ALAN WILSON
ATTORNEY GENERAL

August 13, 2021

The Honorable Renee Elvis
Horry County Clerk of Court
P.O. Box 677
Conway, SC 29528-0677

Re: **Bruce M. Richardson, #229315 v. State of South Carolina**
2019-CP-26-7234

Dear Ms. Elvis:

Enclosed please find the original Order of Dismissal signed by The Honorable William H. Seals Jr., in the above-captioned case, for filing in your office.

In addition, please forward proof of service and a time stamped copy back to our office for our file.

Sincerely,

William H. Ray
Assistant Attorney General

WHR/geh

CC: Carla Faye Grabert Lowenstein, Esquire

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Bruce M. Richardson, SCDC No. 291292	)	Case No. 2019-CP-26-7234
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina	)	
Respondent.	)	

This matter comes before the Court by way of Applicant Bruce M. Richardson's application for post-conviction relief, filed on November 17, 2019. Respondent made its return and partial motion to dismiss on September 14, 2020. An evidentiary hearing was convened on Thursday, June 24, 2021. Applicant was present and represented by Attorney Carla F. Grabert-Lowenstein. Assistant Attorney General William H. Ray represented Respondent.

Applicant testified on his own behalf at the hearing. Plea counsel Clay W. Pinkerton, Assistant Solicitor Scott Graustein, of the Fifteenth Circuit Solicitor's Office, and Robert Hayner also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, the Horry County Clerk of Court's records, the plea transcript, and both the original and amended PCR applications. The Court has reviewed the pleadings and the record, has observed the witnesses, and finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. During its December 2018 term, the Horry County Grand Jury indicted Applicant for first-degree burglary (2018-GS-26-06630) stemming from his August 20, 2018, break-in of a car dealership in Conway, South Carolina, wherein he stole various property. The burglary was captured by surveillance

cameras and Applicant was identified as a suspect. He was apprehended later that day and gave statements implicating himself in the burglary.

Applicant was represented by Attorney Clay W. Pinkerton and Assistant Solicitor Scott Graustein, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On May 6, 2019, Applicant appeared before the Honorable William A. McKinnon and entered a guilty plea to the lesser included offense of burglary, second degree (violent). Applicant was sentenced to fifteen years' imprisonment upon the State's recommendation. Applicant did not appeal his conviction or sentence.

III. CURRENT APPLICATION

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

1. Ineffective Assistance of Counsel
2. Violation of Due Process under the Sixth and Fourteenth Amendment
3. Court acted without subject matter jurisdiction over offense

Applicant served Respondent with amended allegations on June 10, 2021. At the hearing Applicant proceeded forward with these allegations, which alleged he is being held in custody unlawfully for the following reasons:

1. Mr. Richardson was prejudiced because his counsel, Mr. Clay Pinkerton, did not sufficiently discuss with him the difference between first degree burglary and the lessor second degree burglary with violence. It is clear from the plea transcript that Mr. Pinkerton did not have a grasp of the facts of the case and admitted he did not remember whether the case had been true-billed (Plea Transcript, p. 5 at 1-25, and, p.6 at 1).

2. The Applicant did not enter a residence and thus should not have been indicted on first degree burglary. Mr. Pinkerton did not discuss whether or not the court had jurisdiction over Mr. Pinkerton nor did Mr. Pinkerton challenge the jurisdiction. If the court found it did not have jurisdiction there would have been no indictment for which to enter a plea.

The situation in the instant case represents the same situation as in *Padgett v. State*, 19770 324 SC.22), where trial counsel was found ineffective for not challenging the indictment. The indictment was for first degree burglary but the building was a barn not a home. [*Id* at 29].

3. Mr. Pinkerton also did not discuss if there was another manner for the state to show Mr. Richardson was guilty of first-degree burglary. Thus Mr. Richardson was prejudiced in making a decision to enter a guilty plea upon incomplete and inaccurate information.

4. Further, Mr. Pinkerton did not discuss the possible evidence available for the State to show first degree or second degree burglary.

5. Mr. Pinkerton not having full and sufficient knowledge of the existing evidence could not fully advise Mr. Richardson concerning the plea and options. Thus, Mr. Richardson could not receive a fully advised and voluntary plea to the lessor and included charge, especially in light of the fact Mr. Richardson had a history of taking mental health medications; Seroquel for bi-polar condition, and, Prazosin for Post-Traumatic Stress Disorder (PTSD). (Plea Transcript p.3 at 20-24).

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 has alleged various claims of ineffective assistance of counsel. In a PCR action, an 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), SCRCP. 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 578, 592 (5th 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 (4th 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. 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." *Strickland*, 466 U.S. at 670.

Failure to Challenge the Indictments and Jurisdiction of the Trial Court

Applicant alleges that his counsel provided constitutionally ineffective representation by failing to challenge his first degree burglary indictment and also failing to challenge the court's jurisdiction. This Court finds the allegation to be without merit.

South Carolina's first-degree burglary statute requires that the State must prove that a criminal defendant entered a dwelling without consent with intent to commit a crime therein, plus an enumerated aggravating factor. S.C. Code Ann. §16-11-311. Second degree burglary can be proven by either showing that the person entered a dwelling without consent and with intent to commit a crime therein, or that the defendant entered a building with the same criminal intent, plus an enumerated aggravating factors. S.C. Code Ann. §16-11-312. The South Carolina Supreme Court found in *Padgett v. State*, 324 S.C. 22, 484 S.E.2d 101 (1997) that defense counsel's failure to challenge a first-degree burglary indictment may amount to ineffective assistance of counsel if the crime did not take place in a dwelling and the defendant is nevertheless convicted of first-degree burglary. There, a criminal defendant entered a guilty plea to six counts of first degree burglary arising out of a string of burglaries into several dwellings as well as one barn. *Id.* 324 S.C. at 28, 484 S.E.2d at 104. Counsel failed to challenge the indictment relating to the barn, and the Supreme Court found that such a decision cannot be considered trial strategy because the

defense attorney in that case did not recognize a distinction between a barn and a dwelling, and articulated no strategy explaining his shortcomings. *Id.* 324 S.C. at 29, 484 S.E.2d at 104.

An Applicant may challenge the subject matter jurisdiction of the trial court and such a claim is one that may be raised at any time. *Brown v. State*, 343 S.C. 342, 346, 540 S.E.2d 846, 848-49 (2001) (overruled in part by *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)). However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters. *Gentry*, 363 S.C. at 101, 610 S.E.2d at 499, *see also* S.C. Const. Art. V, §11. "[S]ubject matter jurisdiction of the circuit court and sufficiency of the indictment are two distinct concepts and the blending of these concepts serves only to confuse the issue." *Gentry*, 363 S.C. at 101, 610 S.E.2d at 499. "[A]n indictment is merely a notice document." *State v. Baker*, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010) (citing *Gentry*, 363 S.C. at 102-103, 610 S.E.2d at 500. Therefore, a motion to quash an indictment does not challenge the sufficiency of the State's evidence; the sufficiency of the evidence can properly be challenged only by a motion for a directed verdict following the State's presentation of its case at trial. *State v. Massey*, 430 S.C. 349, 358, 844 S.E.2d 667, 671 (2020).

At the PCR hearing plea counsel explained that he was aware that Applicant had not broken into a dwelling, and was therefore indicted for the wrong offense. He explained that the evidence showed that Applicant broke into a car dealership—not a dwelling—at night. He stated that he would have challenged the indictment had Applicant proceeded to trial, but did not believe it was worthwhile because Applicant accepted a plea offer to the proper charge of second degree burglary.

He explained that he had spoken with the solicitor about the indictment and was told that Applicant would simply be reindicted for second degree burglary if the indictment was

successfully challenged. It would have simply amounted to a delay tactic. Given that Applicant was entering his plea to the appropriate charge, he saw no reason to challenge the indictment at that point. He stated that he did not believe the State would be willing to negotiate the plea further because of Applicant's lengthy prior record, but did attempt to argue for less time at the plea hearing.

Robert Hayner, the victim in this case and owner of the car dealership, testified that the building in question was not a dwelling and had not been used as one for at least ten years at the time of the crime.

Assistant Solicitor Scott Graustein testified that he was the solicitor who handled the case, and agreed that second degree burglary was the appropriate charge. He confirmed that plea counsel had brought the issue with the indictments to his attention and he offered Applicant the opportunity to enter a plea to second degree burglary. He also confirmed that he was not willing to negotiate anything less than that because of Applicant's prior record.

Applicant testified and stated that a first degree burglary charge was not supported by the evidence. He stressed that the indictments were incorrect and he was never properly indicted for second degree burglary. On cross-examination he stated that he never intended to go to trial because he was guilty of the crime. His guilt compelled him to enter the guilty plea to second degree burglary.

This Court finds that Applicant's allegation regarding the indictments and jurisdiction are without merit. Applicant cannot meet his burden of showing prejudice from his counsel's performance as a matter of law because he testified that he was guilty of the crime and never intended to go to trial. His admission of guilt is consistent with what he told police after he was arrested, and what he told the plea court at his plea hearing. There simply is no indication that

Applicant ever intended to take the case to trial. Furthermore, the record is clear that Applicant entered his guilty plea to the appropriate offense of second degree burglary. Both the State and his plea counsel were in agreement that he would not have received a friendlier plea offer, even if he had been indicted the second degree burglary offense. Finally, even if a motion to quash the indictment had been made, it would have failed because the indictment is facially valid. Applicant's proffered challenge is a challenge to the sufficiency of the evidence against him, which is not grounds for challenging an indictment before trial. Therefore, Applicant has failed to meet the burden of proving that his counsel's performance prejudiced him.

While the indictment may have charged a greater offense than necessary, plea counsel was aware of the issue and used it to negotiate a plea to a lesser, more appropriate offense. Such is common practice in the Court of General Sessions. This Court finds plea counsel's testimony that he would have challenged the indictment had Applicant proceeded to trial to be credible, and agrees that it would have been largely pointless considering that Applicant was not at risk of being convicted of that offense because he would have challenged it before trial. Applicant's case is distinguishable from *Padgett* because here counsel was aware of the distinction between first and second degree burglary, offered a reasonable strategic explanation for not challenging the indictment, and did not allow his client to enter a plea to a greater offense than the law allows. Furthermore, Applicant has not presented any proof that the plea court lacked jurisdiction over his case, and has made no showing as to what his counsel should have done differently regarding jurisdiction. Therefore this Court finds that Applicant has failed to meet his burden of proving that plea counsel's performance was deficient.

Failure to Properly Advise Applicant Regarding First Degree Burglary

Applicant alleges that his counsel did not sufficiently discuss with him the difference between first degree burglary and the lessor second degree burglary with violence, did not discuss if there was another manner for the state to show Mr. Richardson was guilty of first degree burglary, and did not discuss the possible evidence available for the State to show first degree or second degree burglary. This Court finds these allegations to be without merit.

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 counsel's errors, he would not have pled guilty, but would have insisted on going to trial. *Roscoe v. State*, 345 S.C. 16, 546 S.E.2d 417 (2001).

Plea counsel credibly testified that he made weekly phone calls with Applicant and met with him approximately twenty to twenty-five times while Applicant was in jail. He stated that he had received the discovery of the case, reviewed it with Applicant, and provided him copies. They also discussed Applicant's prior record and his mental health issues. He explained the requirement that Applicant be proven guilty beyond a reasonable doubt. He explained that he never doubted Applicant's ability to understand the charges against him and their consequences, and Applicant had been helpful in developing a defense against the charges. Applicant testified that he had spoken with his attorney about his other burglary charges, which were dismissed as part of his plea agreement. (Tr. 9, 7-22).

This Court finds that Applicant has failed to meet his burden of proving his counsel was deficient in advising him about his case. Plea counsel's testimony shows that he reviewed the discovery and the elements that the State would have to prove. Furthermore, as addressed above,

discussions regarding whether the State could prove Applicant guilty of first degree burglary at trial is of little significance because Applicant stated that he did not intent to proceed to trial and plea counsel stated that he would have challenged the indictments if Applicant had wished to proceed to trial.

Additionally, the plea court explained to Applicant that he was pleading to the lesser included offense of second degree burglary (Tr. 3, 5-10; Tr. 5, 19), that the state must prove his guilt beyond a reasonable doubt (Tr. 6, 3-10), and he agreed with the State's recitation of the facts and asserted that he was guilty of the crime (Tr. 8, 20 – Tr. 10, 7). He has not shown that he would have rejected the plea offer and proceeded to trial but for his plea counsel's advice, nor has he shown any other prejudice resulting from the representation he received. It is clear that he entered his guilty plea because he was guilty, not because of any confusion regarding his charges, or the evidence against him. Therefore Applicant has failed to meet the burden imposed upon him of proving ineffective assistance of counsel, and this Court finds that the application must be denied and dismissed with prejudice.

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 PCR application must be denied and dismissed with prejudice.

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

AND IT IS SO ORDERED this 31 **day of** July **, 2021.**

William H. Seals, Jr.
Presiding Judge
Fifteenth Judicial Circuit

Florence, South Carolina