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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

Case No. 2018-CP-24-00705

Alfonso Morgan, #257372, ... Petitioner,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant, Alfonso Morgan, appeals the order of the Honorable J. Mark Hayes, II, dated August 17, 2020, and filed August 27, 2020.

August 27, 2020

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STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)	IN THE COURT OF COMMON PLEA FOR THE EIGHTH JUDICIAL CIRCUIT
Alfonso Morgan, Jr., #257372, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2018-CP-24-00705 **ORDER OF DISMISSAL**

This matter comes before this Court by way of an application for post-conviction relief filed on August 3, 2018, by Alfonso Morgan, Jr. (Applicant). The State (Respondent) filed a return and motion for more definite statement on December 4, 2018, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on March 13, 2020, at the Laurens County Courthouse. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf. W. Townes Jones (Jones), Esquire, James W. Bannister (Bannister), Esquire, and former Captain of the Greenwood Police Department, Nick Futch (Futch) also testified. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenwood County Clerk of Court. During its May 2015 term, the Greenwood County Grand Jury indicted Applicant for murder (2015-GS-24-0728).

Applicant was represented by Jones and Bannister. Solicitor David Stumbo, and Assistant Solicitor Yates Brown of the Eighth Circuit Solicitor's Office prosecuted the case. In January 2016, Applicant filed a motion seeking immunity from prosecution pursuant to the South Carolina Protection of Persons and Property Act. On February 1, 2016, a pre-trial hearing was commenced on the motion in the Greenwood County Court of General Sessions before the Honorable Eugene C. Griffith, Jr. At the conclusion of the multi-day hearing, Judge Griffith denied Applicant's motion for immunity from prosecution. Thereafter, on February 5, 2016, Applicant pled guilty to the lesser-included-offense of voluntary manslaughter. After accepting Applicant's plea, Judge Griffith sentenced Applicant to twenty-five years suspended upon service of twelve-and-a-half years with three years' probation after the end of the community supervision.

Applicant filed a timely notice of appeal raising the following issues:

1. The trial court's denial of immunity in a hearing under the Protection of Persons and Property Act is appealable after a defendant pleads guilty to a lesser-included offense.

2. The trial court erred in denying appellant immunity under the Protection of Persons and Property Act because Appellant was sitting in the back seat of a car when he was attacked by the decedent.

Appellate Defender Robert M. Pachak of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction in an unpublished opinion on June 6, 2018. State v. Morgan, Op. No. 2018-UP-233 (S.C. Ct. App. filed June 6, 2018). The remittitur was returned to the circuit court on June 22, 2018.

Applicant filed a timely application for post-conviction relief on August 3, 2018, alleging:

1. Ineffective Assistance of Counsel
    a. "where if the defendant had had the actual documentation of the states case, there is reasonable probability that for counsel's unprofessional errors, the result of the proceedings would have been different"
    b. "deficient performance created ineffective assistance of counsel from lack of due diligence would of produced the investigation

reports, statement of Captain Futch and secured his testimony..."

c. "The states investigation and facts from witness statements concluded beyond doubt, meeting the requirements in State v. Douglas, for self-defense and stand your ground if not for the unprofessional errors"
d. "Here Mr. Town violated this trust by out-sourcing to Mr. Bannister not only failed at calling Mr. Futch as a witness for the defense but who also has a political relationship with the solicitor David Stumbo creating prejudice and a serious conflict of interest"
e. "Counsel failed to articulate a valid strategy for failing to call either investigator to testify at the immunity hearing as such defendant's trial counsel was deficient for failing to call either investigative expert to challenge the state's alleged claim of murder, although stand your ground was proven at immunity hearing prior to being induced to plea while not knowingly or intelligently doing so."
f. "Counsel did not call to the stand either investigator witness during the hearing, even though he knew the state would attempt to admit evidence of no self-defense"
g. "thus these elements prejudiced defendant as elements of ineffective assistance of counsel since captain futch's investigation proved self-defense testimony that reasonably could have resulted in a different outcome at immunity hearing or at trial thus meeting the 2 requirements of the prongs Strickland v Washington, 466 US 668 (1984) where counsel's performance fell below an objective standard of reasonableness and prejudice and if not for the counsel's errors and deficient performance, the result of the proceedings would have been different."

2. Involuntary Guilty Plea
    a. "Counsel for defendant prejudiced Defendant into accepting a non-negotiated or recommendation plea under their direction and advisement that was not favorable to the defendant based from the state's own evidence"
3. Brady violations
    a. "The state created bias and prejudice by violating due process rights of disclosure under Brady 5/6 material and not providing all case material and withholding police narrative reports to the defendant for his personal inspection and to the court from its own investigation from Capt. Futch, the state's first investigator of the court before this honorable court, US v. Stokes"
    b. "Here, the state, solicitor and the defendant's counsel of record failed to do-provide these provisions of law. When a defendant or defendant's counsel at any time prior to sentencing, the due process clause and the US constitution requires all Brady material, it is the responsibility of the state to make sure that any and all evidence, material is presented to the defendant for his personal inspection so that he is knowingly part of the case and understanding the material

as it is imperative for the defendant to know what he is to defend against and not just trust what his counsel may or may not provide, Parkus v Delo, 33 F.3d 933 (8th cir. 1994)."

On March 3, 2020, Applicant filed an amended application setting forth two additional allegations of ineffective assistance of counsel:

1. Ineffective Assistance of Counsel
   i. Counsels were ineffective when they informed the Applicant he would be pleading to a ten-year plea deal; not the twelve years he ended up with.
   ii. Counsels were ineffective when they did not call Nick Futch as a witness in the stand your ground hearing.

On March 13, 2020, Applicant proceeded to an evidentiary hearing before the Honorable J. Mark Hayes, II, at the Laurens County Courthouse. Applicant was represented by Ashley A. McMahan, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office represented the State.

SUMMARY OF FACTS

On the night of November 14, 2013, Captain Hugh Butler of the Greenwood Police Department was alerted of a fight taking place at the Triangle Social and Senior Citizens Club, which was colloquially known as the Cabstand, and quickly began heading to that location. (Hearing Tr. 311.) As he made his way there, Captain Butler received a follow-up report indicating someone had been shot at the club. (Hearing Tr. 311.) Moments later, he arrived at the scene and observed numerous people running around in a frantic manner. (Hearing Tr. 312.) Captain Butler then attempted to ascertain what had transpired but received no assistance from most of the people present at the scene. (Hearing Tr. 307.) However, one individual approached him and reported he saw the victim engaged in an argument with an unknown person seated in a black Chevrolet Impala, the door to that vehicle swung open, the victim was shot, and the vehicle sped off. (Hearing Tr. 313-314.) Critically, that individual also provided Captain Butler with the license tag number

of the vehicle involved in the shooting, and the captain quickly alerted his fellow officers to be on the lookout for the shooter's vehicle. (Hearing Tr. 314.)

Shortly thereafter, Jamaal Aiken (Victim), the person who was shot in the parking lot of the club during the incident, died at the hospital as a result of the injuries he sustained in the shooting.[1] (Hearing Tr. 174, 182, 260, 285-286, 312, 318.) Meanwhile, officers quickly tracked down and arrested Applicant at the home of Lenwood Ramsey, the owner of the black Chevrolet Impala involved in the shooting.[2] (Hearing Tr. 203, 212-213, 364-365.) Following his arrest, Applicant was transported to the police department and interviewed. (Hearing Tr. 365-366.) However, he invoked his rights and declined to provide a statement that night. (Hearing Tr. 367.)

Thereafter, several months later, Applicant arranged to speak with officers with the assistance of defense counsel and provided a statement about the shooting. (Hearing Tr. 369.) In that statement, Applicant alleged he went to the Cabstand on the night of the shooting with a .44-caliber revolver he purchased after "doing time."[3] Once there, Applicant indicated he got a "funny feeling" and left. After that, Applicant stated he was alerted one of his friends had been "jumped" and he returned to the club in response. When he got back to the club, Applicant claimed Victim approached his car in an "enraged" manner and snatched the door open. At that point, Applicant stated he shot Victim. Then, Applicant stated he directed the driver of the vehicle he was in to go, they travelled to Ramsey's house, he hid the gun he used to shoot Victim underneath a pile of leaves, and he was eventually arrested by the police.

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[1] While Victim was at the hospital, his pants were removed and a stolen .380-caliber pistol was discovered in his pocket along with twenty-eight grams of marijuana. (Hearing Tr. 256-258.)

[2] During the immunity hearing, Tonya Fuller indicated law enforcement officers arrived at that location only five minutes after Ramsey and Applicant returned to the home after the shooting. (Hearing Tr. 193-194, 200.)

[3] Notably, Applicant did not have a concealed weapons permit for that weapon. (Hearing Tr. 499.)

Following the interview, Applicant was indicted for murder as a result of Victim's death, and he filed a motion seeking immunity from prosecution before his case was called to trial. (Hearing Tr. 9-12.) In response, the circuit court judge conducted a pre- immunity hearing in regard to Applicant's motion. (Hearing Tr. 7.)

During the hearing, defense counsel presented the testimony of numerous witnesses who offered varying accounts of the shooting. (Hearing Tr. 18-68, 186-228, 260-319.) Regarding those accounts, Thomas Gilchrist, who was known as "Bug," testified he went to the Cabstand with Applicant on the night of the incident, they stayed for a little while, Applicant indicated he wanted to leave before anyone got into trouble, and they left the club. (Hearing Tr. 18-20, 28-30.) A short time later, Gilchrist stated Applicant received a call and indicated they needed to return to the club, they returned together in Ramsey's car, they observed a commotion near the door to the club, Victim walked alone towards their car "in a frenzy," Victim opened the rear door of the car and made an insulting comment to Applicant, and then Victim tried to reach into the car and pull Applicant out. (Hearing Tr. 31-36, 57-59, 68.) At that point, Gilchrist indicated Applicant suddenly shot Victim before closing the door and directing Ramsey to drive them away. (Hearing Tr. 37, 59.) After that, Gilchrist indicated they returned to Ramsey's home, he eventually returned to the scene of the shooting, and he falsely claimed to have observed the incident from outside the vehicle to a police officer he encountered there. (Hearing Tr. 38- 43, 65.) Similarly, Ramsey testified he went to the Cabstand on the night of the incident before returning to his home with Applicant and some other individuals after Brent Williams (Brent) slapped Applicant's hat and cursed at him inside the club. (Hearing Tr. 202 – 208, 217.) After that, Ramsey indicated he returned to the club with Applicant and Gilchrist after Applicant was advised someone had "jumped on" an individual called "Crip," they pulled into the club's parking lot, he heard the door

to the car open, he heard Victim yell some angry words, he heard a gunshot, and then Applicant directed him to drive away. (Hearing Tr. 208-212, 221.) Conversely, Brent testified he went to the Cabstand on the night of the incident with Victim and some other people, he got into a fight with Brown after Brown looked like he was going to hit his female cousin, Victim broke up the fight and helped get everyone outside of the club, and they exited the club. (Hearing Tr. 258, 267-268, 275- 278, 294.) Once they were outside, Brent stated Victim walked over to Ramsey's car possibly to let Applicant and his associates know the club had been closed, Victim appeared to partially open the vehicle's door and greet Applicant, and then Applicant suddenly shot Victim. (Hearing Tr. 279-283, 285-286, 299- 300.) Brent further asserted Victim did not curse at Applicant, hit anyone, behave in an aggressive manner, or pull out a gun before he was shot.[4] (Hearing Tr. 285, 293, 296, 300.) Additionally, Captain Butler recounted what he was told at the scene by the unknown eyewitness to the shooting. (Hearing Tr. 313-314.)

In addition to that testimony and evidence, Applicant elected to personally testify during the immunity hearing about what allegedly transpired on the date of the incident. (Hearing Tr. 360.) Specifically, Applicant indicated he went to the Cabstand that night, Brent slapped his hat and told him to "get some balls" while he was at the club, he got a "funny feeling" about what occurred, he left the club after showing the concealed pistol he was carrying to "Crip," and he returned to Ramsey's home. (Hearing Tr. 361, 370, 374-377, 382-383, 395.) While there, Applicant asserted he was contacted and alerted "Crip" had been jumped so he returned to the club.[5] (Hearing Tr. 361-362, 384, 397.) Thereafter, Applicant stated they pulled into the parking

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[4] Regarding the victim, Brent noted Victim was known as "Smooth" based on his cool, calm, collected, and easy going personality. (Hearing Tr. 305.)

[5] During the immunity hearing, Shay Simon, who was the person that allegedly contacted Applicant about the fight that occurred inside the club after he left, testified on Applicant's behalf but indicated she did not actually observe the shooting in light of the fact she was not outside when

lot, Victim walked alone towards the vehicle with a "mean look on his face," Victim yanked the door opened and leaned in, Victim cursed him, Victim reached into the vehicle, and he responded by pulling out a gun and shooting Victim. (Hearing Tr. 362-364, 384- 386, 398- 399, 408.) After that, Applicant stated he returned to Ramsey's home, hid the gun he used to shoot Victim in Ramsey's backyard, and was subsequently arrested. (Hearing Tr. 364-365, 403.) Applicant further claimed he thought Victim was going to pull him from the vehicle to assault him and believed it was "[Victim's] life or [his own]" at the time he fired the fatal shot. (Hearing Tr. 385, 387.)

Furthermore, defense counsel presented the testimony of Dr. Brett Woodard, who conducted Victim's autopsy and was an expert in forensic pathology. (Hearing Tr. 169-170.) During his testimony, Dr. Woodard discussed the trajectory the bullet Applicant fired took through Victim's body and opined it could have been consistent with the narrative defense counsel presented to him, which was Victim was shot while reaching into the vehicle Applicant was seated in. (Hearing Tr. 193, 178-179.) However, Dr. Woodard expressly indicated the narrative presented by defense counsel constituted just one possibility as to how Victim was shot and was not the only possibility, and he stated he could not conclude any one possibility was more probable than another without having additional evidence. (Hearing Tr. 180.) Dr. Woodard further opined Victim could have been shot as he approached the vehicle and indicated he believed Victim "would have [had] to be back more than five to six feet in order to get the terminal ballistics" seen in Victim's body. (Hearing Tr. 181, 185.)

Beyond the testimony and evidence presented by defense counsel, the solicitor offered the testimony of several witnesses who presented accounts of the shooting that differed sharply from

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it occurred. (Hearing Tr. 344, 350-351.) However, she did claim to have observed Victim grab or punch Robinson during the fight that occurred inside the club prior to the shooting. (Hearing Tr. 349, 355.)

the accounts offered by Applicant and his witnesses. (Hearing Tr. 409-413, 416-449, 454-475, 479-497.) Regarding those accounts, Demecus Sayles, who was present at the club on the night of the incident, testified he was in the club's parking lot when a Chevrolet Impala pulled up without parking, the vehicle's back window rolled down, and someone fired a shot from inside. (Hearing Tr. 416-420.) Sayles further stated Victim did not approach the vehicle, open the vehicle's door, say anything to anyone inside the vehicle, or engage in an argument with anyone inside of the vehicle prior to being shot right after he walked outside of the club. (Hearing Tr. 420-422, 431, 437.) Similarly, Drina Morgan (Drina) testified she was at the club on the night of the incident, she observed Victim help break up a fight that occurred inside the club after Applicant had left, she went outside of the club with Victim after the fight, she saw Ramsey's car pull into the club's parking lot with its headlights off, and she watched Applicant shoot Victim from inside the vehicle before the vehicle quickly sped away. (Hearing Tr. 454, 457-462, 469.) Drina further testified Victim did not approach Ramsey's vehicle, grab the vehicle's door, open the vehicle's door, or argue with anyone inside the car prior to the shooting. (Hearing Tr. 463, 465, 472, 474.) Additionally, Shanina Williams (Shanina), who was Victim's fiancée at the time of his death, testified she was present at the club on the night of the shooting, observed Victim help get her brother outside the club after her brother got into a fight, saw a car pull into the club's parking lot with its headlights off, heard a gunshot, and then heard Victim state he had been shot by Applicant. (Hearing Tr. 479-480, 483-488.) Shanina further indicated Victim did not hit anyone, pull anyone to the ground, say anything to Applicant, or do anything to prompt Applicant to shoot him on the night of the incident. (Hearing Tr. 491-492, 497.)

Furthermore, the solicitor introduced a recording of Applicant's statement to police in regard to the shooting, and the circuit court judge reviewed that recording.[6] (Hearing Tr. 399-400.) Following the presentation of that testimony and evidence, defense counsel readily acknowledged some of the facts involved in Applicant's case were in dispute but nonetheless argued Applicant had satisfied his burden of establishing he was entitled to immunity from prosecution. (Hearing Tr. 500-515.) In support of that argument, defense counsel contended Victim had alcohol and marijuana in his system at the time of his death while further noting Victim was in possession of a stolen pistol on the night he was killed. (Hearing Tr. 503.) Furthermore, defense counsel contended the "competent" evidence presented during the immunity hearing established Victim approached the black Chevrolet Impala and opened the door, which he asserted triggered the protections of the immunity statute and permitted Applicant to act in self-defense and in defense of the vehicle. (Hearing Tr. 507-508, 510, 512, 514.) In rebuttal, the solicitor argued Applicant was not entitled to immunity from prosecution based on the testimony and evidence that had been presented. (Hearing Tr. 510-530.) In support of that argument, the solicitor noted numerous facts were in dispute in Applicant's case and contended those factual disputes could best be resolved by a jury. (Hearing Tr. 516-517.) Specifically, the solicitor pointed out factual disputes existed in regard to what happened inside the club while Applicant was still present, what happened inside the club after Applicant left, what role Victim played in the fight that occurred inside the club, and what actions Victim took towards the vehicle Applicant was in after exiting the club. (Hearing Tr.

[6] During his immunity hearing testimony, Applicant acknowledged he did not indicate in his statement to law enforcement Victim was reaching into the vehicle at the time of the shooting. (Hearing Tr. 399-400.) After making that acknowledgement, Applicant initially attempted to explain that significant omission by claiming he was not asked that question during the interview before contending he actually physically demonstrated Victim was reaching into the car while speaking to the detective who conducted the interview. (Hearing Tr. 399-400.)

517-520.) Furthermore, the solicitor contended Applicant's testimony during the immunity hearing was the only testimony presented suggesting Victim was trying to remove him from the vehicle and was inconsistent with Applicant's earlier statement about the shooting. (Hearing Tr. 520-521.) For those reasons, the solicitor asserted the evidence supported a conclusion the shooting was unjustified and Applicant's request for immunity should be denied. (Hearing Tr. 525.)

Thereafter, upon considering the arguments of counsel, the circuit court judge denied Applicant's motion seeking immunity from prosecution. (Hearing Tr. 531.) In denying the motion, the circuit court judge concluded Applicant failed to meet his burden of establishing by a preponderance of the evidence he was entitled to immunity from prosecution in light of the factual disputes that existed regarding what actually occurred. (Hearing Tr. 531.) Due to the existence of those factual disputes, the circuit judge concluded Applicant's case should properly be resolved by a jury. (Hearing Tr. 531.)

Following Judge Griffith's ruling, Applicant decided to enter a guilty plea two days later to the lesser-included offense of voluntary manslaughter and appeared before the circuit court judge to do so. (Hearing Tr. 532-533.) During the plea hearing, Applicant indicated he wished to waive his right to trial and plead guilty, and he confirmed he wanted to enter a guilty plea after considering everything associated with his case, including the defenses he could present. (Hearing Tr. 533, 537, 540-542.) Likewise, defense counsel confirmed Applicant understood he was pleading guilty to an intentional killing and indicated he was in agreement with Applicant's decision to plead guilty. (Hearing Tr. 534-535.) Applicant then pled guilty to voluntary manslaughter and indicated he did, in fact, commit the offense. (Hearing Tr. 542-543.)

Following the entry of that plea, defense counsel confirmed he believed the facts of what transpired fit the offense of voluntary manslaughter. (Hearing Tr. 550-552.) Applicant then apologized and expressed remorse, and Judge Griffith accepted Applicant's guilty plea. (Hearing Tr. 558.) Applicant was then sentenced to a twenty-five-year term of imprisonment and directed the remaining balance of that sentence be suspended to a three-year term of probation following the service of twelve-and-a-half years of the sentence. (Hearing Tr. 558.)

ALLEGATIONS RAISED

On March 13, 2020, Applicant's post-conviction relief hearing was held at the Laurens County Courthouse. Applicant was represented by Ashley A. McMahan, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office represented the State. At the evidentiary hearing, Applicant proceeded on the following allegations:

1. Ineffective Assistance of Counsel

    i. Counsels were ineffective when they informed the Applicant he would be pleading to a ten-year plea deal; not the twelve years he ended up with.[7]

    ii. Counsels were ineffective when they did not call Nick Futch as a witness in the stand your ground hearing.

SUMMARY OF TESTIMONY AT EVIDENTIARY HEARING

Applicant's Testimony

Applicant testified after his arrest he was in the detention center for nine months, and then on house arrest once he was released. Applicant testified Jones was retained by his family to represent him. Applicant testified Bannister joined his defense after Jones retained his services to assist him with the immunity hearing. Applicant testified he met with Jones a few times when he

[7] This allegation is also construed as an involuntary guilty plea allegation.

was in the detention center and a few times when he was on house arrest. Applicant testified they went over a discovery during those meetings.

Applicant testified the ultimate issue he has with Jones and Bannister is the plea offer. Applicant testified his understanding was that he would receive an eight year sentence when he pled guilty. Applicant testified after his motion for immunity was denied, he went back to Jones' office and was asked if he would take an eight year plea offer. Applicant testified he trusted Jones and Jones said the plea was the best way to go. Applicant testified Jones told him the plea had to be done by Friday. Applicant testified he went in and signed papers on Friday morning. Applicant testified he told the judge he had not been promised anything during the plea colloquy because he thought it would still be an eight year sentence. Applicant testified, had he known it was not an eight year sentence, he would not have taken the plea offer. Applicant testified after the plea hearing he spoke to Jones and Jones told him he did not know what went wrong.

Applicant testified Bannister was brought in to help Jones with the immunity hearing. Applicant testified he believed he had a strong defense in his case because he believed he met all of the criteria for the stand your ground defense. Applicant testified he had conversations with Jones regarding the immunity hearing. Applicant testified, prior to the immunity hearing, Bannister asked him if he would take a five year plea offer, but Applicant testified he was not interested in pleading guilty at that time. Applicant testified Futch was the lead investigator in his case. Applicant testified several different reports were entered regarding the incident by police officers and Futch. Applicant testified Futch was not subpoenaed by Jones or Bannister and he was not called as a witness during the immunity hearing.

On cross-examination, Applicant testified going to trial was "on the table." Applicant testified after his motion for immunity was denied he chose to plead guilty. Applicant testified he

did not recall Judge Griffith telling him the penalty for voluntary manslaughter was two to thirty years. (GP Tr. 534, line 20.) Applicant testified he recalled telling Judge Griffith that he was not promised anything in exchange for his guilty plea, but testified that he told Judge Griffith that because he trusted Jones and had signed the plea deal. Applicant testified he recalls Judge Griffith stating the only negotiation for the plea was that he be allowed to plead guilty to the lesser-included-offense of voluntary manslaughter. (GP Tr. 540.) Applicant testified he recalled Judge Griffith explaining he would have to serve 85% of the sentence imposed by the court. (GP Tr. 540.) Applicant testified he recalled telling Judge Griffith that he was in fact guilty of voluntary manslaughter. (GP Tr. 543.) Applicant testified he recalled waiving his constitutional rights and telling Judge Griffith that he had enough time to talk to his attorneys. Applicant testified he provided those answers to the court because he was doing what his attorney told him to do. Applicant testified Jones told him it was a good deal, so he put his trust in Jones. Applicant testified Jones did not tell him how to answer the questions during the colloquy. Applicant testified Jones did not tell him the questions Judge Griffith would ask him during the plea hearing. Applicant testified he was aware that he would have to proceed to trial on Monday if he did not enter his guilty plea on Friday.

Jones's Testimony

Jones testified he has been practicing law for over thirty-five years. Jones testified he was the elected solicitor for many years. Jones testified his private practice was 80-90% criminal defense. Jones testified he was retained in November 2014 and represented Applicant up until his guilty plea on February 5, 2016. Jones testified he met with Applicant eight to ten times while he was in the detention center, and a total of thirty to fifty times in preparing Applicant's defense. Jones testified he had successfully represented Applicant on several other charges prior to this

incident. Jones testified he spoke to the investigators in Applicant's case prior to meeting with Applicant. Jones testified investigators had already taken statements from the two friends Applicant was in the vehicle with at the time of the incident. Jones testified the two statements both stated that Applicant shot Victim. Jones testified there were several other fairly credible witnesses who also told officers Applicant shot Victim. Jones testified Applicant told officers they had the wrong guy when he was arrested. Jones testified Applicant told officers he was leaving the club when the shooting happened. Jones testified he went and confirmed the statements with the witnesses who were in the vehicle with Applicant at the time of the incident and they all said Applicant yelled, "Go, Go, drive!" after the shooting. Jones testified the witnesses drove to the gas station after the shooting because they were scared. Jones testified the witnesses stated Applicant made them drive to one of the witness's residence. Jones testified the witnesses stated Applicant had the gun when he got out of the vehicle, however, when he came inside the residence a little while later, he did not have the gun. Jones testified he told Applicant's mother they had work to do because they had an issue with witnesses. Jones testified Applicant shot Victim without provocation, fled the scene, and hid the gun in one of the witness's backyard under some leaves. Jones testified he explained to Applicant that fleeing the scene can be charged to the jury as evidence of guilt. Jones testified he explained to Applicant that hiding the firearm under the leaves was also evidence of guilt.

Jones testified the first few meetings he had with Applicant was about getting him re-interviewed by law enforcement. Jones testified he got the police to re-interview Applicant so he could explain that he was scared of Victim. Jones testified he told Applicant he needed to tell the police the truth and be convincing and thorough about his fear of Victim. Jones testified Applicant

provided a statement that he concluded to be the truth, but he does not know how believable the statement was. Jones testified it was sufficient enough to establish Applicant's version of the facts.

Jones testified he hired a private investigator to assist him in investigating Applicant's case. Jones testified Applicant's brother questioned why they were not pursuing a "stand your ground" defense more aggressively. Jones testified he told Applicant's brother they could do that and that is why Jones asked around about what attorney was the best in presenting a stand your ground defense. Jones testified Bannister's name came up many times, so he approached him about assisting Jones with Applicant's case. Jones testified he discussed Bannister's involvement with Applicant and his family and they did not object to Bannister's involvement. Jones testified he paid Bannister, not Applicant. Jones testified he was the lead attorney on Applicant's case.

Jones testified Applicant's testimony at the immunity hearing was unimpressive. Jones testified Applicant did not seem to understand that it was the most important testimony he would ever give in his life. Jones testified he did not once turn to the judge and explain he had no choice, he had to shoot Victim. Jones testified Applicant never told the judge Victim made him do it. Jones testified he believes he did subpoena Futch for the immunity hearing. Jones testified Futch was present at the immunity hearing and he spoke to him. Jones testified he did not call him to the stand because Futch never believed this was a self-defense case. Jones testified the best thing Futch said was that he didn't oppose a manslaughter charge. Jones testified Futch never said Applicant's case was a self-defense case.

Jones testified the solicitor's office was not initially willing to make a plea offer in this case. Jones testified after the immunity hearing, Judge Griffith asked them to start negotiations. Jones testified they discussed manslaughter and that the sentence would be two to thirty years. Jones testified Solicitor Stumbo (Stumbo) would not recommend a sentence or provide a

negotiated plea in Applicant's case. Jones testified he told Judge Griffith and Stumbo that he would try to get Applicant to consider a plea around ten years. Jones testified he, Bannister, Applicant, and Applicant's family went back to Jones' office where they had a "spirited discussion" about how they would proceed. Jones testified Bannister asked to speak to Applicant alone in Jones' office. Jones testified they were in his office for about thirty minutes. Jones testified when Bannister came back out, he was told Applicant would take the plea if they could get the judge to consider a ten year sentence. Jones testified Applicant's decision was based on losing the immunity hearing and the possibility of being charge federally for a firearm violation. Jones testified the goal was to have Applicant plea to a manslaughter charge and hopefully get a ten year sentence. Jones testified he got the judge to agree that he would consider the ten year sentence and credit for time served. Jones testified Stumbo asked Judge Griffith, if he were to give Applicant ten years, to give Applicant twenty years suspended to ten years. Jones testified he explained to Applicant that he would have to make up his mind and enter a plea on Friday, because, if Applicant decided not to enter the plea, they are headed for a trial on Monday. Jones testified he was prepared for trial on Monday.

On cross-examination, Jones testified, prior to the plea, he discussed Applicant's constitutional rights with him, possible defenses, and reviewed the sentencing sheet with Applicant. Jones testified he reads the sentencing sheet with every client that pleads guilty. Jones testified he explained sentencing recommendations and negotiations and pointed out to Applicant that neither were marked on his sentencing sheet as Applicant's was not negotiated and the State was not providing a sentencing recommendation. Jones testified the sentencing sheet was not filled out when he signed it, nor did it state the sentence was eight years. Jones testified he told Applicant many times that the ten years he hoped to receive was not guaranteed. Jones testified

he told Applicant he felt 90% sure the judge would sentence him in the range of ten years. Jones testified he told Applicant that he could go to trial. Jones testified he never promised Applicant an eight year sentence. Jones testified the judge did not commit to any sentence during their discussion. Jones testified the judge said he would give "strong consideration" to the ten year sentence, but could have sentenced Applicant anywhere from two years to thirty years. Jones testified he explained that to Applicant.

Jones testified he believes Applicant's decision to plead guilty was in his best interest. Jones testified the benefit of Applicant pleading guilty was that he plead to the lesser-included offense of voluntary manslaughter, federal charges were not going to be pursued, and a defense of self-defense at trial would have been a tough defense to pursue.

Bannister's Testimony

Bannister testified he has been practicing law for almost twenty-five years. Bannister testified that almost half of his practice has been 80-90% criminal law. Bannister testified he became involved with Applicant's case after he got a call from Jones explaining there were stand your ground implications in Applicant's case. Bannister testified he went to Greenwood on eight different occasions and Applicant came to his office in Greenville once to practice his direct and cross-examination. Bannister testified he was assisting Applicant's lead attorney, Jones, in Applicant's case.

Bannister testified he assisted in the investigation in Applicant's case. Bannister testified he met with witnesses and took the vehicle to the scene of the shooting. Bannister testified he does not think he spoke to Futch. Bannister testified he did not believe Futch had any firsthand knowledge, but that he had information that had been put together in the investigation. Bannister testified Futch never told him it was a self-defense case.

Bannister testified after the immunity motion was denied, that was Applicant's best time to plea, because Bannister believe the solicitor saw issues with the State's case. Bannister testified Applicant's case had weaknesses as well. Bannister testified there was no 911 call by Applicant where he claims he was in fear of his life and had to shoot Victim. Bannister testified the fact that Victim was not armed would make it hard for the jury to believe that Applicant was in fear for his life. Bannister testified he has a matrix he uses to calculate a defendant's chance in a self-defense or stand your ground case. Bannister testified, based on his calculations, any offer under fifteen years would be a solid offer Applicant needed to consider.

Bannister testified the judge seemed to believe a sentence around ten years was reasonable. Bannister testified he never extended an eight year offer to Applicant. Bannister testified Applicant had about two years to two-and-a-half years on an ankle monitor and that Applicant may be able to get credit for time served to include that time on house arrest. Bannister testified he told Applicant he did not see any reason to risk a thirty year to life sentence by going to trial. Bannister testified the federal prosecution was not eminent, but believed it was a realistic possibility, which is why they took extra steps to make sure it did not happen. Bannister testified he discussed best and worst case scenarios with Applicant.

Bannister testified he told Applicant this was a "dicey plea" because there was no recommendation. Bannister testified he told Applicant he needed to be ready to show remorse and take responsibility. Bannister testified he told Applicant he had to give the judge a base to stand on if he wanted a favorable sentence. Bannister testified he and Jones tried to set Applicant up to provide a strong statement to the judge, however, Bannister testified Applicant stated he was sorry, but that it came across that he was sorry he had to plead guilty, not that he was remorseful for the incident. Bannister testified Applicant's failure to communicate remorse at the plea probably

affected his sentence. Bannister testified it was Applicant's decision to enter a guilty plea. Bannister testified he agreed with Applicant's decision to plead guilty. Bannister testified he felt "beyond prepared" to go to trial on Monday if Applicant had decided to go to trial.

On cross-examination, Bannister testified he does not recall extending a five year offer to Applicant. Bannister testified he does not have an independent recollection of having a conversation on speaker phone with Applicant's brother and Futch. Bannister testified he explained to Applicant that even if they won the case, Applicant could end up doing jail time on federal charges.

Futch's Testimony

Futch testified he was the Captain over investigations in November 2013. Futch testified his duties included assigning cases out to the detectives he supervised. Futch testified he almost always assigned cases out, but if the detectives were overwhelmed, he would keep cases on a rare occasion. Futch testified on serious cases he would respond to the scene. Futch testified that once the case got to the point where witnesses needed to be interviewed or a suspect was developed, he would assign the case out and just follow-up on it as needed.

Futch testified he recalled aspects of Applicant's case. Futch testified he would have been made aware of the charges being sought in Applicant's case. Futch testified he would let his thoughts be known to the solicitor's office, but the solicitor's office was in charge of negotiating or making a plea offer. Futch testified he does not recall having an issue with the plea offer in Applicant's case. Futch testified he knows Applicant was originally charged with murder, but thought a murder conviction would be difficult because of the circumstances. Futch testified the facts of Applicant's case fit the elements of murder. Futch testified he recalled there being several scenes in Applicant's case (club, residence, and hospital). Futch testified he believes he went to

the scene at the residence where Applicant was located. Futch testified if he did file a report in the case it would have been a supplemental report. Futch testified if he and another officer were present when a piece of evidence was found, he would instruct the other officer with him to do the report.

Futch testified he does not recall being asked to testify at the immunity hearing. Futch testified his involvement was very limited after March 2015. Futch testified he could have had a conversation with Jones and his investigator, but it was not in the normal course of business for him to discuss the case with defense attorneys. Futch testified any discussion regarding his opinion on the case would have been in the presence of a representative from the solicitor's office. Futch testified he did not feel this was a self-defense case. Futch testified he vaguely remembers having a conversation where self-defense was mentioned, but he would have been objecting to it.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the evidence presented at the evidentiary hearing, observed the witnesses, passed upon their credibility, and weighed the testimony and evidence accordingly in its discussion below. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, as well as the pretrial hearing transcript, guilty plea transcript, and appellate records. This Court finds the combined record of the transcripts and the testimony at the evidentiary hearing establishes Applicant received effective assistance of counsel, and this application should be denied. Set forth below are the relevant findings of fact and conclusion of law as required by section 17-27-80 of the South Carolina Code of Laws.

Applicant alleges he received ineffective assistance of counsel such that his guilty plea was rendered involuntary. In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "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. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688 (1984)). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove counsel's representation was below the standard of reasonableness, and but for counsel's unprofessional errors, there is a reasonable probability he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

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.

This Court finds Applicant has failed to prove Jones and Bannister were deficient in their performance in any way, and Applicant was not prejudiced by their performance. Jones met with Applicant between thirty and fifty times prior to his immunity hearing and guilty plea and reviewed with him the evidence and discovery in the case. Jones and Bannister discussed Applicant's version of the facts and possible defenses in preparation for the pretrial immunity hearing and trial. This Court finds Futch was not called to testify at the immunity hearing because he had nothing of substance to offer that would have changed the outcome of Applicant's immunity hearing. This Court also finds Applicant ultimately chose to enter a guilty plea, and this decision was made freely and voluntarily knowing he could receive a sentence between two and thirty years for voluntary manslaughter. Therefore, for the reasons stated below, the Court denies relief and dismisses the allegations with prejudice.

Ineffective assistance of counsels rendering Applicant's guilty plea unknowing and involuntary

Applicant alleges his guilty plea was involuntary because his attorneys acted deficiently by promising him that he would receive an eight year sentence if he pled guilty, but he ended up with a twelve year sentence. Applicant testified had he known he would have received a twelve year sentence, he would not have taken the plea offer.

Jones testified he reviewed Applicant's constitutional rights, and explained multiple times that the plea was not negotiated. Jones testified he explained to Applicant that the penalty for voluntary manslaughter was two to thirty years imprisonment. Jones testified he never promised or guaranteed Applicant that he would receive an eight year sentence. Jones testified he explained

to Applicant that their goal was to get him a ten year sentence and credit for the nearly two-and-a-half years Applicant spent either in the detention center or on house arrest. Jones testified he explained to Applicant that Judge Griffith would consider that sentence, but it was not guaranteed.

Bannister testified he never promised Applicant he would receive an eight year sentence if he pled guilty to voluntary manslaughter. Bannister testified he told Applicant this was a "dicey plea" because there was no recommendation on the sentence. Bannister testified Applicant's lack of remorse when he addressed the court prior to being sentenced most likely affected his sentence.

In Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997), Wolfe pled guilty to assault and battery with intent to kill (ABIK) and possession of a firearm or knife during the commission of a violent crime. Wolfe received the maximum possible sentence of twenty years for ABIK and five years for the weapon charge. Id. at 162, 485 S.E.2d at 369. Wolfe later filed a post-conviction relief action alleging, in part, that his guilty plea was induced by his trial counsel's representation to him that the trial judge would give him a reduced sentence if he pleaded guilty to the charges. Id. at 164, 485 S.E.2d at 370. Wolfe testified at the evidentiary hearing that trial counsel informed him that he has not known this judge to "backstep on a representation that he would impose a reduced sentence." Id. at 165, 485 S.E.2d at 371. Wolfe further testified trial counsel told him "the trial court's questions concerning the plea were 'routine' questions." Id.

The Supreme Court of South Carolina held "any possible misconceptions on Wolfe's part were cured by the colloquy during the actual guilty plea hearing. . . . the judge repeatedly asked Wolfe about the range of sentencing, and asked Wolfe *twice* whether he understood that there were no promises and that no sentencing recommendations were binding on the judge. Wolfe indicated he understood there were no such promises." Id. at 164-165, 485 S.E.2d at 370. The Court also noted trial counsel's statement to the judge during the guilty plea hearing that there had been no

promises made as to the actual sentence the trial court would impose on Applicant. Id. The Court further noted, "The transcript of Wolfe's guilty plea hearing reflects that the trial judge questioned Wolfe extensively about the plea, asking him, *inter alia*, whether he understood that he could get twenty years for ABIK and five years for possession of a firearm or knife during the commission of a violent crime and whether he had been promised anything for pleading guilty." Id. at 161, 485 S.E.2d at 369. Ultimately, the Court found Applicant's "[w]ishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentence, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made." Id. at 165, 485 S.E.2d at 371.

Here, Applicant is alleging his attorneys were ineffective for promising him he would receive an eight year sentence if he entered a guilty plea. However, this Court finds, as in Wolfe, Applicant was informed by his attorneys that he could receive a sentence between two to thirty years for entering a guilty plea to voluntary manslaughter. This Court also finds Applicant was not promised an eight year sentence by his attorneys as this Court finds the testimony of Jones and Bannister credible as to this allegation and Applicant's testimony not credible. Further, as in Wolfe, the record of the guilty plea shows Judge Griffith conducted a very detailed colloquy with Applicant, which clearly shows the plea court explained the sentencing range Applicant was facing by entering a guilty plea to voluntary manslaughter. Further, Applicant testified during the plea hearing that he had not been promised anything in exchange for his guilty plea. (GP Tr. 540.)

This Court finds the testimony of Jones and Bannister regarding this allegation credible whereas Applicant's testimony is not credible. Applicant has failed to establish Jones and Bannister were constitutionally ineffective as both Jones and Bannister credibly testified they discussed the terms of the plea with Applicant and explained numerous times that the plea was not

negotiated. Additionally, both Jones and Bannister credibly testified they did not promise Applicant an eight year sentence and the record supports their testimony that Applicant was aware of the sentencing range he faced and was not promised anything in exchange for his plea.

Applicant has also failed to establish any resulting prejudice as to the alleged deficiency as it is unreasonable to believe Applicant would have chosen to proceed to trial alleging self-defense after losing his immunity motion, especially since both of his attorneys believed pleading guilty was in his best interest. Both Bannister and Jones credibly testified about the numerous challenges Applicant faced in proceeding to trial on a claim of self-defense. By taking the plea offer and receiving a twelve year sentence, which after receiving credit for time served was actually a ten year sentence, Applicant received a favorable outcome considering the strength of the State's case. Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Counsel was constitutionally ineffective and this allegation is denied and dismissed with prejudice.

Ineffective assistance of counsel for failing to call Futch to testify at the immunity hearing.

Applicant alleges his attorneys were ineffective for failing to call Futch to testify at the immunity hearing. Applicant testified he felt Futch should have been called as a witness because of inconsistency in the reporting. Applicant testified that Futch put in a report after the initial report was already filed.

Jones testified Futch was present at the immunity hearing and he spoke to him in court that day. Jones testified that the best thing Futch said was he would not oppose a manslaughter charge for Applicant. Jones testified Futch was not called because Futch never believed Applicant's case was a self-defense case. Bannister testified Futch never told him Applicant's case as a self-defense case.

Futch testified he never believed Applicant's case was a self-defense case. Futch testified he believed the incident supported Applicant's murder charge, but did not oppose a manslaughter charge. Futch testified he may have done a report in Applicant's case, but it would have been a supplemental report to the main investigation report.

This Court finds the testimony of Jones, Bannister, and Futch credible as to this allegation, whereas Applicant's testimony is not credible. This Court finds Jones and Bannister were not deficient for failing to call Futch as a witness during the immunity hearing as Futch had nothing of substance to provide to the court that would have changed the outcome of Applicant's immunity hearing. As such, Applicant has also failed to show this Court any resulting prejudice from the alleged deficiency as Futch's testimony would not have changed the outcome of his immunity hearing. Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Jones and Bannister was constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on the foregoing, the Court finds and concludes 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.

The Court notes Applicant must file and serve a notice of appeal within thirty days from post-conviction relief counsel's receipt 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), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant is to remain in the custody of Respondent.

AND IT IS SO ORDERED this 17th day of August, 2020.

J. MARK HAYES, II
Presiding Judge
Eighth Judicial Circuit

Greenwood, South Carolina