THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

HONORABLE J. DERHAM COLE

2018-CP-42-2396

KARRAS CASCELLE COHEN, JR., SCDC#362970

APPELLANT,

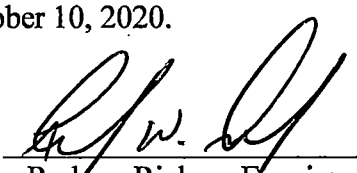
vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Karras Cascelle Cohen, Jr. appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable J. Derham Cole, Circuit Judge on July 15, 2019 an Order issued on October 8, 2020 and filed on October 9, 2020. The Appellant received notice of the judgment on October 10, 2020.



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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Karras Cascelle Cohen, Jr., S.C.D.C. No. 362970, Applicant, v. State of South Carolina, Respondent.	Case No.: 2018-CP-42-02396 ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief filed by Karras Cascelle Cohen, Jr. ("Applicant") on July 9, 2018. Respondent made its return on or about April 12, 2019. The Court convened an evidentiary hearing into the matter on July 15, 2019, at the Spartanburg County Courthouse in Spartanburg, South Carolina. Applicant was present at the hearing and represented by Rodney W. Richey, Esq. Johnny Ellis James Jr, Esq., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Beverly Jones, Esq. ("Counsel"), and Applicant's sister, Tiffany Shell, also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the March 2017 term of the Spartanburg County Grand Jury, and those indictments later amended at the

February 2018 term of the same, for possession of a firearm by a person convicted of a violent crime (2017-GS-42-01813); armed robbery and possession of a weapon during the commission of a violent crime (2017-GS-42-01814, Cts. I & II); attempted murder (2017-GS-42-01816); and burglary, first degree (2017-GS-42-01817). Beverly Jones, Esq., represented Applicant, and Spenser H. Smith, Esq., of the Seventh Circuit Solicitor's Office, prosecuted the case. On February 18, 2018, Applicant pled guilty as indicted. The Honorable Grace G. Knie sentenced Applicant to imprisonment for concurrent terms of five years for the illegal gun, nineteen years for armed robbery, five years for possession of a weapon during the commission of a violent crime, and nineteen years for attempted murder.[1] Applicant did not appeal his plea or sentence.

Present Application

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

1. "Insufficient counsel"
    a. "My public defender never presented me my trial options as far as nolo contendere, she never inquired about alibi witnesses. She didn't fight to get me a bond while I was in the county jail. She never supported my desire to go to trial, never effectively counseled me."
2. "Lack of DNA evidence"
    a. "The crime scene never produced any physical DNA evidence tying me to the scene. No video, photo, DNA or anything."
3. "Victim and witness testimony"
    a. "The victim stated initially he didn't know who committed the alleged crime. Was shown a photo line-up and didn't sign under my picture. The witness stated I was in her vehicle prior to the crime, but never witnessed a crime committed."

Applicant requests relief as follows:

- "If I can't get the charges overturned, I at least request 5 to 10 years be taken off my overall sentence or get the 15 year sentence my co-defendants received."

[1] The plea court originally imposed split sentences to include five years of probation upon completion of the nineteen years, but the court withdrew the probationary portion of the sentence after a brief recess.

At the evidentiary hearing, Applicant proceeded forward without amendment.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence

required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough, 540 U.S. at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" Harrington, 562 U.S. at 111-12 (quoting Strickland, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." Id. at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he/she would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

1. Failure to Advise Regarding Nolo Contendere, Respect Desire to Go to Trial

Applicant alleges Counsel was ineffective in failing to advise him regarding the option of entering a *nolo contendere* plea, and more generally complains that Counsel did not respect his desire to go to trial. "A plea of nolo contendere is for all practical purposes treated as a guilty plea." Deal v. State, 338 S.C. 455, 456, 527 S.E.2d 112, 112-13 (2000) (citing Kibler v. State,

267 S.C. 250, 227 S.E.2d 199 (1976); State v. Munsch, 287 S.C. 313, 338 S.E.2d 329 (1985)); but cf Zurcher v. Bilton, 379 S.C. 132, 136 n.2, 666 S.E.2d 224, 227 n.2 (2008) (articulating similarities and differences between *nolo contendere* pleas and pleas pursuant to North Carolina v. Alford, 400 U.S. 25 (1970)).

During the plea proceeding, the plea court openly assumed that Applicant was not going to plea pursuant to Alford, which Counsel then confirmed. (Tr. 4, ll. 21-24). The Court explained to Applicant that by entering a guilty plea, he would waive his right to a trial by jury and his right to confront the witnesses against him; Applicant answered that he understood. (Tr. 5-6). The Court continued by explaining that if he were to proceed to a trial, the burden of proof would not be upon him, but would be upon the State to prove every element of the charges against him beyond a reasonable doubt, and that he was presumed innocent until proven guilty; Applicant answered that he understood. (Tr. 6, ll. 9-16). The Court made clear that a jury would have to unanimously agree that Applicant was guilty in order for him to be convicted at trial; Applicant answered that he understood. (Tr. 6, ll. 17-21). Applicant later expressed that he was satisfied with Counsel's services, and then he pled guilty. (Tr. 11, ll. 8-19). After the factual basis was provided by the State, Applicant paused before confirming the solicitor's recitation of the facts, and then declined the opportunity to take a moment to confer with Counsel. (Tr. 15, ll. 13-21). Counsel confirmed she had time to review the discovery and evidence with Applicant, and explained his hesitation with a detailed exploration of the facts of the case. (Tr. 16-18). After substantial mitigation and response from the State, Applicant apologized to the Court, to the victims, to his family, asserted he was not going to make any excuse, and requested leniency that he might be able to "get back to [his] kids in the fastest route possible." (Tr. 30, ll. 5-25).

At the evidentiary hearing, Applicant testified that he had wanted to go to trial, but did not think he had the option of doing so. On cross-examination, Applicant further explained that while he understood he had a right to a jury trial, he was just going with the flow during the plea proceeding, and that he had not been satisfied with Counsel's performance.

Counsel testified she represented Applicant on his charges, and that she already represented Applicant on drug charges. On cross-examination, Counsel testified that she was prepared to go to trial, and that one of Applicant's co-defendants had already started their trial, but pled guilty. Counsel testified she had already discussed trial preparation matters with Applicant. Counsel could not remember in detail how it was the plea offer from the State came about, but recalled discussing the offer at length with Applicant while also keeping him abreast of developments as they occurred in his co-defendant's trial, such as the expanded scope of the victim's testimony. Counsel testified that Applicant slept on the offer overnight, and then accepted it the next day.

The Court finds no ineffectiveness on the part of Counsel. As to the *nolo contendere* plea, it is not meaningfully different from a guilty plea, and communication of the concept to Applicant could not rationally lead to a different outcome. A plea of *nolo contendere* as opposed to a standard guilty plea is not a different outcome as envisioned by Strickland and Hill; Applicant's burden is to show that but for the deficiency alleged, he would not have pled guilty, but would have proceeded *to trial*. Furthermore, no testimony was provided at the evidentiary hearing in support of the *nolo contendere* claim.

As to the claim that Applicant wished to proceed to trial, the Court finds it is refuted by the record and the testimony before it. Applicant unequivocally indicated his understanding of his rights, that he was satisfied with Counsel, and that he wished to plead guilty. Applicant

affirmed that he understood he had the right to go to trial during his testimony at the evidentiary hearing. This Court does not find credible Applicant's testimony that he was not satisfied with the services of Counsel at the time of the plea, but even if he was not it would be of no consequence to the validity of his plea. This Court also does not find credible Applicant's testimony that he actually wished to go to trial. Applicant was extended a plea offer by the State, which was communicated to him and explained by Counsel in the context of developing facts from a co-defendant's trial. Applicant took a measured and appropriate amount of time to consider the offer, and fully appraised of his rights and the evidence against him, opted to accept the offer and plead guilty. There is no evidence presented by Applicant that Counsel coerced him into accepting a guilty plea, or told him that he could not go to trial, or any other basis to deem her performance deficient.

Applicant has presented no credible evidence to show any deficiency on the part of Counsel, or that but for the deficiencies alleged he would not have pled guilty but would have proceeded to trial, and accordingly his request for relief by way of these allegations is DENIED.

2. Failure to Investigate Alibi

Applicant alleges Counsel was ineffective in failing to investigate his alibi witness Tiffany Shell. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (quoting Strickland, 466 U.S. at 691). "One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable." Id. (citing Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991)). "To establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus

making it impossible for him to have been at the scene of the crime." State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980). "It is not enough for the accused to say that he was not at the scene and must therefore have been elsewhere. The latter statement does not constitute an alibi." Id. "[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." Id.

The record before the Court—including both the State's recitation of facts during the plea proceeding, the indictments, and the incident reports included in the Clerk's Records—provides that the burglary and robbery occurred in the very late evening hours of September 1, 2016, and was reported to law enforcement eleven minutes after midnight on September 2, 2016.

At the evidentiary hearing, Applicant testified that he understood that "alibi" was a potential defense. On cross-examination, Applicant asserted his alibi could be established by Tiffany Shell, and that he also told Counsel to investigate one Knesha Macobs.

Tiffany Shell, Applicant's sister, testified at the hearing. Shell testified that Applicant was with him the entire day, and that he left at 7 P.M. to go visit his child, then "came right back." Shell claimed that she did not know anything about Applicant's charges until the plea proceeding, and that neither Counsel nor law enforcement ever spoke to her. On cross-examination, Shell testified that she did not know how to reach out about her story and that she thought it was too late to do so once they were in court. Asked by the State to clarify when Applicant returned, Shell testified that Applicant returned to the home between 11:45 P.M. and midnight. Shell recalled she was waiting for Applicant to return home because she was supposed to work the night shift that night.

Counsel testified she may have spoken to Shell prior to the plea, but explained that she was never told Shell was a potential alibi witness. Counsel, who was present for Shell's evidentiary hearing testimony, further explained that the "alibi" provided by Shell was not helpful, and that the crime was said to have occurred in a tight time frame. On cross-examination, Counsel recalled that Applicant mentioned one Kinetra Macobson to her as a person who Applicant was with that night, and that he provided contact information. When Counsel explained alibi defenses to Applicant, he withdrew his assertion that she could help. Counsel recalled that she knew who Shell was from working with Applicant on his other drug charges, and that the plea proceeding was not the first time the family had been gathered for Applicant's benefit. Counsel noted that Applicant's family had her contact information. Counsel articulated her recollection of the facts on the record.

The Court finds Applicant has failed to meet his burden of proof as to either prong of Hill. First, as to deficiency, the Court finds credible Counsel's testimony that Applicant did not tell her that Shell was an alibi witness, and does not find credible Applicant's testimony to the contrary. Neither Applicant, nor anybody else, ever provided Counsel the lead necessary to trigger the need for reasonable investigation. It is incumbent upon an accused to assist his or her attorney in establishing his whereabouts during the time in question in order to prepare an alibi defense; a defense attorney cannot otherwise know who to investigate or how to prepare an alibi defense.

Second, as to prejudice, the alibi provided is not an alibi, Shell was not a credible witness, and Applicant would have pled guilty anyway. Shell's purported alibi leaves Applicant's whereabouts unknown from 7 P.M. until midnight, which encompasses the entirety

of the time frame in which the burglary and robbery were said to have occurred, and thus leaves it possible for Applicant to have been the perpetrator he admitted to being.

This Court also does not find Shell's testimony to have been credible. Shell's shift in testimony at the evidentiary hearing from "came right back" to an admission on cross that Applicant was gone for upwards of five hours was highly discrediting. While the nonspecific common parlance "came right back" can represent different ranges of time to different people, or represent a description of the directness of a route of travel, this Court perceives Shell's intended meaning on direct to have been a period of time substantially less than *five hours*. Shell's claims to have known nothing about Applicant's charges or how to reach out regarding information she may have had regarding them, despite the severity of the charges and Counsel's credible testimony establishing prior gatherings with Applicant's family and her provision of contact information, also discredits her. Finally, this Court enjoyed the opportunity to closely observe Shell and pass upon her candor, cadence, demeanor, and based thereon this Court does not find her to be credible.

Even if Counsel had somehow known to interview Shell as a potential alibi witness, and done so, the Court finds Applicant would have pled guilty anyway. For much of the same reasons as noted by this Court above, Counsel testified that Shell's "alibi" was not at all helpful to Applicant's defense. In that context, this Court may reasonably infer that provision of the "alibi" would not have changed Counsel's advice to Applicant regarding the State's plea offer, and thus Applicant still would have pled guilty based upon the same advice and circumstances.

Accordingly, Applicant has failed to meet his burden of proof as to either prong of Hill, and his request for relief by way of this allegation is **DENIED**.

3. Failure to Seek Bond

Applicant alleges Counsel was ineffective in failing to move for bond. No testimony was introduced at the evidentiary hearing in support of this claim. Accordingly, Applicant has failed to meet his burden of proof as to either prong of Hill, and his request for relief by way of this allegation is **DENIED.**

B. Sufficiency of the Evidence

Applicant's remaining allegations all appear to revolve around the sufficiency of the evidence to support the charges and his ultimate guilty plea. Absent a proper claim of newly discovered evidence, a claim of actual innocence is not a valid post-conviction relief allegation, especially where the Applicant pled guilty. Applicant waived his right to raise innocence as a defense when he pled guilty and waived his right to a jury trial. Therefore, the plea waives any non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence. Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981); Rivers v. Strickland, 264 S.C. 21, 213 S.E.2d 97 (1975).

Insufficient evidence of guilt is not a valid claim to overturn a guilty plea. "Where defendant voluntarily, intelligently, and understandingly enters a plea of guilt, this makes it unnecessary for the State to offer evidence to prove the offense charged in the warrant or indictment." State v. Allen, 261 S.C. 448, 451, 200 S.E.2d 684, 686 (1973). This is because the guilty plea "admits all matter of fact averments of the accusation." Id. The defendant admits all circumstances described in the indictment, leaving only sufficiency of the indictment for review and waiving all other defenses. State v. Thomason, 341 S.C. 524, 526, 534 S.E.2d 708, 710 (2000).

Additionally, PCR is not a proper avenue to challenge the sufficiency of evidence. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974); S.C. Code Ann. § 17-27-20(a)(6); see also State v. Munsch, 287 S.C. 313, 314, 338 S.E.2d 329, 330 (1985) (quoting United States v. Broce, 488 U.S. 563, 569 (1989)) ("[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack.").

No testimony was offered at the evidentiary hearing in support of the claims, and the claims are not cognizable in a post-conviction relief action. Accordingly, Applicant's demand for relief by way of these allegations is **DENIED.**

[*Conclusion and signature on following page*]

III. CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

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

AND IT IS SO ORDERED this 8th **day of** October, **2020.**

J. DERHAM COLE
Presiding Judge
Seventh Judicial Circuit

_____, South Carolina