

ROSS AND ENDERLIN, PA  
ATTORNEYS AT LAW

January 28, 2020

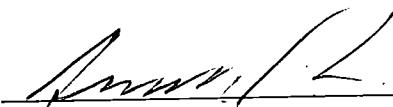
Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: Tavaris Dewberry v. State  
2017-CP-42-4642

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,

  
Susannah Ross  
Attorney at Law

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JAN 30 2020

S.C. SUPREME COURT

enclosure

cc: Office of the Attorney General  
Office of Appellate Defense  
Spartanburg County Clerk of Court

330 E. COFFEE ST. • GREENVILLE/SC • 29601  
PHONE: (864) 242-0029  
E-MAIL: SUSANNAH@ROSSENDERLIN.COM

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

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2017-CP-42-4642

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Tavaris Dewberry, ..... Appellant,  
v.  
The State, ..... Respondent.

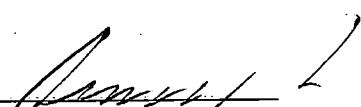
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NOTICE OF APPEAL

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Tavaris Dewberry appeals the Honorable G. Thomas Cooper's Order of Dismissal filed January 6, 2020.

This 28 day of January, 2020.

  
Susannah Ross, Attorney at Law  
330 E. Coffee St.  
Greenville, SC 29601  
(864) 242-0029  
Attorney for Appellant

Other Counsel of Record:  
Jacob A. Isenberg, Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-3970  
Attorney for Respondent

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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF Tavaris Dewberry ) FOR THE SEVENTH JUDICIAL CIRCUIT  
Tavaris Dewberry, ) Case No.: 2017-CP-42-4642  
S.C.D.C. No. 354780, )  
Applicant, )  
v. ) ORDER OF DISMISSAL  
State of South Carolina, )  
Respondent. )

This matter comes before the Court by way of an application for post-conviction relief filed by Tavaris Dewberry ("Applicant") on December 18, 2017. Respondent made its return on or about April 12, 2018. 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 Susannah Ross, 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, Michael D. Morin, Esquire ("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 evidence and testimony in the record, this Court finds the application for post-conviction relief shall be dismissed with prejudice.

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## 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. During its August 2015 term, the Spartanburg County Grand Jury indicted Applicant for three counts of armed robbery (2015-GS-42-03859, 03860, -03861), attempted murder (2015-GS-42-03862), and first-degree burglary (2015-GS-42-03863). The charges stem from a July 2015 incident in which the Applicant and two other individuals broke into the victim's residence in an apparent robbery attempt. While committing the robbery, Applicant and the other assailants ultimately shot the victim two times before fleeing from the scene with the Applicant driving the get-away car.

Michael D. Morin, Esquire, represented Applicant, and Solicitor Barry J. Barnett and Assistant Solicitor Spenser H. Smith of the Seventh Circuit Solicitor's Office, prosecuted the case.

On February 22, 2017, Applicant appeared in the Spartanburg County Court of General Sessions before the Honorable J. Derham Cole, circuit court judge, pled guilty to armed robbery, attempted murder, and the lesser included offense of second-degree burglary. Pursuant to a plea agreement entered into between Applicant and the State, the remaining two armed robbery charges were dismissed. Judge Cole sentenced Applicant to imprisonment for eighteen years on the armed robbery, eighteen years on the attempted murder, and fifteen years for the burglary charge, all to be served concurrently. Applicant did not appeal his conviction or sentence.

## II. CURRENT APPLICATION

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

1. Ineffective Assistance of Counsel
  - a. Failure to advise of plea offer

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- b. Failure to advise Applicant the State would have to prove to a jury that he had specific intent to kill to get a conviction for attempted murder under State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 4/22/15) which would have been difficult under accomplice liability theory.
  - c. Failure to review discovery with Applicant prior to plea
  - d. Failure to advise Applicant that his right to appeal the ruling on pretrial motion to suppress statement would be waived after pleading guilty
  - e. Failure to appeal the plea and sentence on behalf of Applicant
2. Involuntary Plea
- a. Applicant was not advised pleading guilty would have his right to appellate review of the court's ruling on pretrial motion to suppress and the co-defendant received probation.

Applicant requests relief as follows:

- "Sentence vacated, modified to a downward departure, or conviction reversed and remanded for a new trial."

At the evidentiary hearing, Applicant proceeded forward on the above-mentioned allegations.

### III. SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

Applicant testified on his own behalf at the evidentiary hearing. Applicant testified there were no pretrial hearings. Thereafter, Applicant testified he was supposed to have a hearing to suppress the statement he gave at which he says he was under the influence of drugs and alcohol.

Applicant testified Counsel pressured him to plea. Applicant testified he was not a lookout for the crime his co-defendants committed. Moreover, Applicant testified he had no knowledge the crime was taking place.

Applicant testified he pled guilty because he felt his co-defendants would testify unfavorably at trial. He testified he would not have pled guilty with knowledge of the "intent to kill" legal requirement. Applicant further testified Counsel did not adequately investigate the case.

Applicant testified Counsel told him he would receive between ten to fifteen years and he relied on Counsel's advice that the sentence would be no more than fifteen years.

Applicant testified he directed Counsel to file an appeal but Counsel failed to file an appeal.

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On cross examination, Applicant testified he remembered waiving his right to compel the State to prove him guilty beyond a reasonable doubt at trial. Thereafter, Applicant testified he pled guilty based upon the overwhelming evidence against him.

### Plea Counsel

Counsel testified on behalf of Respondent at the evidentiary hearing. Counsel testified he has been a criminal defense attorney for sixteen years. Counsel testified he met with Applicant about five times. He asked Applicant about co-defendants at the first meeting. Counsel testified he traditionally gives clients discovery right after receiving it.

Counsel stated he never guaranteed Applicant a specific sentence and he never guarantees a specific sentence unless entering a negotiated sentence. However, Counsel testified he traditionally tells clients he will advocate for certain sentences. Counsel admitted he likely told Applicant he would advocate for ten to fifteen years. Counsel affirmed he was prepared for trial and that he was aware the State had to prove a defendant had the specific intent to kill for attempted murder. Counsel testified he did not pressure Applicant to plead guilty.

Counsel testified he reviewed the co-defendants' statements. Originally, Counsel believed Applicant was going to trial with his co-defendants. Counsel testified this would have been favorable to Applicant because the co-defendants' statements would not have been admissible. However, the co-defendants eventually pled guilty and therefore, the co-defendants' statements could then become admissible at trial. Counsel testified the co-defendants planned on testifying, at trial on behalf of the State. This flip put additional pressure on Applicant to plead. Accordingly, Counsel testified Applicant pled guilty because his co-defendants flipped.

### IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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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

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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

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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; 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.

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*I. Failure to Communicate the Plea Offer*

Applicant contends Counsel erroneously told him entering a plea would result in a sentence of no more than fifteen years.

This Court finds Counsel's testimony to be credible on the issue. The record reflects Counsel told Applicant the plea court would not be bound by the recommended sentence. (Tr. 29-30). Further, the record reflects Counsel advocated for the recommended sentence. (Tr. 30). Counsel requested the plea court consider ten years based upon the low end of this sentencing range. (Tr. 31). On the other hand, the record fails to provide evidence in support of Applicant's testimony. Based upon the circumstances, this Court finds Applicant did not provide credible testimony. As a result, this Court finds Applicant has failed to prove Counsel failed to communicate the plea offer.

Here, the following colloquy took place between the plea court and Applicant:

The Court: Did your lawyer tell you what kind of sentence would be imposed if you did plead guilty?

Defendant: No.

The Court: Did you understand that that sentence is going to be left strictly up to me?

Defendant: Yes, sir.

The Court: And do you understand that the potential sentences in the cases are 30 years for attempted murder, 15 years for burglary in the second degree and 30 years for armed robbery?

Defendant: Yes, sir.

The Court: Understanding that, you still to go forward and plead guilty?

Defendant: Yes, your Honor.

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(Tr. 19-20). Accordingly, this Court finds the plea court gave an adequate colloquy about the sentence it could impose. This Court finds Applicant has failed to provide a valid reason to explain his inconsistent statements about understanding the potential sentence. The Court finds Applicant has failed to prove he was prejudiced by Counsel's failure to convey the plea offer.

## ***2. Failure to Advise of the Specific Intent to Kill Requirement***

Applicant contends Counsel deficiently failed to advise him the State would be required to prove Applicant had the specific intent to kill at trial.

Counsel testified the State was going to take Applicant to trial on attempted murder. He met with Applicant about five times before the plea hearing and he was completely prepared for trial.

Counsel testified the State believed Applicant blindly fired shots into the home and planned to present this fact at trial. Counsel testified he was aware of the specific intent to kill requirement at this time and this could apply if evidence is presented at trial that Applicant fired a

shot into the home. Counsel believed this was going to be a material issue at trial. Counsel testified he also went over accomplice liability extensively.<sup>1</sup> Counsel concluded he had discussed all material elements of attempted murder with Applicant.

On the other hand, Applicant testified Counsel never informed him of the specific intent to kill requirement.

At the plea hearing, the Solicitor stated a shot was fired at the home while Applicant was outside. (Tr. 23). The Solicitor said Applicant was outside with Martin, who planned to testify at trial. (Tr. 23-4). The Solicitor said Applicant entered the home to tell his co-defendants to hurry up. (Tr. 23-4). Applicant agreed with the Solicitor's version of events. (Tr. 23-4). The Solicitor questioned the victim about whether Applicant had a gun. (Tr. 35). The victim said Applicant did not have a gun. (Tr. 35). However, the Solicitor indicated he questioned the credibility of this response from the victim. (Tr. 35).

Accordingly, this Court finds the record supports Counsel's version of events. This Court finds it is more likely than not that Counsel discussed the specific intent requirement with Applicant. As a result, Applicant has failed to overcome the burden to prove Counsel was deficient based upon this allegation.

Applicant contends he was prejudiced because the facts are insufficient to convict him under accomplice liability. Substantively, if two or more combine together to commit an unlawful act and, in execution of such criminal act, another crime is committed by one of the actors, as a probable or natural consequence of the acts done in pursuance of common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act. State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972).

<sup>1</sup> At the plea hearing, Counsel stated he discussed accomplice liability extensively with Applicant. (Tr. 29). Therefore, this is corroborated by the record.

Applicant testified he was never the lookout. Applicant testified he had no knowledge the crime, attempted murder, was taking place and therefore, Applicant testified he could not have been an accomplice. The following colloquy occurred between the plea court and Applicant:

**The Court:** Indictment 2015-3862 charges you with attempted murder. The State alleges that you did on or about July 14<sup>th</sup> of 2015 with intent to kill, attempt to kill Marlon Shermaine Davis with malice aforethought expressed or implied by shooting him with a firearm.

You could be found guilty of attempted murder by committing those acts yourself or by acting in concert with other persons pursuant to common course of action, common scheme, plan, or conspiracy basically.

Attempted murder carries a sentence of up to years in jail. Do you understand that charge?

**Defendant:** Yes, sir.

**The Court:** Do you understand the potential sentence?

**Defendant:** Yes, sir.

**The Court:** Do you want to plead guilty or not guilty to it?

**Defendant:** Guilty.

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(Tr. 10). Applicant confirmed Counsel told him what the State would have to prove for an attempted murder conviction. (Tr. 13). The Solicitor stated two co-defendants shot the victim inside the home. (Tr. 23). The Solicitor notified the plea court Applicant was a lookout, with knowledge of the plan to invade this home. (Tr. 24, 25). The Solicitor said Applicant entered the home, two or three times, to speed things up. (Tr. 23-5). Moreover, the Solicitor said Applicant called a driver to pick them up from the home. (Tr. 24). Applicant said he agreed with the Solicitor's version of events. (Tr. 28).

Accordingly, this Court finds Applicant presented inconsistent testimony at his plea and evidentiary hearings. Therefore, he must provide a valid reason to explain why the original testimony was given. However, Applicant did not offer any explanation as to why he originally agreed with the Solicitor. Therefore, this Court finds he has not provided a valid reason to depart from the conclusive plea hearing statements. As a result, this finds Applicant has failed to show prejudice from pleading guilty based upon accomplice liability.

Applicant contends he would have demanded a trial if he had knowledge of the specific intent to kill requirement. The S.C. Supreme Court held a defendant could not prove prejudice where his decision to plea was not based upon the error by counsel. Goins v. State, 397 S.C. 568, 575, 726 S.E.2d 1, 4 (2012). Applicant testified he pled guilty because of the significant amount of evidence against him. Moreover, Counsel testified Applicant pled based upon the prospect his co-defendants were going to provide unfavorable testimony at trial. The record reflects admissibility of unfavorable statements played a significant role in Applicant's decision to plea (Tr. 30). This Court finds Applicant's plea was based in part upon his co-defendants' decision to testify unfavorably to him at trial. Accordingly, this Court finds Applicant was not prejudiced by any alleged failure to adequately advise him about the law of attempted murder.

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**3. Failure to Review Discovery**

Counsel testified he reviewed the discovery materials with Applicant extensively over the course of five meetings. Specifically, Counsel testified they spent a great deal of time reviewing the co-defendants' statements. Counsel testified Applicant pled after finding out that the co-defendants planned to testify against him at trial. Applicant also testified he and his Counsel did not review discovery.

Accordingly, this Court finds it is undisputed Applicant plea was based in part upon the co-defendants' potential unfavorable testimony. This corroborates Counsel's version of events which includes reviewing the co-defendants' statements extensively during discovery discussions. Moreover, the record reflects Counsel told the plea court he reviewed discovery with Applicant (Tr. 29). Accordingly, this Court finds Counsel gave credible testimony on the issue. As a result, this Court finds Applicant has failed to overcome the burden to prove Counsel failed to review discovery.

Applicant contends he was prejudiced by a failure to review discovery. However, Applicant failed to specify which piece of discovery they did not review together. To reiterate, an applicant cannot prove prejudice where his decision to plea was not based upon the alleged error by counsel. Goins v. State, 397 S.C. at 575, 726 S.E.2d at 4. This Court finds Applicant pled based upon his co-defendants' decision to testify unfavorably at trial. Accordingly, this Court finds Applicant was not prejudiced by any alleged failure to review discovery.

**4. Failure to Advise Appellate Consequences to Pleading before Pretrial Motions**

Applicant contends Counsel failed to advise him of the right to appeal. Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Roe v. Flores-Ortega, 528 U.S. 470 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995).

Counsel testified he informed Applicant of the right to appeal. However, Counsel testified Applicant never requested him to file an appeal. Counsel testified he did not believe there were any appealable issues.

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Additionally, the following colloquy took place between the plea court and Applicant:

The Court: Well a defense is a reason why you should not be found guilty of a crime. As an example, if you are accused of robbing a bank in Spartanburg, South Carolina, on January the 1<sup>st</sup> and you could establish that you were in San Francisco, California, at the same time the bank was robbed, that would be an alibi defense. You couldn't be guilty of armed robbery in Spartanburg if you're in San Francisco, California.

Defendant: Okay.

The Court: So that's just an example. There are multiple defenses that might apply to any given case.

Defendant: Yes, sir.

The Court: So I just need to find out if you have some reason why you think you should not be found guilty these crimes that you're offering to plead guilty to

Defendant: No, sir.

The Court: Well, do you understand that if you did have defense to a charge when you plead guilty to it you give up your right to assert that defense?

Defendant: Yes, sir.

The Court: And you'll be sentenced just as if you had pled guilty, admitted your guilt or just as if a jury had considered the evidence and found you guilty.

Defendant: Yes, sir.

The Court: Is that what you wish to do?

Defendant: Yes, Your Honor.

The Court: Did Mr. Morin explain to you each of the constitutional rights that you have that you have to give up if you want to plead guilty?

Defendant: Yes, your Honor.

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(Tr. 14-6). This Court finds the record corroborates Counsel's version of events. Moreover, this Court finds Counsel gave credible testimony on this issue. Therefore, this Court finds Applicant has failed to overcome the burden to prove Counsel advised him deficiently.

At the evidentiary hearing, Applicant departed from his decision to waive the right to present a defense. Specifically, Applicant testified there should have been a suppression hearing regarding his statement. Moreover, Applicant testified the suppression hearing would have addressed a statement he gave at which he says he was under the influence of drugs and alcohol. This Court finds Applicant has failed to provide a valid reason to explain his inconsistent statements.

Applicant contends he was prejudiced by Counsel's failure to give correct advice about consequences of pleading guilty. An applicant cannot prove prejudice where his decision to plea was not based upon the alleged error by counsel. Goins v. State, 397 S.C. at 575, 726 S.E.2d at 4. Applicant testified he pled guilty because of the significant amount of evidence against him. Moreover, Counsel testified Applicant pled based upon the prospect his co-defendants were going to provide unfavorable testimony at trial. Accordingly, this Court finds Applicant was not prejudiced by an alleged failure to adequately advise about appellate rights.

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**5. Failure to Appeal**

Applicant contends Counsel deficiently failed to file a notice of appeal. Courts must judge reasonableness of counsel's conduct on facts of particular case, viewed as of time of counsel's conduct. Roe v. Flores-Ortega, 528 U.S. 470, 476 (2000). Furthermore, counsel only has a duty to consult with his client about an appeal when they have reason to believe either: 1) a rational

defendant would want to appeal; or 2) this particular defendant reasonably demonstrated interest in appealing. Roe, 528 U.S. at 480. The courts take into account information counsel knew or should have known at the time. Id. Courts should also consider whether the conviction followed a guilty plea based upon the following: 1) pleas may signal a defendant's quest to end judicial proceedings; and 2) pleas have significantly smaller scope of appealable issues. Id.

Counsel testified he traditionally files a notice of appeal when client's request one. In this case, Counsel testified he notified Applicant of his appellate rights and he does not remember Applicant requesting an appeal. Counsel testified he does not believe Applicant requested an appeal. Finally, Counsel testified he did not believe there were any appealable issues. Accordingly, this Court finds Counsel gave credible testimony on the issue. Therefore, this Court finds Applicant has failed to overcome the burden to prove Counsel was deficient in this regard.

#### V. INVOLUNTARY PLEA

Applicant alleges his guilty plea was involuntary based upon not knowing he would waive his right to appeal for multiple reasons.<sup>2</sup> 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). Additionally, the plea colloquy can cure an alleged deficiency if counsel has not properly advised 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).

<sup>2</sup> Applicant contends he wanted to appeal a motion to suppress as well as his co-defendant receiving probation.

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Applicant testified there was no pretrial motion to suppress his statement but Applicant testified there was supposed to be a pretrial motion to suppress his statement. Applicant testified he would not have pled if he had known it would waive his right to appeal the failure to conduct a pretrial motion to suppress his statement.

At the plea hearing, Applicant waived his right to present a defense during the plea colloquy. (Tr. 14-6). Applicant acknowledged this meant he would be sentenced as if a jury found him guilty based upon the evidence. (Tr. 14-6). Finally, Applicant claimed he discussed all constitutional waivers with Counsel beforehand. (Tr. 14-5).

Accordingly, this Court finds the record establishes Applicant discussed the consequences of pleading guilty with Counsel beforehand. Moreover, the record establishes the Court gave a sufficient colloquy on the consequences of waiving his right to a defense. As a result, the Court finds Applicant entered a knowing and voluntary plea of guilty.

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## VI. 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


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review of the denial of PCR. Rule 71.1(g), SCRCR 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 remain in 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

Camden, South Carolina

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Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

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