WALLER
LAW GROUP

September 06, 2019

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

Re: Gerry James vs. State of South Carolina
C/A No: 2017-CP-40-3819

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. James in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,

Jonathan D. Waller

Cc: Lindsey A. McCallister, South Carolina Office of Attorney General

Enclosures

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1116 Blanding Street, Suite 2B
Columbia, SC 29201

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STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
SEP 09 2019
S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Jocelyn Newman, Circuit Court Judge

2017-CP-40-3819

Gerry Brent James, # 302355,

Appellant,

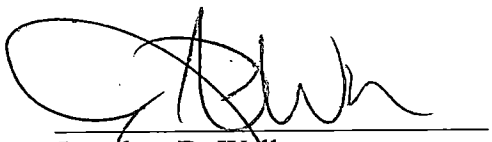
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Gerry Brent James, # 302355, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed September 5, 2019, issued by the Honorable Jocelyn Newman, Presiding Judge, Twelfth Judicial Circuit.



Jonathan D. Waller

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ATTORNEY FOR PETITIONER

September 06, 2019

Other Counsel of Record:
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Post Office Box 11549
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STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Jocelyn Newman, Circuit Court Judge

2017-CP-40-3819

Gerry Brent James, # 302355,

Appellant,

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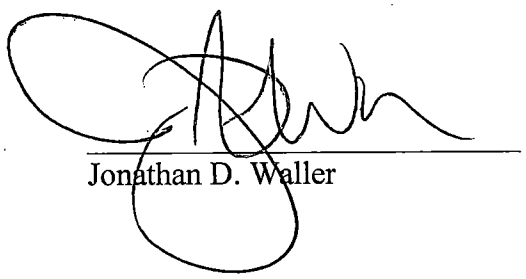
STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Lindsey A. McCallister, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to her office located at P.O. Box 11549, Columbia, SC 29211.



Jonathan D. Waller

September 06, 2019

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Gerry Brent James (SCDC #302355), Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2017-CP-40-03819 **ORDER OF DISMISSAL**

This matter came before the Court upon Application for Post-Conviction Relief ("PCR Application") filed by Applicant Gerry Brent James ("Applicant") on June 21, 2017. Respondent, the State of South Carolina, filed its Return on June 18, 2018; and Applicant filed an amended PCR Application on November 30, 2018. An evidentiary hearing was conducted at the Richland County Judicial Center on December 6, 2018. Applicant was present along with his counsel, Jonathan D. Waller, Esquire; and Respondent was represented by Assistant Attorney General Lindsey A. McCallister, Esquire.

For the reasons set forth below, the PCR Application is DENIED; and this matter is DISMISSED WITH PREJUDICE.

FACTUAL AND PROCEDURAL HISTORY

Applicant is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. During the July 2015 term, the Richland County Grand Jury indicted Applicant for Malicious Injury to Real Property – Third Offense (Indictment 2015-GS-40-3578) and Safecracking (Indictment 2015-GS-40-3579). Subsequently, during the July 2016 term, Applicant was indicted for Shoplifting – Third Offense

(Indictment 2016-GS-40-3962). Tivis Sutherland, Esquire ("Plea Counsel") was retained to represent Applicant on all charges.

On June 20, 2016, before the Honorable L. Casey Manning, Applicant pled guilty as indicted to all charges and was sentenced to imprisonment for concurrent terms of nine years each for Safecracking and Shoplifting, and five years for Malicious Injury to Real Property. Applicant did not appeal his conviction or sentence.

On June 21, 2017, Applicant filed the instant PCR Application in which he alleges "ineffective assistance of counsel." Specifically, he contends that "Counsel was ineffective, failed to provide complete discovery and told about pictures four (4) days before trial. Additionally, signed sentencing sheet for nonviolent sentence, received nine (9) violent." However, during the evidentiary hearing, Applicant abandoned this allegation and opted for the Court to hear only those two allegations contained in his Amended PCR Application. In the amendment, Applicant alleged:

(a) Counsel was ineffective, failed to properly investigate the facts and circumstances surrounding the allegations against Application, thus rendering Applicant's plea unknowingly and involuntarily entered into

(b) Counsel was ineffective, failed to conduct adequate amount of meetings with Applicant to review discovery so that Applicant would know of the allegations against him and the potential sentences regarding those allegations thus rendering Applicant's plea unknowingly and involuntarily entered into

Therefore, the allegation contained in the initial PCR Application is denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As to the remaining allegations, the Court has reviewed the record in its entirety and has considered the testimony and arguments presented at the evidentiary hearing. Specifically, the Court has had the opportunity to observe each witness who testified at the evidentiary hearing and

to closely pass upon their credibility. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. CODE ANN. §17-27-80 (2003).

I. Evidentiary Hearing

A. Applicant's Testimony

During the evidentiary hearing, Applicant testified that he retained Plea Counsel to represent him on all charges. He stated that he met with Plea Counsel three times prior to entering his guilty plea, including the morning of the plea at the courthouse. According to Applicant, he and Plea Counsel discussed some of the evidence the State had against him, including the pictures and statements, but they did not go into detail. Specifically, Applicant testified that he saw pictures of the outer structure of the ATM, some tools and a saw, and reviewed several statements or reports from law enforcement.[1] Applicant stated Plea Counsel had discovery with him for their second meeting and at the courthouse on the day of the plea, but they only discussed penalties and Applicant's constitutional rights on the morning of the guilty plea.

Applicant testified that he wanted to have a jury trial. On the day before trial was to begin, Applicant was informed that there was another photograph showing cut marks on the ATM, which the State planned to introduce into evidence. He also learned that the State had taken extractions from the front surface of the safe. According to Applicant, the guilty plea was only discussed on the morning of trial, and "Everything was so rushed." He testified that he barely discussed the guilty plea with Plea Counsel, but he believed that Plea Counsel was no longer prepared for trial due to the new evidence. Prior to learning of the new evidence, Applicant believed that he had

[1] Applicant was charged with breaking into an ATM which was situated in an enclosed space, accessed by a service door. He was alleged to have used an electric saw in the commission of the crime.

several potential defenses to the charges, including the lack of evidence such as DNA and fingerprints. However, because the trial was scheduled to begin the day after Plea Counsel received the new evidence, Applicant didn't believe that Plea Counsel was ready for trial.

According to Applicant, he was told that if convicted at trial he would get a thirty-year sentence because of the newly-discovered evidence. In addition, the State had previously offered a plea bargain resulting in a sentence of six to twelve years; however, that offer was revoked, scaring him. Applicant and Plea Counsel did not discuss requesting a continuance. He also admitted that he never provided Plea Counsel with the names of potential witnesses or any leads to investigate in his defense.

Applicant initially testified that he didn't know the maximum possible sentence, that Plea Counsel didn't discuss the difference between violent and non-violent crimes, and that he didn't know anything about eighty-five percent sentences; however, he later admitted that the Court informed him of the maximum possible punishment and that he told the Court that he understood. Applicant also testified that he was most concerned about the safecracking charge because its sentence would require a longer period of incarceration before parole eligibility.

Finally, Applicant conceded that he told the Court that Plea Counsel had, in fact, explained the charges, their possible penalties and his constitutional rights. He also admitted having told the Court that he was satisfied with Plea Counsel and that he understood all of their conversations. Applicant testified that he "wasn't pushed or made by someone else" and no one "twisted [his] arm" to plead guilty. Rather, he pled because if he didn't, the attorneys were going to select a jury; so he felt it was the only choice.

B. Testimony of Plea Counsel

Plea Counsel testified that he knew Applicant prior to this case because Applicant had previously been a co-defendant of another client, and he and Applicant had a personal relationship. Plea Counsel explained the allegations leading to Applicant being charge with safecracking, including the use of the electric saw, which was found near the scene of the incident and turned out to have been rented in Applicant's name. The State also had video of Applicant having rented the saw in question; and Applicant's GPS monitor placed him at the scene of the crime. Plea Counsel explained that Applicant was arrested and charged in an unrelated shoplifting incident while he was out on bond for the safecracking and destruction of property charges, which caused the State to press the case for a resolution.

According to Plea Counsel, he focused on the safecracking charge because it is classified as a violent offense. He stated that the initial discovery received from the State contained pictures of damage to the building's door, an alarm panel that had been cut, and a hat and a saw nearby in the grass. However, the evidence did not indicate any action had taken place inside the building. He believed this to be important because while researching the applicable statute, Plea Counsel read its legislative history. He believed that he could make a compelling argument for dismissal of the charge against Applicant because the allegations didn't comport with the statute's legislative intent – to punish "cowboys and Indians" in the time of stagecoach robberies. Plea Counsel intended to argue that third-degree burglary, a non-violent offense, was the more appropriate charge because Applicant hadn't actually reached the vault/ATM in question. While Plea Counsel had to finagle a defense, he testified that he was confident in his plan.

Unfortunately, on the day before trial Plea Counsel received a phone call from the State, advising him that they had additional, more incriminating pictures which showed saw cuts on the

vault itself. Plea Counsel testified that he told Applicant about the new pictures and that he went to see the pictures in order to confirm the State's description of them. The new pictures decimated their defense (that Applicant hadn't attempted to enter the vault), and Plea Counsel felt like they were up against the wall. Plea Counsel testified that while it was not unusual to receive additional discovery items so close to trial, it was surprising in this case because it destroyed his defense strategy, leaving him no way to prepare any other defense. Although Plea Counsel believed that he had sufficient time to prepare for trial and was "ready to go," the new pictures precipitated Applicant's guilty plea.

Plea Counsel further testified, although he could not recall whether he and Applicant specifically discussed the conditions of Applicant's sentence, they both signed the sentencing sheets, each of which was marked as either violent or nonviolent. While the ultimate decision was Applicant's, Plea Counsel agreed with Applicant's choice to plead guilty. He testified that he adequately discussed the plea agreement with Applicant. Finally, Plea Counsel explained that the reason given by the Court for the lengthy sentence imposed on Applicant was not the facts of this case but was because of Applicant's lengthy criminal record.

II. Involuntary Guilty Plea

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Where an application for PCR alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "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." *Id.* 466 U.S. at 686; *see Butler v. State*, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence

required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland,* 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. *Bell v. State,* 321 S.C. 238 (1996); *see also Cherry v. State*, 300 S.C. 238 (1989); Rule 71.1(e), SCRCP.

The court applies 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, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117 (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." *Id.* at 117-18.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Walker v. State*, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (*rev'd on other grounds by Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014)). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. *Porter v. State*, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003).

In addition, where a PCR applicant alleges ineffective assistance due to counsel's failure to call witnesses or present evidence, the South Carolina Supreme Court has repeatedly held that an applicant must produce the testimony of a favorable witness or otherwise offer testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *See, e.g., Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). To establish counsel failed to adequately prepare for trial, an applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. *See Palacio v. State*, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); *Moorehead*, 329 S.C. at 334, 496 S.E.2d at 417 (holding trial counsel's failure to conduct independent investigation does not constitute ineffective assistance when the allegation is supported only by mere speculation as to the result); *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing that he would have had a defense with additional time to prepare for trial); *Skeen v. State*, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant not entitled to relief where no evidence presented at the PCR hearing to show how additional preparation would have had any possible effect on trial outcome).

In order to find that a guilty plea is knowing and voluntary, the record must establish that the applicant had a full understanding of the consequences of his plea and the charges against him. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the evidentiary hearing. *Harris v. Leeke*, 282 S.C. 131, 318 S.E.2d 360 (1984). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an

individual, an applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *Blackledge v. Allison*, 431 U.S. 63 (1977). Statements made during a guilty plea should be considered conclusive, unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements. *Crawford v. U.S.*, 519 F.2d 347 (4th Cir. 1975) *overruled on other grounds by U.S. v. Whitley*, 759 F.2d 327 (4th Cir. 1985).

In this case, the Court finds Plea Counsel's testimony to be credible – specifically his statements that he reviewed the State's evidence, potential defenses, and the plea agreement with Applicant prior to the plea. The Court also finds credibility in Plea Counsel's assertion that he had researched and prepared a defense, but the defense was essentially neutralized once the State produced the pictures showing Applicant had attempted to open the vault. Further, this Court finds the plea colloquy dispositive as to these issues, as the record clearly establishes that Applicant pled guilty freely and voluntarily.

In addition, the Court finds that Applicant's testimony is strictly contradicted by the record and is, therefore, not credible. The record reflects that Applicant informed the plea court that he had discussed the charges with Plea Counsel and had understood those discussions, that he did not need any more time to speak to Plea Counsel, and that he was satisfied with Plea Counsel's advice. Most tellingly, the plea court asked Applicant directly whether Plea Counsel had done everything Applicant asked him to do, and Applicant stated that Plea Counsel had. Additionally, Plea Counsel explained to the plea court the potential defense and the late discovery of the new pictures, confirming that, at the time of the guilty plea, Applicant at least new of the existence of the pictures and was aware of Plea Counsel's analysis of how the pictures impacted their defense.

Based on the foregoing, the Court finds that Plea Counsel was not deficient in his representation of Applicant, his investigation of the case, or his preparation for trial. Applicant

has also failed to prove any resulting prejudice. Plea Counsel met with Applicant on multiple occasions to review discovery, discuss the facts of the case, and explain Applicant's constitutional rights and options for resolving the case. He prepared a creative defense based on the discovery he had received and was prepared to try the case. Plea Counsel properly informed Applicant that he was unlikely to succeed at trial, and Applicant knowingly and voluntarily agreed to enter a guilty plea to avoid receiving a possible maximum sentence of forty-five years.

The plea court clearly explained the terms of the plea agreement to Applicant, including the possible sentences, and Applicant indicated his understanding of the agreement. The plea court also explained to Applicant his rights to a jury trial, to call witnesses, and to put on a defense – all of which were waived by Applicant. Finally, the plea court clearly explained its sentencing decision had less to do with the circumstances of this case than Applicant's extensive criminal record. Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations which would require this Court to grant relief. Therefore, this PCR Application must be denied and dismissed with prejudice.

Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Further, 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 the appropriate procedures for appealing a judgment in a PCR action.

IT IS THEREFORE ORDERED that the Application for Post-Conviction relief is DENIED, and this action is DISMISSED with prejudice.

IT IS FURTHER ORDERED that Applicant Gerry Brent James be REMANDED to the custody of the State of South Carolina.

AND IT IS SO ORDERED.

Jocelyn Newman
Presiding Judge

September 4, 2019
Columbia, South Carolina.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2017CP4003819

Gerry James #302355

PLAINTIFF(S)

State Of South Carolina
Richland County Judicial Ct

DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

JANET M. CORRIE
C.C.P., G.S., F.C.
2019 SEP -5 AM 8:52
RICHLAND COUNTY
FILED

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 5 September 2019 to attorneys of record or to parties (when appearing pro se) as follows:

Jonathan D Waller

Lindsey Ann McCallister

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

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Columbia, SC 29201

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
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