

# Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

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May 2, 2019

RECEIVED

MAY 03 2019

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: Jerry Dean Heard, SCDC # 373296 v. State of South Carolina  
Docket Number 2018-CP-19-176


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. 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. Heard on his PCR, and I would ask that Appellate Defense open a file to represent Mr. Heard in this case.

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

Respectfully,



Kristy Goldberg

CC: David Spencer  
Assistant Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211-1549

Jerry Heard, SCDC # 373296  
Broad River Correctional Institution  
4460 Broad River Road  
Columbia, South Carolina 29210

The Honorable Charles Reel  
Clerk of Court  
Post Office Box 34  
Edgefield, South Carolina 29824

Office of Appellate Defense  
Chief Appellate Defender – Robert Dudek  
PO Box 11433  
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM EDGEFIELD COUNTY  
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

RECEIVED

MAY 03 2019

S.C. SUPREME COURT

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Case No. 2018-CP-19-176

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Jerry Dean Heard, SCDC # 373296, ..... Appellant

v.

State of South Carolina, ..... Respondent.

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NOTICE OF APPEAL

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Applicant David Coon hereby appeals from the Order of the Honorable William A. McKinnon, presiding Judge for the 11<sup>th</sup> Judicial Circuit, filed April 29, 2019 and received by counsel for the Applicant on May 1, 2019 in the matter of Jerry Dean Heard v. State of South Carolina, Case No. 2018-CP-19-176.

May 2, 2019

  
\_\_\_\_\_  
Kristy Goldberg  
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.  
1720 Main Street, Suite 303  
Columbia, SC 29201  
Phone (803) 667-6633  
kristy@kristygoldberglaw.com

Other Counsel of Record:  
Assistant Attorney General, David Spencer  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM EDGEFIELD COUNTY  
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

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Case No. 2018-CP-19-176

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Jerry Dean Heard, SCDC # 373296, ..... Appellant

v.

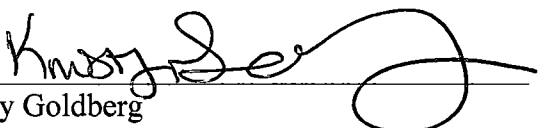
State of South Carolina, ..... Respondent.

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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 May 2, 2019 by  
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, David Spencer  
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](mailto:kristy@kristygoldberglaw.com)

Other Counsel of Record:  
Assistant Attorney General, David Spencer  
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Post Office Box 11549  
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EDGEFIELD COUNTY  
CLERK OF COURT  
CHARLES L. REEL  
STATE OF SOUTH CAROLINA  
COUNTY OF EDGEFIELD

IN THE COURT OF COMMON PLEAS  
FOR THE ELEVENTH JUDICIAL CIRCUIT

2019 APR 29 AM 8:53

Jerry Dean Heard, #373296, )  
)  
Applicant, )  
)  
v. )  
)  
State of South Carolina, )  
)  
Respondent. )  
)  
\_\_\_\_\_ )

Case No.: 2018-CP-19-00176

**ORDER OF DISMISSAL**

This matter is before this Court by way of an application for post-conviction relief (PCR) filed June 18, 2018. The State made its return on November 19, 2018. A hearing on the matter was convened at the Lexington County Courthouse on April 4, 2019. Applicant was present and represented by Kristi Goldberg, Esquire. The State was represented by Senior Assistant Attorney General David Spencer.

Applicant testified on his own behalf. Also testifying was his plea counsel, Eric J. Drylie, Esquire, and private investigator Donald Kneece. This Court also had before it the pleadings for both parties, the transcript of Applicant's guilty plea hearing, the Clerk of Court's records regarding the subject convictions, and Applicant's records from the South Carolina Department of Corrections.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Edgefield County Clerk of Court. During its July 2016 term, the Edgefield County Grand Jury indicted Applicant for two counts of first-degree criminal sexual conduct with a minor (CSC 1st - minor). Erik J. Drylie, Esquire, represented Applicant on the charges. Deputy Solicitor L. Suzanne Mayes, of the Eleventh Circuit Solicitor's Office, prosecuted the case. On July 24, 2017, Applicant appeared before the Honorable R. Scott Sprouse and pled

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guilty to one of the counts of CSC 1st - minor. Judge Sprouse sentenced Applicant to twenty-five years imprisonment. Applicant did not appeal his plea or sentence.

### **FACTS PRESENTED AT THE GUILTY PLEA**

During the guilty plea proceedings, the prosecutor advised the plea court about the facts supporting the charge upon which Applicant pled guilty: On January 24, 2015, Applicant picked up a six-year old girl and a nine-year-old girl (Victim). Applicant was considered a grandfather figure to both of them and watched them in the past. Guilty plea transcript (Tr.) pp. 7-8. At approximately 11:00 p.m., Applicant committed a sexual battery against Victim. Tr. pp. 7-8. Specifically, Applicant placed his mouth on Victim's vaginal area. Tr. p. 8. One of the girls recorded the assault on her iPad. Tr. p. 8. On that recording, one of the girls is heard telling Applicant to put his clothes back on and Victim is heard saying "quit, quit." Tr. pp. 12-13.

### **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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1985).

#### **Ineffective Assistance of Counsel and Involuntary Plea**

Applicant alleges his plea was rendered involuntary by ineffective assistance of counsel. The burden of proof is on the applicant in a PCR proceeding to prove the allegations in his application. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRCP.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must

show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). With respect to guilty plea counsel, an applicant must show a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would insist on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985); Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009); Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, the PCR court should consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

This Court will now address each allegation of ineffective assistance of counsel:

#### **Five year recommendation**

Applicant alleges that he pled guilty under the belief there would be a recommendation for a five year prison term. According to Applicant, on the morning trial was set to begin, he spoke with Donald Kneece, one of two private investigators hired by counsel to work on the case. Applicant alleges Kneece told him the recommendation would be for five years if he pled guilty. He claims Kneece told him he would be fishing and drinking beer in short while, implying a short sentence. Applicant thought this was humorous because he did not like fishing or drinking. Applicant also

alleges counsel presented him with the sentencing sheet in which the sentence filled in was for five years. On the sentencing sheet before this Court, something is written in the space for the sentence, but blacked out. Written above it is the twenty-five year sentence that the plea court pronounced during the guilty plea hearing.

Kneece denied he told Applicant that Applicant would receive a five year sentence. Instead, he reminded Applicant that Applicant was facing ten to thirty years imprisonment. He denied having a conversation with Applicant about fishing or drinking beer.

Counsel testified that until the morning of trial, there were no plea negotiations. He explained when he originally played the audio recording of the assaults to Applicant, Applicant wanted to negotiate a plea deal. However, despite counsel's attempt to initiate negotiations, the prosecutor never entered negotiations with counsel. Only after Applicant informed counsel that Applicant wanted to plead guilty on the morning of trial did the prosecutor agree to allow Applicant to plead to one charge and to dismiss the other charge.

Counsel testified the prosecution was not making any recommendations and definitely there was no deal for five years. Counsel testified that when Applicant signed the sentencing sheet, the space for the sentence was blank, it did not reflect a five year sentence. At that point, Counsel advised Applicant again that he was facing a sentence of ten to thirty years imprisonment. Counsel suggested asking the plea court for a sentence of fifteen years. However, Applicant did not want counsel to ask for a specific amount of time. Counsel testified that when the plea court announced the sentence, Applicant did not seem surprised at all.

This Court notes that during the guilty plea proceeding, Applicant agreed with the plea court that he understood the charge he pled to carried between ten and thirty years imprisonment. Tr. p. 4, lines 9-14. Applicant further agreed that the State may ask for the maximum sentence to be imposed

and the sentence would be up to the plea court to determine. Tr. p. 4, lines 15-22.

This Court finds there was never a five year recommendation and further finds that Kneece never told Applicant that there was a five year recommendation. This Court finds that counsel advised Applicant of the proper sentencing range and Applicant understood the potential sentence he was facing. Further, the possibility of any misapprehension would have been cured by the colloquy with the plea court. This Court finds Applicant's testimony not credible, especially given the plea colloquy. This Court finds Kneece and counsel's testimony credible and gives their testimony great weight. This Court denies this allegation.

### Alibi

Applicant alleges counsel was ineffective in failing to pursue an alibi defense. Applicant was a truck driver. Applicant submitted a record from his employer that purports to show that on the morning of the assault, at around 11 a.m., Applicant purchased gasoline for his truck in Walton, Kentucky, a town just south of Cincinnati, Ohio. Applicant claims that because of hills and mountains, and necessary stops, he would have been unable to return to Edgefield by 11 p.m., the time that the State alleged he picked up the victims.

Both counsel and Kneece testified that when Applicant provided them with the records, he admitted he did not think the records would help. Counsel reviewed the records and in his opinion, the records would not establish a viable alibi defense and were not very useful. Counsel testified that Kneece and another investigator from Kneece's agency (Kneece is the owner of the agency) worked on the case and would have been able to run down any leads and investigate any defenses, including the alibi defense.

This Court is skeptical of Applicant's claim that he would not have been able to return from Walton to Edgefield in roughly eleven to twelve hours' time. The Court takes judicial notice of the

fact Google maps reports a driving distance of 489.7 miles between Walton, KY and Edgefield, SC, with an estimated driving of time of 7 hours 33 minutes. Further, the indictment was for a much wider time range and time is not an element of criminal sexual conduct with a minor.

A charge on the defense of alibi “should be given when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission.” State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980). “To be successful, [a defendant’s] alibi must cover the entire time when his presence was required for accomplishment of the crime. To establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime.” Id. “[Because] 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.” Id.

This Court does not believe the evidence presented actually represents a complete alibi. This Court finds that it does not carry any force to establish a viable defense at trial. Further, this Court finds counsel’s testimony on the subject credible and gives it great weight. This Court finds counsel’s judgment in assessing the defense to be reasonable. This Court finds Applicant’s testimony is not credible on this matter. This Court finds Applicant has failed to meet his burden of proving either prong of Strickland.

#### **Failure to review discovery**

Applicant alleges counsel did not provide him discovery and did not go through all the discovery. He further alleges he only heard the audio recording twice and the first time it was inaudible. The second time was immediately before trial. Applicant also alleges he did not see the victim’s statement until shortly before trial was ready to begin.

Counsel testified he reviewed all of the discovery with Applicant. He explained he told Applicant he was willing to provide copies of discovery to Applicant, but he did not advise it because of the risk a jailhouse informant would use the materials to make a claim against Applicant. Counsel testified the audio recording was devastating. Applicant admitted he was the man in the recording. The recording contained coarse language and captured what sounded like a sexual assault on the children. Counsel testified that although the State would later provide better audio copies of the recording, even the first recording was sufficiently audible for its incriminating value to be apparent and it was sufficient for Applicant to understand its devastating evidentiary impact. In contrast to Applicant's testimony, counsel testified Applicant listened to the recording numerous times.

This Court finds counsel reviewed discovery in detail with Applicant and Applicant was keenly aware of the State's evidence against him so as to make an intelligent and knowing decision as to whether to proceed to trial or plead guilty. This Court finds counsel's testimony on the matter credible and gives it great weight. This Court finds Applicant's testimony lacks credibility. This allegation is denied as this Court finds Applicant failed to meet his burden of proving either prong of Strickland.

#### **Failure to file an appeal**

Applicant alleges he was never advised he could appeal the conviction and sentence from his guilty plea. Counsel testified that he advised Applicant of the right to appeal prior to Applicant pleading guilty. Counsel testified Applicant never indicated he wanted to appeal the guilty plea proceeding. Counsel testified that he did not see any circumstance suggesting an appeal was prudent. See Roe v. Flores-Ortega, 120 S.Ct. 1029 (2000) (finding counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either: (1) that a

rational defendant would want to appeal or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing). This allegation is denied.

**Failure to understand rights and the ramifications of pleading guilty**

Applicant alleges he did not understand his rights and the ramifications of pleading guilty. Counsel testified that he was prepared for trial on the day of the guilty plea. He hired the investigators to run down any leads and pursue any defenses Applicant suggested. Applicant seemed to believe that the two victims would never testify against him. One of the investigators, with the prosecutor's permission, actually took a short video of the victims at the courthouse to convince Applicant that they were actually present for the trial and would testify against him.

Despite several meetings with Applicant, Applicant never offered anything that could constitute a real defense to the charges and admitted, at least partially, to some of the acts alleged. Applicant admitted he was the man in the audio recording. Applicant always denied penile penetration, but during the guilty plea, advised counsel he agreed there was oral stimulation sufficient to satisfy that element of CSC with a minor. Applicant understood his right to trial and was not coerced into pleading guilty.

The guilty plea transcript reflects the knowing and voluntary nature of the guilty plea. The plea court advised Applicant of his trial rights and the potential sentence. Tr. pp. 4-6. The State presented its version of the facts. When the plea court asked Applicant if he agreed with the facts, he disputed penetration. However, after consulting with Applicant off-record, counsel advised the plea court that Applicant agreed there was oral stimulation sufficient to meet the definition of a sexual battery, and Applicant agreed with counsel's comments. Tr. p. 9, line 4 – p. 10, line 1.

This Court finds that the plea transcript and counsel's testimony clearly demonstrates Applicant understood his rights and the ramifications of pleading guilty. This Court finds that

Applicant made a free, knowing, and voluntary decision to plead guilty with the proper advice of counsel. The guilty plea transcript also demonstrates the knowing and voluntary nature of the guilty plea. This Court finds Applicant's testimony on the matter to not be credible and finds counsel's testimony to be credible and gives it great weight. This allegation is denied.

**Investigator coerced confession**

Applicant alleges Kneece coerced him into pleading guilty. According to Applicant, Kneece said a prayer in front of Applicant asking Applicant not to put the victims through a trial. Applicant alleges Kneece pressured Applicant into pleading guilty. Applicant claimed he was not thinking clearly and was upset when he pled guilty.

On the other hand, Kneece denied he coerced Applicant into pleading guilty. He testified he did not tell Applicant he should not put the victims through a trial, although Applicant said he did not want to put the victims through trial. He claimed he simply gave up.

Counsel testified Applicant appeared to be thinking clearly when he pled guilty. He did tear up when the audio recording was played for the plea court, but was not so overwrought that he did not understand the proceedings.

This Court does not find Applicant's claims to be credible. This Court finds Kneece's testimony to be credible and a more accurate recollection of events than Applicant's contrary testimony. This Court also finds counsel's testimony credible. This Court finds Applicant has not met his burden of showing that his guilty plea was coerced. This Court denies this claim.

**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 advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (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), SCRCR, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf.

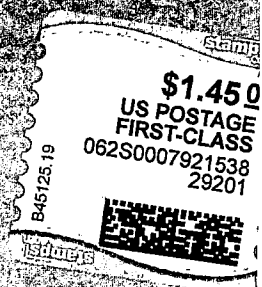
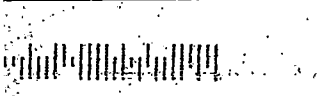
**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant shall remain in the custody of the Respondent.

AND IT IS SO ORDERED this 24 day of April, 2019.

  
William A. McKinnon  
Presiding Judge  
Eleventh Judicial Circuit

York, South Carolina



CE OF  
Goldberg, LLC  
AT LAW  
ET, SUITE 303  
CAROLINA 29201

The Honorable Daniel E. Shearouse  
Clerk of Court, South Carolina Supreme Court  
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