THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

HONORABLE G. THOMAS COOPER

2018-CP-42-3121

JONATHAN JOHNSON, SCDC# 375868

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Jonathan Johnson appeals the denial of his Post- Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable G. Thomas Cooper, Circuit Judge on October 8, 2019 an Order issued on December 27, 2019 and filed on January 6, 2020. The Appellant received notice of the judgment on January 10, 2020.

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AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on January 14, addressed to their attorney of record, Jacob Isenberg, Esquire Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: January 14, 2020

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Jonathan Johnson, S.C.D.C. No. 375868, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2018-CP-42-3121 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed by Jonathan Johnson ("Applicant") on September 10, 2018. Respondent made its return on or about April 16, 2019. The Court convened an evidentiary hearing into the matter on October 8, 2019, at the Spartanburg County Courthouse in South Carolina. Applicant was present at the hearing and represented by Rodney Richey, Esquire. Jacob A. Isenberg, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Jacqueline Alicia Moss ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions and the pleadings. After a thorough review of the credible evidence and testimony, this Court finds the application should be dismissed with prejudice.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the October

2017 term of the Spartanburg County Grand Jury for two counts of kidnapping (2017-GS-42-4888, 4888A) two counts of first degree assault and battery (4885, 4885A) possession of a stolen pistol (4887) two counts of armed robbery (4883, 4884) first degree burglary (4886) and possession of a weapon during a violent crime (4883A). Roger Poole ("Poole") first represented Applicant. Thereafter, Mary Stuart Shealy ("Shealy") represented Applicant. On November 20, 2017, Jacqueline Alicia Moss ("Moss") began representing Applicant. Barry J. Barnette of the Seventh Circuit Solicitor's Office, prosecuted the case.

On March 30, 2018, Applicant pled guilty, under Alford v. North Carolina, 400 U.S. 25, (1970), to two counts of armed robbery, possession of a weapon during the commission of a violent crime, two counts of assault and battery, first degree burglary, possession of a stolen pistol, and two counts of kidnapping. The Solicitor did not offer a recommendation. The Honorable Grace G. Knie sentenced Applicant to imprisonment for concurrent terms totaling twenty-five (25) years followed by five (5) years of probation.

On April 2, 2018, Applicant's mother filed a notice of appeal on his behalf. On May, 2, 2018, the South Carolina Court of Appeals dismissed Applicant's notice of appeal because 1) Applicant's mother not an attorney licensed to practice in South Carolina; and 2) hybrid representation prevents Applicant from filing it on his own behalf because Moss still represented him. (Case No. 2018-000606). A remittitur was issued on May 17, 2018.

II. STATEMENT OF THE FACTS

The underlying facts of the crime(s) for which Applicant is incarcerated were articulated by the State during the plea proceeding as follows:

On July 28, 2017, Applicant broke into the home located at 453 Belcher Road in Spartanburg County, SC. One of the Victims saw Applicant kick in the door, and dialed 9-1-1.

Applicant, with a co-defendant, demanded money, drugs, and other items from the Victims. (Tr. 22-3).

Applicant, with a co-defendant, fired a shot at some point during the confrontation. One of the Victims was hit in the head. Applicant, with his co-defendant, took money, a play-station, jewelry, and marijuana from the Victims' home. Upon arrival, Spartanburg County police located Applicant and his co-defendant near the home. (Tr. 22-3).

Spartanburg County Law Enforcement located several items at the scene. They found $210 near the residence, a $20 bill behind the residence, and a $10 bill to the left of the residence. They found a silver necklace that belonged to one of the Victims. They found another $100 on the ground at the intersection where Applicant was caught. They found an ounce of marijuana. They found the black play station game that belonged to the Victims, a play-station controller, and a black cell phone. They also found two weapons, one of which was identified as stolen. (Tr. 24).

III. CURRENT APPLICATION

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

1. Constitutional Claims
   a. On July 28, 2017 Applicant was denied sixth amendment right to counsel by the Spartanburg County Sheriff Department during the line-up.
   b. Defendant has right to counsel after initiation of adversarial judicial proceeding.
   c. Applicant was denied the eighth amendment right to bail on or about August 23, 2017.
   d. On October 30, 2017, Applicant was denied the fourteenth amendment right to a preliminary hearing.
   e. Preliminary hearing shall be held within ten days following the request by Defendant
   f. Fourteenth Amendment violation based upon due process
2. Ineffective Assistance of Counsel

a. Between August 2017 and November 2017, Head Public Defender Clay Allen changed Applicant's lawyer three times without giving Applicant notice.
b. Applicant's attorney was ineffective for not keeping her word.
c. On January 12, 2018, Applicant saw his lawyer Jacqueline A. Moss for the first time in five months of being incarcerated.

3. Involuntary Plea
   a. On March 30, 2018, Applicant told him right before he pled that she was going to get him a sentence between 15-20 years and that she was going to do her best to get him lower end of the sentence which was 15 years non-violent.
4. Prosecutorial Misconduct
   a. State or Public Defender lied to Applicant and breached the plea agreement.

Applicant requests relief as follows:

- 1) Enter judgment granting fifteen years non-violent; or
- 2) Pull the plea and take it to trial.

At the evidentiary hearing, Applicant only proceeded forward on the following claims: 1) Ineffective assistance of counsel based upon a failure to advise Applicant he could receive more than fifteen years; and 2) Involuntary plea based upon his belief the sentence imposed would not be higher than fifteen years. Accordingly, this Court finds all other claims are dismissed with prejudice based upon Applicant's failure to proffer evidence in support.

IV. SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

Applicant

Applicant testified on his own behalf at the evidentiary hearing. Applicant testified he believed Counsel effectively represented him. Applicant testified Counsel advised him he could potentially receive a life sentence. However, Applicant testified Counsel advised him she would advocate for less time. Applicant stated Counsel told him she would attempt to get him fifteen years. Applicant testified he would not have pled if he believed he would get more than fifteen years.

Applicant testified he was under the influence during the incident at issue. He further testified to having no memory of the incident.

Applicant testified he did not remember the plea hearing. He did not remember the plea court notifying him of the potential sentences of the charges he pled guilty to. He also did not remember the plea court telling him he could receive life on his burglary first charge. Finally, Applicant testified he was unhappy with his sentence.

Counsel

Counsel testified on behalf of Respondent at the evidentiary hearing. Counsel testified she was in her twenty-fifth year of practicing law. She testified she advised Applicant of the potential sentence for each charge and went over every indictment with Applicant. She did not promise Applicant a sentence of fifteen years but she did advise Applicant he could receive fifteen to life for the first degree burglary charge. Counsel testified, based upon her experience, she never promises anything to a client before appearing before a judge in Court.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and 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

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (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). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). 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 Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he/she would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (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 an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975)).

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. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is

easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

1. Erroneous Advice about Potential Sentence

Applicant contends Counsel guaranteed him that a guilty plea would result in a sentence no higher than fifteen years. However, Counsel testified she did not promise Applicant a fifteen year sentence and she would never promise a client anything before a plea hearing.

Additionally, Counsel testified she advised Applicant about the first degree burglary charge consequences. She stated she told Applicant the court could impose the mandatory minimum of fifteen years on this charge, and she told Applicant the court could impose a maximum of life without parole on this charge. She testified she told Applicant she would advocate for the court to impose a fifteen year sentence.

This Court finds Counsel gave credible testimony on the issue. Therefore, this Court finds Counsel did not guarantee Applicant he would receive fifteen years. As a result, this Court finds Applicant has failed to overcome the burden to prove prejudice.

Applicant contends he entered a guilty plea after Counsel allegedly guaranteed a fifteen year sentence. However, erroneous advice from counsel can be cured, on the record, through information supplied during a defendant's plea hearing. Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997).

The plea court advised Applicant the potential penalty for first degree burglary was fifteen years to life. (Tr. 11). Thereafter, the plea court told Applicant the potential penalty for kidnapping was zero to thirty years. (Tr. 13). The plea court then told Applicant the potential penalty for armed robbery was ten to thirty years. (Tr. 14, 15). Applicant told the plea court nobody promised

him anything in exchange for pleading guilty. (Tr. 16). Finally, Counsel advocated for mercy from the plea court before the sentence was imposed. (Tr. 33).

Accordingly, this Court finds the record cures any erroneous advice given by Counsel. Specifically, this Court finds the record reflects the plea court gave appropriate advice about the potential consequences of these charges. Moreover, this Court finds the record adequately reflects Applicant stated he was not promised anything to plead guilty. Therefore, this Court finds Applicant has failed to overcome the burden to prove prejudice based upon this allegation.

VI. INVOLUNTARY PLEA

Applicant alleges his guilty plea was involuntary based upon being promised a fifteen year sentence. To find a guilty plea voluntarily and knowingly, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000). Also, an applicant's statements during the plea hearing are considered "conclusive unless [he] presents valid reasons why he should be allowed to depart from the truth" of them. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007). Finally, the plea colloquy can cure any alleged deficiency if counsel does not properly advise an applicant about the consequences of accepting it. See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997) (stating that plea counsel's deficient performance can be cured by the plea court's colloquy).

At the plea hearing, Applicant stated he was not promised anything to plead guilty. (Tr. 16). At the evidentiary hearing, Applicant testified he did not remember the plea hearing. Accordingly, this Court finds Applicant has not presented a valid reason to depart from those statements. Therefore, this Court finds Applicant has failed to prove his plea was involuntary based upon a promise made by Counsel.

III. CONCLUSION

Based on 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 27 **day of** December, **2019.**

G. THOMAS COOPER
Presiding Judge
Seventh Judicial Circuit

Columbia, South Carolina

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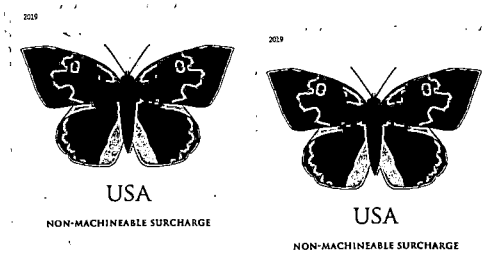

The Honorable Daniel E. Shearouse
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