

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

—————
Certiorari to Florence County

Honorable D. Craig Brown, Circuit Court Judge

—————
RUSTY T. EVANS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000946

—————
APPENDIX
—————

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

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Assistant Attorney General
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

RECEIVED

Feb 12 2021

S.C. SUPREME COURT

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STATE OF SOUTH CAROLINA)	
COUNTY OF FLORENCE)	COURT OF GENERAL SESSIONS
)	2018-GS-21-1449
	)	2018-GS-21-1454
	)	2018-GS-21-1516
)	
)	
State of South Carolina	)	TRANSCRIPT OF RECORD
vs.)	
Rusty T. Evans)	
)	
	)	August 28, 2018
DEFENDANT	)	Florence, South Carolina

B E F O R E:

THE HONORABLE THOMAS A. RUSSO.

A P P E A R A N C E S:

ANGEL DANIELS, ASSISTANT SOLICITOR
Attorney for the State

ELIZABETH NEYLE, ASSISTANT PUBLIC DEFENDER
Attorney for the Defendant

KESHIA REED
Official Court Reporter

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I N D E X

(WHEREUPON, no witnesses were called.)

1 THE COURT: All right. Ladies and gentlemen,
2 if I can have your attention, those of you who were here
3 this morning and heard me go over the rights, if you all
4 just please bear with me. We've got some new folks here
5 that I need to go over the rights with. If you were not
6 here this morning and you think you might be entering a
7 guilty plea, I need to have your attention. I'm going to
8 go over your constitutional rights with you because if you
9 do decide to plead guilty, then you need to understand
10 these rights because for purposes of your plea if you go
11 forward with a guilty plea, you waive or you give up these
12 rights. So it's important you understand what they are.
13 I'm going to go over these rights with you as a group, so
14 that I don't have to repeat it, you know, 15 times because
15 these rights are the same for all of us. We all have the
16 same rights. It doesn't change, doesn't matter who you
17 are or what you're charged with or whether you're even
18 charged with anything. We all have these rights. So
19 rather than repeat it 15 times, I'm just going to go over
20 it with you once.

21 If you have any questions about anything I go
22 over, I will give you whatever time you need to talk to
23 your lawyer and have those questions answered. Also, the
24 fact that I'm going over these rights with you as a group
25 it does not bind you or commit you to do anything. In

1 other words, if after I go over these rights the State
2 calls your case and you've changed your mind and you do
3 not want to go forward, that's your decision. No one's
4 going to force you to do anything against your will, but
5 if you do decide that you want to go forward, it's
6 important that you understand these rights.

7 All of us have the right to remain silent. We
8 all have a right to a jury trial. If you decide to go
9 forward with a guilty plea, then for purposes of your
10 plea, you waive or give up those two important
11 constitutional rights. And when you give up your right to
12 a jury trial, you give up all the other rights that are
13 connected to it or associated with it. For example, if
14 you were to have a jury trial, you be presumed innocent of
15 the charge or charges that you're facing. That
16 presumption of innocence places the burden of proof on the
17 State to prove guilt. The way they would try to do that
18 is during that jury trial they would call witnesses to the
19 stand. Those witnesses would be placed under oath and
20 they would testify more than likely against your best
21 interest.

22 The Constitution of the United States says that
23 any person charged with a criminal offense has the right
24 to face their accusers or to confront their accusers.
25 What that means is during that jury trial through your

1 attorney, you would have the right to question the State's
2 witnesses or cross-examine them as to their testimony.
3 That's your right of confrontation under the constitution.
4 But when you plead guilty by entering that plea of guilt,
5 you waive or you give up that presumption of innocence and
6 you relieve the State of their burden of proof. And since
7 they don't have to prove your guilt, they don't have to
8 bring their witnesses into court and so you give up the
9 right to confront those witnesses.

10 Now, the State's not the only one that can call
11 witnesses in a trial. You could call witnesses in your
12 defense or you could take the witness stand and testify
13 yourself. You could do either one of those things or you
14 could do both of those things. But the important thing to
15 understand is is that you don't have to do anything. In
16 this country, a person charged with a criminal offense is
17 never required to prove themselves innocent. The burden
18 of proof is on the State to prove guilt. You could remain
19 silent. And if you chose to remain silent, I would tell
20 the members of the jury that that is your constitutional
21 right. And I would instruct them that the fact that you
22 chose to remain silent could not be considered by the jury
23 at all as to your guilt or innocence. As a matter fact, I
24 would tell them that the fact that you chose to remain
25 silent could not even be discussed in the jury room. They

1 are not to give it any consideration at all.

2 As I said earlier, the State has the burden of
3 proof. They have to prove guilt to a unanimous decision.
4 In other words, they have to convince all 12 members of
5 the jury that you are guilty or they could not convict
6 you. But if you did have a jury trial and if you were
7 convicted, you could appeal that conviction to a higher
8 court if you felt that was appropriate. We all have these
9 rights, but if you decide to go forward with a guilty
10 plea, then for purposes of your plea you waive or you give
11 up these rights, you will not have a jury trial and your
12 case will be resolved pursuant to your plea.

13 Now, you do have an appellate right with regards
14 to your plea. If you decide to go forward with a guilty
15 plea, if you wish to appeal this court's decision, you may
16 do that, but you would have to file a notice of intent to
17 appeal within ten days of today's date. Now, as I said
18 earlier, these are the rights that we all have. If you
19 have any questions about these rights at all, I'll give
20 you whatever time you need to talk to your lawyer and have
21 those questions answered. All right. So we're going to
22 take them one at a time, so guys if you'll follow them and
23 we'll bring you out one at a time.

24 (WHEREUPON, this begins the guilty plea.)

25 THE COURT: Yes, ma'am.

1 MS. DANIELS: May it please the Court standing
2 before you is Rusty Evans. He's pleading guilty to three
3 different indictments. The first being 2018-GS-21-01449
4 which is for petty larceny under the enhancement statute
5 that carries up to ten years. Indictment 2018-GS-21-01454
6 which is for grand larceny which carries from zero to five
7 years. And indictment 2018-GS-21-01516 which is for
8 burglary third first offense which carries up to five
9 years. The State's recommending a cap of seven years and
10 for them to run concurrent. And I'll explain the
11 negotiations at the appropriate time.

12 THE COURT: All right.

13 THE CLERK: Sir, please raise your right hand.
14 Do you swear to tell the truth, the whole truth, and
15 nothing but the truth so help you God?

16 THE DEFENDANT: Yes, ma'am.

17 THE COURT: All right. Sir, you are Rusty
18 Evans, is that correct?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Mr. Evans, indictment
21 2018-GS-21-1449 is a true bill indictment for grand
22 larceny under the enhancement provisions of that statute,
23 that charge carries a maximum penalty of up to ten years.
24 Do you understand that, sir?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: And then indictment 2018-GS-21-1454
2 is a true bill indictment charging you with grand larceny
3 in an amount more than two thousand dollars, but less than
4 ten thousand dollars and that charge carries a maximum
5 penalty of up to five years. Do you understand that, sir?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And then indictment 2018-GS-21-1516
8 is a true bill indictment charging you with burglary in
9 the third degree that being a first offense, that carries
10 a maximum penalty of up to five years as well. Do you
11 understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Okay. Mr. Evans, understanding the
14 nature of the charges against you and the possible
15 punishment that's associated with these charges, how do
16 you plead to these matters, sir, guilty or not guilty?

17 THE DEFENDANT: Guilty.

18 THE COURT: Thank you, sir.

19 Ms. Neyle, you represent Mr. Evans on these
20 matters?

21 MS. NEYLE: I do, Your Honor. I do believe I
22 need to be appointed on the burglary third charge though.

23 THE COURT: All right. We'll certainly do that
24 appoint you to represent him on that along with these
25 other matters. Have you discussed with him these three

1 charges and his constitutional rights to a trial?

2 MS. NEYLE: I have, Your Honor.

3 Mr. Evans, sir, am I correct that you're 37
4 years of age?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: How long have you been in jail on
7 these charges?

8 THE DEFENDANT: 134 days.

9 THE COURT: 134?

10 THE DEFENDANT: Uh-huh.

11 THE COURT: Mr. Evans, when I went over the
12 constitutional rights with the group this morning were you
13 present for that?

14 THE DEFENDANT: Yes, sir. Yes, sir.

15 THE COURT: Did you understand those rights,
16 sir?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Do you have any question about those
19 rights?

20 THE DEFENDANT: No, sir.

21 THE COURT: Okay. You understand that by
22 entering your plea here today that you waive or you give
23 up those rights and that you will not have a jury trial.
24 Do you understand?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Okay. Now, the State has made a
2 recommendation that whatever sentence the Court imposes on
3 these charges that it not exceed seven years. Is that
4 your understanding of their -- and that they all run
5 together or concurrent?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Is that your understanding, sir?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: All right. Other than that
10 recommendation, has anybody promised you anything, held
11 out any hope of reward or threaten you in any way to get
12 you to enter these pleas?

13 THE DEFENDANT: No, sir.

14 THE COURT: Are you satisfied with the
15 representation and the advice that Ms. Neyle has provided?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Are you today under the influence of
18 any substance that would affect your ability to understand
19 what it is you're doing here today?

20 THE DEFENDANT: No, sir.

21 THE COURT: Mr. Evans, are you entering your
22 plea of guilt on these three charges of your own free
23 will, sir?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: And are you guilty of these matters?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: All right. I'm going to ask if you
3 would to listen carefully. I'm going to ask Ms. Daniels
4 to give me the facts behind these charges.

5 Yes, ma'am.

6 MS. DANIELS: Thank you, Your Honor. Before I
7 get into the specific incidences just give you an
8 overview, Mr. Evans along with some co-defendants went on
9 a sort of a crime spree in the months of January and
10 February of this year. So in addition to the negotiations
11 for this plea, I'll also be dismissing six indictments,
12 other indictments that Mr. Evans has.

13 THE COURT: Okay.

14 MS. DANIELS: As well as two new warrants and
15 two grand larcenies that he's got pending in Marion
16 County, so that's all.

17 THE COURT: This wraps everything up.

18 MS. DANIELS: It wraps everything up. And the
19 crimes are all the same. It's receiving stolen goods,
20 grand larceny. It's petty larcenies and most of the
21 properties been returned to the victim. I think almost
22 all. Our office has been in touch with all the victims.
23 They all know the plea is going forward. No one wish to
24 be present today, so just get that the out of the way.

25 THE COURT: Okay, sure. Good.

1 MS. DANIELS: Okay. All right. Now, on to the
2 specific facts for indictment 18-1449, that incident
3 occurred between January 11th of this year and
4 February 20th, the defendant with some co-defendants took
5 a four wheeler which was located at [REDACTED] Old Manning Road
6 in Scranton, which is in Florence County. It was valued
7 at approximately \$1500. The victim stated that -- the
8 victim had deceased on December 25th 2017 and his family
9 notice that it was missing. The investigators recovered
10 it from Mr. Evans and he did admit to them that he took it
11 from the deceased victim.

12 Indictment 18-1454 that incident occurred on
13 February 19th 2018. The defendant along with
14 co-defendants took various tools, equipment and a lawn
15 mower. All of that valued at approximately \$7600 from the
16 victim at [REDACTED] Creek Road in Timmons ville, which is in
17 Florence County. The investigators actually found the
18 property when they were investigating another incident on
19 Mr. Evans -- I think it was his residence. In any event,
20 he also admitted that he and the co-defendants that they
21 took those items from the victim.

22 For indictment 18-1516 the burglary third
23 degree, that incident occurred on April 19th 2018 at [REDACTED]
24 Trifolly Road in Scranton which is in Florence County.
25 Mr. Evans went into a building that was -- I think it was

1 the garage. It was behind the house and he attempted to
2 steal a weed eater, an edger and a box fan. Law
3 enforcement responded. They actually apprehended him
4 while he was still in that building.

5 Your Honor, as far as his prior record, he's got
6 a DUI in '99, a driving under suspension in 2004, three
7 counts of a breach of trust with fraudulent intent value
8 greater than a thousand, that was in 2007. In 2008 a
9 breach of peace, a simple possession of marijuana,
10 disorderly conduct, 2009 a criminal conspiracy which it
11 looks like he received a four year sentence, in 2011 a
12 DUI, 2013 a possession of cocaine, in 2015 a distribution
13 of cocaine for which he got a 15 month sentence.

14 THE COURT: All right. Mr. Evans, the facts
15 that Ms. Daniels gave to the Court as it relates to these
16 three charges that you're before the Court on are those
17 facts essentially correct, sir?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: All right. I find that the State
20 has provided a substantial factual basis to support these
21 charges that Mr. Evans has pled guilty to. I believe his
22 decision to enter these pleas has been done freely,
23 voluntarily and intelligently having had the advice and
24 counsel of an outstanding attorney in Ms. Neyle. And
25 Mr. Evans has indicated he is satisfied with the

1 representation and advice that Ms. Neyle has provide. And
2 I'm going to accept his pleas.

3 Ms. Neyle, I'll be happy to hear from you,
4 ma'am.

5 MS. NEYLE: Thank you, Your Honor. Mr. Evans is
6 37 years old. He has his GED. He's married. His wife,
7 Melissa Evans, and he have six children. Your Honor, he
8 does roofing and construction work. All of these property
9 offenses go back to Mr. Evans and his drug addiction.
10 He's had an addiction most of his adult life and that's
11 why he commits all these offense Your Honor. And he is
12 honest and he does admit to law enforcement that he takes
13 them, but that's no excuse at all for what he's done Your
14 Honor. The most he's ever done in SCDC is four years.
15 Mr. Evans understand the cap of seven. He would just ask
16 that you be as lenient as possible. He understands that
17 this takes care of all of his pending charges including
18 the two Marion charges. And he's just standing before
19 Your Honor asking for leniency.

20 THE COURT: Thank you, ma'am.

21 Anything further, Mr. Evans?

22 THE DEFENDANT: No, sir.

23 THE COURT: All right. On indictment
24 2018-GS-21-1449, sentence of the Court is that you be
25 committed to the state department of corrections for a

1 period of seven years. 1454 and 1516 the sentence of the
2 Court is that you be committed to the state department of
3 corrections for a period five years on each of those. All
4 of these sentences are to run concurrent with each other.
5 And he's to be given credit for the 134 days that he has
6 served. Good luck to you, sir.

7 END OF REQUESTED TRANSCRIPT

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FORM 5

20 19 CP 21 0136

STATE OF SOUTH CAROLINA
County of Florence

IN THE COURT OF COMMON PLEAS

Rusty Timmy Evans
Full name and prison number (if any) of Applicant
#336314

2019 AUG -5 PM 1:28
BORIS FOLIOS CHUKMA
CCCP & CS
FLORENCE COUNTY

FILED

APPLICATION FOR
POST-CONVICTION RELIEF

State of South Carolina

INSTRUCTIONS B READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Evans Correctional Institutional
610 Hwy 9 West Bennettsville, SC 29512
2. Name and location of Court which imposed sentence Florence County
181 N. Irby Street suite 1100 Florence, SC 29501
3. Name(s) of co-defendant(s) (if any) Melissa Dale Evans
David Edward Floyd Jr, Kelly Lee Vause
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2018-GS-21-01449 Petit Larceny 3rd or Subsequent

1

- i. _____
- ii. _____
- iii. _____

9. If you answered No@ to (7), state your reasons for not so appealing:

(a) _____

STATE OF SOUTH CAROLINA)

County of Florence)

Rusty Timmy Evans)

Full name and prison number (if any) of Applicant)
#336314)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2019 AUG -5 PM 1:28
BONN FOLLOS QUARA
C/O CP & ES
FLORENCE COUNTY, SC

FILED

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David Edward Floyd Jr, Kelly Lee Vause
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2018-GS-21-01449 Petit Larceny 3rd or Subsequent

(b) _____
(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) 8/28/2018 7 years (non-violent)
(b) _____
(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____
(b) after a plea of not guilty _____
(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

8. If you answered Ayes@ to (7), list:

(a) the name of each Court to which you appealed:

i. _____
ii. _____
iii. _____

(b) the result in each such Court to which you appealed:

i. _____
ii. _____
iii. _____

(c) the date of each such result:

i. _____
ii. _____
iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____
ii. _____
iii. _____

9. If you answered Ano@ to (7), state your reasons for not so appealing:

(a) _____

- (b) _____
- (c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective assistance of council
- (b) Court lack subject matter over offence charge
- (c) Complaint / Indictment is invalid / Illegal sentence

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Misinformed me of exactly what I being charged for
- (b) There are no prior convictions of property crimes
- (c) Complaint / Indictment say I have two or more convictions but thats untrue

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) _____
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? Elizabeth H Neyle
- (b) your trial, if any? _____
- (c) your sentencing? Elizabeth H Neyle
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered Ayes@ to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. 12th Circuit Public Defenders Office Elizabeth H Neyle
County Complex Room 703 180 N Irby St Florence, SC
29501
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. _____
 - ii. _____
 - iii. _____

19. State clearly the relief you seek in filing this application:

I expect to give 2 years of the 7 back being I have no prior convictions of property crimes and my charge should only carry 0-5

20. Are you now under sentence from any other court that you have not challenged?

No

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Florence)

VERIFICATION

I, Rusty Timmy Evans, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Rusty Evans #336314

SWORN to and subscribed before me this 31 day of July, 2019

S. Burton (L.S.)
Notary Public

My Commission Expires: 2-17-24

2019 AUG -5 PM 1:28
DORIS POLLOS QUANA
CC CP 2 08
FLORENCE COUNTY, SC

FILED

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Rusty Timmy Evans, hereby apply for leave to
proceed in this action without prepayment of fees or costs or security therefor. In support of my
application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Rusty Evans #336314
Applicant

SWORN or affirmed to and subscribed before me this

31 day of July, _____.

[Signature]
Notary Public

My Commission Expires: 2/17/24

DORIS POWERS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

2019 AUG -5 PM 1:28

FILED

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- (1) I am the applicant in this action and believe I am entitled to redress, and,
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Rusty Evans #336314
Applicant

SWORN or affirmed to and subscribed before me this

31 day of July
S. [Signature]

Notary Public

My Commission Expires: 2/17/24

2019 AUG -5 PM 1:28
BONIS PAUL OS O'HARA
CLCP & CS
FLORENCE COUNTY, SC

FILED

in forma pauperis

STATE OF SOUTH CAROLINA)
COUNTY OF Florence)

IN THE ___ COURT OF COMMON PLEAS
___ MAGISTRATE COURT
___ FAMILY COURT

IN THE _____ JUDICIAL CIRCUIT

Rusty Timmy Evans)
Plaintiff,)

CASE NO.: _____

vs.)
State of South Carolina)

MOTION AND AFFIDAVIT TO

PROCEED IN FORMA PAUPERIS

Defendant(s).)

I, Rusty Timmy Evans, being duly sworn, state that I am the Plaintiff and that I do not have the funds available to pay the costs of filing and service in the present matter. I hereby request that the complaint be filed and service made without costs.

Sworn to and Subscribed before me)

this 31 day of July, 2019.)

J. Quita)
Notary Public for South Carolina)

Rusty Evans #336314
Plaintiff

My Comm. Exp.: 2/17/24)

ORDER

Leave _____ (granted) / _____ (denied) to proceed in forma pauperis.

Dated: _____, 20_____
_____, South Carolina

JUDGE / CLERK OF COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE	)	FOR THE TWELFTH JUDICIAL CIRCUIT
)	
)	
Rusty T. Evans, #336314,	)	2019-CP-21-2136
)	
Applicant,)	
)	
v.	)	RETURN
	)	(Counsel Appointed)
State of South Carolina,)	
)	
Respondent,)	
)	

In response to Rusty T. Evans (Applicant) action for post-conviction relief (PCR) commenced August 5, 2019, the State makes this return:

I. Procedural History

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. Applicant was indicted at the August 2018 term of the Florence County Grand Jury for petit larceny, third or subsequent offense (2018-GS-21-1449). Applicant was represented by Elizabeth H. Neyle, Esquire. Assistant Solicitor Angel Isla Daniels prosecuted the case.

Applicant pleaded guilty on October 2, 2018, before the Honorable Thomas A. Russo to petit larceny, third or subsequent offense, as indicted.¹ In exchange for Applicant's guilty plea, the State recommended a sentencing cap of seven years.² Judge Russo sentenced Applicant to

¹ Applicant also pleaded guilty to grand larceny (2018-GS-21-01454), and third-degree burglary (2018-GS-21-01516). (Plea Tr. 7). Applicant does not challenge those convictions in this PCR action. Applicant received concurrent terms of five years on the unchallenged charges. (Plea Tr. 15).

² The State also dropped six other Florence County indictments, and two grand larceny charges from Marion County in exchange for Applicant's guilty plea. (Plea Tr. 11).

seven years' imprisonment for petit larceny, third or subsequent offense. Applicant did not appeal his conviction or sentence.

Applicant commenced this PCR action on August 5, 2019.

II. Facts

Between January 11 and February 20, 2018, Applicant and his codefendants stole a four-wheeler from a residence. The owner of the residence deceased on December 25, 2017. The deceased owner's family members noticed the four-wheeler was missing and notified law enforcement. Applicant was in possession of the four-wheeler and admitted to taking it from the deceased's residence when he was arrested. (Plea Tr. 12).

As for Applicant's prior property crimes, the State indicated Applicant had three convictions in 2007 for breach of trust with fraudulent intent, greater than \$1,000. (Plea Tr. 13). In mitigation, Counsel stated "All of these property offenses go back to [Applicant's] drug addiction." (Plea Tr. 14).

III. Current Application

Applicant alleges he is being held in custody unlawfully, alleging:

1. Ineffective assistance of counsel:
 - a. Counsel misinformed Applicant of exactly what he was charged for.
2. Subject matter jurisdiction:
 - a. Applicant has no prior convictions of property crimes.
3. Illegal Sentence:
 - a. The indictment claims Applicant has two or more prior convictions, which is untrue.

Applicant requests relief in the form of a sentence reduction.

Attached to this return and incorporated herein are the Florence County Clerk of Court records of the challenged conviction, Applicant's records from the South Carolina Department of Corrections, the plea transcript, and the records of this PCR action.

IV. Response to Allegation of Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of plea counsel are without merit. To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989).

The test for determining the validity of a guilty plea is “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). “[A] defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived.” *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). “The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases.” *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To prove prejudice, the applicant must show a reasonable probability he would not have pleaded guilty and would have insisted on going to trial absent plea counsel's alleged deficiency. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Applicant cannot satisfy either requirement of *Strickland*. However, the record likely does not refute or disprove Applicant's allegations of ineffective assistance of trial counsel; therefore, the State requests an evidentiary hearing to fully resolve the issues. See *Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (providing an evidentiary hearing shall be held when a PCR application “alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court”).

V. **Response to Subject Matter Jurisdiction and Illegal Sentence**

The State interprets Applicant's allegations (2) and (3) as illegal sentence allegations. Applicant claims he has no prior convictions of property crimes, and the indictment claiming he has two of more prior property crimes is incorrect. These allegations are without merit.

Applicant's petit larceny charge was enhanced pursuant to section 16-1-57 of the South Carolina Code. Section 16-1-57 provides:

A person convicted of an offense for which the term of imprisonment is contingent upon the value of the property involved must, upon conviction for a third or subsequent offense, be punished as prescribed for a Class E felony.

Section 16-1-20(A)(5) of the South Carolina Code provides a person convicted of a Class E felony must be imprisoned for "not more than ten years."

The plea transcript reflects Applicant has three prior convictions for breach of trust with fraudulent intent, greater than \$1,000. Subsection 16-13-230(A) of the South Carolina Code states, "A person committing a breach of trust with a fraudulent intention or a person who hires or counsels another person to commit a breach of trust with a fraudulent intention is guilty of larceny." The term of imprisonment for larceny is contingent upon the value of the property involved. See S.C. Code Ann. § 16-13-30 (stating petit larceny is larceny of goods worth less than \$2,000, and grand larceny is larceny of goods worth more than \$2,000). A person convicted of petit larceny "must be fined not more than one thousand dollars, or imprisoned not more than thirty days." S.C. Code Ann. § 16-13-30(A). A person convicted of grand larceny "must be fined in the discretion of the court or imprisoned not more than: (1) five years if the value of the personalty is more than two thousand dollars but less than ten thousand dollars; (2) ten years if the value of the personalty is ten thousand dollars or more." S.C. Code Ann. § 16-13-30(B).

Here, the record reflects Applicant has three prior convictions of breach of trust with fraudulent intent, greater than \$1,000. Because Applicant has three convictions for breach of trust with fraudulent intent, Applicant has three prior larceny convictions. As reflected above, larceny is an offense for which the term of imprisonment is contingent upon the value of the property involved. Therefore, Applicant's petit larceny charge was properly enhanced pursuant to Section 16-1-57. Applicant was sentenced to seven years' imprisonment which is within the sentencing range for a Class E felony. Therefore, Applicant did not receive an illegal sentence. However, the record likely does not conclusively refute or disprove Applicant's allegation of an illegal sentence; therefore, the State requests an evidentiary hearing to fully resolve the issues. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (providing an evidentiary hearing shall be held when a PCR application "alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court").

VI. Any Future Amendments

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to the Uniform Post-Conviction Procedure Act³ and Rule 71.1 of the South Carolina Rules of Civil Procedure. *See also* Rules 15(a)–(b), SCRCPP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRCPP. *Pro se* filings will not be considered at the PCR hearing. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State. *See* Rule 15(a), SCRCPP.

³ S.C. Code Ann. §§ 17-27-10 to -160.

VII. Any and All other Allegations

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

VIII. Conclusion

WHEREFORE, the State requests an evidentiary hearing be held on the claims of ineffective assistance of counsel, and illegal sentencing.

Respectfully submitted,


ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

SAMUEL L. KEY
Assistant Attorney General

By:


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9/24, 2019

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE) 2019-CP-21-02136
RUSTY T. EVANS,)
))
Applicant,) **Transcript of Record**
))
vs.))
)) DECEMBER 19, 2019
STATE OF SOUTH CAROLINA,)
))
Respondent.)
)

B E F O R E:

Honorable D. Craig Brown
Florence County Courthouse
Florence, South Carolina

A P P E A R A N C E S:

Jonathan Waller, Esquire
Attorney for Applicant

Samuel Key, Esquire
Attorney for State

Sallie Beth Todd
Circuit Court Reporter

1 **THE COURT:** Yes, sir.

2 **MR. KEY:** May it please the Court? This is Rusty Timmy
3 Evans versus State of South Carolina case number 2019-CP-21-
4 2136. Mr. Evans commenced this PCR action on August 5th,
5 2019. He's confined in the South Carolina Department of
6 Corrections pursuant to order of commitment of the Florence
7 County Clerk of Court. He was indicted at the August 2018
8 term of the Florence County Grand Jury for petit larceny, 3rd
9 or subsequent offence and he was represented by Elizabeth
10 Neyle. Assistant Solicitor Angel Daniels prosecuted the case.
11 He plead guilty on October 2nd, 2018 before the Honorable
12 Thomas Russo to petit larceny, 3rd or subsequent offense as
13 indicted. In exchange for his guilty plea the state
14 recommended a sentencing cap of 7 years. Judge Russo
15 sentenced him to 7 years imprisonment for petit larceny, 3rd
16 or subsequent offense. He did not appeal his conviction or
17 sentence. He did timely file this PCR action on August 5th,
18 2019. In his PCR application he had alleged ineffective
19 assistance of counsel alleging counsel misinformed him of
20 exactly what he was charged with. He alleges subject matter
21 jurisdiction claiming applicant has no prior convictions of
22 property crime and alleging an illegal sentence. The
23 indictment claims the applicant has two or more prior
24 convictions which is untrue. Mr. Evans is represented by Mr.
25 Jonathan Waller and he and Mr. Evans are present today.

1 **THE COURT:** Mr. Waller.

2 **MR. WALLER:** Thank you, Your Honor. May it please the
3 Court? The applicant would call Rusty Evans.

4 **THE COURT:** Sir?

5 **MR. WALLER:** The applicant would call Rusty Evans.

6 **THE COURT:** All right. Sir, if you'd come around and be
7 sworn, please.

8 Did you do an amendment on this, Mr. Waller?

9 **MR. WALLER:** No, I did not.

10 **THE COURT:** I just wanted to make sure I wasn't missing
11 it.

12 **MR. WALLER:** Yes, sir.

13 **RUSTY T. EVANS, HAVING BEEN FIRST**
14 **DULY SWORN, TESTIFIED AS FOLLOWS:**

15 **DIRECT EXAMINATION OF MR. EVANS BY MR. WALLER:**

16 Q: Good morning, Mr. Evans. How are you today?

17 A: All right.

18 Q: Mr. Evans, I want to kind of take you back to when you
19 were first arrested on these charges. Do you remember that?

20 A: Yes, sir.

21 Q: Okay.

22 **THE COURT:** You need to speak up, please. Okay.

23 **MR. EVANS:** Yes, sir.

24 **BY MR. WALLER:**

25 Q: When you were first arrested what were all of the charges

1 that you had? It wasn't just these charges?

2 A: No, sir. It was a couple of petit larcenies, receiving
3 stolen goods, and a burglary 3rd.

4 Q: Do you know what that burglary was?

5 A: Burglary 3rd.

6 Q: Burglary 3rd. Okay.

7 A: Yes, sir.

8 Q: All right. And who was your lawyer on all of these
9 charges?

10 A: Elizabeth Neyle.

11 Q: Okay. And I guess let me back up. They were all
12 Florence County charges?

13 A: Two of them was Marion County.

14 Q: Okay. They were all 12th within the 12th Circuit, I
15 guess.

16 A: Yes, sir.

17 Q: And you handled them all at the same time?

18 A: Yes, sir.

19 Q: Okay. All right. You had some co-defendants in this
20 case, right?

21 A: Yes. Yes, sir. I had four.

22 Q: How many co-defendants did you have?

23 A: Four co-defendants.

24 Q: Four total or four others?

25 A: Three others, but with me it'd be four.

1 Q: Okay. One of those was your wife, Melissa.

2 A: Yes, sir.

3 Q: Who were the other two?

4 A: David Floyd, Junior and Kelly Vause.

5 Q: And what was your relation to them?

6 A: Melissa was my wife. Kelly Vause lived with me and David
7 Floyd was a real close friend. All of us stayed together
8 really.

9 Q: Okay. When you were arrested did you and Ms. Neyle have
10 a chance to talk about the charges against you?

11 A: Not really. I mean, I was locked up for like 130 some
12 days, you know. She come seen me once and talked to me on the
13 phone once.

14 Q: Okay. The charges that you ultimately plead guilty to,
15 what was the item they said was stolen?

16 A: It was a \$1,500 four-wheeler.

17 Q: Okay. You say a \$1,500 four-wheeler; where did that
18 number come from?

19 A: It's on my original warrant, it says \$1,500. My
20 officer's case notes says \$1,500, everything, indictments and
21 all is \$1,500 property.

22 Q: Okay. So, that was determined by law enforcement?

23 A: Yes, sir.

24 Q: Okay. Did you and Ms. Neyle have a chance to discuss the
25 value of that property and how that number came to be?

1 A: No, sir.

2 Q: Okay. Were you -- were you worried about that?

3 A: No, sir.

4 Q: Okay. Did you and Ms. Neyle have an chance to talk about
5 the threshold for property crimes as far as the value of the
6 goods?

7 A: No, sir.

8 Q: You knew that under \$2,000 was the lowest one though?

9 A: Yes, sir.

10 Q: Okay. All right. What did you and Ms. Neyle talk about?

11 A: The only thing that me and her every talked about, she
12 asked me what, what amount of time would I be comfortable
13 doing and I told her, you know, five years non-violent if
14 possible. And she said she'd get me into court as soon as
15 possible. And then when I got here it was 8 years, you know,
16 it changed from 5 to 8 years, you know, just within a few
17 weeks.

18 Q: Okay. Did y'all discuss what the change was?

19 A: She said that Ms. Daniels said that that was the best she
20 could do with record, you know, but she would dismiss
21 everything on my wife if I took the 8-year plea.

22 Q: Okay. So, part of your plea was to help your wife?

23 A: Yes, sir.

24 Q: Okay. You plead guilty to a property crime under the 3rd
25 or subsequent enhancement statute.

1 A: Yes, sir.

2 Q: Did you and Ms. Neyle have a chance to discuss that
3 before your plea?

4 A: No, sir.

5 Q: Okay. There was -- there's obviously a change in the
6 amount of time for that penalty versus the petit larceny that
7 you were also charged with under \$1,500. Did y'all discuss
8 the difference?

9 A: No, sir.

10 Q: Okay. Well how did you -- you plead to a cap of 7 years.

11 A: Yes, sir.

12 Q: Did you ask Ms. Neyle why it was 7 years?

13 A: No, sir. She just informed me that with my record, my
14 record was supposed to be the, you know, the big deal. And
15 they said since 2015 -- I took my wife's charges then, they
16 knowed (sic) I would do that. So, I guess just to make it
17 easier for them is how I feel. You know, convict me, send her
18 home, but that's not what happened.

19 Q: Okay. Your wife didn't go home?

20 A: They give her probation, which is a conviction, you know.
21 I wouldn't have took the extra time had they, you know,
22 informed me of that, you know, alone.

23 Q: Okay. But specifically to the amount of time, did y'all
24 discuss how your charge went from being petit larceny at the
25 lowest level to potentially up to 10 years? Did y'all discuss

1 the difference in that?

2 A: No, sir.

3 Q: Okay. What did you think when you went into court about
4 getting 7 years?

5 A: The way they made it out to me, I figured I was getting a
6 good deal because, I mean, they was dismissing, you know, a
7 few other charges. But then when I get to, you know, doing my
8 own research, you know, with the getting sentenced -- it
9 doesn't carry that at all, even if it's the 3rd offense.

10 Q: Okay. The value of that property doesn't carry that.

11 A: It doesn't carry the 7-year sentence.

12 Q: Okay. Did you know that before you got into court that
13 day?

14 A: No, sir.

15 Q: You've learned that afterwards.

16 A: Just recently. Yes, sir.

17 Q: Okay. This isn't your first time being convicted of
18 anything; is that right?

19 A: This is my first time for property crimes.

20 Q: Okay. Did you and Ms. Neyle have a chance to discuss
21 your prior record?

22 A: No, sir.

23 Q: Okay. Did you -- did you ask her how you were eligible
24 for a property crime enhancement if you didn't have any prior
25 convictions for property crimes?

1 A: No, sir. Like I said, I mean, as far as it goes -- I
2 don't really know much about -- I mean, I've had a long life
3 of doing wrong, but far as, you know, what's supposed to be
4 the, you know, the sentence for stuff I didn't know. It just
5 sounded like, I mean, I had a 4-year sentence the first time,
6 an 18-month sentence the second time, and I just assumed, you
7 know, 7 was decent for 15 charges or better, you know.

8 Q: Okay. You had some arrests for property crimes.

9 A: I had arrests, three arrests in 2007 for breach of trust,
10 which I was given rehab. It's not no conviction, it was on my
11 arrest record but not my conviction.

12 Q: Okay. Had you also had arrests for other charges that
13 didn't result in convictions?

14 A: I had, in 2009 I had an arrest for burglary of a vehicle,
15 which was then -- the Judge, I think it was Mr. King I think,
16 sentenced me to 4-years criminal conspiracy though, so that
17 wouldn't be considered a property crime either once it was
18 changed to North Carolina versus Alford.

19 Q: Okay. Did you have two charges of grand larceny and a
20 burglary charge in 1998?

21 A: All nolloed, nolle processed.

22 Q: So, those were dismissed?

23 A: Yes, sir.

24 Q: So, what in your mind when you're talking to Ms. Neyle
25 about pleading guilty, what did you think your prior record

1 was for property crimes?

2 A: I didn't know I had any. I didn't under the property
3 crime itself at all, you know. I just figured I was getting
4 sentenced for how many times I've seen a Judge period, you
5 know.

6 Q: Okay.

7 A: All I've ever had is distributions my whole life.

8 Q: Okay. So, your decision on the plea was not based on
9 whether you fit into that statute, it was just based on
10 general what you thought was, you know, what you thought was
11 based on your prior record.

12 A: Yes, sir.

13 Q: Okay. All right. Did you ever ask Ms. Neyle?

14 A: No, sir.

15 Q: Okay. Mr. Evans, I don't think I have any further
16 questions for you. Is there anything you think I've left out
17 that the Judge needs to be aware of?

18 A: No, sir.

19 Q: All right. Please answer any questions Mr. Key has for
20 you.

21 **THE COURT:** Mr. Key.

22 **CROSS EXAMINATION OF MR. EVANS BY MR. KEY:**

23 Q: Mr. Grey, have you ever plead guilty to breach of trust
24 with fraudulent intent?

25 A: My name's Rusty Evans.

1 Q: I'm sorry. Mr. Evans, have you ever plead to breach of
2 trust with fraudulent intent?

3 A: I was arrested for it. No, sir. I mean, the Judge, the
4 Judge didn't sentence me to it. It's not on my SCDC record
5 nor my conviction or indictments or anything like that. It's
6 on my arrest record, along with a lot of other things, but
7 that's -- you can be arrested for several things, it doesn't
8 mean you're convicted of them.

9 Q: So, you did not plead guilty on October 25th, 2007?

10 A: Like I said, I wasn't convicted of anything.

11 Q: But you plead guilty to it?

12 A: In front of Newman. Yes, sir.

13 Q: Okay. And you plead -- so, you plead guilty to breach of
14 trust with fraudulent intent in front of Judge Clifton Newman
15 in Williamsburg County?

16 A: Yes, sir. And then went back to court two days later.

17 Q: Okay. And then in Georgetown County, did you plead
18 guilty to breach of trust with fraudulent intent in front of
19 Judge Barber?

20 A: I'm not sure if that's his name, but probably so. Yes,
21 sir.

22 Q: And ---

23 MR. KEY: No further questions, Your Honor.

24 MR. WALLER: Very, very briefly, Your Honor.

25 REDIRECT EXAMINATION OF MR. EVANS BY MR. WALLER:

1 Q: Mr. Evans, were those breach of trust, were those all out
2 of the same instance or were they separate instances?

3 A: It was three different individuals. I had my own roofing
4 business here in Lake City. And ABC Supply Company right here
5 on Trade Street, they actually come to court with me and
6 brought the invoices where I had paid for the material. It was
7 a whole big misunderstanding, but I was in the county jail for
8 9 months because with the arrest I got a probation violation.
9 So, that was the whole reason that the people thought I was
10 fraudulently taking their money and that's the reason the
11 other Judge went back and, you know, gave me the 28 days rehab
12 and dismissed everything.

13 Q: Okay. So, you were picked up on a probation violation?

14 A: I was violated because of the three breach of trusts. I
15 got locked up for the breach of trusts, I was bonding out on
16 the three breach of trusts, but they denied my bond because I
17 was on probation at the time.

18 Q: Okay. Okay. Nothing further. Thank you.

19 **THE COURT:** Anything else, Mr. Key?

20 **MR. KEY:** No, Your Honor.

21 **THE COURT:** Sir, you may step down. Thank you.

22 **MR. EVANS:** Thank you.

23 **THE COURT:** Mr. Waller, anything else?

24 **MR. WALLER:** Nothing further from the applicant, Your
25 Honor.

1 Q: Okay. Did he indicate to you that he did not have any
2 other property crimes?

3 A: Not to my knowledge.

4 Q: Do you know if he did have other property crimes?

5 A: I did. I reviewed his NCIC and noted that he had
6 multiple breach of trust with fraudulent intent convictions.

7 Q: Okay. And did you explain that to him?

8 A: I did. It's my general policy when someone pleads to an
9 enhancement to explain to them why they're pleading under an
10 enhancement, and also to advise them in the future if they
11 pick up other property crimes they can be enhanced as well.

12 Q: Okay. Did -- I believe Mr. Evans testified that he told
13 you he could do 5 years. Did you take that offer to the
14 state?

15 A: I did, but the assistant solicitor said the best she
16 could do was a cap of seven due to his prior record.

17 Q: Okay. And did you relay that back to Mr. Evans?

18 A: I did.

19 Q: Did you explain to him what a cap of 7-years meant?

20 A: I did.

21 Q: Did he ever indicate to you that he did not want to plead
22 guilty?

23 A: No. My notes indicate in his voicemails that he wanted
24 to be brought to court as soon as possible to plead. So, it
25 was always a plea to him. He always wanted to plead.

1 Q: Mr. Evans testified that he was charged with stealing a
2 four-wheeler. Do you recall where that four-wheeler was
3 stolen from?

4 A: The warrant indicates in Scranton. It was stolen in
5 Scranton.

6 Q: Ms. Evans, I'm sorry. Ms. Neyle, did you explain to Mr.
7 Evans that breach of trust with fraudulent intent is a
8 property crime?

9 A: I believe I did.

10 **MR. KEY:** No further questions, Your Honor.

11 **THE COURT:** Mr. Waller.

12 **MR. WALLER:** Thank you, Your Honor.

13 **CROSS EXAMINATION OF MS. NEYLE BY MR. WALLER:**

14 Q: Ms. Neyle, did -- you said you researched that he had
15 prior property crime convictions.

16 A: Yes.

17 Q: Did you have a chance to discuss with Mr. Evans, I guess,
18 the details of those convictions?

19 A: I don't believe I discussed the details of his prior
20 convictions, just that he had been convicted of it.

21 Q: Okay. I mean, I guess that's a poor question, I
22 apologize. Mr. Evans testified that he went into some rehab
23 type program following those charges. Do you know if it was a
24 drug court conviction or do you know?

25 A: I don't believe he ever told me that he went to rehab.

1 Q: Okay. Those charges weren't from either Florence or
2 Marion County.

3 A: No.

4 Q: Did you -- did you get any copies of sentencing sheets or
5 anything like that from the -- from either Williamsburg or
6 Georgetown County?

7 A: No.

8 Q: Okay.

9 **MR. WALLER:** I beg the Court's indulgence, please. I
10 don't have anything further. Thank you.

11 **MR. KEY:** Nothing from the state.

12 **THE COURT:** You may step down, Ms. Neyle.

13 **MS. NEYLE:** Thank you.

14 **MR. KEY:** Your Honor, can Ms. Neyle be released from her
15 subpoena?

16 **THE COURT:** Any objection?

17 **MR. WALLER:** No objection, Your Honor.

18 **THE COURT:** Yes, she may be released.

19 All right. Anything else?

20 **MR. KEY:** Nothing further, Your Honor.

21 **THE COURT:** It seems to me, Mr. Waller, that the main
22 point of contention here is your client's allegation of simply
23 the fact that he did not have two prior -- at least two prior
24 property offense; is that correct?

25 **MR. WALLER:** That's correct, Your Honor. Just that the

1 enhancement statute did not apply.

2 **THE COURT:** Any evidence in light of the fact that this
3 is his application and he bears the burden of proof, any
4 evidence -- you certainly asked Ms. Neyle as to whether or not
5 she sought and received any certified copies of sentencing
6 sheets to confirm such convictions. Has the applicant been
7 able to obtain any certified -- certification from the Clerk
8 of Court from Georgetown or Williamsburg County that those
9 convictions do not in fact exist?

10 **MR. WALLER:** Your Honor, the short answer is no. I have
11 seen a copy of the rap sheet which certainly indicates
12 convictions.

13 **THE COURT:** Okay.

14 **MR. WALLER:** But no certified copies to the contrary,
15 Your Honor.

16 **THE COURT:** All right. Well, based upon what I've heard
17 here today, as each of you know a defendant who pleads guilty
18 on the advice of counsel may collaterally attack a plea
19 showing that counsel was ineffective, one; and there is a
20 reasonable probability that but for counsel's errors defendant
21 would not have plead guilty. Defendant indicated through his
22 testimony that he was willing to accept 5-years. There's no
23 evidence that the defendant did not enter his plea freely,
24 voluntarily, knowingly and intelligently. He has failed to
25 illustrate or establish each of the elements as previously

1 stated. One, that counsel was ineffective or two, that but
2 for counsel's error defendant would not have plead guilty to
3 the charges for which he plead guilty to. Therefore, the
4 Court is respectfully denying the defendant's request for
5 relief under the Post-Conviction Relief Act.

6 Mr. Key, if you'd get me an order to that effect, please.

7 **MR. KEY:** Thank you, Your Honor.

8 **MR. WALLER:** Thank you.

9 (COURT IS ADJOURNED.)

10

C E R T I F I C A T E

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I, the undersigned, Sallie Beth Todd, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the Transcript of Record of the hearing held in the interest of Rusty T. Evans versus State of South Carolina held in the Court of Common Pleas for Florence County, Florence County Courthouse, Florence, South Carolina, on December 19th 2019.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Sallie Beth Todd, CVR

Official Reporter

September 16, 2020.

STATE OF SOUTH CAROLINA)
 COUNTY OF FLORENCE)
)
 Rusty T. Evans, #336314,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent,)

IN THE COURT OF COMMON PLEAS
 FOR THE TWELFTH JUDICIAL CIRCUIT

2019-CP-21-2136

ORDER OF DISMISSAL

2020 JUN 19 AM 9:26
 FORIS POLIOS O'HARA
 C.C.P. & G.S.
 FLORENCE COUNTY, SC

FILED

The matter before the Court is Rusty Timmy Evans's (Applicant) action for post-conviction relief (PCR) commenced August 5, 2019. In his action, Applicant raised claims of ineffective assistance of counsel, subject matter jurisdiction, and illegal sentence. The State made its return on September 26, 2019, requesting an evidentiary hearing on the issue.

An evidentiary hearing into the matter convened on December 19, 2019, before the undersigned at the Florence County Courthouse. Applicant was present and represented by Jonathan D. Waller, Esquire. Assistant Attorney General Samuel L. Key represented the State. Applicant and Assistant Public Defender Elizabeth H. Neyle (Counsel) testified at the hearing. Also before the Court were the Florence County Clerk of Court records of the challenged conviction, Applicant's records from the South Carolina Department of Corrections, the plea transcript, and the records of this PCR action.

For the reasons stated below, this Court finds Counsel was not constitutionally ineffective. Counsel was not deficient in her representation of Applicant, and Applicant has failed to show he was prejudiced by Counsel's alleged deficiencies. As such, the Court denies relief and dismisses the action with prejudice.

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CERTIFIED: A TRUE COPY
Foris Polios O'Hara
 CLERK OF COURT C.P. & G.S.
 FLORENCE COUNTY, S.C.

I. Procedural History

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. Applicant was indicted at the August 2018 term of the Florence County Grand Jury for petit larceny, third or subsequent offense (2018-GS-21-1449). Applicant was represented by Counsel. Assistant Solicitor Angel Isla Daniels prosecuted the case.

Applicant pleaded guilty on October 2, 2018, before Judge Thomas A. Russo to petit larceny, third or subsequent offense, as indicted.¹ In exchange for Applicant's guilty plea, the State recommended a sentencing cap of seven years.² Judge Russo accepted Applicant's guilty plea and sentenced him to serve seven years' imprisonment for petit larceny, third or subsequent offense. Applicant did not appeal his conviction or sentence.

Applicant timely commenced this PCR action on August 5, 2019.

II. Facts

Between January 11 and February 20, 2018, Applicant and his codefendants stole a four-wheeler from a residence. The owner of the residence deceased on December 25, 2017. The deceased owner's family members noticed the four-wheeler was missing and notified law enforcement. Applicant was in possession of the four-wheeler and admitted to taking it from the deceased's residence when he was arrested. (Plea Tr. 12).

¹ Applicant also pleaded guilty to grand larceny (2018-GS-21-01454), and third-degree burglary (2018-GS-21-01516). (Plea Tr. 7). However, Applicant does not challenge those convictions in this PCR action. Applicant received concurrent terms of five years on the unchallenged charges. (Plea Tr. 15).

² The State also dropped six other Florence County indictments, and two grand larceny charges from Marion County in exchange for Applicant's guilty plea. (Plea Tr. 11).

As for Applicant's prior property crimes, the State indicated Applicant had three convictions in 2007 for breach of trust with fraudulent intent, greater than \$1,000. (Plea Tr. 13). In mitigation, Counsel stated "All of these property offenses go back to [Applicant's] drug addiction." (Plea Tr. 14).

III. Current Application

Applicant alleges he is being held in custody unlawfully, alleging:

1. Ineffective assistance of counsel:
 - a. Counsel misinformed Applicant of exactly what he was charged for.
2. Subject matter jurisdiction:
 - a. Applicant has no prior convictions of property crimes.
3. Illegal Sentence:
 - a. The indictment claims Applicant has two or more prior convictions, which is untrue.

Applicant requests relief in the form of a sentence reduction.

IV. Discussion

The Court has reviewed the entire record in this matter. The Court has also observed the witnesses presented at the evidentiary hearing, judged their credibility, and weighed their testimony accordingly in its discussion below. Set forth below are the findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

Applicant alleges he received ineffective assistance of counsel, claiming Counsel misinformed him of what he was charged with, and that he has never been convicted of a property

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crime.³ Applicant also alleges his sentence is illegal because he has never been convicted of a property crime. For the reasons discussed below, the Court finds Applicant has failed to prove either deficiency or prejudice. Therefore, the Court denies relief and dismisses the action with prejudice.

1. Ineffective Assistance of Counsel/Involuntary Guilty Plea

Applicant claims ineffective assistance of counsel for (a) misadvising him of what he was charged with, and (b) failure to investigate whether Applicant's charge was subject to enhancement. The Court disagrees.

An applicant who entered a plea on the advice of counsel may only attack the knowing and voluntary nature of the plea by showing ineffective assistance of counsel. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). "[A] defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To prove prejudice, the applicant must show a reasonable probability he would not have pleaded guilty and would have insisted on going to trial absent plea counsel's alleged deficiency. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

³ The Court interprets Applicant's second allegation as an allegation of ineffective assistance of counsel for failure to investigate whether Applicant was subject to enhancement.

⁴ DLS
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At the PCR hearing, Applicant testified Counsel did not really explain the charges against him. Applicant recalled being charged with petit larceny, receiving stolen goods, and third-degree burglary. Applicant stated that some of his charges were from Florence County and some were from Marion County. Applicant testified he was in jail for 130 days, and Counsel visited him once and spoke to him over the phone once during that time. Applicant recalled his charges were linked to the theft of a \$1,500 four-wheeler.

Applicant testified the only thing he and Counsel ever discussed was how much time he would be comfortable serving. Applicant stated he told Counsel to negotiate for five years' non-violent. However, when he came to court to plead guilty, Counsel informed him that, due to his criminal record, the State's best offer was for a five-to-eight year range.

Applicant testified Counsel told him his prior record was a big deal. However, Applicant claimed Counsel never discussed that his charge was statutorily enhanced. Applicant testified he thought the seven year sentencing cap was a good deal because the State was dismissing a few other charges. However, Applicant claimed that after he pleaded guilty, he did his own research and found out the value of the stolen property did not carry seven years.

Applicant testified this was his first property crime conviction. Applicant testified he has been arrested for property crimes before, but has never been convicted. However, on cross-examination, Applicant admitted to previously pleading guilty to breach of trust with fraudulent intent on two separate occasions—first, in Williamsburg County before Judge Clifton Newman, and second, in Georgetown County before Judge Barber.

Counsel testified she was appointed to represent Applicant in late-spring 2018. Counsel testified she visited Applicant in jail in August 2018 and also spoke to him on the phone a few times. Counsel testified she explained Applicant's charges to him and gave him a copy of the

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discovery. Counsel testified she explained to Applicant this was his third or subsequent property crime. Applicant could not recall if Applicant disputed having prior property offenses. Counsel recalled reviewing Applicant's NCIC report, and noted that he had multiple convictions off breach of trust with fraudulent intent. Counsel testified she explained the convictions and enhancement with Applicant, and she explained to Applicant that any future property crimes could also be enhanced. Counsel also believed she explained to Applicant that breach of trust with fraudulent intent is a property crime.

Counsel testified she took Applicant's five year plea offer to the State, but the State countered with a seven year sentencing cap due to Applicant's prior record. Counsel testified her notes reflected that Applicant always wanted to plead guilty as soon as possible.

The Court finds Applicant's allegation that Counsel misadvised him of what he was charged with is without merit. The Court makes this finding based on Counsel's credible testimony. Counsel credibly testified she explained the charges to Applicant and gave him copies of the discovery. Counsel also explained to Applicant this was a third or subsequent offense. Based on Counsel's credible testimony, the Court finds that Applicant has failed to prove Counsel deficiently advised him of the charges against him.

As for Counsel's alleged failure to investigate if Applicant's charge was subject to enhancement, the Court finds credible Counsel's testimony she reviewed the NCIC which indicated Applicant had prior property crime convictions. Based on Counsel's credible testimony that she explained the charges to Applicant, the Court finds that Applicant has failed to prove deficiency on this issue.

The Court also finds Applicant cannot show prejudice resulted from either of Counsel's alleged deficiencies in this case. First, Applicant testified he thought the seven-year sentencing cap

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was a good deal at the time because the State was dropping his other charges. Additionally, Counsel testified that Applicant wanted to plead guilty as soon as possible, and she had notes that he left her voice-mails indicating he wanted to plead guilty as soon as possible. Based off this testimony the Court is not convinced Applicant would have chosen to go to trial rather than plead guilty; therefore, Applicant has failed to show prejudice.

2. Illegal Sentence

Applicant alleges he received an illegal sentence. However, Applicant's petit larceny charge was properly enhanced pursuant to section 16-1-57 of the South Carolina Code.

Section 16-1-57 provides:

A person convicted of an offense for which the term of imprisonment is contingent upon the value of the property involved must, upon conviction for a third or subsequent offense, be punished as prescribed for a Class E felony.

Section 16-1-20(A)(5) of the South Carolina Code provides a person convicted of a Class E felony must be imprisoned for "not more than ten years."

Subsection 16-13-230(A) of the South Carolina Code states, "A person committing a breach of trust with a fraudulent intention or a person who hires or counsels another person to commit a breach of trust with a fraudulent intention is guilty of larceny." The term of imprisonment for larceny is contingent upon the value of the property involved. See S.C. Code Ann. § 16-13-30 (stating petit larceny is larceny of goods worth less than \$2,000, and grand larceny is larceny of goods worth more than \$2,000). A person convicted of petit larceny "must be fined not more than one thousand dollars, or imprisoned not more than thirty days." S.C. Code Ann. § 16-13-30(A). A person convicted of grand larceny "must be fined in the discretion of the court or imprisoned not more than: (1) five years if the value of the personalty is more than two thousand

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dollars but less than ten thousand dollars; (2) ten years if the value of the personalty is ten thousand dollars or more." S.C. Code Ann. § 16-13-30(B).

Here, the plea transcript reflects Applicant had three prior convictions for breach of trust with fraudulent intent, greater than \$1,000. Applicant admitted that he pleaded guilty to breach of trust with fraudulent intent on two separate occasions. Further, this Court asked PCR counsel if there was any evidence showing Applicant did not have two or more prior property crime convictions. PCR counsel informed the Court he had seen Applicant's rap-sheet and it indicated Applicant had the prior property crime convictions. Based on the testimony, and PCR counsel's and the State's representations to the Court, this Court finds Applicant did have two, or more, breach of trust with fraudulent intent convictions.

Because Applicant had two or more breach of trust with fraudulent intent convictions, Applicant had two or more larceny convictions. *See* S.C. Code Ann. § 16-13-230(A) ("A person committing a breach of trust with a fraudulent intention or a person who hires or counsels another person to commit a breach of trust with a fraudulent intention is guilty of larceny."). As reflected above, larceny is an offense for which the term of imprisonment is contingent upon the value of the property involved. *See* S.C. Code Ann. § 16-13-30(a) and (b) (providing the punishments for larceny is based on the value of the stolen property). Therefore, Applicant's petit larceny charge was properly enhanced pursuant to section 16-1-57. Finally, Applicant was sentenced to seven years' imprisonment which is within the sentencing range for a Class E felony. *See* S.C. Code Ann. § 16-1-20(A)(5) (providing a Class E felony is punishable by a term "not more than ten years"). Based on the foregoing, Applicant did not receive an illegal sentence. As such, the Court denies relief and dismisses this allegation with prejudice.

V. Conclusion

Based on the foregoing, Applicant did not receive ineffective assistance of Counsel. Counsel adequately advised Applicant of the charges he faced, and Counsel conducted a reasonable investigation into Applicant's prior convictions triggering the enhancement of his charge. Further, Applicant has failed to show prejudice, because, at the time, Applicant felt the seven year sentencing cap was a good deal because the State was dismissing other charges. Additionally, Applicant has failed to show that he did not have two or more prior property crime convictions. Indeed, Applicant's own testimony shows that he previously pleaded guilty to property crimes on two separate occasions. Finally, Applicant's sentence is not illegal because it falls within the sentencing range set by statute. Accordingly, this Court denies relief and dismisses the action with prejudice.

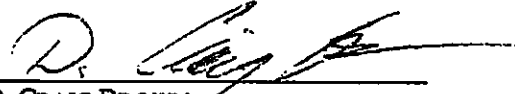
The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a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

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THEREFORE:

1. The Court denies relief and dismisses the action with prejudice; and
2. Applicant shall be remanded to the custody of the State.

AND IT IS SO ORDERED.



D. CRAIG BROWN
Presiding Judge
Twelfth Judicial Circuit

Florence, South Carolina

June 9, 2020.

FILED

2020 JUN 19 AM 9:26

DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

CERTIFIED: A TRUE COPY
Doris Poulos O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

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2019-CP-21-2136

DOCKET NO. 2018-GS-21-01449

The State of South Carolina

County of

FLORENCE

COURT OF GENERAL SESSIONS

August TERM 2018

THE STATE

vs.

MELISSA DALE EVANS

RUSTY TIMMY EVANS

DAVID EDWARD FLOYD JR - Nolle pros 1/15/2019

&

KELLY LEE VAUSE

Indictment for

PETIT LARCENY,
3RD OR SUBSEQUENT OFFENSE

WITNESSES

Helen D Cain

Florence County Sheriff

Angel I. Daniels

ARREST WARRANT NUMBER

2018A2110200254
2018A2110200256

2018A2110200255

2018A2110200258

RETURN OF GRAND JURY

TRUE BILL

Angel I. Daniels
Foreperson of Grand Jury
Date: 8-23-18

VERDICT

Foreperson of Petit Jury

Date:

FILED

2018 AUG 23 PM 3:00

DORIS POULOS O'HARA
CCJP & GS
FLORENCE COUNTY, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

INDICTMENT FOR

PETIT LARCENY, 3RD OR SUBSEQUENT OFFENSE

At a Court of General Sessions, convened on August 23, 2018 the Grand Jurors of FLORENCE County present upon their oath:

COUNT ONE- PETIT LARCENY, 3RD OR SUBSEQUENT OFFENSE

CDR: 3596 16-01-0057

That MELISSA DALE EVANS, RUSTY TIMMY EVANS, and DAVID EDWARD FLOYD JR. did in Florence County between the approximate dates of January 11, 2018 and February 20, 2018, take possession of, carry away, transfer to another, or cause to be carried away or transferred, property of Taylor Moore, to wit: a Honda Four Wheeler valued at \$1500, in violation of Section 16-13-0030, S. C. Code of Laws, 1976, as amended, such being the defendants' third or subsequent offense for which the penalty is contingent upon the value of the property involved, in violation of Section 16-01-0057, S. C. Code of Laws, 1976, as amended.

COUNT TWO- PETIT LARCENY, 3RD OR SUBSEQUENT OFFENSE

CDR: 3596 16-01-0057

That KELLY LEE VAUSE did in Florence County between the approximate dates of January 11, 2018 and February 20, 2018, take possession of, carry away, transfer to another, or cause to be carried away or transferred, property of Taylor Moore, to wit: Single Axel EZ Dumper Trailer valued at \$1500, in violation of Section 16-13-0030, S. C. Code of Laws, 1976, as amended, such being the defendants' third or subsequent offense for which the penalty is contingent upon the value of the property involved, in violation of Section 16-01-0057, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



E.L. Clements, III
TWELFTH CIRCUIT SOLICITOR

