

STATE OF SOUTH CAROLINA )  
 COUNTY OF DARLINGTON )  
 )  
 Marquives Boatwright, SCDC No. 374313 )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FOR THE FOURTH JUDICIAL CIRCUIT

Case No. 2018-CP-16-00561

**ORDER OF DISMISSAL**

This matter comes before the Court by way of Applicant Marquives Boatwright’s June 27, 2018 application for post-conviction relief. Respondent made its return on November 26, 2018. An evidentiary hearing into the allegations was convened on January 6, 2020. Applicant was represented by Attorney Overture Walker and Assistant Attorney General Jake Isenberg represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant’s plea counsel Kevin Ethridge also testified. The Court had before it Applicant’s records from the South Carolina Department of Corrections, the records from the Darlington County Court of Common Pleas, a copy of the original plea transcript, and the pleadings. The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted at the January 2014 term of the Darlington County Grand Jury for criminal sexual conduct with a minor, second degree (2014-GS-16-00079). Applicant was represented by Attorney Kevin Ethridge and Assistant Attorney General Kinli Abee prosecuted the case. On October 18, 2017, Applicant pled guilty as indicted. The Honorable Roger E. Henderson sentenced him to a term of fifteen years’ imprisonment. Applicant did not appeal his plea or sentence.

2020 MAY 14 2 11:15 PM  
 FILED  
 SCOTT B. SUGGS  
 CLERK OF COURT/R.M.C.  
 DARLINGTON COUNTY, S.C.

**TRUE CERTIFIED COPY,**  
*Scott B. Suggs*  
**CLERK OF COURT/R.M.C.**  
**DARLINGTON COUNTY, SC**

## II. FACTUAL HISTORY

In October, 2013, Applicant was taking a polygraph as part of the Darlington County Sheriff's Office's pre-employment screening process. (Plea Tr. 8, 25 – Plea Tr. 9, 3). He was asked whether he had ever committed the crime of molestation. (Plea Tr. 9, 3-6). He replied by asking "how does that molestation thing work" before telling the officer conducting the exam that he had engaged in sexual relations with an eleven year old child. (Plea Tr. 9, 7-17).

He explained that the girl was the younger sister of an ex-girlfriend and that he had penetrative sex with her on numerous occasions when they lived together in 2007. (Plea Tr. 9, 13-21). The victim was interviewed, and she described the assaults as occurring much more frequently than Applicant had led investigators to believe. (Plea Tr. 9, 22 – Plea Tr. 10, 7). The victim described episodes of forceful sodomy and oral sex that caused her serious trauma. (Plea Tr. 10, 2-13).

These facts were presented at the plea hearing and Applicant substantially agreed with them prior to the plea being accepted. (Plea Tr. 10, 16-25; Plea Tr. 11, 14-16). Prior to imposing the sentence the judge had the following exchange with Applicant:

The Court: How old was your girlfriend at the time?

Applicant: Twenty-one.

The Court: And you have an 11 year old daughter now?

Applicant: Yes, sir, I do.

The Court: What would you think about somebody sexually abusing her?

Applicant: It would hurt.

The Court: I would certainly hope so it would hurt. What would you want to do to that individual? Eleven years old, that's a child. You understand that; a child? I have a granddaughter that's 11 years-old.

What possessed you to think you could have sex with an 11 year old and get away with it?

Applicant: I didn't intend to get away with it.

The Court: Well, what possessed you to have sex with an 11 year old? Forget about getting away with it. You didn't tell anybody you were having sex with her, did you?

Applicant: No, sir.

The Court: You didn't want anybody to know, did you?

Applicant: No, sir. Not at the time.

The Court: You didn't want anybody to know at any time, did you?

Applicant: Yes, sir. I knew it would come out.

The Court: Sir?

Applicant: I knew it would come out.

The Court: So you're the one that volunteered the information about it?

Applicant: Yes, sir.

The Court: During the polygraph test?

Applicant: Yes, sir.

The Court: What were you being tested for with the polygraph?

AAG Abee: It was pre-employment, Your Honor. I believe he was applying for a position, I think, at the detention center.

Plea counsel: A C.O. job, Your Honor.

The Court: Still haven't told me what possessed you to have sex with an 11 year old. I mean you had a girlfriend. Wasn't good enough sex from her? Don't laugh over there whoever is laughing. This isn't funny. This is dead serious.

Applicant: Honestly have no answer, sir.

The Court: This is about as despicable an act as you can run into. A 22 year old man with an 11 year old child. I don't have a lot of mercy for people that do that. That violates children. An innocent child.

The fact that you have no record doesn't really impress me one way or the other because of what you did, and you deserve to be punished. You certainly punished this child with your conduct.

(Plea Tr. 16, 9 – Plea Tr. 18, 9).

### III. CURRENT APPLICATION

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

1. Ineffective Assistance of Counsel
  - a. Counsel ineffective for failing to file a 'Notice of Appeal' for Petitioner when Petitioner told Counsel to file an Appeal
  - b. Counsel ineffective for failing to file for a sentence reconsideration for Petitioner
  - c. Counsel ineffective for failing to object to the plea sentencing Judge's personal biased and improper prejudicial comments toward Petitioner at petitioner's plea sentencing Hearing

Applicant amended his application on August 10, 2019, and raised the following allegations:

1. Ineffective Assistance of Counsel
  - a. trial/plea counsel failed to adequately investigate the criminal charge(s) for which Applicant was convicted and prepare a defense for trial. Further, trial/plea counsel deprived Applicant of an opportunity to review the State's evidence and assist in the preparation of his defense.
  - b. trial/plea counsel failed to call or contact material witnesses whose testimony would have been favorable to Applicant.
  - c. trial/plea counsel advised him to enter a guilty plea that was knowingly and/or intelligently made.
  - d. trial/plea counsel pressured and improperly induced him to enter an involuntary guilty plea based on statements and representations made by counsel.
  - e. trial/plea counsel failed to inform him of his right to appeal his guilty plea and sentence, and/or failed to initiate an appeal of the same on his behalf notwithstanding Applicant's request.

- f. trial/plea counsel failed to file a motion for reconsideration of his sentence.
- g. trial/plea counsel failed to object and/or move to withdraw applicant's guilty plea after biased, prejudicial, and improper comments from the trial/plea judge during the sentencing phase.

#### IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

##### A. Ineffective Assistance of Counsel

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

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

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

Second, counsel’s deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. “This does not require a showing that counsel’s actions ‘more likely than not altered the outcome,’ but the difference between *Strickland*’s prejudice standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case.’” *Harrington*, 562 U.S. at 111-12. (quoting *Strickland*, 466 U.S. at 697). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112. “The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality

of the evidence before the judge or jury.” *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

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

These 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.

#### ***Failure to Investigate***

Applicant alleges that his plea counsel provided constitutionally ineffective assistance when he failed to adequately investigate his charges and prepare a defense. Applicant further

alleges that this failure deprived him of an opportunity to review the State's evidence and assist in the preparation of his defense.

To establish counsel failed to adequately prepare for trial, Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. *Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998); *Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998) (failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); *Davis v. State*, 326 S.C. 283, 486 S.E.2d 747 (1997) (relief denied where Applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); *Skeen v. State*, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Even if guilty plea counsel is deficient in failing to adequately prepare for trial, an applicant must also establish the existence of some helpful witness or evidence that would have been discovered had a more thorough preparation been conducted. *Stalk v. State*, 383 S.C. 559, 681 S.E.2d 592 (2009).

At the evidentiary hearing Applicant testified that he retained his plea counsel about two years before making his plea. (PCR Tr. 6, 6-24). During the course of those two years he met with his counsel about "three to four times" at his office, for about fifteen to twenty minute intervals, to discuss the case. (PCR Tr. 6, 25 – PCR Tr. 7, 10). During those meetings Applicant stated that they discussed the charges and the possible punishments, but did not discuss the elements of the offense or the strength of the State's case against him. (PCR Tr. 7, 11 – PCR Tr. 8, 4). Applicant also acknowledged that he had called his counsel, and at one point became "a little heated" because he "thought he was going down the wrong path." (PCR Tr. 8, 15-24). He stated that his attorney

provided him with the discovery but did not review it with him prior to his plea hearing. (PCR Tr. 8, 5 – PCR Tr. 10, 8).

On the issue of his counsel's failure to investigate, Applicant testified that he felt that there was more that could have been done, and he believed his counsel did not do enough. (PCR Tr. 12, 5-14). When prompted to be more specific he stated that "it's not really much to say, honestly." (PCR Tr. 15-19). On cross-examination Applicant stated that his attorney did not represent him and did not stand up for his rights. (PCR Tr. 17, 24 – PCR Tr. 18, 3). He explained that his attorney did not look further into the details to discover that there was more to the story. (PCR Tr. 19, 23 – PCR Tr. 20, 3). Nevertheless, Applicant claimed that he tried his best to tell him everything that happened, but still felt that his attorney should have investigated further. (PCR Tr. 20, 4-13). He stated that his counsel never reviewed the discovery with him and would have liked for him to have reviewed the victim's story with him. (PCR Tr. 21, 12-20). He acknowledged that he agreed with the solicitor's version of the victim's story at his plea hearing. (PCR Tr. 21, 21 – PCR Tr. 22, 17).

Applicant's plea counsel testified that Applicant came by his office to retain him and they discussed his case and the fact that he had already made a confession. (PCR Tr. 24, 8-24). Such cases are rare, he explained, and the confession "limits what you can do" in terms of mounting a defense. (PCR Tr. 24, 25 – PCR Tr. 25, 7). He testified that he reviewed the discovery with Applicant and spoke with him and his wife numerous times during this process. (PCR Tr. 25, 10 – PCR Tr. 26, 6). The evidence, including the victim's statement, was "pretty damning," and it led him to the conclusion that Applicant would be best served by entering a guilty plea. (PCR Tr. 25, 10-17; PCR Tr. 26, 7-9). In addition to reviewing the evidence, he also spoke with a police investigator who conducted a polygraph test on Applicant. (PCR Tr. 26, 21 – PCR Tr. 27, 5).

Applicant did not specifically request anything be investigated further. (PCR Tr. 27, 6-8). Plea counsel confirmed on cross-examination that he met with Applicant multiple times and discussed the allegations and evidence in the case. (PCR Tr. 35, 2-17).

It is clear from the records, pleadings, and testimony provided to the Court that Applicant's allegations of ineffective assistance of counsel for failure to investigate are without merit. As an initial matter, Applicant confessed to committing this crime. He did so prior to consulting with his attorney, which would limit any attorney's ability to mount an effective defense. Furthermore, Applicant's allegation that his plea counsel failed to unearth favorable evidence through further investigation raises the question: what is that evidence? Applicant fails to provide an answer. Instead, he states that there is nothing much to say, as if the allegation speaks for itself. Then he points to the victim's statement, which he undisputedly received prior to his plea, reviewed with counsel, and actually agreed with at the plea hearing. Without more, the allegation of ineffective assistance of counsel for failure to investigate must fail. Therefore, post-conviction relief on this allegation is denied, and it is dismissed with prejudice.

#### ***Failure to Contact Favorable Material Witnesses***

Applicant alleges that his plea counsel provided constitutionally ineffective assistance when he failed to contact material witnesses who could have provided favorable testimony.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post-conviction relief hearing. *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990) cert. denied, 499 U.S. 982 (1991). In order to show prejudice from the failure to contact an allegedly favorable witness, a PCR applicant must present the testimony of that witness at the PCR hearing. *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995). The applicant's mere speculation as to what a

witness's testimony would have been cannot, by itself, satisfy his burden of showing prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993).

Applicant's allegation fails for the same reasons listed above. Nowhere in the pleadings or in the testimony provided at the PCR hearing does Applicant explain who these favorable material witnesses are, what testimony they may have provided, or why it would have benefitted his defense. The testimony presented by his plea counsel shows that he contacted Applicant, his wife, his brother, and the police officer who conducted his polygraph test. No further testimony was given on the issue at the hearing, and no such witnesses were called. Therefore, Applicant has failed to meet his burden of proof, post-conviction relief must be denied, and this allegation shall be dismissed with prejudice.

#### ***Involuntary Guilty Plea***

Applicant alleges that his plea counsel provided constitutionally ineffective assistance in advising him to enter a guilty plea that was not knowingly and/or intelligently made. Applicant further alleges that his counsel was constitutionally ineffective for pressuring and improperly inducing him to enter his guilty plea involuntarily.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969). *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. *Harris v. Leeke*, 282 S.C. 131, 318 S.E.2d 360 (1984).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, an Applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621 (1977). Statements made during a

guilty plea should be considered conclusively, unless the Applicant presents valid reasons why he should be allowed to depart from the truth of his statements. *Crawford v. U.S.*, 519 F.2d 347 (4th Cir. 1975) (overruled on other grounds by *U.S. v. Whitley*, 459 F.2d 327 (4th Cir. 1985)). An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. See *Roscoe v. State*, 345 S.C. 16, 546 S.E.2d 417 (2001); *Richardson v. State*, 310 S.C. 360, 426 S.E.2d 795 (1993).

At the plea hearing Applicant was informed by the Court of his charge and its potential sentence. (Plea Tr. 4, 23 – Plea Tr. 5, 5). He indicated his understanding and informed the Court that he wished to plead guilty. (Plea Tr. 5, 6-13). He indicated that he had a clear understanding of what his “straight up plea” entailed. (Plea Tr. 5, 14 – Plea Tr. 6, 2). The Court explained that his plea was a waiver of his right to a jury trial, the State's burden of proving guilt beyond a reasonable doubt to a unanimous jury, his right to confront witnesses, his right to defend himself, his right to remain silent, and his right to discovery. (Plea Tr. 6, 16 – Plea Tr. 7, 24). He clearly stated that he was “freely and voluntarily giving up” all of those rights in order to enter the plea. (Plea Tr. 7, 25 – Plea Tr. 8, 3). He indicated that he was satisfied with his attorney. (Plea Tr. 8, 7-19). His plea counsel indicated his agreement with the decision to enter the plea and the Court found that it had been made freely, voluntarily, and intelligently. (Plea Tr. 11, 4-16). His plea counsel further indicated that he never wavered in admitting his guilt, that he was entering the plea in an effort to save the State the time and expense of a trial, and that he wanted to atone for what had transpired. (Plea Tr. 13, 14 – Plea Tr. 14, 14).

At the PCR hearing Applicant stated that he discussed the charges and the potential punishments he faced with his counsel, but did not discuss the elements of the offense. (PCR Tr. 7, 11-23). He testified that his attorney did not discuss the strength of the State's case and did "not exactly" discuss whether the State could prove his guilt beyond a reasonable doubt. (PCR Tr. 7, 24 – PCR Tr. 8, 4). He further testified that he could not recall his plea counsel discussing any defenses with him. (PCR Tr. 10, 9-11). He indicated that the very first time he went to court he admitted his guilt. (PCR Tr. 9, 4-5).

He further testified that he, and he alone, made the decision to enter the guilty plea. (PCR Tr. 10, 22 – PCR Tr. 11, 7). The decision was not reached with any input from his attorney, even though his attorney had advised him to plead guilty. (PCR Tr. 11, 5-17; PCR Tr. 12, 20 – PCR Tr. 13, 3). Nevertheless, Applicant stated that his attorney pressured him into entering the plea by calling him to the back on the day of the plea, asking him the "same thing" he had previously asked, and telling him they were going to throw themselves on the mercy of the Court. (PCR Tr. 13, 15-25).

Applicant confirmed on cross-examination that he had admitted guilt of the crime on several occasions, and that was the reason he entered the guilty plea. (PCR Tr. 16, 22 – PCR Tr. 17, 14). He admitted that his counsel did the best he could, and that his own conscience compelled his decision making. (PCR Tr. 17, 15-19).

Applicant's plea counsel stated that they discussed the evidence and facts of the case after receiving the discovery and he advised Applicant that "it was probably going to be in his best interest to plea." (PCR Tr. 25, 8-17). He felt that the plea was in Applicant's best interest because of the evidence against him, his lack of a prior record, and the fact that he was an extremely likable

person. (PCR Tr. 28, 3-6). Prior to the plea he advised him of all the rights he was waiving and informed him that the judge had full discretion in imposing a sentence. (PCR Tr. 27, 9-24).

The record makes it clear that Applicant entered his guilty plea on his own accord and with the reasonable advice of competent counsel. He had a full understanding of the charges against him, the potential sentences he was facing, and the consequences of entering the plea. Whatever misunderstanding may have existed between him and his counsel was invariably cured during the Court's plea colloquy. Furthermore, the record is bereft of evidence that Applicant would have insisted on going to trial but for counsel's allegedly erroneous advice. He admitted to committing the crime during a pre-employment polygraph screening, he then admitted his guilt at his initial court appearance. He testified that his decision to plead guilty was made independently of his counsel's advice. At the plea hearing his attorney stated that the decision was made to save the State the resources required to go to trial, and because Applicant wanted to atone for his behavior. He confirmed this at the PCR hearing, stating that his own guilty conscience compelled him to enter the plea. He has never wavered from his guilt of this crime, and there is no reason to believe he would have insisted on proving his innocence at trial. His allegation that his plea was involuntarily made, or was made due to pressure from his attorney, is without merit. Therefore, post-conviction relief must be denied on these grounds and the allegations shall be dismissed with prejudice.

#### ***Failure to File a Direct Appeal***

Applicant alleges that his plea counsel provided constitutionally ineffective assistance for failing to inform him of his right to appeal his guilty plea and sentence, and/or failed to initiate an appeal on his behalf.

A defendant has ultimate authority to make the fundamental decision as to whether to take an appeal, and counsel's obligation to assist the defendant includes a duty to consult with the defendant on important decisions. *Frazer v. South Carolina*, 430 F.3d 696, 705 (2005) (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Strickland v. Washington*, 466 U.S. 668, 688 (1984)) (cleaned up). A defendant has the right to be informed of the right to an appeal and the method for taking the appeal. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1984). Trial counsel may not assume that a defendant is fully aware of appellate rights but is required to make certain defendant is made fully aware of appellate rights. *Smith v. State*, 309 S.C. 413, 424 S.E.2d 480 (1992).

A lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). However, absent such instructions, counsel is only constitutionally required to consult with a defendant about an appeal when there is reason to think that a rational defendant would want to appeal. *Id.* at 480. The merits of an appeal are relevant when considering whether counsel was ineffective for failing to advise a defendant of the right to appeal, but not when a defendant has asked for an appeal to be filed. *Kinard v. State*, 418 S.C. 478, 481, 795 S.E.2d 15, 16 (2016) (citing *Flores-Ortega*, 528 U.S. 470).

The Court informed Applicant at his plea hearing that he had ten days to appeal its acceptance of his guilty plea. (Plea Tr. 11, 14-15). This information was conveyed to him prior to sentencing. Nevertheless, Applicant asserted at his PCR hearing that he was not informed of his appellate rights until after he was sentenced. (PCR Tr. 14, 16-24). Applicant claimed that he then told his plea counsel that he wished to appeal his guilty plea. (PCR Tr. 14, 23 – PCR Tr. 15, 3). He indicated at the PCR hearing that he knew he had ten days to file an appeal. (PCR Tr. 15, 21-24). His attorney told him they would discuss it, but no discussions were had. (PCR Tr. 15, 4-7).

Instead, plea counsel discussed it with Applicant's brother and wife, and intended to have a "friend of his" perfect the appeal. (PCR Tr. 15, 6-12). No notice of appeal was ever filed. (PCR. 15, 11-12).

Applicant's plea counsel testified at the PCR hearing that he did not believe this case presented any appealable issues, but that he discussed the possibility of appellate review with Applicant's wife after the plea hearing. (PCR Tr. 29, 14-21). He informed her that time was of the essence, and that he did not usually handle appeals but would be willing to put them in touch with someone who would. (PCR Tr. 29, 22 – PCR Tr. 30, 30). They spoke three or four times and then communication ceased. (PCR Tr. 30, 3-4). Plea Counsel assumed that they had decided to pursue a different route when he did not hear back. (PCR Tr. 30, 3-12). He stated that he did not remember Applicant ever expressing a desire to appeal his guilty plea. (PCR Tr. 33, 23 – PCR Tr. 34, 4).

Here, Applicant's alleges both that he was not informed of his right to appeal his plea, and that an appeal was not perfected by his counsel after one was requested. He testified at the PCR hearing that he was sentenced, informed of his appellate rights, and requested that his counsel file the appeal on his behalf. The record clearly reflects that he was aware of his right to appeal his plea, as he was made aware of such by the court prior to sentencing. His plea counsel did not believe there was any merit to an appeal, and did not remember Applicant ever expressing a desire to appeal. Instead, he discussed the appeal numerous times with Applicant's family members, made them aware of the time constraints, and did not hear back. He indicated at the PCR hearing that he made arrangements for another attorney to handle the appeal if Applicant wished to pursue one.

Given the inconsistencies with Applicant's allegations and the plea colloquy as well as the evidence presented at the PCR hearing, this Court sees no reason justifying post-conviction relief

on these grounds. It is clear that plea counsel made Applicant aware of his right to appeal, made efforts to discuss these rights with him and his family, and was willing to make arrangements for an appeal to be filed if Applicant so desired. It is not clear from the evidence before the Court that Applicant ever requested that appellate review be pursued, given the lack of evidence corroborating Applicant's lone assertion. Therefore, this Court finds that the allegation is without merit, post-conviction relief is denied on these grounds, and it is dismissed with prejudice.

#### ***Failure to File a Motion for Reconsideration***

Applicant alleges that his counsel provided constitutionally ineffective assistance by failing to file a motion to reconsider the sentence.

Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 530 (1992). A judge has discretion in sentencing within statutory limits. *State v. Sidell*, 262 S.C. 397, 205 S.E.2d 2 (1974). South Carolina law provides for a sentence of up to twenty years, in the discretion of the court, for criminal sexual conduct with a minor, second degree. S.C. Code Ann. §16-3-655(D)(3) (1976).

The plea judge accepted Applicant's plea and imposed a fifteen year sentence for criminal sexual conduct with a minor, second degree. (Plea Tr. 18, 11-13). Applicant explained at the PCR hearing that he never discussed a motion to reconsider with his attorney, because he was concerned with the ten-day time period to file an appeal. (PCR Tr. 15, 13-24). His attorney testified that he did not think about filing a motion to reconsider the sentence because he did not believe it would have made any difference, and he did not recall Applicant asking him to do so. (PCR Tr. 34, 5-20). He explained that the judge was "heated" about the facts of the case, but imposed a fair sentence. (PCR Tr. 28, 17 – PCR Tr. 29, 5; PCR Tr. 36, 18-20). Even if the judge had a moment

to cool off, he did not believe a motion to reconsider would have been fruitful. (PCR Tr. 34, 23 – PCR Tr. 35, 1). He did not perceive anything improper about the judge’s handling of the matter. (PCR Tr. 36, 23 – PCR Tr. 37, 2).

Applicant has not proved that his counsel was deficient in his in his representation. He never requested that his plea counsel move to reconsider the sentence because he was preoccupied with considerations of a direct appeal. His plea counsel’s opinion that a motion to reconsider would have been fruitless is supported by the fact that the Applicant did not receive the maximum sentence, despite the judge stating that he did not have much mercy for grown men who violate children. Instead, his plea counsel chose to discuss the possibility of a direct appeal with Applicant and his family. This was a reasonable strategy given the circumstances of the case. Therefore, the allegation is without merit, post-conviction relief is denied on these grounds, and it is dismissed with prejudice.

#### ***Failure to Move to Withdraw the Guilty Plea***

Finally, Applicant alleges that his counsel provided constitutionally ineffective assistance by failing to move to withdraw his guilty plea when the plea judge made prejudicial and improper comments.

The withdrawal of a guilty plea is generally within the sound discretion of the trial court. *State v. Riddle*, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982). Where there is reason to think a rational defendant would want to withdraw his plea, or when the defendant reasonably demonstrated an interest in so withdrawing his plea, plea counsel may be constitutionally obliged to move to terminate a plea proceeding or otherwise move to withdraw his client’s guilty plea. See *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000) (finding counsel ineffective for failing to move to withdraw a plea after the state reneged on its plea agreement); *Smith v. State*, 407 S.C.

270, 754 S.E.2d 900 (Ct. App. 2014) (same); *Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988) (same); *Rolen v. State*, 384 S.C. 409, 683 S.E.2d 471 (2009) (finding counsel ineffective for failing to move to withdraw a plea after client repeatedly asserted his innocence during the plea hearing); *Turner v. State*, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (comparable standard in the context of failure to appeal from a guilty plea).

Applicant testified that the judge seemed emotional during the sentencing phase of his guilty plea hearing. (PCR Tr. 14, 7-9). The judge made it “a bit personal” by mentioning his own grandchild who was similar in age to the victim of Applicant’s crime. (PCR Tr. 14, 9-11). He stated that he wished his plea counsel had moved to withdraw the plea due to this reaction. (PCR Tr. 14, 13-15).

The judge’s comments in question were made in reaction to the facts of the case, specifically the fact that Applicant had forcibly sodomized a child. (PCR Tr. 33, 6-7). Applicant’s plea counsel testified that the plea judge had always been very fair and he believed that they “were going to get as fair a shake with him as with anybody else.” (PCR Tr. 33, 8-11). He was not concerned about the judge’s reference to his own granddaughter because he felt that anyone “would find it hard not to personalize it to a certain degree.” (PCR Tr. 33, 12-22).

There is nothing in the record indicating that Applicant or anybody on Applicant’s behalf ever asked plea counsel to move to withdraw the plea. Second, given plea counsel’s belief that his client was receiving a fair hearing and that any judge would be angered by the facts of the case, it cannot be said that plea counsel should have been prompted to action by the judge’s comments. Finally, even if plea counsel had moved to withdraw the plea, there is no reason to believe he would have been permitted to do so. The comments were made in the sentencing phase of the plea hearing, after the plea had been accepted. In fact, Applicant reaffirmed his guilt and stated that he

did not intend to get away with the crime while the comments were being made. For all these reasons, the Court finds Applicant has failed show deficiency or prejudice from his plea counsel's failure to move to withdraw the plea. Therefore, the allegation is without merit, post-conviction relief is denied on these grounds, and it is dismissed with prejudice.

## V. CONCLUSION

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

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

[Order and signature page follows]

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 16 day of May, 2021

W H Seals  
William H. Seals, Jr.  
Presiding Judge  
Fourth Judicial Circuit

Marion, South Carolina

**FILED**  
2021 MAY 24 A 11:15  
SCOTT B. SUGGS  
CLERK OF COURT/R.O.D.  
DARLINGTON COUNTY, S.C.

**TRUE CERTIFIED COPY,**  
Scott B. Suggs  
**CLERK OF COURT/RMC  
DARLINGTON COUNTY, SC**