

Tristan M. Shaffer
Attorney at Law

August 11, 2019

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AUG 13 2019

S.C. SUPREME COURT

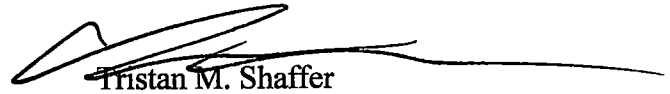
Daniel Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Derrick J. Brown v. State 2014-CP-21-1062

Dear Mr. Shearouse,

Please find the enclosed Notice of Appeal, Certificate of Service, and Order of Dismissal in the above referenced case.

Sincerely,



Tristan M. Shaffer

CC: Florence County Clerk of Court
Samuel Key
Derrick Brown #315942

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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AUG 13 2019

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

William H. Seals, Circuit Court Judge

Case No. 2014-CP-21-1062

Derrick Brown #315942,

Petitioner,

v.


The State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner appeals the order dismissing his post-conviction relief action filed July 29, 2019 and received by Petitioner on August 1, 2019.

August 11, 2019



Tristan M. Shaffer (SC Bar # 77565)
P.O. Box 1027
Chapin, SC 29036
(803) 941-7514
Attorney for Petitioner

Other Counsel of Record:
Samuel Key
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
Attorney for Respondent

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S.C. SUPREME COURT

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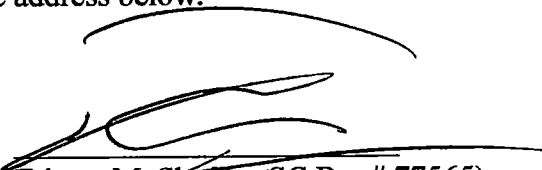
The State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I certify that on the date below I served the Notice of Appeal on The State of South Carolina by mailing a copy to the Respondent at the address below.

August 11, 2019



Tristan M. Shaffer (SC Bar # 77565)
P.O. Box 1027
Chapin, SC 29036
(803) 941-7514
Attorney for Petitioner

Other Counsel of Record:
Samuel Key
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
Attorney for Respondent

Applicant's attempted murder, carjacking, and weapons charges stem from an incident that occurred on April 26, 2012. Applicant was on a bicycle in a trailer park and was approached by Georell Blathers, who was driving a car. Applicant and Blathers had a heated exchange, and Blathers exited his car. Thereafter, Applicant shot Blathers, then entered Blathers' car and drove away. Blathers mother and sister witnessed the incident from inside their trailer. (Plea Tr. 15-17).

On September 6, 2013, Applicant pleaded guilty to attempted murder and carjacking with negotiated concurrent twenty-year sentences before Judge D. Craig Brown. Applicant's remaining charges were dismissed in exchange for his guilty plea. Judge Brown accepted Applicant's guilty plea and sentenced him pursuant to the negotiated sentence. Applicant did not appeal his guilty plea or sentences.

II. ALLEGATIONS RAISED

Applicant alleges he is being held in custody unlawfully for the following reasons alleging ineffective assistance of counsel in that:

1. Plea counsel told Applicant's family Applicant would only get twelve-years' imprisonment;
2. Applicant moved to relieve plea counsel before he pleaded guilty; and
3. Plea counsel failed to review discovery materials with Applicant or the State withheld discovery from Applicant.

III. PCR TESTIMONY

Plea Counsel

Plea counsel testified he was assigned to represent Applicant by the Florence County Public Defender's Office. (PCR Tr. 5). Plea counsel testified he was a part-time assistant public defender, familiar with criminal law, and felt comfortable handling Applicant's case. (PCR Tr. 5, 10-11). He testified he met with Applicant four or five times. (PCR Tr. 6, 9). Plea counsel stated he filed a Rule 5 discovery motion and received all of the discovery materials he anticipated receiving.

(PCR Tr. 11). Plea counsel stated he was able to communicate with Applicant and believed Applicant understood what was going on; he reviewed all of the discovery materials with Applicant; he and Applicant discussed Applicant's version of the facts; and he and Applicant discussed a potential trial strategy and any possible defenses. (PCR Tr. 11).

As to the potential trial strategy, plea counsel testified Applicant claimed Victim had a gun and he shot Victim in self-defense; however, plea counsel stated he was unable to find anyone to substantiate or corroborate Applicant's claim Victim had a gun. (PCR Tr. 7). Plea counsel recalled Victim's mother was a potential witness. (PCR Tr. 7). Plea counsel stated, "[I]nitially [Victim's mother] informed law enforcement that she heard some [gun] shots and then came out and saw that it appeared that her son had been shot" (PCR Tr. 8). Plea counsel recalled having a conversation with the solicitor before trial. Plea counsel stated the conversation led him to believe "[Victim's mother's] story may have changed;" however, he did not remember receiving anything written regarding the change of Victim's mother's story. (PCR Tr. 8).

Plea counsel stated he and Applicant were preparing for trial when Applicant first indicated he wanted to plead guilty. (PCR Tr. 9). Plea counsel stated the State initially offered to allow Applicant to plead as charged to a thirty-year sentence, but he was able to negotiate for a better deal—a plea to the attempted murder and carjacking charges with negotiated twenty-year concurrent sentences. (PCR Tr. 10). Plea counsel testified he explained to Applicant the benefits and risks associated with going to trial, and he explained to Applicant the meaning of a negotiated sentence. (PCR Tr. 12–13).

Plea counsel recalled Applicant informing the plea court Applicant felt the State coerced his guilty plea; however, plea counsel felt any questions regarding Applicant's coercion were cured by the plea court's colloquy. (PCR Tr. 15–16).

Applicant

Applicant did not deny shooting Blathers; rather, Applicant testified he shot Blathers in self-defense. (PCR Tr. 21–22). Applicant testified he first met with plea counsel while he was serving a different sentence under the Youthful Offender Act¹ (YOA sentence). (PCR Tr. 22). Applicant stated he met with plea counsel four or five times regarding these charges. Applicant stated he and plea counsel were preparing a self-defense claim for trial, and the first plea offer from the State was for thirty-years' imprisonment. Applicant refused the State's initial offer. Applicant stated a twenty-five year offer was conveyed to his mother, and then he learned of the twenty-year offer. (PCR Tr. 23). Applicant testified he did not want to accept the State's twenty-year offer. (PCR Tr. 24).

Applicant recalled moving *pro se* to relieve plea counsel but stated he never went into court regarding his motion. (PCR Tr. 24). Applicant testified he did not bring the motion to relieve plea counsel to the plea court's attention because he felt he would have then had to represent himself. Applicant testified plea counsel informed him plea counsel met with the judge, and the judge said he would only relieve plea counsel if Applicant wished to proceed *pro se*. (PCR Tr. 25). Applicant testified he moved to relieve plea counsel because he wanted plea counsel to look deeper into the charges and evidence in the case, but plea counsel refused to do so. Applicant wanted plea counsel to speak with two potential witness who would have supported his self-defense claim, but plea counsel informed him the witnesses would not provide enough to support his self-defense claim. Applicant stated plea counsel interviewed the two witnesses and the witnesses told him Blathers had a gun, but Blathers never pointed the gun at Applicant. (PCR Tr. 26).

¹ S.C. Code Ann. §§ 24-19-5 to -160 (2007 & Supp. 2018).

Applicant recalled requesting the discovery in his case. Specifically, Applicant testified the Clerk's Office told him there were no statements or written documents from anyone in connection to his case. However, Applicant testified that on the day of his plea, the State pulled out a statement from the victim's mother and started reading it. (PCR Tr. 28). Applicant testified he asked plea counsel for that statement, but plea counsel told him there was no statement. (PCR Tr. 28). Applicant claims the statement would have helped his case because it was inconsistent with the victim's mother's previous statement. (PCR Tr. 29).

On cross-examination, the State asked Applicant, "So you chose taking [twenty] years for certain over rolling the dice and perhaps getting [sixty]?" (PCR Tr. 36). Applicant replied, "Yes ma'am. . . ." (PCR. Tr. 37).

IV. DISCUSSION

The issue before the Court is whether Applicant's plea was the result of ineffective assistance of counsel. Specifically, Applicant alleges plea counsel was ineffective because plea counsel told Applicant's family Applicant would only receive twelve years' imprisonment, Applicant moved to relieve plea counsel before he pleaded guilty, and plea counsel failed to review the discovery with Applicant. Applicant further claims he would not have pleaded guilty and would have insisted on proceeding to trial absent these alleged deficiencies. These allegations are properly before the Court as attacks on the knowing and voluntary nature of Applicant's plea. *See Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (stating a defendant who entered a plea with the advice of counsel may only attack the voluntary and intelligent nature of the plea).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained

prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). "[A] defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To prove prejudice, the applicant must show a reasonable probability he would not have pleaded guilty and would have insisted on going to trial absent plea counsel's alleged deficiency. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

In his PCR application, Applicant alleged plea counsel told Applicant's family he would only receive twelve-years' imprisonment. However, Applicant presented no evidence regarding this allegation at the PCR hearing. Conversely, Applicant recalled the State offering thirty years, twenty-five years, and twenty years in exchange for his guilty plea. Applicant testified he refused the State's thirty and twenty-five year offers, and he initially refused the State's twenty year offer. However, Applicant testified he eventually accepted the State's twenty year offer over facing a potential sixty year sentence at trial. The plea transcript and Applicant's testimony at the PCR hearing show Applicant knowingly pleaded guilty to negotiated concurrent twenty-year sentences.

The Court finds plea counsel was not deficient because Applicant knew he was pleading guilty to negotiated concurrent twenty-year sentences. Applicant failed to prove he was prejudiced because, as he admitted, he chose to plead pursuant to the State's offer instead of potentially

receiving a sixty-year sentence at trial. Therefore, the Court denies relief and dismisses this allegation with prejudice.

Applicant alleges ineffective assistance of counsel because Applicant moved to relieve plea counsel. In support of this allegation, Applicant testified he moved *pro se* for plea counsel to be relieved from his case. Applicant testified plea counsel was aware of his desire to relieve plea counsel from representing Applicant, and plea counsel then spoke to a judge regarding Applicant's motion. Applicant testified plea counsel told him the judge would only grant his motion if Applicant wished to proceed *pro se*. (PCR Tr. 24-26). Applicant stated he did not want to represent himself, so he did not inform the plea court of the motion to relieve plea counsel. (PCR Tr. 24).

The Court finds Applicant has failed to show prejudice resulted from his motion to relieve plea counsel. Applicant testified at the PCR hearing he did not inform the plea court of his motion to relieve counsel because he did not want to represent himself. The Court finds credible Applicant's testimony that he did not want to represent himself and alternatively chose to be represented by plea counsel. It is also clear from Applicant's PCR testimony he was aware of the dangers of self-representation and did not wish to represent himself. *See Faretta v. California*, 422 U.S. 806, 835 (1975) (stating a defendant must knowingly and intelligently waive the benefits associated with the right to counsel before relinquishing the right to counsel). Further, at the plea hearing, Applicant informed the plea court, under oath, he was completely satisfied with plea counsel's representation and plea counsel had done everything Applicant asked him to do. (Plea Tr. 10). Based on the foregoing, the Court finds plea counsel was not ineffective on this allegation; therefore, relief is denied and the allegation is dismissed with prejudice.

Finally, Applicant alleges plea counsel either failed to review all the discovery with him or the State withheld evidence from him. The Court disagrees.

The disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. *State v. Kennerly*, 331 S.C. 442, 452, 503 S.E.2d 214, 220 (Ct. App. 1998) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). Favorable evidence includes both exculpatory evidence and evidence which may be used for impeachment. *United States v. Bagley*, 473 U.S. 667, 676 (1985). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Clark v. State*, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993).

At the PCR hearing, Applicant testified that on the day of his plea, the State pulled out a statement from the victim's mother and started reading it. (PCR Tr. 28). Applicant testified he asked plea counsel for that statement, but plea counsel told him there was no statement. (PCR Tr. 28). Applicant claims the statement would have helped his case because it was inconsistent with the victim's mother's previous statement. (PCR Tr. 29). Plea counsel stated he reviewed all the discovery with Applicant, and he and Applicant discussed presenting a self-defense claim at trial. Plea counsel recalled the victim's mother was a potential witness at trial, and she provided a statement to law enforcement. However, plea counsel recalled the State informing him the victim's mother's story may have changed leading up to trial. (PCR Tr. 8).

The Court finds credible plea counsel's testimony he reviewed all the discovery he received with Applicant, and he and Applicant discussed pursuing a claim of self-defense at trial. As for the allegation of prosecutorial misconduct or a *Brady* violation, the Court finds Applicant has failed to meet his burden of proof. The only evidence in support of this allegation was Applicant's

self-serving testimony the State read from a statement the victim's mother gave that was inconsistent with her previous statement and was never produced to Applicant. However, plea counsel recalled the State informing him the victim's mother's testimony at trial may be different from her initial statement to the police. Based upon plea counsel's credible testimony, the State disclosed the information which plea counsel could have used to impeach the victim's mother at trial. Therefore, there was no *Brady* violation. Further, Applicant has failed to show the victim's mother's second statement was ever reduced to writing or how it differed from the first statement. What the State referred to during its recitation of the facts at the plea hearing is merely speculative from the record before the Court. Therefore, the Court finds Applicant has failed to meet his burden of proof on this allegation.

V. CONCLUSION

The Court finds plea counsel's representation was neither deficient nor prejudicial. Applicant pleaded guilty pursuant to the advice of plea counsel. Applicant knew the meaning and consequences of pleading guilty to the charges and voluntarily chose to do so. Applicant failed to show plea counsel was ineffective for allegedly telling Applicant's family Applicant would only receive twelve years' imprisonment, Applicant moved to relieve plea counsel before he pleaded guilty, and failing to review the discovery with Applicant. Additionally, the Court finds the State did not withhold evidence from Applicant. Further, the Court finds Applicant knowingly and voluntarily pleaded guilty because the plea court's colloquy cured any of plea counsel's alleged deficiencies. *See Wolfe v. State*, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997) (stating any possible misconceptions due to counsel's alleged deficiencies can be cured by the plea court's colloquy) Therefore, based on the foregoing, the Court denies relief on all allegations and dismisses this PCR action with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.


THEREFORE:

1. The Court denies relief and dismisses the action with prejudice; and
2. Applicant shall be remanded to the custody of the State.

AND IT IS SO ORDERED.



WILLIAM H. SEALS, JR.
Presiding Judge
Twelfth Judicial Circuit

 _____, South Carolina

7/16, 2019.