

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

HONORABLE GRACE GILCHRIST KNIE

2018-CP-42-00492

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S.C. SUPREME COURT

AQUAVIOUS RAY, SCDC# 356637

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

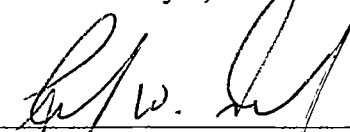
RESPONDENT.

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**NOTICE OF APPEAL**

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Aquavious Ray appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Grace Gilchrist Knie, Circuit Judge on November 13, 2020 an Order issued on November 24, 2020 and filed on November 24, 2020. The Appellant received notice of the judgment on February 2, 2021.



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STATE OF SOUTH CAROLINA )  
 COUNTY OF SPARTANBURG )  
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 Aquavious Ray, #356637, )  
 Applicant, )  
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 v. )  
 )  
 State of South Carolina, )  
 Respondent. )  
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IN THE COURT OF COMMON PLEAS  
 FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-42-00492

**ORDER OF DISMISSAL**

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This matter comes before this Court by way of Applicant's post-conviction relief application filed February 12, 2018. Respondent made its return and motion to dismiss on May 22, 2019, requesting the Court summarily dismiss the application for untimeliness. This Court executed a conditional order of dismissal on May 28, 2019. A hearing on the State's motion to dismiss was held on August 5, 2020, before the Honorable Letitia H. Verdin, circuit court judge, and was denied, by written order, on September 18, 2020. An evidentiary hearing was held on November 13, 2020. Rodney Richey, Esquire, of Richey and Richey, PA, represented Applicant. Assistant Attorney General Chelsey Marto, Esquire, of the South Carolina Attorney General's Office represented Respondent. The court reporter was Linda D. Moffitt. The hearing was conducted through video conference on Webex platform through the Court's virtual courtroom with consent of all parties.

Applicant testified on his own behalf at the evidentiary hearing, through Webex. Counsel Robin File also testified in person. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In August 2015, the Spartanburg County Grand Jury indicted Applicant for three counts of armed robbery (2015-GS-42-03873, -03874, -03875), first degree burglary (2015-GS-42-03876), and attempted murder (count one) and possession of a weapon during the commission of a violent crime (count two) (2015-GS-42-3877). Robin File, Esquire, represented Applicant. Solicitor Barry Barnette prosecuted the case. On November 9, 2016, Applicant pled guilty as indicted before the Honorable Daniel D. Hall, circuit court judge. Applicant was sentenced to five years' imprisonment on the weapons possession charge and twenty-five years' imprisonment on each of the remaining charges, sentences running concurrently. Applicant filed a motion to reconsider the sentence, which was denied by Judge Hall, through written order, dated December 22, 2016, and filed January 6, 2017.

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Summary of Relevant Facts

On July 14, 2015, Applicant and his co-defendants, Tyrus Woodruff, Tavaris Dewberry, and Xavier Martin showed up at the house where the incident occurred. (Tr. 16-17). Marlon Shermaine Davis, Akia Ross, and Marlon LaShawn Davis lived at the residence. (Tr. 16). Martin, who was the driver, dropped Applicant, Dewberry, and Woodruff off at the residence, the elder Davis confronted the man, was shot, and then the men robbed two iPhones and two wallets. (Tr. 19-20). Both Applicant and Woodruff had guns. (Tr. 20). The men entered the home without masks and were later identified by the witnesses. (Tr. 20). After the robbery, the men left. (Tr. 20). Martin pled guilty to accessory after the fact and provided the police with information concerning the other co-defendants, including Applicant. (Tr. 20). The iPhones were

tracked by law enforcement to the residence the co-defendants fled to. (Tr. 21). The stolen contents were found in the getaway vehicle. (Tr. 22).

**Current Action before this Court**

In his PCR application filed February 12, 2018, Applicant asserted he was entitled to relief based on the following:

1. Ineffective assistance of counsel;
2. Due process of law; and
3. That the sentence be re-considered, vacated, or that he should be granted a new trial.

Applicant, through Counsel Richey, asserted the following in his amended PCR application, dated November 2, 2020:

1. Trial Counsel erroneously advised Applicant that he would receive a twelve year sentence. This advice induced him to plead guilty to the charges;
2. Trial Counsel was ineffective by not spending adequate time with the Applicant;
3. Trial Counsel was ineffective for not discussing the Rule 5 or Brady Material with Applicant;
4. Trial Counsel was ineffective for not investigating the facts and law surrounding Applicant's case; and
5. Trial Counsel was ineffective for not making any pretrial motions to suppress evidence or a motion to dismiss charges.

Applicant proceeded forward on the allegations in his amended PCR application. All other allegations raised in his initial application are deemed waived and abandoned and, accordingly, will not be addressed in this order.

**Summary of the Testimony**

***Aquavious Ray Testimony***

Applicant stated that he and Counsel never seriously discussed going to trial on the case. Applicant testified he was promised a twelve year sentence if he pled and would not have entered the plea if he knew he would not receive the twelve year sentence. When asked about why he stated he understood he could be sentenced to life imprisonment at the plea hearing, Applicant

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discovery in full with him, nothing was left undiscussed, and Applicant never indicated to Applicant that he did not understand something discussed. Counsel stated he told Applicant about the hand of one hand of all doctrine. Counsel testified that he shared all discovery with Applicant, that when they met prior to the plea hearing they discussed all discovery, that there was no discovery that he did not share or discuss with Applicant, and that Applicant did not say he did not understand anything in the discovery. Counsel testified that he thought the discovery and evidence he received was complete and that he could not think of anything in the case he needed to investigate further. Counsel credibly testified that he did not pursue pretrial motions on this case, because Applicant never seriously considered going to trial on this case, given the wealth of evidence against him.

**Findings of Fact and Conclusions of Law**

This Court has reviewed from the underlying action and this PCR action all pertinent documents including, but not limited to: the transcript of record from the guilty plea held November 16, 2016, the sentencing sheets, the indictments, the reconsideration pleadings, the initial PCR application referenced above and the amended PCR application of November 2020, the return and motion to dismiss, the reply brief and orders. The Court has also taken into consideration all testimony presented at the PCR hearing.

This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

***Ineffective Assistance of Counsel***

In a PCR action, the applicant bears the burden of proving allegations contained in the

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application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show “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. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove that defense counsel’s performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel’s actions fell outside of the zone of “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRCP (“The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.”). Reasonableness is determined by the “variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant,” and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel’s performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the applicant so that

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“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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

The court makes this determination based upon the totality of the evidence. *Id.* at 695.

Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

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; 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.

***Invalid Plea and Erroneous Sentence Length Advice***

This Court finds that Applicant’s claim that he would not have accepted to plea if he had not been falsely promised he would receive a twelve year sentence is not credible and, thus, squarely rejected. In the context of a guilty plea, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Applicant’s right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the guilty plea process. *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

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unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.”). Absent valid reasons why the applicant is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive. *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)).

For a plea to be valid, the applicant must have been aware of the nature and essential elements of the offense the maximum and minimum penalties, and the rights he is giving up by accepting the plea. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Roddy v. State*, 339 S.E.2d 29 (2000). A plea is not knowing or voluntary if a defendant “lacks knowledge of material evidence in the prosecution’s possession.” *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

Applicant claims his plea was unknowingly and unintelligently entered because he was allegedly erroneously promised by Counsel that he would receive a twelve year sentence if he pled guilty. This Court finds Applicant’s testimony not credible and that he has not met his burden of proof on this claim. At the PCR hearing, Counsel credibly testified that he never promised Applicant a twelve year sentence but, instead, told him what the potential sentencing ranges were. Counsel stated that, if he told Applicant a specific year length, he made clear that that length was not certain but, instead, was only a possibility. Counsel also credibly testified that Applicant decided to plead early on because of the weight of the evidence against him at trial; specifically, that there were eyewitnesses and one of his co-defendants was cooperating with law enforcement. Additionally, at the plea hearing, the Court made clear what the potential sentences regarding each charge were and, if the presiding judge wanted to, he could sentence him up to life imprisonment. (Tr. 5-12). Thus, based upon Counsel’s credible testimony and Applicant’s answers given at the plea hearing clearly show that Applicant was never told, by the plea court

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nor Counsel, that he would be guaranteed a twelve year sentence. Consequently, Applicant is unable to withdraw his plea now based upon this claim and relief is denied on this ground.

***Inadequate Time Spent***

Applicant's allegation that Counsel was ineffective for failure to spend adequate amount of time with Applicant is without merit. "[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating "how additional preparation or communication would have resulted in a different outcome." *Id. See Jackson v. State*, 345, 353-54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case).

This Court finds that Counsel credibly testified that he met with Applicant multiple times, discussed the case and discovery in full with him, nothing was left undiscussed, and Applicant never indicated to Applicant that he did not understand something discussed. Additionally, at the plea hearing, Applicant stated he discussed all possible defenses with Counsel, that he did not need any more time to talk with Counsel, that they had plenty of time to talk about the case with Counsel, that Counsel reviewed all the discovery with him, and that he was satisfied with his representation. (Tr. 14-15). Additionally, at the PCR hearing, Applicant failed to state, let alone provide evidence of, what evidence would have been disclosed or discovered through additional meetings or time or how it would have impacted Applicant's decision to plead. Thus, this Court finds Applicant's allegation that Counsel did not spend adequate enough time with Applicant.

***Failure to Share Discovery***

This Court finds Applicant's allegation that Counsel failed share discovery related to the

case with Applicant is without merit. Counsel credibly testified that he shared all discovery with Applicant, that when they met prior to the plea hearing they discussed all discovery, that there was no discovery that he did not share or discuss with Applicant, and that Applicant did not say he did not understand anything in the discovery. Additionally, Applicant stated at the plea hearing that he went over all of the discovery in the case with Counsel prior to entering the plea. (Tr. 14-15). When asked about this discrepancy on cross-examination, Applicant did not provide an answer concerning the discrepancy beyond stating he did not know what he was doing at the plea hearing. This is an insufficient excuse and, consequently, relief is denied on this ground.

***Failure to Investigate the Law and Facts***

Applicant has not met his burden of proof and, consequently, is not entitled to relief based upon his allegation that Counsel was ineffective for failing to investigate law and facts relating to the charges. *Strickland* makes clear that defense counsel “has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” 466 U.S. at 691. When highlighting failure to investigate as a ground for an ineffective assistance of counsel claim, judicial determination of this claim’s validity is evaluated for “reasonableness [under] all the circumstances” with “a heavy measure of deference to counsel’s judgments” applied. *Id.* At the PCR hearing, Applicant is required to present evidence or witnesses he alleges Counsel did not properly investigate. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Additionally, whether Applicant was prejudiced by Counsel’s failure to investigate is contingent on whether the evidence presented would have led Counsel to change his recommendation regarding the plea. *Stalk v. State*, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009).

Counsel credibly testified that he thought the discovery and evidence he received was

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complete and that he could not think of anything in the case he needed to investigate further. Additionally, at the plea hearing, Applicant stated he was satisfied with the work Counsel did on the case and there was nothing further in the case he needed to discuss with Counsel. (Tr. 14-15). Further, at the PCR hearing, Applicant did not present any evidence or witnesses he thought Counsel did not properly investigate or how this alleged failure to investigate would have impacted his recommendation to plead. Thus, Applicant has failed to meet his burden of proof and relief is denied on this ground.

***Failure to Make Pretrial Motions***

Applicant's allegation that Counsel was ineffective for failure to pursue pretrial motions is without merit. Applicant stated that he and Counsel never seriously discussed going to trial on the case. Counsel credibly testified that he did not pursue pretrial motions on this case, because Applicant never seriously considered going to trial on this case, given the wealth of evidence against him. Counsel was not ineffective for failing to pursue motions inaccessible to him due to Applicant's decision to plead. Thus, relief is denied on this ground.

**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 PCR application must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure 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 the 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

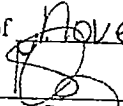
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counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

**IT IS THEREFORE ORDERED:**

1. The PCR Application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 24<sup>th</sup> day of November, 2020.

  
GRACE GILCHRIST KNIE  
Presiding Judge  
Seventh Judicial Circuit

Spartanburg, South Carolina.

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