

AIKEN & HIGHTOWER, PA

Attorneys at Law

2231 Devine Street, Suite 201

Columbia, SC 29205

Phone: 803-799-5205

Fax: 803-799-5206

Arthur K. Aiken

A. Bea Hightower

July 26, 2019

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RECEIVED

JUL 29 2019

Re: Gilbert E. Day #181471 v. State of South Carolina
Civil Action No.: 2018-CP-02-01052

S.C. SUPREME COURT

Dear Mr. Shearouse:

I am appointed counsel for the Applicant, Gilbert E. Day, in the above captioned post-conviction relief case. I have enclosed an original and one (1) copy of a Notice of Appeal for this case. Please file the original and return the file stamped copy to me in the enclosed SASE.

By copy of this letter with the filing enclosed, I have filed the filing with the Clerk of the Aiken County Court of Common Pleas and have also served the filing on the Office of the Attorney General for South Carolina. Please call with any questions.

Thank you for your help

Sincerely,



Arthur K. Aiken

art@aikenandhightower.com

cc: Clerk, Aiken County Court of Common Pleas (w/enclosures)
Office of the Attorney General for South Carolina (w/enclosures)
Gilbert E. Day (w/enclosures)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

JUL 29 2019

J. Cordell Maddox, Jr., Circuit Court Judge

S.C. SUPREME COURT

Case No. 2018-CP-02-01052

Gilbert E. Day # 181471.....Applicant/Appellant

v.

State of South Carolina.....Respondent/Respondent

NOTICE OF APPEAL

This is a post-conviction relief case. Appellant appeals from the Order of Dismissal filed on June 27, 2019 in this case. Appellant received written notice of the Order of Dismissal by mail on July 1, 2019. A copy of the Order of Dismissal appealed from is attached.

July 26, 2019



Arthur K. Aiken
Aiken & Hightower, PA
2231 Devine Street, Suite 201
Columbia, SC 29205
Telephone: 803-799-5205
Fax: 803-799-5206
Email: art@aikenandhightower.com
ATTORNEYS FOR APPELLANT

OTHER COUNSEL OF RECORD:

Office of the Attorney General of the State of South Carolina
Assistant Attorney General Jacob A. Isenberg
PO Box 11549
Columbia, SC 29211
ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUL 29 2019

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

S.C. SUPREME COURT

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2018-CP-02-01052

Gilbert E. Day #181471.....Applicant/Appellant

v.

State of South Carolina.....Respondent/Respondent

PROOF OF SERVICE AND FILING

I certify that, on July 26, 2019, I served and filed the Notice of Appeal in the above
appeal by mailing copies of those filings to the following:

Office of the Attorney General for South Carolina
Assistant Attorney General Jacob A. Isenberg
PO Box 11549
Columbia, SC 29211

and

The Honorable Robert J. Harte
Aiken County Clerk of Court
109 Park Ave., SE
Aiken, SC 29801

SIGNATURE ON THE FOLLOWING PAGE



Arthur K. Aiken
Aiken & Hightower, PA
2231 Devine Street, Suite 201
Columbia, SC 29205
Telephone: 803-799-5205
Fax: 803-799-5206
Email: art@aikenandhightower.com
ATTORNEYS FOR APPELLANT

Columbia, SC
July 26, 2019

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
) FOR THE SECOND JUDICIAL CIRCUIT
)

COUNTY OF AIKEN

Gilbert Edward Day,
S.C.D.C. No. 181471,

) Case No.: 2018-CP-02-01052
)
)

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 Gilbert Edward Day ("Applicant") on April 30, 2018. Respondent made its return on October 29, 2018. The Court convened an evidentiary hearing into the matter on May 15, 2019, at the Aiken County Courthouse in South Carolina. Applicant was present at the hearing and represented by Arthur K. Aiken, Esquire. Jacob A. Isenberg, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Derek Bush ("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 Aiken County Clerk of Court regarding the subject convictions, and the pleadings. The Court finds Applicant has not met his burden of establishing any constitutional deprivations or other grounds entitling him to relief and denies and dismisses the application with prejudice.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to a commitment order of the South Carolina Department of Corrections. I, Robert J. Harte, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina, certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

JUN 27 2019

FILED 06/27 20 19
Robert J. Harte
C.C.P. & G.S.

Charla Griffi Plausse
Deputy Clerk

Robert J. Harte
C.C.P. & G.S., Aiken County, S.C.
Charla Griffi Plausse
Deputy Clerk

County Grand Jury indicted Applicant for second-degree burglary, violent and grand larceny, \$10,000 or more. The charges arose from an incident occurring on August 14, 2017, when employees at the City of Aiken Engineering and Utilities Building came into work, noticed a side door had been forced open, and found things missing. Upon review of the surveillance video from inside the building, the employees were able to identify Applicant, a former employee, as the person on camera. Applicant stole a total estimated value in excess of \$150,000.

Counsel represented Applicant on the charges. Assistant Solicitor Michael Bradley McMillian prosecuted the case. On October 19, 2017, Applicant pled guilty as 1 of 7 indicted before the Honorable Benjamin H. Culbertson. Judge Culbertson sentenced Applicant to imprisonment for concurrent terms of twelve years for second-degree burglary and ten years for grand larceny. Applicant did not appeal his guilty plea or his sentence.

II. 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. Failure to Investigate
 - i. Failure to Interview Detective Griffin before he testified at the plea hearing
 - b. Failure to advise based upon defense of consent
 - c. Failure to prepare case for trial
 - d. Failure to advise advantages and disadvantages of pleading guilty

Applicant requests relief as follows:

- Vacate conviction and sentence

At the evidentiary hearing, Applicant proceeded forward on the above-mentioned allegations.

III. SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

Applicant

Applicant testified on his own behalf at the hearing. Applicant testified he was an employee at the time he was arrested for burglary. Applicant further testified he was out on worker's compensation leave at the time he was arrested for burglary.

Applicant testified Counsel informed him Detective Griffin would speak well on his behalf. Applicant testified he did not know if Counsel had any discussions with Detective Griffin before the hearing. Applicant testified he did not know Detective Griffin was going to bring up his deceased wife during the plea hearing. Applicant testified he would not have pled guilty if he knew Detective Griffin was going to bring up his deceased wife.

Applicant testified Counsel never discussed the defense of consent with him. Applicant testified he would not have pled if he knew about the defense of consent.

Counsel

Counsel testified on behalf of Respondent at the hearing. Counsel testified Applicant confessed to multiple crimes on the night he was arrested. Counsel testified Applicant assisted law enforcement in recovering stolen items that valued at about three hundred thousand dollars. Thereafter, Counsel was assigned Applicant's case through his job at the Second Circuit Public Defender's Office.

Counsel testified he immediately began negotiating an immunity agreement on behalf of Applicant. Counsel testified he met with the Solicitor and Detective Griffin about this immunity agreement. Counsel testified he negotiated an immunity agreement which allowed Applicant to be free from prosecution for several open cases based upon items he stole in other counties and states. Specifically, Counsel testified Applicant was not prosecuted for multiple crimes in Georgia based upon this agreement.

Counsel testified he investigated Applicant's employment at the facility. Counsel testified there was no basis for a defense of consent based upon Applicant's employment. Counsel testified Applicant was not allowed at the facility because he was out on worker's compensation leave. Counsel further testified the break-in took place at a time when Applicant would not have been working. Specifically, Counsel testified the break-in took place at night when no employees were scheduled to be working. Counsel testified this is why the doors to the facility were locked. Counsel testified Applicant would not have needed to use a tool to open the facility door if he had consent to be there. Counsel further testified to going over all of these issues in a jailhouse meeting with Applicant prior to signing the immunity agreement.

Counsel testified Applicant wanted to enter into a plea from the moment he was arrested. Counsel further testified Applicant made it clear through several statements he did not want to go to trial. Counsel testified Applicant confessed in order to get a more favorable plea. Counsel testified Applicant's confession allowed him to get the immunity agreement. Counsel testified Applicant continually asked when his plea would be finalized after securing the immunity agreement.

Counsel testified he typically goes over all the charges with clients before the plea hearing. Counsel testified he further goes over how a plea hearing is structured with clients beforehand. Counsel further testified he goes over constitutional rights in this meeting. Specifically, Counsel testified he goes over the right to remain silent, right to a trial by jury, right to make the solicitor prove each element of the charge beyond a reasonable doubt, right to confront witnesses, right to call witnesses in defense, and right to have an indictment presented to the County Grand Jury. Counsel testified he remembered this type of meeting with Applicant based upon having to explain the standard to be indicted is twelve out of eighteen county grand jurors.

Counsel testified his only conversations with Detective Griffin were about the immunity agreement. Counsel testified Detective Griffin was the investigating officer for Applicant's case. Counsel further testified he believed Detective Griffin was going to testify favorably for Applicant at the plea hearing. Counsel testified he was shocked when Detective Griffin testified about Applicant's role in his deceased wife's death. Counsel testified he immediately objected to Detective Griffin's testimony. Counsel testified he did not believe there was anything more he could have done after the objection was overruled.

IV. 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).

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 Detective Griffin before the Plea Hearing

a) Deficient investigation

Applicant contends Counsel is deficient based upon the failure to interview Detective Griffin before he testified at the plea hearing. For the purposes of the claim of ineffective assistance, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007).

Here, Counsel credibly testified he had no idea Applicant's phone conversations with his wife in prison were an issue. Counsel further credibly testified the phone calls were not exculpatory so he did not receive them in discovery. Counsel also credibly testified that neither Applicant, Assistant Solicitor, nor Detective Griffin notified him of the existence of these phone conversations. Counsel credibly recalled having conversations with Detective Griffin about Applicant's confession, assistance in recovering items, and the immunity agreement. Counsel further credibly assessed his belief testimony about confession, assistance, and immunity would be overwhelmingly positive for the court to hear from an officer. Therefore, Counsel credibly recalled believing Detective Griffin's testimony was going to be favorable for Applicant prior to

the plea hearing. At the plea hearing, Counsel notified the court he did not have the phone calls Detective Griffin referenced. (Tr. 17, L. 2-14). There is nothing in the record to suggest Counsel had knowledge about these calls before Applicant's plea hearing. Accordingly, this Court finds Counsel did a reasonable investigation into Detective Griffin based upon multiple interviews about Applicant's confession and the resulting immunity deal. Therefore, this Court finds Applicant has failed to overcome the burden to prove Counsel was deficient when investigating Detective Griffin.

b) Prejudice based upon investigation

Applicant testified he would not have pled guilty if he had known Detective Griffin's testimony beforehand. An ineffective assistance of counsel claim cannot overcome the burden to prove prejudice if the applicant merely offers speculation. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (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). The government's obligation to make disclosures of exculpatory material under Brady v. Maryland is pertinent not only to an accused's preparation for trial but also to his determination of whether to plead guilty; the defendant is entitled to make that decision with full awareness of favorable material evidence known to the government. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 323 (1999) (holding the solicitor committed a violation by failing to fully disclose favorable evidence about material witness altering their story before his plea hearing). Favorable evidence includes both exculpatory evidence and evidence which may be used for impeachment. U.S. v. Bagley, 473 U.S. 667, 676 (1985).

Here, Applicant testified he would have demanded trial with prior knowledge of Griffin's proposed testimony. Applicant further testified Counsel had no idea what Griffin was going to say

which caused a less favorable sentence. However, Counsel credibly testified there was no prior disclosure of this evidence. Counsel credibly admitted he did not anticipate Griffin testifying about evidence not previously disclosed. However, Counsel further credibly testified there was no duty to disclose because it was inculpatory and entirely unfavorable to Applicant. At the plea hearing, Detective Griffin stated referenced phone calls where Applicant told his wife not to talk to police, collect stolen items in the woods, and hide stolen items from police. (Tr. 14, L. 21-4). Griffin further stated police interviewed the wife, who informed them Applicant was abusive for several years so she feared he would kill her. (Tr. 15, L. 24-5) (Tr. 16, L. 1-2). Applicant did not present evidence to contradict the favorability of these recorded jailhouse phone calls or this witness statement. The record reflects the phone calls and statement indicated Applicant attempted to force his wife to tamper with evidence. Therefore, the phone calls and statements were not favorable to Applicant. As a result, Counsel would not have been entitled to the evidence in discovery. Therefore, this Court finds Applicant has failed to overcome the burden to prove prejudice based upon any deficient prior investigation of the evidence.

Additionally, Applicant testified Counsel should have interviewed Griffin about the hearing beforehand. Counsel credibly admitted he did not interview Griffin about planned testimony at the hearing. However, Counsel further credibly testified Griffin gave him no indication this evidence existed in multiple prior conversations about the case. Specifically, Counsel credibly recalled Griffin failing to hint at this throughout conversations about confessions, recovering items, and the immunity agreement. Counsel credibly testified Griffin would have had to disclose information about the inculpatory evidence in a witness interview. Counsel further credibly assessed his uncertainty as to whether Griffin would have. Griffin did not testify at this PCR hearing. Therefore, this Court finds Applicant can only speculate about whether Counsel

could have gotten the information at issue from Griffin beforehand. Accordingly, this Court finds Applicant has not overcome the burden to prove prejudice based upon a failure to interview Griffin before the plea hearing.

2. Failure to Advise Defense of Consent

a) Deficient advice

Applicant contends Counsel failed to advise him about the defense of consent based upon employment at the facility. However, Counsel credibly testified about looking into Applicant's employment. Specifically, Counsel credibly assessed consent was not relevant based upon three major factors. First, Counsel credibly recalled discovering Applicant was out on worker's compensation leave so he had no reason to be at the facility. Second, Counsel credibly recalled discovering the intrusion took place when no employees were scheduled to work. Third, Counsel credibly recalled assessing Applicant would not have used bolt cutters to enter the facility if he had permission to be there. Importantly, Counsel credibly testified to going over these issues with a consent defense in a jailhouse meeting with Applicant. Counsel further testified to discussing burglary elements with Applicant in a meeting before the plea hearing. Counsel credibly testified his custom is to explain elements of the charge when notifying them a solicitor will have to prove each one beyond a reasonable doubt at trial. Therefore, this Court finds Applicant has not overcome the burden to prove Counsel was deficient based upon a failure to advise him about the defense of consent.

b) Prejudice based upon advice

Applicant contends he would have gone to trial if Counsel properly advised him about the consent defense. Substantively, a person is guilty of burglary in the second degree if the person enters a building *without consent* and with intent to commit a crime therein and the entrance occurs

at nighttime. S.C. Code Ann. § 16-11-312 (B) (3) (emphasis added). In PCR, An applicant's statements during the plea hearing are considered "conclusive unless [he] presents valid reasons why he should be allowed to depart from the truth" of them. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (holding applicant did not establish ineffective assistance after a review of the plea hearing clearly refuted his assertion he believed he had a defense at the time); Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975) (adopting the rule an applicant must present reasonable allegations to depart from the truth of conclusive statements previously given at his plea hearing), overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4th Cir. 1985).

Here, Counsel credibly assessed the facts of this case did not amount to a legitimate defense of consent. At the plea hearing, Counsel notified the court Applicant was not working when the crime was committed. (Tr. 13, L. 4). Additionally, Applicant confirmed a side door was forced open when items were stolen from the facility he worked at. (Tr. 10, L. 6) (Tr. 12, L. 6). Applicant further confirmed he was the person identified on camera committing the crime. (Tr. 10, L. 7-9) (Tr. 12, L. 6). Applicant also confirmed the estimated value of power tools and equipment stolen from this building exceeded \$150,000. (Tr. 10, L. 9-12) (Tr. 12, L. 6). There is nothing in the record to contradict Applicant was caught on camera forcing a door open before stealing several pricey equipment pieces. Furthermore, Counsel credibly testified there was evidence Applicant used bolt cutters to get in the door. Accordingly, this Court finds Applicant has not presented a valid reason to depart from statements confirming he entered the building by force. Therefore, this Court finds Applicant has not overcome the burden to prove he would have gone to trial with knowledge of the consent defense.

3. Failure to Advise Advantages and Disadvantages of Trial

a) **Deficient advice**

Applicant contends Counsel failed to advise him of the benefits and consequences of choosing a plea or trial. However, Counsel credibly testified he customarily has a client conversation about constitutional rights before plea hearings. Specifically, Counsel credibly testified he goes over how the waiver of a right to remain silent waiver at the plea hearing means the court can begin to ask a wide range of questions. Counsel further credibly testified he goes over the right to a jury trial, burden of proof placed upon each element within the charges, right to confront witnesses, right to call witnesses in defense, and requirement to be indicted on charges before facing them at trial. Counsel credibly recalled going over this with Applicant based upon a rather long conversation about indictment requirements. Therefore, this Court finds Applicant has not overcome the burden to prove Counsel was deficient based upon failure to advise benefits and consequences of pleading and going to trial.

b) **Prejudice based upon advice**

Applicant contends he would have gone to trial with sufficient advice about the benefits and consequences. The South Carolina Supreme Court has found deficient counsel does not prejudice an applicant where the basis for their decision to avoid trial was a favorable plea. Goins v. State, 397 S.C. 568, 575, 726 S.E.2d 1, 4 (2012) (finding no prejudice where evidence showed Applicant accepted the plea after State offered to dismiss certain charges).

Here, Applicant testified knowledge of the consent defense would have caused him to give trial serious consideration. However, Counsel credibly recalled Applicant stating several times his desire to avoid trial. Counsel further credibly testified Applicant confessing to several crimes and assisting in item recovery because he wanted to get the best possible plea deal. Specifically, Counsel credibly recalled Applicant helping police officers recover hundreds of thousands of

dollars in stolen good. Finally, Counsel credibly recalled continually asking when the plea hearing was going to be after the immunity agreement was finalized. At the plea hearing, the Assistant Solicitor notified the Court Applicant helped them recover about \$272, 000 worth of items after his arrest. (Tr. 11, L. 1-5). Furthermore, the Assistant Solicitor told the Court Applicant disclosed his involvement in everything. (Tr. 11, L. 16-7). Finally, Applicant confirmed both of those statements were accurate. (Tr. 12, L. 6). Therefore, this Court finds Applicant's decision to plead guilty was primarily to get a more favorable deal through confession and assistance. Accordingly, this Court finds Applicant was not prejudiced based upon alleged deficient advice about the benefits and consequences of going to trial.

4. Failure to Prepare Case for Trial

a) Deficient preparation

Applicant contends Counsel failed to prepare the case for trial. To establish counsel failed to adequately prepare for trial, applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (relief denied where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial); Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999) (trial counsel not ineffective for failing to timely request discovery because contents of documents were not presented at PCR hearing).

Here, Counsel credibly testified Applicant made it clear his desire was to avoid trial. Counsel further credibly testified Applicant wanted to focus on assisting police to recover items to increase his chances of getting a favorable plea offer. Counsel also credibly testified Applicant believed confessing to everything would put him in a better position than not cooperating. As previously mentioned, Counsel credibly recalled doing an investigation into Applicant's status at work to see if he had a right to be present when items were stolen. Thereafter, Counsel credibly testified to notifying Applicant the facts did not support raising a defense of consent. Counsel credibly testified the rest of representation was spent formalizing the immunity agreement followed by formalizing a plea agreement. However, Counsel credibly recalled notifying Applicant before the plea hearing he still had the constitutional right to request a formal grand jury indictment. Counsel further credibly testified Applicant had no interest in anything except going through with the plea hearing based upon prior cooperation. At the plea hearing, Applicant did waive his right to be indicted on all charges. (Tr. 6, L. 1-15). The record further reflects Counsel concluded before the plea hearing a consent defense was meritless for multiple adequate reasons including worker's compensation leave, time of crime, and forcing the door open. Therefore, this Court finds Applicant has not presented an issue Counsel should have spent more time preparing to address. Accordingly, this Court finds Applicant has not overcome the burden to prove Counsel was deficient based a failure to prepare for trial.

b) Resulting prejudice

Applicant contends he had no choice but to plead guilty based upon Counsel's failure to prepare for trial. An applicant's statements during the plea hearing are considered "conclusive unless [he] presents valid reasons why he should be allowed to depart from the truth" of them. Dalton, 376 S.C. at 137, 654 S.E.2d at 874;

Here, Applicant testified the only option Counsel presented to him was pleading guilty. Applicant further testified his only choice was to plead guilty. At the plea hearing, Applicant told the court he was pleading voluntarily. (Tr. 9, L. 14). Applicant further told the court he was satisfied with Counsel. (Tr. 9, L. 16). Applicant also told the court he was pleading guilty because he was guilty. (Tr. 9, L. 19). Additionally, Applicant confirmed the set of facts proffered by the Assistant Solicitor. (Tr. 12, L. 6). As previously mentioned, Applicant also voluntarily waived his right to an indictment. (Tr. 6, L. 1-15). Thus, the record clearly refutes Applicant's assertion that he felt forced to plead guilty. Accordingly, this Court finds Applicant has not overcome the burden to prove prejudice based upon an alleged failure to prepare for trial.

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 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), SCRCR 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:

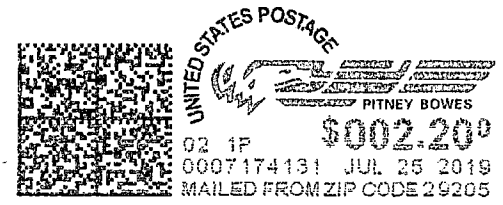
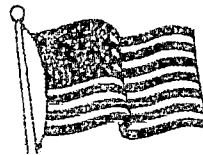
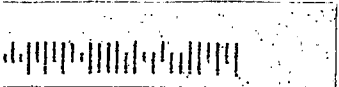
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must remain in custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 25 day of June, 2019.



J. CORDELL MADDOX
Presiding Judge
Second Judicial Circuit

Anderson, South Carolina



Hightower, PA
Vine Street, Suite 201
Columbia, SC 29205

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211