

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**Aug 07 2020**

CERTIORARI TO KERSHAW COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Alison R. Lee, Circuit Court Judge

Case No. 2019-CP-28-796

Myles James Dunne,

Respondent,

v.

State of South Carolina,

Petitioner.

NOTICE OF APPEAL

The State appeals the order granting post-conviction relief and the order denying the Rule 59(e), SCRCP, motion to alter or amend of the Honorable Alison R. Lee dated May 20, 2020, and filed May 26, 2020. The State received written notice of entry of this order granting post-conviction relief on May 29, 2020. The State submitted a motion to alter or amend pursuant to Rule 59(e), SCRCP, on June 8, 2020, and filed on June 10, 2020. Judge Lee denied the State's motion to alter or amend on July 6, 2020. The State received the filed order denying the motion on July 8, 2020.

August 7, 2020

s/Samuel L. Key  
SAMUEL L. KEY  
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recommended deferred sentencing to allow Applicant to participate in the Kershaw County Drug Court program. Judge Alford accepted Applicant's guilty plea and deferred sentencing for Applicant to participate in the Drug Court program. Judge Alford additionally ordered Applicant to pay \$200 in restitution on the second-degree burglary charge.

Applicant failed to successfully complete the Drug Court program and pay restitution. On April 5, 2019, the case proceeded to a sentencing hearing before the Honorable DeAndrea G. Benjamin. Applicant was represented by Assistant Public Defender Jason D. Kirincich at the sentencing hearing. Deputy Solicitor Curtis A. Pauling, III, represented the State. At sentencing, the State recommended Applicant receive probation and pay the previously ordered \$200 restitution. Judge Benjamin sentenced Applicant to serve concurrent terms of two years imprisonment, suspended upon service of eighteen months' probation, on the drug charges; and seven years' imprisonment, suspended upon the service of eighteen months' probation and restitution of \$200, for second-degree burglary. Applicant did not appeal his convictions or sentences.

However, because he pleaded guilty, the Department of Immigration and Customs Enforcement (ICE) placed a detainer on Applicant. A hearing on Applicant's immigration status was held and he was represented by an attorney with immigration experience. He is currently detained at an ICE facility in Georgia and is awaiting deportation scheduled for May 27, 2020.

### **ALLEGATIONS IN THE CURRENT ACTION**

Applicant timely filed his application for post-conviction relief on July 9, 2019. In his application Applicant alleges he is being held unlawfully based upon:

1. Ineffective assistance of counsel:
  - a. Failure to inform Applicant of his right to appeal and the appellate process.
  - b. Failure to inform Applicant of the immigration consequences of pleading guilty.
  - c. Failure to inform Applicant that deportation would commence upon conviction.

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The application states, "Counsel never informed [Applicant] that there could and would be immigration consequences upon conviction." Citing *Padilla v. Kentucky*, 559 U.S. 356 (2010). Applicant requests relief in the form of "immediate release from custody/detention, and the convictions be ordered null and void." During this proceeding, Applicant abandoned his grounds of failure to inform Applicant of right to Appeal.

At the PCR hearing, Applicant testified on his own behalf. Jason Kirincich, Esquire, and James Lyon, Esquire, who both represented Applicant testified. Mr. Lyon's representation was prior to and during the plea. Mr. Kirincich represented Applicant while he was involved with Drug Court and afterward at his sentencing.

After review of the records and evidence presented, this Court grants Applicant relief as to Applicant's allegation that he was not properly advised of the consequences of conviction, specifically that he would be subject to deportation if he was unsuccessful in Drug Court. Accordingly, Applicant's convictions are vacated based on testimony from all witnesses including both counsels that Applicant was not informed of those consequences.

### **SUMMARY OF FACTS**

On August 31, 2017, Applicant was passed out in his vehicle parked at the Dollar General in Camden. When law enforcement arrived, Applicant was unconscious with a needle in his arm. Transcript of Record dated November 13, 2017 before Hon. Lee Alford ("Plea Tr.") at 16. Applicant was awoken and in his possession was a small quantity of heroin. Plea Tr. at 17. Applicant was transported to the hospital, released, and then charged with possession of heroin. Plea Tr. at 17. Thereafter, Applicant was released on bond. Plea Tr. at 3.

On November 1, 2017, law enforcement was dispatched to a residence regarding a home invasion. The residents found Applicant inside their home in possession of their property.

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Applicant had entered their home through a window. The homeowners detained Applicant until law enforcement arrived. Plea Tr. at 17. Additionally, Applicant possessed a small amount of cocaine. Plea Tr. at 18. Applicant was arrested for burglary and possession of cocaine. Plea Tr. at 18. Judge Alford accepted Applicant's guilty plea and deferred sentencing. Plea Tr. at 18-19, 21-22. Judge Alford advised Applicant if he successfully completed Drug Court and paid restitution, the charges against him would be dismissed. Plea Tr. at 21.

Prior to the plea, Applicant met with his attorney, James Lyon, to discuss the charges and a possible plea. Applicant admitted having a drug problem. He moved to the United States from Ireland and had been living in the United States for over 20 years. He worked in Camden in the horse industry "breaking" horses. He suffered multiple injuries over time including a broken back, neck, legs, and arms and was prescribed the drug Oxycontin. The use of Oxycontin lead to his addiction to drugs seeking relief from intense and constant pain. Despite his addiction, he worked every day to support his wife and two children (now ages 21 and 14).

Applicant admitted he had a drug problem and wanted to "get behind it" and go to Drug Court. Lyon explained the requirements of Drug Court and counseled him on the consequences of failure to complete the Drug Court program. Specifically, successful completion of Drug Court would result in dismissal of the charges and expungement. Lyon did not recall discussing with Applicant any potential immigration issues or advising Applicant that he could be deported if he failed to complete the program. Applicant wanted the opportunity to participate in Drug Court and intended to complete the program. At the plea hearing, there was no mention of his immigration status or any advice or notification of the risk of deportation by entering into the plea or failing to successfully complete the Drug Court program. Applicant entered into the plea

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without knowledge of the consequences the plea could have on his ability to remain in the United States.

When Lyon left the Public Defender's office in November 2017, Jason Kirincich became Applicant's attorney. Applicant had already entered a plea and sentencing was deferred pending completion of Drug Court. Kirincich did not recall having any conversations with Applicant about the possibility of deportation until after Applicant was dismissed from Drug Court. Once dismissed from the program, Kirincich met with Applicant to talk about his "green card" and informed him in March 2019 that this matter would negatively affect his immigration status. If Applicant had successfully completed the program, the charges to which he pled would be dismissed and expunged from his record. Kirincich testified Applicant sincerely worked to complete Drug Court, but failed a drug test. Applicant would not be able to withdraw his plea. Kirincich was aware Applicant wanted to remain in the United States with his family. Kirincich advised him to contact an attorney with experience in immigration law.

Applicant did not successfully complete the Drug Court program. He participated for approximately 10 months before he was terminated from the program. At the sentencing hearing, the State recommended Applicant receive probation on all charges. Transcript dated April 5, 2019 before Hon. DeAndrea Benjamin ("Sentencing Tr.") at 5. In mitigation, Kirincich advised the sentencing court that Applicant participated in Drug Court for forty-five weeks; however, he did not complete the program. Sentencing Tr. at 5-6. Kirincich stated Applicant immigrated to the United States from Ireland when he was seventeen. Sentencing Tr. at 6. Kirincich stated Applicant was married to a U.S. citizen and in the country on a valid green card. Sentencing Tr. at 10. Kirincich stated Applicant's immigration status became a concern while Applicant was in Drug Court. Kirincich stated Applicant now knew these convictions could affect his immigration status.

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Sentencing Tr. at 10. (Emphasis added). Once Applicant entered the plea and it was accepted by the Court, sentencing was deferred to allow him to participate in Drug Court, he could no longer withdraw his plea upon learning of the possible consequences.

### **FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

This Court heard the testimony presented at the evidentiary hearing, observed the witnesses, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the transcripts, and Applicant's records, the application for post-conviction relief, and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her 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, 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." *Strickland v. Washington*, 466 U.S. 686, 104 S.Ct. 2064 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813 (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 if counsel was "a reasonably competent attorney" and the advice was "within the range of competence demanded of attorneys in criminal cases." *Strickland*, 466 U.S. at 667, 104 S. Ct. at 2064. Applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

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Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. *Id.* at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. *Id.* Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." *Id.* (citing *Strickland*, 466 U.S. 688, 104 S. Ct. at 2065). Second, any 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, 386 S.E.2d at 625.

In *Padilla v. Kentucky*, 559 U.S. 356, 374, 130 S.Ct. 1473, 1486 (2010), the U.S. Supreme Court stated that "counsel must inform [the] client whether [the] plea carries a risk of deportation." "Further, to be effective, counsel must inform a defendant whether his or her plea carries a risk of deportation because it is a critical factor when deciding whether to plead guilty or proceed to trial." *Lucero v. State*, 414 S.C. 238, 245, 777 S.E.2d 409, 413 (2015) (citing *Hamm v. State*, 403 S.C. 461, 463 n. 1, 744 S.E.2d 503, 504 n. 1 (2013)).

**Failure to inform Applicant of immigration consequences including deportation**

Applicant alleges that he was not informed of the possibility of deportation either before or during his plea before the court. The record before this Court and testimony of the witnesses support Applicant's claim that he was not informed of this possible consequence.

This Court finds that his plea counsel never informed Applicant of the possibility of deportation and it was not mentioned during the plea. Further representation by his counsel prior to and at the plea hearing was deficient because Counsel failed to inform Applicant that entering into the plea could have an adverse impact upon this immigration status and would negatively affect the status if he failed to complete the Drug Court program and have the charges dismissed.

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In *Taylor v. State of South Carolina*, 422 S.C. 222, 810 S.E.2d 862 (2018), our Supreme Court further elaborated on the requirements set forth in *Padilla*. “If the deportation consequences of a particular plea are unclear or uncertain, ‘a criminal defense attorney need do no more than advise a non-citizen client that pending charges may carry a risk of adverse immigration consequences.’” 422 S.C. at 225, 810 S.E.2d at 863, citing *Padilla*, 559 U.S. at 369, 130 S. Ct. at 1483. *Taylor* further cites *Padilla*, “where the terms of the relevant immigration statute are ‘succinct, clear and explicit’ in defining removal consequence, counsel has an ‘equally clear’ duty to give correct advice.” *Id.* (internal citation omitted).

A brief review of the immigration statute found at 8 U.S.C.A. § 1227(a)(2)(B)(i) would have revealed that an alien admitted to the United States who is convicted of a violation of “any law or regulation of a State ... relating to a controlled substance ... is deportable.” A guilty plea to possession of heroin and cocaine places Applicant clearly within the parameters of this statute making Applicant "deportable". Even if Counsel was unsure whether the charges pending against Applicant or the possibility the plea to Drug Court would impact his immigration status because the charges could be dismissed at a later point, Counsel had to inform Applicant that entering into a plea and his failure to complete the Drug Court program may have an adverse effect on his immigration status. Counsel failed to do so and his representation was deficient by failing to be reasonable under prevailing professional norms.

The second prong of the *Strickland* test requires Applicant to show that Counsel’s deficient advice prejudiced him such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” The evidence presented during the hearing establishes that Applicant has been in this country for 25 years continuously working in the horse racing industry. He is married with two children, the youngest

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of whom is his son 14 years old son. Applicant testified that he wanted to live in this country and was ignorant of the potential to be deported. He has lived in the United States for more than half his life. The testimony of Mr. Kirincich was that Applicant wanted to remain in this country. Based upon all of the evidence, Applicant has established his attorney's conduct prejudiced him and the proceedings would have been different if Applicant was aware of the consequences of entering a plea.

**CONCLUSION**

Based on the foregoing, the Court finds and concludes Applicant has established he was not adequately informed by his plea counsel that he would possibly be deported for the offenses to which he pled. Plea Counsel was deficient for failing to advise Applicant of the immigration consequences of his guilty plea. Applicant established prejudice to him as there is a reasonable probability that but for Counsel's deficient performance, the result would have been different. Applicant would not have pleaded guilty.

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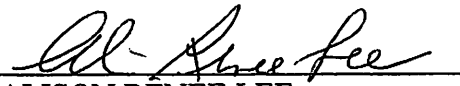
**ORDER**

**IT IS THEREFORE ORDERED THAT:**

1. The application for post-conviction relief is granted; and
2. The guilty pleas and convictions are vacated.

A notice of appeal must be filed within thirty days from the receipt of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR.

**AND IT IS SO ORDERED.**

  
ALISON RENÉE LEE  
Presiding Judge  
Fifth Judicial Circuit

May 20, 2020  
Columbia, South Carolina

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**ORDER**

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ALISON RENEE LEE  
Presiding Judge  
Fifth Judicial Circuit

May 20, 2020  
Columbia, South Carolina

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2019-CP-28-00796

FILED FOR RECORD  
2020 JUL -6 PM 2:04

Myles James Dunne

State of South Carolina

APPLICANT

RESPONDENT

Submitted by:

JANET C. HASTY  
CLERK OF COURT  
KERSHAW COUNTY, S.C.

Or:  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.
- ACTION DISMISSED (CHECK REASON):  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):  Rule 40(j), SCRPC;  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.

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

ORDER INFORMATION

This matter is before the Court on a Rule 59(e) motion to alter, amend, or reconsider filed by the State of South Carolina. The motion was filed on June 10, 2020. It was not served on the Court until June 25, 2020 when the motion was sent to the Court by email. Pursuant to Rule 59(g), "a party filing a written motion ... shall provide a copy of the motion to the judge within ten (10) days after filing the motion." Pursuant to Rule 59(g) and *Smith v. Fedor*, 422 S.C. 118, 809 S.E.2d 616 (Ct. App. 2017), *reh'g denied* (Feb. 26, 2018), the motion to alter, amend, or reconsider is not timely and is therefore, denied.

This order  ends  does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|---|---------------------------------------|--------------------------------|
|   |                                       | \$                             |
|   |                                       | \$                             |
|   |                                       | \$                             |

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.

Circuit Court Judge s/ ALISON RENEE LEE

Judge Code 2118

Date July 6, 2020

ATTEST True, Correct & Certified  
Copy of Original on File in this  
Court

*Janet C. Hasty*

Clerk of Court

Kershaw County

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ 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:

\_\_\_\_\_  
Timothy Lee Griffith, Esq.  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
Samuel L. Key, Esq.  
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_