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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Court of Common Pleas, Spartanburg County
The Honorable Grace Knie, Circuit Court Judge

Circuit Court Case No. 2019-CP-42-02979
Appellate Case No. _____

Tysean Edmondson, #372301 ..... Appellant,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL
(PCR CASE)

Appellant hereby appeals the judgment of the Court of Common Pleas dismissing his action for post conviction relief by way of the attached ORDER OF DISMISSAL, signed by the Honorable Grace Gilchrist Knie, entered of record on April 26, 2021. A copy of said order is enclosed herewith and made a part hereof.

Respectfully submitted,

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Tysean Edmondson, #372301, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2019-CP-42-02979 **ORDER OF DISMISSAL**

This matter comes before this Court by way of Applicant's post-conviction relief application filed August 26, 2019. Respondent made its return on October 30, 2019, requesting an evidentiary hearing be convened. An evidentiary hearing was held on April 6, 2021, via the Webex platform. J. Falkner Wilkes, Esquire, represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel N. Douglas Brannon also testified. 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 July 2016, the Spartanburg County Grand Jury indicted Applicant for two counts of attempted murder (2016-GS-42-4096 and -4097 (count one)) and possession of a weapon during a violent crime (2016-GS-42-4097 (count two)). N. Douglas Brannon, Esquire ("Counsel") represented Applicant. Spenser H. Smith prosecuted the case. On April 25, 2017, Applicant pled guilty before the

Honorable Letitia A. Verdin, circuit court judge, to the lesser-included offenses of assault and battery of a high and aggravated nature and the lesser-included offense of unlawful carry of a pistol. Applicant was sentenced to sixteen years' imprisonment on the ABHAN charges and one year imprisonment for unlawful carry of a pistol.

Applicant, by and through Counsel, filed on April 25, 2017, a motion to reconsider the sentence imposed. Applicant and Counsel again appeared before Judge Verdin on June 5, 2017, at the Spartanburg County Courthouse. Judge Verdin took the matter under advisement, and filed an amended sentencing sheet on December 27, 2018, resentencing Applicant to twelve years' imprisonment on the ABHAN. Applicant did not appeal his plea or sentence.

Summary of Relevant Facts

On April 1, 2016 deputies responded to a shooting. (Plea Tr. 16). The victim stated he and his girlfriend left his house when a dark car pulled behind them. (Plea Tr. 16). He heard two or three gunshots and realized the back window of his car had been shot out and his girlfriend's face grazed by one of the bullets. (Plea Tr. 16). A deputy was sitting on Loan Oak Road and Valley Falls Road near where the shots came. (Plea Tr. 16). The victim thought he heard automatic gunfire and saw a small sedan speeding away and attempted a traffic stop. (Plea Tr. 16-17). A high speed chase ensued, during which the deputy saw firearms thrown out of the driver's side of the vehicle. (Plea Tr. 17).

The chase ended eight to ten minutes later in Victoria Gardens Apartments. (Plea Tr. 17). Applicant, the back seat passenger, jumped out of the car and took off running. (Plea Tr. 17). The driver, Douglas Jones, and front seat passenger, Deandre Foster, stayed in the car. (Plea Tr. 17).

The vehicle search revealed an AR-15 round in the driver's front pocket and an extended magazine for a .40 caliber pistol, a loaded AR-15 magazine, and another loaded pistol magazine

in the vehicle itself. (Plea Tr. 17).The police went back to the route of the chase and found an AR-15 on the side of the road that was thrown out of the vehicle. (Plea Tr. 17). Another 9 millimeter pistol was recovered on the side of the road. (Plea Tr. 17). Additionally, the next day a Milliken's ground crew discovered and brought in a third pistol around where the chase took place. (Plea Tr. 17). The State believed that all individuals in the car were armed because there were three individuals and three guns inside the car. (Plea Tr. 17). All three came back with gunshot residue on them and Applicant admitted that the 9 millimeter Smith & Wesson with a regular clip was his. (Plea Tr. 17).

It was later revealed this happened because a girl's car got keyed. (Plea Tr. 17). Jones dated a girl who had a dispute with her prior roommate and the roommate was kicked out of the apartment. (Plea Tr. 17-18). After being kicked out, she stole various items and there were allegations that she vandalized Jones' girlfriend's car. (Plea Tr. 18). The girlfriend told Jones about it and knew he and his friends would show up with weapons but did not know what exactly they would do. (Plea Tr. 18).

Pictures were admitted at the plea hearing showing the back of victim's car and a front view of the car. (Plea Tr. 18). The pictures showed the bullet went right by where the victim's girlfriend's head was. (Plea Tr. 18). A third picture shows the victim's girlfriend's face, where she was grazed by the bullet. (Plea Tr. 18). The victim himself was not injured. (Plea Tr. 18).

Current Action before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. "The Court failed to inform defendant of the elements of the hand of one is the hand of all. Also the trial court failed to inform defendant of the elements of attempted murder."
    a. "In relation to ground one in the Petition, during the Plea colloquy defense

Counsel informed the Court that the reason defendant was Pleading guilty was because of the hand of one is the hand of all. However, the Court never informed defendant of the elements that the State must prove to find defendant guilty under such theory."

2. "The factual basis did not support the offense."
    a. "In relation to ground Two in the Petition, the Court never informed defendant of the Elements of Attempted Murder. Though defendant Pleaded guilty to ABHAN, provided he rejected the State's offer, he faced the charges of Attempted Murder. Hence, before an intelligent decision could be had of whether to accept or reject the plea, it was necessary for the Court to inform defendant of the elements of Attempted Murder."
3. "Trial court failed to inform defendant of elements of ABHAN."
    a. "In relation to ground Three in the Petition, during the Plea Colloquy the State, in support of its factual basis for ABHAN, told the Court that one of the victims, Mr. Clay, did not suffer any bodily and/or physical injure at all. In ought for a person to commit the offense of ABHAN, there must be some form of physical and/or bodily injure. Defendant pleaded guilty to two counts of ABHAN, one of those counts being against Mr. Clay."
    b. "In relation to ground Five in the Petition, the trial court failed to inform defendant of the elements of the offense he pleaded guilty to, i.e. ABHAN."
4. Ineffective assistance of plea counsel, in that:
    a. "In relation to ground four in the Petition, defense counsel failed to inform defendant of the elements of Attempted Murder to enable defendant to make an intelligent decision of whether or not to accept the State's offer or proceed to trial."
    b. "Defense Counsel was also ineffective for allowing defendant to plead guilty to an offense that the factual basis did not support."

In addition to proceeding forward on the above allegations, Applicant challenged the validity of the plea, stating it was entered unknowingly, unintelligently, and involuntarily. He also stated that he was unclear about the difference between hand of one hand of all and mere presence.

Summary of the Testimony

Applicant's Testimony

Applicant stated that Counsel represented him for about four or five months prior to the plea. Applicant's prior plea counsel was relieved before Counsel assumed representation. Applicant stated he was in jail throughout the entirety of the representation.

Applicant stated Counsel visited him about three times at the jail. Applicant stated

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Counsel told him what he was charged with but never explained the elements of the charges. Applicant stated he told Counsel that he never intended to enter the car or join in the conspiracy to begin with. Applicant stated he was not driving the car, nor was he the shooter. Applicant stated he was not given discovery material until after he had entered the plea, despite asking Counsel for the materials. He claimed Counsel did not want to give him a copy to keep.

Though Applicant denies ever being a part of the shooting, he stated he pled to two counts of ABHAN and the unlawful carry of a pistol charge. Applicant stated he did not understand the State's theory of the case against him, but stated he understood he was implicated under the hand-of-one-hand-of-all theory. Specifically, Applicant stated he pled guilty because he thought that his "mere presence" was sufficient to be found guilty, but discovered that is incorrect after working as a clerk in the prison law library. Applicant stated he did not understand the elements of ABHAN when he entered the plea and, in particular, did not understand the meaning of "serious bodily injury." Applicant stated that had he known this at the time he would have proceeded to trial rather than accepting a plea offer.

Applicant stated that the victim's girlfriend who was shot suffered only superficial wounds from broken glass, not a gunshot wound, and that the other victim did not suffer any injuries. Applicant claims that this was not sufficient to find him guilty as charged at trial and, had he known that prior to entering the plea, he would have proceeded to trial. Applicant stated he was not aware that the solicitor would frame the victim's girlfriend's injuries as rendering them "lucky to be alive." Applicant stated had he known the solicitor would say this, he would have been prepared to provide the discovery evidence contradicting it.

On cross-examination, Applicant admitted Counsel never told him that mere presence was sufficient under the hand of one hand of all theory, but stated it was never discussed, and he

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believed mere presence was enough for a conviction. Applicant stated he did not remember why he did not ask about the theory in discussions with Counsel or when it was brought up at the plea hearing. Applicant stated he was not the shooter or the driver, but could not say with certainty whether there was someone else who acted in the capacity of the shooter or driver throughout the incident. Applicant stated he could not speak on behalf of anyone else who may have been involved, just himself, and again articulated he was only merely present. When pressed, Applicant stated he could not say whether anyone even drove the vehicle. When asked why he had a gun on him when in the car, Applicant stated he had a Second Amendment right to bear arms.

After Counsel's testimony, Applicant again testified on re-direct. Applicant stated he understood that because he was in the car, he could have been found guilty, but again stated he had no idea of what he was pleading guilty to because Counsel did not explain the hand of one theory. Applicant stated he now understands what specific intent means and that mere presence is insufficient to support a conviction, but that Counsel never explained the conflict between the two theories to him before the plea hearing. Applicant stated that if he understood this conflict, he would not have pled, but would have proceeded to trial. Applicant stated that if the elements of his charges and the hand of one hand of all theory had been explained to him, he would not have pled guilty, but would have proceeded to trial.

Counsel's Testimony

Counsel testified he has been practicing law for twenty years and a lot of his work is criminal defense. Counsel stated he was retained to represent Edmondson approximately six months prior to the plea. Counsel stated he met with Applicant three or four times. Counsel discussed the discovery with Applicant. Counsel did not give the discovery to him while he was

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in the jail, but he sat down and reviewed everything with him at the prison. Counsel stated he did not give a copy to Applicant because he did not want a cell mate to become a witness against him at trial, which has happened in prior cases when he has given his incarcerated client a copy of their discovery. Counsel stated that Applicant had an opportunity to ask questions. Counsel testified he thought Applicant understood everything and did not have any lingering questions.

Counsel stated he discussed proceeding to trial with Applicant and met with the family prior to meeting with Applicant after he was hired. Counsel testified that the State made a plea offer and he told Applicant he could choose to go to trial up until the night of the plea.

Counsel stated he printed out the statute for each charge, read it to him word for word, and explained the elements to Applicant, who indicated that he understood. Counsel stated they "absolutely" discussed hand of one is the hand of all and mere presence, because they are so inextricably linked to each other. Counsel stated he did not know if he told Applicant that he could not be convicted based upon mere presence alone, but explained the difference between mere presence and what must be shown to be found guilty under hand of one hand of all. Counsel stated that he thought there was evidence that Applicant went beyond mere presence because he threw the gun out the window of the car and took off running from the police.

Counsel testified that a co-defendant pled guilty before Applicant did, which gave them an idea of what the sentence would be. Counsel stated he was told that this co-defendant would testify against him if he went to trial. Counsel stated they spoke about this testimony because the GSR test would have proven the co-defendant to be a liar if he said that Applicant was the shooter, because Applicant only had minimal GSR on his non-dominant hand.

Counsel stated it was Applicant's decision alone to enter the plea. Counsel stated he never promised him anything or tried to talk him into pleading. Counsel stated he warned him

about the effects of waiving his constitutional rights on numerous occasions and Applicant never asked questions about this or otherwise indicated he did not understand.

On cross-examination, Counsel stated he did not remember specifically what he told Applicant concerning the difference between mere presence and hand of one hand of all theory, but knew it was discussed in detail. When asked why Counsel stated that Applicant was simply at the wrong place at the wrong time at the motion for reconsideration hearing, Counsel stated that it was the theory of the defense he presented in attempting to get a shorter sentence, but confirmed the record showed he tossed a gun out of the car and took off running.

Counsel confirmed Applicant pled solely under the hand of one hand of all theory and they talked about the theory at length. When asked why the plea affidavit Applicant signed did not include language about the hand of one, hand of all theory, Counsel stated that the affidavit was created to make sure Applicant was aware of his rights and was based upon a template from the state Supreme Court, which did not factor in case-specific details, such as the hand of one hand of all theory.

Counsel stated he did not remember if the Court went over the elements of the charges at the plea hearing, but knew that he printed out the statutes and went over them with Applicant when they met to discuss the case, and that the statutes were attached to the affidavit. Counsel acknowledges that the statute does not specifically mention specific or transferred intent.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the plea and motion for reconsideration hearings transcripts, and this PCR action's records. This

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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 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 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

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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 "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. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

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

Invalid Plea

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

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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 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 crucial elements of the offense the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama,* 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 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).

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray,* 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "'[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.'" *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, "guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea."

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Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981). Though rare, pleas are rendered invalid when the PCR court finds that the trial judge did not affirmatively ask for an admission of guilt or advise the defendant of the crucial elements of the charged offenses and the mandatory minimums associated with the crime. *See Pittman v. State*, 337 S.C. 597, 600, 524 S.E.2d 623, 624 (1999) (finding that the plea entered was not voluntary, intelligent, and knowing when counsel had little to no memory of issues discussed with applicant prior to the plea and the plea court failed to question applicant to ensure he knew about the consequences of the plea or the elements charged).

This Court finds that Applicant entered his plea freely, knowingly, intelligently, and voluntarily. At the plea hearing, the State called the case by explaining Applicant was originally charged with attempted murder and would be pleading to the lesser-included offense of ABHAN. (Plea Tr. 2). The plea court advised Applicant that he was present to plead guilty to two counts of ABHAN, each of which carried a sentence of up to twenty years, are classified as violent and serious offenses, as well as one count of unlawful carrying of a pistol. (Plea Tr. 6). Applicant affirmed to the plea court that he had discussed the charges with Counsel, and that he was happy with Counsel's performance. (Plea Tr. 9). Applicant stated he was not under the influence of drugs or alcohol at the plea hearing. (Plea Tr. 13). Applicant stated he understood he was waiving his right to remain silent, to a jury trial, to call and confront witnesses, and that he would have to be found guilty beyond a reasonable doubt by a jury. (Plea Tr. 14). Applicant stated no one promised him anything or forced him into pleading. (Plea Tr. 14-15). Additionally, after the solicitor stated the facts of the case, Applicant stated he wanted to plead guilty. (Plea Tr. 19-20).

Additionally, Counsel's testimony at the PCR hearing further substantiates the plea's validity. Counsel testified that he showed Applicant the discovery against him when he met with

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him prior to the plea and that Applicant knew the evidence against him. Counsel stated that the State made a plea offer and he told Applicant he could choose to go to trial instead up until the night of the plea. Counsel stated it was Applicant's decision alone to enter the plea. Counsel stated he never promised him anything or tried to talk him into pleading. Counsel stated he warned him about the effects of waiving his constitutional rights on numerous occasions and Applicant never asked questions about this or otherwise indicated he did not understand. Counsel stated he thought Applicant understood everything and he did not have any lingering questions. Based upon Counsel's credible testimony and the plea transcript, this Court finds the plea was entered freely, knowingly, intelligently, and voluntarily and cannot be withdrawn now.

Failure to Inform Applicant

This Court finds that Applicant was adequately informed of the elements of ABHAN and attempted murder, the hand of one hand of all theory, and the meanings of specific intent and mere presence and knew about these elements when he entered his plea.

"A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29. A person is guilty of assault and battery of a high and aggravated nature "if the person unlawfully injures another person and great bodily injury to another person results; or the act is accomplished by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600(B)(1)(2015). Attempted murder is not a mere codification of the offense of assault and battery with intent to kill, but rather constitutes a new, separate offense for which a specific intent to kill must be proven beyond a reasonable doubt. *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017).

""Under the 'hand of one is the hand of all' theory [of accomplice liability], one who

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joins with another to accomplice an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.'" *State v. Thompson*, 374 S.C. 257, 261-62, 647 S.E.2d 702, 704-05 (Ct. App. 2007) (quoting *State v. Condrey*, 394 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002)). Though "[m]ere presence and prior knowledge that a crime was going to be committed, without more is insufficient to constitute guilt", "'presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a [principal].'" *Id.* (quoting *State v. Hill*, 268 S.C. 390, 395-96, 234 S.E.2d 219, 221 (1977)). "In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties." *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010). *See also Condrey*, 394 S.C. at 193, 562 S.E.2d at 324 (stating that "[a] formally expressed agreement is not necessary to establish the conspiracy" that brings the accomplice to the crime scene).

In similar cases, guilty convictions were sustained if there was sufficient evidence indicating a common scheme or plan, regardless of whether or not the defendant fired the fatal shot. *See Gibson*, 390 S.C. at 355, 701 S.E.2d at 770 (finding sufficient evidence existed indicating the defendant participated in a common scheme or plan with his co-defendant when he agreed to act in concert with his co-defendant who fired the fatal shot when defendant informed co-defendant of the situation, that the call to pick him up from the bar was not solely for the purpose of removing defendant from the scene, and that defendant was aware of the firearm available for him to retrieve from his co-defendant's car); *State v. Dickman*, 341 S.C. 293, 534 S.E.2d 268 (2000) (finding that enough evidence existed to sustain a murder conviction when the

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appellant acted with his co-defendant pursuant to a common scheme or plan when appellate told a friend the date the murder would take place, arranged the incident with the co-defendant, retrieved a gun set aside by the co-defendant, and handed the gun to co-defendant, who promptly fired the fatal shot).

Based upon the plea transcript and Counsel's testimony at the PCR hearing, this Court finds that Applicant sufficiently understood the elements of both the charges he was indicted under, and the charges to which he ultimately pled guilty. At the plea, the State called the case by explaining Applicant was originally charged with attempted murder and would be pleading to the lesser-included offense of ABHAN. (Plea Tr. 2). The plea court advised Applicant that he was present to plead guilty to two counts of ABHAN, each of which carried a sentence of up to twenty years, are classified as violent and serious offenses, as well as one count of unlawful carrying of a pistol. (Plea Tr. 6). Applicant affirmed to the plea court that he had discussed the charges with Counsel, and was satisfied with Counsel's performance. (Plea Tr. 9). Counsel, in mitigation, specifically indicated that part of Applicant's calculus in choosing to accept the offer and plead guilty was "because the hand of one is the hand of all." (Plea Tr. 21). At no point during mitigation did Applicant indicate he did not understand what Counsel was saying concerning the theory pled under.

Counsel's credible testimony at the PCR hearing further substantiates this finding. Counsel stated he printed out the statute for each charge, read and explained each to him word for word, and Applicant indicated that he understood. Counsel stated they "absolutely" discussed hand of one is the hand of all and mere presence, because they are so inextricably linked to each other. Counsel stated he did not know if he told Applicant that he could not be convicted based upon mere presence alone, but explained the difference between mere presence and what must be

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shown to be found guilty under hand of one hand of all. Counsel testified that he thought there was evidence that Applicant went beyond mere presence because he threw the gun out the window of the car and took off running from the police. Counsel confirmed Applicant pled solely under the hand of one hand of all theory and they talked about the theory at length. Thus, based on the above, this Court finds Applicant was not credible in his statements that he did not understand the elements of the crimes charged with and convicted upon. Accordingly, relief is denied on this ground.

Facts did not Support the Offense

As a part of the plea validity issue, Applicant claims the facts do not support his guilty plea. "A defendant may, as part of a plea bargain, agree to plead guilty to a crime for which he has been indicted (or to which he has waived grand jury presentment), but of which he is not guilty." *Rollison v. State*, 346 S.C. 506, 510, 552 S.E.2d 290, 292 (2001); *see also Anderson v. State*, 342 S.C. 54, 58, 535 S.E.2d 649, 651 (2000) ("We find, so long as there was a sufficient factual basis to support the crime for which the defendant was indicted, a plea to any lesser included offense is sufficient."). ABHAN is a lesser-included offense of attempted murder. S.C. Code Ann. § 16-3-600(B)(3); *State v. Middleton*, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014).

Applicant and Counsel seemingly thought that the facts were sufficient for Applicant to support the conviction before entering the plea and while at the plea hearing, despite Applicant's current statement to the contrary. Specifically, after the solicitor stated the facts of the case, Applicant stated he wanted to plead guilty. (Plea Tr. 19-20). Additionally, Counsel credibly testified at the PCR hearing that he thought there was evidence that Applicant went beyond mere presence because he threw the gun out the window of the car and ran from the police. However, even if Applicant is correct and the evidence does not perfectly fit the charge, under South

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Carolina law Applicant can still freely plead guilty to ABHAN because he was indicted for the greater offense of attempted murder. Accordingly, 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 the 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 the Applicant wishes to seek appellate review, PCR 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 26th day of April, 2021.

GRACE GILCHRIST KNIE
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina.

FILED
2021 APR 26 PM 2:04
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX

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