LAW OFFICE OF
JEREMY A. THOMPSON
LLC

July 1, 2019

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211-1330

RE: Cesar Mendez-Martinez, #373834 v. State of South Carolina; 2018-CP-42-1406

Dear Mr. Shearouse:

Enclosed please find the original and two copies of my Notice of Appeal in the above-captioned action. I would appreciate your filing the original, clocking the copies, and returning the two clocked copies to me in the envelope provided. I would note that Judge Russo issued a written Order of Dismissal in this case which was filed with the Spartanburg County Clerk of Court's Office on June 10, 2019. A copy of that Order is also enclosed. With my thanks for your assistance in this matter and my best regards, I am,

Yours sincerely,

Jeremy A. Thompson
Attorney and Counselor at Law

JAT/
Enclosures
cc: Johnny James, Assistant Attorney General (w/ notice of appeal)
Cesar Mendez-Martinez, #373834 (w/ enclosures)
Claudia Martinez-Alejo (w/ enclosures)

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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Thomas A. Russo, Presiding Judge

RECEIVED
JUL 03 2019
S.C. SUPREME COURT

2018-CP-42-1406

CESAR MENDEZ-MARTINEZ, #373834,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Cesar Mendez-Martinez, #373834, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed June 10, 2019, and received by counsel on the same date, issued by the Honorable Thomas A. Russo, presiding judge.

Jeremy A. Thompson
Attorney and Counselor at Law

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ATTORNEY FOR PETITIONER

This 1st day of July, 2019.

Other Counsel of Record:
Johnny James, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
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Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Petitioner's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Johnny James, Assistant Attorney General, P.O. Box 11549, Columbia, SC 29211, by mailing in an envelope properly addressed with postage prepaid on this 1st day of July, 2019.

Jeremy A. Thompson
Attorney and Counselor at Law

SWORN TO BEFORE me this 1st day of July, 2019.

_____ (L.S.)
Notary Public for South Carolina
My Commission Expires: 02-28-2029

YVONNE Y BYRD
Notary Public - State of South Carolina
My Commission Expires February 28, 2029

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
Cesar Mendez-Martinez, S.C.D.C. No. 373834,	)	Case No.: 2018-CP-42-01406
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief filed by Cesar Mendez-Martinez (Applicant) on April 27, 2018. Respondent made its return on or about August 1, 2018. The Court convened an evidentiary hearing into the matter on Friday, March 8, 2019, at the Spartanburg County Courthouse in Spartanburg, South Carolina. Applicant was present at the hearing and represented by Jeremy A. Thompson, Esq. Johnny Ellis James, Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Timothy M. Ray, Esq. (Counsel) also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the March 2017 term of the Spartanburg County Grand Jury for armed robbery (2017-GS-42-01386, Ct. I),

attempted armed robbery (2017-GS-42-01387, Ct. I), and two counts of possession of a weapon during the commission of a violent crime (2017-GS-42-01386, Ct. II; -01387, Ct. II). Timothy M. Ray, Esq. represented Applicant, and Spenser H. Smith, Esq., of the Seventh Circuit Solicitor's Office, prosecuted the case. On September 7, 2017, Applicant pled guilty as indicted to armed robbery, attempted armed robbery, and one of the weapon charges.[1] Upon a recommendation from the State of a sentencing cap of 20 years, the Honorable R. Keith Kelly sentenced Applicant to imprisonment for concurrent terms of 18 years each for armed robbery and attempted armed robbery, and 5 years for possession of a weapon.

Applicant filed a timely notice of appeal. By order filed October 25, 2017, the South Carolina Court of Appeals dismissed Applicant's appeal for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. State v. Mendez-Martinez, S.C. Ct. App. filed Oct. 25, 2017. The Remittitur was issued on November 13, 2017.

Present Application

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

1. "Ineffective Assistance of Counsel"
    a. "Defense counsel failed to conduct an adequate investigation into the Applicant's case"
    b. "Defense counsel failed to adequately advise the Applicant of all possible defenses and legal and factual claims that could be made at trial and failed to adequately advise the Applicant of all available plea offers"
2. "Involuntary Guilty Plea"
    a. "The Applicant's pleas of guilty were not knowingly, voluntarily, or intelligently entered"

Applicant requests relief as follows:

[1] The remaining weapon charge was dismissed.

- "To vacate the Applicant's convictions and sentences and to remand for a new trial."

At the evidentiary hearing, Applicant amended his application to allege Counsel was ineffective for failing to advise him about the legal concept of "mere presence."

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her 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, he or she 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." Butler, 286 S.C. at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for

a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). 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 (citing Strickland, 466 U.S. at 694). 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, 59 (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) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Statements made during a guilty

plea should be considered conclusively, unless an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975) (overruled on other grounds by United States v. Whitley, 759 F.2d 327 (4th Cir.1985)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. 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. Id. at 696-97.

1. Failure to Investigate, Advise of "Mere Presence"

Applicant has failed to present any credible evidence to show Counsel failed to adequately investigate and advise him of a defense based on "mere presence." To prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

"Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (quoting State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002)). "Under accomplice liability theory, a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act." Id. (quoting State v. Langley, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999)). "In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct." Id., 388 S.C. at 480, 697 S.E.2d at 584 (quoting State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)). "Any person who is present at a homicide, aiding and abetting, is guilty of the homicide as a principal, even though another does the killing." Id. (quoting State v. Zeigler, 364 S.C. 94, 103, 610 S.E.2d 859, 864 (Ct. App. 2005)). A formally expressed agreement is not necessary to establish the conspiracy; it may be shown by circumstantial evidence and the conduct of the parties. State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002).

"Mere presence at the scene is not sufficient to establish guilt as an aider or abettor." Id. There are two instances where "mere presence" and its associated charge may be applicable to a case:

> First, in instances where there is some doubt over whether a person is guilty of a crime by virtue of accomplice liability, the trial court may be required to instruct the jury that "a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act."
>
> . . .
>
> Secondly, mere presence is generally an issue where the state attempts to establish he defendant's possession of contraband because the defendant is present where the

> contraband is found. In such cases, the trial court may be required to charge the jury that the defendant's mere presence near the contraband does not establish possession.

State v. Dennis, 321 S.C. 413, 420, 468 S.E.2d 674, 678 (Ct. App. 1996). "Mere presence" is not relevant or chargeable where there is no evidence that anybody other than the defendant was present at the scene of the crime and when the State does not attempt to establish constructive possession of contraband. State v. James, 386 S.C. 650, 654-55, 689 S.E.2d 643, 645-46 (Ct. App. 2010); State v. Burgess, 393 S.C. 396, 406-07, 712 S.E.2d 1, 6 (Ct. App. 2011).

The colloquy conducted during the plea proceeding was very thorough. Judge Kelly explained each indictment to Applicant in detail, along with the minimum and maximum statutory sentencing ranges and the State's recommendation as to each charge, and Applicant confirmed his understanding upon inquiry by the court. (Tr. 5-7). Applicant confirmed he knew what a trial by jury was and indicated he did not want one. (Tr. 7, ll. 17-22). Applicant gave up his right to remain silent and his right to call and confront witnesses. (Tr. 7-8). Applicant pled guilty to each offense separately and affirmed to the plea court that he was pleading guilty because he was, in fact, guilty, and that he did so freely, intelligently, and voluntarily. (Tr. 8-9). Applicant affirmed he had adequate time to consult with Counsel, that Counsel answered all of his questions, that he was satisfied with Counsel's services, and that Counsel had shared with him the voluminous materials in Counsel's possession at the plea. (Tr. 9, ll. 2-19). Applicant affirmed Counsel had done everything he could. (Tr. 9, ll. 20-24). After an extensive recitation of facts by the State, Applicant substantially agreed to them, excepting only two details articulated by Counsel. (Tr. 13, ll. 8-21).

At the evidentiary hearing, Applicant expressed that he was struggling at the time of the crimes due to witnessing the killing of a friend, and that he was depressed and under the influence

of drugs and Xanax. Applicant asserted that he did not participate in the robberies, but confessed that he couldn't remember. Applicant denied discussing the robbery and denied proposing it. Applicant testified he met with Counsel and talked about his role in the robberies, and that although they discussed "hand of one, hand of all," they did not discuss "mere presence." Applicant testified he believed he was going to trial the week of the plea. Applicant recalled that Counsel came to him with an offer from the State to plead in exchange for a sentence between 10 and 20 years, and that Counsel advised him to accept the plea. On cross-examination, Applicant admitted that when approached by the State, he declined to testify against his friend's killer. Applicant further conceded he was aware of, and his attorney expressed, his factual disagreements with the State's case at the time of the plea. Applicant testified Counsel told him that, of the range offered by the State, Applicant was more likely to get 10 years, but Applicant admitted he knew he could get up to 20 years. Applicant testified he had already declined an offer for 15 years. Applicant opined that Counsel never really wanted to take the case to trial and did not discuss defenses with him. On re-direct, Applicant asserted he did not cooperate in the prosecution of his friend's killer because of his frustration with the State about his own treatment.

Counsel testified that a cooperating co-defendant implicated Applicant as the driver in the armed robbery and as a person who went in on the attempted armed robbery. Counsel explained that a witness to the second robbery followed Applicant's car from the scene until law enforcement took over, and that contraband was found in the car after it was pulled over: money, deposit receipts, clothes, a shotgun, airsoft guns, and shotgun shells, mixed about the passenger cabin and the trunk. Counsel noted that Applicant was the driver of the vehicle when the car was stopped by law enforcement. Counsel testified that his initial discussions with Applicant were in the context of him as the driver, and that they discussed "mere presence" in that context, though Counsel noted

he may not have used the exact phrase "mere presence." Subsequently, Applicant claimed to have been passed out on drugs in the back seat. Counsel opined that there was not a good "mere presence" defense, especially where the cooperating codefendant could credibly testify to Applicant's involvement, including his possession and distribution of the loot after the first robbery, and his "going in" on the second robbery. Nonetheless, Counsel testified that the only defense strategy he could discern was "mere presence," and that he discussed the subject with Applicant. Counsel described his job as to give advice, and that he did not sugar-coat his words in advising Applicant that he would not do well at trial. Counsel explained he attempted to negotiate a deal for Applicant's testimony in an unrelated murder. Counsel saw no basis for an independent investigation, but explained that what he needed was a viable explanation for Applicant's presence in the car when it was pulled over, and that there was potentially an identification issue. Counsel testified he was prepared for trial, as he was never sure Applicant would actually plead guilty. On cross-examination, Counsel expressed that he had expected the case to go to trial, and that he had discussed with Applicant the need for him to testify to establish any viable defense. Counsel expressed he felt there was a decent chance Applicant could receive less than a 15 year sentence, and that he was surprised by the 18 year sentence ultimately imposed. On redirect, Counsel clarified that he never promised Applicant he would receive any particular sentence. Upon inquiry by the Court, Counsel testified that Applicant admitted to removing his mask during the second robbery.

The Court finds Applicant has failed to meet his burden of proof to show either a deficiency on the part of counsel or any prejudice from the deficiency alleged. Counsel credibly testified to his analysis of the case, his identification of "mere presence" as the only potential defense, and that he discussed the subject with Applicant, though he may not have used the exact phrase "mere

presence." The Court finds Counsel's analysis of the case, and his advice to Applicant that prevailing at trial would be difficult, reflects his thorough preparation and competence as a lawyer.

The Court finds Applicant's testimony to the contrary to be not credible. The Court finds Applicant's selective memory about the events during the crime to be particularly unbelievable, and finds much of Applicant's testimony to be self-serving—one either remembers or they do not. The Court finds Applicant has presented no credible evidence to establish counsel was ineffective, nor any reason to permit him to now depart from the truth of his admissions made as part of his guilty plea. Applicant has failed to show any deficiency on the part of Counsel and, accordingly, his request for relief is **DENIED**.

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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 notifies the Applicant that he must file and serve a notice of appeal within thirty (30) 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, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 31ST **day of** May **, 2019.**

THOMAS A. RUSSO
Presiding Judge
Seventh Judicial Circuit

Florence, South Carolina

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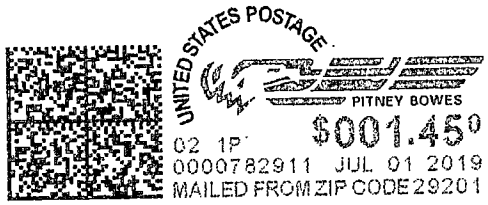

The Honorable Daniel E. Shearouse
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