

ROSS AND ENDERLIN, PA  
ATTORNEYS AT LAW

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S.C. SUPREME COURT

October 12, 2018

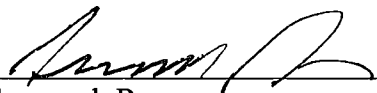
Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: Michelle S. Allison v. State  
2017-CP-42-3815

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,

  
Susannah Ross  
Attorney at Law

enclosure

cc: Office of the Attorney General  
Office of Appellate Defense  
Spartanburg County Clerk of Court

330 E. COFFEE ST. • GREENVILLE/SC • 29601

PHONE: (864) 242-0029

E-MAIL: SUSANNAH@ROSSENDERLIN.COM

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Michael G. Nettles , Circuit Court Judge

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2017-CP-42-3815

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Michelle S. Allison, ..... Appellant,  
v.  
The State, ..... Respondent.

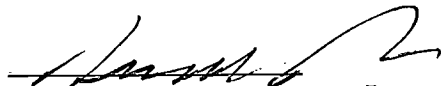
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NOTICE OF APPEAL

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Michelle S. Allison appeals the Honorable Michael G. Nettles 's Order of Dismissal filed February 8, 2019.

This 20 day of February, 2019.

  
Susannah Ross, Attorney at Law  
330 E. Coffee St.  
Greenville, SC 29601  
(864) 242-0029  
Attorney for Appellant

Other Counsel of Record:  
Johnny E. James, Jr., Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-3970  
Attorney for Respondent

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S.C. SUPREME COURT

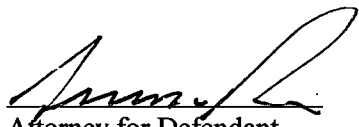
STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )  
 )  
MICHELLE S. ALLISON, )  
 )  
APPELLANT, )  
 )  
 )  
VS. )  
 )  
 )  
THE STATE OF SOUTH CAROLINA, )  
 )  
RESPONDANT. )  
\_\_\_\_\_ )

IN THE SUPREME COURT **RECEIVED**  
FEB 22 2019  
S.C. SUPREME COURT

**CERTIFICATE OF SERVICE  
BY MAIL**

1. I am the attorney for the Applicant in the above-captioned matter.
2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Notice of Appeal** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

**Office of the Attorney General  
Assistant AG Johnny James, Jr.  
P.O. Box 11549  
Columbia, SC 29211**

  
Attorney for Defendant

This 20 day of February, 2019

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

Michelle S. Allison, #356182,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT

2017-CP-42-3815

**ORDER OF DISMISSAL  
WITH PREJUDICE**

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SOUTH CAROLINA  
COUNTY

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Michelle S. Allison (Applicant) on October 17, 2017. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on February 20, 2018 at the Spartanburg County Courthouse. Applicant was present and represented by Susannah Ross, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on her own behalf. Suzanne White, Esquire, (Counsel) also testified. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the plea transcript, the PCR application, and Respondent's return.

#### **PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In May 2017, the Spartanburg County Grand Jury indicted Applicant for first-degree burglary (2017-GS-42-2221) and grand larceny (2017-GS-42-2222). Applicant was also charged with accessory after the fact to a felony (2017-GS-42-2708).

Suzanne H. White, Esquire, represented Applicant. Assistant Solicitor Timi Poulos represented the State. On July 24, 2017, Applicant waived presentment to the grand jury and pled guilty to accessory after the fact to a felony before the Honorable J. Mark Hayes, II. The State dismissed the burglary and grand larceny indictments in exchange for Applicant's guilty plea. The State also recommended a sentence concurrent to an unrelated charge for which Applicant was already incarcerated.<sup>1</sup> Judge Hayes sentenced Applicant to five years' incarceration, suspended upon the service of two and a half years and probation for five years. The sentence was to run consecutive to her ten year sentence for which she was already incarcerated. Applicant did not appeal her conviction or sentence.

#### ALLEGATIONS

In her application for post-conviction relief, Applicant alleges that she is being held in custody unlawfully for the following reasons:

1. Involuntary guilty plea
  - a. "I was told one plea and given another at time of sentencing. I did not enter the plea knowingly or intelligently. Boykin v. Alabama, 395 U.S. 238."
  - b. "The plea exceeded the expectations given to me by my public defender with a consecutive sentence instead of a concurrent sentence that I was told I would receive by my public defender. I was not fully advised of the sentence that could be given."

At the start of the hearing, Applicant specifically alleged Counsel advised Applicant that if she pled guilty, she would not receive more time than what she was already serving in the Department of Corrections and that had she known she could receive more time, she would not have pled guilty.

<sup>1</sup> At the time of her plea, Applicant was serving a ten year sentence for distribution of methamphetamine from Union County. (Tr. p. 18).

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SPARTANBURG COUNTY

**SUMMARY OF TESTIMONY AT PCR**

**I. Applicant testified to the following:**

Applicant testified she has some college education. She was convicted of possession with the intent to distribute methamphetamine, second offense, in Union County in June and was sentenced to ten years' incarceration. In Spartanburg, she was charged with first degree burglary and grand larceny. Counsel advised her to plead guilty to accessory after the fact and promised Applicant she would not have to serve any more time than what she was already serving for her Union County conviction. Applicant testified she would not have otherwise pleaded guilty because she had a good defense. Applicant explained her defense was that she was not present during the burglary. Applicant claimed her brother, using her phone, found out the victims were out of town and decided to rob their house. Applicant denied telling her brother the victims would be out of town.

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Applicant testified she does not know the maximum sentence for her charges. She testified her brother received a ten year sentence, suspended to five years and five years' probation. Applicant also testified her brother wrote a letter stating that Applicant did not tell him anything and did not know anything about the crime.

Applicant could not remember if she had a 2011 prior conviction for giving false information.<sup>2</sup> Applicant admitted she had prior convictions for shoplifting, possession of methamphetamine, trespassing, driving under suspension, attempt to possess a controlled substance, open container, and manufacturing methamphetamine. Applicant is serving a sentence for a distribution of methamphetamine conviction.

Applicant admitted that she had lived with the victims. She admitted to receiving a call from Christopher Lamb (the other man who robbed the victims' home with Applicant's brother) who

<sup>2</sup> At her guilty plea, under oath, Applicant agreed with the criminal history provided by the solicitor. (Plea tr. p. 18,

instructed her to sell the victims' property, but denied knowing the property was stolen. Applicant admitted counsel reviewed the discovery with her, but she did not recall her brother telling law enforcement that Applicant had advised him the victims would be out of town so that he could rob their home.

II. Counsel testified to the following:

Counsel has been an Assistant Public Defender with Spartanburg County since 2015. She has been practicing criminal law since 2009. She was appointed to represent Applicant. She reviewed the discovery with Applicant and discussed the case with her. Counsel believed the evidence against Applicant on the original charges was circumstantial and negotiated with the State to get them to accept a plea to the charge of accessory after the fact. Counsel felt that charge best represented Applicant's involvement in the case. Counsel testified that the state had evidence of cell phone discussions between Christopher Lamb and Applicant about selling the victims' stolen items. Counsel testified she was aware of the letter from the brother saying Applicant did not know anything, but he had previously given an oral statement that Applicant told him the victims' would be out of town and had an opportunity to rob them.

Counsel testified that she advised Applicant of the minimum and maximum sentence she would face for accessory after the fact, as well as for her original charges. Counsel testified she did not recall specifically having a conversation about consecutive sentencing. However, she did express her confidence in Applicant receiving concurrent sentencing based on the State's recommendation. Counsel testified she did not promise or guarantee a concurrent sentence.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the

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testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency.

***Applicable Law***

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged 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, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117 (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. With respect to guilty plea counsel, Applicant must show that there is a

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SOUTH CAROLINA COUNTY

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, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton, 376 S.C. 138, 654 S.E.2d at 874 (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, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton, 376 S.C. 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)).

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 who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability

that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985). 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 un<sup>intelligent</sup> 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.

#### Analysis

In this case, the record refutes Applicant's allegation she was not aware of the sentence that could be imposed. At the guilty plea, the plea judge informed Applicant he could sentence her *up to five years*, to which Applicant responded she understood. (Tr. pp. 18-19). Applicant further testified that understanding the possible sentence the court could impose, she still wished to enter a plea of guilty. (Tr. p. 19). Not only was Applicant under oath during her guilty plea, she also reasserted the truthfulness of her answers to the plea judge. (Tr. p. 19). Applicant has failed to give a sufficient reason to be allowed to depart from the truth of his statements made during his guilty plea.

This Court finds Counsel was diligent in her review of the case and her negotiations with the State to allow Applicant to plead to the more favorable offense of accessory after the fact to grand larceny, with a recommendation of concurrent sentencing to her Union County sentence. This Court finds Counsel's testimony credible that she did not promise or guarantee a concurrent sentence and that she informed Applicant of the potential sentence she faced. This Court further finds that

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Counsel's was not deficient in advising Applicant that she was confident Applicant would receive a concurrent sentence, based on the State's recommendation. This is a reasonable belief to have and share with one's client. Additionally, this Court does not find Applicant's testimony credible. During her guilty plea, she agreed with the State's recitation of the facts and Applicant's criminal history. (Plea tr. pp. 17-18). However, at PCR, she denied knowing about some of the facts and also "could not remember" if she had been convicted of a crime of dishonesty.

This Court notes Applicant only received an additional two and half years of prison time, despite facing life plus ten years. This Court finds it unreasonable and not credible that Applicant would have proceeded to trial instead of pleading guilty had Counsel not promised her concurrent sentencing, especially in light of the fact that there was direct (brother's statement to police) and circumstantial (living with victims and knowing they were out of town) evidence that she, at the very least, was an accessory to the burglary of the victims' home. This Court is confident that Applicant is aware, from her extensive criminal history, that by pleading open to the court, there is no guarantee as to sentencing. This Court finds Applicant received the benefit of the bargain by pleading to a lesser offense and receiving a relatively insignificant amount of time in comparison with her Union County drug conviction sentence.

Considering Applicant was facing a total of life plus ten years, Applicant benefited greatly from Counsel's negotiations. Even though Applicant is unappreciative of Counsel's negotiating efforts and unhappy with her ultimate sentence, she has failed to prove Counsel was deficient in her advice to Applicant or that she was prejudiced by such alleged deficiency. This allegation is denied and dismissed.

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UNION COUNTY

**CONCLUSION**


Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove prejudice from any alleged deficiencies in Counsel's representation of her. Therefore, as Applicant has failed to meet her burden of proof in this post-conviction relief action, her application is denied and dismissed with prejudice.

This Court notifies Applicant she must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED THAT:**

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of her sentence.

AND IT IS SO ORDERED this 4 day of Feb, 2018.

  
MICHAEL G. NETTLES  
Presiding Judge  
Seventh Judicial Circuit

, South Carolina

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SOUTH CAROLINA DEPARTMENT OF CORRECTIONS  
SEVENTH JUDICIAL CIRCUIT

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

MICHELLE S. ALLISON, #356182,

Applicant,

v.

STATE OF SOUTH CAROLINA,

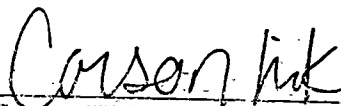
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

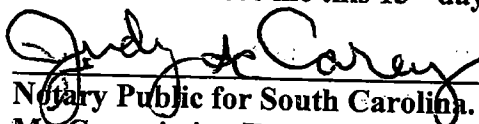
Susannah Conyers Ross, Esquire  
Ross & Enderlin, PA  
330 East Coffee Street  
Greenville, South Carolina 29601

This 13<sup>th</sup> day of February, 2019.



Carson Kirk  
Legal Assistant

SWORN to before me this 13<sup>th</sup> day February, 2019.



Judy A. Carey  
Notary Public for South Carolina

My Commission Expires: May 14, 2024

 **SUSANNAH ROSS ESQ.**  
330 EAST COFFEE ST.  
GREENVILLE SC 29601

Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

