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September 9, 2019

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

RECEIVED
SEP 12 2019
S.C. SUPREME COURT

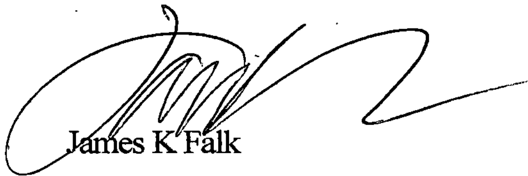
Re: Dashon Garner, 371523, 2018-CP-26-0096

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, in the above Horry County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc:
Jacob Isenberg, Esq
Dashon Garner 371523
Horry County Circuit Court Clerk

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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SEP 12 2019

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable John C Hayes, III, Circuit Judge

Case No.: 2018-CP-26-0096

Dashon Garner 371523..PETITIONER

V.

State of South Carolina..RESPONDENT

NOTICE OF APPEAL

The Petitioner Dashon Garner 371523 appeals the Honorable John C Hayes', III August 13, 2019 Order of Dismissal. Undersigned counsel received notice of entry of the order on September 9, 2019. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

September 9, 2019

Jacob A Isenberg, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

Clerk of Court- Horry CP
PO Box 677
Conway, SC 29526

THE STATE OF SOUTH CAROLINA

In The Supreme Court

RECEIVED

SEP 12 2019

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable John C Hayes III, Circuit Judge

Case No.: 2018-CP-26-0096

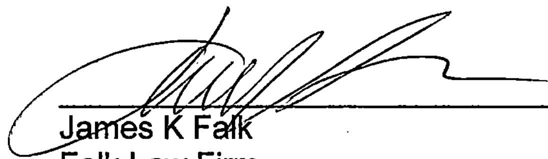
Dashon Garner 371523..PETITIONER

V.

State of South Carolina..RESPONDENT

CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Jacob Isenberg, Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Horry County Clerk of Court. I further certify that all parties required by Rule to be served have been served this September 9, 2019.



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STATE OF SOUTH CAROLINA COUNTY OF HORRY Dashon Amin Garner, S.C.D.C. No. 371523, Applicant, v. State of South Carolina, Respondent.	) IN THE COURT OF COMMON PLEAS) FOR THE FIFTEENTH JUDICIAL CIRCUIT) Case No.: 2018-CP-26-00096) **ORDER OF DISMISSAL**

2019 AUG 26 PM 12:28
CLERK OF COURT
HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed by Dashon Amin Garner ("Applicant") on January 9, 2018. Respondent made its return on March 21, 2018. The Court convened an evidentiary hearing into the matter on June 20, 2019, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by James K. Falk, Esquire. Jacob A. Isenberg, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Ralph J. Wilson Junior, Esquire, also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Horry County Clerk of Court regarding the subject convictions, and the pleadings. After a thorough review of the evidence and testimony presented, the Court finds Applicant has not met his burden of establishing any constitutional deprivations or other grounds entitling him to relief and denies and dismisses this application with prejudice.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the May 2015 term of the Horry County Grand Jury for four counts of attempted murder (2015-GS-26-01879, -01902, -01903 -01907), and carjacking (2015-GS-26-01909).[1] The State's summation of the underlying facts is as follows:

> As to 2015-1902 and -1903, it happened at Futrell Park. Myrtle Beach Police Department received a call about a drunken driver. They took the – found the subject vehicle. It turned out to be a stolen plate. They pursued it. Located it at the end of Warren Street near Futrell Park in Myrtle Beach. Officer Chris Smith pursued the car and the occupant of that car turned out to be the defendant through the park. They did a brief manhunt in the neighborhood near that park. The defendant was relocated. Four officers, Sergeant Mike Hall, Officer C.S. Owed (phonetic), Officer Austin Cox and Officer Shular were approaching the park. As he was fleeing through the park [h]e fired several shots at those four officers. That is the basis of the charge.
>
> Some hour-and-a-half later, after he [eluded] the police who attempted to capture him at Futrell Park, the defendant approached an individual named Robbie Bufkin at a gas station at Highway 15 and 3rd Avenue South. He took the vehicle that Mr. Bufkin was driving by force. In the course, he shot Mr. Bufkin in the stomach and groin. Mr. Bufkin required serious treatment for those wounds. He did survive and he is available to testify, although he [is] at the Department of Corrections, Your Honor. That was the attempted murder and carjacking.

[1] Applicant was also indicted at that term for three additional counts of attempted murder (2015-GS-26-01880, -01904, -01905), failure to stop for a blue light (2015-GS-26-01881), grand larceny (2015-GS-26-01899), possession of cocaine, first offense (2015-GS-26-01900), possession of cocaine base (2015-GS-26-01901), and two counts of possession of a weapon during the commission of a violent crime (2015-GS-26-01906, -01908). Applicant was further indicted at the November 2015 term for threatening State's witness (2015-GS-26-04556). Applicant was further indicted at the September 2016 term for kidnapping (2016-GS-26-03870), attempted armed robbery (2016-GS-26-03871), possession of a weapon during the commission of a violent crime (2016-GS-26-03872), attempted criminal sexual conduct, first degree (2016-GS-26-03873), and assault and battery of a high and aggravated nature (2016-GS-26-03874). Applicant was additionally charged, but not indicted, for obstruction of justice (2015 A26 10201892). The multitude of charges were dismissed as part of Applicant's plea.

> The carjacking was a purple Mercedes-Benz. The police put a BOLO out for that car. It was located by County Officer Woodrum on Highway 17 Business and 17 South at another gas station. He pursued the car from there up King's Highway, Harrison Boulevard, off Highway 15 and the defendant went to a dead-end street called Rose Haven. The officer got out of his vehicle, but Mr. Garner drove directly towards the vehicle where the officer was, brushing the officer's hitting him on the side of the leg when he was standing on the running board of his Tahoe trying to avoid being hit. That is the basis of the 2015-1879.

(Tr. 9-11).

Initially, J.M. Long III represented Applicant. Thereafter, Ralph J. Wilson Junior ("Counsel") represented Applicant George H. Debusk, Jr., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On February-21, 2017, Applicant pled guilty to three counts of the lesser-included offense of assault and battery of a high and aggravated nature, and as indicted for carjacking. The Honorable Steven H. John sentenced Applicant to imprisonment for concurrent terms of eighteen years on each charge. Applicant did not appeal his plea or sentence.

II. PRESENT APPLICATION

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

a. Involuntary Plea
    i. "In pleading guilty the Applicants plea of guilty was not freely and voluntarily given because his counsel threaten him that he would lose trial and be sentenced to life in prison if he as much spoke at the pretrial hearing."
b. Ineffective Assistance of Counsel
    i. "Defense counsel failed to investigate properly in preparing for trial although with some preparation there could have been different results in the court procedures."
    ii. "With in his time of being retained defense counsel did no kind of defending of the sort for the defendant until Feb. 17, 2017 when he filed four pretrial motions (severance of indictments motion, notice of defendants intention to offer an alibi, motion to suppress motion for bond); but on Feb. 23, 2017 before the pretrial hearing counsel

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refused to present any of the motions then [lying] to both the defendant and his family forcing him to plead out."

iii. "Defense counsel never fought for the venue to be changed even though it was a major conflict of interest in the case since said crimes were committed against public officials of that county."

iv. "The defendant felt he had no other choice but to plead out after 2 years of telling his first counsel J.M. "Buddy" Long, III, then Ralph Wilson Jr., both his wishes to preside in trial. Doing so several times in letters and in person. They both ignored evidence in favor of the defendant. J.M. Long III actually said as much in the plea agreement he sent to Solicitor George H. Debusk, Jr. Oct. 2015."

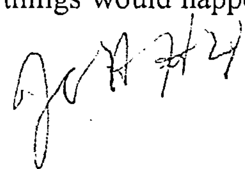
Applicant requests relief in the form of a sentence reduction, removal of charges, or the right to proceed with a trial. At the evidentiary hearing, Applicant proceeded forward on the above-mentioned allegations. Additionally, Applicant presented a new allegation of failure to review discovery.

III. SUMMARIZATION OF EVIDENTIARY HEARING TESTIMONY

Applicant

Applicant testified on his own behalf at the evidentiary hearing. Specifically, Applicant testified Counsel told him he would lose at trial. He further testified they met about four times prior to the plea hearing.

Applicant testified he believed a certain victim named Robbie Bufkin ("Bufkin") was not able to properly identify him as the suspect. Applicant testified he believed Counsel did not interview Bufkin to ensure he could make proper identification. Applicant further testified he believed Bufkin was not injured during the night of the incident. Finally, Applicant testified he wanted to speak to Bufkin, but was unable to do so. Applicant testified the charge against him for trying to intimidate Bufkin, was false. Applicant testified he never threatened anyone. Instead, Applicant testified he only made jailhouse phone calls to say bad things would happen to people who present false accusations.



Applicant testified he had an alibi throughout the duration of this case. Applicant testified he was with an individual named Gary Vereen ("Vereen") the entire night of the incident. Applicant testified Counsel interviewed Vereen. Applicant further testified Vereen offered a full statement to Counsel which detailed his alibi on the night of the incident.

Applicant testified Counsel did not review important pieces of discovery with him. Specifically, Applicant testified Counsel did not review photographs, video, gunshot residue test, and medical records with him. Applicant testified he did not know there were videos in evidence before accepting a plea offer. Applicant further testified there were almost forty videos in evidence he did not know about. However, Applicant also testified he knew about multiple videos before Counsel was appointed to his case. Additionally, Applicant also testified he believed Bufkin was given an improper photo-lineup to identify Applicant as the perpetrator. Applicant further testified he did not know this photo-lineup was in evidence before accepting a plea agreement. However, Applicant also testified he learned of the photo-lineup a month before his plea hearing.

Applicant testified he requested severance. He further testified Counsel claimed he would get a severance. Applicant testified he requested a motion to suppress evidence. He further testified Counsel claimed he would get certain evidence suppressed. Applicant testified he requested a change of venue based upon the incident involving an injured Horry County police officer. Applicant further testified his belief that the officer injury would prevent a fair trial in Horry County.

Applicant testified he notified Counsel he wanted to go to trial. Applicant further testified Counsel exploded after hearing this request followed by raising his hands in the air to illustrate disapproval. Applicant testified he felt there was no choice but to plead guilty.

Applicant testified he remembered agreeing with the facts after the Assistant Solicitor summarized them at his plea hearing. Specifically, Applicant remembered the Assistant Solicitor stating he shot at multiple police officers. Applicant further remembered the Assistance Solicitor stating he shot a man in the stomach and groin. Applicant testified Counsel claimed the court would give him life in prison if he spoke up about issues during a plea hearing.

Applicant testified he felt Counsel did not pursue any defenses. However, Applicant acknowledged Counsel's pretrial motions were geared towards presenting a defense at trial.

Robbie Bufkin

Robbie Bufkin testified on Applicant's behalf at the evidentiary hearing. Specifically, Bufkin testified he does not know Applicant on a personal basis. Bufkin further testified he does not remember signing a photo-lineup related to this case. Finally, Bufkin also testified he does not remember Applicant assaulting him.

Additionally, Bufkin testified he did remember being shot in the stomach. Bufkin testified he did remember Applicant being caught in his car after it was stolen. Finally, Applicant testified he had seen Applicant around before this incident without knowing his name.

Counsel

Counsel testified on behalf of Respondent at the evidentiary hearing. Counsel testified he was retained after Buddy Long, III, was removed from the case.

Counsel testified Applicant was identified by multiple victims. Specifically, Counsel testified Bufkin and multiple police officers identified Applicant as the suspect. Counsel further testified he had issues and questions with the facts surrounding identification.

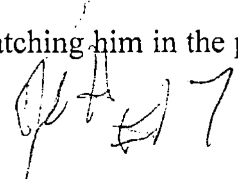
Counsel testified he did not interview Bufkin on behalf of Applicant. Counsel testified he was concerned with the witness intimidation charge against Applicant based upon jailhouse phone

calls. Counsel testified the charges were based upon alleged threats made by Applicant to Bufkin. Counsel also testified the facts behind the witness intimidation charges included alleged threats by Applicant to Bufkin's family.

Counsel testified the jailhouse phone calls certainly led to charges of witness intimidation. Counsel testified he informed Applicant these jailhouse phone calls were relevant towards his evidence of guilt and potentially admissible at trial. Counsel testified he reviewed the specific jailhouse phone calls used to charge Applicant. Counsel testified he assessed there were no inferences to be made from the phone calls. Counsel further explained Applicant was explicit in communicating threats to Bufkin.

Counsel testified he interviewed Gary Vereen on behalf of Applicant. Counsel further testified he had major concerns with eliciting perjury after interviewing Vereen. Specifically, Counsel testified Vereen asked him what time the crimes occurred on different occasions throughout the interview. Counsel testified witnesses do not customarily ask questions about the crime time when presenting an alibi during initial interviews. Thereafter, Counsel testified he informed Vereen about the penalty of perjury.

Counsel testified to preparing for trial in this case every day for a month. Counsel testified he created a huge white board to address the several relevant identification issues connecting Applicant to each charge. Counsel testified each piece of identification evidence added up to create a strong connection Applicant committed all crimes charges on the same night. Counsel testified towards pursuing a defense of disconnecting the various forms of identification made by different witnesses. Counsel testified he tried to explain to Applicant how all the dots connected to linking everything to the same crime spree committed by one suspect on one night. Counsel testified one big piece of evidence against Applicant was catching him in the park with keys to a

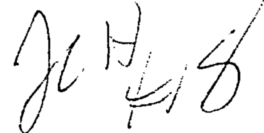


vehicle heavily linked to this incident. Counsel testified Applicant recommended presenting a defense of third-party guilt based upon an individual who looked similar to him. Counsel testified this individual died between the time of incident and plea hearing. Counsel testified as to reviewing several videos with Applicant. He further testified about telling Applicant that he looked like the person in the videos. However, Counsel testified Applicant did not want to plead guilty during the trial preparation process.

Counsel testified he discussed the venue issue with Applicant. However, Counsel testified he notified Applicant the police officer injury issue was not a proper basis for a motion to change venue. Counsel further testified he told Applicant filing a motion based upon this reasoning would be frivolous.

Counsel testified he actually filed notice of an alibi as a cautionary measure while preparing for trial. Counsel testified he customarily does not elicit perjury on the witness stand. Therefore, Counsel testified the potential use of an alibi defense would be letting the witnesses get on the stand and tell their story. However, Counsel testified Vereen could not be reached leading up to trial. Specifically, Counsel testified he called Vereen using a number he gave to be contacted for follow-up interviews.

Counsel testified he filed a motion to sever and a motion to suppress identification by Bufkin. Counsel testified he arrived before the pretrial motions with every intention to go forward with them. However, Counsel testified the Assistant Solicitor notified him the plea offer would be off the table if Applicant proceeded with motion hearings. Thereafter, Counsel testified to meeting with Applicant about this issue. Counsel further testified to advising Applicant he was facing potential life in prison if convicted at trial on a substantial amount or all the charges. Counsel testified he customarily has "come to Jesus" meetings with clients when the evidence is



overwhelmingly stacked against them. Counsel testified he remembers having this type of meeting with Applicant based upon the incriminating evidence as well as exposure to a such a heavy sentence. Counsel testified towards believing Applicant had a ninety five percent chance of losing at trial. Counsel testified he notified Applicant of his opinion on the odds. Counsel further testified he notified Applicant the improper contact with Bufkin was a major concern. However, Counsel testified he made it clear the decision was Applicant's to make because Applicant would be serving the sentence. In the end, Counsel testified Applicant decided to plead guilty because of the exposure to serving a massive amount of time at trial.

Counsel testified to reviewing all of the evidence with Applicant. Counsel testified the only evidence he customarily does not review is items considered absolutely inadmissible.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler, 286 S.C. at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of

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performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694). With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for

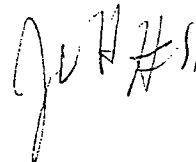
counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

1. Involuntary Plea based upon Coercion from Counsel

Applicant contends Counsel forced him to enter a guilty plea with the promise that his only alternative was to serve life in prison. To find a guilty plea voluntarily and knowingly, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000). Also, an applicant's statements during the plea hearing are considered "conclusive unless [he] presents valid reasons why he should be allowed to depart from the truth" of them. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007). Finally, the plea colloquy can cure any alleged deficiency if counsel not properly advise an applicant about the consequences of accepting it. See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997) (stating that plea counsel's deficient performance can be cured by the plea court's colloquy).

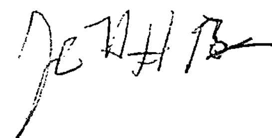
At the plea hearing, Applicant waived the right to a jury trial where the State would have to prove him guilty beyond a reasonable doubt through presentation of facts and evidence. (Tr. 7, L. 1). Applicant then waived his right to present a defense through cross-examination, presenting witnesses, and entering evidence. (Tr. 7, L. 8). Accordingly, this Court finds Applicant



conclusively stated his wish to waive the alternative of going to trial, presenting witnesses, and entering evidence.

Here, Applicant wishes to depart from his conclusive statements at the plea hearing based upon being under duress. It is undisputed Applicant and Counsel met about accepting the plea offer. Applicant testified Counsel notified him he should accept the plea agreement. Thereafter, Applicant testified he told Counsel his desire was to go to trial. Applicant then testified Counsel exploded in rage claiming the options were plead guilty or spend life in prison. Subsequently, Applicant testified he felt like he had no choice besides pleading guilty. Finally, Applicant testified he felt like he had no choice but to say as Counsel commanded at the plea hearing. On the other hand, Counsel credibly testified he laid everything out for Applicant to consider because this was their last opportunity to decide between a guilty plea and trial. Counsel credibly testified his custom has always been the person serving a prison sentence must always be the one to choose between pleading guilty or going to trial. Specifically, Counsel credibly remembered telling Applicant a guilty verdict on all charges at trial could result in a sentence of two hundred and seventy four years. Based upon experience, Counsel credibly remembered telling Applicant there was about a ninety-five percent chance trial would result in a guilty verdict. Finally, Counsel credibly testified he told Applicant going to trial could result in multiple guilty verdicts followed by a sentence lasting the rest of his life.

After reviewing testimony, Applicant essentially rests his argument on going into his plea hearing with a belief the only other option was spending life in prison. However, Applicant has failed to provide a logical explanation why he would then waive the right to trial and right to present a defense after the court presented these alternatives. Therefore, this Court finds Applicant

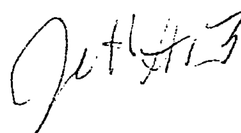


has not presented a valid basis to depart from conclusive statements made at his plea hearing. Accordingly, this Court finds Applicant entered into a knowing and voluntary guilty plea.

2. Failure to Investigate Alibi Defense

Applicant contends Counsel was deficient based upon the failure to do an adequate investigation of Vereen. In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation "was itself reasonable." Taylor v. State, 404 S.C. 350, 364, 745 S.E.2d 97, 104 (2013). However, defense counsel is not deficient in conducting a reasonable investigation as long as they interview potential witnesses "when it is reasonable to do so." Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). Additionally, an applicant's statements during the plea hearing are considered "conclusive unless [he] presents valid reasons why he should be allowed to depart from the truth" of them. Dalton, 376 S.C. at 137, 654 S.E.2d at 874.

Here, Applicant testified he was with Vereen at another location during the entire incident. Applicant further testified he notified Counsel numerous times about his desire to using an alibi defense at trial. On the other hand, Counsel credibly recalled interviewing Vereen based upon potentially using an alibi defense. Furthermore, Counsel credibly testified he had major concerns when Vereen repeatedly asked about the timeframe of the incident. Thereafter, Counsel credibly recalled notifying Vereen about the penalties of perjury. Counsel credibly testified he filed a notice of alibi defense to allow himself the opportunity to use it at trial if necessary. Finally, Counsel credibly testified he could not get into contact with Vereen to potentially testify after the initial interview. Accordingly, this Court finds Counsel performed a reasonable investigation into the alibi where he interviewed the witness requested, filed notice of an alibi defense, and attempted to



contact the witness to testify. Therefore, this Court finds Applicant has failed to overcome the burden to prove Counsel was deficient based upon a failure to investigate a potential alibi.

Additionally, Applicant alleges Counsel's failure to utilize Vereen as an alibi witness prejudiced his decision to go to trial. The prejudice prong is dependent upon whether counsel's deficiencies "affected the outcome of the plea process." Frierson v. State, 417 S.C. 287, 789 S.E.2d 762 (Ct. App. 2016), aff'd as modified, 423 S.C. 257, 815 S.E.2d 433 (2018). To establish it through witness corroboration an applicant "must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. SCRE 801. Mere "speculation" about the details of what a witness would testify about is insufficient to establish prejudice. Dalton, 376 S.C. 130 at 143, 654 S.E.2d 870 at 877.

Here, Applicant testified he was with Vereen the entire night of this incident. Applicant further testified towards his confidence Vereen would corroborate his whereabouts for the entire night in question. However, Vereen did not testify at this evidentiary hearing. Accordingly, this Court finds any testimony offered by Applicant on behalf of Vereen is mere speculation. Therefore, this Court finds Applicant has failed to overcome the burden to prove he was prejudiced by Counsel's alleged deficiencies in using an alibi witness.

3. Failure to Prepare Alibi Defense

Applicant contends Counsel was deficient in refusing to interview Bufkin to investigate his belief Bufkin did not identify him as the suspect. In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation

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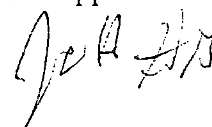
"was itself reasonable." Taylor, 404 S.C. at 364, 745 S.E.2d at 104. However, defense counsel is not deficient in conducting a reasonable investigation as long as they interview potential witnesses "when it is reasonable to do so." Edwards, 392 S.C. at 457, 710 S.E.2d at 65.

Here, Counsel does not dispute the fact he did not interview Bufkin. However, Counsel credibly testified Applicant was charged with witness intimidation after making jailhouse phone calls allegedly threatening Bufkin. Counsel further credibly testified he believed Applicant explicitly threatened Bufkin after reviewing these jailhouse phone calls. Counsel also credibly recalled notifying Applicant these calls would be admissible in trial as evidence of guilt towards the witness intimidation charge. As a result, Counsel credibly testified he decided an attempt to secure this interview could create additional intimidation concerns.

Applicant testified he initially asked to personally speak with Bufkin. He further testified his intention was never to threaten Bufkin. However, Applicant testified he wanted to relay the message bad things happen to people who make false accusations.

Applicant acknowledged he attempted to directly send Bufkin a message. The message was apparently so intimidating it merited a witness tampering charge. After review, Counsel considered this message to be an explicit threat. As a result, Counsel had to make a judgement call on the potential repercussions in further attempts to contact Bufkin on behalf of Applicant. Accordingly, this Court finds Counsel reasonably decided not to conduct an interview of Bufkin on behalf of Applicant. Therefore, this Court finds Applicant has failed to overcome the burden to prove Counsel was deficient for failing to interview Bufkin.

Additionally, Applicant contends securing Bufkin's interview would have resulted in statements indicating there was no injury sufficient for attempted murder. Here, Applicant testified he was confident Bufkin would have notified Counsel he was not shot. Applicant testified he was

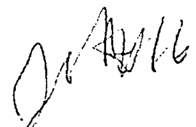


confident Bufkin would indicated the officers pressured him into giving a false statement. However, Bufkin testified he remembered being shot in the stomach during this incident. Therefore, this Court finds Applicant has failed to overcome the burden to prove a failure to interview Bufkin was prejudicial based upon injury concerns.

Finally, Applicant contends interviewing Bufkin would have resulted in statements supporting the inadmissibility of his original identification of the suspect. At the plea hearing, Applicant confirmed he forcefully took the vehicle Bufkin was driving. (Tr. 10-11). Furthermore, Applicant confirmed he shot Bufkin in the stomach and groin. (Tr. 10-11). Here, Applicant testified he was confident Bufkin did not identify him on the night in question. Bufkin then testified he did not remember being assaulted by Applicant. Bufkin further testified he did not remember signing a photo lineup to identify the suspect. However, this testimony does not provide direction on how the original identification was inadmissible. Also, Applicant asserted he tried to contact Bufkin before pleading guilty about faking an injury and wrongful identification. Thereafter, Applicant conceded to threatening people who made false statements. This Court finds the evidence and credible testimony conclusively reflect Applicant threatened Bufkin about this incident. Therefore, this Court finds no credible evidence has been presented to support Bufkin's original suspect identification was improper. Accordingly, this Court finds Applicant has failed to overcome the burden to prove Bufkin would have originally provided statements indicating the identification was inadmissible.

4. Failure to Prepare Third-Party Guilt Defense

Applicant contends Counsel was deficient based upon a failure to investigate an unknown third-party potentially responsible. In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation "was itself



reasonable." Taylor, 404 S.C. at 364, 745 S.E.2d at 104. However, defense counsel is not deficient in conducting a reasonable investigation as long as they interview potential witnesses "when it is reasonable to do so." Edwards, 392 S.C. at 457, 710 S.E.2d at 65.

Here, Applicant testified the party responsible was actually a man from the same area who looked like him. Applicant further testified he advised Counsel to investigate after learning this information. Counsel testified Applicant did initiate a conversation about potential third-party guilt. Counsel also testified Applicant gave him a specific name to investigate. However, Counsel credibly recalled learning the individual Applicant identified was deceased. Therefore, Counsel credibly testified he could not interview this person about the case. Thereafter, Counsel credibly testified to focusing on other potential defenses based upon the weakness of this claim. Specifically, Counsel credibly testified there was no evidence to corroborate third party guilt. Furthermore, Counsel credibly assessed presenting this defense would not have explain how Applicant was arrested with keys to one of the stolen vehicles. Accordingly, this Court finds Counsel performed a reasonable investigation where he made necessary steps to setup the interview until learning this witness was deceased. Therefore, this Court finds Applicant has failed to overcome the burden to prove Counsel was deficient based upon a failure to investigate the witness to assist in a third party guilt defense.

Applicant contends securing this witness testimony would have exonerated him before he felt forced to plead guilty. To establish it through witness corroboration an applicant "must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing." Bannister, 333 S.C. at 303, 509 S.E.2d at 809. However, an applicant's statements during the plea hearing are considered "conclusive unless [he] presents valid reasons why he should be allowed to depart from the truth" of them. Dalton, 376 S.C. at

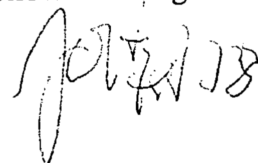
137, 654 S.E.2d at 874. Mere "speculation" about the details of what a witness would testify about is insufficient to establish prejudice. Id, 376 S.C at 143, 654 S.E.2d at 877.

Here, Applicant testified tracking the person responsible down would have led to him being fully exonerated. Applicant testified Counsel credibly testified the person could not be interviewed based upon being deceased. Regardless, Applicant has not presented any admissible statements from this individual. Accordingly, this Court finds Applicant is merely speculating this witness would have taken full responsibility for the incident. Therefore, this Court finds Applicant has failed to overcome the burden to prove prejudice based upon any alleged failure

5. Failure to File a Motion to Change Venue

Applicant contends Counsel should have attempted to change venues based upon the major conflict of interest through injured police officers. The crux of the prejudicial inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018) (finding the prejudicial analysis in a PCR based upon pleading guilty is limited to examining whether deficiencies impacted the plea process, not potential success at trial).

Here, Applicant testified the case never felt fair based upon being accused of crimes of violence against police officers. However, Applicant failed to offer a specific issue in his case to exemplify unfair bias. Furthermore, Counsel credibly testified the police officer injury had no impact on judicial fairness. Counsel credibly recalled the Assistant Solicitor giving them a deadline to accept the plea offer before starting pretrial motions. Counsel credibly testified Applicant accepted the plea offer before the deadline. The record reflects no pretrial motions were made in this case. It further reflects the Assistant Solicitor followed through with the plea offer.



Finally, the record reflects the court accepted a negotiated sentence. Accordingly, Applicant has presented no evidence to show how the venue impacted his ability or decision to plead guilty. Therefore, this Court finds Applicant has failed to overcome the burden to prove he was prejudiced by any alleged failure to change venues.

6. Failure to Review Discovery with Applicant

Applicant contends Counsel deficiently ignored reviewing exculpatory evidence with him through videos, photographs, a gunshot residue test, and medical records.

Here, Applicant initially testified he did not know about almost forty videos entered into evidence before accepting the plea offer. Thereafter, Applicant testified he knew about multiple videos in evidence before Applicant was appointed. Applicant also testified he knew Bufkin was given an improper photographic lineup to identify Applicant. Thereafter, Applicant testified he did not know this photographic lineup was entered in evidence before accepting a plea offer. However, Applicant also testified he knew this photographic lineup was in evidence a month before accepting the plea. Additionally, Counsel credibly testified he reviews all potentially admissible pieces of evidence with clients. In this case, Counsel credibly testified as to reviewing all items in evidence with Applicant. Specifically, Counsel credibly recalled reviewing several videos with Applicant. Counsel further credibly remembered he informed Applicant that the person on the video looked like Applicant. Accordingly, Applicant failed to elaborate on his contradicting testimony in regards to when he learned about the photographic lineup. Therefore, this Court finds Applicant has failed to overcome the burden to prove Counsel was deficient based upon a failure to review discovery.

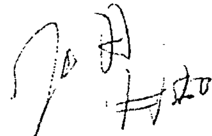
Applicant contends he felt forced to plea after Counsel ignored favorable pieces of evidence while representing him. The crux of the prejudicial inquiry is whether counsel's

ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Frierson, 423 S.C. at 262, 815 S.E.2d at 436. Additionally, an applicant is not prejudiced by deficiencies involving video disclosure when he "was aware throughout negotiations and guilty plea proceedings that videotape was not exculpatory." Hyman, 397 S.C. at 48, 723 S.E.2d at 382.

Here, Applicant testified he felt forced to plea after not being adequately informed about favorable videos and improper identification. However, Counsel credibly testified as to reviewing all the videos in evidence involved with Applicant's incident. Counsel further credibly testified as to believing the person in the video looked like Applicant. Counsel also credibly testified as to notifying Applicant all these videos showed a person who looked like Applicant. Additionally, Counsel credibly testified Applicant decided to forgo pretrial motions in favor of pleading guilty. Counsel credibly recalled his pretrial motion to suppress would have given clarity on whether Applicant was properly identified multiple times throughout the incident. Accordingly, Applicant had sufficient knowledge the videos in evidence were not favorable to his case. Furthermore, Applicant failed to explain how improper identification effected his decision when he decided to plea instead of moving forward with this suppression motion. Therefore, this Court finds Applicant has failed to overcome the burden to prove he was prejudiced in anyway by an alleged deficient review of evidence by Counsel.

VI. 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.



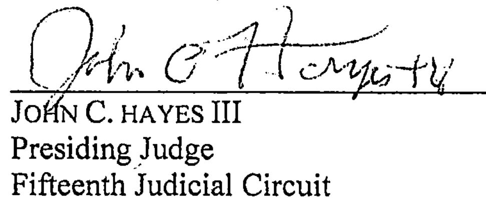
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), 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 remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 13th day of August, 2019.



JOHN C. HAYES III
Presiding Judge
Fifteenth Judicial Circuit

Rock Hill, South Carolina

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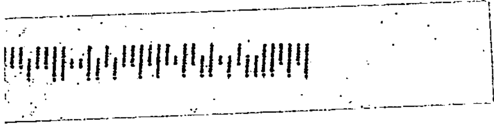

Clerk of Court
Supreme Court of South Carolina
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Columbia, SC 29211