

Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

December 10, 2018

RECEIVED

DEC 12 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: Douglas Green, SCDC # 354245, vs. State of South Carolina
Appeal of Case No. 2013-CP-40-6370

Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal, along with an order denying a motion to alter/amend judgment. 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. I was **appointed** to represent Mr. Green on his PCR.

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

Respectfully,



Kristy Goldberg

CC: J. Clayton Mitchell
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Douglas Green, SCDC # 354245
Kirkland Correctional Institution
4344 Broad River Road
Columbia, South Carolina 29210

Jeanette McBride
Richland County Clerk of Court
Post Office Box 2766
Columbia, South Carolina 29202

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2013-CP-40-06370

Douglas Green, SCDC # 354245, Appellant


v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant Douglas Green hereby appeals from the Order of the Honorable Diane S. Goodstein presiding Judge for the 5th Judicial Circuit, filed October 16, 2015 and Order Denying Motion to Alter/Amend received by counsel for the Applicant on December 7, 2018 in the matter of Douglas Green v. State of South Carolina, Case No. 2013-CP-40-06370.

December 10, 2018



Kristy Goldberg
Attorney for Plaintiff

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Columbia, SC 29201
Phone (803) 667-6633
kristy@kristygoldberglaw.com

Other Counsel of Record:
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Post Office Box 11549
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
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Case No. 2013-CP-40-06370

Douglas Green, SCDC # 354245, Appellant

v.

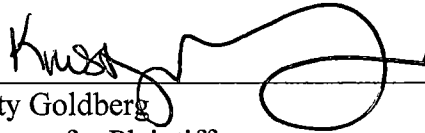
State of South Carolina, Respondent.

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 December 10, 2018 by
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, J. Clayton Mitchell
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211



Kristy Goldberg
Attorney for Plaintiff

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kristy@kristygoldberglaw.com

Other Counsel of Record:
Assistant Attorney General, J. Clayton Mitchell
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

RECEIVED
DEC 12 2010
S.C. SUPREME COURT

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

FORM 4

JUDGMENT I CIVIL CASE

CASE NO. 2013 CP-40-06370

Douglas Green, #354245

State of South Carolina

RECEIVED
 DEC 12 2018

S.C. SUPREME COURT

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> 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. See Page 2 for additional information.
- 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 order ends does not end the case.

Additional Information for the Clerk:

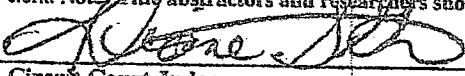
INFORMATION FOR THE JUDGMENT INDEX

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 (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

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

2112
 Judge Code

10/1/15
 Date

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Douglas Green, #354245,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2013-CP-40-06370

ORDER GRANTING RELIEF IN PART
AND DENYING RELIEF IN PART

OCT 16 11 9:30 AM
CLERK OF COURT

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed October 18, 2013. Respondent made its Return on February 25, 2014, requesting an evidentiary hearing be convened. Kristy R. Goldberg, Esquire was appointed by the Richland County Clerk of Court. An evidentiary hearing was held on January 22, 2015, at the Richland County Courthouse. Applicant was present and represented by Counsel Goldberg. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's plea counsel, Elizabeth Fielding Pringle, Esquire. This Court had before it the Richland County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, and the guilty plea transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was represented by Counsel Pringle. On December 18, 2012, Applicant appeared before the Honorable L. Casey Manning, where he pled guilty as indicted. Sentencing was deferred until February 20, 2013, where Judge Manning sentenced Applicant as follows:

2011-GS-40-871	Bank Robbery	30 years concurrent
2011-GS-40-873	Carjacking	20 years concurrent to -888, suspended, held in abeyance pending completion of probation
2011-GS-40-874	Armed Robbery	30 years provided upon the service of 15 years, the balance is suspended with probation for 5 years, consecutive to -871
2011-GS-40-875	Burglary, 2 nd (nonviolent)	15 years concurrent to -871
2011-GS-40-877	Assault and battery of a high and aggravated nature (ABHAN)	20 years concurrent to -871
2011-GS-40-881	Failure to stop for a blue light	10 years concurrent to -871
2011-GS-40-880	Possession of a weapon during the commission of a violent crime	5 years concurrent to -871
2011-GS-40-888	Attempted murder	30 years consecutive to -871, suspended, held in abeyance pending completion of probation
2011-GS-40-892	Assault and battery, 1 st degree	10 years concurrent to -871
2011-GS-40-893	Assault and battery, 1 st degree	10 years concurrent to -871
2011-GS-40-894	Assault and battery, 1 st degree	10 years concurrent to -871
2011-GS-40-895	Wearing masks	1 year concurrent to -871
2011-GS-40-4664	Throwing bodily fluids	15 years concurrent to -871
2011-GS-40-4665	Throwing bodily fluids	15 years concurrent to -871
2010-GS-40-3994	Malicious injury to jail property	15 years concurrent to -871

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Counsel failed to enter into plea negotiations with the solicitor's office.
2. Counsel incorrectly advised Applicant that, upon entering a guilty plea, all sentences were to be imposed concurrently.
3. Counsel failed to explain Applicant's constitutional rights, elements of each charge, and what Applicant was pleading guilty to under the law, which resulted in Applicant's plea not being knowingly and voluntarily made.
4. Counsel failed to challenge Applicant's charge of attempted murder as there was no factual basis provided that Applicant had an intent to kill as required by S.C. Code § 16-3-29.
5. Counsel failed to challenge Applicant's charge of assault and battery of a high and aggravated nature as there was no factual basis provided that the victim was injured in a manner that great bodily injury resulted or was likely to result as required by S.C. Code § 16-3-600.
6. Counsel failed to challenge Applicant's charge of second degree burglary, as no factual basis was provided to sufficiently prove the elements of the charge as required by S.C. Code § 16-11-312.

7. Counsel failed to challenge Applicant's charges of entering a bank with intent to steal and armed robbery, as a conviction of both offenses is a violation of Applicant's right against double jeopardy.
8. Counsel was ineffective in failing to move to withdraw the plea because it was not entered knowingly and voluntarily.
9. Counsel failed to object when Applicant was illegally sentenced to greater than the law allows:
 - a. Sentence to indictment 2011-GS-40-875 for second degree burglary (non-violent) exceeded the maximum of 10 years provided by S.C. Code § 16-11-312(A).
 - b. Sentence to indictment 2010-GS-40-3994 for malicious injury to jail property is illegal in that the 15 year sentence exceeds the maximum allowed by statute which is 3 years pursuant to S.C. Code § 4-17-70.
10. Counsel failed to file a motion to reconsider the Court's sentence to request a sentence reduction.
11. Counsel failed to advise Applicant of his right to appeal and failed to file a notice of appeal on his behalf.
12. The cumulative effect of counsel's errors resulted in deficient performance violating Applicant's constitutional rights under the Sixth Amendment.
13. Counsel violated the Rules of Profession Conduct in her representation.

II. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, 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, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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. 668. Applicant must overcome this presumption in order 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. *Id.* at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. *Id.* Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." *Id.* (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Involuntary and Unintelligent Guilty Plea

Applicant argues he did not plead guilty knowingly and voluntarily. Applicant argues he was advised that Judge Manning would run the sentences concurrently. He also alleges that he was not properly advised of the numerous charges against him. This Court finds otherwise and concludes that Applicant's guilty plea was entered freely and voluntarily.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). 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." 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)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate'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 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

Applicant claims he did not plead guilty knowingly and voluntarily for a number of reasons. This Court finds these contentions without merit. This Court finds the record reflects Applicant was advised of the waiver of his constitutional rights by the plea court. Applicant's testimony regarding Counsel's advice is not credible. This Court finds very credible Counsel's

testimony regarding her preparation and advice concerning the case and the amount of time Applicant was facing. Counsel's testimony that she meticulously reviewed the charges, possible punishment, and the discovery materials is persuasive. Counsel also noted that she believed Applicant to have a full understanding of the rights he was waiving by pleading guilty and did so voluntarily. Counsel explained that neither she nor the State made Applicant any promises with respect to a possible sentence. There was no credible evidence presented that Applicant was advised that the sentences were to only be run concurrently. It is abundantly clear from the plea transcript and from Counsel's testimony that Applicant was fully aware that Judge Manning could run the charges consecutively. Counsel even noted that she further advised Applicant of the distinction between consecutive and concurrent time at the sentencing hearing.

The record reflects Applicant admitted his guilt to the plea court. This Court finds that Applicant presented *no* evidence that he was coerced or forced to plead guilty. This Court finds Applicant's intent to plead guilty was made clear to the plea judge. Applicant was fully informed of the nature and consequences of his plea by his attorney and was advised further by the plea court. Applicant knew he was pleading guilty and conveyed that to the plea court. Judge Manning went through a very extensive colloquy with Applicant to ensure he understood all consequences of pleading guilty. This Court finds the plea judge correctly found Applicant's plea was freely, voluntary, and intelligently made. This allegation is denied and dismissed with prejudice.

Ineffective Assistance of Counsel

Failure to File a Notice of Appeal

This Court further finds Applicant has failed to carry his burden to prove Counsel was ineffective in failing to file a notice of appeal. "[C]ounsel has a constitutionally imposed duty to

consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036, 145 L. Ed. 2d 985 (2000). Here, Applicant did not convey any wishes to have the guilty plea appealed. This Court finds there was no basis for an appeal as there were no objections made. This Court finds Green’s testimony not credible and relies on the credible testimony of Counsel. This Court also finds Applicant failed to present any evidence showing how he may be prejudiced by this alleged deficiency. See Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Failure to enter into plea negotiations

Applicant alleges Counsel failed to enter into plea negotiations with the solicitor’s office in an effort to resolve the case in a manner favorable to Applicant. Applicant testified that no negotiations took place with the prosecuting solicitor. Counsel testified that she never seriously thought about taking this case to trial as the State’s case against Applicant was strong. She testified that the State did not make any offers to Applicant despite her efforts to solicit some kind of offer.

The South Carolina Supreme Court has held “[t]he decision whether to offer a plea bargain is within the *solicitor’s* discretion.” State v. Whipple, 324 S.C. 43, 49, 476 S.E.2d 683, 686 (1996) (emphasis added), citing State v. Chisolm, 312 S.C. 235, 439 S.E.2d 850 (1994). A criminal defendant has “no right to be offered a plea . . . nor a federal right that the judge accept it.” Lafler v. Cooper, 132 S. Ct. 1376, 1387, 182 L. Ed. 2d 398 (2012).

This Court finds this allegation without merit. This Court finds Counsel's testimony credible on the issue in that the State was unwilling to extend a plea offer to Applicant, as was their right. Counsel attempted to negotiate an offer with the prosecuting solicitor, but that was to no avail. Applicant ultimately pled guilty straight up with no recommendation or negotiation in place. Counsel was not deficient in any regard as she made attempts to work with the prosecuting solicitors. Applicant has failed to show any resulting prejudice because there has been no evidence submitted to show that the State had any intention of offering Applicant a deal. This Court denies and dismisses this allegation with prejudice.

Failing to challenge the attempted murder, ABHAN, and second degree burglary charges

Applicant further alleges that Counsel was ineffective in failing to challenge the sufficiency of the charges of attempted murder, ABHAN, and second degree burglary. Applicant argues there was not a sufficient factual basis for him to be convicted of attempted murder, ABHAN, or second degree burglary.

Post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(b); see also Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."). Applicant's allegation regarding the charges against him is an inappropriate challenge to the sufficiency of the evidence. Simmons, 264 S.C. at 423, 215 S.E.2d at 885 ("[T]he Uniform Post-conviction Procedure Act 'shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.'" (citing Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973))). "A guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d

123, 129 (2014) (citing State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013); Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)).

This Court finds this allegation is not proper for this forum. Applicant must have taken this case to trial and argued for dismissal of the charges at that stage. Instead, he admitted the truth to the allegations set forth in the indictments at the plea hearing. Applicant may not now challenge the sufficiency of the evidence.

It is noteworthy that Applicant was still facing over 150 years not taking into account these four charges. It was certainly reasonable for Counsel to advise Applicant to plead guilty to the charges even though she had concerns that the State may have trouble proving all necessary elements at trial. Counsel brought her concerns to the attention of the prosecuting solicitor in an attempt to challenge the charges, but they would not agree to drop or reduce any of the charges. Applicant has failed to prove Counsel rendered deficient performance. He has also failed to present the Court with any credible evidence showing he was prejudiced by this alleged deficiency.

Double Jeopardy

Next, Applicant alleges Counsel was ineffective in failing to challenge Applicant's charges of armed robbery and entering a bank with intent to steal as a violation of the right against double jeopardy. "Where an act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180 (1932).

Counsel testified she did not believe armed robbery and entering a bank with intent to steal carried the same elements and, therefore, did not implicate the double jeopardy clause. This

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Court agrees with Counsel's analysis that Applicant's convictions do not constitute a double jeopardy violation. The offenses do not share identical elements. See S.C. Code Ann. § 16-11-380 (2007); S.C. Code Ann. § 16-11-330 (1996). Therefore, this allegation is denied and dismissed with prejudice.

Failure to move to withdraw guilty plea

Applicant further alleges Counsel was ineffective in failing to move to withdraw the guilty plea. He argues that since he did not plead guilty knowingly and voluntarily that Counsel should have learned of this and brought it to Judge Manning's attention. He also argues that Counsel should have moved to withdraw the plea when she realized Applicant was unsatisfied with her representation.

This allegation is without merit. The only requirements for a plea to be accepted are that the defendant "understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea." Rollison v. State, 346 S.C. 506, 511, 522 S.E.2d 290, 292 (2001). Once a defendant has entered a guilty plea, he is not entitled to withdraw it as a matter of right. State v. Thomason, 355 S.C. 278, 285, 584 S.E.2d 143, 146 (2003); Riddle v. State, 278 S.C. 148, 292 S.E.2d 795 (1982). In this instance, a defendant's withdrawal of guilty plea is "left in the sound discretion of the circuit court." Thomason, 355 S.C. at 283. Moreover, "[a]n accused is not permitted to speculate on the supposed clemency of the judge and enter a plea of guilty with the right to retract it if he finds that his expectation was not realized." State v. Cantrell, 250 S.C. 376, 380, 158 S.E.2d 189, 191-192 (1967). Applicant's argument that counsel was ineffective in failing to withdraw the guilty plea is based on a mere allegation of prejudice in that he received a harsher sentence than expected.

[Withdrawal of a plea] should not be made use of solely because of defendant's surprise at the severity of the sentence imposed, in the absence of some showing that the plea was induced by fraud, misrepresentation, or other unfair or undue means on the part of the prosecuting attorney or the presiding judge.

State v. Harvey, 123 S.E. 201, 202 (1924).

Counsel testified she did not see any reason to move to withdraw Applicant's plea. This Court notes that Applicant conveyed to Judge Manning that he was completely satisfied with Counsel's services. Applicant failed to produce any credible evidence to support a motion to withdraw the plea.

Failure to object to the sentences imposed on the second degree burglary and malicious injury to jail property charges

Applicant further alleges Counsel was ineffective in failing to object to the sentences of fifteen (15) years' on the second degree burglary and malicious injury to jail property charges. Applicant argues these sentences exceed the maximum allowed by statute. This Court agrees. It is clear Applicant was charged with second degree burglary, non-violent under S.C. Code Ann. § 16-11-312(A). South Carolina Code Ann. § 16-11-312(C)(1) provides: "Burglary in the second degree pursuant to subsection (A) is a felony punishable by imprisonment for not more than *ten* years," (emphasis added). S.C. Code Ann § 4-17-70 provides in relevant part: "A person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined in the discretion of the court or imprisoned not more than *three* years," (emphasis added).

This Court orders the limited relief of resentencing for 2011-GS-40-875 and 2010-GS-40-3994 to allow the court to sentence Applicant within the range provided by statute.

Failure to file a motion to reconsider the Court's sentence to request a sentence reduction

Applicant also alleges that Counsel was ineffective for failing to file a motion for reconsideration of the sentence imposed. Applicant testified Counsel failed to file a motion for

reconsideration on his behalf. This Court finds this allegation to be without merit. Under Rule 29(a), SCRCrimP, "post-trial motions shall be made within ten (10) days after the imposition of the sentence." Counsel was never asked by Applicant to file the motion to reconsider within the ten (10) day timeline, nor did counsel have any reason to believe Applicant wanted such a motion filed. Counsel also found no reason to file a motion for reconsideration. This Court finds Counsel's performance was objectively reasonable under the prevailing professional norms.

Further, Applicant has failed to prove resulting prejudice. The record before this Court and testimony provided at the hearing firmly convinces this Court that Applicant would have been no better off in filing a motion for reconsideration as there was no new evidence or information that was not already provided to the plea judge.¹

Cumulative Error

Applicant also argued that because there are multiple instances of deficiency on Counsel's behalf, the application should be granted based upon the open question of law in South Carolina regarding cumulative error. This Court finds that the doctrine of cumulative error, although often raised in post-conviction relief proceedings, contradicts the use of the Strickland two prong test, requiring both deficiency and prejudice for a finding of ineffective assistance of counsel. Therefore, this Court finds that it is not an appropriate test for a determination of ineffective assistance of counsel.

Alleged Violation of Professional Conduct

Finally, Applicant alleges Counsel violated the Rules of Professional Conduct in her representation. He broadly argues that Counsel had a conflict of interest in representing him.

¹ This Court does not address the allegations that Counsel was ineffective for failing to file a motion to reconsider the sentences imposed on the second degree burglary and malicious injury to jail property. This Court has granted limited relief in the form of resentencing on the two indictments because the sentences are illegal. This Court need not now consider whether Counsel's performance was deficient in failing to bring this to the plea court's attention.

Applicant presented no specific evidence of any sort of conflict. This Court finds Counsel's testimony not credible on this issue. This allegation is also irrelevant to the disposition of this proceeding. See Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993) ("[T]he Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction."). This allegation is readily denied and dismissed with prejudice.

All Other Allegations

As to any and all allegations that were raised in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

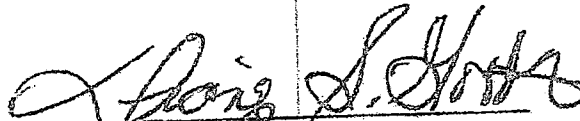
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR 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 THAT:

1. The Application for Post-Conviction Relief is granted on the limited ground that Applicant was sentenced to more than the maximum provided by statute on indictments 2011-GS-40-875 and 2010-GS-40-3994;
2. The sentence entered by the Richland County Clerk of Court for indictment numbers 2011-GS-40-875 and 2010-GS-40-3994 is vacated;
3. The matter is remanded to the Honorable L. Casey Manning for a limited resentencing hearing to allow the court to sentence Applicant within the range provided by statute on indictments 2011-GS-40-875 and 2010-GS-40-3994 only;
4. All other allegations raised are denied and dismissed with prejudice; and
5. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 1 day of October, 2015.


DIANE S. GOODSTEIN
Presiding Judge

 South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Douglas Green, #354245,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2013-CP-40-06370

ORDER DENYING MOTION
TO ALTER OR AMEND

RECEIVED
DEC 12 2013

S.C. SUPREME COURT

JEANETTE W. HOBBS
C.C.P. & G.S.
2018 NOV 30 PM 3:49
RICHLAND COUNTY
FILED

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed October 18, 2013. An evidentiary hearing into the matter was convened on January 22, 2015, at the Richland County Courthouse. Applicant was present at the hearing and was represented by Kristy G. Goldberg, Esquire. Respondent was represented by Assistant Attorney General J. Clayton Mitchell of the South Carolina Attorney General's Office. By written Order signed October 1, 2015, and filed October 16, 2015, this Court denied and dismissed Applicant's post-conviction relief action with prejudice.

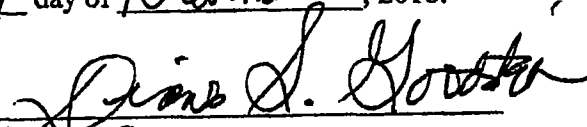
Applicant made a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, in which he asks this Court to alter or amend its order dismissing his PCR application. On October 23, 2018, a hearing was held on Applicant's motion. Applicant argued that State v. King, 422 S.C. 47, 810 S.E.2d 18 (2018), published after Applicant's hearing, would entitle him to relief. Relevant to Applicant's case, King held that attempted murder, as defined by section 16-3-29 of the South Carolina Code, requires the State to prove specific intent to commit murder as an element of the charge as opposed to general intent. At the evidentiary hearing, Applicant argued that he did not have the requisite specific intent to commit murder and that he would not have pleaded guilty had he known he could not be found guilty of the charge. The State argued that

Applicant and his counsel were aware of a potential challenge to the charge but decided it was not in Applicant's best interests to take the cases to trial in hopes of negating the one element of the attempted murder charge.

Based upon careful reconsideration of the evidence in this case, including Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend its judgment. The Order of Dismissal issued by this Court contains the required findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code and Rule 52(a) of the South Carolina Rules of Civil Procedure. As to Applicant's specific arguments regarding King and its effect, the Court finds Applicant pleaded guilty knowingly, voluntarily, and intelligently. Applicant's counsel recognized the argument challenging the intent requirement of attempted murder, briefed it, and even brought it to the attention of the prosecuting solicitor and to a circuit court judge. Counsel also advised Applicant of the potential challenge but also advised him that it would likely be in his best interests to accept a plea deal and hope to provide as much mitigation as possible. This was certainly within the reasonable professional norms and was not deficient performance. Finally, the Court reaffirms its finding that Counsel's testimony that he would have proceeded to trial had he known he could have challenged the intent element at trial is not credible. Even assuming he did not know about the potential challenge before he pled, the Court finds his decision to plead guilty was based primarily on his hopes of receiving a more lenient sentence by presenting mitigating circumstances, by accepting responsibility, and by not putting the victims through a trial. In addition, the Court denies Applicant's request to reconsider all other grounds.

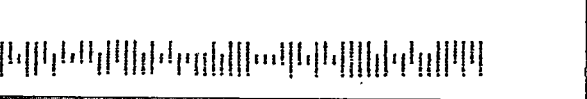
IT IS THEREFORE ORDERED that Applicant's motion be denied and dismissed.

AND IT IS SO ORDERED this 27 day of November, 2018.



DIANE S. GOODSTEIN
Presiding Judge

St. George South Carolina



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