

LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW

December 13, 2019

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

RECEIVED
DEC 17 2019
S.C. SUPREME COURT

RE: Michael Boykin, SCDC # 284399 v. State of South Carolina
Appeal of Case No. 2018-CP-28-380

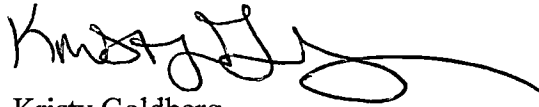
Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal and asking their office to open a file on his behalf, as I was **appointed** to represent Mr. Boykin on his PCR.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,



Kristy Goldberg

CC: Samuel L. Key
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Michael Boykin, SCDC # 284399
Ridgeland Correctional Institution
P.O. Box 2039
Ridgeland, South Carolina 29936

Kershaw County Clerk of Court
ATTN: Lynn Lyons
Post Office Box 1557
Camden, South Carolina 29021 - 8557

Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC 17 2019

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Diane S. Goodstein, Circuit Court Judge

Case No. 2018-CP-28-0380

Michael Boykin, SCDC# 284399, Appellant

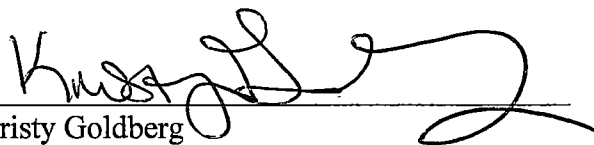
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant Michael Boykin hereby appeals from the Order of the Diane Goodstein, presiding Judge for the 5th Judicial Circuit, November 22, 2019 and received by counsel for the Applicant on November 27, 2019.

December 13, 2019



Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
Phone (803) 667-6633
kristy@kristygoldberglaw.com

Other Counsel of Record:

Assistant Attorney General, Samuel L. Key
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC 17 2019

S.C. SUPREME COURT

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2018-CP-28-0380

Michael Boykin, SCDC# 284399, Appellant

v.

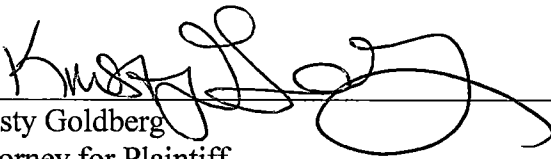
State of South Carolina, Respondent.

PROOF OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes
and states:

She is the counsel of record for Applicant;
Service by mail is proper in this instance; and
She has served the NOTICE OF APPEAL on the following party on December 13, 2019 by
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Samuel L. Key
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211



Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.

1720 Main Street, Suite 303
Columbia, SC 29201
Phone (803) 667-6633
kristy@kristygoldberglaw.com

Other Counsel of Record:
Assistant Attorney General, Samuel L. Key
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

STATE OF SOUTH CAROLINA)
)
COUNTY OF KERSHAW)
)
Michael Boykin,)
S.C.D.C. No. 284399)
)
Applicant,)
vs.)
)
State of South Carolina,)
)
Respondent)

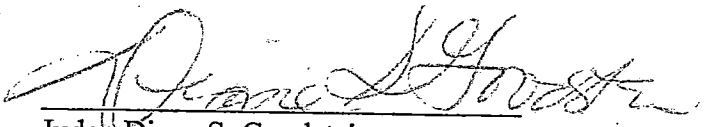
IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
CASE No. 2018-CP-28-0380

**ORDER DENYING MOTION TO
ALTER OR AMEND**

FILED FOR RECORD
2019 NOV 22 PM 2:05
JANET C. HASLEY
CLERK OF COURT
KERSHAW COUNTY, S.C.

This matter is before the Court on Defendant's Motion to alter or amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Defendant's motion seeks amendment of an Order of this Court dated September 8, 2019. The Defendant's Motion does not raise any novel issues for the Court's consideration, the Defendant's Motion to Alter or Amend is denied.

AND IT IS SO ORDERED.


Judge Diane S. Goodstein
First Judicial Circuit

NOV 18, 2019
Orangeburg South Carolina

ATTEST True, Correct & Certified
Copy of Original on File in this
Court
Janet C. Hasley
Clerk of Court

STATE OF SOUTH CAROLINA)
 COUNTY OF KERSHAW)
)
)
 Michael Boykin, #284399)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT

Case No.: 2018-CP-28-380

ORDER OF DISMISSAL

JANET C. HASTY
 CLERK OF COURT
 KERSHAW COUNTY, S.C.

FILED FOR RECORD
 2019 SEP 19 PM 12:07

The matter before this Court is an action for post-conviction relief (PCR). Michael Boykin (Applicant) commenced this PCR action April 26, 2018. The State made its return on July 16, 2018. On March 6, 2019, Applicant filed an Amended PCR application. The Court held an evidentiary hearing June 19, 2019, at the Richland County Courthouse before the undersigned. Applicant was present and represented by Kristy G. Goldberg, Esquire. Assistant Attorney General Brianna L. Schill represented the State.

At the PCR hearing, Applicant testified on his own behalf. Ronald W. Moak, James F. Lyon, and Michael D. McMullen, Esquires, also testified at the hearing. After reviewing the testimony presented and reviewing the relevant portions of the record before the Court, for the reasons discussed below, the Court finds Applicant's allegations are without merit and concludes counsel was not ineffective. Therefore, the Court denies relief and dismisses the action with prejudice.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Kershaw County Clerk of Court. In April 2017, the Kershaw County Grand Jury indicted Applicant for possession with intent to distribute crack cocaine – third offense (2017-GS-28-0768), possession of hydrocodone – third offense (2017-GS-28-0769) and

Attest & Certified
 Copy of Original on File in this
 Court

Janet C. Hasty

possession of oxycodone – third offense (2017-GS-28-0770). Ronald Moak, Esquire, represented Applicant. Assistant Solicitor Brett Perry, Esquire, prosecuted the case. On January 8-11, 2018, Applicant proceeded to trial before the Honorable G. Thomas Cooper, Jr. and a jury. The jury found Applicant guilty as indicted on the charges of possession of hydrocodone and oxycodone, as well as the lesser-included offense of possession of crack cocaine. On January 11, 2018, Judge Cooper sentenced Applicant to imprisonment for concurrent terms of five years each for possession of hydrocodone and oxycodone, plus ten years for possession of crack cocaine to be served consecutively. Applicant did not appeal.

Applicant timely commenced his PCR action on April 26, 2018.

FACTS

Applicant's charges stem from a police investigation regarding suspected narcotics activity at the Plantation Motel ^{+ D59} in Camden, South Carolina. During its investigation, Deputy Lawson and Investigator Lee Young of the Kershaw County Sheriff's Department saw Applicant and his step-father ^{+ D59} leave the Plantation Motel and enter a taxi cab.

Shortly after the taxi's departure from the Planation Motel, the taxi driver committed a traffic infraction. Law enforcement pulled the taxi cab over for this traffic infraction. Law enforcement recognized Applicant by sight as there were active bench warrants on Applicant. Lawson noticed Applicant seemed visibly nervous and was sweating profusely. Applicant was taken to the detention center due to the active warrants on him. Law enforcement conducted a strip-search on Applicant and found a bag of crack cocaine, as well as hydrocodone pills and oxycodone pills on Applicant's person.

(Trial Tr. 12-15).

The South Carolina Law Enforcement Division (SLED) submitted a drug analysis of the

drugs found on Applicant. Lynn Black, a SLED drug analyst, testified at Applicant's trial. Black testified he determined through chemical analysis that Applicant possessed 2.83 grams of crack cocaine and three five-milligram hydrocodone pills. Black testified that she did not perform a chemical analysis of the third drug, but used pharmaceutical markings to determine that the third drug found on Applicant was one ten milligram oxycodone pill.

(Trial Tr. 100-102).

Applicant introduced his Rite Aid prescription history at trial. According to Applicant's Rite Aid history, Applicant was prescribed: (1) fourteen ten-milligram oxycodone pills on November 4, 2017; (2) twenty five-milligram hydrocodone pills on May 31, 2017; and (3) twelve five-milligram oxycodone pills on June 26, 2016.

(Trial Tr. 179).

After Applicant rested his case but before closing arguments began, Applicant absconded his trial. Subsequently, Moak asked the Court to seal Applicant's sentence, suggesting that if Applicant's sentence were to become public he might attempt to flee from law enforcement. However, the Court denied Moak's request on the record, stating, "[the sentence] is going to be probably pretty public when we leave here today." The Court opined Applicant's trial did not constitute a trial *in absentia* because Applicant had the opportunity to appear, testify, and he in fact testified on his own behalf. Moak did not challenge Judge Cooper's ruling further.

(Trial Tr. 184-186; 228-229).

ISSUES RAISED

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

1. "Ineffective Assistance of Counsel"
"My attorney didn't argue anything"

2. "Sentencing"
"Sentencing on evidence that wasn't correct"
3. "Prejudice of the Court"
"Picking of the jury"

Applicant amended his PCR application, through PCR counsel, on March 6, 2019, as follows:

1. Trial counsel failed to adequately relay and explain plea offer to Applicant and advise the Applicant to accept the plea offer;
2. Trial counsel unreasonably advised the Applicant, after his testimony, that he would be convicted and was going to get more time, and failed to advise the applicant that he had the option to ask the Court's permission to enter a guilty plea at this point;
3. Trial counsel failed to investigate and reasonably prepare for trial;
4. Trial counsel failed to object after the trial court failed to seal the Applicant's sentence;
5. Trial counsel failed to preserve the Applicant's due process rights which were violated by the sentencing procedure that took place and Trial counsel failed to ensure that the Applicant was brought to court or a sentencing hearing;
6. Trial counsel failed to file any post-trial motions on the applicant's behalf including a motion to reconsider sentence;
7. Trial counsel failed to file notice of appeal.

At the outset of the evidentiary hearing, PCR counsel indicated Applicant would proceed only on the allegations set forth in the amended PCR application. Therefore, this Court finds all other allegations raised in Applicant's original application are waived and abandoned, and those allegations shall be denied and dismissed with prejudice.

PCR TESTIMONY

Applicant's Testimony

Applicant testified he is currently serving a fifteen year sentence for possession with intent to distribute crack cocaine and for possession of "pills." Applicant testified he was first offered a plea deal of five years for all three charges. Applicant testified that, while his case was pending, he was aware he was facing a minimum of ten years, and a maximum of thirty years. However, Applicant testified none of his lawyers informed him of this, but rather that he "heard

somewhere.” Applicant recalled that he was in jail for approximately thirty days before he released on bond.

Applicant recalled that McMullen was his first attorney and was appointed from the Public Defender’s Office. Applicant testified he met with McMullen twice; once at “roll call,” and once at McMullen’s office. According to Applicant, McMullen informed Applicant of the current plea offer and discussed his charges with him. Applicant testified he did not want to accept plea offer at that time. Applicant testified he wanted to get a “different opinion” and speak to another lawyer.

Applicant recalled Lyon assuming representation for McMullen after McMullen left the public defender’s office. Applicant testified that he met with Lyon several times, and they discussed the same plea offer of five years. Applicant testified he asked to negotiate a better plea offer and never asked for a trial.

Applicant testified he hired Moak at the “end of 2017.” Applicant testified Moak indicated he could “do better than Lyon” and could negotiate a better plea offer for Applicant. Applicant testified his trial started very soon after Moak was hired. Applicant testified he kept asking for a better plea offer but the best offer he was offered was for five years. Applicant stated he would not accept a five year plea offer and that his ideal plea offer was less than five years, preferably probation, and drug counseling.

Applicant testified Moak never discussed his case with him or reviewed discovery with him. Applicant testified that Moak never reviewed the SLED drug analysis with him.

Applicant recalled the State putting its current plea offer on the record prior to the commencement of his trial. Applicant could not recall what the exact offer it was, but testified it wasn’t the same offer as before and wasn’t “any better.” After Applicant’s counsel refreshed Applicant’s recollection by showing him the trial transcript, he testified he recalled receiving an

offer¹ from the Solicitor's Office on the day of his trial.

Applicant testified he decided to take the stand and testify on his behalf at his trial because Moak wasn't "speaking up," and Applicant wanted to tell the jury "his side of the story." Applicant recalled admitting during his trial that he possessed the crack cocaine and the oxycodone and hydrocodone pills.

Applicant recalled retrieving his Rite Aid prescription history for his trial. Applicant testified Moak told him to get his prescription history to see if the oxycodone and hydrocodone pills found on Applicant matched any pills he had been previously prescribed. Applicant testified it was "not helpful" because he did not have a valid prescription to either hydrocodone or oxycodone at that time.

Applicant testified he left his trial prior to closing arguments because he was "scared" and because Moak told him his testimony would result in him receiving a harsher sentence. Applicant admitted he did not have permission to leave his trial. Applicant also testified he did not speak to Moak prior to leaving his trial. Applicant testified he was not present for the verdict or for sentencing because he left his trial without permission. Applicant testified he was found guilty of the lesser-included offense of possession of crack cocaine, and possession of oxycodone and possession of hydrocodone. Applicant testified he was later arrested on a bench warrant, and he was sent to South Carolina Department of Corrections immediately after being arrested and did not have a sentencing hearing. Applicant testified he never heard from Moak after being arrested. Applicant testified he wanted a sentencing hearing so he could "ask for a better plea offer" or "mercy."

¹ The State's offer was to dismiss both the possession of hydrocodone and possession of oxycodone charges and to allow Applicant so plead guilty to simple possession of crack cocaine- third offense. (Trial-Tr. 46; 7-14).

McMullen's Testimony

McMullen testified his involvement in Applicant's case was limited. McMullen briefly recalled the facts of Applicant's case as follows. Applicant was at a motel "notorious" for drug trafficking. Law enforcement spotted Applicant and a relative at the motel where they subsequently got into a taxi. The taxi made a "strange" turn and was pulled over. The officers knew of Applicant due to outstanding warrants on him. The bench warrants gave officers probable cause to arrest Applicant and perform a search. Applicant was strip-searched at the detention center and two-to-three grams of crack cocaine were found on his person, and pills were found on his person.

McMullen stated at the time he represented Applicant, he had the incident report and SLED drug report, but he was unsure as to whether he had any witness statements at that time. McMullen testified he reviewed all of the discovery he had with Applicant at the time.

McMullen recalled receiving plea offers and indicated the Solicitor's Office made an initial offer of ten-to-twelve years in exchange for Applicant pleading guilty to possession with intent to distribute as charged. McMullen recalled working with Lt. Lawson in hopes of negotiating a better deal for his client. McMullen testified he eventually received a plea offer of five years, but he could not recall if the five-year plea offer involved reducing the crack cocaine charge to simple possession or to a second offense. McMullen recalled the five-year plea offer involved dismissing the two possession charges. McMullen testified Applicant was primarily concerned with the length of the prison time and whether the charge was a violent offense. McMullen stated Applicant rejected the five-year offer because he was hoping to receive a "better offer" that did not involve prison time, which McMullen stated was "not realistic."

McMullen testified he discussed trial strategy with Applicant. McMullen testified he

discussed the possibility of impeachment in the event Applicant decided to testify at his trial because of Applicant's prior criminal history. McMullen stated he and Applicant also specifically discussed Lieutenant Lawson's potential testimony. McMullen testified he did not represent Applicant at the time of his trial.

Lyon's Testimony

Lyon testified he inherited the case as a public defender in August 2017. Lyon recalled meeting with Applicant "at least twice" in a conference room and a "couple times in the courtroom" regarding Applicant's case. Additionally, Lyon recalled having a "couple" of phone conversations with Applicant. Lyon recalled receiving the incident report, the SLED drug analysis, and a recording of Applicant's phone conversations from jail. Lyon also recalled reviewing this discovery with Applicant.

Lyon testified the first plea offer he received was for Applicant to plead to possession with intent to distribute crack cocaine-second offense, in exchange for seven years' imprisonment. Subsequently, the Solicitor's Office made a plea offer of five years in exchange for dropping the possession of hydrocodone and possession of hydrocodone charges. Lyon stated all plea offers were communicated to Applicant. Lyon testified Applicant told him at their first meeting that he either wanted his case dismissed, or alternatively, Applicant wanted to go to trial. Lyon stated he asked Applicant if he would be interested in pleading guilty in exchange for probation if that opportunity came about, but Applicant stated he would not and would only forgo a trial if his case were dismissed.

Lyon testified he discussed with Applicant the consequences of rejecting plea offers and going to trial. Lyon testified he went so far as to calculate possible sentences under all "potential scenarios" to help Applicant understand the potential consequences of going to trial.

Moak's Testimony

Moak testified he became involved in Applicant's case after he met Applicant at "roll call," and Applicant decided to hire him. Moak indicated he received the SLED drug analysis and the police incident report, which he reviewed as a part of his investigation. Moak testified he had a good relationship with narcotics officers and spoke with the officers and also talked to the taxi driver.

Moak recalled an original offer for a five-year negotiated sentence in exchange for a plea to possession of crack cocaine-third offense. The original offer also would have dismissed Applicant's possession of hydrocodone and possession of oxycodone charges. Moak testified Applicant made it "very clear" he would not accept a five-year guilty plea offer. Moak stated Assistant Solicitor Perry, the second Assistant Solicitor assigned to Applicant's case, would only offer Applicant a ten-year plea offer and would not reduce the crack cocaine charge from possession with intent to distribute to a simple possession charge. Moak testified he recalled Assistant Solicitor Perry stating Applicant's current plea offer for the record prior to trial.² Moak testified Applicant did not appear to be interested in any guilty plea that would involve jail time.

Moak testified Applicant never contested possessing the pills or whether the pills were in fact oxycodone or hydrocodone pills. Moak testified the trial strategy was to argue that Applicant was prescribed the oxycodone and hydrocodone pills at some point. Moak testified he and Applicant discussed his prescription history, and Applicant wanted to introduce it into evidence. Moak stated he thought Applicant's prescription history could be helpful. Moak testified he used

² Moak also listed Applicant's plea offer history prior to trial and indicated that Applicant had rejected the prior plea offers. (Trial Tr. 6-7, 45).

Applicant's prescription history³ to argue the hydrocodone and oxycodone pills were once prescribed to him and, therefore, Applicant was in lawful possession of the pills. After reviewing the SLED drug analysis and Applicant's prescription history on cross-examination, Moak conceded the only oxycodone or hydrocodone prescription prescribed to Applicant prior to the incident was a prescription for ten-milligram tablets of oxycodone prescribed on June 26, 2016.

Moak testified the trial strategy regarding the crack cocaine was to prove Applicant was only in possession of the crack cocaine for personal use and not for distribution purposes. Moak recalled the SLED analyst's testimony matching the SLED report and did not find anything facially invalid about the SLED drug analysis.

Moak indicated that, as far as he knew, Applicant left the courtroom during a break in the trial to smoke a cigarette, but Applicant did not return. Moak testified he had a brief interaction with Applicant at the defendant's table after Applicant testified. Moak stated that during this exchange, Applicant told Moak he thought he "messed up" during his testimony, but Moak told Applicant it "was fine." Moak testified no other conversation occurred between him and Applicant after Applicant's testimony but prior to Applicant's premature departure from the courtroom. Moak testified he was under the impression Applicant was going to smoke a cigarette and was not aware that Applicant was going to leave. Moak testified Judge Cooper wanted to sentence Applicant immediately following the verdict. Moak recalled asking Judge Cooper to seal Applicant's sentence, which he usually requested when a defendant was not present at sentencing. Moak testified he asked both Assistant Solicitor Perry and Applicant's sister to inform him when Applicant was picked up on his bench warrant. Moak testified he did not file a notice of appeal or

³ Applicant's Rite Aid prescription history indicates that Applicant was prescribed twelve five-milligram oxycodone pills on June 26, 2016, twenty five-milligram hydrocodone pills on May 31, 2017, and fourteen ten-milligram oxycodone pills on November 4, 2017.

post-trial motions because he was waiting to be notified that Applicant was picked up on the bench warrants. Moak testified he was not notified by the Solicitor's Office, Applicant's family, or Applicant at the time of Applicant's arrest and was not aware Applicant was arrested until Applicant's sister called him months later.

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 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

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).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. 668.

This Court finds Applicant failed to prove Counsel's performance was deficient in any way, nor was Applicant prejudiced by Counsel's performance. Therefore, for the reasons stated below, the Court denies relief and dismisses the allegations with prejudice.

I. Failure to Investigate, Generally

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Walker v. State*, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144

(2014)). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. *Porter v. State*, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

Failure to Investigate and Introduction of Prescription History Evidence

Applicant alleges Counsel was ineffective for failing to investigate Applicant's prescription history and for introducing Applicant's prescription history into evidence at trial. More specifically, Applicant alleges Moak was ineffective for introducing his prescription history at trial because the dates and dosages do not match the dosages at issue in this case. This Court disagrees.

"[W]here counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). Counsel testified Applicant wanted to introduce his prescription history at his trial, and Counsel thought it could provide an alternative, legal explanation for why Applicant was in possession of hydrocodone and oxycodone pills even if the dates and dosages did not precisely match, as the State had no way of proving when Applicant obtained the pills found in his possession. As Applicant testified, the hydrocodone and oxycodone pills were found on Applicant's person and, accordingly, Applicant never denied that he was in personal possession of the pills or that the pills were in fact oxycodone and hydrocodone. Therefore, Moak attempted to introduce the prescription history evidence in an attempt to convince the jury that Applicant was lawfully in possession of hydrocodone and oxycodone pills, as this was the only viable defense to the charges. The Court finds Moak's strategy to deal with the possession charges sound and

reasonable. See *Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531 (“[W]here counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.”). Moak is not ineffective simply because the jury did not believe his argument.

This Court further finds Applicant failed to meet the prejudice prong of his burden as set forth in *Strickland* because Applicant has not shown “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. 668. Even if Moak was ineffective for introducing Applicant’s prescription history, Applicant was not prejudiced by the introduction of his prescription history. Applicant testified that introducing the prescription history was “not helpful” to his case, but did not provide any explanation as to how this changed the outcome of his case, as Applicant admitted to possessing the pills. Accordingly, this allegation is denied and dismissed with prejudice.

All Other Failure to Investigate Claims

To the extent that Applicant asserts any other claims of failure to investigate, this Court denies and dismisses these claims. McMullen testified that his involvement in Applicant’s case was brief and occurred in the beginning stages of Applicant’s case. McMullen reviewed discovery with Applicant and communicated plea offers to Applicant, but Applicant’s case shortly thereafter was reassigned to Lyon. Lyon testified he reviewed all of the discovery and listened to jailhouse recordings regarding Applicant’s case and created a timeline of events. Moak testified he reviewed the evidence including the incident reports and drug analysis. Moak also testified he spoke with witnesses including the taxi driver. Furthermore, Applicant failed to provide any evidence regarding what either McMullen, Lyon, or Moak should have investigated other than the prescription history. Therefore, this Court finds that McMullen, Lyon, and Moak sufficiently

investigated Applicant's case and, therefore, denies and dismisses any remaining allegations of failure to investigate.

II. Plea Negotiations

Applicant alleges trial counsel failed to "adequately relay and explain [the] plea offer to Applicant and advise the Applicant to accept the plea offer." This Court finds Applicant's allegation is without merit and must be dismissed. This Court finds credible McMullen, Lyon, and Moak's testimony they communicated and explained plea offers to Applicant, and Applicant would not accept any of the plea offers because he did not want to receive any jail time. Moak recited Applicant's plea offer history on the record at trial and indicated all offers were communicated to Applicant. (Trial Tr. 6-7). Applicant did not dispute this fact either at trial or the evidentiary hearing. Furthermore, Moak specifically testified he and Applicant discussed the consequences of pleading guilty versus going to trial. Ultimately, it is Applicant's decision whether he wants to plead guilty or go to trial. Accordingly, this allegation is therefore denied and dismissed.

III. Unreasonable Advice

Applicant alleges "trial counsel unreasonably advised the Applicant, after his testimony, that he would be convicted and was going to get more time, and failed to advise the Applicant that he had the option to ask the Court's permission to enter a guilty plea." This Court finds this allegation is without merit. This Court finds credible Moak's testimony he made no such comment to Applicant. Moak testified he had only a brief interaction immediately following Applicant's testimony during which Applicant told Moak he thought he "messed up" his testimony, and Moak told Applicant it "was fine." Furthermore, Applicant made no inquiry about requesting a new plea offer, and based on his repeated prior refusals to enter a guilty plea, Moak had no reason to advise

Applicant about the issue again. This Court finds Applicant absconded his trial giving Moak no opportunity to advise him regarding any issue about his case whatsoever. Accordingly, this allegation is therefore denied and dismissed.

IV. Issue Preservation Regarding Sealing of Applicant's Sentence and Failure to Ensure Applicant Was Brought to Court for Sentencing Hearing

Applicant alleges trial counsel was ineffective for failing to object after trial court refused to seal Applicant's sentence, thereby failing to preserve this issue for appeal, and for failing to ensure Applicant was brought to court for a formal sentencing hearing. This Court finds the allegations are without merit and must be dismissed. Applicant's trial was not a trial *in absentia* because Applicant had the opportunity to appear, testify, and he in fact testified on his own behalf. Applicant was present for all evidentiary aspects of his trial and left only before closing arguments. Additionally, Applicant had the opportunity to appear and testify, and did in fact testify on his own behalf. Applicant was able to confront his accusers as required by the Sixth Amendment. U.S. Const. amend. VI.

Even if Applicant's case were a trial *in absentia*, this Court finds the trial court was not required to seal Applicant's sentence. Although sealing a sentence is usual practice, it is not based on a legal requirement such as a statute or case law. *See* State of South Carolina Office of the Attorney General Informal Opinion, Hon. Robert K. Whitney (April 21, 1995) (“[W]ith respect to sealing of a sentence, although I am not aware of any legal requirement for this procedure, it is the usual practice, apparently based on custom, or our courts to seal the sentence where a defendant is tried in his absence.”).

Moreover, Moak preserved the issue for appeal because Moak requested the trial court seal the sentence, and the trial court ruled on Moak's request on the record. *Herron v. Century BMW*, 395 S.C. 461 (2011) (“At a minimum, issue preservation requires an issue to be raised to and ruled

upon by the trial judge.”); *Wilder Corp v. Wilke*, 330 S.C.71 (1998) (an issue “must have been raised and ruled upon by the trial judge to be preserved for appellate review.”); *State v. Gee*, 262 S.C. 373 (1974) (“It is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal.”). Moak requested on the record that Judge Cooper seal Applicant’s sentence. Judge Cooper considered Moak’s request and denied it determining, “[the sentence] is going to be probably pretty public when we leave here today.” (Trial Tr. 229). Accordingly, the issue was preserved for appeal and Applicant’s allegation is denied and dismissed.

Furthermore, Applicant’s allegation Moak was ineffective for failing to ensure that he was brought to court for a formal sentencing hearing is without merit. Applicant’s trial was not a trial *in absentia*, as Applicant voluntarily left the courthouse during his trial, despite knowing he did not have permission to do so. Therefore, Applicant was not entitled to any further hearings regarding sentencing. Accordingly, Applicant’s allegation is denied and dismissed.

V. Failure to File Motion to Reconsider Sentence

Applicant alleges Moak was ineffective for failing to file a motion for reconsideration of this sentence after the trial to seek a lesser sentence or a “better plea deal.” Moak testified Applicant was not present at his sentencing because he absconded his trial, and Moak did not have any contact from Applicant thereafter. Moak stated Applicant never requested reconsideration of his sentence. Applicant testified he wanted a motion to reconsider his sentence so he could inform the trial court that he left his trial because he was “scared” and also so that he could ask for “mercy” or try to get a “better plea deal.”

This Court finds Applicant’s allegation is without merit and must be denied. By absconding his trial, Applicant waived his right to present any mitigation on his behalf at

sentencing. Furthermore, there is no professional obligation to file a motion for reconsideration of a sentence absent a specific legal reason to do so. The sentence imposed on Applicant was not an illegal sentence, nor was there any allegation that the trial court acted with partiality, prejudice, oppression or corrupt motive when sentencing Applicant. See *Shraiar v. U.S.*, 736 F.2d 817, 818 (1st Cir. 1984) (“No court has held that failure to file a [motion to reduce sentence] automatically constitutes ineffective assistance of counsel.”). Moak was not under any obligation to file a motion to reconsider Applicant’s sentence and had no basis to do so. Therefore, Moak was not ineffective for failing to file a motion to reconsider Applicant’s sentence.

Furthermore, Applicant fails to establish he was prejudiced by Moak’s alleged failure to file a motion to reconsider Applicant’s sentence. To establish prejudice under *Strickland*, Applicant must show a reasonable probability that, but for counsel’s deficient performance, the results of the proceeding would have been different. 466 U.S. at 694. In the context of a motion to reconsider sentence, Applicant must establish a reasonable probability his sentence would have been reduced if the motion had been filed. Applicant provided no testimony or evidence suggesting his sentence would have been reduced by way of a motion to reconsider. Applicant merely hoped the Court would show him “mercy” if he had the chance to explain to the court that he absconded his trial because he was “scared.”⁴ Furthermore, Applicant testified he hoped he could ask for a “better plea deal” by way of a motion to reconsider sentence. However, the Court would not have had the authority to offer Applicant a “better plea deal.” Accordingly, Applicant has failed to provide support for either prong of the *Strickland* test and, accordingly, this claim is dismissed and denied.

⁴ Moak also offered an argument in mitigation on Applicant’s behalf. (Trial Tr. 225-26).

VI. Failure to File a Notice of Appeal

Applicant asserts counsel was ineffective for failing to file a direct appeal on his behalf, and Applicant asserts he wanted to appeal his convictions and sentence. In response to this allegation, Moak testified he was not able to speak with Applicant regarding whether he wanted to appeal because Applicant left his trial and never made contact with him. Moak testified he was unaware of Applicant's whereabouts. Applicant left his trial before either the Court or Moak were able to discuss his appellate rights.

"To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." *Simuel*, 390 S.C. at 271, 701 S.E.2d at 740 (citing *Sheppard v. State*, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (internal citation omitted). In the present case, Applicant has failed to meet his burden that he is entitled to a belated appellate review of direct appeal issues pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). Applicant voluntarily absconded during trial and never returned, and accordingly, made the decision not to be present for sentencing. He also presented no evidence he ever attempted to contact Moak following trial to pursue an appeal. Accordingly, this allegation is dismissed and denied.

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. The Court finds Moak's representation was neither deficient nor prejudicial. Moak articulated a reasonable strategy for introducing Applicant's prescription history. Applicant has failed to show any prejudice resulted from the introduction of his prescription history. The credible testimony shows Moak did not provide "unreasonable advice" to Applicant, and that all plea offers were communicated to Applicant. Additionally, this Court finds Moak preserved the issue regarding

the sealing of Applicant's sentence for appellate review. Further, this Court finds Moak was not ineffective for failing to file a motion to reconsider sentence and has failed to show how he was prejudiced by any alleged failure to file a motion to reconsider his sentence. Finally, Applicant waived his right to a direct appeal.

The Court notes 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 pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). 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 appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 30 day of August, 2019.


 DIANE SCHAFFER GOODSTEIN
 Presiding Circuit Court Judge
 Fifth Judicial Circuit

Aug 30, 2019

STATE OF SOUTH CAROLINA)
)
 COUNTY OF KERSHAW)
)
 Michael Boykin,)
 S.C.D.C. No. 284399,)
)
 Applicant,)
 v.)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT
 C.A. No. 2018-CP-28-380

**MOTION TO ALTER/AMEND
 JUDGMENT**

FILED FOR RECORD
 2019 OCT 11 AM 8:4
 JANEET C. HASTY
 CLERK OF COURT
 KERSHAW COUNTY, S.C.

Counsel for the Applicant has received the Order of the Court dismissing

Applicant’s claims for Post-Conviction Relief on September 8, 2019. Pursuant to South Carolina Rule of Civil Procedure Rule 59(e), the Applicant hereby requests this Court consider to Alter or Amend the current Judgment based upon the following argument:

1. Failure to Investigate and Introduction of Prescription History Evidence

The prescription evidence offered at trial did not prove that the Applicant was lawfully in possession of the pills found in his possession at the time of arrest, and it was not a viable defense to argue accordingly. Rather, the introduction of the prescription history removed any doubt that the Applicant could have been in possession of the pills lawfully and fully aided the State in their prosecution. Accordingly, the Applicant was prejudiced by the admission of the document. As a result, it cannot be said that attorney Moak’s strategy in dealing with the possession charges as sound and reasonable.

2. Plea Negotiations

It appears that a breakdown in communication between counsel and Applicant resulted in the Applicant proceeding to a jury trial rather than entering a guilty plea and asking for mercy.

The last offer presented to the Applicant prior to trial was to plead guilty to only one count of possession of crack cocaine facing 0-10 years. While the Solicitor intended to ask for a five year sentence, the trial Court was not bound by that request. Moak testified that the Applicant was "hung up" on the State's intent to request five years and that is the only reason he chose to proceed to trial. Upon review of the transcript and the testimony presented in the evidentiary hearing, it appears that Moak failed to explain to Boykin that the Court was not bound by the five year request by the State and Moak could ask for a lesser sentence during a plea hearing. It also appears that Moak failed to explain to Boykin that Solicitor could still request five years, or whatever sentence he wanted, regardless of whether Boykin was convicted by plea or by a jury, as proceeding through a jury trial does not remove the State's ability to request a particular sentence. However, proceeding to trial did increase Boykin's sentence exposure and actual sentence. It is indisputable that if Boykin had accepted the plea offer at the beginning of trial he could not have received a sentence greater than 10 years in prison. However, after being found guilty of possession of crack *and* oxycodone *and* hydrocodone, the State requested consecutive sentences in the aggregate amount of fifteen years. TT. P. 224. Boykin was directly prejudiced when the Court imposed consecutive sentences as requested by the State and received a fifteen year sentence.

Given the nature of counsel's ineffectiveness interfering with Boykin's understanding of whether or not he should accept the plea offer, the most appropriate remedy would be for this matter to be remanded back to General Sessions and allow the plea bargaining process to start over.

3. Issue Preservation Regarding Sealing of Applicant's Sentence and Failure to Ensure Applicant was Brought to Sentencing Hearing.

The issue as to whether or not a sentence must be sealed when the Defendant is not present at the time of sentencing is surprisingly unclear in South Carolina. South Carolina Code Section 17-25-310 addresses the proper procedure for the opening and enforcement of a sealed sentence upon arrest, but does not dictate when a sentence should be sealed. Additionally, while South Carolina case law thoroughly discusses the proper procedure of opening a sealed sentence and the consequences thereof on the appellate procedure, none of these cases establish whether or not a sealed sentence is required. State v. Robinson, 287 S.C. 173, 337 S.E.2d 204 (1985), State v. Washington, 285 S.C. 457, 330 S.E.2d 289, (1985), State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981), State v. Williams, 303 S.C. 410, 401 S.E.2d 168 (1991), Braddock v. State, 344 S.C. 578 (2001). The closest reference to the legal requirement of a sealed sentence is in the facts/procedural background section of State v. Thompson, wherein the Court of Appeals references that a "sealed sentence was given as required by law." 355 S.C. 255, 259, 584 S.E.2d 131, 133 (App. Ct. 2003).

In each of the cases mentioned above a sealed sentence was imposed by the lower court, and the appellate court seemed to acknowledge that this procedure was appropriate. However, each of these cases stem from a defendant's trial in absence. Boykin was not technically tried in his absence, as he was present for the entirety of the presentation of evidence and left prior to closing arguments. There should be a legal question as to whether this distinguishing factor makes a difference regarding the appropriateness of imposing a sentence without seal.

An informal opinion from the Attorney General's office dated April 21, 1995 briefly addresses if and when a sentence should be sealed if a person is tried in their absence. *See, Attorney General letter to the Honorable Robert K. Whitney, Municipal Court Judge, City of*

Westminster, Informal Opinion dated April 21, 1995. This opinion states that there appears to be no legal requirement for the procedure of sealing a sentence but, rather it seems to be the usual practice based on custom. This opinion states that a sentence is usually sealed in South Carolina “presumably to guard against the risk of flight by the absent defendant among other reasons.”

Looking to the jurisprudence available on this issue, the Applicant argues that the practice of imposing sentences without a hearing in which the defendant is present (such a hearing where a sentence is unsealed) may not satisfy the general notice requirement that due process guarantees. The procedure for imposing a sealed sentence is clearly established. The hearing unsealing a sealed sentence places the defendant on notice of the parameters of his sentence and allows him the opportunity to present mitigating information. The hearing also notifies the defendant of his right to file any post-trial motions and his right to appeal and firmly establishes the deadline by which these must be filed. Conversely, when a sentence is imposed without seal the defendant is not clearly placed on notice of his sentence and given the opportunity to present mitigating information. Several of the cases cited above reference motions or objections that could have or should have been made at the time a defendant’s sentence was opened in order to preserve certain rights. When a defendant’s sentence is imposed without seal, this opportunity for a hearing and opportunity to present motions, objections and mitigation does not exist. It is also unclear if the deadline to file post-trial motions or notice of appeal would be calculated from imposition of the sentence in Court or from the subsequent arrest date of the defendant. Of special concern in this matter would be a motion to reconsider sentence, as Boykin was sentenced to consecutive sentences. Therefore, the Applicant would argue that a sentence must be sealed when a defendant is convicted and sentenced in their absence, and they must be given the opportunity to be present in court when the sentence is unsealed.

4. Failure to file Motion to Reconsider Sentence or Notice of Appeal

Boykin testified that he was arrested on his bench warrant on or about March 1, 2018 and delivered to the South Carolina Department of Corrections. He did not receive a hearing of any kind. Boykin testified that his family members unsuccessfully attempted to contact Ronald Moak to request that he file a motion to reconsider his sentence and/or file notice of appeal.

Attorney Moak testified that he was aware of the jurisprudence that dictates that the time to file notice of appeal begins after a sealed sentence is opened. He testified that he *assumed* the same would be true in this case, even though the sentence wasn't sealed, and he waited to hear when Boykin was arrested to file any motions or notice of appeal. Moak testified that was not notified by Boykin's family, law enforcement, the Clerk of Court, or the Solicitor's Office when Boykin was arrested and taken to prison and he did not learn that Boykin was incarcerated until 2-3 months after the arrested. Moak testified that he did not file anything at this time because he believed the legal deadlines had certainly expired. During the evidentiary hearing Moak testified that he believes he should have gone ahead and filed post-trial motions and potentially notice of appeal immediately after trial and sentencing to ensure that Boykin's rights were preserved. Moak testified that he believes that he made a mistake in assuming the matter would be treated like a sealed sentence and in waiting to file anything.

The Applicant argues that counsel was ineffective in preserving his rights in this situation. Given that the sentence was without seal, and given the lack of clarity in the law regarding such sentences, the only way for Moak to have ensured that any post-trial filings were filed in a timely manner was to file them after sentencing. It was unreasonable for Moak to assume that this sentence would be treated the same as a sealed sentence.

Waiver

In the Order, this Court has found that Boykin's voluntary absence from the end of his jury trial constituted a waiver by conduct of any post-trial or appellate rights. Looking to Braddock v. State, the Supreme Court has clearly stated that failure to appear at trial alone "does not act to waive [his] right to appeal from his conviction." 344 S.C. 578, 580, 545 S.E.2d 498, 499 (2001). While Braddock's sentence was sealed and Boykin's sentence was never sealed, this distinguishing factor should not affect the question of whether or not the act of failing to appear constitutes a waiver of appellate rights. If failure to appear at trial does not act, in and of itself, waive a defendant's appellate rights, then the failure to appear at only a portion of the trial (verdict and sentencing) should likewise not act to waive appellate rights.

Therefore, the relevant question should not be whether Boykin's failure to appear resulted in a waiver of his appellate or post-trial rights, but rather, whether or not the failure to file a timely post-trial motion or notice of appeal constituted a knowing and voluntary waiver of those rights. This Court cannot affirmatively find that Boykin made a knowing and voluntary waiver of these rights when trial counsel Moak acknowledged that he incorrectly assumed these filings should be made after the Applicant was arrested. Based on the facts in this matter, this Court should not find that a voluntary waiver existed.

Remedy

Since Boykin did not knowingly and intelligently waive his right to post-trial objections and motions regarding sentencing or otherwise, this Court should find the appropriate remedy for this deficiency would be to remand the matter back to General Sessions to allow a post-trial hearing regarding sentencing and any other issues the Applicant deems appropriate to rise. This remedy, allowing for a hearing, also cures the problem with Moak's failure to object to the

sentence imposition without seal. This appears appropriate, as our Appellate Courts have previously held that post-conviction relief may be tailored to remedy the precise prejudice resulting from trial counsel's deficient performance. *Boan v. State*, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010), *citing Rolan v. State*, 384 S.C. 409, 414-15, 683 S.E.2d 471, 474 (2009) (*citing United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981) (recognizing that the remedy for a violation of the Sixth Amendment right to counsel "should be tailored to the injury suffered from the constitutional violation"))).

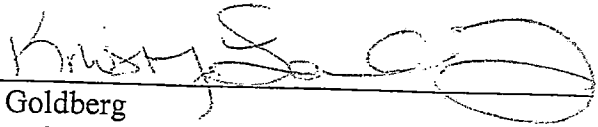
The Applicant should also be allowed to file notice of appeal after any judgment is issued, if he believes any remaining appellate issues exist, within the standard time limitations contained with the South Carolina Appellate Court Rules. Regardless of if any post-trial motions are filed, because the Applicant "did not knowingly and intelligently waive his right to appeal, he is entitled to a belated appeal." *Braddock v. State*, 344 S.C. 578, 580, 545 S.E.2d 498, 499 (2001), *citing Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986); *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). A belated appeal should be allowed to correct the deficiency that occurred.

Remaining Claims

As to the Applicant's remaining claims not addressed in this Motion, Applicant hereby asserts that all allegations offered in his Post-Conviction Relief application and during the hearing were valid claims for Post-Conviction Relief that were sufficiently addressed on the record. Applicant would ask the Court to reconsider all allegations but does not have argument in addition to what has already been presented. The Applicant intends to file a Notice of Appeal regarding the Court's decision on any remaining grounds upon the final conclusion of this case after a ruling on this Motion to Alter/Amend Judgment is received.

Conclusion

The Applicant respectfully requests that this Court reconsider the previous Order and issue a new order to overturn the Applicant's convictions and remand for a new trial on all charges.



Kristy Goldberg
Attorney for Applicant

Kristy Goldberg
Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
803-667-6633
803-799-4059 (fax)
kristy@kristygoldberglaw.com

Columbia, South Carolina

This 1th day of October, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

Michael Boykin, #284399,)
Applicant,)

v.)

State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS)
FOR THE FIFTH JUDICIAL CIRCUIT)

Case No. 2018-CP-28-380)

RETURN TO APPLICANT'S MOTION)
TO ALTER OR AMEND JUDGMENT)

JANET C. HOSTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

FILED FOR RECORD
2019 OCT 24 PM 4:04

The State making its return to Applicant's motion to alter or amend judgment pursuant to Rule 59(e), SCRCF, filed on October 11, 2019, would respectfully show this Court

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Kershaw County Clerk of Court. In April 2017, the Kershaw County Grand Jury indicted Applicant for possession with intent to distribute (PWID) crack cocaine—third offense (2017-GS-28-0768), possession of hydrocodone—third offense (2017-GS-28-0769), and possession of oxycodone—third offense (2017-GS-28-0770). Ronald Moak (Counsel), Esquire, represented Applicant. Assistant Solicitor Brett Perry prosecuted the case.

On January 8–11, 2018, Applicant proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr. The jury convicted Applicant as indicted on the possession of hydrocodone and oxycodone charges, and to the lesser-included offense of possession of crack cocaine. Judge Cooper sentenced Applicant to an aggregate term of fifteen years' imprisonment—concurrent terms of five years for the possession of hydrocodone and oxycodone charges, plus consecutive ten years for possession of crack cocaine. Applicant did not appeal.

Applicant timely commenced this PCR action on April 26, 2018. The State made its return on July 16, 2018. On March 6, 2019, Applicant filed an amended PCR application. This Court

held an evidentiary hearing on June 19, 2019, at the Richland County Courthouse. Applicant was present and represented by Kristy G. Goldberg, Esquire. Assistant Attorney General Brianna L. Schill represented the State.

At the PCR hearing, Applicant testified on his own behalf. Counsel and former counselors James F. Lyon and Michael D. McMullen, Esquires, also testified at the hearing. After reviewing the testimony presented at the PCR hearing and the relevant portions of the record before the Court, the Court denied relief on all Applicant's allegations and dismissed the action with prejudice. Applicant timely filed this motion to alter or amend judgement pursuant to Rule 59(e), SCRCP, on October 11, 2019.

II. Allegations

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

1. Ineffective assistance of Counsel:
 - a. Counsel did not argue anything.
2. Sentencing:
 - a. Sentencing on evidence that was not correct.
3. Prejudice of the Court:
 - a. Picking of the jury.

On March 6, 2019, Applicant, through PCR counsel, amended his PCR application alleging:

1. Ineffective assistance of Counsel:
 - a. Counsel failed to adequately relay and explain the plea offer to Applicant and advise Applicant to accept the plea offer;
 - b. Counsel unreasonably advised Applicant, after Applicant testified at trial, that Applicant would be convicted and was going to receive more time, and Counsel failed to advise Applicant that he had the option to ask the trial court's permission to enter a guilty plea at this point;
 - c. Counsel failed to investigate and reasonably prepare for trial;
 - d. Counsel failed to object after the trial court failed to seal Applicant's sentence;
 - e. Counsel failed to preserve Applicant's due process rights which

were violated by the sentencing procedure that took place, and Counsel failed to ensure that Applicant was brought to court for a sentencing hearing;

- f. Counsel failed to file any post-trial motions on Applicant's behalf including a motion to reconsider the sentence; and
- g. Counsel failed to file a notice of appeal.

At the outset of the evidentiary hearing, PCR counsel indicated Applicant would proceed only on the allegations set forth in the amended PCR application. Therefore, this Court found all other allegations raised in Applicant's original PCR application were waived and abandoned, and those allegations were denied and dismissed with prejudice.

III. Applicant's Motion to Alter or Amend

In his motion to alter or amend, Applicant requests this Court to alter or amend its findings as to: (1) failure to investigate and introduction of prescription history evidence; (2) plea negotiations; (3) issue preservation regarding sealing of Applicant's sentence and failure to ensure Applicant was brought to a sentencing hearing; (4) failure to file a motion to reconsider sentence or notice of appeal; and (5) remaining claims. The order of dismissal issued by this Court on September 19, 2019, contains the findings of facts and conclusions of law regarding these issues as required by section 17-27-80 of the South Carolina Code (2014) and Rule 52(a), SCRPC, and amendment of the order is not necessary to support the Court's ruling. The Court correctly found Applicant had failed to meet his burden as to either deficiency or prejudice as to issues 1-4 and 5 raised in the motion to alter or amend; therefore, the motion should be denied as to these issues. However, after a review of the record and testimony presented, the State concedes Applicant is entitled to relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). For the reasons discussed below, the Court should deny the motion and uphold its order denying relief on the allegations except for relief in the form of belated appellate review pursuant to *White*.

Accordingly, the State joins Applicant's motion to alter or amend on the *White* issue and requests the Court issue an amended order granting only *White* relief.

1. Failure to investigate and introduction of prescription history evidence

Applicant requests the Court to alter or amend its judgment finding Counsel was not ineffective for failure to investigate and introduction of prescription history evidence. Applicant asserts the prescription evidence offered at trial did not prove that Applicant was lawfully in possession of the pills found in his possession at the time of arrest, and Counsel's strategy to present the evidence was not a valid trial strategy under the circumstances of this case. Rather, Applicant contends Counsel's strategy to introduce the prescription history removed any doubt that Applicant could have been in possession of the pills lawfully and fully aided the State in its prosecution. This Court found Counsel's strategy to introduce the prescription history was a valid trial strategy and denied relief on this allegation. The Court correctly concluded Counsel articulated a valid trial strategy for introducing Applicant's prescription history at trial, and, therefore, the Court should not alter or amend its judgement on this issue.

The Court found Counsel was not deficient, reasoning: Counsel testified Applicant wanted to introduce his prescription history at his trial, and Counsel thought it could provide an alternative legal explanation for why Applicant was in possession of hydrocodone and oxycodone pills even if the dates and dosages did not precisely match, as the State had no way of proving when Applicant obtained the pills found in his possession. As Applicant testified, the hydrocodone and oxycodone pills were found on Applicant's person and, accordingly, Applicant never denied that he was in personal possession of the pills or that the pills were in fact oxycodone and hydrocodone. Therefore, Counsel attempted to introduce the prescription history evidence in an attempt to

convince the jury that Applicant was lawfully in possession of hydrocodone and oxycodone pills, as this was the only viable defense to the charges.

The Court found Counsel's strategy to deal with the possession charges was sound and reasonable. See *Whitehead v. State*, 308 S.C. 119; 122, 417 S.E.2d 529, 531 (1992) ("[W]here counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."); see also *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (stating judicial scrutiny of counsel's performance must be highly deferential); *Strickland*, 466 U.S. at 693 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). Counsel was not ineffective simply because the jury did not believe his argument. See *Strickland*, 466 U.S. at 689 (stating in making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time"). The Court's finding that Counsel articulated a valid trial strategy to attack the possession of hydrocodone and oxycodone charges is supported by the testimony presented at the PCR hearing. As such, this Court should not alter or amend its judgement on this issue.

2. Plea negotiations

Applicant requests the Court to alter or amend its judgment finding Counsel was not ineffective for failure to convey and recommend Applicant accept the State's plea offer. Applicant contends there was a breakdown in communication between Counsel and Applicant that resulted in Applicant proceeding to a jury trial rather than entering a guilty plea. The Court found this allegation was without merit and denied relief.

The Court found credible Counsel's and Applicant's previous counselors' testimony they communicated and explained the plea offers to Applicant, but Applicant would not accept any of the plea offers because he did not want to receive any jail time. Further, Counsel recited Applicant's plea offer history on the record at trial and indicated all offers were communicated to Applicant. (Trial Tr. 6-7). Applicant did not dispute this fact either at trial or the evidentiary hearing. Further, Counsel specifically testified he and Applicant discussed the consequences of pleading guilty versus going to trial. The Court ultimately found it was Applicant's decision whether he wanted to plead guilty or go to trial, and Applicant chose to proceed to trial rather than accept the plea offers. This ruling is supported by the credible testimony from the PCR hearing.

Applicant contends it appears from the record and the PCR testimony, Counsel failed to explain to Applicant that the plea court would not be bound by the State's request for Applicant to receive five years, and Counsel could request for a lesser sentence during the plea hearing. Further, Applicant contends Counsel did not explain to Applicant the State could request a specific sentence had Applicant been convicted at trial.

Applicant contends he was prejudiced by Counsel's alleged deficiency of failing to explain the sentencing consequences of proceeding to trial rather than pleading guilty because if Applicant had accepted the State's plea offer, the maximum sentence he could have received would have been ten years. However, because Applicant was convicted at trial, he received an aggregate fifteen year sentence. This assertion is without merit. As mentioned above, this Court found credible Counsel's testimony that Applicant did not want to accept any of the State's plea offers because Applicant did not want to receive any jail time. Applicant simply chose to risk more jail time if convicted or receiving no jail time if he was successful at trial. Based on this credibility

finding, the Court concluded Applicant knowingly and voluntarily rejected the State's offers and chose to proceed to trial. As such, Applicant's motion to alter or amend judgement on this issue should be denied.

3. Issue preservation regarding sealing of Applicant's sentence and failure to ensure Applicant was brought to a sentencing hearing

Applicant requests the Court to alter or amend its judgment finding Counsel was not ineffective for Failure to preserve the issue regarding the sealing of Applicant's sentence and failure to ensure Applicant was brought to a sentencing hearing. Applicant contends the issue whether or not a sentence must be sealed when a defendant is not present at sentencing "is surprisingly unclear in South Carolina." (Motion, 3). Applicant asserts his case is distinguishable from South Carolina case law where a defendant is tried in his absence, and thus, the sentence is to be sealed. However, Applicant acknowledges he was present for the entirety of the presentation of evidence but left before closing arguments and sentencing. Applicant contends Counsel should have preserved for appellate review the legal question as to whether this distinguishing factor makes a difference regarding the appropriateness of imposing an unsealed sentence.

In support of this argument, Applicant references an Attorney General's Office informal opinion from April 21, 1995, which briefly addresses if and when a sentence should be sealed if a person is tried in their absence. This informal opinion was presented at the PCR hearing. The opinion suggests there appears to be no legal requirement for the procedure of sealing a sentence, but rather, it appears to be the usual practice based on custom. Applicant asserts the practice of imposing sentences without a hearing in which the defendant is present may not satisfy the general notice requirement that due process guarantees. Applicant argues when a sentence is imposed without seal, the defendant is not clearly placed on notice of his sentence and given the opportunity

to present mitigating information. Applicant asserts the notice is especially important for Applicant to move for sentence reconsideration because Applicant was sentenced to a consecutive sentence. As such, Applicant contends that a sentence must be sealed when a defendant is convicted and sentenced in their absence, and the defendant must be given the opportunity to be present in court when the sentence is unsealed.

Applicant's contentions that Counsel was ineffective in failing to preserve whether the unsealed sentence was erroneous fails for three reasons. First, Applicant's aggregate sentence was a legal sentence as sentencing was within the trial court's discretion. Second, Applicant acknowledges whether Applicant's sentence should have been sealed is a novel question of law. *See Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) ("This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law."). Because the question is a novel issue, Counsel cannot have been deficient for failing to foresee the questionably successful appellate challenge. Finally, as this Court found in the order of dismissal, this question arguably was preserved for appellate review because whether the sentence should be sealed or unsealed was raised to and ruled on by the trial court. Therefore, Counsel was not deficient for failing to preserve the novel issue. Accordingly, the Court should deny Applicant's motion to alter or amend judgment as to this issue.

4. Failure to file a motion to reconsider the sentence or a notice of appeal

Applicant requests the Court to alter or amend its judgment finding Counsel was not ineffective for failure to file a motion to reconsider the sentence or a notice of appeal. In making this assertion, Applicant requests this Court to reverse its finding that Counsel was reasonable to expect Applicant's sentence would be treated as a sealed sentence. However, as stated above,

whether Applicant's sentence should have been sealed or unsealed is a novel question of law. As such, the deadlines for when to file post-trial motions would also be a novel question of law. Further, Applicant never requested Counsel to file a motion to reconsider the sentence or a notice of appeal. While Counsel testified in hindsight, he should have filed a motion to reconsider and notice of appeal immediately after the trial court sentenced Applicant, Counsel stated he felt at the time, the timing for a motion to reconsider and notice of appeal would run as if the sentence had been sealed.

In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Whether Applicant's sentence should have been sealed is a novel question of law; accordingly, the timing for Counsel to file a motion to reconsider would also be a novel question. Counsel's hindsight testimony gives little weight to Counsel's reasoning at the time Applicant was sentenced. As such, the Court found Counsel's failure to move for sentencing reconsideration reasonable, as Applicant never requested for Counsel to move as such. Further, Applicant has failed to show prejudice because he presented nothing to indicate the trial court would have changed its original sentence. Applicant testified he hoped he could ask for a "better plea deal" by way of a motion to reconsider the sentence. However, the State would not have had the authority to offer Applicant a "better plea deal." See *State v. Johnson*, 287 S.C. 171, 172, 337 S.E.2d 204, 205 (1985) (finding the State has no authority to enter into plea negotiations for a charge in which the defendant has already been convicted). At most, Applicant could have

requested a new trial, but Applicant could not have received a better plea deal once he had already been convicted.

This Court also found Applicant waived his right to a direct appeal by absconding before closing arguments and sentencing citing *Simuel v. State*, 390 S.C. 267, 271, 701 S.E.2d 738, 740 (2010). Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either: (1) that a rational defendant would want to appeal; or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). "Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal." *Simuel*, 390 S.C. at 270, 701 S.E.2d at 739. "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967)." *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008).

There is no evidence in the record Applicant was advised of his right to a direct appeal. However, the Court found Applicant waived his right to a direct appeal when he absconded during trial. Applicant's claims he should be granted a belated direct appeal because he did not knowingly and voluntarily waive his right to a direct appeal when he fled. In *Braddock v. State*, our Supreme Court held a defendant tried in his absence did not waive his right to appeal from his conviction. 344 S.C. 578, 580, 545 S.E.2d 498, 499 (2001). Where a defendant is tried in his absence, an appeal may not be taken until the judgment is final. *State v. Robinson*, 287 S.C. 173, 173, 337 S.E.2d 204, 204 (1985). "Judgment in a criminal case is not final until sentence is imposed." *Id.*

Here, Applicant absconded before he was convicted. As such, Applicant was tried in his absence. While the trial court refused to seal Applicant's sentence, Applicant's sentence did not

become final until the sentence was imposed. *See Robinson*, 287 S.C. at 173, 337 S.E.2d at 204 (“Judgment in a criminal case is not final until sentence is imposed.”). Therefore, Counsel was correct in assuming the time to file a notice of appeal did not run until Applicant was arrested after his conviction. However, this Court found Applicant presented no evidence he attempted to contact Counsel after his arrest to notify Counsel he had been arrested. Because Applicant made no effort to contact Counsel after he was arrested, the Court found Applicant failed to show he did not knowingly and voluntarily waive his right to a direct appeal. At this juncture, the State concedes Applicant did not knowingly and intelligently waive his right to a direct appeal, as Applicant is entitled to a direct appeal of his conviction. In making this concession, the State points out if Applicant is denied his right to a belated appeal even though he was never advised of his right to a direct appeal, Applicant has an arguable claim for federal habeas corpus relief on this issue. *See Frazer v. South Carolina*, 430 F.3d 696, 711 (4th Cir. 2005) (“Simply demonstrating that the defendant was actually or constructively aware of his right to appeal is insufficient to relieve defense counsel of his obligations under *Flores-Ortega*.”). Therefore, the State concedes to limited relief granting Applicant belated appellate review pursuant to *White*.

5. Remaining Claims

Applicant requests the Court to reconsider all of Applicant’s other allegations, but does not present further argument in addition to what was already presented to the Court. As such, this Court should not reconsider its rulings on the other allegations, and should deny Applicant’s motion to alter or amend the other allegations.

IV. Conclusion

Based on the foregoing, Applicant’s motion should be denied. This Court’s ruling was legally correct and supported by the record, and this Court should deny Applicant’s request to alter

or amend its ruling. This Court properly ruled on all issues before it after ample opportunity for Applicant to present his issues. Therefore, the motion should be denied as to issues 1-4 and 5; however, the State concedes Applicant is entitled to belated appellate review and requests the Court issue an amended order granting Applicant belated appellate review pursuant to *White v. State*.

Respectfully submitted,


ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

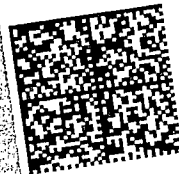
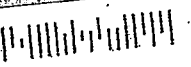
MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

BRIANNA SCHILL
Assistant Attorney General

SAMUEL L. KEY
Assistant Attorney General

BY: 
ATTORNEYS FOR THE STATE
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

10/22, 2019



U.S. POSTAGE
\$1.90

FCM LG ENV
29206 0000
Date of sale
12/16/19
06 250
11488004

FOLD HERE

F
Iberg, LLC
AW
SUITE 303
COLINA 29201

RECEIVED

DEC 17 2019

S.C. SUPREME COURT

The Honorable Daniel Shearouse
Clerk of Court - South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211