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March 15, 2019

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED
MAR 20 2019
S.C. SUPREME COURT

Re: Jarret Graddick 358060 v State, 2018-CP-10- 0540

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, in the above Charleston County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc:
Benjamin Limbaugh, Esq
Jarret Graddick 358060
Charleston County Circuit Court Clerk

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

RECEIVED
MAR 20 2019
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable G. Thomas Cooper, Circuit Judge

Case No.: 2017-CP-10-0540

Jarret Graddick 35806...PETITIONER

V.

State of South Carolina...RESPONDENT

NOTICE OF APPEAL

The Petitioner Jarret Graddick appeals the Honorable G. Thomas Coopers' February 19, 2019 Order of Dismissal. Undersigned counsel received notice of entry of the order on March 14, 2019. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
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Charleston, SC 29402

March 15, 2019

Benjamin Limbaugh, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

Clerk of Court- Charleston CP
100 Broad Street
Charleston, SC 29401

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CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Benjamin Limbaugh Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Charleston County Clerk of Court. I further certify that all parties required by Rule to be served have been served this March 15, 2019..

James K Falk
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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Jarret Graddick, #358060, Applicant,	)	Case No. 2017-CP-10-540
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter comes before this Court by way of an application for post-conviction relief filed February 2, 2017, by Jarret Graddick (Applicant). The State (Respondent) made its return on July 6, 2017, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on December 3, 2018, at the Charleston County Courthouse before the Honorable G. Thomas Cooper, Jr. Applicant was present at the hearing and represented by James K. Falk, 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 denies 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 April 2012 term, the Charleston County Grand Jury indicted Applicant for two counts of armed robbery (2012-GS-10-02226; -02370) and two counts of kidnapping (2012-GS-10-02371; -02372). Deputy Public Defender Andrew Grimes (Counsel)[1], formerly of the Charleston County Public Defender's Office, represented Applicant on these charges. Assistant Solicitor Jennifer K. Shealy, of the Ninth Circuit Solicitor's Office, prosecuted the case. On July 7, 2014, Applicant appeared before the Honorable Roger M. Young, Sr. and pled guilty as indicted to all charges pursuant to *North Carolina v. Alford*.[2] Judge Young accepted the pleas, finding they were entered freely, voluntarily, and intelligently, and sentenced Applicant to concurrent terms of imprisonment of twenty years for each charge. The sentences were also to be served concurrently to a charge of armed robbery (2011-GS-10-2074), for which Applicant a jury convicted Applicant on December 6, 2013.[3]

Applicant filed a timely notice of appeal. Thereafter, by written order dated August 10, 2016, the South Carolina Court of Appeals dismissed Applicant's appeal for failing to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. The remittitur was issued on August 26, 2016.

STATEMENT OF FACTS

On July 25, 2011, just before ten o'clock in the evening, the bag boys at the Piggly Wiggly on the Isle of Palms connector high-fived each other as they were closing up for the night and went to lock the main doors. Tr. 17. As they went to lock the doors, three males entered, each with their face covered and each holding a weapon. Tr. 17. The men made the bag boys get on the floor and pointed the guns at the bag boys' heads. Tr. 17. The men then made two other employees open the safe. Tr. 17-18.

After getting the money from the safe, the men fled the store and went to an apartment complex behind the store, where a fourth co-defendant was waiting for them with the getaway

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[1] Counsel passed away after Applicant's plea and before this evidentiary hearing.
[2] 400 U.S. 25 (1970).
[3] Applicant was sentenced to a term of imprisonment of twenty years for this 2011 armed robbery.

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vehicle. Tr. 18. The men travelled down Rifle Range Road and told the driver to turn into a residential area. Tr. 18. The three men who entered the store then got out of the vehicle, took some of their clothing off in the woods, and scattered. Tr. 18.

CURRENT APPLICATION

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

1. Ineffective Assistance of Trial Counsel – 6th & 14th Amend. Violation; [and]
   a. Plea counsel was ineffective for failing to object to and preserve [sic] for appellate review, the trial judges [sic] extraneous comments injecting his personal opinion about Applicant exercising his constitutional right to trial or to plead guilty as well as judicial participation in guilty plea."
   b. Counsel's failure to investigate and interview several out-of-town and in-town potential alibi witnesses, answer State's request for discovery [if any] and, specifically give notice of alibi and identities of alibi witnesses was ineffective assistance of counsel.
2. Coerced Guilty Plea.
   a. Applicant was denied the due process of law where the trial judge's extraneous comments, coerced Applicant into pleading guilty to the charged offenses.

At the evidentiary hearing, Applicant proceeded forward on allegations of ineffective assistance of counsel for failing to investigate an alibi defense and involuntary guilty plea.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf and presented the testimony of Preston Swinton and Kenneth Murray. Respondent presented the testimony of Assistant Solicitor Jennifer K. Shealy. This Court also had before it a copy of Applicant's plea transcript, the records of the Charleston County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, and Applicant's appellate records.

During the evidentiary hearing, Applicant testified on his own behalf. Applicant testified when he was brought to court on July 7, 2014, he did not know for what he was coming to court. He further testified at the time, he was serving a twenty-year sentence for another armed robbery. He testified he was advised that armed robbery was a strike offense. He elaborated on July 7th, he told the plea court he did not want to plead guilty and wanted to relieve Counsel. He further elaborated he wanted to relieve Counsel because Counsel was "not representing him as well." Applicant explained Counsel only met with him three or four times, and Counsel had also represented him on his prior armed robbery charges. Applicant also testified he did not want to plead guilty because he did not commit these crimes, and he told the plea court he did not want to plead. He testified, however, the plea court told him he would end up in a pine box, would be behind prison walls forever, and would die in prison if Applicant were convicted at trial because he was eligible for a sentence of life without the possibility of parole (LWOP). He further testified the plea court also told him a plea would be a no brainer. Applicant testified he wanted to exercise his right to proceed to trial, but the plea court and Counsel coerced him and forced him into pleading guilty. He testified he, Counsel, and Assistant Solicitor Shealy discussed an *Alford* plea. He elaborated he gave in to the pressures of pleading guilty. He further elaborated his understanding of an *Alford* plea was although he did not commit these crimes, he was pleading to get "it" over with. He explained he was avoiding receiving a life sentence for something he did not do.

Applicant further testified at the plea, the plea court spent a good deal of time advising him of the consequences of pleading guilty versus going to trial. He testified the plea court informed him even if he were acquitted on these charges, he would still have to serve twenty years in prison; but if he were convicted he would receive an LWOP sentence, which meant he would spend every single day of the rest of his life in prison. He further testified if he pled guilty, he would only be facing twenty years. He elaborated he thought the plea court was calling him stupid if he did not plead guilty. Applicant testified, after having his memory refreshed, the plea court telling him it was not its job to convince Applicant to plead guilty but it was its job to make sure Applicant understood his options. He also testified the plea court informed him if he wanted to proceed to trial, to stop the proceedings. He further testified he informed the plea court he did not want Counsel to cross-examine any witnesses, did not want Counsel to suppress evidence, did not want Counsel to call witnesses on his behalf, and did not want Counsel to tell Applicant's side of the story. He testified he informed the plea court it was his decision to plead guilty and also informed the plea court no one had forced him into pleading guilty or promised him anything in exchange for the plea. He elaborated he lied when he told the plea court no one had forced him.

He testified Counsel showed him the discovery in this case, and there was neither fingerprint nor DNA evidence. He further testified he wanted an investigation into his case. He testified he was not near the Piggly Wiggly on the night of this robbery, and he was not identified by anyone in the store. He also testified he expected Preston Swinton and Kenneth Murray to testify at trial on this armed robbery and expected they would testify to the truth. He elaborated Swinton and Murray would testify he was not involved in this crime. He also explained both Swinton and Murray were charged in connection with these crimes.

Following Applicant's testimony, Preston Swinton testified. Swinton testified he is currently housed at Kirkland Correctional Institution and is serving sentences for armed robbery, strong arm robbery, possession with intent to distribute, and weapons charges. He explained his armed robbery conviction is in connection with the armed robbery of the Piggly Wiggly, and he pled guilty to that armed robbery and received a fourteen-year sentence. He further explained his plea was not contingent on anything, and he was not supposed to testify at Applicant's trial.

He testified he was involved in the armed robbery of the Piggly Wiggly, but Applicant was not. He elaborated Applicant was not there, was not driving the car, and did not have a gun. He further testified he gave a statement to law enforcement, but Investigator Hembree wrote the statement and coerced his answers. He testified, however, he signed the statement. Swinton also testified in this statement, he said Applicant had an uzi during this robbery. He elaborated Investigator Hembree coerced him into pinpointing Applicant. He further elaborated Investigator Hembree did not hit him, but rather continuously brought up Applicant's name during the interview.

Swinton recalled meeting with Assistant Solicitor Shealy about this robbery, but did not recall specifics. He denied telling Assistant Solicitor Shealy he had known Applicant since he was a teenager, and testified he had not known Applicant since he was a teenager because he was living in Georgia at the time. Swinton denied telling Assistant Solicitor Shealy Applicant had an uzi during the robbery and denied telling her about the plan to rob the Piggly Wiggly. He further denied telling Assistant Solicitor Shealy about an armed robbery for which no one was charged. Swinton also denied having any communication with Applicant or Applicant's mother since being in prison.

Following Swinton's testimony, Applicant presented the testimony of Kenneth Murray. Murray testified he is currently housed in Lieber Correctional Institution, and is serving a twenty-eight year sentence for armed robbery. He explained the armed robbery for which he was sentenced to twenty-eight years does not involve the armed robbery of the Piggly Wiggly. He further explained he did not plead guilty to the Piggly Wiggly armed robbery, but he was

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charged in connection to that armed robbery and those charges were dismissed without prejudice. He testified he was accused of being involved in the armed robbery of the Piggly Wiggly, but he, Swinton, and Applicant were not there. Murray also testified he is Applicant's cousin, and he has communicated with Applicant since being in prison. He further testified Applicant's mother has also visited him in prison.

Murray testified he was approached by law enforcement and taken into custody, but they did not have a warrant for him. He testified he was held at the police station for ten to eleven hours, and law enforcement forced names on him. He elaborated he was denied food and water during this interview and was also denied bathroom breaks. He further elaborated Investigator Hembree woke him up by kicking his chair. Murray testified he gave a statement[4] about the Pizza Hut[5] and Piggly Wiggly robberies in order to get away from Investigator Hembree. He testified Investigator Hembree wrote the statement, but Murray signed the statement as being true. He further testified he implicated Applicant in this statement, but the statement was coerced. He elaborated he had no information about Applicant being at the Piggly Wiggly or having a gun. Murray also testified prior to his trial on the Pizza Hut armed robbery, a *Jackson v. Denno*[6] hearing was held regarding his statement, and the judge found his statement was voluntarily given and admissible.

Applicant then rested his case, and Respondent presented the testimony of Assistant Solicitor Shealy. She testified she has been practicing law since 1986 and has been employed at the Ninth Circuit Solicitor's Office for approximately twelve years. She testified she prosecutes murder, armed robbery, and rape cases.

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[4] A copy of this statement was introduced as Respondent's Exhibit #1.
[5] Murray was convicted of and is serving a twenty-eight year sentence for the armed robbery of the Pizza Hut.
[6] 378 U.S. 368 (1964).

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She further testified Applicant and his co-defendants committed a string of armed robberies in the Mount Pleasant area along the Isle of Palms connector. Assistant Solicitor Shealy further testified Applicant was charged with the armed robbery of the Cricket store, the Piggly Wiggly, and the Golden Bull, which was *nolle prossed.* She explained none of the charges of any of these co-defendants were *nolle prossed* because these co-defendants were not involved in the crimes. She further explained she used her discretion in dismissing Murray's charge of armed robbery in connection with the Piggly Wiggly because she did not want to use up the court's time. She testified the armed robbery of the Piggly Wiggly occurred late at night, and she had a videotape of this robbery. She explained the two bag boys at the store were seen high-fiving each other at the end of their shift, when Applicant, Murray, and Swinton entered the store wearing masks and carrying menacing weapons. She testified the robbers were all of varying heights and wearing masks, but there was nothing special about their clothing. She further testified no one at the Piggly Wiggly could specifically identify Applicant.

She further explained Applicant and his co-defendants fled the scene, and Dante Smalls drove the getaway vehicle. Assistant Solicitor Shealy also testified Applicant was identified fleeing the area, and speeding into the yard of Applicant's home. She explained the witness who identified the car fleeing the area gave Applicant's and Murray's name to law enforcement and alerted law enforcement to look for them. She further explained the Piggly Wiggly is close to Applicant's home, approximately three or four miles. She also testified both Applicant and Murray are known as troublemakers in the area, and the neighbor alerted law enforcement to their odd behavior that night. She testified the tip indicated Applicant was hiding off Crosstown; and when law enforcement responded, both Applicant and Swinton were found hiding under a house.

She testified she interviewed both Swinton and Smalls in connection with this armed robbery. She testified when she interviewed Swinton, he indicated he was present at the Piggly Wiggly robbery, and he had always been jealous of Applicant because he always had guns and money. She further testified Swinton informed her Applicant was involved in the Piggly Wiggly robbery and had an uzi during the robbery. She testified Swinton also implicated Smalls and Murray in this armed robbery. She explained her interview with Swinton was persuasive, and it echoed her interview with Smalls. She further explained Smalls told her he was the driver, and his car was hidden during this robbery. Assistant Solicitor Shealy testified Smalls told her he saw the uzi and implicated Applicant, Swinton, and Murray in this armed robbery. She further testified both Swinton and Murray gave statements to law enforcement implicating themselves and Applicant.

Assistant Solicitor Shealy also testified at trial, she would have primarily presented eyewitness testimony. She explained she would have had Swinton, Smalls, and Applicant's neighbor testify. She further testified Applicant's neighbor would identify Applicant's clothing and car, seen fleeing the area of the crime scene. She testified there was no DNA evidence in connection with the Piggly Wiggly robbery, but there was DNA evidence in connection with the Cricket robbery, with which Applicant also denied being involved. She also testified the gun was never recovered. Assistant Solicitor Shealy testified, however, she believed the evidence against Applicant was strong.

She testified Applicant was brought to court on July 7, 2014, because he had rejected the plea offer she had made, and she wanted the rejection of the offer on the record. She explained because this was an LWOP-situation and she had filed LWOP-notice, she wanted everything vetted out in the courtroom. She further explained it was her understanding Applicant was going to reject the offer and attempt to relieve Counsel. She testified during that hearing, Applicant asked to speak with her. She further testified when she spoke with Applicant during the hearing, he attempted to charm her into offering a sentence of less than twenty years. She testified Applicant's decision to plead guilty was smart, as he was avoiding a potential life sentence. Assistant Solicitor Shealy testified neither she nor Counsel forced Applicant into pleading guilty. She explained Counsel was a zealous trial advocate, who would not talk his clients into pleading guilty. She further explained Counsel had represented Applicant in his trial on another armed robbery charge, during which they presented Applicant's mother as an alibi witness. She testified Applicant's mother is an enabler and zealously attempts to protect Applicant. She explained Murray is easily manipulated by Applicant and Applicant's mother.

Assistant Solicitor Shealy also testified she pursued this armed robbery charge with respect to Applicant because he was only sentenced to twenty years imprisonment for the Cricket armed robbery, whereas Murray received a twenty-eight year sentence on the Pizza Hut armed robbery. She explained she had Applicant's name as a suspect in many more armed robberies than Murray's. She further testified she took Swinton's cooperation, willingness to take responsibility, and willingness to testify against Applicant into consideration when offering Swinton a fourteen-year plea deal for the armed robbery of the Piggly Wiggly.

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 investigate an alibi defense; and (2) involuntary guilty plea.

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 investigate an alibi defense

Applicant contends Counsel was ineffective for failing to investigate. In particular, Applicant contends Counsel was ineffective for failing to investigate an alibi defense. "Counsel's concern is the faithful representation of the interest of his client and such representation frequently involves highly practical considerations as well as specialized knowledge of the law." *Tollett v. Henderson*, 411 U.S. 258, 267-68 (1973). "'Although counsel should conduct a reasonable investigation into potential defenses, *Strickland* does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client.'" *Tucker*, 350 F.3d at 442 (quoting *Green v. French*, 143 F.3d 865, 892 (4th Cir. 1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691; *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). Moreover, "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*, 368 S.C. at 385-86, 629 S.E.2d at 357, *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836 (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

Encompassed in counsel's duty to investigate is the duty to investigate alibi witnesses identified by a defendant. *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (citing *Grooms v. Solem*, 923 F.3d 88, 90 (8th Cir. 1991)). "Failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable." *Id.* However, when the testimony presented at the evidentiary hearing from purported alibi witnesses do not establish an alibi defense, no prejudice can result from the alleged deficiency. *See Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995) (holding trial counsel's failure to contact alleged alibi witnesses did not result in prejudice when the testimony these alibi witnesses presented did not establish an alibi defense). Moreover, questions concerning the weight and believability of alibi witnesses is solely within the province of the post-conviction relief court. *Walker*, 407 S.C. at 407, 756 S.E.2d at 147.

Through an alibi, an accused attempts "'to show that because he was not at the scene of the crime at the time of its commission, having been at another place at the time, he could not have committed the crime.'" *State v. Robbins*, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (quoting 21 Am. Jur. 2d Criminal Law § 136)). To do so, the accused must show "'he was at a place so distant that his participation in the crime was impossible.'" *Id.* Furthermore, the alibi must account for the entire time during which these crimes were committed. *Id.* "Since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." *Glover*, 318 S.C. at 498, 458 S.E.2d 540 (citing *Robbins*, 275 S.C. 373, 271 S.E.2d 319).

Here, Applicant contends he was not at the Piggly Wiggly on the night these crimes were committed. Similarly, Swinton testified he was involved in the robbery of the Piggly Wiggly, but Applicant was not. On the other hand, Murray testified neither he, Swinton, nor Applicant were involved in the armed robbery of the Piggly Wiggly. However, both Swinton and Murray gave statements to law enforcement implicating not only themselves in these crimes but also Applicant. Swinton and Murray contend their statements were coerced by law enforcement. Despite this contention, both Swinton and Murray admitted they signed their statements as being true. Indeed, Murray testified a *Jackson v. Denno* hearing was held regarding the voluntariness of his statement prior to his trial, and the trial court determined his statement was voluntarily given and admissible. Furthermore, Assistant Solicitor Shealy testified she interviewed Swinton, who repeated the statements he made in his statement to law enforcement—that Applicant was involved in this armed robbery and carried the uzi during the robbery. Additionally, Assistant Solicitor Shealy also interviewed another co-defendant in this armed robbery, Smalls,[7] who echoed the statements Swinton had given—that Swinton, Murray, and Applicant were involved in the armed robbery of the Piggly Wiggly. Based on the foregoing, this Court finds Assistant Solicitor Shealy's testimony very credible, whereas Applicant's testimony, Murray's testimony, and Swinton's testimony are not credible.

This Court further finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. Although Applicant, Swinton, and Murray allege Applicant was not at the Piggly Wiggly during this robbery, they wholly fail to identify where Applicant was during this time. Because of the utter failure of any of these witnesses to identify where Applicant was, Applicant has failed to establish "'he was at a place so distant that his participation in the crime was impossible.'" *Robbins*, 275 S.C. at 375, 271 S.E.2d at 320. Indeed, both Swinton and Murray not only placed Applicant at the scene of the crime but also stated Applicant was an active participant in the crime. It is all too convenient Swinton and Murray want to now recant

[7] Applicant failed to present the testimony of Smalls at the evidentiary hearing.

their previous statements to law enforcement, **seven years after** the commission of the crime and after giving their statements. *See State v. Wright*, 269 S.C. 414, 421, 237 S.E.2d 764, 768 (1977) (recanted testimony is normally unreliable and should be subjected to the closest scrutiny). Based on the foregoing, this Court finds the testimony offered by Applicant, Swinton, and Murray at the evidentiary hearing does not establish an alibi. Accordingly, this allegation must be denied and dismissed with prejudice.

Involuntary Guilty Plea

Applicant further alleges his guilty plea was not voluntarily made. In particular, Applicant alleges Counsel and the plea court coerced him into pleading guilty. Specifically, Applicant alleges the plea court's statements regarding the consequences of proceeding to trial and being convicted at trial, forced him into pleading guilty. 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).

"[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty." *Alford*, 400 U.S. at 37. Indeed, "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Id.* The Supreme Court in *Alford* noted:

> That [the defendant] would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage.

Id. at 30. In essence, an *Alford* plea is a guilty plea, which carries the same penalties and punishments. *State v. Herndon*, 403 S.C. 84, 91, 742 S.E.2d 375, 379 (2013). Furthermore, the entry of an *Alford* plea "has the same preclusive effect as a standard guilty plea." *Zurcher v. Bilton*, 379 S.C. 132, 137, 666 S.E.2d 224, 227 (2008). Indeed, in South Carolina, "there is no significant distinction between a standard guilty plea and an *Alford* plea." *Herndon*, 403 S.C. at 93, 742 S.E.2d at 380.

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 *Alford*, 400 U.S. at 31). In order to find a guilty plea was knowingly and voluntarily entered into, the record must establish the defendant had a full

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understanding of the consequences of his plea and the charges against him. *Boykin*, 395 U.S. at 244.

This Court finds this allegation is without merit, and Applicant has failed to carry his burden of proving his plea was involuntarily made. This Court finds Applicant's plea was entered into freely and voluntarily. The record before this Court reflects the trial court thoroughly reviewed all of Applicant's constitutional rights with him, including his right to a jury trial. Tr. 12. Applicant indicated he understood his constitutional rights and, understanding he would be waiving those rights, entered an *Alford* plea. Tr. 12-13. Moreover, Applicant indicated to the plea court he did not want Counsel to cross-examine any witnesses and did not want Counsel to attempt to suppress any of the evidence against him. Tr. 14. In fact, Applicant informed the plea court he did not want Counsel to call any witnesses on his behalf, and he did not want to tell his side of the story. Tr. 14. Applicant further indicated no one had promised him anything or promised him anything in order to get him to plead guilty. Tr. 15. Additionally, Applicant indicated the decision to enter an *Alford* plea was his, and his alone. Tr. 14.

Furthermore, the plea court thoroughly explained the consequences of not accepting this plea offer to Applicant, specifically highlighting strike offenses and LWOP. Tr. 3-6. In explaining these consequences, the plea court stated: "I'm not trying got convince you. It's not my job to convince you, but it is my job to make sure that you understand what the deal is, and I have explained what the deal is to you." Tr. 7. The plea court further insisted Applicant was "the only person in the world that can make that decision." Tr. 6. The plea court then explained to Applicant he could enter an *Alford* plea to these charges and also recessed so that Applicant could speak without Counsel about an *Alford* plea. Tr. 7-9. It was after those discussions, Applicant decided to enter an *Alford* plea to all charges. Tr. 10-11.

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.

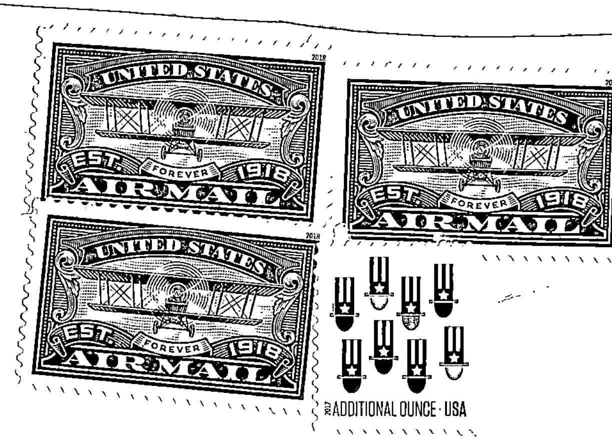
IT IS THEREFORE ORDERED:

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 19 day of February, ~~2018~~ 2019.

G. THOMAS COOPER, JR.
Presiding Judge
Ninth Judicial Circuit

Camden, South Carolina



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