Law Office of Leah B. Moody, LLC

Leah B. Moody
Lbmatty@comporium.net

235 East Main Street, Suite 115
Post Office Box 1015 (29731)
Rock Hill, South Carolina 29730

March 6, 2020

Mr. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29221

RE: Gary Thomas v. State of South Carolina
Case No.: 2017-CP-40-00046

Dear Mr. Shearouse:

The Richland County Court of Common Pleas appointed my office to represent Gary Thomas in his Post-Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the Notice of Appeal, Proof of Service, and one (1) copy of the Order of Dismissal in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance with this matter.

Sincerely,

Leah B. Moody

Enclosure

cc Gary Thomas
Lindsey McCallister, Esquire
Sharon Graham, SCCID
Jeanette McBride, Clerk of Court, Richland County

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
MAR 11 2020
S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Jocelyn Newman, Presiding in Richland County

Case No. 2017-CP-40-00046

Gary Thomas, ... Appellant,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Gary Thomas appeals the order of the Honorable Jocelyn Newman, dated January 27, 2020 and mailed on February 6, 2020. Appellant received written notice of entry of the final order February10, 2020.

Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
235 E. Main Street, Suite 115
Post Office Box 1015
Rock Hill, South Carolina 29731

Other Counsel of record:
Lindsey McCallister, SC Attorney General's Office
Attorney for Respondents
Rembert C. Dennis Building
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-3970

RECEIVED
MAR 11 2020
S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jocelyn Newman, Presiding in York County

Case No. 2017-CP-40-00046

Gary Thomas, ... Appellant,

v.

State of South Carolina, ... Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Lindsey McCallister by depositing a copy of it in the United States Mail, postage prepaid, on 3/7 2020, addressed to its attorney of record, Justin Hunter, Post Office Box 11549, Columbia, South Carolina, 29211-1549.

Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
235 E. Main Street, Suite 115
Post Office Box 1015
Rock Hill, South Carolina 29731

March 7, 2020

Cc Gary Thomas
Lindsey McCallister, Esq.
Jeanette McBribe, Clerk of Court, Richland County
Sharon Graham, SCCID

Law Office of Leah B. Moody, LLC

Leah B. Moody
Lbmatty@comporium.net

235 East Main Street, Suite 115
Post Office Box 1015 (29731)
Rock Hill, South Carolina 29730

March 6, 2020

The Honorable Jeanette McBride
Richland County Clerk of Court
Post Office Drawer 2766
Columbia, South Carolina 29202

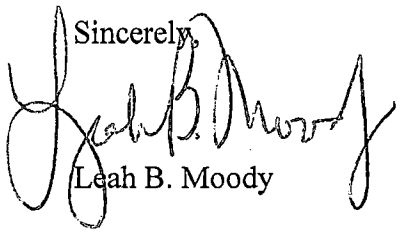
RE: Gary Wayne Thomas, #366010, v. State of South Carolina
C.A. No.: 2017-CP-40-00046

Dear Mrs. McBride:

The Richland County Court of Common Pleas appointed my office to represent Gary Thomas in his Post-Conviction Relief action. Please find enclosed a copy of the Notice of Appeal and Proof of Service in this matter.

If you have any questions or concerns, please feel free to contact my office. Thank you.

Sincerely,



Leah B. Moody

Enclosures

cc Gary Thomas
Lindsey McCallister, Esq.
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Sharon Graham, SCCID

Law Office of Leah B. Moody, LLC

Leah B. Moody
Lbmatty@comporium.net

235 East Main Street, Suite 115
Post Office Box 1015 (29731)
Rock Hill, South Carolina 29730

March 6, 2020

Lindsey A. McCallister, Esquire
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

RE: Gary Thomas v. State of South Carolina
Case No.: 2017-CP- 40-0046

Dear Mrs. McCallister:

The Richland County Court of Common Pleas appointed my office to represent Gary Thomas in his Post-Conviction Relief action. Please find enclosed a copy of the Notice of Appeal and Proof of Service in this matter.

If you have any questions or concerns, please feel free to contact my office. Thank you.

Sincerely,

Leah B. Moody

Enclosures

Cc Gary Thomas
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Jeanette McBride, Clerk of Court, Richland County
Sharon Graham, SCCID

Law Office of Leah B. Moody, LLC

Leah B. Moody
Lbmatty@comporium.net

235 East Main Street, Suite 115
Post Office Box 1015 (29731)
Rock Hill, South Carolina 29730

March 6, 2020

Sharon Graham
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11433
Columbia, South Carolina 29211-1433

RE: RE: Gary Thomas v. State of South Carolina
Case No.: 2017-CP-40-00046

Dear Ms. Graham:

The Richland County Court of Common Pleas appointed my office to represent Gary Thomas in his Post-Conviction Relief action. Please find enclosed a copy of the Notice of Appeal and Proof of Service in this matter.

If you have any questions or concerns, please feel free to contact my office. Thank you.

Sincerely,

Leah B. Moody

Enclosures

Cc Gary Thomas
Lindsey McCallister, Esq.
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Jeanette McBride, Clerk of Court, Richland County

ALAN WILSON
ATTORNEY GENERAL

February 6, 2020

Ms. Leah B. Moody
Law Office of Leah B. Moody, LLC
PO Box 1015
Rock Hill, SC 29731

Re: **Gary Wayne Thomas v. State of South Carolina**
2017-CP-40-0046

Dear Ms. Moody:

Enclosed is a copy of the filed **Order of Dismissal** the above-captioned case signed by The Honorable Jocelyn Newman and filed with the Richland County Clerk of Court.

Sincerely,

Lindsey A. McCallister
Assistant Deputy Attorney General

LAM/em
Enclosure(s)

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

Gary Wayne Thomas, Applicant,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** have been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

Ms. Leah B. Moody
Law Office of Leah B. Moody, LLC
PO Box 1015
Rock Hill, SC 29731

This 6th day of February, 2020.

Erik Marcusson
Legal Assistant for Respondent

SWORN to before me this 6th day of February, 2020.

Notary Public for South Carolina.
My Commission Expires: 10/1/2025

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP4000046

GARY WAYNE THOMAS (SCDC #366010)

PLAINTIFF(S)

STATE OF SOUTH CAROLINA

DEFENDANT(S)

Submitted by: NEWMAN, J.	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

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

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

RICHLAND COUNTY FILED
2020 JAN 29 AM 10:12

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

RECEIVED
MAR 11 2020
S.C. SUPREME COURT

ORDER INFORMATION

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

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

Jocelyn Newman

Circuit Court Judge

2757
Judge Code

January 27, 2020
Date

For Clerk of Court Office Use Only

This judgment was entered on the 29th day of Jan, 2020 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT Jeanette W. McBride

Court Reporter:

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

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

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

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Gary Wayne Thomas (SCDC #366010), Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2017CP4000046 **ORDER OF DISMISSAL**

This matter comes before the Court upon Application for Post-Conviction Relief ("PCR Application") filed by Applicant Gary Wayne Thomas ("Applicant") on January 26, 2017. Respondent filed its Return and Motion to Dismiss[1] on December 12, 2017. On December 5, 2018, a hearing was conducted at the Richland County Judicial Center. Applicant was present along with his counsel, Leah B. Moody, Esquire. The State was represented by Lindsey A. McCallister, Esquire.

For the reasons set forth below, the Application for Post-Conviction Relief is DENIED; and this matter is DISMISSED WITH PREJUDICE.

FACTUAL AND PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. He was indicted at the February 2015 term of the Richland County Grand Jury in indictment 2015-GS-40-00196 for Armed Robbery and indictment 2015-GS-40-00183 for Attempted Murder. Applicant was represented on these charges

[1] The State moved to dismiss based on the statute of limitations. The motion was withdrawn once the State learned of Applicant's post-guilty plea motion and the date of the Court's ruling on the same.

by Tracy E. Pinnock, Esquire ("Plea Counsel"). Meghan Walker, Esquire, from the Fifth Circuit Solicitor's Office prosecuted the case.

On November 9, 2015, Applicant pled guilty to both charges as indicted. The Honorable Tanya Gee sentenced him to consecutive terms of imprisonment of thirty years for Attempted Murder and ten years for Armed Robbery, giving him credit for the time he had already served as a pre-trial detainee. Applicant did not appeal his conviction or sentence, but he filed a motion for reconsideration in which he asked for a reduction of his sentence. The motion for reconsideration was heard on May 19, 2016, and denied by Order dated June 29, 2016.

On January 5, 2017, Applicant filed the instant PCR Application in which he alleged that he is *not* being unlawfully detained by that he is "in no way a career criminal," and should not have received the maximum sentence allowed for Attempted Murder. However, during the evidentiary hearing Applicant also alleged that he was "misrepresented due to ineffective assistance of counsel." Specifically, via his testimony, Applicant alleged (1) failure to challenge indictment setting forth incorrect facts; (2) failure to move for a continuance or otherwise object after the solicitor incorrectly recited the factual background of Applicant's previous domestic violence conviction; (3) failure to sufficiently explain the terms of the plea agreement leading to an involuntary guilty plea; and (4) failure to adequately argue or address issues in the motion for reconsideration.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Where a PCR Application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* at 686; *see also Butler v. State*, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. *Bell v. State*, 321 S.C. 238 (1996); *see also Cherry v. State*, 300 S.C. 238 (1989); Rule 71.1(e), SCRCP.

The court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117 (citing *Strickland*, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18. Specifically, where an applicant has pled guilty, he must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

I. Insufficiency of Indictments

Applicant contends that Plea Counsel was ineffective for failing to challenge the indictment which set forth incorrect facts. First, Applicant alleges that the signatures (of the Grand Jury's foreperson) on the two indictments don't match one another, even though the indictments bear the same dates of issue. Second, he believes that Plea Counsel should have challenged the fact that the indictment for Armed Robbery erroneously states that Applicant had a co-defendant. Finally, Applicant believes that Plea Counsel should have moved to quash the indictment for Attempted Murder because the more appropriate charge was Criminal Domestic Violence of a High and Aggravated Nature ("CDVHAN"). The Court disagrees.

Plea Counsel testified that over approximately eleven meetings with Applicant, he raised concerns about there not having been a co-defendant, but they did not discuss the signatures on the indictments. She also conceded that the State never alleged that Applicant had a co-defendant in the commission of the armed robbery and, therefore, she should have asked that the indictment be corrected. While Plea Counsel did discuss the indictment with the prosecutor, she couldn't recall the substance of those discussions. Ultimately, she concluded that the mention of a co-defendant was simply a scrivener's error.

Plea Counsel also stated that Applicant never asked her to address the charge of Attempted Murder instead of CDVHAN. Even if they had discussed the issue, Plea Counsel believes that either charge would have been appropriate, given that the victim was Applicant's ex-wife. Applicant admitted that he didn't discover this "error" until he got to SCDC.

An indictment is a notice document, and any challenges to its sufficiency "shall be taken by demurrer or on motion to quash... before the jury shall be sworn and not afterwards." S.C. CODE ANN. §17-19-20 (2003). "The indictment must state the offense with sufficient certainty

and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer, and whether he may plead an acquittal or conviction thereon." *State v. Guthrie*, 352 S.C. 103, 108, 572 S.E.2d 309, 311-12 (Ct. App. 2002). Further, the "test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." *Id.* Additionally, the South Carolina Code states, in pertinent part:

> If (a) there be any defect in form in any indictments or (b) on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof, the court before which the trial shall be had may amend the indictment (according to the proof, if the amendment be because of a variance) if such amendment does not change the nature of the offense charged.

S.C. CODE ANN. §17-19-100 (2015).

In this case, the indictment discussed by Applicant did, in fact, cite the correct statute such that Applicant knew the nature of the offense he was required to defend, as well as the date, location, and identity of the alleged victim. Any reference to a codefendant was merely a scrivener's error which did not render the indictment – or the guilty plea – invalid. Furthermore, even if Counsel had moved to quash the indictment, the State could have asked to amend instead; and because the amendment would not change the nature of the offense, that motion would likely have been granted.

Additionally, although CDVHAN may also have been *an* appropriate charge, the Court finds that attempted murder was not an *inappropriate* charge. Plea Counsel had no control over the State's decision as to which crime to charge. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("so long as the prosecutor has probable cause to believe that the accused committed

an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion.").

Applicant has not met his burden of proving that Plea Counsel was deficient in any way regarding the indictments and has failed to show that he was prejudiced by Plea Counsel's failure to move to quash the indictment. Therefore, this allegation is denied and dismissed with prejudice.

II. Applicant's Prior Record

Applicant next claims that Plea Counsel was ineffective for failing to move for a continuance of his guilty plea or otherwise object when the prosecutor recited erroneous information about Applicant's prior conviction for criminal domestic violence ("CDV"). When Applicant's criminal history was discussed during the guilty plea, the court was informed about the CDV conviction as well as a conviction for Pointing and Presenting a Firearm ("P&P"), which the prosecutor alleged was the result of Applicant pointing a gun at his first wife. Applicant argues that the victim of the P&P was actually a man, not his ex-wife, and that Plea Counsel was ineffective for failing to challenge this.

In his testimony, Applicant admitted that during his meetings with Plea Counsel, they never discussed the underlying facts leading to the CDV conviction; and he testified that they never discussed the P&P charge at all, although they did review his RAP sheet. In response, Plea Counsel testified that Applicant never asked her to clarify or correct the details of his prior convictions. While she didn't anticipate that the prosecutor discussing details of Applicant's previous criminal charges, Plea Counsel stated that the only issue was the identity of one of the victims; and she did not believe she had a successful argument on that issue.

While the prosecutor may (or may not) have erred in identifying the victim of Applicant's prior conviction for P&P, the Court finds that this alleged error was harmless. Applicant has not

demonstrated that Plea Counsel was deficient in failing to correct the prosecutor. In fact, Applicant was present during the guilty plea and addressed the court at that time, yet he too neglected to correct the alleged erroneous information. Moreover, the record is clear that Plea Counsel did, in fact, object to the court's consideration of the prior convictions in determining Applicant's sentence because they were so remote in time. The Court cannot find that Plea Counsel was deficient in this regard or that Applicant was prejudiced by Plea Counsel's conduct. Therefore, this allegation is denied and dismissed with prejudice.

III. Involuntary Guilty Plea

Applicant's next argument is that Plea Counsel failed to sufficiently explain to him the terms of his guilty plea, rendering the plea involuntary. Again, the Court disagrees.

Applicant testified that he met with Plea Counsel a number of times about his case and told her that he was willing to serve ten to fifteen years in prison. He also testified that he rejected a twenty-five-year plea offer made by the State, believing that Plea Counsel could get him a lesser sentence. Applicant believed that although the prosecutor intended to seek a thirty-year sentence, the court would be lenient in sentencing him because he pled guilty.

According to Applicant, he did not know the meaning of a "straight up" plea and wasn't aware that by entering such a plea he was exposing himself to a possible sixty-year sentence. While he understood that both Attempted Murder and Armed Robbery have potential thirty-year sentences, Applicant testified that he believed his sentence would be in the range of ten to fifteen years because that would be Plea Counsel's request. He also admitted that the court advised him of the possible maximum sentence for each charge, yet he still opted to plead guilty.

Plea Counsel disputed key portions of Applicant's testimony, stating that she explained the meaning of "straight up" to him during meetings at the jail and at the courthouse. These discussions occurred after Applicant rejected the State's twenty-five-year plea offer because he wanted a probationary sentence (which Plea Counsel explained was not an option). According to Plea Counsel, Applicant became so comfortable with her explanations that when they again discussed the twenty-five-year plea offer, Applicant asked to plead "straight up," using that terminology himself. She also informed Applicant of the maximum possible sentence for each of the charges and the possibility of a trial. Plea Counsel also testified that she never told Applicant how to resolve the case; she merely gave him advice, and the decision to enter a "straight up" plea was his.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish that Applicant had a full understanding of the consequences of his plea and the charges against him. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. *Harris v. Leeke*, 282 S.C. 131, 318 S.E.2d 360 (1984). 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, but not invariably, foreclosed. *Blackledge v. Allison*, 431 U.S. 63 (1977). Statements made during a guilty plea should be considered conclusive, unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements. *Crawford v. U.S.*, 519 F.2d 347 (4th Cir. 1975).

In this case, much of Applicant's testimony is refuted by the record and is, therefore, not credible. The Court finds the plea colloquy dispositive as to these issues, as the record clearly establishes Applicant pled guilty freely and voluntarily. Applicant informed the court that he had

discussed the charges with Plea Counsel, that he understood their discussions, that he did not need more time to speak to Plea Counsel, and that he was satisfied with her advice. Both Plea Counsel and the court explained the minimum and maximum sentences Applicant faced on each charge, and Applicant indicated his understanding and informed the court he wished to plead guilty. It is clear that Applicant's decision was freely and voluntarily made. It is also clear that the court determined Applicant's sentence based on his lack of remorse or apology.

Accordingly, the Court finds that Plea Counsel's representation of Applicant was not deficient, and Applicant was not prejudiced by her representation. While Applicant is entitled to waive his right to trial and enter a guilty plea, he is not entitled to any particular plea offer or sentence. *See, e.g., State v. Miller*, 375 S.C. 370, 388, 652 S.E.2d 444, 453 (Ct. App. 2007) ("[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced. . . . However, a defendant has no constitutional right to plea bargain.") (internal citations omitted). Therefore, this allegation is denied and dismissed with prejudice.

IV. Motion for Reconsideration

Finally, Applicant argues that Plea Counsel failed to adequately argue or address issues in his motion for reconsideration of his sentence. The Court disagrees.

According to Plea Counsel, she filed a motion for reconsideration of Applicant's sentence without first telling Applicant. She did so because she believed that Applicant's comments during the guilty plea had a negative effect on his sentence. Therefore, her strategy for the reconsideration was to "fix" what Applicant had said during the plea. Applicant testified that Plea Counsel advised him not to speak during the reconsideration hearing.

Applicant complains that Plea Counsel was ineffective because she failed to give the court any reasons why his sentence should be decreased. He wanted Plea Counsel to raise issues of whether CDVHAN was a more appropriate charge, address the misstatement about his prior criminal convictions, and point out that he was sentenced to consecutive prison terms even though the State had not requested that. Overall, Applicant was upset because at the time of his plea he was fifty-five years old, making forty years' imprisonment a *de facto* life sentence.

According to Plea Counsel, she spoke to Applicant on the morning of the reconsideration hearing and explained the issues she intended to present to the court. While she did not tell the court about the State's twenty-five-year plea offer during the initial guilty plea (because Applicant wanted a lesser sentence), she mentioned it during reconsideration to entice the court to lower Applicant's sentence.

"A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." *State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2009). "[W]hen the State fulfills its agreement to recommend a specific sentence, the fact that the judge does not accept the recommendation does not affect the validity of the plea." *State v. Riddle*, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982). Further, "the authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion." *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981).

The Court finds that Plea Counsel properly filed a motion for reconsideration because she identified multiple grounds to support the motion – the plea court had not been informed of the State's twenty-five year offer, the imposition of a *de facto* life sentence, and Applicant's issues

with expressing himself appropriately to the court. Although Counsel did not consult with Applicant prior to filing, she immediately informed him what she had and done and why. Applicant clearly welcomed the motion even if he did not know in advance it would be filed. Additionally, the Court finds credible Plea Counsel's testimony that she met with Applicant on the morning of the motion hearing and explained the issues she planned to raise, and Applicant never asked to her address his prior record.

This Court has also reviewed the transcript of the reconsideration hearing and finds the sentence imposed by the plea court was a result of Applicant's actions, not those of Plea Counsel. The court clearly articulated its reasoning in imposing the forty-year sentence, explaining:

> ...I had not expected to give him the sentence I had either until Mr. Thomas spoke. And when he spoke, he said that the victim needed to be forgiven too. And there was a lot of blame put on the victim and not personal blame taken. And I believed the victim needed to be protected. . . .
>
> [A]nd upon hearing what he had to say for himself... the anger that he still had towards this victim, who he blamed because he believed she was talking to another man or whatever he thought she was doing; made me realize that if he was not incarcerated, that victim, who he attempted to kill with a two-by-four, would be at risk of being victimized again.
>
> So I'm just explaining to you where that forty-year sentence came from. . . . But just so you understand that it wasn't that you asked for ten years. I mean, you certainly did nothing wrong. You represented your client, you represented your client well. I wasn't expecting to give him the sentence that I did until he spoke for himself.

In addition, Plea Counsel articulated a valid strategy for discussing the State's plea offer when she did.

The Court can find no deficiency in Plea Counsel's representation and no prejudice to Applicant in the motion, except by his own actions. *See, e.g., Watson v. State*, 370 S.C. 68, 72,

634 S.E.2d 642, 644 (2006) (citing *Stokes v. State,* 308 S.C. 546, 419 S.E.2d 778 (1992)) ("Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel."). Accordingly, this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on the foregoing, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations which would require this Court to grant relief. Plea Counsel was not deficient in any manner, and Applicant was not prejudiced by Plea Counsel's representation. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Further, Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

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

IT IS FURTHER ORDERED that Gary Wayne Thomas (SCDC #366010) be remanded to the custody of the State of South Carolina.

AND IT IS SO ORDERED.

Jocelyn Newman

January 27, 2020
Columbia, South Carolina.

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