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March 30, 2020

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

Re: Gafaskie Richardson v State, 2018-CP-26-4099

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, in the above Charleston 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.

Cc:
Chelsey F. Marto, Esq
Gafaskie D. Richardson 256102
Horry County Circuit Court Clerk

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

THE STATE OF SOUTH CAROLINA

In The Supreme Court

RECEIVED

APR 03 2020

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable William H. Seals, Jr. Circuit Judge

Case No.: 2018-CP-26-4099

Gafaskie D. Richardson 256102.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Gafaskie Richardson appeals the Honorable William H Seals, Jr's March 11, 2020 Order of Dismissal. Undersigned counsel received notice of entry of the order on March 30, 2020. A copy of the order on appeal is attached hereto.

James K Falk
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Charleston, SC 29402

March 30, 2020

Chelsey F. Marto, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

Clerk of Court- Horry County
PO Box 677
Conway, SC 29526

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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, Chelsey F. Marto, Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Horry County Clerk of Court. I further certify that all parties required by Rule to be served have been served this March 30, 2020.

James K Falk
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Charleston, SC 29402

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Gafaskie D. Richardson, S.C.D.C. No. 256102,	)	Case No.: 2018-CP-26-04099
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief filed by Gafaskie D. Richardson ("Applicant") on July 16, 2018. Respondent made its return on or about September 17, 2018. The Court convened an evidentiary hearing into the matter on October 8, 2019, at the Horry County Government & Justice Center in Conway, South Carolina. Applicant was present at the hearing and represented by James K. Falk, Esq. Johnny Ellis James Jr., Esq., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Linward C. Edwards, II, Esq. ("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 Horry County Clerk of Court regarding the subject convictions, the pleadings, and the exhibits introduced at the hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the July 2017 term of the Horry County Grand Jury for possession with intent to distribute cocaine (2017-GS-

26-03556); and trafficking methamphetamine (2017-GS-26-04406).[1] Linward C. Edwards, II, Esq., represented Applicant, and W. Grayson Ervin, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On March 12, 2018, Applicant pled guilty to as indicted above. Accepting terms negotiated between Applicant and the State, the Honorable Larry B. Hyman, Jr. sentenced Applicant to imprisonment for concurrent terms of ten years on each charge. Applicant did not appeal his plea or sentence.

Present Application

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

1. Ineffective assistance of counsel, in that:
   a. Counsel was ineffective "for not challenging the drug amount or weight";
   b. "Trial counsel failed to review and discuss all discovery information and evidence";
   c. "Trial counsel was ineffective in that he did unlawfully and improperly pressure and coerce me into giving up my rights in accepting a plea offer";
   d. "Trial counsel was ineffective in that he should have been able to negotiate a better plea deal on my behalf.

Applicant requests relief as follows:

- "Conviction reversed with remand for new trial"

At the evidentiary hearing, Applicant proceeded forward on the allegations as set forth above.

II. 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

[1] Applicant was additionally indicted for possession with intent to distribute MDMA or ecstasy (2017-GS-26-03554); possession with intent to distribute marijuana (2017-GS-26-03555); trafficking cocaine, between ten and twenty-eight grams (2017-GS-26-03557); and distribution of cocaine (2017-GS-26-03558). These charges were dismissed *nolle prosequi* as part of Applicant's plea. (Tr. 9, ll. 19-24).

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). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. 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, 540 U.S. 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. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" Harrington, 562 U.S. at 111-12 (quoting Strickland, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." Id. at 112. "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. Failure to Challenge Drug Weights

Applicant alleges Counsel was ineffective in failing to investigate and challenge the weight of the drugs for which he was convicted. "Notwithstanding any other provision of this article, the weight of any controlled substance referenced in this article is the weight of that substance in pure form or any compound or mixture thereof." S.C. Code Ann. §44-53-392; see also State v. Johnson, 410 S.C. 10, 763 S.E.2d 36 (Ct. App. 2014) (affirming trial court's ruling that the relevant weight of methamphetamine included the weight of any material, compound, mixture, or preparation containing methamphetamine); State v. Kerr, 299 S.C. 108, 382 S.E.2d 895 (1989) (affirming the same ruling, but with respect to cocaine).

The facts presented by the State during the plea proceeding established that Applicant was the subject of two controlled drug buys at his residence in April and May of 2017; law enforcement agents purchased 33.5 grams of methamphetamine tablets and 6.8 grams of cocaine. (Tr. 9, ll. 5-16). The State noted that the meth tablets initially tested positive for MDMA, and Counsel later explained in mitigation that Applicant "didn't have knowledge that the MDMA pills were, in fact, I guess a composite of methamphetamine." (Tr. 9, ll. 19-24; Tr. 11, ll. 21-23). Applicant confirmed the facts as presented by the State, and explained "[i]t's, like I say, I be doing music, a lot of partying." (Tr. 10, ll. 5-15).

Applicant did not specifically mention the weight of the drugs at the evidentiary hearing, but echoed Counsel's remarks during the plea proceeding that he had not known the tablets contained meth, and that he believed he had been selling ecstasy. Applicant revealed that the State wanted him to be a snitch, but he declined, even though (as he noted on cross-examination) he knew who "set him up" and told Counsel that he had been set up. Applicant recalled getting the lab reports for the testing of the cocaine and marijuana, but not the meth. Applicant testified he asked Counsel to permit him to speak directly with the solicitor; Applicant told the solicitor that he was willing to plead guilty to all of the charges except for those related to meth, but the solicitor was not interested and wished to secure a conviction for which Applicant would have to serve at least 85% of the sentence. Contrary to his prior contention that he had been selling the pills he thought to be ecstasy, Applicant claimed that he was using the pills, not selling them, and that he had two kinds. On cross-examination, Applicant conceded his guilt as to the cocaine, but that he wanted to go to trial regarding the meth. Applicant denied ever seeing his discovery. Applicant testified his chief concern had been the total length of his sentence.

Counsel was unable to recall precisely when he received the lab reports from law enforcement, but explained that the illicit pills field tested positive for MDMA, and only after the lab testing did the State find they contained meth. Counsel testified that the lab report was able to establish just how much of the pills were meth. Counsel described the State's case as "airtight," supported by two confidential informant purchases, a valid search warrant, and Applicant's willing cooperation to show law enforcement where his drugs were when they executed the search warrant. Counsel opined that not knowing the pills were meth was not a valid defense. On cross-examination, Counsel testified he met with Applicant around ten times, and that he reviewed the discovery materials with Applicant and provided a copy. Nonetheless, Counsel recalled that Applicant promptly admitted to everything and that he did not need to see the discovery. Counsel did not perceive any basis to challenge the weight or type of drugs. Counsel testified that the State initially extended an offer where Applicant would plead guilty in exchange for twelve years, but that he was able to negotiate the ten year offer on the day of Applicant's plea. On redirect examination, Counsel clarified that the lab report which reflected the discovery of meth in the pills was in the discovery, and that Applicant saw the report.

Applicant again took the stand to deny meeting with Counsel as often as Counsel claimed. Applicant additionally denied he ever saw the lab report for meth.

The Court finds Applicant has failed to meet his burden of showing ineffective assistance of counsel. No evidence or arguments have been presented to the Court to show any colorable basis on which Applicant could have challenged the weight of the drugs. That multiple drugs were identified as part of the mixture does not diminish the State's ability to attribute the entirety of the weight of the substance to one of the illicit drugs which comprise the mixture. The Court does not find credible Applicant's testimony that he did not review discovery with Counsel, nor

does the Court find credible Applicant's testimony that he did not see the lab report identifying meth in the pills seized by law enforcement. The Court finds Counsel's testimony broadly credible. Counsel received discovery from the state, including the lab reports from the testing of the seized narcotics, reviewed the reports, and reviewed the reports with Applicant such that he would have known the weights of the drugs and their substance. Counsel performed as expected and required under the Constitution.

Further, the Court does not find credible Applicant's testimony that he wanted and still desires to go to trial to challenge his conviction for trafficking meth. Applicant knew he was pleading guilty to trafficking meth prior to doing so. As Applicant partly admitted during evidentiary hearing, his primary concern was not which drug he was pleading to, but rather the duration of his sentence. This Court is thus not convinced that even if there were some identifiable and actionable discrepancy in the weight of the drugs, that Applicant would not have pled guilty but would have proceeded to trial. For all of these reasons, the Court finds Applicant has failed to demonstrate any deficiency on the part of Counsel, or that but for the deficiency alleged he would not have pled guilty but would have proceeded to trial, and accordingly his request for relief by way of this allegation is **DENIED**.

2. Failure to Review, Discuss Discovery with Applicant

Applicant alleges Counsel was ineffective in failing to review and discuss the discovery materials with him. The relevant facts were already set forth in the prior section, and the claim is disposed by this Court's factual findings therein. The Court finds Counsel did receive discovery, did review it in its entirety, did review it all with Applicant, and discussed the substance with him. The Court finds credible Counsel's recollection of the number of meetings with Applicant, and does not find credible Applicant's dispute that they met on fewer occasions. The Court does

not find credible Applicant's testimony that he did not see portions of his discovery, or that Counsel did not discuss parts of it with him. Furthermore, assuming for the sake of argument that Counsel failed to review with Applicant the portion of the lab report indicating the discovery of methamphetamine, Applicant has failed to offer any credible evidence to show that he would have acted differently. As noted in the prior section, Applicant knew he was pleading guilty to trafficking methamphetamine at the time of the plea, and his primary concern was the duration of his sentence, not which of the blended drugs he was pleading guilty to. Altogether, the Court finds the record refutes Applicant's allegation, such that Applicant cannot meet his burden of proving either prong of Hill, and his request for relief by way of this allegation is **DENIED.**

3. Coerced Guilty Plea

Applicant alleges Counsel was ineffective by improperly pressuring and coercing him into pleading guilty. Applicant's claim is rebutted by the record and may be quickly resolved. During the plea proceeding, the plea court inquired, and Applicant answered:

> Q. Mr. Richardson, anyone promise you anything, threatened you in any way, done anything inappropriate or improper to make you enter this plea against your will?
>
> A. No, sir.
>
> Q. Are you pleading freely and voluntarily?
>
> A. Yes, sir.

(Tr. 11, ll. 16-22). Applicant presented no credible evidence at the evidentiary hearing to show any undue pressure or improper coercion on the part of Counsel, or anybody else, to elicit his guilty plea. Applicant presented no credible evidence to set aside his sworn statements of voluntariness at the plea proceeding. The Court finds Applicant knowingly, intelligently, and voluntarily pled guilty, and accordingly his claim for relief by way of this allegation is **DENIED.**

4. Failure to Negotiate Better Plea Deal

Applicant contends Counsel was ineffective in failing to negotiate a more favorable plea agreement. "Prosecutors have broad powers in the plea bargain process[.]" Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999). "Under the separation of powers doctrine, which is the basis for our form of government, the Executive Branch is vested with the power to decide when and how to prosecute a case." Id. (quoting State v. Thrift, 312 S.C. 282, 291-92, 400 S.E.2d 341, 346-47 (1994)). "Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety." Id., 333 S.C. at 684, 511 S.E.2d at 400-01. "The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion; however, on occasion, it is necessary to review and interpret the results of the prosecutor's actions. We must, therefore, analyze the State's agreement within our judicial constraints." Id.

"[A] defendant has no constitutional right to plea bargain." Id. (citing State v. Easler, 322 S.C. 333, 471 S.E.2d 745 (Ct. App. 1996), aff'd as modified, 327 S.C. 121, 489 S.E.2d 617 (1997)). "Furthermore, a trial judge is not required to accept a plea. Id. (citing Santobello v. New York, 404 U.S. 257 (1971)). "A plea agreement is only an 'offer' until the defendant enters a court-approved guilty plea. A defendant accepts the 'offer' by pleading guilty. Thus, until formal acceptance of the plea by the court has occurred, the plea binds no one, not the defendant, the State, or the court." Id., 333 S.C. at 688, 511 S.E.2d at 402 (citing Harden v. State, 453 So.2d 550 (Fla.Dist.Ct.App. 1984); see also State v. Nesbitt, 411 S.C. 194, 201 n.7, 768 S.E.2d 67, 71 n.7 (2015) ("We note that the Due Process clause is not implicated until the defendant enters his guilty plea, and that plea is accepted by the court. Therefore, if the defendant enters into a negotiated plea agreement prior to the court's acceptance of his guilty plea, that agreement

is a mere executory promise that, standing alone, has no constitutional significance, as it binds neither the government nor the defendant."); Puckett v. United States, 556 U.S. 129, 137 (2009) ("Although the analogy may not hold in all respects, plea bargains are essentially contracts."). The only exception is where a defendant can show he has detrimentally relied upon a plea agreement. Id., 333 S.C. at 688-89, 511 S.E.2d at 402-03. Otherwise, a prosecutor may withdraw a plea offer at any time prior to an actual entry of the guilty plea. Id., 333 S.C. at 689-90, 511 S.E.2d at 403-04.

Counsel could not force the State to offer a more generous plea offer, and Applicant offers no evidence to show that Counsel could have presented anything further to the State that would have prompted the prosecution to extend a more favorable plea offer. To the contrary, Applicant's testimony was that the State was focused on securing a conviction which would produce a sentence of which Applicant would be required to serve at least 85%, and rejected Applicant's offer to plead to everything except the indictment for trafficking methamphetamine. Counsel capably negotiated with the State to reduce its plea offer by two years; he could do no more. Accordingly, Applicant cannot meet his burden of proof under Strickland through this allegation, and his request for relief is **DENIED**.

[*Conclusion and signature on following page*]

III. 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:

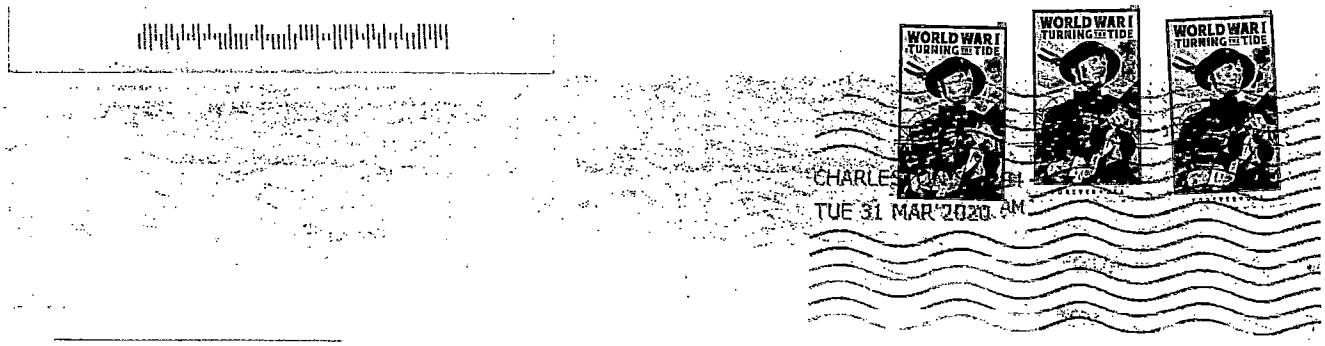
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 11 **day of** March **, 2020.**

WILLIAM H. SEALS, JR.
Presiding Judge
Fifteenth Judicial Circuit

Marion, South Carolina



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