

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

Gary Z. Thomas, #10751,

APPELLATE COURT
PICKENS COUNTY
SOUTH CAROLINA

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

Case No. 2018-CP-39-1276

ORDER OF DISMISSAL

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SC Court of Appeals

This matter comes before this Court by way of an application for post-conviction relief filed on November 30, 2018, by Gary Z. Thomas (Applicant). The State (Respondent) filed a return on February 28, 2019, in which it requested an evidentiary hearing on some claims and moved to dismiss on others. Applicant filed an amended application on July 22, 2019. Respondent filed a return to the amended application on October 11, 2019, again requesting an evidentiary hearing for the resolution of some claims and moving to dismiss others. Respondent also filed a return to Applicant's motion for sanctions, which had been served upon Respondent by Applicant on or around September 6, 2019.

An evidentiary hearing in the matter was held before the undersigned on October 22, 2019, at the Greenville County Courthouse. Applicant was present and represented himself.¹ Respondent was represented by Assistant Attorney General Taylor Z. Smith of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf and called Ferris Harvley, Assistant Public Defender John Maxwell Gravlee (plea counsel) of the Greenville County Public Defender's Office and Assistant Solicitor James Durham Hill

¹ Applicant was present at the hearing as a pro se litigant, as he had moved successfully to relieve his PCR counsel and proceed pro se in this PCR action at an earlier hearing. Thomas v. State, No. 18-CP-39-1276 (Greenville, S.C. Ct. Common Pleas, April 18, 2019). This Court notes the order resulting from that hearing indicates Judge Kinlaw questioned Applicant thoroughly and gave him proper warnings regarding the dangers of self-representation.

(solicitor) of the Thirteenth Circuit Solicitor's Office as witnesses. Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds that Applicant has failed to meet his requisite burden of proof and denies his application for post-conviction relief.

PROCEDURAL HISTORY

Applicant is presently incarcerated in the South Carolina Department of Corrections.² On December 1, 2017, he appeared before the Honorable Letitia H. Verdin in order to move to relieve plea counsel; however, Applicant ultimately waived presentment to a count of second-degree domestic violence (2014-GS-39-2623) and pleaded guilty to the same. The solicitor's recitation of facts at the plea hearing indicated the victim was Applicant's live-in girlfriend, and that law enforcement officers responded to a call from Applicant's residence regarding domestic violence. Plea Tran. 5-6. The solicitor stated Applicant and the victim had been arguing about a cell phone, and that Applicant threw her down on the couch and punched her when she threatened to call police, at which point the victim called police from her sister's home. Plea Tran. 5-6. In accordance with the solicitor's recommendation, Judge Verdin sentenced Applicant to imprisonment for three years, suspended to probation for five years. Applicant did not appeal his plea or sentence.

CURRENT PROCEEDING

On November 30, 2018, Applicant filed an application for post-conviction relief, in which he challenged his guilty plea and alleged that he was being held in custody unlawfully because he (1) received the constitutionally ineffective assistance of counsel, (2) was deprived of

² Although Applicant was sentenced to time served, a review of SCDC's inmate search detail report for Applicant and the public index entry for Applicant's underlying criminal conviction shows that Applicant is presently incarcerated in SCDC for this offense of second-degree criminal domestic violence after the Circuit Court revoked his probation.

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the right to represent himself adequately, (3) was prejudiced by the solicitor's manipulation of the General Sessions roster, (4) was sentenced to probation for five years in excess of the statutory maximum, and (5) entered his guilty plea involuntarily due to the constitutionally ineffective assistance of counsel and the denial of his right to adequately represent himself. On July 22, 2019, Applicant filed an amended application for post-conviction relief, setting forth the addition claim that he was being held in custody unlawfully because his guilty plea was not entered into voluntarily, knowingly, and intelligently due to a supposed defect in Judge Verdin's colloquy during Applicant's plea hearing.

At the start of the PCR hearing, Respondent asked that Applicant clarify for the record the claims upon which he intended to proceed, and Applicant specified he wanted to present the following allegations: (1) his sentence exceeds the maximum allowed by statute, (2) plea counsel was constitutionally ineffective for failing to object to Applicant's illegal sentence, (3) Applicant's probation officer made Applicant sign additional conditions of release that were not part of his sentence, (4) plea counsel was constitutionally ineffective for failing to conduct an adequate investigation, (5) plea counsel was constitutionally ineffective for failing to move for speedy trial, and (6) Applicant's guilty plea was not knowingly and voluntarily entered. This Court finds that all allegations other than these have been waived by Applicant and they will not be addressed in this order.

Victim's Motion to Quash Applicant's Subpoena

On October 21, 2019, Patricia D. Phillips, Esquire, filed a motion to quash Applicant's subpoena of the victim in the underlying criminal action on behalf of the victim. Before the evidentiary hearing began, this Court heard argument from the parties and the victim's counsel as to this motion so that the victim would have notice that her attendance would be required at

the evidentiary hearing if the Court denied the motion to quash. Phillips argued the victim had been served with the subpoena only a few days before the hearing, which would thereby cause inconvenience if she were required to comply and testify at the evidentiary hearing with such short notice. She also argued the victim's testimony would not be relevant to the hearing as the victim did not testify or address the plea court during Applicant's plea hearing and characterized the subpoena as Applicant's using the post-conviction relief process to harass the victim. Applicant argued his last-minute subpoena could not have been sent earlier because he did not have time to prepare for the evidentiary hearing or subpoena the victim earlier due to his lack of sufficient notice of the time and place of the hearing; additionally, Applicant argued the victim's testimony was critical to his case because he had been framed, and he required her testimony in order to support his claims. Respondent did not take a position on the issue.

This Court finds Applicant is entitled to call any witness with admissible testimony as allowed under the South Carolina Rules of Evidence; however, Applicant failed to establish that the victim's testimony was relevant or material to his claims. This Court ruled the victim would be required to be present in the Greenville County Courthouse in compliance with Applicant's subpoena at the time of the evidentiary hearing, which was held later in the day. This Court informed the parties and the victim's counsel that Applicant would have to put up sufficient evidence during his hearing in order to establish a prima facie case that the victim's testimony was necessary to establish his claims, and that this Court would grant the victim's motion to quash if Applicant failed to do so. Later in the day, at the start of the evidentiary hearing, Applicant asked the Court if he would be allowed to call the victim as a witness. This Court informed Applicant that its ruling stood and Applicant had not yet made any showing that the victim's testimony would be necessary. Applicant never again asked to call the victim as a

witness, and this Court finds Applicant abandoned the issue, conceding the issue to the victim and her counsel. Therefore, it was not necessary for this Court to issue a final ruling on the motion.

Denial of Applicant's Motion for Sanctions

On September 6, 2019, Applicant filed a motion for sanctions, titled "Notice of Motion and Motion for Sanctions (S.C. Code Ann. § 15-36-10)".³ Applicant moved for sanctions therein, in accordance with S.C. Code Ann. § 15-36-10, et seq., alleging Assistant Attorney General Smith had knowingly, intentionally, and maliciously maintained a frivolous defense on Respondent's behalf against Applicant's claim that he had been subjected to an illegal sentence of five years' probation, causing Applicant to be wrongfully incarcerated. Applicant also alleged therein that Respondent had violated a court order requiring the evidentiary hearing to be held in an earlier term than that of October 21, 2019. Respondent filed a return to Applicant's motion on October 11, 2019, arguing therein that it had complied with the terms of Judge Kinlaw's order of continuance, issued in April of 2019, and acted without any impropriety in adding Applicant's case for an evidentiary hearing during the October of 2019 PCR term in the Thirteenth Judicial Circuit. Respondent also argued its position in response to Applicant's PCR allegations was not a frivolous position being offered knowingly, intentionally, and maliciously, as required by the relevant code section.

This Court finds Applicant has failed to establish any frivolous arguments on the part of Respondent and failed to demonstrate any improper actions in scheduled Applicant's evidentiary hearing. Respondent has established a basis to proceed with litigation and assert its legal positions therein that is not frivolous. Applicant's motion for sanctions is denied.

³ This written motion does not appear in the public index, but this Court was provided with a copy bearing the file markings of the Pickens County Clerk of Court, which indicated that the motion had been filed on the aforementioned date. Applicant was a pro se litigant when he filed the motion.

Testimony at PCR Hearing

Applicant called Ferris Harvley as his first witness at the PCR hearing. She testified she is in a romantic relationship with Applicant, and was cohabitating with him in an apartment from early in May of 2017 until his arrest in September of 2017. She testified he scheduled an appointment with plea counsel in order to provide him with some "paperwork" on Applicant's behalf, but that she did not keep that appointment. She testified the purpose of the meeting was to give evidence to plea counsel that the victim had been stalking her and Applicant. She testified she never invited the victim to their apartment, and she told the victim by text message not to come to the apartment. She testified she went with Applicant to the police so that they could file a report concerning the victim's supposed harassing her and Applicant, and Applicant gave some documents to the police at that time in support of their allegations against the victim. She testified she asked plea counsel to come to her to get these documents but that he did not do so. She testified she did take some but not all of the documents to plea counsel, but that he did not contact her after that meeting, ask any questions of her, or try to get any other information from her.

She affirmed she was a witness to Applicant's second arrest, and summarized the event by testifying that the victim came to the parking lot at the apartment in order to make accusations against Applicant. She testified she asked the victim to leave the apartment and tried to retreat into the apartment, at which point the victim tried to force her way in despite her yells that the victim should leave. She testified Applicant appeared and knocked the victim unconscious on the front porch of the apartment. She testified a maintenance worker was calling police during the incident, and that the victim informed them that she was going to call the police once she sat up, and that she then left. She testified that threats were made.

Applicant then called as a witness plea counsel. He affirmed he still had in his possession copies of all documents given to him by Harvley and a USB drive given to him by either Applicant or Harvley. When asked if he had inspected the contents of the drive, he testified Applicant had given the drive to the solicitor who gave it to plea counsel. He testified he tried to access the single file on the drive, but was unable to do so because he did not have any program on his computer that would open it, and he did not recall the format of the file. He testified he did not remember the exact time at which the solicitor passed the drive along to him, but that he informed Applicant in September of 2017 that he had been unable to open the file on the drive, at which time Applicant was in jail. When asked if he could plug the drive into a computer at the PCR hearing in order to describe the file, he answered that he did not have access to a computer. He testified they went before Judge Verdin in December of 2017 because Applicant had indicated to him that he wished to have plea counsel relieved so that he could proceed as a pro se defendant, but that they were able to negotiate a deal on the day of that hearing wherein Applicant would plead guilty and be sentenced to time served with probation so that he could be released on the same day.

He testified he requested a personal recognizance bond at Applicant's request, but that Judge Verdin instead ordered that Applicant pay a \$50,000 surety bond with GPS monitoring. He testified that this would have occurred during the first term of General Sessions in Pickens County, as there is usually only a single term per month. He testified he was ultimately able to get a charge of first-degree domestic violence dismissed on Applicant's behalf, and described the underlying incident that case as the one in which Applicant pushed the victim down and out of Applicant's door. He did not remember how many terms of court went by while Applicant was in jail. In response to questioning from this Court, plea counsel testified he moved for a bond

reduction at Applicant's request. He testified he requested Applicant receive a personal recognizance bond, but that Judge Verdin denied the motion. He noted the solicitor moved to revoke Applicant's bond and testified he was able to convince the bond court not to revoke. At Applicant's request, plea counsel read portions of State v. Campbell, 277 S.C. 408, 288 S.E.2d 395 (1982). He testified he did not cite Campbell at Applicant's bond hearing because he did not think the case was relevant, and that he probably did not cite any specific statutes either. He testified he probably would not have made a difference whether or not he had cited any statutes at Applicant's bond hearing.

Applicant asked if plea counsel knew of any procedures whereby he could have requested that the first-degree domestic violence charge against Applicant be reduced. Plea counsel testified he asked the solicitor to dismiss the first-degree charge as a part of Applicant's agreement to plead guilty to the separate offense of second-degree domestic violence, and the solicitor agreed to do so. Plea counsel testified the solicitor refused to make a recommendation that Applicant be sentenced to time served.

Plea counsel affirmed Applicant noted he did not want to have plea counsel relieved during the December of 2017 hearing before Judge Verdin due to Applicant's lack of access to legal resources while in jail, and testified he supplied Applicant with various legal resources at the time.

Applicant played a recording for the Court and plea counsel, in which someone claims to be looking at a police report and commenting that the speaker does not remember much about "that night" but that the speaker would have been in the hospital if another had punched her.⁴ Plea counsel his estimation of the recording was that the speaker was not making a categorical

⁴ Applicant asserted that the speaker was the victim, and that the message was directed towards him as the person who punched her.

denial of assault that Applicant committed, saying only that Applicant did not punch the victim three times.

When asked on cross-examination to summarize the facts giving rise to the first-degree and second-degree criminal domestic violence charges against Applicant, plea counsel testified there was a pending second-degree CDV charge against Applicant when the victim showed up at the apartment where Applicant and Harvley lived, that an altercation ensued during which the victim was struck in the face, and that the victim received facial fractures as a result. He testified their defense would have been that Applicant struck the victim in self-defense. He testified the second-degree CDV charge, which preceded the first-degree CDV charge, came about when Applicant and the victim got into an argument in their mutual home, and a fight occurred over a phone, after which the victim claimed Applicant had struck her in the face multiple times. He testified there were photographs he received in discovery in the case that showed the victim with bloody lips and a red face. He testified Applicant pleaded guilty to this second-degree offense because the State had a stronger case there than it did in the first-degree CDV case. He testified he informed Applicant of his right to a trial and left the decision about whether to plead guilty or proceed trial to his client.

He affirmed he informed Applicant that he had not been able to access the file on the USB drive before Applicant pleaded guilty. He explained that his defense at trial if Applicant had pleaded not guilty to second-degree CDV would have been to attack the credibility of the victim and would have had no choice but to call the victim as a witness in order to cross-examine her. He testified he explained to Applicant that the victim would have had to testify at trial because Applicant had a right to confront her under the Confrontation Clause.

He testified he spoke with Harvley on multiple occasions by phone. He spoke to her on October 12, 2017, about the first-degree CDV case against Applicant. He testified Harvley came to the courthouse at some point after that during October of 2017 and told him she did not like being in public because it gave her anxiety, and told him she preferred to meet at her car. He testified he followed her to her car and received copies from her of things on Applicant's behalf. He testified those documents contained some good and some bad evidence. He discussed the evidence with Applicant, and told him the elements the State would have to prove should Applicant plead not guilty. He testified Applicant gave no indication that he did not understand. He testified he could not believe he could have done anything further to get a speedier trial for Applicant.

He testified he informed Applicant that the plea deal included a recommended five years' probation. The original plea deal, he testified, included active prison time and home incarceration for two years. Since Applicant did not want home incarceration, he was able to negotiate ninety days of active time plus probation for five years. Eventually, he was able to get the offer reduced to a recommendation to time served and probation, with no active time. He testified he explained this final offer to Applicant, and that Applicant wanted to take it so that he could be released from jail on the same day. He testified Applicant decided to plead guilty and take this final offer before the conclusion of the hearing on Applicant's motion to relieve counsel and proceed as a pro se defendant. He testified that, if Applicant had indicated during that final plea negotiation during the hearing that he did not want to continue with plea counsel as his attorney, he would have informed Judge Verdin that they could not move forward with the entry of a guilty plea because Applicant wanted to relieve him as counsel.

On redirect, plea counsel testified he did not believe it was his duty to inform Judge Verdin during Applicant's plea hearing that Applicant had only limited access to a law library at the jail because Applicant wanted to plead guilty in exchange for the State's sentencing recommendation, making Applicant's complaint about the law library irrelevant. Plea counsel affirmed Applicant had told plea counsel his email address and account password so that plea counsel could access emails contained therein, and plea counsel testified he did not access that account because he was not comfortable logging into his client's personal email account.

Applicant called the solicitor as a witness. He testified Applicant dropped off a USB drive with the solicitor's receptionist, and that he passed it along without opening it to plea counsel. He did not open any files on the drive because Applicant was represented at the time and the solicitor did not feel comfortable plugging it into any of his computers. He testified he would have scheduled a bond hearing for Applicant at the next term of court after his second arrest, and does not remember its being rescheduled. On cross-examination, the solicitor testified Applicant had filed the motion to relieve plea counsel and that Applicant was taken to the courthouse for a bond hearing. He testified Applicant was arrested in early May of 2017 for second-degree criminal domestic violence and pleaded guilty in December of that year, meaning that he was incarcerated for approximately seventy-eight days. He testified he did not do anything intentional to delay Applicant's court appearances.

Finally, Applicant testified on his own behalf. He testified he pleaded guilty to second-degree domestic violence because he was booked in September of 2017 for first-degree criminal domestic violence. He testified he asked plea counsel to get the charge reduced in order to get a hearing and that plea counsel did not comply. He asked plea counsel to get the charge reduced afterwards in order to have his bond reviewed against evidence to the court's attention. He

testified plea counsel did not do enough in his defense, and that plea counsel could have asked to have the charge reduced. He testified the only method he had for gathering the evidence necessary for him to defend himself was to plead guilty in order to get out of jail since plea counsel did not do a proper investigation. He testified the victim has continued to "terrorize" him to this day, and that she has also terrorized Harvley. He testified the solicitor behaved inappropriately by refusing to reduce the charge despite having seen the evidence. He was scared to let plea counsel try the case considering his lack of preparation. He testified he would have been confident to proceed to trial if plea counsel had had the evidence of Applicant's innocence. He testified about the poor conditions in the jail. He testified he was not satisfied with the plea deal offered by the State.

On cross-examination, Applicant affirmed Judge Verdin informed him that he had the right to proceed to a jury trial instead of pleading guilty. He testified he waived his right to a trial because he did not think he would have had a good jury trial since plea counsel did not have any evidence to support his defense and challenge the victim's credibility. When asked if he informed Judge Verdin during his plea hearing that he was happy with plea counsel's performance, he affirmed that he did so and explained that he was referring only to the fact that plea counsel had given him printouts of case law and emailed the jail to complain about Applicant's limited access to the law library, and that he did not intend his statement to Judge Verdin to show that he was happy with plea counsel's performance as an attorney.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety, including the transcript from Applicant's plea hearing, which included discussion as to Applicant's motion to relieve plea counsel, and the hearing on Applicant's motion to relieve his PCR counsel, which was held

before the Honorable Alex Kinlaw, Jr. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to scrutinize their credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he 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, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel’s performance was deficient. Id.; 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 v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “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). 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 Petitioner 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. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). The "prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial." Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009).

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. 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. Strickland, 466 U.S. 668. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney. Id. at 690. "A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). "Indeed, where a thorough colloquy is

conducted, courts must exercise caution in setting aside the guilty plea.” Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that “guilty plea[s] must be treated as final in the vast majority of cases” and instructing that caution must be exercised so as not to “undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea”).

Based on this standard set forth above, and the reasoning below, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel. The allegations are addressed fully below:

Applicant received an illegal sentence. Plea counsel was constitutionally ineffective for failing to object to the illegal sentence.

Applicant argues he received an illegal sentence because he was sentenced to imprisonment for three years, suspended to probation for five years, and that the five-year probation term exceeds the maximum sentence of three years allowed for a conviction of second-degree criminal domestic violence, that plea counsel’s performance was deficient due to his failure to object to the illegal sentence, and that he was prejudiced thereby.

However, even if the claim of an illegal sentence is properly before this Court, this Court finds Applicant was not subjected to an illegal sentence. A person convicted of second-degree domestic violence must be fined or “imprisoned for not more than three years, or both.” S.C. Code Ann. § 16-25-20(C). The plea court had the authority to “suspend the imposition . . . and place the defendant on probation” S.C. Code Ann. § 24-21-410 (1976). “The period of probation or suspension of sentence shall not exceed a period of five years” S.C. Code Ann. § 24-21-440. Here, the plea court sentenced Applicant to imprisonment for three years and suspended the service of the sentence upon a term of probation. Applicant’s reliance upon Thompson v. S.C. Dep’t of Pub. Safety, 335 S.C. 52, 515 S.E.2d 761 (1999), is misplaced

because the case concerns an interpretation of the phrase “term of imprisonment” for the purpose of establishing the start date of the requirement that the Department of Public Safety suspend the driver’s license of someone sentenced for felony DUI, not the legality of a sentence of probation that is longer than the maximum amount of active prison time allowed by a statute setting out the range of penalties for a criminal offense. As the sentence was lawful, there would have been no reason for plea counsel to object thereto, and this Court finds Applicant has failed to demonstrate any deficiency in plea counsel’s performance.

This Court finds Applicant has failed to demonstrate his sentence was illegal, failed to demonstrate any deficiency in plea counsel’s performance in failing to object to the sentence, and any resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

Applicant’s probation officer required him to sign conditions of release that were not required by his sentence.

Applicant asserted at the start of his PCR hearing that he wished to move forward on the allegation that he is entitled to post-conviction relief because his probation officer required him to sign conditions of release that were in excess of those required by Judge Verdin’s sentence; however, Applicant did not mention this allegation again during the hearing and provided no testimony of evidence that would support this position or supply a legal basis for the claim. This Court finds Applicant has failed to meet his burden in demonstrating that he is entitled to relief and has abandoned this ground for relief. As such, this allegation is denied and dismissed with prejudice.

Plea counsel was constitutionally ineffective for failing to conduct an adequate investigation.

Applicant argues plea counsel performed an inadequate investigation, and that this deficiency left Applicant with no choice but to plead guilty so that he could get out of jail and then present his defense at a later time.

A defense attorney has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland, at 691. Thus, “[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). A defense attorney’s “[f]ailure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.” Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). An applicant alleging that his attorney failed to prepare for the case must show how additional preparation would have resulted in a different outcome. Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997). Moreover, counsel’s decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel’s judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). “[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690; Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014).

This Court finds plea counsel conducted a reasonable investigation in the underlying criminal case. The testimony of both plea counsel and Harvley indicated plea counsel did speak with Harvley, although the testimony diverged between the two as to the number of times of their conversations. Plea counsel’s testimony that he spoke with Harvley on multiple occasions and met with her in person in order to receive information from her about the conflict between Applicant and the victim is more credible than her testimony in contradiction to the extent of

their interactions. Plea counsel testified he reviewed the documents presented to him by Harvley and shared his opinions about the value of them with Applicant before Applicant pleaded guilty. With regards to the audio recording that Applicant claims captures the victim recanting her allegations, plea counsel's conduct was likewise reasonable. Plea counsel testified he received the recording from the solicitor, whose testimony indicated he had received it directly from Applicant. Plea counsel testified he did not listen to the audio recording that was on the USB drive he received from the solicitor, whose testimony was that he had received it directly from Applicant. Plea counsel testified he attempted to open the file saved thereon, but was unable to do so because his computer did not have a computer program able to access the file. He testified he informed Applicant that he could not access the file, and this Court finds Applicant was aware of the fact plea counsel could not watch the recording before pleading guilty. Instead of sharing with plea counsel a desire that he do further investigation into the contents of the USB drive, Applicant decided to plead guilty, removing from counsel the obligation to conduct further investigation in the case.

This Court finds Applicant has failed to demonstrate he suffered prejudice from trial counsel's supposed failure to conduct an adequate investigation. The testimony of both Applicant and plea counsel indicates Applicant was not satisfied with plea counsel's representation of Applicant during the underlying criminal case. Applicant, plea counsel, and the solicitor appeared before Judge Verdin on December 1, 2017, so that Applicant could move to relieve plea counsel. The transcript from that hearing indicates Applicant abandoned his complaints of plea counsel and pleaded guilty in order to avail himself of a sentencing recommendation from the solicitor that Applicant viewed with favor at the time. While Judge Verdin was questioning Applicant regarding his wishes as to his representation, Applicant

mentioned the solicitor had made a plea offer that day. Applicant told Judge Verdin he would like to take a break in the hearing so that he could discuss the plea offer with plea counsel, and thanked the court for its suggestion that the proceedings resume once Applicant had decided whether to accept or reject the latest plea offer. After that break, Applicant affirmed to Judge Verdin that he was happy with everything plea counsel had done for him, that he understood he would be giving up his right to a jury trial by pleading guilty, and that he wanted to plead guilty.

Applicant played for this Court the audio recording in which he claims the victim recants her allegations against him. Even assuming that speaker on the recording was the victim and the person to whom she was referring therein was Applicant, Applicant failed to demonstrate that he would not have pleaded guilty if plea counsel had somehow listened to the recording. This is especially true since Applicant was aware of the recording's existence before he pleaded guilty; in fact, he provided the solicitor with the USB drive containing the recording. Applicant touted the supposed exculpatory value of the recording to plea counsel before pleading guilty, indicating he knew it would have been available as evidence should he have asserted his right to a trial instead of pleading guilty. Plea counsel's testimony at the hearing, after he listened to the recording, was that he did not consider it to have contained any exculpatory evidence that would have negated any of the elements of second-degree criminal domestic violence, for which Applicant pleaded guilty. Plea counsel also testified he would have taken the case to trial had Applicant not pleaded guilty or had Applicant not abandoned his motion to have counsel relieved, and that he would have called the victim as a witness and cross-examined her at trial. This Court finds Applicant wanted to abandon his motion to relieve counsel and decided to plead guilty on December 1, 2017, in order to take advantage of the solicitor's sentencing

recommendation, which would allowed him to be released from jail on that day, rather than out of a fear that plea counsel had not conducted an adequate investigation.

This Court finds Applicant has failed to demonstrate plea counsel was constitutionally ineffective with respect to his failure to conduct an adequate investigation because Applicant has failed to demonstrate any deficiency in plea counsel's performance and any resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

Plea counsel was constitutionally ineffective for failing to failing to move for a speedy trial.

Applicant argues plea counsel was constitutionally ineffective for failing to assert Applicant's right to a speedy trial because Applicant was being housed in poor conditions at the detention center while awaiting trial and did not have access to legal resources, which forced him to plead guilty in order to escape the jail's conditions and have access to evidence and legal resources after being released following the entry of his guilty plea.

The South Carolina Court of Appeals has held that a reviewing court must consider four factors when determining whether a defendant's right to a speedy trial has been violated: 1) the length of the delay, 2) the reason for the delay, 3) the defendant's assertion of the right to a speedy trial, and 4) the prejudice suffered by the defendant. State v. Cooper, 386 S.C. 210, 687 S.E.2d 62 (S.C. Ct. App. 2009) (citations omitted). This Court finds Applicant has failed to show that plea counsel's performance was deficient due to his failure to move for a speedy trial. Applicant was arrested in May of 2017, and pleaded guilty in December of 2017, which was not an unreasonable period of time. See Cooper at 218, 687 S.E.2d at 67 (finding the trial court's denial of Cooper's motion to dismiss the charges against him when Cooper argued his right to a speedy trial was violated when his trial was delayed by 44 months). Plea counsel's testimony indicated he unsuccessfully moved for a bond reduction, but that the court would not give Applicant a personal recognizance bond as Applicant wanted. During this time, Applicant had

also been charged with first-degree criminal domestic violence, and the indication from testimony at the PCR hearing was that this pending case contributed to the length of time between Applicant's arrest and his plea hearing. The solicitor testified credibly that he did not take any actions to delay the disposition of Applicant's charge. Applicant's testimony was that he was unhappy with the conditions of the jail while he was awaiting trial, and he testified as to his having to share space with others at the detention center, but he has failed to demonstrate in any way that there was any impropriety in the tie between his arrest and the entry of his guilty plea. This Court finds Applicant has failed to establish plea counsel's performance was deficient when counsel failed to assert Applicant's right to a speedy trial because Applicant has not shown that the right was violated.

This Court finds Applicant has failed to establish any prejudice from plea counsel's failure to assert Applicant's right to a speedy trial. Applicant's testimony at the PCR hearing on this point concerned the allegedly dissatisfactory conditions at the detention center and his desire to conduct his own legal research after being released from jail after pleading guilty.

Applicant's guilty plea was not knowingly and voluntarily given.

Applicant argues his guilty plea was not knowingly and voluntarily given because plea counsel did not warn him that he could receive probation for five years, did not advise him of the elements of second-degree criminal domestic violence, did not make an effort to get the charge reduced, did not ask for Applicant to be released on his personal recognizance, and did not advocate for Applicant's right to represent himself, and because Applicant did not have access to a law library while he was in jail awaiting trial. Applicant has failed to show the plea was unknowing or involuntary for the reasons stated below.

Applicant argues his guilty plea was not knowingly and voluntarily given because plea counsel did not inform him that he could be sentenced to probation for five years if he pleaded

guilty. This Court finds Applicant has failed to show plea counsel was constitutionally ineffective for failing to advise Applicant that he could be sentenced to probation for five years if he pleaded guilty. Plea counsel credibly testified he made specific plea deal requests at Applicant's direction, and explained the final plea offer to Applicant. Plea counsel testified he informed Applicant that the recommendation would include the solicitor's request that Applicant receive probation for five years, that Applicant gave no indication that he did not understand this aspect of the recommendation the solicitor would give if Applicant pleaded guilty or Judge Verdin's authority to sentence Applicant to probation, and that Applicant indicated at the time that he approved of the deal so that he could be released from jail. In light of all the evidence, this Court finds plea counsel adequately informed Applicant of the potential sentence he could face, including probation for five years, and that Applicant accepted this sentencing recommendation when he pleaded guilty. This Court finds Applicant has failed to show plea counsel's actions with regards to explaining to Applicant the potential sentence he could face if he pleaded guilty caused Applicant's guilty plea to have been entered unknowingly or involuntarily.

Applicant argues his guilty plea was not knowingly and voluntarily given because plea counsel did not explain to him the elements of the offense charged. This Court finds Applicant has failed to show plea counsel was constitutionally ineffective for failing to advise of the elements of second-degree domestic violence. Plea counsel credibly testified at the PCR hearing that he discussed with Applicant the evidence in the case and the elements of the offense. Plea counsel further testified Applicant gave no indication that he did not understand the substance of that discussion. Applicant affirmed to Judge Verdin at the plea hearing that he understood that he was pleading guilty to second-degree criminal domestic violence and that he had discussed the

case with plea counsel. This Court finds Applicant has failed to show plea counsel's actions with regards to explaining to Applicant the elements of second-degree criminal domestic violence caused Applicant's guilty plea to have been entered unknowingly or involuntarily.

Applicant argues his guilty plea was not knowingly and voluntarily given because plea counsel did not make an effort to get his charge of second-degree criminal domestic violence reduced to a lesser offense. This Court finds Applicant has failed to show plea counsel was constitutionally ineffective for failing to engage in negotiations with the solicitor on his behalf. The testimony from plea counsel and from the solicitor indicates plea counsel engaged in negotiations with the solicitor in an attempt to secure a favorable plea deal for Applicant. Plea counsel's testimony shows he was able to secure progressively more favorable deals from the solicitor throughout his representation of Applicant, which culminated in the final plea offer that Applicant accepted when he pleaded guilty before Judge Verdin in December of 2017. Indeed, plea counsel testified he was able to get the solicitor to dismiss the charge for first-degree criminal domestic violence that was also pending against Applicant at the time. Applicant has failed to show that he was entitled to plead guilty to some lesser offense. Applicant waived his right to seek challenge the State's evidence by pleading guilty, affirmed to Judge Verdin that he understood that he was pleading guilty to the offense and wanted to plead guilty, and denied that anyone was forcing him to plead guilty. This Court finds Applicant has failed to show plea counsel's actions with regards to plea negotiations caused Applicant's guilty plea to have been entered unknowingly or involuntarily.

Applicant argues his guilty plea was not knowingly and voluntarily given because plea counsel did not seek to have Applicant released on his personal recognizance while awaiting trial. This Court finds plea counsel's performance was not deficient with respect to his actions

regarding Applicant's pre-trial detention. Plea counsel credibly testified at the PCR hearing that he made multiple attempts to gain a more favorable bond for Applicant, including his moving for a bond reduction and requesting that Applicant be released on his personal recognizance, but these efforts were not successful. Applicant has not explained any further efforts plea counsel could or should have made on Applicant's behalf. Applicant testified that he was not satisfied with the condition of his pre-trial confinement, but has failed to show that his discomfort entitles him to set aside his guilty plea and depart from his solemn declaration of guilty therein. See Satterwhite v. State, 325 S.C. 254, 259, 481 S.E.2d 709, 712 (1997) (instructing that the fact that an applicant for post-conviction relief may have pleaded guilty in order to obtain a release from administrative segregation does not render the guilty plea involuntary) (citing Wicker v. State, 310 S.C. 8, 425 S.E.2d 25 (1992)). This Court finds Applicant has failed to show plea counsel's actions with regards to Applicant's pre-trial detention caused Applicant's guilty plea to have been entered unknowingly or involuntarily.

Applicant argues his guilty plea was not knowingly and voluntarily given because plea counsel did not advocate for Applicant's right to represent himself in the underlying criminal case. This Court finds plea counsel's performance was not deficient with respect to his actions regarding Applicant's desire to relieve counsel. Plea counsel credibly testified he took Applicant before Judge Verdin in December of 2017 so that Applicant could move to relieve counsel. The transcript from that hearing shows Applicant informed Judge Verdin of his reservations about plea counsel's representation, but it also shows that Applicant abandoned his motion in order to accept a plea offer from the State. Plea counsel performed with reasonable diligence in taking Applicant before the court in order to inform the court of his desire to relieve counsel. At that time, Applicant could have persisted in his motion if he believed he or substitute counsel could

do something else in his defense or in plea negotiations that plea counsel had not done, but Applicant's decision to abandon that effort in order to accept the State's offer and plead guilty indicates that he was satisfied with plea counsel's work in plea negotiations, at least at the end. This Court finds Applicant has failed to show plea counsel's actions with regards to Applicant's request to relieve counsel caused Applicant's guilty plea to have been entered unknowingly or involuntarily.

Applicant argues his guilty plea was not knowingly and voluntarily given because he did not have adequate access to legal resources during his pre-trial detention. The transcript from Applicant's plea hearing on December 1, 2017, shows Applicant informed Judge Verdin of his dissatisfaction with the legal resources at his disposal at the detention center, and that Applicant expressed an opinion that he would not be able to adequately represent himself with those resources if he were to proceed in his criminal case as a pro se defendant. This Court does not need to consider the quality of the legal resources at the Pickens County Detention Center because it was not Applicant's responsibility to advocate on his own behalf in the criminal case as he was represented by plea counsel. Plea counsel credibly testified he conducted legal research, evaluated the evidence in the case, and discussed those matters with Applicant. Applicant's own testimony agrees that plea counsel shared case law with him. Plea counsel was not limited to the legal resources at the jail, and the responsibility for conducting legal research would have been his, and not Applicant's, as Applicant was not a pro se defendant and plea counsel was not engaging in a hybrid representation. See United States v. Lawrence, 161 F.3d 250 (4th Cir. 1998) ("[t]he Sixth Amendment does not require a court to grant advisory counsel to a criminal defendant who chooses to exercise his right to self-representation by proceeding pro se"), United States v. Mikolajczyk, 137 F.3d 237 (5th Cir. 1998) (holding that, as the defendant

"had no right to standby counsel, it seems unlikely that standby counsel's failure to assist could be a violation of his Sixth Amendment rights"), and United States v. Bova, 350 F.3d 224 (1st Cir. 2003) (nothing that the defendant did not have the right both to "represent himself and to enjoy the benefit of standby appointed counsel"). At any rate, Applicant waived his right to challenge the State's case by waiving his right to a trial by pleading guilty. This Court finds Applicant has failed to show that the quality of the legal resources at the detention center caused Applicant's guilty plea to have been entered unknowingly or involuntarily.

Applicant has failed to demonstrate that this Court should allow him to depart from the guilty plea he entered before Judge Verdin in December of 2017. He has failed to show any deficiencies in plea counsel's performance or an Applicant's circumstances at the time that caused Applicant to plead guilty rather than proceeding to trial. On the contrary, the evidence before this Court indicates Applicant desires to be released from incarceration on probation in accordance with the sentencing recommendation to which Applicant subjected himself by pleading guilty. Applicant has failed to show he did not understand and accept the consequences of pleading guilty to second-degree criminal domestic violence or plead guilty of his own free will. As such, these allegations are denied and dismissed with prejudice.

CONCLUSION

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


This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate

counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCF, provides if the applicant wishes to seek appellate review and is represented by post-conviction relief counsel, that counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 27 day of January, 2020.


EDWARD W. MILLER
Presiding Judge

Georgetown, South Carolina

CLERK OF COURT
BERGEN COUNTY
SOUTH CAROLINA

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