

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Jason Allen Larson, SCDC # 338587

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE THIRTEENTH JUDICIAL CIRCUIT

) Case No.: 2018-CP-23-06333

) ORDER OF DISMISSAL

) **RECEIVED**

) JUL 16 2021

) **SC Court of Appeals**

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This matter comes before the Court by way of an application for post-conviction relief filed December 19, 2018, by Jason Allen Larson (Applicant). On April 30, 2019, the State (Respondent) made its return and partial motion to dismiss, seeking summary dismissal of all claims beyond whether counsel was ineffective for advising Applicant to enter the written plea agreement waiving his rights to challenge his conviction through post-conviction relief pursuant to the written plea agreement. An evidentiary hearing into that issue was convened March 2, 2021, via Cisco WebEx Meetings in accordance with the Chief Justice’s administrative memorandum, *Court Operations*, dated September 14, 2020, and supplemented January 8, 2021.¹ Applicant was present at the hearing and represented by Sarah Henry, Esquire. Assistant Deputy Attorney General Lindsey A. McCallister from the South Carolina Attorney General’s Office appeared on behalf of Respondent. Following the hearing, this Court took the matter under advisement and issued a ruling on March 2, 2021. This order follows.

¹ See S.C. Sup. Ct. Memorandum dated September 14, 2020 (“Judges . . . have discretion to determine whether it is appropriate to conduct a hearing using remote communication technology. *Consent of the parties or counsel is not required.* Please use WebEx, the conferencing platform supported by the Judicial Branch.” (emphasis added)).

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PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for the South Carolina State Grand Jury.² On October 22, 2015, the State Grand Jury indicted Applicant for one count of conspiracy to traffic in cocaine (four hundred grams or more) (2015-GS-47-08) as part of a multi-count, multi-defendant indictment stemming from an investigation into a methamphetamine trafficking ring. On the same date, the State Grand Jury also indicted Applicant for possession with intent to distribute methamphetamine and possession of a schedule I-V controlled substance (2015-GS-47-10) along with co-defendant Felicia Kersey stemming from an October 16, 2014, traffic stop in which quantities of methamphetamine and other illegal drugs were recovered. Scott D. Robinson, Esquire (Counsel), represented Applicant. Assistant Attorney General Joshua Underwood of the South Carolina Attorney General's Office, prosecuted the case.

By plea agreement filed on January 25, 2017, Applicant entered into a written plea agreement, in which he agreed to "fully and truthfully cooperate with the Office of the Attorney General of South Carolina, and any local, state and federal law enforcement agents in their investigation of importation, possession, and distribution of controlled substances and related unlawful activities," in exchange for a recommended sentence range of up to fifteen years imprisonment (effectively, for a sentence of between seven to fifteen years imprisonment) and

² Applicant is also serving active terms of imprisonment for unrelated convictions (assault and battery of a high and aggravated nature and possession of a weapon during the commission of a violent crime) arising out of Pickens County. Applicant pled guilty to these offenses on September 30, 2015, before the Honorable Edward W. Miller and never filed an application challenging these convictions. These convictions and sentences are not being challenged in this post-conviction relief action.

allowing Applicant to plead to the lesser included offense of conspiracy to traffic in cocaine (28-100 grams) and the other two indicted offenses as indicted, with all sentences to be served concurrently with each other and with Applicant's unrelated sentences he was currently serving within the Department of Corrections. As part of this plea agreement, Applicant **expressly waived** his right to both a direct appeal and **post-conviction relief** action. ("The Defendant, Jason Allen Larson, agrees that as a part of the consideration for this plea he will not appeal his plea of guilty or any sentence he receives in General Sessions Court in South Carolina. The Defendant, Jason Allen Larson, acknowledges that he understands that he has a right of direct appeal of his guilty plea or sentence and that he knowingly, voluntarily and expressly waives this right of direct appeal. Additionally, the Defendant, Jason Allen Larson, understands that he has a right to file a post-conviction relief (PCR) action in this case but agrees to knowingly and voluntarily waive any post-conviction relief action except for claims that directly attack the effectiveness of advice to agree to this waiver."). Applicant initialed each page of this written plea agreement and signed this plea agreement on January 25, 2017.

On January 25, 2017, Applicant appeared before the Honorable Perry H. Gravely, circuit court judge, and pursuant to the signed plea agreement, pled guilty to one count of the lesser included offense of conspiracy to traffic in cocaine (28-100 grams) (first offense), possession with intent to distribute methamphetamine (first offense), and possession of a schedule I-V controlled substance. At this hearing, Judge Gravely specifically asked Applicant if he understood the terms of his plea agreement and Applicant affirmed he did understand the terms of the plea agreement and had entered into the plea agreement freely and voluntarily. (Plea Tr. p. 13-14). Judge Gravely accepted Applicant's pleas and deferred sentencing.

On May 18, 2018, Applicant again appeared before Judge Gravely for a sentencing proceeding, represented by counsel Robinson. At this hearing, Robinson requested Judge Gravely not only run Applicant's new sentences concurrently with his unrelated, active sentences for his Pickens County convictions, but also ask that the new sentences be backdated to start when his active sentences started, essentially giving Applicant additional years of credit for time served on his unrelated sentences. The State opposed this request, stating Applicant would be unfairly benefitting from prior crimes if the court were to give him credit for the entirety of his active sentences but did agree Applicant should receive credit for the time served since entering his pleas in this case. Judge Gravely agreed Applicant would be unfairly benefitting from his prior crimes and gave Applicant credit for the time served since his plea was entered (January 25, 2017), but explicitly denied Applicant's request that he receive credit for the entirety of his sentence on the unrelated convictions. Judge Gravely sentenced Applicant to imprisonment for nine years for trafficking in methamphetamine, to eight years for possession with intent to distribute methamphetamine, and to time served for possession of a schedule I-V controlled substance, with the sentences to be served concurrently to each other and to his active sentence. Applicant did not pursue a direct appeal.

ALLEGATIONS RAISED

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

1. Ineffective assistance of counsel
 - a. Counsel failed to respond to Applicant and did not visit with him
 - b. Counsel failed to review discovery with Applicant
 - c. Plea agreement breached because Applicant was not given credit for time served for the entirety of his unrelated sentence,

which is also affecting Applicant's custody status within SCDC.

- i. "Plea agreement stated sentence would run concurrent with the sentence I am serving time for now. Sentence start date should be back dated to June 2014. This start date of 1/25/17 was a split sentence which was not stipulated in plea agreement. . . . Attorney General elected to pick up distribution and controlled substance charges to aide and assist them to indict me on conspiracy. Therefore, I was not allowed to plea (sic) guilty and I entered SCDC with holds and detainers. Because of them picking up charges, I have had to remain a level two custody status instead of a level one. My co-defendant's are receiving all their jail credits. . . ."

As requested relief, Applicant states he is seeking resentencing to give him credit since June 1, 2014, "[s]ince the attorney general took phone records during my jail time for the attempted murder charge and presented to the State Grand Jury as evidence and elected to adopt my distribution and controlled substance charges to couple with the conspiracy indictment."³

Applicant also requests to amend his sentence for trafficking to eight years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record and to observe the witnesses presented at the hearing, evaluate their credibility, and weigh their testimony accordingly. Set

³ Although no amendment to the application was filed, the parties agree Applicant's main contention is that, due to Counsel's ineffective assistance, Applicant was not given time-served credit to which he believes he is entitled. At the hearing, counsel for Applicant explained the allegation in further detail. Applicant alleges the Attorney General in the original case adopted county charges and turned those into the above-listed State Grand Jury indictment. Applicant argues he was not given credit he is entitled to by law for time served in jail on those county charges because the Attorney General did not reference those warrant numbers in the State Grand Jury indictments, and Applicant's attorney failed to inform the court of this issue during the plea hearing. Counsel for Applicant further clarified he is requesting relief in the form of backdating his sentence to October 16, 2014.

forth below are the relevant findings of facts and conclusions of law as required pursuant to section 17-27-80 of the South Carolina Code of Laws.

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel’s deficient performance must have prejudiced the 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. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he would

not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

At the start of the evidentiary hearing, Respondent renewed its motion to dismiss all allegations beyond whether counsel was ineffective for advising Applicant to enter into the portion of the plea agreement waiving his rights to challenge counsel's representation in a post-conviction relief action. Respondent argued that Applicant's plea agreement was valid and enforceable, and pursuant to Sanders v. State, 412 S.C. 611, 617, 773 S.E.2d 580, 583 (2015), Applicant was entitled to raise only the narrow issue as to whether counsel was ineffective for advising him to enter into the plea agreement waiving his right to pursue post-conviction relief. Respondent further argued Applicant still had a judicial remedy available to him to correct the allegedly miscalculated time-served credit, because Applicant could file a grievance with SCDC which can then be reviewed by the Administrative Law Court. See Al-Shabazz v. State, 338 S.C. 354, 370, 527 S.E.2d 742, 750 (2000) (finding issues regarding the calculation of an inmate's sentence, sentence-related credits, and custody status are administrative matters and, thus, cannot be raised in a post-conviction relief proceeding); Jernigan v. State, 340 S.C. 256, 260, 531 S.E.2d 507, 509 (2000) ("We held in Al-Shabazz that if an inmate raises a non-collateral matter with the Department of Corrections (DOC), then the state Administrative Procedures Act (APA) applies and an inmate may seek review of the DOC's final decision under the APA.").

In response, Applicant argued (a) Counsel was ineffective in advising Applicant to enter into the plea agreement and did not fully explain the rights Applicant was waiving by doing so; and (b) Applicant's sentence violates state law and invalidates the plea agreement because he was not given the full credit he is entitled to for time served. Applicant argued the Court needed

to hear testimony and evidence regarding the sentencing issue in order to evaluate whether the advice Counsel gave to waive PCR was proper. Respondent objected, arguing it was not proper to take testimony and evidence on the merits of the credit issue unless and until this Court found Counsel was ineffective in advising Applicant to enter into the waiver provision. Respondent requested the Court continue the hearing due to the late production of documents and potential need to have other witnesses present in order to fully present its case on the merits.

This Court ultimately allowed Applicant to proffer testimony and documents regarding the sentencing issue in order to fully evaluate whether dismissal of all claims beyond this limited issue was proper, and the Court reserved its ruling on the dismissal of all other claims until after the hearing on the limited issue as set forth in Sanders. However, after careful review of the entire record, based on the standard discussed above, this Court finds Applicant has failed to carry his burden of proof regarding his allegation of ineffective assistance of counsel in deciding to enter into the plea agreement. Therefore, the Court grants Respondent's motion to dismiss and denies relief, in accordance with the findings below.

Whether Counsel was Ineffective for Advising Applicant to Waive His Right to Post-Conviction Relief

Applicant proceeded at the evidentiary hearing on the claim of whether counsel was ineffective for advising him to waive collateral review of his convictions through post-conviction relief in exchange for the favorable terms as set forth in the signed plea agreement, namely a significant reduction in sentencing exposure. In support of this allegation, Applicant testified on his own behalf. Applicant testified he is currently serving sentences for ABHAN and trafficking in methamphetamine. Applicant testified he was originally arrested in Pickens County for distribution of methamphetamine – second offense and possession of controlled substance on

October 16, 2014. He testified Dorothy Manigault originally represented him on those charges. Applicant further testified that Scott Robinson later represented him on his other, unrelated Pickens County charges (assault and battery of a high and aggravated nature and possession of a weapon during the commission of a violent crime) as well as the above-listed county drug charges after they were adopted by the State Grand Jury in an indictment on October 22, 2015. Applicant testified the county warrants that were picked up by the State Grand Jury were not directly referenced in the State Grand Jury indictments, although the incidents were the same. Applicant also testified that those county drug warrants were dismissed and transferred to the State Grand Jury.

According to Applicant, Counsel was on extensive medical leave from the time of indictment to the time of sentencing, and he and Counsel had very little interaction. Applicant testified Counsel did not advise him about waiving his right to PCR, but he was aware he waived his right to a direct appeal. Applicant averred Counsel did not guarantee a particular sentence, but he stated they both felt the sentence would be favorable to him and would be backdated to the original arrest in Pickens County. Applicant further testified he believed he was entitled to time-served credit starting on that date, and Counsel assured him he would receive time-served credit. Further, Applicant testified Counsel previously told him the time would be backdated to June 2014. Applicant also testified he never discussed with Counsel the sentences any of his codefendants received nor was he aware of whether Counsel researched the codefendants' sentences, but Counsel was confident the court would backdate Applicant's sentence. Applicant testified several codefendants had received credit for their previous time-served. Applicant acknowledged Counsel raised the issue of credit at sentencing and requested some time-served

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credit, but he testified the judge ultimately did not backdate his sentence to the date Counsel asked for. Applicant testified Counsel did not inform the court about the county warrants for drugs that were adopted by the State Grand Jury, did not inform the court that the warrants were not referenced in the State Grand Jury indictments, did not inform the court that Applicant had served pre-conviction jail time on the underlying warrants, and did not request that the court give him credit for this time. He also testified Counsel did not bring up the credit other codefendants received and did not tell the court that Applicant was legally entitled to this credit.

Applicant testified he was not aware when he waived his right to PCR that this meant he could not file a claim alleging ineffective assistance against Counsel, and he and Counsel did not discuss the implications of waiving his appellate and collateral rights if the sentence was not backdated. Applicant further testified he would not have pleaded guilty if he had known he would not receive the time-served credit and could not file a PCR action on that issue. Applicant stated Counsel did not discuss what remedy Applicant would have if he did not receive the credit Applicant expected.

On cross-examination, Applicant testified he met with Counsel several times when he was brought to court for various hearings. Applicant agreed he and Counsel discussed the plea agreement, but he testified he did not read the agreement. Applicant testified Counsel advised as to what was in the agreement, and Applicant signed and initialed each page, even pages which he had not read. Applicant testified he signed the plea agreement based on Counsel's advice because he wanted to admit guilt and put the situation behind him. Applicant testified it "may have" swayed him not to sign the agreement if he had known he was waiving his post-conviction rights. Applicant stated he recalled Counsel advising him he was waiving his right to a direct

appeal, but he did not recall a discussion regarding post-conviction relief. Applicant testified he did not ask Counsel what would happen if he waived his appellate rights and did not receive the credit because there was no need to do so, as he believed he would receive it. Applicant agreed he told the plea judge he had plenty of time to review the agreement with Counsel, he understood it, and he was pleading guilty freely and voluntarily.

Counsel testified he has been practicing law for twenty years and approximately ninety-eight percent of his practice is criminal work. Counsel stated he was retained to represent Applicant on the Pickens County charges initially and was later appointed to represent him on the State Grand Jury charges. Counsel testified he met with Applicant several times when Applicant was brought to court. Counsel stated he felt it was an adequate number of meetings to effectively represent Applicant.

Counsel explained Applicant was originally facing a mandatory, twenty-five year sentence for the trafficking charge, but he ultimately pleaded guilty to a lesser-included offense, thereby avoiding a mandatory minimum sentence. Counsel testified he engaged in plea negotiations with the State, and the State ultimately offered Applicant a plea bargain with a recommended cap of fifteen years. Counsel testified he and Applicant entered a written plea agreement, which he reviewed with Applicant at length. Counsel testified he reviewed every paragraph of the agreement with Applicant, including the waiver paragraph, and Applicant had plenty of time to ask questions during the process. Counsel stated every plea agreement with the Attorney General's Office contains the provision waiving direct appeal and collateral rights, so he was familiar with the provision. Counsel testified he reviewed that provision with Applicant and explained what both a direct appeal and a PCR action are, including Applicant's right to

challenge Counsel's conduct if he made mistakes. Counsel further testified it would be impossible for him to explain or list every potential PCR claim Applicant could raise. However, he stated he explained that if he made a mistake, Applicant would normally file a PCR but in this case, he would not be able to do so because he was waiving that right in exchange for a substantial benefit in sentencing.

Counsel explained Applicant did not want to take the chance of going to trial on the original charge, and he received a big benefit from the State in pleading to the lesser charge in exchange for waiving these rights. Counsel testified he did not recall Applicant asking any questions about the waiver provision and stated Applicant was focused on avoiding a trial on the trafficking charge. Counsel further testified Applicant is intelligent and could have asked questions if he wanted to do so, and Counsel believed Applicant understood what he was doing in agreeing to the waiver.

Counsel agreed Applicant raised the issue of time-served credit, and Counsel testified he told Applicant they would ask the judge to give Applicant credit for any time Applicant was entitled to receive. Counsel testified he also told Applicant SCDC would calculate the amount of credit, and he did not guarantee Applicant would receive credit for time served on any Pickens County charges or warrants. Counsel stated he made an argument to the judge on this issue, but ultimately the judge did not backdate to the sentence to the date Counsel requested.

On cross-examination, Counsel testified he told Applicant that SCDC would determine how much credit he was due and apply that to his sentence, which would be time-served in jail on the State Grand Jury charges. Counsel testified he did not now recall whether Applicant had outstanding warrants from Pickens County for the charges ultimately prosecuted by the State

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Grand Jury, but he would have been aware of any pending charges at the time. Counsel testified he did not specifically recall if he discussed the warrants with Applicant, though he would have in his normal practice, and he stated he believed Applicant's first attorney dealt with that issue. Counsel also testified he did not recall whether he was aware the State Grand Jury indictment did not list specific warrant numbers and did not point that out the court, and he did not recall whether he made the court aware of the previous warrants. Counsel testified he does not guarantee specific time credit but normally tells defendants that SCDC will compute the time-served credit, and he stated he asked the plea judge for the time Applicant was entitled to.

Counsel testified he explained to Applicant a PCR action is what Applicant could file within a year to see if the attorney's performance fell below a certain standard, and that Applicant would be attacking his performance in that action. He testified he explained a direct appeal would challenge some error the plea court made during the colloquy or in sentencing. On cross-examination, Counsel stated he explained to Applicant that Applicant could file a PCR against him if he made a mistake or if Applicant was unhappy with his performance as his attorney, and he tells all of his clients this information. Counsel further testified he explained to Applicant that Applicant would be giving up that right if he signed the plea agreement. Counsel also testified he explained Applicant was receiving a significantly lower sentence in exchange for waiving those rights. Counsel testified he did not specifically give an example about errors in sentencing, but he explained, generally, what PCR is, and Applicant chose to sign off on the agreement.

After reviewing the record and listening to the testimony presented, this Court finds counsel performed competently in advising Applicant to enter into the plea agreement including

the waiver of post-conviction relief. Under South Carolina law, a criminal defendant can choose to waive his right to collateral review of his conviction. Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008) (holding that a waiver of appellate rights is valid and enforceable as long as it is knowing and voluntary). Plea agreements in general operate under contractual principles and are upheld when each party receives the benefit of the bargain. State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994). However, South Carolina case law also holds that, while appellate waivers are enforceable, a criminal defendant who has waived his appellate and collateral rights is still entitled to raise the narrow issue of whether his attorney's assistance in advising him to enter into the waiver was constitutionally ineffective. Sanders, 412 S.C. at 617, 773 S.E.2d at 583 ("Consequently, we hold that although a defendant may waive his right to collateral review, he is nevertheless still entitled to challenge whether the advice he received in agreeing to that waiver was constitutionally defective.").

Here, Applicant chose to plead guilty and agreed to waive his appellate and collateral rights in exchange for a favorable negotiated sentence. Both parties received a benefit of the bargain, and this Court finds Applicant's plea agreement is valid under contractual law. This Court also finds Counsel's testimony on this issue to be credible. Counsel is experienced in handling similar plea agreements based on his significant criminal defense experience. Counsel's credible testimony establishes that he adequately and fully explained all portions of the plea agreement to Applicant including the waiver of Applicant's direct appeal and post-conviction relief remedies, and Applicant knowingly and voluntarily waived his rights after these conversations with Counsel. This Court also finds Counsel was prepared and competent in his representation of Applicant generally. Therefore, the allegation Counsel was constitutionally

ineffective in advising Applicant to enter into the waiver provision is denied and dismissed with prejudice.

Dismissal of All Other Allegations Beyond Whether Counsel was Ineffective for Advising Applicant to Waive his Right to Post-Conviction Relief

Because this Court finds Applicant received effective assistance of counsel in deciding whether to enter into the waiver provision, this Court dismisses with prejudice all other allegations contained in Applicant's application and raised at the hearing. See Sanders v. State, 412 S.C. 611, 617, 773 S.E.2d 580, 583 (2015) ("[W]e hold that... a defendant may waive his right to collateral review"); Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008) (holding that a waiver of appellate rights is valid and enforceable as long as it is knowing and voluntary). Moreover, Applicant has a remedy available to him as outlined in Al-Shabazz, discussed above, through SCDC's grievance procedure and review by the Administrative Law Court.

CONCLUSION

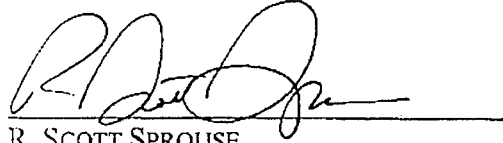
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief must be denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 4 day of June, 2021.



R. SCOTT SPROUSE
Presiding Judge
Thirteenth Judicial Circuit

Walthalla, South Carolina

Copy mailed to Attorney <u>General and S. Henry</u> on <u>6 / 15 / 2021</u>
