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November 11, 2019

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NOV 15 2019

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

S.C. SUPREME COURT

RE: Rashad Demond Johnson (#314730) v. State of South Carolina | 2018-CP-29-1087

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal along with the accompanying Order for the above-referenced matter. By way of this letter I am copying the Office of Appellate of Defense, as I was appointed to represent Mr. Johnson.

Best regards,



Donae A. Minor, Esq.
Attorney at Law

cc: Rashad Demond Johnson (#314730)
Samuel L. Key, Esq.
Lancaster County Clerk of Court
Office of Appellate Defense

STATE OF SOUTH CAROLINA
In the Supreme Court

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NOV 15 2019

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable D. Craig Brown, Circuit Court Judge

Case No. 2018-CP-29-1087

Rashad Demond Johnson, #314730,..... Petitioner,

v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Applicant, Rashad Demond Johnson, appeals the order of the Honorable D. Craig Brown, dated November 4, 2019, filed November 8, 2019, and received November 11, 2019.



DONAE A. MINOR, ESQUIRE
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SC Bar No. 102550
ATTORNEY FOR APPLICANT

November 11, 2019

Opposing Counsel:
Samuel L. Key
Post-Conviction Relief
6th and 13th Judicial Circuits
P.O. Box 11549
Columbia, SC 29211-1549

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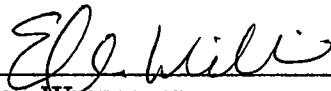
PROOF OF SERVICE

I, Ella Williams, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, on November 11, 2019, addressed as follows:

Samuel L. Key
Post-Conviction Relief
6th and 13th Judicial Circuits
P.O. Box 11549
Columbia, SC 29211-1549

I further certify that all parties required by Rule to be served have been served.

November 11, 2019



ELLA WILLIAMS
PARALEGAL TO ATTORNEY DONAE A. MINOR
1750 SC Highway 160 West,
Ste. 101-259
Fort Mill, SC 29708
803-504-0971

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT

Rashad Demond Johnson, #314730,)
)
Applicant,)

C.A. No. 2018-CP-29-1087

v.)

ORDER OF DISMISSAL

State of South Carolina,)
)
Respondent.)

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Rashad Demond Johnson (Applicant) on September 20, 2018. Respondent made its Return and Motion for a More Definite Statement on March 12, 2019. An evidentiary hearing into the matter was convened on July 29, 2019, at the Lancaster County Courthouse before the undersigned. Donae A. Minor, Esquire, represented Applicant. Assistant Attorney General Lindsey A. McCallister represented Respondent.

Applicant testified on his own behalf. Michael H. Lifsey, Applicant's plea counsel, testified on behalf of Respondent. This Court had before it a copy of the records of the Lancaster County Clerk of Court, records from the South Carolina Department of Corrections, the PCR application, Respondent's Return, and the plea transcript. 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 for relief.

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PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lancaster County Clerk of Court. In August 2016, the Lancaster county Grand Jury indicted Applicant for murder and possession of a firearm during the commission of a violent crime (2016-GS-29-1281). Michael H. Lifsey, Esquire (Counsel), represented Applicant. On November 11, 2017, Applicant pleaded guilty, without recommendation or negotiation, before the Honorable Brian M. Gibbons to the lesser-included offense of voluntary-manslaughter and as indicted to the weapons charge. Applicant also waived presentment to the grand jury and pleaded guilty to first-degree assault and battery for an unrelated incident. Judge Gibbons accepted Applicant's plea and sentenced him to an aggregate term of imprisonment of twenty-three years.

Plea counsel filed a notice of appeal and statement pursuant to Rule 203(d)(1)(B)(iv), SCACR, and In re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991), on November 21, 2017. Applicant filed a pro se statement with the Court of Appeals on December 18, 2018. The Court of Appeals dismissed the appeal on December 28, 2017, and remitted the case on January 16, 2018. Applicant commenced this PCR action September 20, 2018.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel

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Through PCR counsel, Applicant amended his application on July 19, 2019, to include an allegation plea counsel "failed to properly explained (sic) the strength and weaknesses of all evidence sought against Applicant so that Applicant could make an informed decision as to whether to proceed with a trial in lieu of a plea." At the evidentiary hearing, PCR counsel explained Applicant's allegation is that plea counsel failed to investigate and failed to adequately explain the evidence to Applicant, leading to Applicant's entry of an involuntary guilty plea.

SUMMARY OF FACTS ADDUCED AT PLEA

Applicant's murder and weapons charges stem from an incident that occurred May 21, 2016, at Palmetto Place Apartments (Palmetto). The incident was captured by Palmetto's video surveillance system. Applicant shot and killed Deangelo Kirk. The video of the incident was played for the plea court, in chambers, prior to Applicant's plea. Plea Tr. 8-9.

The video of the event showed Kirk fleeing from Applicant; Applicant, with his gun drawn, pursuing Kirk; and Applicant shooting Kirk. After shooting Kirk, Applicant fled. He surrendered to law enforcement May 28, 2016. Both Applicant and Kirk were armed during the incident, and Kirk tested positive for gunshot-residue (GSR). Plea Tr. 9-12.

Applicant's first-degree assault and battery charge stems from an incident that occurred January 15, 2017. Applicant was confined in the Lancaster County Detention Center awaiting the disposition of his murder and weapons charges when this incident occurred. Applicant and three other defendants "jumped" Malcom Belk. The incident was captured by the detention center's video surveillance system. Plea Tr. 14-15.

SUMMARY OF TESTIMONY AT EVIDENTIARY HEARING

Applicant testified it took eight months for Counsel to visit Applicant in the county jail. Applicant agreed Counsel brought the discovery for Applicant at their first meeting, but Applicant testified he and Counsel did not review it together; Applicant reviewed it on his own. Applicant stated Counsel "came back later," and Applicant asked if the victim had tested positive for GSR. Applicant testified Counsel never gave him the GSR kit, and he only found out about the results during the plea. Applicant testified he and Counsel met approximately seven times, but Applicant stated he did not think that was enough since he was charged with murder. Applicant testified he wrote Counsel a letter requesting a visit, and Counsel visited two weeks later. However, Applicant testified he felt Counsel did not represent him as Counsel should have.

Applicant testified he asked Counsel about parts of the discovery, but Counsel did not have the answers and never let Applicant know the results of the GSR test until Applicant entered the plea. According to Applicant, he found out about the results of the GSR test when the solicitor informed the plea court of the positive result during the plea hearing. Applicant testified Counsel did not review the discovery with him, and Counsel just asked Applicant what he wanted to do — meaning go to trial or accept a plea. Applicant stated he asked Counsel what evidence the State had against him, and Counsel showed him the videos of the shooting. However, Applicant testified Counsel did not discuss the strengths and weaknesses of the case with him. Applicant further testified Counsel told him he would be facing a zero-to-thirty-year sentence if he pleaded guilty, but the State would push for a life sentence if Applicant went to trial because he had another charge

pending. Applicant testified Counsel told him the State would not drop his charge from murder to voluntary manslaughter, and Applicant would receive a life sentence if he lost at trial.

On cross-examination, Applicant explained he was charged with assault by mob in a separate incident, and he indicated he understood the State could have pursued life without parole if they resolved that case separately. Applicant reiterated his testimony he did not know the result of the GSR test until the assistant solicitor explained the factual basis for the plea during the hearing. Applicant agreed he continued with the plea and never told the plea court he wanted to change his mind; Applicant testified he did not know he could do that. Applicant further agreed he was willing to plead guilty without knowing the results of the GSR test.

Counsel testified he has been the Chief Public Defender in the Sixth Circuit since March 2009. Counsel recalled representing Applicant and testified he met with Applicant at least eleven times, based on the notes in his file. Counsel testified, during those meetings, he fully explained the evidence against Applicant and the potential consequences Applicant was facing. Counsel testified he investigated potential defenses, specifically self-defense, and he and Applicant had multiple conversations about self-defense, murder, and voluntary manslaughter. Counsel testified he believed Applicant understood the differences and the issues involved, and Applicant had a better grasp of the legal issues than most of Counsel's clients. Counsel explained Applicant "had a street definition of self-defense," but the facts of the case did not fit the legal definition, although Counsel would have argued self-defense had the case gone to trial. Counsel stated he felt Applicant stood a decent chance of being convicted of the lesser-included offense of voluntary manslaughter rather than murder, and he explained all of this to Applicant.

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Counsel explained the shooting was captured by two different video cameras. Counsel stated the video clearly showed the victim running around the corner of the apartment building, and Applicant chasing him. Counsel explained when the videos were enhanced by SLED, they showed both the victim and Applicant had firearms, but Applicant was clearly chasing the victim. Counsel also explained the video showed one man raise his arm, a puff of smoke, and then the other man dropped to the ground. Counsel stated there were some good facts for the defense – mainly that the victim had a gun, and GSR results indicated the victim had fired a weapon at some point. Counsel explained they also had a witness statement who heard a “firecracker,” then saw the two men running past him, and then heard more noise. Counsel explained the defense theory was the victim was angry at Applicant because Applicant helped bond out the man accused of murdering the victim’s brother, so the victim shot at Applicant first. However, Counsel stated the problem was Applicant chased the victim after the victim fled. Counsel testified both the victim and Applicant were identifiable on the video, and Applicant was clearly the pursuer and shooter.

Counsel further testified the State refused to make any offer to Applicant for a long time because they felt they had a murder captured on video, and both sides were waiting on the GSR results for months. Counsel testified he and Applicant discussed the GSR issue at length, and he remembered explaining if those results were positive, it would help Applicant’s case. Counsel further explained the positive GSR result was the factor that prompted the State to offer voluntary manslaughter. Counsel testified the GSR results came in sometime in November, and the case was scheduled for trial in December. Counsel testified he knew about the GSR results, and he informed

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Applicant about them. Counsel reiterated those results were the reason the State extended a plea offer other than a plea to the murder charge, and he explained that reasoning to Applicant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record and heard the testimony at the PCR hearing. This Court has observed the evidence and witnesses presented at the evidentiary hearing, judged their credibility, and weighed their testimony accordingly in its discussion below. Set forth below are findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code.

Applicant alleges he received ineffective assistance of counsel. In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant 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." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's

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performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688 (1984)). 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, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

Involuntary Guilty Plea

Applicant alleges Counsel's ineffective assistance in failing to properly investigate the case and prepare a defense, as well as "threatening [him] with a life sentence," led to Applicant entering an involuntary and unknowing guilty plea. This Court disagrees and finds the combined record from the plea hearing and the evidentiary hearing clearly establishes Applicant pleaded guilty freely and voluntarily. Therefore, for the reasons set forth below, this Court denies relief and dismisses these allegations with prejudice.

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). An applicant who pleads guilty with the advice of counsel may collaterally attack the plea only by showing (1) counsel was deficient and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419

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(2001) (citing Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994); Lockhart, 474 U.S. at 52). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Lockhart, 474 U.S. at 56.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish 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). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. Harres, 282 S.C. at 133, 318 S.E.2d at 361. However, 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. United States, 519 F.2d 347 (4th Cir. 1975), overruled on other grounds by United States v. Whitley, 759 F.2d 327 (4th Cir. 1985).

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The plea transcript reflects Applicant told the plea court he understood why he was in court, the charges against him, and that he had reviewed his case with his attorney. Tr. pp. 4-5. The plea court explained each charge individually, and Applicant indicated he understood each one and wished to plead guilty. Tr. p. 5. The plea court also explained the State's burden of proof beyond a reasonable doubt and Applicant's presumption of innocence at trial, Applicant's right to have a jury trial, and, specifically, Applicant's right to call witnesses and present a defense. Tr. pp. 6-7. Applicant indicated he understood those rights and wished to give them up in order to plead guilty. Tr. pp. 6-7. Applicant further stated Counsel had reviewed these rights with him as well. Tr. p. 7. Importantly, Applicant informed the plea court he had enough time to talk with his attorney, and he understood the discussions Counsel had with him. Tr. p. 6.

Further, the Court finds Counsel's testimony on these issues to be credible, while Applicant's was not. The Court finds Counsel met with Applicant on several occasions and reviewed with him the evidence and discovery in the case. Counsel and Applicant engaged in in-depth discussions of the State's evidence; Applicant's potential defense of self-defense; and the interplay of self-defense, murder, and voluntary manslaughter. This Court finds Applicant ultimately chose to plead guilty in order to avail himself of a favorable plea offer and to resolve both sets of charges at the same time in order to avoid a potential life sentence at trial or on a subsequent case, and this decision was made freely and voluntarily.

In any event, Applicant did not present any witnesses or evidence to support his claim Counsel failed to investigate and failed to adequately explain the discovery to Applicant, and therefore, this claim must fail on the prejudice prong as well. See, e.g., Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely

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request discovery because the contents of the documents were not presented at the PCR hearing); Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (holding a PCR 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 in order to establish prejudice); 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 applicant 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 was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

Accordingly, based on the combined record of the plea transcript and the testimony presented at the evidentiary hearing, this Court finds Counsel's representation of Applicant was not deficient, nor was Applicant prejudiced by his representation. Counsel met with Applicant on multiple occasions to review discovery, discuss the facts of the case, explore potential defenses, and explain Applicant's constitutional rights and options for resolving the case. Further, the plea transcript reflects Applicant understood the proceedings, interacted intelligently with the plea court, and entered his guilty plea knowingly and voluntarily. For all of these reasons, this Court finds Applicant's decision to enter the guilty plea was made freely and voluntarily. Therefore, this Court denies relief and dismisses this allegation with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation.

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Therefore, this application for post-conviction relief is denied, and Applicant's claims are dismissed with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. 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:

1. The application for post-conviction relief is denied, and Applicant's claims are dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.



AND IT IS SO ORDERED.


D. CRAIG BROWN
Presiding Circuit Court Judge
Sixth Judicial Circuit

11-4, 2019

D.C.B.
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