



March 28, 2019

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

RECEIVED

APR 01 2019

S.C. SUPREME COURT

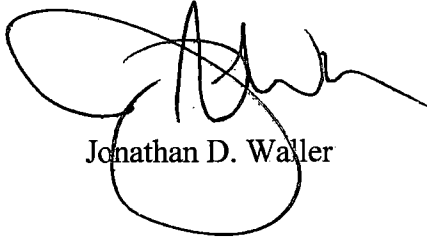
Re: Touriarnold Spann vs. State of South Carolina  
C/A No: 2015-CP-38-01468

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Spann in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,



Jonathan D. Waller

Cc: Benjamin Limbaugh, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM ORANGEBURG COUNTY  
Robert E. Hood, Circuit Court Judge

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2015-CP-38-01468

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RECEIVED

APR 01 2019

S.C. SUPREME COURT

Touriarnold Spann, # 305939,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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NOTICE OF APPEAL

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Touriarnold Spann, # 305939, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed April 13, 2018<sup>1</sup>, and served on counsel by letter dated March 25, 2019, issued by the Honorable Robert E. Hood, Presiding Judge, First Judicial Circuit.



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Jonathan D. Waller  
Waller Law Group  
SC Bar No.: 76290  
1116 Blanding Street  
Suite 2B  
Columbia, SC 29201  
803-520-7278 (phone)  
jonathan@wallergroupsc.com  
ATTORNEY FOR PETITIONER

March 28, 2019

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<sup>1</sup> The Public Index indicates a filing date of April 13, 2018. Applicant was only served with a signed but not filed copy of the Order and Respondent indicates that it has never received a filed copy of the Order.

Other Counsel of Record:  
Benjamin Limbaugh, Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3319



ALAN WILSON  
ATTORNEY GENERAL

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APR 01 2019

S.C. SUPREME COURT

March 25, 2019

Jonathan D. Waller; Esquire  
Waller Law Group, LLC  
1116 Blanding Street-Suite 2B  
Columbia, South Carolina 29201

**Re: Touriarnold Spann, #305939 v. State of South Carolina**  
**2015-CP-38-01468**

Dear Mr. Waller:

Enclosed is a copy of the **Order of Dismissal** the above-captioned case signed by The Honorable Robert E. Hood.

Sincerely,

Benjamin Limbaugh  
Assistant Attorney General

BL/trb  
Enclosures

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

RECEIVED

APR 01 2019

S.C. SUPREME COURT

TOURIARNOLD SPANN, #305939

Applicant,

v.

STATE OF SOUTH CAROLINA,

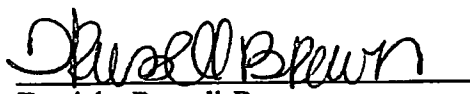
Respondent.

CERTIFICATE OF SERVICE

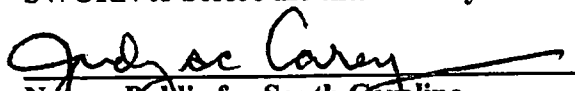
The undersigned hereby certifies that a true copy of **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**Jonathan D. Waller, Esquire  
Waller Law Group, LLC  
1116 Blanding Street- Suite 2B  
Columbia, South Carolina 29201**

This 25<sup>th</sup> day of March, 2019.

  
Tamiaka Russell-Brown  
Legal Assistant for the Respondent

SWORN to before me this 25<sup>th</sup> day of March, 2019

  
Notary Public for South Carolina.  
My Commission Expires: 5/14/2024

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY  
Robert E. Hood, Circuit Court Judge

2015-CP-38-01468

RECEIVED  
APR 01 2019  
S.C. SUPREME COURT

Touriarnold Spann, # 305939,

Appellant,

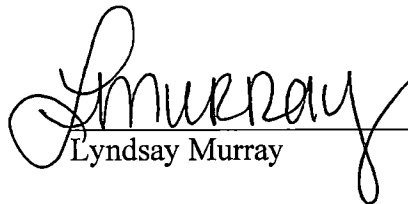
v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Benjamin Limbaugh, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to his office located at P.O. Box 11549, Columbia, SC 29211.

  
Lyndsay Murray

March 28, 2019

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF ORANGEBURG )  
 )  
Touriarnold Spann, #305939, )  
 )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE FIRST JUDICIAL CIRCUIT

Case No.: 2015-CP-38-01468

**ORDER OF DISMISSAL**

The above-captioned matter is before the court based on a post-conviction relief (PCR) application filed by Touriarnold Spann, on November 30, 2015. This Court convened an evidentiary hearing into this matter on May 24, 2017 at the Dorchester County Courthouse. Applicant was present at the hearing and represented by Jonathan Waller, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Applicant's plea counsel was Breen Stevens (Counsel), Esquire, who was present and testified. This Court had the opportunity to listen to the testimony and assess the credibility of Applicant and Counsel. This Court had before it the records of the Orangeburg County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings in this matter.

**I. PROCEDURAL HISTORY**

Applicant was indicted by the July 14, 2014 session of the Orangeburg Grand Jury for one count of Malicious Injury to Personal Property (2014-GS-38-0799), one count of Burglary first degree (2014-GS-38-0800), one count of Possession of a Weapon During the Commission of a Violent Offense (2014-GS-38-8001), one count of Impersonating a Law Enforcement Officer (2014-GS-38-0802), one count of Taking a Vehicle by Force and Great Bodily Harm

(2014-GS-38-0803) and one count of Armed Robbery (2014-GS-38-0804). Applicant was represented by Peggy Hinds, Esquire. Applicant pleaded guilty as indicted to all counts, and on March 23, 2015, was sentenced by the Honorable Maite Murphy as follows:

<b>Indictment</b>	<b>Indictment</b>	<b>Sentence</b>
2014-GS-38-0799	Malicious Injury to Personal	30 days
2014-GS-38-0800	Burglary 1 <sup>st</sup>	30 Years
2014-GS-38-8001	Possession of a Weapon During	5 Years
2014-GS-38-0802	Impersonating a Law	1 Years
2014-GS-38-0803	Carjacking	30 Years
2014-GS-38-0804	Armed Robbery	30 Years

All sentences are concurrent pursuant to the State's recommendation. Applicant did not appeal his plea or sentence.

## **II. ALLEGATIONS**

In his PCR application, Applicant alleged he is being held unlawfully for the following reasons:

1. Ineffective assistance of counsel.
  - a. Failure to object to thirty-year sentence on carjacking.
  - b. Failure to investigate DNA evidence, search warrant, or fingerprint analysis.

## **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court reviewed the record in its entirety, listened to the testimony given, and heard the arguments presented at the evidentiary 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. This Court finds Counsel's testimony was credible and persuasive and Applicant's testimony was not credible. Therefore, this Court dismisses Applicant's application for the reasons set out below:

**A. Ineffective Assistance of Plea Counsel**

This Court finds the record fully supports the knowing and voluntary nature of Applicant's guilty plea. Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Thus, an applicant must show both error and prejudice to win relief in a PCR proceeding." Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001).

The court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he should be allowed to depart from the truth of his statements. See Crawford v. U.S., 519 F.2d 347, 350 (4<sup>th</sup> Cir. 1975) (overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4<sup>th</sup> Cir.1985)). Applicant presented no reasons to show that he should be allowed to depart from the truth of the statements he made during his guilty plea hearing. For the reasons set out below, this Court finds the record and credible testimony support Applicant had a full understanding of the charges and consequences of his guilty plea:

1. Failure to object to thirty-year sentence on carjacking.

Applicant asserts his guilty plea was entered involuntarily as the result of ineffective assistance of counsel. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the Applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin, 395 U.S. at 243. In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. See Harris v. Leeke, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge, 431 U.S. at 73-74. Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he should be allowed to depart from the truth of his statements. See Crawford, 519 F.2d at 350. Applicant failed to show that he should be allowed to depart from the truth of the statements he made

during his guilty plea hearing.

An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness, and there is a reasonable probability, but for trial counsel's errors, he would not have pleaded guilty, but would have insisted on going to trial instead. See Roscoe, 345 S.C. at 20, 546 S.E.2d at 419. Given the Applicant's burden of proof and the analysis to be applied to this claim, the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it will be treated as such.

An applicant'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, 339 S.C. at 34, 528 S.E.2d at 421. "[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." Dalton, 376 S.C. at 138, 654 S.E.2d at 874. Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874.

This Court agrees with Applicant's assertion that his sentence was unlawful. The maximum sentence for carjacking without great bodily injury is twenty years. Applicant was sentenced to thirty years on that charge. However, the plea deal offered by the State and accepted by Applicant was for a recommendation of thirty years and Applicant received concurrent thirty-year sentences for Burglary 1<sup>st</sup> degree and Armed Robbery.

Applicant was not prejudiced because the sentence he received was not altered by the

incorrect sentence on Carjacking and the plea deal he agreed to, incarceration for thirty years, is the sentence he received. Therefore, this Court finds Applicant failed to prove he was prejudiced by Counsel's lack of investigation such that there was a reasonable probability Applicant would have insisted on trial rather than plead guilty. This Court also finds Applicant's guilty plea was voluntarily, intelligently, and knowingly made. This Court, with the consent of the State and Applicant, resentenced Applicant to twenty years' incarceration on his Carjacking charge during the PCR hearing. Therefore, this Court dismisses the allegation Applicant's guilty plea was involuntary based on the unlawful sentence.

2. Failure to investigate DNA evidence, search warrant, or fingerprint analysis.

Applicant failed to show how further investigation by Counsel would have benefited Applicant at trial. Applicant's assertion Counsel should have investigated further is purely speculative. Applicant did not present what Counsel would have found if he had hired an investigator sooner or done further investigation. Notwithstanding the fact this Court does not find Counsel deficient for failing to investigate, a court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." State v. Glover, 318 S.C. 496, 498-499, 458 S.E.2d 538, 540. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). The only evidence Applicant presented regarding witness testimony or further investigation was speculation on the

part of Applicant. This Court finds Applicant failed to prove he was prejudiced by any lack of investigation by Counsel.

Having reviewed the pleadings, considered the applicable law, and reflected upon the testimony provided at the evidentiary hearing, this Court finds Applicant's allegation that his guilty plea was involuntary to be meritless. Applicant failed to present any evidence that Counsel's performance or advice was deficient or that he was prejudiced by the deficiency.

Further, the evidence against Applicant was overwhelming. Applicant gave a written confession to the crime and was linked to the crime by fingerprints, DNA evidence, and Applicant's phone which was left at the scene. Based on the testimony, this Court also finds the evidence against Applicant was overwhelming and any error of Counsel would not have prejudiced Applicant. Therefore, Applicant cannot prove prejudice where the evidence against her was overwhelming. See Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008).

Accordingly, this Court finds Applicant failed to prove Counsel failed to properly investigate. This Court also finds Applicant failed to prove he was prejudiced by Counsel's lack of investigation such that there was a reasonable probability Applicant would have insisted on trial rather than plead guilty. Accordingly, this Court denies and dismisses this allegation.

#### **IV. CONCLUSION**

Based on 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 (30) days from 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), SCRCR, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are 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 denied and dismissed with prejudice; and
2. Applicant is remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 13 day of April, 2018.

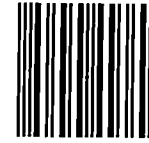
*ReHood*

ROBERT E. HOOD  
Presiding Judge  
1<sup>st</sup> Judicial Circuit

Columbia, South Carolina



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Clerk of Court  
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