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July 23, 2019

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

RE: Sandy Lynn Westmoreland vs. The State of South Carolina
Case No: 2018-CP-42-1200

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

Rodney Richey

RWR/
Enclosures
cc: Johnny James, Esquire

RECEIVED

JUL 30 2019

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

HONORABLE J. MARK HAYES

2018-CP-42-1200

SANDY LYNN WESTMORELAND SCDC# 362335

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Sandy Lynn Westmoreland appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable J. Mark Hayes, Circuit Judge on May 13, 2019 an Order issued on July 19, 2019 and filed on July 19, 2019. The Appellant received notice of the judgment on July 22, 2019.

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Other Counsel of Record:
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RESPONDENT.

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on July 24, 2019, addressed to their attorney of record, Johnny James, Esquire Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: July 24, 2019

Rodney Richey, Esquire
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
Sandy Lynn Westmoreland, S.C.D.C. No. 362335,	)	Case No.: 2018-CP-42-01200
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 Sandy Lynn Westmoreland ("Applicant") on April 6, 2018. Respondent made its return on or about August 1, 2018. The Court convened an evidentiary hearing into the matter on Monday, May 13, 2019, at the Spartanburg County Judicial Center in Spartanburg, South Carolina. Applicant was present at the hearing and represented by Rodney W. Richey, 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 trial counsel, Matthew W. Shealy, Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial 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 October

2012 term of the Spartanburg County Grand Jury for murder (2012-GS-42-05195). Applicant was further indicted at the September 2013 term for traffic/hit and run with death (2013-GS-42-04625). Matthew W. Shealy, Esq. represented Applicant. Abel O. Gray and Megan Moricle, Esqs., of the Seventh Circuit Solicitor's Office, prosecuted the case. On December 1, 2014, Applicant proceeded to trial before the Honorable Roger L. Couch and a jury. The jury found Applicant guilty as indicted on December 4, 2014. Judge Couch sentenced Applicant to imprisonment for concurrent terms of 30 years for murder and 25 years for the hit and run.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Robert M. Dudek, Esq., who raised the following issues:

1. Whether the court erred by allowing the coroner, who admitted he had never testified about the manner of death in the prior case, to opine, where he was not qualified as an expert, that the cause of the decedent's death was a homicide since this was impermissible opinion by a lay witness that was extraordinarily prejudicial where appellant's defense was accident, and the jury was charged on the law of accident?
2. Whether the court erred by instructing the jury that voluntary intoxication was not a defense where the evidence in this case was undisputed that appellant was heavily medicated in the hospital emergency room for medical purposes, and was nonetheless allowed to leave to drive home, since this instruction on voluntary intoxication should not have been charged given the facts of this case, and it was consequently was very confusing and misleading?

The parties proceeded to oral arguments on April 12, 2017. Applicant was represented by attorney Dudek and the State was represented by Caroline M. Scrantom, Esq., of the South Carolina Attorney General's Office. By opinion decided July 12, 2017, the South Carolina Court of Appeals affirmed Applicant's conviction for hit and run, but reversed and vacated the murder conviction. State v. Westmoreland, 421 S.C. 410, 807 S.E.2d 701 (Ct. App. 2017). The State petitioned for rehearing on July 27, 2017, which was denied by the Court of Appeals by Order filed December 14, 2017. The Remittitur was issued on March 6, 2018.

Present Application

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

1. "Ineffective Assistance of Counsel"
2. "Unconstitutional sentence double jeopardy"
3. "Fifth, Sixth and 14th Amendment U.S.C.A. Violation"

Applicant requests relief as follows:

- "vacate sentence and be released"

At the evidentiary hearing, Applicant proceeded forward on allegations informally amended by way of an e-mail and read into the record by Respondent:

1. Ineffective assistance of counsel, in that:
    a. Lawyer told him he would get 5 years.
    b. If Applicant had known he could get life he would have taken 20 years.
    c. He did not talk about case with lawyer.
    d. Lawyer did not discuss testimony with him.

Applicant proceeded on the allegations as articulated by the State.

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

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of

counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance

need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced 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. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

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. Misadvice as to Potential Sentencing Outcomes, Plea Offer

Applicant's claim that Counsel misadvised him as to the potential sentencing outcomes of pleading guilty versus proceeding to trial is without merit. A defendant has the right to effective assistance of counsel during the plea bargaining process. Davie v. State, 381 S.C. 601, 605, 675 S.E.2d 416, 419 (2009) (citing Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996)); Lafler v. Cooper, 566 U.S. 156, 162 (2012) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)). Misadvising a defendant such that he rejects a plea offer and instead proceeds to trial may constitute deficient performance. See, e.g. Lafler, 566 U.S. at 161 (counsel misadvised defendant "that the prosecution would be unable to establish his intent to murder [the victim]

because she had been shot below the waist."); Lee v. United States, 137 S.Ct. 1958 (2017) (counsel misadvised a noncitizen defendant that he would not be deported as a consequence of his guilty plea). To show prejudice from the improvident rejection of a plea offer based upon the misadvice of counsel, an applicant must show (1) that but for the ineffective advice there is a reasonable probability the plea offer would have been presented to the court, (2) that the court would have accepted its terms, and (3) that the conviction, sentence, or both would have been less severe under the terms of the plea than was in fact imposed. Lafler, 566 U.S. at 164.

At the evidentiary hearing, Applicant testified he discussed the possibility of receiving a sentence between zero and five years with Counsel, and so that is what he expected if he went to trial and was convicted. Applicant recalled that he was offered the opportunity to plead guilty in exchange for a sentence of twenty years, but he rejected the offer because he expected only five years. Applicant testified that Counsel "somewhat" explained the charges against him, but that he did not understand the charges as well as he should have. On cross-examination, Applicant admitted he lied to law-enforcement and that the victim was dead when Applicant found him. Applicant testified that he had a seventh-grade education, and that he dropped out of school to go to work. Applicant testified he started as a bag boy and eventually rose to be a grocery manager. Applicant recalled he attended special education classes while still in school. Applicant testified he was trying to get his G.E.D. When asked, Applicant could not say what, if any, particular learning disability he suffered from.

Counsel testified that he discussed the possibility of a conviction for the lesser-included offense of voluntary manslaughter with Applicant. Counsel explained that involuntary manslaughter was a possible outcome if everything went right at trial, and that such a conviction was the hoped-for outcome. Counsel testified he received the twenty-year-offer from the State

and delivered it to Applicant on July 28, 2014. Counsel recalled that after Applicant rejected the offer that day, Counsel advised him to take some time to think it over, and that it was a good deal. When Counsel again discussed with offer with Applicant on July 31, 2014, Applicant again rejected the offer. Applicant testified he went over the minimum and maximum sentences Applicant was facing, and again went over the sentencing consequences as they related to the plea offer. Counsel testified that Applicant was "sunk on hit and run," and that Applicant understood the undeniable hit and run case against him. On cross-examination, Counsel made clear that Applicant was told he could get much more than five years. Counsel testified Applicant did not want a sentence of more than ten years. Counsel testified he had no notes in his file to indicate any discussion or concern that Applicant had any learning disability. Counsel described Applicant as literate and receptive, such that there was no need for an evaluation. Counsel testified Applicant understood that his confession to law enforcement made beating the hit and run conviction impossible.

The Court finds that Counsel's trial strategy from the beginning was to fight the murder charge in the hopes of a conviction for the lesser-included offense of involuntary manslaughter. If Counsel was successful in that regard, his strategy was to then persuade the sentencing judge to sentence Applicant to only five years for the hit and run. However, the jury convicted Applicant of murder and the trial judge sentenced Applicant to twenty-five years for the hit and run. Counsel accurately explained to Applicant his potential sentencing exposure—that Applicant was facing life—and advised him to accept the plea offer. The offer to plead in exchange for a twenty year sentence was twice presented and twice rejected by Applicant. Applicant wouldn't accept any offer for more than ten years. The Court finds that even though Applicant suggested he suffered from intellectual challenges, it does not appear that these

claimed challenges interfered with his ability to communicate in writing and orally with his attorney. Applicant understood his conversations with Counsel, what he was facing, and the merits of the plea offer. Nothing in Applicant's conduct in consultations gave Counsel reason to believe there was any misunderstanding or inherent inability on Applicant's part to understand their conversations. Applicant's allegation of deficiency is credibly refuted by Counsel's testimony, as is any claim of prejudice from the deficiency alleged. For all of these reasons, Applicant's request for relief by way of this allegation is **DENIED**.

2. Failure to Communicate

Applicant's claim that Counsel failed to adequately communicate with him regarding his case is without merit. "The brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012) (citing Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008)). An applicant alleging he was prejudiced by inadequate time spent in consultation with counsel must present evidence of how additional communication would have resulted in a different outcome. Id. (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998); Skeen v. State, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997)).

Applicant testified at trial, and the substance of his testimony is well enough summarized in the Court of Appeals opinion's harmless error analysis. See Westmoreland, 421 S.C. at 424, 807 S.E.2d at 708-09. Of note, the Court of Appeals concluded that Applicant's "testimony provided overwhelming evidence of guilt" with respect to the hit and run conviction. Id.

At the evidentiary hearing, Applicant testified to the facts of the case in a manner roughly consistent with his testimony at trial. Applicant asserted that testifying at trial was not helpful

Applicant recalled talking about testifying with Counsel, but claimed that they did not talk about it enough. Applicant testified Counsel encouraged him to testify.

As noted in the prior section, Counsel testified that Applicant was "sunk on hit and run," and that their strategy at trial was to argue Applicant was involuntarily intoxicated, and that the collision with the victim was not intentional. Counsel testified he prepared Applicant to testify, emphasizing in his discussions that Applicant needed to not get angry during his testimony. Counsel recalled that Applicant "went off reservation." On cross-examination, Counsel testified he met with Applicant somewhere between eight and ten times.

The Court finds Applicant has failed to present evidence adequate to support this allegation, and finds Counsel's credible testimony refutes what little was presented. Given the defense "theory of the case," the Counsel's advice to Applicant that he testify was justified. Applicant's trial testimony on direct examination was consistent with the theory that he sought to support. However, the State's cross-examination was aggressive and cast doubt on the direct testimony and the defense theory. Counsel objected appropriately throughout, but the trial court's rulings, especially regarding the medications and tolerances to medication, were not helpful to the defense. Prior to trial, the Court finds Counsel adequately met with Applicant on a number of occasions, and wisely advised Applicant on how to approach trial testimony. That Applicant was unable to stick with Counsel's advice under the pressure of effective cross-examination is Applicant's own shortcoming, not Counsel's. For all of these reasons, Applicant has failed to meet his burden of proof as to either prong of Strickland, and his request for relief by way of this allegation 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 19th **day of** July, **2019.**

J. MARK HAYES
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

FILED
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SPARTANBURG COUNTY
2019 JUL 19 PM 2:11

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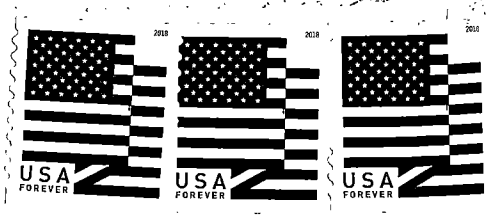

The Honorable Daniel E. Shearouse
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