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September 9, 2019

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

RECEIVED

SEP 16 2019

S.C. SUPREME COURT

Re: Ricardo Dargan v State, 370197, 2017-CP-43-1253

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, in the above Sumter 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:

Janell Gregory, Esq

Ricardo Dargan

Sumter County Circuit Court Clerk

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

SEP 16 2019

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Honorable Brooks P Goldsmith, Circuit Judge

Case No.: 2017-CP-43-1253


Ricardo Dargan 370197.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Ricardo Dargan 370197 appeals the Honorable Brooks P Goldsmith's August 28, 2019 Order of Dismissal. Undersigned counsel received notice of entry of the order on September 10, 2019. A copy of the order on appeal is attached hereto.


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

September 10, 2019

Janell Gregory, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

Clerk of Court- Sumter CP
215 N Harvin St
Sumter, SC 29150

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Honorable Brooks P Goldsmith, Circuit Judge

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SEP 16 2019

S.C. SUPREME COURT

Case No.: 2017-CP-43-1253

Ricardo Dargan 370197.....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, Janell Gregory, Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Sumter County Clerk of Court. I further certify that all parties required by Rule to be served have been served this September 10, 2019.



James K Falk
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PO Box 1058
Charleston, SC 29402

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

2017-CP-43-1253

Ricardo Dargan, #370197,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief filed on July 5, 2017, by Ricardo Dargan (Applicant). The State (Respondent) filed a Return on June 5, 2018, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on July 30, 2019, at the Sumter County Courthouse. Applicant was present at the hearing and represented by James K. Falk, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf. Timothy L. Griffith, Esquire (Counsel), and Applicant's mother, Cynthia Dargan (Cynthia), also testified. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application.

PROCEDURAL HISTORY

The records before this Court establish Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Sumter County Clerk of Court's order of commitment. During its March 2016 term, the Sumter County Grand Jury indicted Applicant for murder and possession of a weapon during the commission of a violent crime (2016-GS-43-0378) and three counts of distribution of crack cocaine base (2016-GS-43-0376, -77, and -78). Counsel represented

Applicant on the charges. Assistant Solicitor Bronwyn K. McElveen of the Third Circuit Solicitor's Office prosecuted the case. On October 17, 2016, Applicant proceeded to an immunity hearing before the Honorable Robin B. Stillwell. At the conclusion of that hearing, Judge Stillwell denied Applicant's immunity motion. Thereafter, on October 18, 2016, Applicant pled guilty to a reduced charge of voluntary manslaughter and as indicted to possession of a weapon during the commission of a violent crime (2016-GS-43-0378). Applicant also pled guilty to all three counts of distribution of crack cocaine. Judge Stillwell sentenced Applicant to imprisonment for concurrent terms of fifteen years for voluntary manslaughter and fifteen years for each of the three distribution charges. Additionally, Judge Stilwell sentenced Applicant to five years for the weapons charge, to be served consecutively to all the other charges, resulting in an aggregate sentence of twenty years.

Applicant filed a notice of appeal on November 15, 2016 through plea counsel Timothy L. Griffith. By Order dated January 12, 2017, the South Carolina Court of Appeals dismissed Applicant's appeal for Applicant's failure to timely serve the Notice of Appeal on Respondent as required by Rule 203(b) of the South Carolina Appellate Court Rules. State v. Dargan, S.C. Ct. App. Order Filed January 12, 2017. The remittitur was issued on February 2, 2017.

SUMMARY OF FACTS

Murder and Weapon Charge

The murder and weapons charges stem from a December 2015 incident in which Applicant and Victim agreed to "street race" on a public road for \$500 dollars. (GP Tr. 9.) Applicant and Victim each gave their \$500 dollars to a third party to hold during the duration of the race. (GP Tr. 10.) Applicant lost the race and demanded his money back from Victim. (GP Tr. 10.) According to the facts presented by the State, at that point, Applicant left the scene and returned with a firearm that was purchased by Victim, but used by Applicant. (GP Tr. 10.) Applicant brandished the

firearm and began shooting at Victim's feet while demanding his money back. (GP Tr. 10.) Victim was struck with a bullet in the femoral artery and falls to the ground. (GP Tr. 10.) Applicant went into Victim's pockets and fled the scene without rendering aid. (GP Tr. 10.) Victim was transported to the hospital where he underwent several surgeries nearly losing his leg. (GP Tr. 10.) Victim spent a little over a month in the hospital, but died fifty-seven days after the incident from the bullet wound. (GP Tr. 10.)

Crack Cocaine

The crack cocaine charges all stem from three instances between July and August 2015, in which confidential informants with the sheriff's office purchased crack from Applicant. (GP Tr. 11-12.)

ALLEGATIONS RAISED

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

1. Involuntary guilty plea
2. Brady violation
3. Ineffective assistance of counsel
 - a. "That counsel, Timothy Griffith, Esq., was ineffective for not challenging the state charges against Applicant when the charge of murder or voluntary manslaughter would be a misrepresentation of the facts and vindictive prosecution."
 - b. "That counsel failed to take Applicant'[s] case to trial and show the jury that the victim, David Clea own negligence was the superseding case of death, bearing his own responsibility for his death and not applicant."
 - c. Applicant believes it was unreasonable for trial counsel to advise Applicant to plead guilty.

On July 30, 2019, an evidentiary hearing was convened. Applicant proceeded with the hearing on all of the allegations set forth in his application.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant's Testimony

Applicant testified that he was represented by Counsel and that he talked to him two or three times. Applicant testified he was in custody about eight or nine months before he pled guilty. Applicant testified he received everything in his discovery except a statement and medical records that were given to him in court.

Applicant testified at the self-defense hearing. During that hearing, Applicant testified he never brought a gun to the scene and never pulled a gun out. Applicant testified he was friends with the victim, they were out together the night of the incident, and there was quite a bit of drinking going on. Applicant testified that he was never provided with a statement from the Victim. Applicant testified that Counsel felt good about going to trial. Applicant testified Counsel never told him what the potential sentences were for the murder charge. Applicant testified Counsel only mentioned the self-defense hearing and never discussed lesser included offenses with him.

Applicant testified that during the guilty plea he disputed the facts presented by the State. Applicant testified he never left the scene and got a gun. Applicant testified there was conflicting testimony as to who brought the gun and who shot the gun during the incident. Applicant testified he decided to plead after the self-defense hearing because the State offered him a twenty year plea. Applicant testified Counsel talked to his family and told them Applicant needed to take the twenty year plea offer. Applicant testified it was Counsel's recommendation earlier to turn down the fifteen year plea offer. Applicant testified Counsel told him they were going to beat the case because Applicant was going to be successful at his self-defense hearing.

Applicant testified he told the plea judge he was satisfied with his attorney because at the time he thought Counsel had done a good job. Applicant testified he has since learned at the law

library that there were other avenues they could have taken that Counsel did not pursue. Applicant testified that Counsel should have interviewed more witnesses. Applicant testified Counsel called Thomas Wilson (Wilson) as a witness during the self-defense hearing and his testimony supported the State's theory.

Applicant testified he understood the consequences of post-conviction relief and wants to go forward with his application because he never brought a gun to the scene. Applicant testified it was not his gun and there were witnesses that knew he did not have a gun. Applicant testified he did not want any of this to happen and that he did not have any malice or anything.

On cross-examination, Applicant testified he met with Counsel about three times and he reviewed discovery with him. Applicant testified he received the medical records and a statement when he got to court.

Applicant testified he recalled waiving his constitutional rights. Applicant testified he recalls stating no one coerced him or threatened him to plead guilty. Applicant testified he recalled telling the plea judge that he wanted to plead guilty. Applicant testified he recalled telling the plea judge he was pleading guilty out of his own free will. Applicant testified he recalled telling the plea judge that he was satisfied with his attorney and did not have any questions for Counsel.

Applicant testified he gave Counsel names of witnesses to interview, which included Sean McFadden, and Randy Johnson. Applicant testified he recalled thanking Counsel during the plea hearing. Applicant testified he recalled the plea judge telling him that if he shot the gun, which he admitted to doing, he was at the very least guilty of manslaughter.

Testimony of Cynthia Dargan

Applicant's mother, Cynthia Dargan (Cynthia), testified on Applicant's behalf during the post-conviction relief hearing. Cynthia testified she had conversations with Counsel and she recalled Counsel telling her Applicant's case was not going to be a long case. Cynthia testified



she felt very confident about Applicant's case because Counsel was confident. Cynthia testified she thought Applicant was going to go back home with them when he went to plead guilty. Cynthia testified she thought his case would be "in and out."

On cross-examination, Cynthia testified Counsel called her and the family into a room and stated he felt good about the case. Cynthia testified Counsel never discussed the plea with her. Cynthia testified she was not sure if there were meetings with Counsel and Applicant outside of her presence.

Testimony of Counsel

Counsel testified he was appointed because there was a conflict in the public defender's office. Counsel testified he was very optimistic about Applicant's case, but that changed after the self-defense hearing. Counsel testified the State discussed making an offer for voluntary manslaughter and he tried to convince the prosecutor to consider involuntary manslaughter. Counsel testified they would have proceeded with a self-defense defense at trial. Counsel testified he was going to request the judge to instruct on voluntary and involuntary manslaughter. Counsel testified there was no discussion with the court on charging accident. Counsel testified he believed there was reasonable doubt as to whether there was malice. Counsel testified he discussed with Applicant that he could be found guilty of murder, voluntary manslaughter, or involuntary manslaughter depending on what the judge would allow the jury to be instructed on. Counsel testified he did not think he would have been able to get an instruction on self-defense because everyone testified during the self-defense hearing that Applicant went to get the gun and that Applicant and Victim were fighting over the gun.

Counsel testified he contacted all of the witnesses Applicant gave him. Counsel testified a witness stated hearing Victim say, "you shot me with my own gun." Counsel testified that is in the plea transcript. (GP Tr. 63.) Counsel testified it is a matter of whether the jury would believe

Applicant or the witnesses. Counsel testified he did not know what Wilson was going to say when he called him as a witness. Counsel testified he tried to talk to Wilson before the self-defense hearing, but Wilson would not talk to him. Counsel testified he believed Wilson would testify in line with Applicant's version of the facts based on what Applicant told him, however, Wilson's testimony was not helpful as he testified he saw Applicant with the gun. Counsel testified Wilson also testified that he never saw Victim with a gun. Counsel testified he was told by Applicant that Wilson would be a favorable witness. Counsel testified he was not aware of any statement made to law enforcement by Victim.

Counsel testified he does not recall the State giving them a fifteen year plea offer, he testified the offer was just for voluntary manslaughter. Counsel testified he discussed the difference between manslaughter and murder with Applicant. Counsel testified he did not ask the judge for a self-defense instruction because they never got to that point. Counsel testified he would have taken Applicant's case to trial, but the decision was up to Applicant. Counsel testified he was perfectly happy taking Applicant's case to trial, but told Applicant he could not make that decision for him. Counsel testified Applicant's chances at trial would have been a toss of the coin as to whether the jury believed him. Counsel testified the witnesses that testified during the self-defense hearing were very credible and their testimony was not favorable to Applicant.

On cross-examination, Counsel testified he has been practicing law for eleven years and about 75-85% of that time has been in criminal law. Counsel testified he filed Rule 5 and Brady motions and the State complied with his discovery requests. Counsel testified he went over Applicant's charges and potential sentences. Counsel testified he met with Applicant at least eight times during his representation.

Counsel testified he is gullible and believed Applicant's story. Counsel testified Applicant is a personal young man and thought it was just horrible circumstances. Counsel testified he tried

reaching out to the witnesses Applicant provided him, but most of them would not talk to him. Counsel testified Wilson was on his and the State's witness list, so if he did not call him, the State would have called Wilson to testify.

Counsel testified he did not think the charge of murder fit the facts of the case, but potentially voluntary or involuntary manslaughter. Counsel testified he believed Victim was negligent with his medical care based on his theory of the case and would have used Victim's medical records at trial. Counsel testified he discussed that theory with Applicant, but Applicant ultimately chose to plead guilty. Counsel testified he believed it was in Applicant's best interest to plead guilty. Counsel testified he would have taken Applicant's case to trial, but does not believe Applicant would have been exonerated. Counsel testified Applicant's testimony at the self-defense hearing was inconsistent to his admissions at the guilty plea hearing. Counsel testified Applicant apologized to him for not being truthful with Counsel.

Testimony of Assistant Solicitor Bronwyn McElveen

McElveen testified she has been practicing law for eleven years and has been with the solicitor's office for nearly ten years. McElveen testified she complied with Counsel's discovery motions and filed supplemental responses that contained SLED analysis that the solicitor's office received after the initial discovery.

McElveen testified the State believed the gun was a shared gun, which was owned by Victim and Applicant jointly. McElveen testified after the shooting, Applicant went into Victim's pockets and then fled the scene. McElveen testified Victim died from an infection caused by a bullet fragment in his leg. McElveen testified she researched Victim's medical care since he died after being discharged from the hospital. McElveen testified she discovered Victim's wound care was "impeccable." McElveen testified Dr. Naylor - the vascular surgeon she consulted with - told her the kind of injury and surgery Victim had caused the highest possible chance of infection.



McElveen testified Victim's toxicology from his autopsy showed he was clean – no drugs or alcohol in his system. McElveen testified Dr. Naylor would have testified at trial had Applicant proceeded to trial. McElveen testified she had twenty-three witnesses that would have testified, which included the EMT who told McElveen that a man at the scene who applied pressure to Victim's leg after the shooting saved his life initially. McElveen testified she could not get in touch with Wilson, despite her efforts. McElveen testified Wilson's testimony aligned with what her other witnesses said.

McElveen testified she initially emailed Counsel and offered to drop one of the gun charges if Applicant pled to the drug charges and voluntary manslaughter. McElveen testified Counsel tried to get her to drop the charge to involuntary manslaughter, and she told him she would check with Victim's family. McElveen testified Applicant's pleas were always to voluntary manslaughter and she never offered a fifteen year plea.

On cross-examination, McElveen testified Victim did not give a statement to law enforcement because when he regained consciousness he could not remember what happened. McElveen testified she believes Victim was in a medically induced coma for a while at the hospital and does not know how many times law enforcement attempted to talk to him.

Applicant's Rebuttal Testimony

Applicant was recalled to the stand in rebuttal. Applicant testified he never apologized to Counsel for lying. Applicant testified, "the truth is going to come out."



APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, 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.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

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. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel’s performance was deficient. Id. Under this prong, courts measure an attorney’s performance by its “reasonableness under prevailing professional norms.” Id. (citing Strickland, 466 U.S. at 688). Second, any 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, 300 S.C. 115. With respect to guilty plea counsel, the applicant must show 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, 59 (1985).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court viewed 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 Clerk of Court records regarding the subject convictions, the immunity hearing transcript, guilty plea hearing transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

This Court finds Applicant has failed to meet his burden of proving he is entitled to post-conviction relief on any of his allegations of ineffective assistance of counsel. Applicant has failed to prove both deficiency on the part of Counsel and any prejudice therefrom.

Counsel was ineffective for failing to challenge the State's charges against Applicant when the charge of murder or voluntary manslaughter would be a misrepresentation of the facts and vindictive prosecution.

Applicant alleges Counsel was ineffective for failing to challenge the State's charge against him because he did not feel the facts supported his charge of murder or voluntary manslaughter. However, Counsel testified they challenged the State's theory of the case in the self-defense hearing, but were unsuccessful. Counsel testified he tried to get the State to offer involuntary manslaughter, but the State only offered a plea to voluntary manslaughter, which Applicant decided to accept. Counsel testified he would have taken Applicant's case to trial, but it was Applicant's decision to accept the plea.

McElveen testified she investigated Victim's follow-up medical care after he was discharged and his medical records indicated he was diligent in his wound care. McElveen testified his autopsy showed he had "impeccable" wound care and his toxicology screening showed he was not using drugs or alcohol at the time of his death. McElveen testified she consulted with vascular surgeon, Dr. Naylor, who would have testified during the trial that Victim's surgery and injury

caused the highest possible risk of infection, which ultimately led to Applicant's death despite his diligent care.

Upon review of this record, it is clear Applicant was informed of his charges and possible sentences by Counsel and the plea judge prior to entering his guilty plea. (GP Tr. 5-6.) It is also clear Counsel challenged the State's version of the facts by proceeding with the immunity hearing, however, the witnesses supported the State's version of the facts, rather than Applicant's. Counsel testified those witnesses came off very credible during the hearing. Counsel also testified Applicant told him Wilson would testify in line with Applicant's version of the facts, however, his testimony supported the State's theory.

This Court finds the testimony of Counsel and McElveen with respect to this allegation very credible, whereas Applicant's testimony is not credible. This Court finds Applicant has failed to establish any deficiency on behalf of Counsel or any vindictive motivation on behalf of McElveen. Counsel challenged the State's theory of Applicant's case by way of the immunity hearing, which was ultimately denied. During the immunity hearing, it was clear the State's theory of the case was more credible based on the testimony of numerous witnesses. Counsel testified he would have proceeded to trial if Applicant wanted to, however, Applicant chose to enter a guilty plea to voluntary manslaughter.

Additionally, Applicant has failed to establish any resulting prejudice from any alleged deficiency as Applicant was clearly aware of his charges and potential sentences prior to entering his guilty plea. Based on the forgoing, Applicant has failed to meet his burden to establish deficiency or prejudice as set forth in Strickland and this allegation must be denied and dismissed with prejudice.



Counsel failed to take Applicant's case to trial to show the jury that Victim's own negligence was the cause of his death and not Applicant. Counsel was unreasonable for advising Applicant to plead guilty.

Applicant alleges Counsel was constitutionally ineffective for failing to take Applicant's case to trial. Applicant alleges Counsel should have taken Applicant's case to trial to show Victim's negligence caused his death, not Applicant. Counsel testified he would have used Victim's medical records at trial to show Victim's own actions or inaction ultimately led to his death, however, Applicant made the decision to plead guilty.

McElveen testified, based on her investigation into Victim's medical records, Victim took impeccable care of his wound and received regular wound care at the hospital. McElveen also testified Dr. Naylor would have been a State's witness at trial and would have testified that the surgery Victim requires after the shooting and his injury created the highest level of risk for infection, which ultimately killed Victim. McElveen testified Victim's autopsy report confirmed Victim's wound care was impeccable and his toxicology report indicated he was not using drugs or alcohol at the time of his death.

A review of the record shows Applicant knew of his constitutional right to a jury trial and waived that along with his other constitutional rights during his guilty plea. The record also shows Applicant's testimony between the immunity hearing and the guilty plea was not consistent.

This Court finds the testimony of McElveen and Counsel with respect to these allegations very credible whereas Applicant's testimony is not credible. This Court finds Applicant has failed to show how Counsel was deficient as Counsel testified he would have presented Victim's medical records at trial to show Victim was ultimately responsible for his own death, not Applicant. However, Applicant ultimately chose to plead guilty to the lesser charge of voluntary manslaughter, therefore precluding such a theory from being presented at trial. Additionally, based on the testimony of the witnesses during the immunity hearing, and the medical evidence obtained

by the State regarding Victim's injury, it is was not unreasonable for Counsel to have agreed with Applicant's decision to enter a guilty plea in this case. (GP Tr. 3.)

Applicant has also failed to establish any resulting prejudice from the alleged deficiency. Counsel testified he would have taken Applicant's case to trial. Counsel testified it was Applicant's decision to enter his guilty plea after his motion for immunity was denied. Based on the forgoing, Applicant has failed to meet his burden to establish deficiency and prejudice as set forth in Strickland and these allegations must be denied and dismissed with prejudice.

Involuntary Guilty Plea¹

In evaluating issues concerning guilty pleas, this Court will consider the entire record, including the transcript of the guilty plea proceeding and the evidence presented at the post-conviction relief hearing. Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000). Voluntariness of a guilty plea is not merely determined by an examination of a specific inquiry by the plea court alone but rather is determined by the record of both the guilty plea proceeding and the post-conviction relief hearing. Id. In order to find a guilty plea was knowingly and voluntarily entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238 (1969). Further, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, an applicant's right to contest the validity of such a plea is usually foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, admissions "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." Id. (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975)); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

¹ Applicant did not provide any specific allegations as to this claim.

Counsel testified he went over Applicant's constitutional rights with him prior to Applicant entering his guilty plea. Counsel testified he would have taken Applicant's case to trial if Applicant wanted to proceed to trial. Counsel testified it was Applicant's decision to plead guilty.

A review of the record shows the plea judge informed Applicant that a jury had already been selected in his case and he had the right to proceed to a jury trial. (GP Tr. 4.) Applicant testified he wanted to waive his right to a jury trial. (GP Tr. 5.) The plea judge also reviewed Applicant's charges and potential sentences with him, which Applicant testified he understood before entering a guilty plea after each charge. (GP Tr. 5-8.) Applicant testified he was entering his guilty plea of his own free will because he was in fact guilty. (GP Tr. 8.) Applicant testified he was not promised anything in exchange for his plea and was not under the influence of drugs or alcohol. (GP Tr. 8.)

During the plea colloquy the plea judge and Applicant had the following exchange:

Judge: The thing that I'm interested in the most is the allegation that you shot into the ground, and it had the effect of entering and severing [Victim's] femoral artery. Is that what happened?

Applicant: I shot the gun in the ground. We were in his yard arguing. I shot the gun. Also, I never went in his pocket and take [sic] money from him.

(GP Tr. 12.) Later, Applicant was given the opportunity to address the court and he again admitted that he shot the gun into the ground and he apologized. (GP Tr. 18.) The plea judge told Applicant, "I recognize you did not mean to kill him. Having said that, [Counsel] was exactly right. And that is, if you actually shoot into the ground, and that has the effect of killing a person, then you are guilty of in the very least, at the very least, manslaughter." (GP Tr. 18.) It is clear from Counsel's testimony and the record that Applicant was fully aware of his charges, potential sentence, and his constitutional rights prior to entering his guilty plea.

This Court finds this allegation is without merit, and Applicant has failed to carry his burden of proving his guilty plea was involuntary. The records before this Court, and particularly the transcript of Applicant's plea proceeding, show Applicant engaged in a thorough colloquy with the court before electing to forgo his constitutional rights and knowingly, voluntarily, and intelligently enter a plea of guilty. This Court finds Applicant knew the charges he was facing and understood the plea he was entering. This Court also finds Applicant was properly and fully advised of his constitutional rights and knowingly and voluntarily waived those rights to accept a favorable plea.

Therefore, this Court finds Applicant had a full understanding of the consequences of his plea and the charges against him, and the plea court correctly found Applicant's plea was freely, voluntarily, and intelligently made. Based on these findings, Applicant's allegations regarding his plea being involuntary are denied and dismissed with prejudice.

Discovery Violation²

"A Brady claim is based on the requirement of due process." Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). In order to be successful on a Brady claim, the applicant must demonstrate: (1) the evidence was favorable to the accused; (2) it was in the possession of or known to the prosecution; (3) it was suppressed by the prosecution; and (4) it was material to guilt or punishment. Id. (citing Kyles v. Whitley, 514 U.S. 419 (1995); Brady v. Maryland, 373 U.S. 83 (1963); State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996)). This rule applies to not only exculpatory evidence but also impeachment evidence. Id. (citing United States v. Bagley, 473 U.S. 667 (1985)).

Applicant alleges generally that there was a Brady violation in his case. During the

² Applicant provided no specific claims in support of his discovery violation allegation.

hearing, Applicant testified he did not receive medical records or a witness statement until he was in court. Counsel testified he filed Rule 5 and Brady motions and received discovery from the State. Counsel testified he went over discovery with Applicant. McElveen testified she complied with Counsel's discovery requests and provided supplemental discovery as information came into her office from SLED on this case.

This Court finds the testimony of Counsel and McElveen credible as to this allegation whereas Applicant's testimony is not credible. This Court finds Counsel's performance was reasonable under professional norms, as he filed his discovery motions and received ongoing discovery from the State. Applicant has failed to show this Court that any favorable information was withheld from him or Counsel in this matter. Therefore, this Court finds Applicant has failed to establish any deficiency on the part of Counsel or any resulting prejudice. This allegation must be denied and dismissed with prejudice.

CONCLUSION

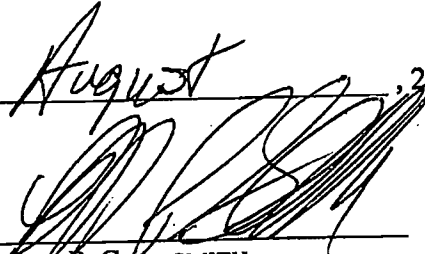
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from post-conviction relief counsel's receipt 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), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.


IT IS THEREFORE ORDERED THAT:

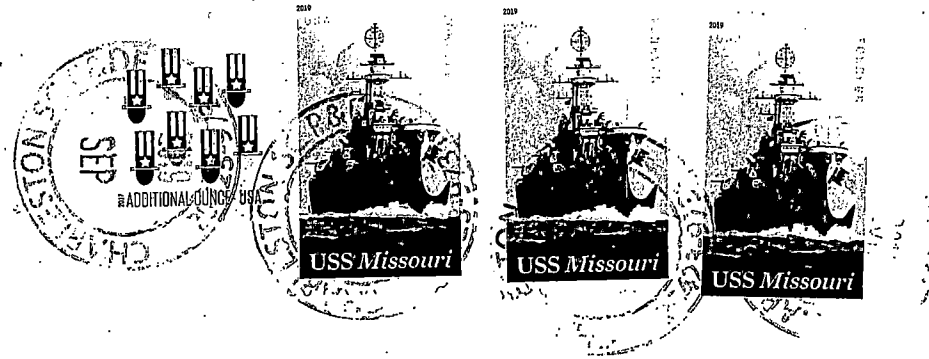
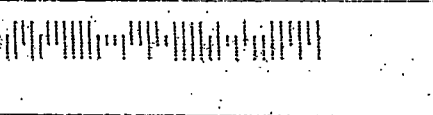
1. The application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 28 day of August, 2019.



BROOKS P. GOLDSMITH
Presiding Judge
Third Judicial Circuit


_____, South Carolina



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