Richard Warder
Attorney At Law

August 8, 2019

South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29201

Re: Lorenzo Jackson 344829 vs State of South Carolina

Dear Court:

Enclosed please find for filing a Notice of Intent to Appeal and Certificate of Mailing in the above captioned case.

Thank you for your cooperation in this matter.

Sincerely,

Richard H. Warder

RHW/ts

Enclosures

cc: Taylor Z Smith, Assistant Attorney General
Greenville County Clerk of Court (courtesy copy)

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF GENERAL SESSIONS

ALEX KINLAW, JR., CIRCUIT COURT JUDGE
2016-CP-23-7620

LORENZO A JACKSON #344829.....Applicant,

v.

STATE OF SOUTH CAROLINA .....Appellant.

NOTICE OF INTENT TO APPEAL

Lorenzo A. Jackson #344829, appeals the Order signed by, the Honorable Alex Kinlaw, Jr. on July 19, 2019

Respectfully Submitted

August 8, 2019

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
AUG 12 2019
SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
COURT OF GENERAL SESSIONS

HONORABLE ALEX KINLAW, JR.

2016-CP-23-7620

Lorenzo A. Jackson, #344829.....Applicant

V

State of South Carolina .....Respondent

I certify that I have served the Notice of Intent to Appeal on Taylor Z. Smith, Assistant Attorney General, by depositing a copy of it in the United States Mail, postage prepaid on August 8, 2019, addressed to him at Office of Attorney General, P.O. Box 115449, Columbia, South Carolina 29211 and to the Clerk of Court, Greenville County Courthouse, 305 E. North Street, Greenville, South Carolina 29601.

RICHARD H. WARDER
POST OFFICE BOX 26133
GREENVILLE, S.C. 29616
ATTORNEY FOR APPELLANT

SWORN to before me this
9th day of August, 2019

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 9-25-23

RECEIVED
AUG 15 2019
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT
Lorenzo A. Jackson, #344829 Applicant, v. State of South Carolina, Respondent.	Case No. 2016-CP-23-7620 ORDER OF DISMISSAL

This matter comes before this Court by way of an Application for Post-Conviction filed on December 28, 2016, by Lorenzo Jackson (Applicant). The State (Respondent) filed its Return and Motion for More Definite Statement on July 17, 2017. Applicant filed a Supplemental Application on September 12, 2017. An evidentiary hearing in the matter was held before the Honorable Alex Kinlaw, Jr., on April 16, 2019, at the Greenville County Courthouse. Applicant was present and was represented by Richard H. Warder, Esquire. Respondent was represented by Assistant Attorney General Taylor Z. Smith of the South Carolina Attorney General's Office. At the hearing, Applicant, Bobby McLain, Applicant's grandmother, Applicant's brother, and Applicant's mother testified on Applicant's behalf, and Scott D. Robinson, Esquire, (Counsel) testified on behalf of Respondent. Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds that Applicant has failed to meet his requisite burden of proof and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. During its March of 2016 term, the Greenville County Grand Jury indicted Applicant for possession of a firearm by a

person convicted of a crime of violence (2014-GS-23-11837), attempted murder (2014-GS-23-11839), possession of a weapon during the commission of a violent crime (2014-GS-23-11839), and armed robbery (2014-GS-23-11843). Counsel represented Applicant and Assistant Solicitor Katryna B. Salisbury prosecuted the case on behalf of the Thirteenth Circuit Solicitor's Office. On August 22-23, 2016, Applicant proceeded to trial before a jury with the Honorable D. Garrison Hill, presiding. On August 24, 2016, before the trial had ended, Applicant pleaded guilty to first-degree burglary (2013-GS-23-11802), possession of a firearm by a person convicted of a crime of violence (2014-GS-23-11837), attempted murder (2014-GS-23-11839), and armed robbery (2014-GS-23-11843). Applicant was sentenced to eighteen years for first-degree burglary, eighteen years for attempted murder, eighteen years for armed robbery, and five years for possession of a firearm for a person convicted of a crime of violence. On August 25, 2019, the Solicitor's Office dismissed the indictment for possession of a weapon during a violent crime (2014-GS-23-11839). Applicant did not appeal his pleas or sentences.

CURRENT PROCEEDING

On December 28, 2016, Applicant filed an Application for Post-Conviction Relief, in which he made the following allegations:

1. Counsel provided erroneous advice with prompted plea;
2. Counsel failed to do the necessary factual investigations on Applicant's behalf;
3. Counsel failed to call witnesses that would have proven Applicant's innocence;
4. Counsel neglected to do the necessary investigation and preparation of the case; and
5. Counsel failed to function as the counsel that the Constitution's Sixth Amendment guarantees.

On September 12, 2017, Applicant filed a Supplemental Application, in which he made the following allegations:

1. Counsel was ineffective for failing to contact alibi witness;
2. Counsel was ineffective for failing to give the State proper notice of Applicant's alibi witnesses prior to trial;
3. Counsel was ineffective for failing to communicate with Applicant prior to trial/plea; and
4. Counsel was ineffective for failing to investigate the victim's statement.

At the start of the evidentiary hearing, Respondent requested that Applicant specify for the record the grounds upon which Applicant would move forward at the hearing. Applicant specified that he would be moving forward at the hearing solely upon the grounds in the Supplemental Application. Later, during the evidentiary hearing, Applicant alleged through testimony that Counsel failed to file a Notice of Appeal at Applicant's request, and this Court allowed Applicant to also proceed upon that allegations. Because these are the only grounds for relief upon which Applicant proceeded at the evidentiary hearing, all over grounds are deemed to be waived and will not be addressed in this Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented at the evidentiary hearing, which allowed the Court to scrutinize the credibility of all witnesses presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he 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, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; 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 v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "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). 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 Petitioner 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. 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 pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985). The "prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial." Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009).

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. 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. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." Id. at 690.

"A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). "Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea." Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of cases" and instructing that caution must be exercised so as not to "undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea").

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel. The allegations are addressed fully below:

Counsel was ineffective for failing to communicate with Applicant prior to trial/plea.

The basis of this allegation is that Applicant was alleging at the evidentiary hearing that Counsel communicated with him about Applicant's case very little during the representation.

Applicant testified that he did not have a defense attorney before Counsel was retained. He testified that he hired Counsel within a month of his arrest. He testified that he talked with Counsel about how the trial would go. He testified that he saw Counsel on only four occasions over the two-year period before his case came up for trial. He testified that the meetings between them were short in duration, lasting only for about ten minutes each. He testified that he wrote a couple of letters to Counsel but that Counsel did not send any letters to him. He testified that he also saw Counsel's secretary or assistant. He testified that he never spoke with Counsel on the phone because Counsel was always absent from the office whenever Applicant called. He testified that, during these calls to Counsel's office, he was only able to speak with Counsel's secretary or assistant. He testified that he heard from his mother and not from Counsel that his case was headed to trial. He testified that Counsel did not explain the charges against Applicant or the potential sentences that he was facing. He testified that Counsel told him that the State did not have any evidence against Applicant. He testified that Counsel showed him the security camera video from the convenience store, which police believed showed the individuals who perpetrated the robbery. He testified that he told Counsel that he wanted a trial and that he always made it clear to Counsel that he wanted a trial. He testified that Counsel did not meet with him at the conclusion of the second day of trial. When confronted with the fact that he had affirmed to Judge Hill on the third day of Applicant's trial that he had had adequate time to talk with Counsel, Applicant testified at the evidentiary hearing that Counsel had told him to answer

affirmatively to all of Judge Hill's questions and that he did as Counsel had told him because Applicant was scared.

Counsel testified that he has been practicing law for over twenty years. He testified that he is currently engaged in private practice. He testified that he was retained in October of 2014 when one of Applicant's family members, either Applicant's mother or grandmother, hired Counsel. He testified that he was hired about one month after Applicant's arrest. He testified that another attorney had initially been Applicant's public defender, and had the public defender helped Applicant get bond before Counsel was retained. He testified that he gave copies of everything he received in discovery to Applicant and reviewed it all with Applicant. He testified that he requires his clients to sign for discovery whenever he gives them copies. He presented two letters showing that he provided discovery to Applicant. These letters were admitted into evidence at the hearing as Respondent's Exhibit 1 and Respondent's Exhibit 2. He testified that he discussed potential defenses with Applicant, and performed an independent investigation into the viability of an alibi defense based on those discussions. He testified that he gave Applicant one month's notice of Applicant's trial date. He testified that he and Applicant discussed their trial strategy and the options available to Applicant following the decision of Mr. Maldonado, Applicant's codefendant, to plead guilty after the second day of the joint trial. He testified that he did not tell Applicant to do anything.

This Court finds that Counsel was not constitutionally ineffective for failing to communicate with Applicant. This Court finds that Applicant's allegation that he met with Counsel for only forty minutes during the entire course of Counsel's representation of him lacks credibility and is without merit in light of Counsel's testimony and the transcript from Applicant's plea hearing. Respondent's Exhibits 1 and 2 directly refute Applicant's testimony

that he never corresponded with Counsel by letter. Counsel met with Applicant on multiple occasions and adequately discussed the case with him. Counsel's meetings with Applicant were of sufficient quantity and quality that Counsel was able to conduct an independent investigation into a potential alibi defense for Applicant. Counsel met with Applicant during trial to discuss the trial strategy and the affect thereon of Mr. Maldonado's decision to plead guilty, and Applicant's options due thereto. Applicant affirmed to Judge Hill during Applicant's plea hearing that he was satisfied with Counsel's services and that he had had enough time to discuss the case with Counsel. This Court finds that Applicant has failed to show how any additional time spent in meetings or discussions with Counsel would have been beneficial to his case. Because Applicant has not satisfied his burden of proof in establishing that Counsel was constitutionally ineffective for failing communicate with Applicant, this allegation is denied and dismissed with prejudice.

Counsel was constitutionally ineffective for failing to contact alibi witnesses. Counsel was ineffective for failing to investigate the victim's statement. Counsel was constitutionally ineffective for failing to give the State proper notice of Applicant's alibi witnesses prior to trial.

The basis of these allegations is that Applicant was alleging that some of his family members could have been alibi witnesses but that Counsel did not meet with them about Applicant's alibi, notify the State that they would be alibi witnesses, or call them as witnesses at trial, and that Bobby McClain, one of the victims of the robbery, would have testified that Applicant was not a participant in the armed robbery, but that Counsel did not meet with Mr. McClain about this fact or investigate his statement to that effect.

Applicant testified that, earlier on the day of the robbery, he was at the home of Bobby McClain, one of the victims in the robbery. He testified that Mr. McClain was hosting a cookout,

that Applicant had overindulged in alcohol at the cookout and become intoxicated, and that Mr. McClain then walked him to his grandmother's house. He testified that he did not leave his grandmother's home again on the night of the robbery after arriving back after the cookout. He testified that, at the time of the robbery, he was at his grandmother's home. He testified that he told Counsel that he was with Mr. McClain earlier in the day on the day of the robbery. He testified that Counsel told him that Mr. McClain's statement was irrelevant to the case. He testified that Counsel did not speak with Mr. McClain or investigate the case. He testified that Counsel did not speak to Applicant's grandmother. He testified that his family did not contact Counsel. He testified that Counsel did not discuss potential defenses with him in preparation for trial. He testified that Counsel never told him that alibi could be a defense. He testified that he did not give any other information or potential leads to Counsel other than the potential alibi witnesses since that was the biggest defense in his case.

Applicant testified that he lived in North Carolina around the years of 2005 or 2008, and that he had never lived in New York. He testified that he has only ever been known as "Lorenzo Jackson", and that he has never been employed under a different name. He testified that no one from North Carolina wanted to testify on his behalf at his trial. He testified that he was wearing an ankle monitor at the time of the robbery as a condition of bond from another case, and that he was not under any travel restrictions, and had curfew restrictions only.

Bobby McLain testified that he was living about two blocks from Applicant's grandmother's home at the time of the robbery. He testified Applicant was living with Applicant's grandmother in her home at the time of the robbery. He testified that Applicant had been at his home earlier on the day of the robbery for a barbeque. He testified that Applicant had to be back at his grandmother's home by 6:00pm because he was under a curfew and was

wearing an ankle monitor. He testified that Applicant was not one of the participants in the armed robbery and that Applicant was not present during the robbery. He testified that the perpetrators of the robbery were wearing ski masks and bandanas over their faces. He testified that he had seen the perpetrators while they were at the convenience store, during which time they were recorded on security cameras, because his home at the time was across the street from the store. He testified that he saw eight to ten people at the convenience store and a single car, a Dodge Charger or a car similarly small. He testified that he saw six or seven people get out of the car. On cross-examination, Mr. McClain testified that he saw eight people car, and that he saw at least five people get out of the car, and saw others on foot around the car. He testified that he could not tell whether there were others still in the car. He testified that the perpetrators were at the convenience store for approximately five minutes and that they looked like young men, but that he could not see their hairstyles. He testified he spoke to Applicant's defense attorney during the case and told the attorney the same things to which Mr. McClain testified at the evidentiary hearing. He testified that he gave recorded statements and one statement recorded by stenographer during the case and that Applicant's defense attorney was present at that time. He testified he was waiting to be called to testify at Applicant's trial but was never called as a witness. On cross-examination for more information about the individual with whom he shared information about his belief that Applicant was not one of the participants of the robbery and that he did not see Applicant there, the individual whom Mr. McClain believed to have been Applicant's defense attorney, Mr. McClain testified that he did not see that defense attorney present in the courtroom during the evidentiary hearing, although Counsel was present in the courtroom at the time. Mr. McClain did not identify Counsel as the individual with whom he

spoke. Mr. McClain testified that he had never spoken with Counsel. Mr. McClain could not remember the date of the barbeque or the month.

Ollie Jones testified that she is Applicant's grandmother. She testified that Applicant lived with her in her home at the time of the robbery. She testified that Applicant was required to wear an ankle monitor at that time. She testified that she saw Applicant in her home on the night of the robbery. She testified she had seen Applicant sitting on her porch. She testified that she went to bed at approximately 11:00pm on the night of the robbery, and that she usually goes to bed between 10:00pm and 11:00om. She testified that she did talk with Counsel during the case, and that she met with him on six or seven occasions. She testified that she met with Counsel at Counsel's office. She testified that she told Counsel that Applicant was at home with her on the night of the robbery. She testified that she begged Applicant to plead guilty based upon Counsel's statement that Applicant could be sentenced to life in prison if he continued with trial.

Demetrius Singleton testified that he is Applicant's brother, and that he was living with Applicant at their grandmother's home during the time of the robbery. He testified that Applicant was wearing an ankle monitor at the time, and that the ankle monitor would have gone off if Applicant had left the house. He testified that he arrived at his grandmother's home a little after 6:00pm on the night of the robbery and that Applicant was already there when he arrived. He testified that Applicant and others were sitting on their grandmother's porch that night and drinking beer. He testified that the sun was doing down when he arrived at his grandmother's home. He testified that he met with Counsel and that Counsel told him and his family that the State did not have any evidence against Applicant. He testified that Counsel told him that he would be an alibi witness at Applicant's trial.

MH #11

Counsel testified that he discussed potential defenses with Applicant, and that Applicant initially told him that Applicant was working in New York at the time of the robbery and that he was not present at the crime scene at the time. He testified his investigation revealed that Applicant was going by different names during his alleged time in New York and his time in South Carolina, and that Counsel was not able to find alibi witnesses in New York for Applicant. He testified that he believed that Applicant's claim to have been in New York was false based on Counsel's search for alibi witnesses in New York and the fact of Applicant's wearing an ankle monitor at the time. He testified Applicant would have run into legal trouble if he had left the jurisdiction of South Carolina at the time and that he would have been brought back to South Carolina. He testified he did not know whether the State or ankle monitor would have been alerted had Applicant left South Carolina while wearing the monitor. He testified he searched for bus tickets, bill, receipts, and anything that could have been used to show that Applicant was in New York at the time of the robbery but that he was unsuccessful, and he testified he believes he was unsuccessful because Applicant had given him a fake name.

Counsel testified Applicant also told him that he was at Applicant's grandmother's home during the time of the robbery. He testified he subpoenaed records from Applicant's ankle monitor in an attempt to corroborate Applicant's alibi, but he testified the records were not helpful to Applicant's defense because they showed Applicant was not at his grandmother's home between 12:25 and 2:00am, during which time the robbery occurred. He presented the ankle monitoring records and they were admitted into evidence at the hearing as Respondent's Exhibit 3. He testified the records could not have been used as evidence that Applicant was at his grandmother's home and therefore would not have been helpful in an alibi defense. He testified the records may have supported an alibi defense if the robbery had occurred during the day time.

He testified Applicant did not give him any helpful evidence of information that could have been used to show that Applicant could not have participated in the robbery.

He testified that none of Applicant's family members, including Applicant's brother, mother, and grandmother, could provide an alibi for Applicant. He testified no one was able to testify as to Applicant's location during the time of the robbery. Counsel testified he received a statement from Mr. McClain in the discovery from the State. He testified Applicant may have mentioned the name of Mr. McClain was a potential witness, but that he never met with Mr. McClain. He testified that Mr. McClain's statements to police and his affidavit indicated that he did not want to be involved in the case, did not want to prosecute, and did not want to speak to anyone about the case. Counsel testified that there was no witness he had discovered or that Applicant had provided to him that could have testified as to Applicant's location during the time of the robbery. He testified he would have given notice to the State of alibi witnesses if Applicant had had an alibi defense that could have been presented at trial.

Counsel testified that his trial strategy, since Applicant did not have a viable alibi defense, was to attack the credibility of Applicant's codefendants, who would have testified against Applicant on the third day of his trial, by claiming that they were lying in order to get plea deals from the State. Counsel testified that all of Applicant's codefendants, except for Joseph Colon Maldonado, with whom Applicant was being tried jointly, had pleaded guilty. He testified he had cross-examined the investigators and deputies in the case in order to establish that the State did not have any evidence, including physical evidence, of Applicant's guilt apart from the testimony that the codefendants were expected to give on the third day of Applicant's trial. He testified that this strategy was a common strategy between Applicant and Mr. Maldonado and that both defense attorneys put this strategy into practice during the trial.

Counsel testified that Mr. Maldonado changed his story and decided to plead guilty two days into trial. Counsel testified that everything changed when Mr. Maldonado decided to plead guilty because he and Applicant now expected Mr. Maldonado to testify against Applicant. Counsel testified that everything changed because Applicant would have had five or six codefendants testify against him at his trial. Counsel testified that this was the tipping point in Applicant's case because the jury would have seen one codefendant who had been tried with Applicant for two days of trial turning against him as a witness on the third day of trial. Counsel testified that Applicant told him then that he wanted to plead guilty. Counsel testified that he discussed the matter with Applicant and presented to him the choices available. Counsel testified that he did not tell Applicant that he had to do anything, but that he left the decision about whether to continue with trial or to plead guilty to Applicant. Counsel testified he discussed all of Applicant's options and explained the potential sentences that Applicant could face after trial. Counsel testified that Applicant could have been eligible for a sentence of life without parole based on the charges against him, but that he would not have been exposed to it after the trial because the State had not noticed him that they were seeking the sentence in this particular case. Counsel testified that Applicant discussed his options with his family, too, but he testified that he did not tell Applicant's family that Applicant would be exposed to the potential sentence of life without parole in this particular case. Counsel testified that Applicant decided to plead guilty because Mr. Maldonado had become a witness for the State, whereas originally he would have provided testimony helpful to Applicant's defense.

This Court finds that Counsel conducted a reasonable investigation as to a potential alibi witness for Applicant in the case. As part of his investigation, Counsel attempted to find alibi

witness in New York who could corroborate Applicant's assertion that he was working in New York at the time of the robbery, but was unsuccessful in his search.

This Court finds that Mr. McClain did tell Counsel that Applicant was not one of the participants of the robbery. Applicant alleged at the evidentiary hearing that Counsel never contacted Mr. McClain and that Mr. McClain had valuable testimony that could have been used in his defense at trial. Although Mr. McClain testified at the evidentiary hearing that he had spoken with Applicant's defense attorney about the matter, he testified that Counsel was not the man with which he spoke, even though Counsel was present in the courtroom during the course of Mr. McClain's testimony. Counsel also testified that he had never spoken with Mr. McClain. Since Applicant, Mr. McClain, and Counsel agree on this point, it is undisputed that Counsel and Mr. McClain never spoke about the case.

This Court finds that Counsel was not constitutionally ineffective for failing to meet with Mr. McClain or investigate Mr. McClain's statement, or failing to call Mr. McClain as a witness at Applicant's trial. Mr. McClain's statements to police and his affidavit indicated that he did not want to be involved in the case, did not want to prosecute, and did not want to speak to anyone about the case. Mr. McClain therefore would have presented as an unwilling witness at Applicant's trial. Counsel made a strategic decision that Mr. McClain would not have been a helpful witness at trial. For these reasons, Counsel's performance as to Mr. McClain was within the range of competence required of defense attorneys. On the merits of Mr. McClain's testimony at the evidentiary hearing, this Court finds that his testimony lacked credibility. Mr. McClain blatantly contradicted himself about the number of individuals he saw in a car or around a car at the convenience store across from his home before the robbery, even going so far as to indicate that there may have been eight to ten people in a single, small car, and then

adjusting this number downward when confronted on the matter. Additionally, Mr. McClain testified that he was sure that Applicant was not among the individuals he saw at the convenience store, although he also testified that the individuals were too far away for him to be able to identify their hairstyles; this further detracts from the credibility of Mr. McClain's testimony. As such, Counsel's failure to speak to Mr. McClain or call him as a witness at Applicant's trial did not prejudice Applicant. The Court also notes that Applicant affirmed to Judge Hill during the plea colloquy that he understood his trial rights, which included the right to call witnesses and challenge the State's evidence, and that Applicant waived those rights and pleaded guilty.

The Court finds that Counsel was not constitutionally ineffective for failing to contact or call alibi witnesses. Applicant presented only his grandmother and brother as potential alibi witnesses at his evidentiary hearing. Counsel spoke to Applicant's family members, including Applicant's grandmother and brother, and they would not have been helpful alibi witnesses for Applicant at trial. This Court finds that the testimony of Applicant's grandmother and brother on Applicant's alibi are without merit and lack credibility in light of the testimony of Counsel. At the evidentiary hearing, Applicant's brother and grandmother were unable to offer a complete alibi for Applicant, and Counsel reasonably concluded that they would not have been helpful alibi witnesses at Applicant's trial. Additionally, Counsel was relying on Applicant's ankle monitor records when evaluating the merits of any alibi for Applicant. Applicant presented two conflicting potential alibis to Counsel during the case, and Counsel conducted a reasonable investigation into both. When both potential alibis proved to be without merit, Counsel adopted the trial strategy of accusing Applicant's codefendants of lying about Applicant's involvement. Applicant's own testimony at the evidentiary hearing about his contention that all of Applicant's codefendants were lying about his involvement in the robbery indicates that Applicant agrees

with Counsel that this was a valid issue to raise at trial. This Court finds that Counsel was attempting to employ the trial strategy of attacking the veracity of the harmful testimony expected to come from Applicant's codefendants. Throughout the State's case, Counsel, through cross-examination, pointed out the lack of physical evidence in the case against Applicant, and was attempting to show that the testimony from Applicant's codefendants, which was expected to come on the third day of Applicant's trial, was the only evidence against applicant, and that that testimony was false. This Court finds that, upon the guilty plea of Mr. Maldonado, Applicant decided to plead guilty because he believed that the trial strategy would no longer be viable with the addition of Mr. Maldonado's harmful testimony to the State's case. The decision of Mr. Maldonado to plead guilty and the expectation that he would testify against Applicant was the turning point in Applicant's estimation of his case.

This Court finds that Counsel did not coerce Applicant into pleading guilty and that Counsel did not tell Applicant that he would be sentenced to life in prison if he did not plead guilty. Applicant affirmed to Judge Hill during his plea colloquy that he was pleading guilty of his own free will because he was guilty, and then Applicant apologized for his conduct during the commission of the crimes. Applicant affirmed his satisfaction with Counsel's performance and affirmed that he was pleading guilty because he was guilty. Applicant's decision to plead guilty was his own and not based upon any alleged ineffective performance or advice from Counsel.

Counsel was ineffective for failing to file a Notice of Appeal.

Applicant testified that, following his guilty pleas on the third day of trial, he asked his mother to tell Counsel that he wished to appeal the pleas and sentences. Evelyn Bennett testified that she is Applicant's mother, and she testified that Applicant did not ask her to relay a message

to Counsel that Applicant wished to appeal his pleas or sentences. Counsel testified that he never received a request for Applicant to appeal his pleas or sentences. Counsel testified that he does not recall Applicant's wanting to talk to him after Applicant pleaded guilty. Counsel testified that he did not recall whether or not Applicant's mother asked to see him after the plea hearing. Counsel testified that there were no meritorious issues that could have been appealed. This Court finds that Applicant's allegation that requested that Counsel file a Notice of Appeal on his behalf is without merit and lacks credibility because it is contradicted by the testimony of Applicant's own mother. Applicant has not alleged that he was unaware of his right to an appeal; furthermore, even if he had alleged that through testimony, Applicant's testimony at the evidentiary hearing that he asked for an appeal immediately after the plea hearing indicates that he was aware of that right, and would have undermined any allegation that he was unaware of the right to appeal. Because he has not satisfied his burden of proof in establishing that Counsel was constitutionally ineffective for failing to file a Notice of Appeal by showing either deficiency or resulting prejudice in Counsel's performance, or shown that he did not knowingly and voluntarily waive his right to a direct appeal, this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant her Application for Post-conviction Relief. Therefore, this application is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a

right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

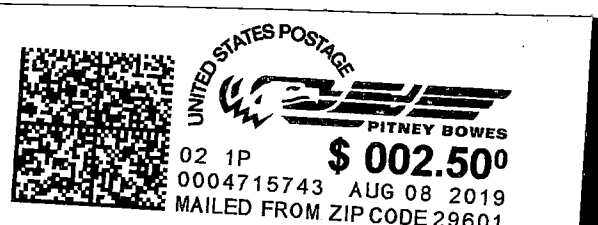
1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 19th day of July, 2019.

ALEX KINLAW, JR.
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

Copy mailed to
Attorney general / Dick Warder
on 11/23/2019.



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