Mr. Jerry Dean Heard, # 373296
Broad River Correctional Institution
Marion Unit B - 209
4460 Broad River Rd.
Columbia, SC 29210

RECEIVED
JAN 13 2020
S.C. SUPREME COURT

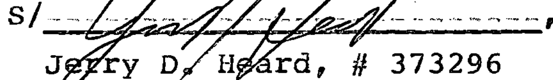
Date: January 9, 2020

South Carolina court of Appeals
Jenny Abbott Kitchings, Clerk
Post Office Box 11629
Columbia, SC 29211

APPELLATE CASE NO. 2019-000731

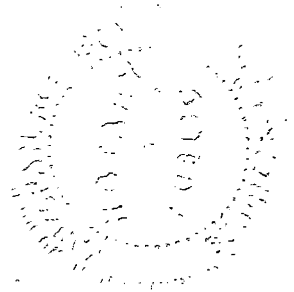
This will acknowledge receipt of the letter that I received on December 9, 2019, in regarding to this appeal. My counsel advised me that I have forty-five (45) days of the date of this letter to file with this court a pro se brief addressing any issues that I may have for this court consideration which I have submitted to this court in memorandum of Laws I would like for this Honorable court to take into consideration.

Sincerely,



S/ ________________,
Jerry D. Heard, # 373296

Sworn to and subscribed before me this 9th Day of January, 2020
Konzora Robinson
Notary Public for the State of South Carolina.
My Commission Expires 8/5/2024



(10 - 30 years)

STATE OF SOUTH CAROLINA) **IN THE COURT OF GENERAL SESSIONS**

COUNTY OF Edgefield

STATE VS. Jerry Dean Heard

AKA:

Race: White Sex: M Age: 65

DOB: 02-05-1952 SS#: 250-86-4299

Address: 101 Rock Creek Rd

City,State,Zip: Trenton, SC 29847-2315

DL#: 004618443 SID#:

*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

INDICTMENT/CASE#: 2016GS1900385

A/W#: 2016GS1900385

Date of Offense: 7/6/2016

S.C. Code § : 16-03-0655(A)(2)

CDR Code #: 3022

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☑ PLEADS TO: Sex / Criminal sexual conduct with minor - victim under 16 years of age and offender w/previous record under 23-03-0430(c) or (

in violation of § 16-03-0655(A)(2) of the S.C. Code of Laws, bearing CDR Code # 3022

☐ NON-VIOLENT ☑ VIOLENT ☐ SERIOUS ☑ MOST SERIOUS ☑ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _______ (defendant's initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

[signature]	64191	[signature]	[signature]	100066
Solicitor	SC Bar#	Defendant	Attorney for Defendant	SC Bar#

WHEREFORE, the Defendant is commited to the ☑ **State Department of Corrections,** ☐ **County Detention Center,**

for a determinate term of 25 days/months/(years) or ☐ under the **Youthful Offender Act** not to exceed _______ years

and/or to pay a fine of $ RSS ; provided that upon the service of __________ days/months/years and/or payment

of $ __________ ; plus costs and assessments as applicable*; the balance is suspended with **probation** for __________

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: __________

☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**

Total: $ __________ plus 20% fee: ______ $ __________

Payment Terms: __________

☐ Set by SCDPPPS __________

Recipient: __________

*Fine:		$
§ 14-1-206 (Assessments 107.5%)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 61.6 (Public Def/Probation)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114 (BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$ 3.75
TOTAL		$ 128.75

PTUP __________

__________ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. __________

May serve W/E begining __________

Substance Abuse Counseling ☐

Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ __________ beginning __________

$ __________ paid to Public Defender Fund

Other: Sex Offender Registry.

☐ Appointed PD or appointed other counsel, §Proviso 61.6 requires $500 be paid to Clerk during probation and shall be collected before any other fees.

Presiding Judge [signature]

Judge Code: 2752

Sentence Date: 7-24-17

Clerk of Court/ Deputy Clerk [signature]

Court Reporter: Brenda Sigwald

SCCA/217 (07/2016)

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JAN 13 2020

S.C. SUPREME COURT

APPEALS FROM EDGEFIELD COUNTY
Honorable William A. McKinnon, circuit court Judge

Jerry Dean Heard, Appellate,

vs.

STATE OF SOUTH CAROLINA Respondent.

PRO SE RESPONSE BRIEF

APPELLATE CASE NO. 2019-000731

This is before the South Carolina court of Appeals which counsel filed a brief indicating that this appeal is without merit and moves to be relieved as my counsel. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.E. 2d 493 (1967). The records in this case reflect counsel has served applicant with a copy of the brief and record on appeal. I have forty-five (45) days of the date of this letter to file with this court a pro se brief addressing any issues I believe the court should consider in this appeal. Upon receipt of my pro se brief or the expiration of forty-five (45) days this appeal will be submitted to the court for its consideration.

Applicant have suffered a miscarriage of justice and his conviction only stands due to severe denial of due process and equal protection in the state court, in multiple and gross violation of the United States constitution, that constitutes an outrage of mockery of justice that the federal court's who sworn to uphold the United States constitution should not tolerats.

The applicant suffered prejudice at the hands of trial counsel and the trial court, and the applicant's plead of guilty under North Carolina v. Alford, was entered Involuntarily unknowingly, unwillingly, and unintelligently, Hill v. Lockhart, 106 S.Ct. 366 (1985). See also Jordan v. State, 374 S.E. 2d 683 (1988).

Applicant's trial counsel's deficiencies prejudiced the applicant in that applicant would have otherwise proceeded to trial as original insisted upon , and under no circumstances would not have plea guilty under Alford otherwise had it not been for trial counsel's advise. Nevertheless, the allegation of the applicant not having pled guilty knowingly, voluntarily and intelligently probably raises questions of fact which may not be conclusively refuted by the record presently before this court.

"COERCED"

The trial counsel was ineffective in allowing his private investigator to coerce the petitioner into pleading guilty.

On the morning of trial as defense counsel was in the courtroom preparing for jury qualification, Mr. Donald Kneece, a private investigator hired by defense counsel, met with petitioner privately. (App. 114, lines 2-7; App. 102 lines 17-20). After the private meeting with the investigator, petitioner decided to plead guilty. In the amended PCR application petitioner alleged that trial counsel was ineffective for allowing his private investigator to coerce the petitioner to plead guilty. (App. P. 47).

At the PCR hearing petitioner testified that on the day of his jury trial the investigator talked with him about pleading guilty (App. P. 74, lines 8-25). Petitioner testified, "we talked about - well, he said, you know, want me to take the plea bergain want me to plead guilty. And Mr. Donald Kneece, said you know, he prayed with his preacher that a couple times that petitioner would plead guilty. And he - the first time he said they must have been praying the wrong prayer, so they prayed a different prayer that I plead guilty. You know, wouldn't put these girls through this, okay. So I asked him, you know if my little River was there. (App. P. 75, lines 5-12). River was one of the alleged witnesses. (App. P. 75, lines 13-17). With permission from the prosecution the investigator took a video of both witnesses to show petitioner that both were at the courthouse and ready to proceed with trial. (App. P. 113, lines 17-24). Petitioner additionally testified that the investigator told him he would not be in prison for a long time. (App. P. 77, lines 2-13). Petitioner testified. "He just - he told me said you won't be there long. You won't be there very long. You'll be in there long enough before you know it, you'll be out there on a bank with a fishing pole in one hand and a beer in the other. (App. P. 77, lines 2-6). Finally, petitioner testified that he was coerced into pleading guilty. (App. P. 82, lines 17-18).

The investigator testified at the PCR hearing and confirmed that he met with petitioner privately prior to the guilty plea. (App. p. 102, lines 17-20). **The investigator did not recall a conversation with petitioner about fishing and drinking beer. (App. p. 104, lines 18-22). He denied telling petitioner that his sentence would not be very long. (App. p. 104, lines 1-3). When asked if he told petitioner that he did not need to put these girls through a trial, the investigator testified, "I'm trying to remember. There was a discussion that he and I had about them having to testify, but I think he was the first one that mentioned that he didn't think they would be there. And he didn't want to put them through that and then I said, well, you're going to put them through that if you want to have a trial.**

(App. p. 103, lines 20-25). In the order of dismissal the PCR judge wrote: Applicant alleges Kneece coered him into pleading guilty. According to applicant, Kneece said a prayer in front of applicant asking applicant not to put the victim's through a trial. Applicant alleges Kneece pressured applicant into pleading guilty. Applicant claimed he was not thinking clearly and was upset when he pled guilty. On the other hand, Kneece denied he coerced applicant into pleading guilty. He testified that he did not tell applicant he should not put the victim's through a trial, although applicant said he did not want to put the victims through trial. He claimed he simply gave up.

A criminal defendant is guaranteed the right to effective assistance of counsel under the sixth Amendment to the United States constitution. U.S. const. amend. V1; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). Court evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E. 2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Cherry, 300 S.C. at 117, 386 S.E. 2d at 625 (quoting Strickland,466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant will demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

IN HIS APPLICATION APPLICANT ALLEGES HE IS BEING HELD IN CUSTODY UNLAWFULLY FOR THE FOLLOWING REASONS:

A. Ineffective assistance of counsel" "trial counsel was ineffective for [not] filing a notice of appeal when asked to do so and applicant did not waive his right to appeal.

B. Counsel failing to conduct an adequate and factual pretrial investigation and failing to prepare for trial.

C. Counsel failing to object to his private investigator when he allow him to coerce applicant into pleading guilty on the morning of trial as defense counsel was in the courtroom preparing for jury qualification, Mr. Donald Kneece, a private investigator hired by defense counsel, met with applicant's privately. (App. p. 114, lines 2-7; App. p. 102, lines 17-20). After the private meeting with the investigator, applicant decided to plead guilty. The trial counsel and his private investigator coerced applicant into entering a guilty plea through deceptive tactics when applicant wished to stand trial by jury when counsel and his private investigator employes an unreasonable trial strategy and make that decision without a full assessment of the facts and evidence at issue, counsel performance is considered ineffective. Cave v. Singletary, 971 F. 2d 1513 (11th cir. 1992). Based of the aforementioned matters counsel has provided ineffective assistance.

A guilty plea must be an informed and intelligent decision. State v. Lopez, 352 S.C. 373, 574 S.E. 2d 210 (2002). To be valid, a guilty plea must represent an intelligent choice among the alternatives available to a defendant. Id.

In the case sub-judice, the colloquy amounted to nothing more than a pro forma answers to pro forma questions. State v. Gardner 570 S.E. 2d 184, 187 (2002). The judge never informed applicant that the state must obtain a Lawful true bill indictment

according to the state statutes and state constitution and that they have failed to do so - this depriving the court of subject matter jurisdiction. And that the only way applicant can be Lawfully convicted is if he pleads guilty and gives the court subject matter jurisdiction that it otherwise does not have. Had applicant been informed of this he would never have plead guilty but would have demanded that the state first obtain subject matter jurisdiction by obtaining a Lawful indictment. Applicant acted reasonably in believeing that the solicitor was trustwortly and had obtained a Lawful indictment. Applicant had no prior reasons for doubting the indictment was Lawfully obtained an could not have known about the indictment at the time of plea because of the solicitors Fraud, perjury, and conspiracy designed to keep this bogus indictment hidden from applicant.

The Strickland test operate similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). A guilty may not be accepted unless it is voluntarily and understandingly made Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 274 (1969). To find a guilty plea is voluntarily and knowingly entered into the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Robby v. State, 339 S.C. 29, 33, 528 S.E. 2d 418, 421 (2000). A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the court and the defendant, between the court and defendant's counsel, or both. Pittman v. State, 337 S.C. 597, 599, 524 S.E. 2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E. 2d 171, 174 91993)).

The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 3191 S.Ct. 160, 27 L.Ed. 2d 162 (1970).

In Frierson v. State, 423 S.C. 257, 262, 815 S.E. 2d 433, 436 (2018). The South Carolina supreme court wrote:

In order to establish prejudice when challenging a guilty plea a defendant must prove there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty, but would have gone to trial. Harden v. State, 360 S.C. 405, 408, 602 S.E. 2d 48, 49 (2004). The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E. 2d 484, 485 (1991).

As the United States supreme court stated in Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). [I]n order to satisfy the prejudice requirement, the defendant must show there is a reasonable probability that, but for counsel errors, he would not have pled guilty and would have insisted on going to trial.

Plea counsel was ineffective in allowing his private investigator to privately meet with petitioner on the day the trial was to begin and continue to discuss a guilty plea. The state never extended a plea bargain. (App. p. 109, lines 3-13). the only benefit petitioner received by pleading guilty was that the state dropped one of the charges and he was no longer exposed to the danger of the judge consecutive sentence. (App. p. 114, lines 13-18). Although petitioner entered a guilty plea, the judge sentenced him to five years less than the statutory maximun of thirty years. Plea counsel's deficient performance affected the outcome of the plea process.

There is a reasonable probability that if counsel had not allowed his private investigator to privately meet with petitioner and continue discussing a guilty plea, petitioner would not have plea guilty and instead would have insisted on exercising his right to a trial by jury.

In Boykin, Supra, the U.S. supreme court held that trial courts were mandated to use the utmost solicitude when canvassing a guilty plea to insure that the plea was given freely and voluntarily with a full knowledge of the circumstances surrounding the plea and the attendant waiver of right occurring with the guilty plea.

Ineffective assistance of counsel, in violation of the fourteenth and sixth Amendment of the United States constitution and Article I, section 13 & 14 of the South Carolina constitution.

Counsel should be afforded reasonable opportunity to prepare to defend the applicant and to confer as often without undue delay to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are available applicant contends that his trial cousel failed to investigate both factual and legal matter to determine if defense can be developed. It is a definitive objective description of the competency normally demanded of counsel in certain aspects of their services And with this discretion the court should admonish that if the right to counsel guaranteed by the constitution is to serve its purpose, the defendant cannot be left to the mercies of incompetent counsel. Judge should strve to maintain proper standards of performance by attorney who are representing defendant's in criminal cases in their courts. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441 25 L.Ed. 2d 736 (1970), Marzullo v. State, of M.D. 561 F. R. 2d S. 56 544 Example Coles v. Peyton, 389 F. 2d 224 226 (4th cir, 1968).

Defense counsel was ineffective for failing to properly advise the applicant of the full scope of appellate review from an appeal of a guilty plea. In this case, this court should find that the applicant was apprised of the constitutional rights he was waiving, including his right to remain silent, right to a jury trial and right to confront his accuser. However, the court overlooked the applicant's argument that defense counsel did not properly advise him of the full scope of appellate review of an appeal from a guilty plea. As defense counsel was required to do so, but failed in this duty, the applicant was entitled to relief on this ground.

Under the Law of this state, a trial court may not accept a conditional guilty plea. In-re-Johnny-Lee-W., 271 S.C. 217, 638 S.E. 2d (2006); see also State-v.-Pepper, 346 S.C. 502, 552 S.E. 2d 288 (2001). In other words, since a guilty plea constitutes a waiver of all alleged constitutional or other violations, a criminal defendant cannot enter a plea in which he reserves the right to plead not guilty upon appellate review and reveral of thoses issues. The applicant at time of entry of his plea of guilty applicant did not understand the remifications of pleading guilty. Moreover, there is no evidence he knowingly, voluntarily and intelligently waived his right to a direct appeal of the trial procedings. See e.g. Wilson v.-State,348 S.C. 215, 559 S.E. 2d 518 (2002). A defendant has the procedure right to one fair bite at the apple that is every defendant has a right to file a direct appeal and one (PCR) application, these principles of Law, it is clear counsel's performance was deficient because applicant did not understand his right, including the right to a direct appeal. Applicant was prejudiced by the deficient preformance because, but for counsel's unprofessional errors, he would have insisted on going to trial. The question presented are whether or not the plea of guilty was involuntary or, in the alternative was based on the inadequate assistance of counsel discussed B. Infro. The Law is equally clear an involuntary plea is unconstitutional. Machiboda-v.-United-States, 368 U.S. 487 (1962). The court has ruled that a plea induced by misrepresentation of defense counsel may be involuntary.

Applicant contends due to his illiteracy to the Law he was entitled to rely upon his counsel to make reasonable decision. Pursuant to U.S. v. Dewalt, 92 F. 30 1209 without some authortative guidence, the defendant cannot know whether he understand anything correctly at his plea trial.

The trial counsel was ineffective in allowing his private investigator to coerce the applicant into pleading guilty through deceptive tactics when applicant wished to stand trial by jury when counsel employes an unreasonable trial strategy and make that decision without a full assessment of the facts and evidence at issue, counsel's performance is considered ineffective. Cave v. Singletary, 971 F. 2d 1513 (11th cir. 1992). Based of the aforementioned matters, counsel has provided ineffective assistance.

The defendant was abandoned after his plea trial counsel did not filed the direct appeal from conviction during a critical stage of his case. Counsel was ineffective in failing to file notice of appeal, upon the appointed counsel was required to file notice of appeal.

The sixth Amendment guarantees that every criminal defendant shall receive "assistance of counsel" in establishing his defense U.S. const. amend. V1. On May 14, 1984, the United States court handed down two opinions holding that the Sixth Amendment requires that the criminal defendant receive effective assistance of counsel. United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed. 2d 657 (1984); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

In cronic, the court characterized the protection that the sixth Amendment offords the defendant, the right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. when a true adversarial criminal trial has been conducted even if defense counsel may have made demonstrable errors the kind of testing envisioned by the sixth Amendment has occurred. But if the process loses its character as a controntation between adversaries, the constitutional guarantee is violated. As judge Wyzanski has written: while a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrified of unarmed prisoners to gladiators.

PLEA BARGAIN

The court has ruled that a plea induced by the misrepresentation of defense counsel may be involuntary, Blackledge-v.-Allison, 431 U.S. 63 (1977). In Blackledge, supra. FN. 8 the court indicated that the question of whether or not the defense attorney misinformed his client concerning the sentence promised had constitutional implications, see Santobello-v.-New-York, 404 U.S. 257, 30 L.Ed. 2d 427, 92 S.Ct. 495; Brady-v.-United States, 397 U.S. 742, 25 L.Ed. 2d 74, 90 S.Ct. 1463.

(A PLEA AGREEMENT REST)

A plea agreement rest on contrectual principles and each should Clark-v.-State, 468 S.E. 2d 653, receive the benefit of their plea bargain. Thrift-v.-State, 312 S.C. 282, 440 S.E. 2d 341 (1994). When an accused pleads guilty upon a promise of the prosecutor, the agreement must be fulfilled. State-v.-Torrence, 305 S.C. 45, 406 S.E. 2d 315 (1991). When the state's attorney has given his word in the form of a plea agreement or plea bargain and that bragain is accepted by the trial court, it behaeves the state's attorney to make every reasonable effort to correct any deviation from the plea bargain when the deviation is called to his attention. Alston-v.-State, 38 Md. App. 611, 379 A 2d 754, 757.

Once a court accepts a plea agreement, it is bound to honor its promise to perform the agreement in so far as the terms of the agreement are within the power of the court to order. State v. Rhinehart, 312 S.C. 36, 430 S.E. 2d 536.

The defendant have suffered a miscarriage of justice and his conviction only stands due to severed denial of due process and equal protection in state court, in multiple and gross violation of the United States supreme court precedents and the United States constitution, that constitutes **an outrage of mockery of justice that the Federal courts** who sworn to uphold the United States constitution should not tolerats.

The court has held that due process requires that a criminal defendant be entitled to present a complete defense. State v. Harris, S.C.427 S.E. 2d 909 (1993) citing California v. Trombetta 467 U.S. 479, 104 S.Ct. 2528 (1984); State v. Mabe, S.C. 412 S.E. 2d 386 (1991).

PLEA BARGAIN

See Page 78, lines 17-25. Mr. Spencer: And if I could just add, I think as to the substance that there was a five-year plea deal or sokething like or, you know, whatever it is then that would still be hearsay I think.

THE COURT: Certainly I understand, your Honor.

By Ms. Goldberg:

Mr. Heard, I think and you were clear that the investigator basically gave you the impression that you wouldn't be there long? **Was there any specific plea offer stated that day** by your attorney or anyone else? The defendant assume that there was a five-year plea bargain had been workout the day of his plea. See Pages 79, lines 24-25. and Page 80, will explain what was supposely to be in the block for a determinate term of 5 year, but it was scribbled out on the sentence sheet.

PLEA BARGAIN

The applicant received ineffective assistance of counsel prior to and at the time of entry of his plea of guilt in that trial counsel failed to (1) timely object to the trial court imposed sentence which exceeded the duration of sentence of the plea negotiated sentence of five (5) years to which the applicant had agreed; (2) timely seek leave of court to withdraw applicant's guilty plea on the basis that the court imposed sentence exceeded the duration of sentence of a plea bargain to which the applicant had agreed. In support thereof, applicant submits that at the time of entering into a guilty plea he was advised by trial counsel that a plea bargain had been "worked out" whereby applicant would receive a concurrent sentence on the indicted charges not to exceed (five years) in duration. Based on this understanding, applicant proceeded to plead guilty when the court imposed a sentence of twenty-five years (25) years on the criminal sexual conduct with a minor in the first degree, one charge were nolle prosse (in custody), applicant's trial counsel provided ineffective assistance of counsel by failing to timely object to the sentence as not comporting with the requirement of applicant's promised plea bargain and trial counsel further exacerbated his ineffective assistance of counsel when he failed to timely seek leave of court to withdraw applicant's plea of guilty as not being comformity with the substance of applicant's plea bargain.

The U.S. suprmem court in Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed 2d 427 (1971). Hold that where a guilty plea rests on a promise or agreement which can be said to be a part of the indictments or consideration, then the agreement must be fulfiied. United States v. Ringling, 986 F. 2d 504 (4th cir. 1993), the court held that a plea bargain rests on contractual principles, and that each party should receive the benefit. Id. The court further stated that a plea agreement analysis must be more stringent than a contract because the rights involved are fundamental and constitutionally based.

Id. The court also noted that the government had to be held to a higher degree or responsibility than the defendant for imprecision or ambiguilies. Id. Another important holding in ringling is that where one district attorney states that the government will not prosecute, it encombers all other districts. Id. At 507. The court also stated; [I]t is the Government at large, not specific United States Attorney or United States districts that are bound by plea agreements negotiated by agents of the Government when a defendant's fundamental right are at stake, the right hand should know what the left is doing. Id. At 507 criminal Law. 982, 3 (3), 1280, 2 1210 (2) D.C.S.C. 1984. When government has entered into a plea agreement, Federal courts must enforce the agreement and not allow the government to retract it's promise and when defendant has relied on government representation and has upheld his obligations under an agreement the government will also be required to honor it's promises U.S. v. CFU const. Co. Inc. 583 F. Supp. 197 affirmed 749 F. 2d 33. When accused pleas guilty upon a promise of proscuter agreement must be fulfilled. State v. Thompson, 292 S.E. 2d 581 278 S.C. ceritorari denied 102 S.Ct. (1996).

The counsel's deficiencies prejudiced the applicant in that applicant would otherwise have proceeded to trial and not have entered into any plea of guilty if he had known the sentence would or could have exceeded the Five (5) years that was promised as part of his plea bargain. As a result of the deficiencies of trial counsel as set out in the court records.

FIVE YEARS RECOMMENDATION

Applicant alleges that he pled guilty under the belief there would be a recommendation for a five years prison term. According to applicant, on the morning trial was set to begin, he spoke with Donald Kneece, one of two private investigators hired by counsel to work on the case. Applicant alleges Kneece told him the recommendation would be for five years if he pled guilty. He claims Kneece told him he would be fishing and drinking beer in short while, implying a short sentence. Applicant thought this was humorous because he did not like fishing or drinking. Applicant also alleges counsel presented him with the sentencing sheet in which the sentence filled in was for for five years. On the sentencing sheet before this court something is written in the space for the sentence, but someone blacked it out. Written above it is the twenty-five years sentence that the plea court pronounced during the guilty plea hearing.

In view of this evidence, we conclude that any alleged deficiency in plea counsel's presentation was cured by the plea colloguy. See Bennett v. State, 371 S.C. 198, 205 n.6. 638 S.E. 2d 673 676 n. 6. (2006) (reversing grant of PCR and stating can be cured where the trial court properly informed the defendant about the sentencing range")) Burnett v. State, 352 S.C. 589, 508, 576 S.E. 2d 144 (2003) reversing grant holding that even if plea counsel erroneously informed defendant that his sentence would only be five years, the information conveyed at the plea hearing cured any misconception. Caused by counsel's alleged inaccurate advice); Moorehead v. State, 329 S.C. 329, 333, 496 S.C. 2d 415, 417 (1998) reversing grant of for on the ground that there was no evidence to support the PCR judge's finding that applicant received ineffective assisatnce of counsel due to erroneous sentencing advise where any misconception was cured at the plea hearing"); Wolfe v. State, 326 S.C. 158, 165, 485 S.E. 2d 367, 370 (1997) (reversing grant of PCR and recognizing that in considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing).

Furthemore, on the sentencing sheet there is a checked box that has nothing in any part of the box, where the charge is there no initial in any box, and the plea is there is no initial on any box. By signing this form, Heard manifesten his promise plea guilty and acknowledged the five years sentence that was promise to him. James v.State, 377 S.C. 81, 85, 659 S.E. 2d 148, 150 (2008) (reversing grant of PCR as to applicant's guilty plea where plea sheet and applicant's conduct at plea hearing expressed applicant' promise to plea guilty.

ALIBI DEFENSE

Tr. P. 65, lines 1-25. While I was in jail an leading up to going to court, defendant had an alibi defense?

Q. Okay. Did you personally seek out any information to support this information

A. Yes.

Q. All right. Now, first of all, what is this potental alibi defense?

A. I wasn't there. I could prove I wasn't there.

Q. And when you say I wasn't there, where is there?

A. I was being -- one time I was in Nitro, West Virginia. The next time I was in Beaverdam, Ohio, which is a little over 100 miles North of Nitro, West Virginia. The next time been in Findlay, Ohio, which is somewhere around 96 miles North of Beaverdam.

Q. And when you say the first time, this second time, the third time, there were actual multiple indictment originally in this case?

A. Every time I get -- every time they indicted me, I prove I wasn't home. Okay, then they indicted me again, I prove I wasn't home. I would prove by the minute that I wasn't home.

Q. And ultimately all of those indictments were dismissed except for the one conviction we have here today; is that right?

See Tr.P. 66, lines 1-25.

A. Right.

Q. Okay. And when you say you weren't there you weren't home, you mean you weren't in South Carolina?

A. South Carolina, right.

Q. Now, that did you do personally to seek out information to back it up?

A. I get my company to send the information -- my fueling information to where I fueled which where I swipe my card and signed. And it gave the minute -- the hour and the minute that I was there the date, the hour and the minute.

Q. How did you request the information?

A. I wrote my company in Canada and the guy's name was Ted somebody and he sent it all to me.

Q. Just by mail?

A. Right.

Q. And when you received this information, did you provide it to Mr. Drylie?

A. Yes.

Ms. Goldberg: All right. Beg the court's indulgence.

THE COURT: Yes, ma'am.

Ms. Goldberg: Your Honor, at this time I'm going to hand the applicant what's been premarked as applicant's Exhibit number 1, which is a one page document.

Q. Mr. Heard, Is that the document you received from your employer?

A. I received multiple paperwork.

Q. is that the particular document that addresses the days relevant to this case?

A. Yes, ma'am.

Q. And you are testifying that you provided Mr. Drylie with a copy of that document?

A. Yes, ma'am.

Ms. Goldberg: Okay. At this time, your Honor. I'd ask that this document be admitted into evidence.

THE COURT: Any objection?

Mr. Spencer: I -- it is as I understand it in Mr. Drylie's file, so I would object as to notice to the attorney to research an alibi potentially, but I'd object to anything further than that.

THE COURT: Okay.

Ms. Goldberg: Your Honor, I mean, it's not a jury here your Honor. When the testimony is all out, you can take it for what ever --

THE COURT: I'll admit it.

Ms. Goldberg: Thank you, your Honor.

(whereupon, applicant Exhibit no. 1 was admitted into evidence.)

Q. All right. Mr. Heard, you've looked at the document that's in front of you. is -- when you first received that document, were you able to remember the days and times generally of where you were on the road -- what was your Job I don't think that's clear?

A. Drove a truck.

Q. You were a truck driver?

A. truck driver, uh-huh.

Q. And what company did you work for?

A. Fti.

Q. And is that a national company?

A. Well, they got -- they have places all over they actually out of Canada.

Q. Typically when you were on a trucking route would this be within the state, outside of the state?

A. Outside.

Q. Okay, long distance?

A. Right.

Q. All right. when you first obtained this document and looked at it, did it appear to correctly reflect your memory as to where you were when?

A. yes, ma'am.

Q. Okay, that was your personal memory of where you had been and when?

A. Right.

Q. All right. So the transcript in this case of the guilty plea on page seven states that the state allege that the incident occurred on or about January 24th 2015 at 11:23 P.M. so, Mr Heard, do you believe --

Mr. Spencer: Your Honor, I object. we haven't heard any authentication about this -- oh, I'm sorry withdraw that. I was jumping ahead.

THE COURT: That's okay.

By Ms. Goldberg:

Q. Mr. Heard, do you believe you have an alibi for January 24th?

A. Yes, Ma'am.

Q. Where do you believe you were on January 24th.

A. I was in Walton, Kentucky.

Q. Walton Kentucky?

A. At 11:41.

Q. And are you talking about a.m. or p.m.?

A. That would be a.m. there.

Q. 11:41 am you believe you're in Walton, Kentucky at 11:41 A.M.?

A. Right.

Q. All right, now, as I said, the allege audio recording that is relative to this case is from the same date at 11:32 p.m. so can you explain to the court whether or not you believe you would have physically been able to be in Edgefield county that time and date?

A. I cannot I could not make it.

Q. Tell the court why?

A. A big truck can only do around average of 50 miles per hour. At that time we could only drive about 11 hours, okay. From Walton, Kentucky that's just over the line of Cincinnati, Ohio. I made it to Tennessee and I can't make it from Tennessee -- I couldn't make it home from Tennessee -- well, I can just barely make it home from Tennessee the next day, that be on the 25th.

Q. Okay.

See page 70, lines 15-25.

A. I would leave Tennessee on the 25th and I could barely make it home then.

Q. So when you able to explain -- were you able to explain all that to Mr. Drylie?

THE COURT: Let me ask --

Ms. Goldberg: Yeah, go ahead.

THE COURT: Sir. I just did Google maps and it says it's 489 miles from Walton to Edgefield. you said you average 50 miles a hour, that's ten hours driving that you would be back.

see pages 71, 72, 73.

STATE OF SOUTH CAROLINA)
COUNTY OF EDGEFIELD)
)
Jerry Dean Heard, # 373296)
Applicant,)
)
VS.)
)
STATE OF SOUTH CAROLINA)
Respondent.)
)

IN THE COURT OF COMMON PLEAS
THE ELEVENTH JUDICIAL CIRCUIT
CASE NO. 2019-000731

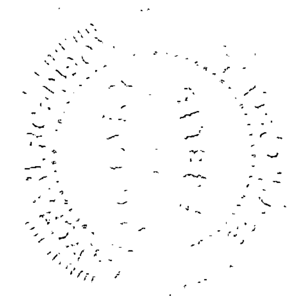
CERTIFICATE OF SERVICE

I, Jerry D. Heard, # 373296, being duty sworn upon my oath; depose and say I have subscribed to the foregoing Appeals which is already on file with the supreme court. That I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence in the above case, attached in this matter, and allegations therein set forth are true. I do hereby under oath and penalty of perjury certify that I have served copies of the documents upon the below party, upon this exact date.

The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

S/ [signature],
Jerry D. Heard, # 373296

Sworn to and subscribed before me
This 9th day of January 2020
[signature]
Notary Public For South Carolina
My Commission Expires: 8/5/2024,



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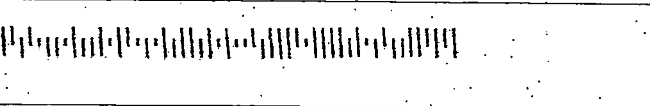

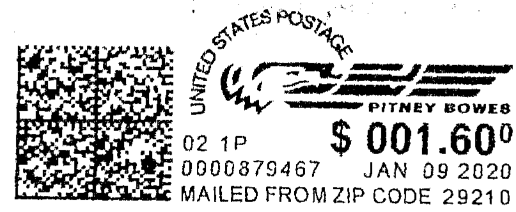

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