

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

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November 12, 2018

Via US Mail

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


Re: Notice of Intent to Appeal from John William Kennedy vs. State of South Carolina C.A. No.: 2017-CP-23-6954

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable Alex Kinlaw Jr.'s Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law



R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw Jr., Circuit Court Judge

Case No. 2017-CP-23-6954

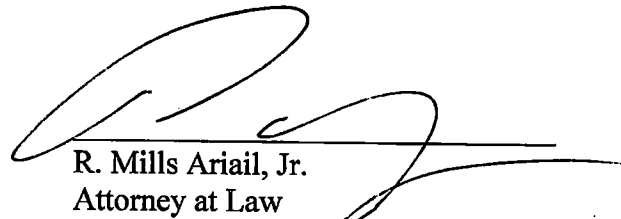
John William Kennedy,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable Alex Kinlaw, Jr.'s Order of Dismissal dismissing Appellant's application for post-conviction relief. On November 5, 2018, the Honorable Alex Kinlaw, Jr. signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on November 9, 2018. A copy of the Honorable Alex Kinlaw, Jr.'s Order of Dismissal is attached.



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Attorney for John William Kennedy

Greenville, South Carolina
November 12, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
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Alex Kinlaw, Jr., Circuit Court Judge

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John William Kennedy,..... Appellant,

v.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this November 12, 2018, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

DeShawn Mitchell, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

John William Kennedy SCDC# 370431
McCormick Correctional Institute
386 Redemption Way
McCormick, SC 29899

SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

November 12, 2018

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In April of 2015, the Greenville County Grand Jury indicted Applicant for reckless homicide (2016-GS-23-3184), failure to stop for a blue light resulting in death (2016-GS-23-3185), leaving the scene of an accident with death (2016-GS-23-3188) and attempted murder (2016-GS-23-3194). Applicant waived presentment to the grand jury on a charge of grand larceny (2016-GS-23-10062)(A). Christopher Scalzo, Esquire, represented Applicant and Andrew Culbreath, Esquire represented the State. On November 9, 2016, Applicant pled guilty before the Honorable Letitia H. Verdin. Judge Verdin sentenced Applicant to imprisonment for ten years for the reckless homicide, twenty years for failure to stop for a blue light resulting in death, twenty years for leaving the scene of an accident with death, twenty years for attempted murder and ten years for grand larceny suspended with probation for five years to be served consecutive to the other charges. Applicant did not appeal his sentences or convictions.

FACTUAL HISTORY

On September 17, 2015, Applicant stole a pickup truck early that morning from the father of his ex-girlfriend. Later that morning, Applicant met up with his co-defendant at TD's Express Mart in Greenville County to attempt to sell the truck and its contents to his co-defendant. The truck was reported stolen and the police were alerted. When the police arrived they observed the truck matching the description of the reported stolen truck and saw Applicant and his co-defendant transferring items from the stolen truck to the co-defendant's truck. After seeing the police arrive, Applicant jumped into his co-defendant's truck and began to flee the scene. In the process he struck one police officer and a high speed chase started. Applicant proceeded to drive

on the wrong side of the road and struck a victim who was riding his motorcycle to work. After hitting the victim, Applicant attempted to exit the truck and flee but was apprehended shortly thereafter. (GP tran. pg. 8-12)

ALLEGATIONS

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

1. Ineffective Assistance of Plea Counsel
 - a. Attached pages 8-17

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant's Testimony

Applicant testified Plea Counsel represented him on his charges. He testified once he was arrested he never posted bond and was incarcerated the entire time his charges were pending. Applicant testified he first met with Plea Counsel in September of 2015 and discussed his case. He testified during their conversation, they discussed his charges but not the evidence the State had against him. Applicant testified he asked Plea Counsel for a copy of his discovery but that he did not receive it until right before he pled guilty. He testified during the course of Plea Counsel's representation he met with Plea Counsel four or five times but that they never discussed his discovery. Applicant testified Plea Counsel told him his case was cut and dry and he should probably plead guilty. He testified he eventually received his discovery but felt as though he did not have enough time to review it prior to pleading guilty. Applicant testified included in his discovery was one statement from an officer who was on the scene that was the victim of the attempted murder charge. He testified there were no medical records for the officer included in his discovery. Applicant testified he discussed the officer's statement with Plea

Counsel and how it could be used at a possibly trial. He testified he asked Plea Counsel about seeing videos from the incident but that Plea Counsel never showed them to him. Applicant testified there were plea negotiations that started out at a plea for thirty years. He testified Plea Counsel told him if he wanted to plead he should do so in front of Judge Verdin and he would get a straight sentence of potentially twenty years. Applicant testified Plea Counsel never talked to anybody at the jail who could have helped with his case. He testified there was also a 911 tape he wanted Plea Counsel to investigate.

On cross-examination, Applicant testified he never heard the 911 tape he wanted Plea Counsel to investigate. He testified Plea Counsel did not provide him his discovery when he requested it but that he had an opportunity to review it prior to pleading guilty. He testified none of the officers he wanted Plea Counsel to talk to about his case were present to testify at his PCR hearing.

Plea Counsel's Testimony

Plea Counsel testified he had practiced law for sixteen years and that he was appointed to represent Applicant on his charges. He testified that Applicant had been charged with attempted murder with a truck after an incident at a gas station with a police officer. Plea Counsel testified after Applicant left the gas station a chase ensued with police where Applicant ultimately struck and killed a firefighter. He testified during the course of his representation he met with Applicant about four or five times. Plea Counsel testified during those meetings he discussed the indictments and the possible punishments Applicant was facing. He testified he discussed Applicant's constitutional rights with him and also the State's burden of proof. Plea Counsel testified he never got a video in discovery from the gas station where the incident took place. He testified he talked to Applicant about a possible video and then had a private investigator go to

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the gas station to see if there was a video. Plea Counsel testified his private investigator informed him the gas station did not have a video of the incident. He testified he did not recall Applicant requesting him to get medical records concerning the officer who Applicant was charged with attempted murder for. Plea Counsel testified he told Applicant that the officer could testify to the events that happened at the gas station which would have been sufficient facts to establish attempted murder. He testified he entered into plea negotiations with the State on behalf of Applicant. Plea Counsel testified the State wanted a negotiated sentence but agreed to let Applicant pled straight up. He testified he never promised Applicant a certain sentence. Plea Counsel testified he considered the attempted murder charge as a secondary charge as the charges related to the death of the firefighter was what drove Applicant's case. Plea Counsel testified he tried to evaluate a defense for Applicant based on Applicant being struck by a bullet prior to starting the high speed chase had the case gone to trial.

On cross-examination, Plea Counsel testified Applicant was arrested in September of 2015 and that on September 22, 2015, he sent his private investigator to go see Applicant. He testified during his representation he went to go see Applicant several times. Plea Counsel testified he believed Applicant comprehended what was going on and knew what he was doing. He testified during the course of his representation there were times where Applicant's case could have been a plea or gone to trial. Plea Counsel testified there was no video available from the TD's gas station where the incident started. He testified what drove Applicant's case and its disposition was the death of the firefighter. Plea Counsel testified he never thought about hiring an expert to access Applicant's head injury as he did not see a valid basis to establish a defense after evaluating Applicant's case.

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 had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "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. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 at 688). Second, counsel's deficient performance must have prejudiced the

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b

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. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 (1985).

In PCR cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citations omitted). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Lockhart, 474 U.S. at 56. Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann v. Richardson, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." Id. at 771.

The record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Cl. App. 2007) (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). 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 the court and defendant, between the court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Further, "[a] guilty

plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, an applicant's right to contest the validity of such a plea is usually foreclosed. Dalton, at 137-38, 654 S.E.2d at 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)). "In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." Id. at 138-39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel. This Court finds as follows on the following grounds presented by Applicant at the evidentiary hearing:

Ineffective Assistance of Counsel

Failure to Investigate

Applicant alleges Plea Counsel was ineffective in failing to investigate facts and adequately prepare. To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have

requested counsel pursue had counsel more fully prepared for the trial.”). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). Here, Applicant testified included in his discovery was one statement from an officer who was on the scene that was the victim of the attempted murder charge. He testified however, there were no medical records for the officer included in his discovery. Applicant testified he discussed the officer’s statement with Plea Counsel and how it could be used at a possibly trial. He testified he asked Plea Counsel about seeing videos from the incident but that Plea Counsel never showed them to him. Plea Counsel testified he never got a video in discovery from the gas station where the incident took place. He testified he talked to Applicant about a possible video and then had a private investigator go to the gas station to see if there was a video. Plea Counsel testified his private investigator informed him the gas station did not have a video of the incident. He testified he did not recall Applicant requesting him to get medical records concerning the officer who Applicant was charged with attempted murder for. Plea Counsel testified he told Applicant that the officer could testify to the events that happened at the gas station which would have been sufficient facts to establish attempted murder. Based on this testimony this Court finds Plea Counsel did investigate the issues Applicant wanted him to. Additionally, this court would note Applicant presented no medical records, 911 tapes, or testimony from other witnesses he alleged he wanted Plea Counsel to talk to for him thus failing to demonstrate sufficient prejudice on Plea Counsel’s behalf. This Court finds Counsel’s investigation was beyond reasonable. Therefore, Applicant has failed to meet his burden to prove Plea Counsel was ineffective. This allegation is denied and dismissed with prejudice.

Involuntary Guilty Plea

Applicant also contends his guilty plea was induced by ineffective assistance of counsel because Plea Counsel failed to provide him with discovery in a timely fashion which did not allow him sufficient time to make a decision regarding a trial or guilty plea. This Court finds Applicant has failed to meet his burden of proof. This Court finds Plea Counsel provided effective assistance in this case and Applicant's decision to plead guilty was made freely and voluntarily. Further this Court finds Applicant's testimony not credible regarding this allegation. This Court would note Applicant testified Plea Counsel did not provide him his discovery when he requested it but that he had an opportunity to review it prior to pleading guilty. Additionally, this Court finds Plea Counsel's testimony credible he met with Applicant on a sufficient number of occasions prior to pleading guilty.

This Court further finds the record reflects Applicant's plea was entered freely, voluntarily, knowingly, and intelligently. The plea judge explained the charges to Applicant, including the maximum penalties for each. The plea judge also went through Applicant's constitutional rights and questioned Applicant as to whether he understood those rights and wished to give them up to plead guilty. Applicant agreed that he did. Applicant admitted he was guilty of these offenses told the plea judge that he was satisfied with his attorney. Applicant further told the plea judge no one had threatened him or made him any promises to get him to plead guilty, and he was doing so of his own accord. Additionally, Applicant told the plea judge he did not have any physical or mental issues which would prevent him from understanding the proceeding, and Applicant indicated he understood all of the plea judge's questions and had answered them honestly. This Court therefore finds that Applicant understood the terms of the plea and the possible sentences he could receive.

Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court also finds that the record fully supports the knowing and voluntary nature of Applicant's guilty plea. See Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (holding defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "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."). In addition, Applicant has presented no evidence or valid reasons why he should be allowed to depart from the truth of his statements made at the plea. See Dalton, 376 S.C. at 137, 654 S.E.2d at 874 ("[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."). This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

CONCLUSION

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

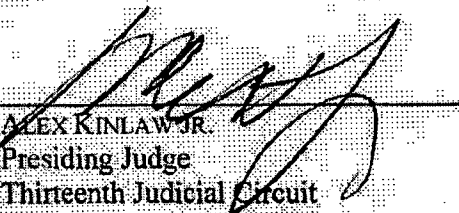
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the

appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

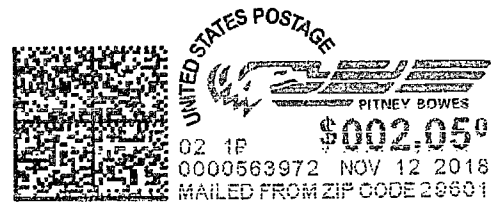
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 5 day of November, 2018.


ALEX KINLAW JR.
Presiding Judge
Thirteenth Judicial Circuit

 South Carolina

Copy mailed to
Attorney Arnold and A.G.
on 11 / 7 / 2018



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