strong arm robbery, he would seek an indictment for armed robbery. This Court finds Counsel's testimony and Assistant Solicitor Kidd's testimony very credible, whereas Applicant's testimony is not credible. Based

on the foregoing, Counsel made Applicant very aware of the possibility of an indictment for armed robbery and also specifically explained the armed robbery charge to Applicant. Accordingly, this Court finds Applicant has failed to establish Counsel was deficient.

This Court further finds Applicant has failed to establish any resulting prejudice from the alleged deficiency. "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision where or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). Indeed, "one of the most fundamental powers of a prosecutor" is to "bring charges against a person the prosecutor believes has committed a crime." *State v. Needs*, 333 S.C. 134, 145, 508 S.E.2d 857, 862 (1998). This decision, however, is subject to constitutional constraints, in that a prosecutor may not base his decision on unjustifiable standards nor baseless threats. *Id.* at 145-46, 508 S.E.2d at 863. Furthermore, "the Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion," nor may it "dismiss a properly drawn indictment issued by a properly constituted grand jury unless a statute grants that power to the court." *Id.* Here, Assistant Solicitor Kidd testified, in his legal opinion, the facts of this case did not constitute a property crime enhancement, but rather armed robbery. Specifically, Victim indicated Applicant grabbed an object out of the back passenger seat of the vehicle and acted as though the object were a weapon. Tr. 6. Indeed, Victim believed the object to be a gun. Tr. 6. Based on these facts, Assistant Solicitor Kidd testified he brought an indictment to the grand jury for armed robbery. Such a decision was solely within Assistant Solicitor Kidd's discretion as the prosecutor of this

case. Moreover, there is no indication this decision was based on any constitutionally impermissible biases. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to convey a plea offer

Applicant alleges Counsel was ineffective for failing to convey a plea offer. In particular, Applicant alleges Counsel never informed him of the State's October 2016 offer, through which Applicant could plead to two counts of strong arm robbery. In order to prevail on a claim counsel was ineffective for failing to convey a plea offer, the applicant must show: (1) plea counsel's failure to communicate the State's initial plea offer constituted deficient performance and (2) the applicant was prejudiced by the deficient performance, in other words there was a reasonable probability that but for this deficient performance, the applicant would have accepted the original plea offer. *Davie v. State*, 381 S.C. 601, 675 S.E. 416 (2009).

Applicant testified he was unaware of the State's October 2016 plea offer, through which Applicant could plead to two counts of strong arm robbery. He testified had he known of such an offer, he would have accepted it. Counsel, however, testified he communicated this offer to Applicant, and Applicant rejected it. Indeed, Applicant rejected all offers that would have allowed him to plead to lesser-included offenses. Moreover, Assistant Solicitor Kidd testified he specifically communicated this offer to Counsel prior to the plea, indicating should Applicant reject this offer, he would seek an indictment for armed robbery. This Court finds Counsel's testimony and Assistant Solicitor Kidd's testimony very credible, whereas Applicant's testimony is not credible. It is apparent Counsel communicated all offers to Applicant. This Court, therefore, finds Applicant has failed to establish Counsel was deficient.

Similarly, this Court finds Applicant has wholly failed to establish any resulting prejudice from this alleged deficiency. Counsel testified Applicant did not accept any offers which would allow him to plead to a lesser-included offense because the offer was not for what Applicant was hoping. Specifically, Applicant indicated he wanted to plead but he was not getting the offers or the sentences he wanted. Based on the foregoing, there is no indication Applicant would have accepted the plea offer to two counts of strong arm robbery. Accordingly, this allegation must be denied and dismissed with prejudice.

Involuntary Guilty Plea

Applicant further alleges his guilty plea was not voluntarily made. This Court finds Applicant's guilty plea was freely and voluntarily made. 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). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." *Id.* at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). 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.* However, the overarching concept remains "a guilty plea should only be accepted where the record evidences 'an affirmative showing that it was intelligent and voluntary.'" *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (internal quotation omitted); *Parke v. Raley*, 506 U.S. 20, 29 (1992). This is because "waivers of constitutional rights not only must be

voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970).

Key to the analysis in reviewing a plea for voluntariness is looking to "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Raley*, 506 U.S. at 29 (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). 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 his plea and the charges against him. *Boykin*, 395 U.S. at 244. 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, but not invariably, 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).

This Court finds this allegation is without merit, and Applicant has failed to carry his burden of proving that his guilty plea was involuntarily made. This Court finds Applicant's plea was entered into freely and voluntarily. The record before this Court reflects the plea court thoroughly reviewed all of Applicant's constitutional rights with him, including his right to a jury trial. Tr. 5. Applicant indicated he understood he waived those rights by pleading guilty. Tr. 5. Applicant further indicated no one had promised him anything or threatened him in order to get him to plead guilty. Tr. 5. Additionally, at the plea, Applicant indicated Counsel had

explained the nature of the charge contained in the indictment and had explained to him the potential sentences. Tr. 2. Applicant further indicated most serious offenses and its significance had been explained to him. Tr. 3. He also indicated he understood no parole offenses, understood he would serve at least eighty-five percent of his sentence, and understood the community supervision program. Tr. 3-4. Applicant also stated he was "totally satisfied" with Counsel. Tr. 4.

Therefore, this Court finds Applicant had a full understanding of the consequences of his plea and the charges against him, 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 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.

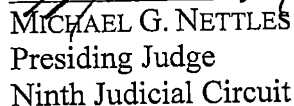
This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an applicant has a right to an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

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

AND IT IS SO ORDERED this 18 day of October, 2018.



MICHAEL G. NETTLES
Presiding Judge
Ninth Judicial Circuit

Florence, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE SUPREME COURT OF SOUTH CAROLINA

Case No.: 2017-CP-10-3199

RECEIVED
NOV 13 2018
S.C. SUPREME COURT
FILED
2018 NOV -8 AM 11:38
JULIE J. ARMSTRONG
CLERK OF COURT

JAMES WHITE,
Applicant.

-versus-

STATE OF SOUTH CAROLINA,
Respondent.

REQUEST FOR REPRESENTATION ON APPEAL

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;

2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;

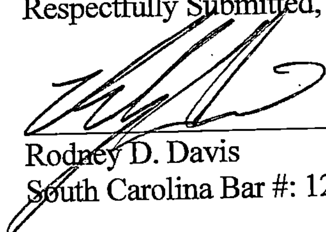
3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;

4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;

5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting his appeal to the South Carolina Supreme Court.

Respectfully Submitted,



Rodney D. Davis
South Carolina Bar #: 12396

November 7, 2018
Charleston, South Carolina.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

VERIFICATION

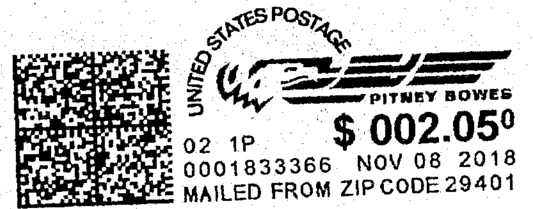
FILED
2018 NOV -8 AM 11:38
JULIE J. ARMSTRONG
CLERK OF COURT
BY

PERSONALLY appeared before me, Rodney D. Davis, attorney for James White, being first duly sworn, deposes and says that he has read the foregoing *Request for Representation on Appeal* and the same is true of his knowledge except those matters alleged on information and belief, and as to those matters, he believes them to be true.

Rodney D. Davis
South Carolina Bar #: 12396

SWORN to and subscribed to me
this 8 day of November, 2018.

Notary Public for South Carolina
My Commission expires 7/28/24



Rodney D. Davis
101 Meeting Street, 5th Floor
Charleston, SC 29401

The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211