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DEC 19 2019

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jocelyn Newman, Circuit Court Judge

Case No. 2017-CP-40-01585

Shiquan Tyon Cwiklinski,

Petitioner,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Shiquan Cwiklinski appeals the Honorable Jocelyn Newman's Order Denying Application for Post-Conviction relief, and the Court's Order Denying Motion to Alter or Amend (Rule 59(e), SCRCP) filed on **December 13, 2019**.

Dayne C. Phillips, Esq.
1614 Taylor Street, Suite D.
Columbia, SC 29201

December 19, 2019

Other Counsel of Record:
Lindsey McCallister, Assistant Attorney General
South Carolina Attorney General's Office
1000 Assembly Street, Room 519
Columbia, SC 29201

cc: Jeanette W. McBride, Richland County Clerk of Court
Shiquan Tyon Cwiklinski (SCDC)
SCCID, Appellate Division

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Lindsey McCallister, Esq., the Honorable Jeanette W. McBride, and Shiquan Tyon Cwiklinski, by depositing a copy in the United States Mail, postage prepaid, on **December 19, 2019**, addressed to the following parties:

Lindsey McCallister, Esquire, South Carolina Attorney General's Office
1000 Assembly Street, Room 519, Columbia, SC 29201

The Honorable Jeanette W. McBride, Richland County Clerk of Court
PO Box 2766, Columbia, SC 29202

Shiquan Tyon Cwiklinski, Perry Correctional Institution,
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December 19, 2019

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Shiquan Tyon Cwiklinski (SCDC #365746), Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2017-CP-40-01585 **ORDER OF DISMISSAL**

This matter came before the Court upon Application for Post-Conviction Relief ("PCR") filed by Applicant Shiquan Tyon Cwiklinski ("Applicant") on March 16, 2017. Respondent filed its Return on September 15, 2017. An evidentiary hearing was conducted at the Richland County Judicial Center on December 3, 2018. Applicant was present along with his counsel, Dayne C. Phillips, Esquire; and the State of South Carolina was represented by Assistant Attorney General Lindsey A. McCallister, Esquire.

At the hearing, Applicant testified on his own behalf. Anastasia Walker, Esquire ("Plea Counsel") also testified. Additionally, this Court had before it a copy of the records of the Richland County Clerk of Court, the PCR application, Respondent's Return, the plea transcripts, the arrest warrant, and indictments. For the reasons set forth below, the Application for Post-Conviction Relief is DENIED, and this matter is DISMISSED WITH PREJUDICE.

FACTUAL AND PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to order of commitment of the Richland County Clerk of Court. During the July 2013 term, the Richland County Grand Jury indicted Applicant

for two counts of Attempted Murder (indictments 2013-GS-40-4043 and -4044) and one count of Possession of a Weapon During the Commission of a Violent Crime (2013-GS-40-4045). Applicant was represented by Plea Counsel. Assistant Solicitors Dolly J. Garfield, Esquire, and Joseph Shenkar, Esquire, prosecuted the case.

On October 15, 2015, before the Honorable Tanya A. Gee, Applicant pleaded guilty as indicted to Possession of Weapon During the Commission of Violent Crime and to the lesser-included offenses of Assault and Battery of a High and Aggravated Nature (ABHAN). Judge Gee sentenced Applicant to imprisonment for twenty (20) years for each ABHAN charge and five (5) years imprisonment for Possession of a Weapon During the Commission of a Violent Crime, with all sentences to be served concurrently.

Following his guilty plea, Applicant filed a timely notice of appeal on October 21, 2015.[1] On March 29, 2016, the South Carolina Court of Appeals dismissed Applicant's appeal for his failure to comply with the requirements of Rule 203(d)(1)(B)(iv), SCACR, which requires a preliminary showing of potentially meritorious issues for an appeal from a guilty plea. *State v. Cwiklinski*, No. 2015-002185 (S.C. Ct. App. filed March 29, 2016). The Remittitur was returned on April 20, 2016.

Applicant then filed the instant Application for PCR in which he alleges "ineffective assistance of counsel" and that he was unlawfully incarcerated for the following reasons:

(a) Counsel was ineffective, failed to inform Applicant of all available defenses and failed to notify Applicant of right to challenge the voluntariness of his confession to police
(b) Counsel was ineffective, failed to review critical evidence with Applicant, failed to review surveillance video recording of shooting and the recorded police interrogations of Applicant and Kendell Pollock

[1] The notice of appeal states it was filed October 21, 2014, which appears to be scrivener's error.

(c) Counsel was ineffective, failed to inform Applicant that Prosecutor would recommend the maximum sentence at plea hearing
(d) Counsel was ineffective, erroneously advised Applicant that he would receive a sentence of ten years imprisonment
(e) Counsel was ineffective, failed to file a Motion for Reconsideration of the Sentence despite Applicant's timely and specific request
(f) Counsel was ineffective, failed to conduct a reasonable investigation and interview witnesses
(g) Counsel was ineffective, failed to adequately explain to Applicant the meaning and consequences of pleading guilty to two serious and violence offenses
(h) Counsel was ineffective, failed to adequately explain to Applicant the State's burden of proof and the procedural for a jury trial

At the beginning of the evidentiary hearing, Applicant, through counsel, added an additional allegation of ineffective assistance of counsel when he alleged Plea Counsel failed to obtain a proper waiver of presentment.

I. Attempted Murders and Possession of a Weapon During the Commission of a Violent Crime Charges

On or about February 23, 2013, while in the Five Points area of the City of Columbia, at approximately 2:01 a.m., a person was recorded on video in possession of a handgun, pointing it towards a crowd at the intersection of Harden and Greene Streets, then firing the weapon approximately seven times. Included in the crowd was Investigator E. Gilliam of the Columbia Police Department. Investigator Gilliam had a suspect named Kendale Pollock in custody at the time of the shooting and ducked down out of fear for his own safety and for the safety of Mr. Pollock.

After conducting an investigation, the Richland County Sheriff's Department received information from residents in the area that the individual with the gun went to a particular car. Law enforcement ran the license tag of the car, and it came back registered to Applicant's mother. During this time, Investigator Jay Christian Ross contacted the owner of the security system in Five Points that had the video footage of the incident in question. While reviewing the video, law

enforcement observed Applicant shooting. Additionally, Investigator Gilliam, while watching the video, noticed Applicant not only fire in his direction but also walk in his direction and have a conversation with him afterwards providing his information.

Law enforcement was able to locate Applicant the next day and noticed he was wearing some of the same clothing from the night before. After Applicant waived his *Miranda* rights, law enforcement began to interview him. The interview lasted over an hour. Initially, Applicant denied his involvement in the shooting; however, after reviewing the video footage from Five Points, Applicant admitted to shooting a gun that night. Applicant did not tell law enforcement where the gun was but claimed that he had thrown the gun into Broad River and he said that he was not shooting at anyone in particular, but he was just shooting in the air trying to scare someone.

II. Plea Hearing

On September 22, 2016, Applicant and Plea Counsel appeared before Judge Gee ("plea judge") on Applicant's request to plead guilty pursuant to a plea offer, where the State dismissed unrelated charges of Burglary in the Second Degree, Petty Larceny, and two counts of Attempted Murder from separate events in exchange for Applicant's guilty plea to a lesser-included offense of ABHAN and one count of Possession of a Weapon During the Commission of a Violent Crime.

At the hearing, the State played the video footage from Five Points, showing Applicant as the suspect shooting towards the crowd the night of the incident. After informing Applicant of his constitutional rights, and Applicant wanting to proceed with the guilty plea, the plea judge sentenced Applicant to concurrent imprisonment of twenty (20) years on the ABHAN charge and five (5) years on the Possession of a Weapon During the Commission of a Violent Crime charge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. CODE ANN. §17-27-80 (2003).

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleged he received ineffective assistance of counsel due to multiple deficiencies by Plea Counsel which are laid out in Applicant's PCR Application and discussed further below. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

First, the applicant must show that counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

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; *see Strickland*, 466 U.S. at 688, 692, 104 S. Ct. at 2065, 2067 ("[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness [and] . . . any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."); *see also Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) ("PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case.").

"Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Watson v. State*, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) (citing *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992)). "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting *Strickland*, 466 U.S. at 690). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Id.* (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). "Courts must be wary of second-guessing counsel's trial tactics; and where 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, 417 S.E.2d 529 (1992) (citing *Goodson v. United States*, 564 F.2d 1071 (4th Cir. 1977)).

I. Evidentiary Hearing

During the evidentiary hearing, Applicant testified he retained Johnny Watson as counsel, but after his representation had ended, he was appointed Plea Counsel. Plea Counsel took over representation approximately a year before Applicant pleaded guilty. Applicant testified he remained in the detention center awaiting a resolution of his case, and Plea Counsel only came to meet with him twice. According to Applicant, at their first meeting, Plea Counsel explained the charges and asked for his version of the facts, and at the second meeting, they discussed the plea agreement. However, Applicant testified Plea Counsel never explained his constitutional rights or the trial process; Plea Counsel merely told him he would lose if he went forward with a trial. Applicant estimated he met with Plea Counsel for no more than thirty minutes total, throughout the course of her representation of him.

Applicant further testified Plea Counsel discussed the terms of the State's plea offer with Applicant, but they never reviewed or discussed any discovery. According to Applicant, he believed the State's plea offer carried a sentencing range of zero-to-twenty years, but it would be capped at ten years, and Plea Counsel would ask for seven. Applicant stated he did not review the surveillance video of the shooting or any of the witness statements with Plea Counsel prior to the plea, but the investigating officers showed him the surveillance video during questioning. Further, Applicant testified he and Plea Counsel never discussed any investigation to be done of the officers, victims, or witnesses involved; any potential defenses or strategies; or the possibility of making pre-trial motions to suppress statements or the eyewitness identification. Applicant also testified Plea Counsel never mentioned anything about the Grand Jury process, whether or not his

indictments had been reviewed by the Grand Jury, and his right to waive (or not) presentment of the indictments.

Applicant testified he believed the maximum sentence he would receive was ten years, and he would not have pleaded guilty if he had known he could be sentenced to twenty years. According to Applicant, Plea Counsel told him he would receive a ten-year sentence. Applicant also testified if Plea Counsel had discussed potential defenses with him, he would not have pleaded guilty because he "could beat it," but Plea Counsel only told him he would be convicted if he went to trial. However, on cross-examination, Applicant admitted he signed an affidavit[2] explaining the terms of the plea agreement, but Applicant stated he did not read the document because he thought he was going to receive ten years. Applicant also admitted he never told the plea judge the agreement as recited by the State was not what he agreed to, nor that he was unsatisfied with Plea Counsel's representation. Further, Applicant agreed he never told Plea Counsel he wanted a trial. Finally, Applicant testified he instructed Plea Counsel to file a Motion for Reconsideration of his sentence immediately after the plea, but Plea Counsel filed a notice of appeal instead.

Plea Counsel also testified at the evidentiary hearing and stated she met with Applicant ten times, though most of those meetings were about defining her representation. According to Plea Counsel, Applicant had an earlier set of charges, and he wanted Mr. Watson to represent him on everything, but a Circuit Court judge eventually ruled Plea Counsel was the attorney of record for the cases at issue in this PCR action. Plea Counsel testified she met with Applicant three times, and they reviewed discovery, discussed the charges, and discussed the surveillance video. Plea Counsel explained she did not play the video for Applicant because he had already seen it, but they

[2] The plea affidavit, advice of rights form signed by Applicant prior to giving his statement, sentencing sheets, indictments, and notice of appeal were introduced as exhibits during the evidentiary hearing. This Court has reviewed and considered those documents in making its ruling.

discussed the content of the video. Plea Counsel testified the video was the main evidence against Applicant, in addition to several other witnesses who could place him in the vicinity of the shooting. Plea Counsel further testified she reviewed and sent copies of all the paper discovery to Applicant, such as the advice of rights form Applicant signed before giving a statement. Plea Counsel stated she did not have a specific memory of reviewing the advice of rights form with Applicant, but they would have discussed each item on the form, as is her usual practice. Plea Counsel also did not recall whether Applicant's statement was written or recorded, but she testified she would have reviewed the contents of the statement with Applicant regardless of its form. Plea Counsel testified she did not specifically recall speaking with any of the investigators, victims, or witnesses, but one of the victims was present at the plea hearing and spoke on Applicant's behalf, rather than the State's.

According to Plea Counsel, she negotiated the plea agreement with Assistant Solicitor Shenkar, who was prosecuting Applicant's other set of charges and assisting on this case. Plea Counsel denied she told Applicant he would receive a maximum sentence of ten years. She testified the offer was always a "straight up" plea, and she did not recall ever discussing a cap of ten years. Plea Counsel further testified she would have reviewed the terms of the plea with Applicant on the day of the plea hearing in conjunction with Applicant signing the plea affidavit, and the affidavit stated the plea was "straight up." Plea Counsel stated her discussion with Applicant would also have included an explanation of Applicant's constitutional rights including the right to a jury trial and the State's burden of proof; however, Plea Counsel's notes indicated Applicant said he did not want a trial. Plea Counsel also testified she explained the sentencing sheet to Applicant, which included a check mark in the box indicating the plea was "without recommendation or negotiation." Plea Counsel explained her standard practice is to inform clients

that when the box is checked it means both sides can ask for anything they want, and she would have given Applicant a similar explanation.

Additionally, Plea Counsel testified Applicant pleaded guilty to ABHAN, which did not require a waiver of presentment of the indictment to the Grand Jury because it is a lesser-included offense of Attempted Murder. However, Plea Counsel testified Applicant nonetheless signed an indictment for ABHAN, indicating he was waiving presentment to the Grand Jury, and she explained to Applicant, ABHAN was a lesser-included offense. Plea Counsel further testified she explained to Applicant the conviction would be classified as a most serious strike in terms of the life without parole statute and strike system, and it would be classified as violent, which would require him to serve at least eighty-five percent of his sentence and participate in the Community Supervision Program upon release. Plea Counsel also noted this information was covered in the plea affidavit and in Applicant's colloquy with the plea judge. Plea Counsel stated, in her opinion, Applicant was fully aware of the charge to which he was pleading guilty, and he entered into the guilty plea voluntarily. Plea Counsel stated she recommended Applicant accept the plea offer. Finally, Plea Counsel testified she did not recall Applicant asking her to file a Motion for Reconsideration, but his mother told her Applicant was unhappy with his sentence and asked her to file an appeal, which she did.

II. Involuntary Plea; Failure to Inform Applicant of Maximum Sentence at Plea Hearing; Erroneously Advising Applicant of Ten Years' Imprisonment; Failure to Adequately Explain the Consequences of Pleading Guilty to a Serious and Violent Offense, and Failure to Adequately Explain the State's Burden Of Proof and the Procedure for a Jury Trial

Applicant alleges his guilty plea was entered involuntarily because he was unaware the State would ask the plea judge to impose the maximum sentence, and if he had known, he would

not have pleaded guilty. Applicant also alleges Plea Counsel told him he would receive a ten-year (10) sentence, and Plea Counsel failed to adequately explain the State's burden of proof and procedures for trial. For the reasons explained below, this Court finds these allegations are without merit. Thus, these allegations shall be denied and dismissed with prejudice.

"Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants." *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)). "A defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases." *Richardson v. State*, 310 S.C. 360, 363, 426 S.E.2d 795, 797 (1993) (citing *Hill v. Lockhart*, 474 U.S. 52, 56 (1985)).

"[A] guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded of attorneys in criminal cases.'" *Strickland*, 466 U.S. 668, 687 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 770 (1970)). "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88.

"Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (citation omitted). Applicant has not done that here.

At the plea hearing, the plea court began its colloquy with Applicant by explaining Applicant was pleading guilty to two counts of ABHAN and one count of Possession of a Weapon During the Commission of a Violent Crime, and Applicant indicated he understood and agreed. The plea court also explained Applicant was facing up to forty-five (45) years' imprisonment on the charges, and Applicant again indicated he understood and wished to plead guilty. Next, the plea court explained Applicant's guilty plea would require him to give up his constitutional rights to a jury trial, his right to confront the witnesses against him, and his right to remain silent; Applicant stated he understood and agreed Plea Counsel had reviewed these rights with him. The plea court explained these charges were classified as both "violent" and "serious" offenses which would affect the amount of time Applicant would serve, as well as his status under South Carolina's "three strikes law." Applicant indicated Plea Counsel had explained these issues to him, as well as the strike law and the potential future consequences of this plea under the life without parole statue. The plea court then specifically inquired whether Applicant had been promised anything in order to get him to agree to plead guilty, and Applicant informed the plea court nothing had been promised to him. Further, even after the State requested the maximum sentence, the plea court asked Applicant if he still wished to plead guilty, and Applicant indicated he did.

Additionally, this Court finds credible Plea Counsel's testimony she never promised Applicant a ten-year sentence and finds such testimony is supported by the plea colloquy, the sentencing sheet, and the plea affidavit. Plea Counsel also credibly testified her usual practice is to tell clients the State will recommend the maximum sentence during a "straight up" plea unless it specifically agrees to remain silent, which this Court finds is correct advice. As the Court of Appeals explained in *State v. Rikard*, 371 S.C. 295, 638 S.E.2d 72 (Ct. App. 2006), "[t]he sentencing sheet offers three alternatives to designate the nature or status of the plea. Those

alternatives provide that the plea is: (1) without negotiations or recommendation; (2) a negotiated sentence; or (3) a recommendation by the State." *Id.* at 302, 638 S.E.2d at 76. The Court of Appeals held "[i]t is axiomatic that the phrase 'without negotiations or recommendation' means that the State and the defendant have not agreed on sentencing. Therefore, either party is free to request a favorable sentence." *Id.; cf. Smith v. State*, 413 S.C. 194, 775 S.E.2d 696 (2015) (finding plea counsel ineffective for failing to object when the State asked for the maximum sentence because the plea agreement included a condition that the State remaining silent at sentencing).

The Court also finds Applicant was fully informed ABHAN is classified as a violent and serious offense, which affects the amount of time Applicant must serve and has potential future consequences under South Carolina's "strike" system. Plea Counsel's testimony is again supported by the plea colloquy and the plea affidavit, the latter of which this Court finds dispositive on the issue of whether Applicant was fully informed as to the parameters of the plea agreement. Finally, the Court finds credible Plea Counsel's testimony she reviewed Applicant's constitutional rights, including his right to a jury trial, with him on multiple occasions, but Applicant never told Plea Counsel he wanted a trial.

Having weighed the credibility of the testifying witnesses and having considered the admissions and explanations offered, this Court cannot find Plea Counsel was ineffective in conveying the plea offer to Applicant and explaining the agreement. This Court finds Applicant pleaded guilty freely and voluntarily, with full knowledge of the potential sentence he could receive and the constitutional rights he was waiving by doing so. This Court also finds Applicant represented no promises had been made to him to induce his plea and indicated he understood the charges to which he was pleading guilty, the potential maximum sentence, and his right to demand a jury trial in lieu of pleading guilty. Moreover, Applicant never informed the plea court he had

been promised a ten-year sentence, and he indicated he still wished to plead guilty even after the State asked the plea court to sentence Applicant to the maximum term. Further, while Applicant contends that he would not have plead guilty but for Plea Counsel's advice, this is not supported by the evidence. Rather, the credible testimony in this case is that Applicant wanted to plead guilty and hoped the sentenced offered by the State would have been ten years. In addition, Applicant has failed to establish a different outcome would have been likely, especially since the defense Applicant would have asserted is not one of actual innocence. Therefore, the PCR application is denied as to these allegations.

III. Failure to Investigate, Failure to Review Surveillance Video and Witness Statements with Applicant, and Failure to Inform Applicant of Potential Defenses

Applicant alleges Plea Counsel was ineffective because she failed to inform Applicant of all available defenses – specifically Applicant's right to challenge the voluntariness of his confession to police; failed to review critical evidence with Applicant prior to his guilty plea hearing – specifically, the surveillance video recording of the shooting in Five Points and the recorded police interrogations of Applicant and Kendell Pollock; and failed to conduct a reasonable investigation and interview witnesses. For the reasons set forth below, this Court disagrees and finds Applicant failed to prove Plea Counsel was constitutionally ineffective on any of these bases. Therefore, these allegations shall be denied and dismissed with prejudice.

"[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)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins v. Smith,* 539 U.S. 510, 521-22 (2003). In addition, the South Carolina Supreme Court has repeatedly held 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. *See, e.g., Bannister v. State,* 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

This Court finds credible Plea Counsel's testimony she reviewed all paper discovery with Applicant, including the Advice of Rights Form Applicant signed. Plea Counsel also stated she reviewed with Applicant written statements, and discussed the content of the surveillance video from Five Points. By Applicant's own admission, he saw the video at least once, when he was being questioned by investigators, so it is uncontested Applicant was aware of the video's existence when he decided to plead guilty. Further, the plea transcript reflects the video was played during the State's presentation of the facts at the plea hearing, and Applicant did not raise an objection to the video or inform the plea court he had not seen or needed more time to speak to Plea Counsel about it. Instead, Applicant agreed with the facts as presented by the State, including that he was the person seen shooting on the video. Additionally, after seeing the video, Applicant confessed his involvement in the shooting to officers.

Although Plea Counsel could not specifically recall if she spoke with the investigators or witnesses, Applicant failed to establish prejudice by presenting potential witnesses and evidence

he alleges Plea Counsel should have prepared. Moreover, mere speculation by Applicant that he might have been able to challenge his statement or any other piece of evidence is insufficient to meet Applicant's burden. *See Moorehead*, 329 S.C. at 334, 496 S.E.2d at 417 (holding trial counsel's failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial. Therefore, this Court finds, to the extent Applicant established Plea Counsel was deficient, he nonetheless failed to prove he was prejudiced by any of Plea Counsel's alleged deficiencies. This Court therefore finds Plea Counsel was not constitutionally ineffective on these grounds, and Applicant's PCR application is denied as to these allegations.

IV. Failure to File a Motion for Reconsideration of the Sentence

Applicant alleges he requested Plea Counsel to file a Motion for Reconsideration of his sentence, and Plea Counsel failed to do so despite a timely and specific request. This Court finds this allegation is without merit. Specifically, this Court finds credible Plea Counsel's testimony that she did not recall Applicant asking her to file a Motion for Reconsideration.

Instead, Plea Counsel stated Applicant's mother informed her Applicant was unhappy with his sentence and asked her to file an appeal, which Plea Counsel did. Additionally, this Court has reviewed the plea transcript and finds no basis for a successful Motion for Reconsideration. The transcript reflects the plea judge, after viewing the surveillance video, characterized Applicant's conduct as "surreal," "stupid," "scary," and "incredibly dangerous." The judge also indicated she "believe[d] in justice tempered with mercy," which in this case was the State's willingness to allow Applicant to plead to a lesser-included charge. Therefore, this Court finds a Motion for

Reconsideration was not reasonably likely to have resulted in a reduced sentence, and therefore Applicant was not prejudice by Plea Counsel's failure to file the motion. Since Applicant has failed to meet his burden of proof as to both the deficiency and prejudice prongs, this Court finds Plea Counsel was not constitutionally ineffective, and this allegation is denied and dismissed on these grounds.

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 his application. Plea Counsel was not deficient in any manner, nor was Applicant prejudiced by her representation. Therefore, this application for PCR must be denied and 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 of this Court's decision. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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

IT IS FURTHER ORDERED that Applicant Shiquan Tyon Cwiklinski be REMANDED to the custody of the State of South Carolina.

AND IT IS SO ORDERED.

Jocelyn Newman
Presiding Judge

May 22, 2019
Columbia, South Carolina.

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP4001585

SHIQUAN TYON CWIKLINSKI (SCDC #365746)

PLAINTIFF(S)

STATE OF SOUTH CAROLINA

DEFENDANT(S)

Submitted by: NEWMAN, J.

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

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

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

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

RICHLAND COUNTY FILED 2019 DEC 13 PM 3:58

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

ORDER INFORMATION

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Jocelyn Newman

Circuit Court Judge

2757
Judge Code

December 12, 2019
Date

For Clerk of Court Office Use Only

This judgment was entered on the 13th day of Dec, 20 19 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Jeanette W McBride

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Shiquan Tyon Cwiklinski (SCDC #365746), Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2017-CP-40-01585 **ORDER** **DENYING MOTION TO ALTER OR AMEND**

This matter came before the Court upon "Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP," filed by Applicant Shiquan Tyon Cwiklinski ("Applicant") on May 28, 2019. In his motion, Applicant objects to the Order of Dismissal filed on May 22, 2019, and asks that the Court reconsider its decisions contained therein.

For the reasons set forth below, Applicant's motion is DENIED.

ARGUMENT 1: DUE PROCESS

Applicant first argues that the Order of Dismissal deprives him of the fundamental fairness of the judicial process which is mandate by the due process clause. The thrust of this argument is the Order of Dismissal closely mirrors the proposed order drafted by Respondent's counsel and that the Court did not provide Respondent's counsel with a specific basis for denying Applicant's claims.

In support of his argument that the Court "impermissibly adopted a modified version" of Respondent's proposed order, Applicant cites *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007). However, *Marlar* does not stand for this proposition. Instead, *Marlar* concerned a case where a post-conviction relief ("PCR") judge, in his Order, failed to make findings of fact and

conclusions of law which were specific to the applicant's claims. *Id.* The Supreme Court went on to address the issue of whether PCR counsel's failure to file a motion to alter or amend the judgment (1) relieved the PCR court of its duty to comply with the mandates of S.C. CODE ANN. §17-27-80 and Rule 52(a), SCRCP; and (2) rendered the PCR issues not preserved for appellate review. *Id.*

Marlar does not prohibit the drafting of proposed orders by counsel. *Id.* In fact, the *Marlar* court recognized that counsel often prepare proposed orders and reminded opposing counsel of their responsibilities with respect to such orders, stating

> We take this opportunity to reiterate our admonition that "[c]ounsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it."

Id. at 410, 653 S.E.2d at 267 (2007).

Here, the Court, in its eighteen-page Order of Dismissal, made findings of fact and conclusions of law specific to the allegations raised in the Application for PCR. In addition, the proposed order prepared by Respondent was sent to the Court and Applicant's counsel via both U.S. mail and email in an editable format. No objection to the proposed order was raised by Applicant's counsel – only an email inquiring whether the proposed order had been signed and whether any changes had been made thereto. Following the Court's careful review and revision of the proposed order, it was signed and filed. Because this Court believes that it adhered to the requirements of S.C. CODE ANN. §17-27-80 and Rule 52(a), SCRCP, this claim is denied.

ARGUMENT 2: FAILURE TO INFORM APPLICANT OF DEFENSES

Applicant next contends that the Order of Dismissal "fails to properly address Applicant's claim that Trial Counsel[1] ... fail[ed] to inform Applicant of two potential defenses prior to entering his guilty plea." The Court disagrees.

In its Order of Dismissal, the Court acknowledges Applicant's testimony at the evidentiary hearing that Plea Counsel failed to discuss potential defenses with him.[2] The Court also heard testimony from Plea Counsel indicating that Applicant did not want a jury trial on his charges.[3] The Court then concluded that Applicant's claim on this issue must be denied, as he failed to show the requisite prejudice in order to prevail.[4] Therefore, the Court finds that this allegation was sufficiently addressed in the Order of Dismissal.

In addition, to the extent that Applicant relies on *Ray v. State*, 303 S.C. 374, 401 S.E.2d 151 (1991), in support of his request for reconsideration, the Court finds it to be inapplicable to the claims made in this case. The *Ray* court reversed the denial of PCR where plea counsel erroneously advised the applicant that if convicted at trial of all charges (instead of pleading guilty to one charge), he would be subject to a sentence of life without parole. *Id.* There, the applicant demonstrated that he would not have pled guilty but for counsel's erroneous advice. *Id.* In the instant case, however, Plea Counsel did not give Applicant *erroneous* advice. Instead, she neglected to discuss certain information. Given that Applicant never wanted a jury trial, cannot

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[1] The Order of Dismissal refers to "Trial Counsel" as "Plea Counsel," as Applicant entered guilty pleas to the charges at issue.
[2] *See* Order of Dismissal, p. 7
[3] *See* Order of Dismissal, p. 9. In addition, Plea Counsel testified, "This was never a trial."
[4] *See* Order of Dismissal, p. 14-16

demonstrate that any defense would have been successful, and offered no evidence of prejudice; that allegation was dismissed.

ARGUMENT 3: FAILURE TO FILE MOTION FOR RECONSIDERATION

Applicant next contends that the Order of Dismissal "fails to properly address Applicant's claim that Trial Counsel ... fail[ed] to file a Motion for Reconsideration of Applicant's sentence." The Court disagrees and believes that the discussion in the Order of Dismissal[5] satisfies S.C. CODE ANN. §17-27-80 and Rule 52(a), SCRCP. In particular, it appears that Applicant and the Court have different interpretations Plea Counsel's position. All agree that Plea Counsel testified that she didn't recall being asked to file a motion for reconsideration. However, Applicant interprets that as meaning Plea Counsel has no memory of the conversation – that Applicant might have asked, but she doesn't remember. The Court, on the other hand, having heard the testimony and the context in which the matter was discussed, finds that Plea Counsel was indicating that Applicant made no such request. Therefore, this claim is denied.

ARGUMENT 4: PCR SHOULD BE GRANTED

Applicant's final argument is that the Court should set aside its Order of Dismissal entirely and grant his Application for PCR. For the reasons set forth herein, as well as those contained in the Order of Dismissal, this claim is denied.

[5] *See* Order of Dismissal p. 16-17

IT IS THEREFORE ORDERED that Applicant's Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP is DENIED.

AND IT IS SO ORDERED.

Jocelyn Newman
Presiding Judge

December 12, 2019
Columbia, South Carolina.