

FALK LAW FIRM, LLC.

James K. Falk

(843) 606-6007

(843) 972-9005 Fax

Admitted to practice: KY(1984) S.C. (2010) jfalklaw@gmail.com

January 10, 2020

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

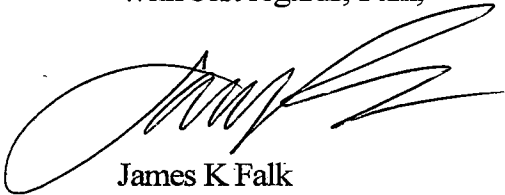
Re: Antwan Travis Lee, #352842 v. State of South Carolina

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, in the above Jasper County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

RECEIVED

JAN 14 2020

S.C. SUPREME COURT

Cc:

Sara Gunton, Esquire

Travis Antwan Lee 352842

Jasper County Circuit Court Clerk

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JAN 14 2020

APPEAL FROM JASPER COUNTY

S.C. SUPREME COURT

Court of Common Pleas

Honorable Jennifer B McCoy, Circuit Judge

Case No.: 2017-CP-27-0125

Travis Antwan Lee 352842.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Travis Antwan Lee appeals the Honorable Jennifer B McCoy's October 23, 2019 Order of Dismissal. Undersigned counsel received notice of entry of the order on January 10, 2020. A copy of the order on appeal is attached hereto.



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

January 10, 2020

Sara E. Gunton, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

Clerk of Court- Jasper CP
PO Box 248
Ridgeland, SC 29936

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JAN 14 2020

APPEAL FROM JASPER COUNTY

Court of Common Pleas

S.C. SUPREME COURT

Honorable Jennifer McCoy, Circuit Judge

Case No.: 2017-CP-27-0125

Travis Antwan Lee 352842.....PETITIONER

V.

State of South Carolina.....RESPONDENT

CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Sara Gunton, Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Jasper County Clerk of Court. I further certify that all parties required by Rule to be served have been served this January 10, 2020.



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

STATE OF SOUTH CAROLINA)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT

Travis Antwan Lee, #352842,)
Applicant,)

2017-CP-27-0125

v.)
State of South Carolina,)
Respondent.)

ORDER OF DISMISSAL

FILED
JASPER COUNTY
CLERK OF COURT
2019 OCT 28 AM 9:28

This matter comes before the Court by way of an application for post-conviction relief filed by Travis Antwan Lee ("Applicant") on March 27, 2017. Respondent made its return on or about September 24, 2018. The Court convened an evidentiary hearing into the matter on Wednesday, August 28, 2019, at the Beaufort County Courthouse in Beaufort, South Carolina. Applicant was present at the hearing and represented by James K. Falk, Esq. Sara E. Gunton, Esq., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's appointed counsel, Robert M. Hughes, and retained counsel, Don C. Colongeli ("Counsel") also testified. The Court has before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Jasper County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Jasper County Clerk of Court. In May 2015, the Jasper County

JBM/ll

Grand Jury indicted Applicant for kidnapping (2015-GS-27-0150), attempted murder (2015-GS-27-0151), and criminal conspiracy (2015-GS-27-0152). The charges resulted from a 2015 attack in which Applicant and a co-defendant lured Victim to a location by impersonating a woman he was trying to meet through text messages. When Victim arrived to the planned location, Applicant and the co-defendant ambushed him, brutally beating and repeatedly stabbing him, before setting him on fire. Plea Tr. p. 5-6. Victim, who had his wrists zip tied behind his back, was then loaded into the back of the pickup truck. Applicant and co-defendant drove off with Victim. Shortly thereafter, Victim was able to roll out of the truck bed and escape. Plea Tr. p. 6, ll. 11-23. While driving the truck, Applicant made a phone call to his girlfriend on Victim's phone, calling his girlfriend at the same number he later used to call her from jail, after his arrest. Plea Tr. p. 6, ll. 24 – p. 7, ll. 21. Victim was also able to identify Applicant as being present and involved in the attack. Plea Tr. p. 5, ll. 17-21. Applicant's co-defendant was placed at the scene of the attack from his GPS ankle monitor. Plea Tr. p. 6.

Robert M. Hughes, Esquire, was originally appointed to represent Applicant. Donald C. Colongeli, Esquire, ("Counsel") represented Applicant when Applicant retained him three weeks prior to the plea.¹ Applicant pled guilty under the same plea offer extended to him while represented by Mr. Hughes. Plea Tr. p. 3, ll. 15 – p. 4, ll. 9. Sean P. Thornton, Esquire, prosecuted the case. On May 13, 2016, Applicant pled guilty as indicted to all charges before the Honorable Michael G. Nettles. Pursuant to the negotiated sentence of a range from fifteen to twenty years with all sentences being concurrent, Judge Nettles sentenced Applicant to imprisonment of eighteen years for attempted murder, eighteen years for kidnapping, and five years for conspiracy, all to be served concurrently.

¹ Applicant's allegations are construed as applying only to retained counsel, Donald C. Colongeli, Esq.

JBM/2

Counsel filed a timely notice of appeal on Applicant's behalf. The South Carolina Court of Appeals dismissed Applicant's appeal by order filed July 22, 2016, for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv) of the South Carolina Appellate Court Rules and letters dated June 1, 2016, and June 28, 2016. *State v. Lee*, App. Case No. 2016-001126 (Ct. App. 2016). The Remittitur was issued on August 9, 2016.

Present Application

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

1. Ineffective assistance of counsel²
 - a. "Trial Counsel deprived Applicant of the Sixth Amendment right to the effective assistance of counsel in failing to research, investigate, and prepare a defense."
 - b. "Illegally seized photo lineup..."
 - c. "The warrants are defective on their face and Trial Counsel was ineffective in failing to have the 'bare bones' warrants dismissed with prejudice at the preliminary hearing."
 - d. "Trial Counsel performed deficiently in failing to file a motion to dismiss the aforementioned warrants during the preliminary hearing and in failing to move the court to withdraw Applicant's guilty plea and then move the court to quash the indictments to which are a [illegible]."
2. "Plea of guilty unlawfully induced."

II. STANDARD OF REVIEW

In a post-conviction relief action, an applicant has the burden of proving the allegations in his application. Rule 71.1(e), SCRPC; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, they must present

² Applicant's allegations as set forth as 1.b., 1.c., and 1.d., were contained in a supplemental memorandum filed *pro se* by Applicant on June 1, 2017, and incorporated into the Return by Respondent.

evidence to satisfy the two prong test enumerated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), to determine whether counsel's "assistance was so defective as to require a reversal of" applicant's sentence. First, the applicant must show counsel's performance was deficient; and second, the applicant must show they were prejudiced by that deficiency. *State v. Stalk*, 383 S.C. 559, 560-61, 681 S.E.2d 592, 594 (2009) (citing *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)) (extending the Court's two prong *Strickland* test to apply to guilty pleas).

In order to prove deficient performance under the first prong of *Strickland*, the burden is on applicant to show that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88, 104 S.Ct. at 2064. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. *Id.* In considering whether counsel's performance was reasonable:

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight.

Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011).

"[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Butler*, 286 S.C. at 442, 334 S.E.2d

at 814 (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066). The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Even if the applicant can establish that counsel's performance was deficient, they must still overcome their burden to demonstrate prejudice from that deficiency. The second prong of *Strickland* requires the applicant to prove that counsel's deficient performance prejudiced applicant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Cherry*, 300 S.C., at 117-18, 386 S.E.2d, at 625 (citing *Strickland*, 466 U.S., at 694, 104 S.Ct., at 2068).

Hill v. Lockhart[474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)] extended the application of the two-part *Strickland* test "to challenges to guilty pleas based on ineffective assistance of counsel." See also *Stalk v. State*, 382 S.C. 559, 560, 681 S.E.2d 592, 594 (2009). The analysis of counsel's performance under the first prong of the *Strickland* test remains unchanged. *Hill*, 474 U.S., at 59, 106 S.Ct., at 370. The second requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* The applicant must "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*

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. *Strickland*, 466 U.S., at 696, 104 S.Ct., at 2068. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the applicant 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. *Id.*, 466 U.S., at 696-97, 104 S.Ct., at 2068.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

JBM/5

This Court has reviewed the testimony presented at the evidentiary hearing in conjunction with the records submitted to it by the parties, and has considered the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented:

A. Ineffective Assistance of Counsel

i. Failure to Research, Investigate, and Prepare a Defense

Applicant alleges Counsel was ineffective for failing to properly research, investigate the facts of the case, and to prepare a defense. At the evidentiary hearing Counsel testified he was retained to represent Applicant roughly three weeks before Applicant pled guilty, after Applicant relieved Robert M. Hughes, Esq., his appointed attorney. Counsel explained that although he had an extremely short period to review Applicant's case, he was able to meet with Applicant several times, and had received and reviewed all of the discovery in the case. There was very little physical evidence tying Applicant to the crime, however, there was substantial circumstantial evidence and Applicant had been identified as a participant by Victim. Counsel described Applicant's wishes to proceed to trial, and Counsel readily agreed that he was prepared to try the case. However, Counsel was extremely concerned that if Applicant proceeded to trial, his co-defendant would be called as a State's witness. If convicted on all charges at trial Applicant faced a total possible sentencing exposure of sixty-five years. Counsel explained the State had offered Applicant a negotiated plea offer of 15-20 years on all charges, and spoke with Applicant at length explaining the risks he faced if he proceeded to trial. Counsel stated that, in his professional judgement, it was in Applicant's best interest to accept the plea offer to mitigate the sentencing exposure Applicant faced at trial.

JBM/6

Applicant testified he planned to go to trial and decided at the last minute to accept the negotiated plea offer after he was informed on Friday, May 6, 2016, that his co-defendant would testify against him at trial. He explained he never wanted to plead guilty, however, he realized it was in his best interest to do so because of what his co-defendant might testify to at trial. Applicant stated he never talked about a possible defense with Counsel, nor did he discuss a trial strategy.

Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, “[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. *Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). “[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions....” *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. “[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.” *Id.* at 690, 104 S.Ct. 2052. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633–34 (Ct. App. 2014).

Here, it is clear from the testimony presented at the evidentiary hearing that Counsel thoroughly investigated Applicant's case and advised Applicant that it was in his best interest to accept the plea offer based on the evidence against him, his lack of a defense, as well as the threat of his co-defendant testifying against him at trial. Applicant failed to testify as to what defense Counsel should have raised if he had proceeded to trial, nor did Applicant produce any witnesses

or evidence at the evidentiary hearing to establish what exactly Counsel failed to investigate or prepare as a defense.

Therefore, this Court finds Applicant has failed to meet his burden under either prong of *Hill*, and his request for relief by way of this allegation, as stated above as 1.a., is denied and dismissed with prejudice.

ii. Illegally Seized Photo Lineup

Applicant alleges that the photo lineup used in his case was "illegally seized." However, Applicant failed to present any testimony, argument, or evidence at the evidentiary hearing concerning this allegation. The failure to do so has waived this allegation as grounds for relief. Accordingly, this allegation as set forth above as 1.b. is denied and dismissed with prejudice.

iii. Failure to Dismiss Defective Warrants

Applicant alleges that counsel was ineffective for "failing to have the 'bare bones' warrants dismissed with prejudice at the preliminary hearing." However, Applicant failed to present any testimony, argument, or evidence at the evidentiary hearing concerning this allegation. The failure to do so has waived this allegation as grounds for relief. Accordingly, this allegation as set forth above as 1.c. is denied and dismissed with prejudice.

iv. Failure to Challenge Warrants and Withdraw Plea

Applicant alleges that counsel failed to file a motion to dismiss the warrants at the preliminary hearing, failed to withdraw Applicant's guilty plea, and failed to have the indictments quashed. However, Applicant failed to present any testimony, argument, or evidence at the evidentiary hearing concerning these allegations. The failure to do so has waived these allegations as grounds for relief. Accordingly, these allegations as set forth above as 1.d. are denied and dismissed with prejudice.

B. Involuntary Guilty Plea

Applicant alleges his guilty plea was “unlawfully induced” and that counsel coerced him into pleading guilty. To find a guilty plea is voluntarily and knowingly entered into, the record must establish Applicant had a full understanding of the consequences of his plea and the charges against him. *Stalk v. State*, 375 S.C. 289, 298, 652 S.E. 2d 402, 406 (2007); *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). “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.” *Gustine v. State*, 325 S.C. 123, 127, 480 S.E.2d 444, 446 (1997) (quoting *Hill* at 56). “All that is required to knowingly and voluntarily enter a plea of guilty is that a defendant have a full understanding of the consequences of his plea and of the charges against him.” *Id.*, 325 S.C. at 128, 480 S.E.2d at 446 (citing *Simpson v. State*, 317 S.C. 506, 455 S.E.2d 175 (1995)).

Applicant’s knowing and voluntary waiver of the constitutional rights which accompanied his guilty plea may be established by colloquy between the plea court and Applicant, his Counsel, or both. *Pittman v. State*, 337 S.C. 597, 601, 524 S.E.2d 623, 625 (1999). “[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.” *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). It is proper for this Court to review the plea colloquy record as well as the testimony and evidence presented at the evidentiary hearing to determine the voluntariness of Applicant’s guilty plea. *Roddy v. State*, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, an Applicant’s right to contest the validity of such a plea is usually barred. *See Blackledge v. Allison*,

JB M/7

431 U.S. 63, 73-74, 97 S.Ct. 1621, 1628-29 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Statements made during a guilty plea should be considered conclusively, unless Applicant presents valid reasons why he should be allowed to depart from the truth of his statements. *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975) (overruled on other grounds by *United States v. Whitley*, 759 F.2d 327 (4th Cir.1985)).

Applicant entering a plea on the advice of counsel may only attack the voluntary and intelligent character of his plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001); *Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926 (2000).

Applicant did not provide any testimony or evidence at the evidentiary hearing that his plea was not voluntarily made. Review of the guilty plea transcript clearly refutes the allegation made in his application for relief that his plea was unlawfully induced. See *Rayford v. State*, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant's claim lawyer misadvised him). The plea colloquy record shows Applicant was fully informed of his constitutional rights, understood the charges against him, was cognizant of the sentencing exposure he faced, as well as his satisfaction with Counsel's representation, and that it was his decision to plead guilty. Plea Tr. 9-10. Any misconceptions concerning Applicant's constitutional rights, the charge, or potential sentence on his part were

cured by the colloquy during the complete and thorough plea proceeding. *See State v. Stalk*, 375 S.C. 289, 300, 652 S.E.2d 402, 407-408 (2007). It is clear from the plea record that Applicant understood the terms of his plea, and he failed, both in his application for relief and at the evidentiary hearing, to assert error on the part of Counsel. From the testimony presented it is clear that Applicant accepted the negotiated plea offer, with the advice of counsel, to mitigate his sentencing exposure. In view of *Rayford*, this Court has determined that Applicant's plea was voluntary, intelligent, and knowing. Therefore, Applicant has failed to meet his burden under either prong of *Hill*, and his request for relief by way of this allegation, set forth above as 2., is denied and dismissed with prejudice.

[*Conclusion and signature page to follow*]

IV. CONCLUSION

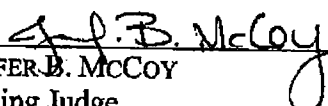
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

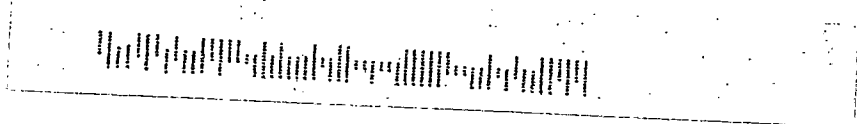
IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 23 day of October, 2019.


JENNIFER B. MCCOY
Presiding Judge
Fourteenth Judicial Circuit

Beaufort, South Carolina



FALK LAW FIRM
PO Box 1058
Charleston, SC 29402

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