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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George M. McFaddin, Jr., Circuit Court Judge

Case No. 2017-CP-40-07665

Xavier U. Brannon, #371454, Appellant,

v.

State of South Carolina, Respondent,

NOTICE OF APPEAL

Xavier U. Brannon appeals the Order of the Honorable George M. McFaddin, Jr., dated August 2, 2021, a copy of which is attached. Appellant received written notice of entry of this Order on August 19, 2021.

September 16, 2021

Nancy C. Fennell
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(803) 553-1772
Attorney for Appellant

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Xavier U. Brannon, #371454 Applicant	)	2017-CP-40-7665
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent	)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Applicant, Xavier U. Brannon on December 20, 2017. Respondent made its return, motion to dismiss, and motion for a more definite statement on May 31, 2018. An evidentiary hearing into the matter was convened on June 16, 2021 at the Richland County Courthouse. Applicant was present at the hearing and represented by Nancy Fennell, Esquire. Yasmeen E. Klein, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Respondent presented testimony from Elizabeth Pringle, Esquire.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to meet his requisite burden of proof, denies relief, and dismisses this application with prejudice.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections. During the July 2015 term, the Richland County Grand Jury indicted Applicant for murder (2015-GS-40-2875). Elizabeth Pringle, Esquire represented

Applicant. Assistant Solicitor K. Luck Campbell of the Fifth Circuit Solicitor's Office prosecuted the case.

Applicant pled guilty to the lesser-included offense of voluntary manslaughter on February 13, 2017, before the Honorable R. Knox McMahon. Pursuant to a negotiated sentence, Judge McMahon sentenced Applicant to fifteen years imprisonment. Applicant did not appeal his conviction or sentence.

FACTS

The charges stem from an incident that occurred on February 22, 2015, at the Gonzales Gardens (Plea Tr. 11). Approximately five days prior, Applicant was shot in retaliation for a shootout at a rival gang's party. (Plea Tr. 11). On the date of the incident, Applicant and three co-defendants drove to the Gonzales Gardens when they encountered the victim and three other individuals. (Plea Tr. 11). Applicant and his codefendants began firing at the group of individuals when the victim turned to run and was shot in the back of the head. (Plea Tr. 12). Law enforcement responded to the scene and located the owner of the truck used, who provided the names of Applicant and other codefendants involved. (Plea Tr. 12).

ISSUES RAISED

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

1. "After discovered evidence"
2. "Sentence reduction (lack of evidence)"
3. "Withheld evidence from rule 5"

Applicant submitted a *pro se* amendment to his application on September 27, 2018, adding the following issues:

1. "Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amend to the U.S. Constitution and by Article I, §§ 3 AND 14 of the S.C. Const., during and before the court proceeding to case,"
2. "Supporting facts, trial counsel's performance during the guilt phase was both unreasonable and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984). Counsel actions and omission included but were not limited to, the following:"
    a. "Counsel was ineffective for advising me to plead guilty on the day of trial when counsel and I discussed being prepare for trial,"
    b. "After discovered evidence, the forensic analyst who did the gunpowder reside analysis was terminated for tampering with evidence,"
    c. "Counsel failure to file a reconsideration motion for a sentence reduction based upon the subject matters of the case in chief not disclosed to the court at the guilty plea."

At the evidentiary hearing, PCR counsel for Applicant proceeded on the allegations raised in the amended application, which encompasses and expands upon the allegations in Applicant's original application.

SUMMARY OF RELEVANT TESTIMONY

Applicant's testimony

At the evidentiary hearing, Applicant testified Plea Counsel was appointed and he met with her the first time approximately a month after he was charged. Applicant indicated he and plea counsel met four or time times in person, and had no phone conversations regarding his case. Applicant testified during their meetings he and Plea Counsel discussed the evidence in his case and how to prepare for trial because he wanted to go to trial. Applicant testified Plea Counsel conveyed the plea offer of fifteen years for voluntary manslaughter, which was the first offer he received. He testified they had been preparing for trial and the plea offer "threw him off." Applicant stated he did not believe Plea Counsel was ready for trial and that Plea Counsel told him taking the plea was the best thing because Plea Counsel did not want Applicant to get a life sentence. Applicant testified he became nervous and took the plea. Applicant testified he and Plea Counsel discussed strategy for trial including reviewing the co-defendant's statements, video

evidence, and other evidence related to the case. Applicant claimed he was ready to go to trial and was not thinking about a plea when the offer was made. He testified that he was given one day to consider the offer.

Applicant testified Plea Counsel explained the sentence range and possible exposure of thirty years to life should he go to trial. Applicant stated Plea Counsel told him she did not feel comfortable going to trial because she was concerned if they lost, the Judge may give him a life sentence, which scared him. Applicant stated he thought Plea Counsel was advising him correctly, so he took the plea. Applicant testified he did not fully understand the forensic testing issue but Plea Counsel told him there was gunshot powder residue found in the truck. Applicant claimed that if Plea Counsel had not made him afraid of a life sentence he would have gone to trial. Applicant testified he did not expect to have a plea and on the day of trial he believed counsel was prepared and there was no reason for him to think the day of trial she was not prepared. Applicant stated he did not remember discussing or asking Plea Counsel to file a motion for reconsideration of the sentence. Applicant claimed he thought there should have been a motion because he later learned his co-defendants were serving less time than him.

Applicant stated the next time he talked to Plea Counsel after the plea was approximately three months later when she called him, told him to file an application for post-conviction relief, and mentioned issues with the gunshot residue and an individual from SLED who was fired. Applicant testified his co-defendants got lesser sentences, so he felt his sentence was unfair. Applicant testified he and Plea Counsel discussed notes received from his co-defendants apologizing to him and conflicting statements from the co-defendants. Applicant thought he should go to trial because he felt he did not do what he was charged with. Applicant testified ultimately

he was afraid the day of trial because Plea Counsel said his co-defendants would testify to say anything to save themselves based on the case being gang related.

Applicant testified he and Plea Counsel discussed how much time the charge carried; however, Applicant claimed prior to the plea, he and Plea Counsel never discussed that he may get life, and Plea Counsel never mentioned she thought Applicant may get life. Applicant stated there is nothing else he believes Plea Counsel could have or should have done in her representation.

On cross-examination, Applicant confirmed he reviewed the discovery with Plea Counsel, and gave Plea Counsel his version of the shooting incident. Applicant testified he and his co-defendants drove to where the murder happened and everyone started shooting, but that Applicant did not know someone was killed. Applicant testified Plea Counsel explained that the plea would waive his constitutional rights and right to a jury trial. Applicant testified he remembered responding affirmatively to the plea court's questions about his waiver of rights. Applicant confirmed he told the plea court he was satisfied with his attorney, and expressly telling the court he could not have asked for a better attorney.

Applicant testified the morning of trial Plea Counsel came to him and discussed the plea offer. Applicant said the offer was for fifteen years and Plea Counsel stated she was concerned he would get life because Applicant was facing thirty years to life. Applicant testified he did not want to take the offer because he felt like he did not commit the crime and should not have to serve time. Applicant claimed he told the judge he wanted the deal because he was nervous, despite testifying at the PCR hearing that he did not want to plead. Applicant testified he also did not want to go to trial at the time because he was scared, but he did not want to tell the judge. Applicant acknowledged he told the plea court he was not under any coercion to plead. Applicant was aware of the second forensic analysis performed in his case and after reviewing the report, Applicant

admitted the findings of both reports were the same. Applicant admitted he told the judge during his plea that he had a gun and had fired the gun during the incident. Applicant testified he had no current issues with the evidence.

Plea Counsel's testimony

Plea Counsel testified she was appointed the day after Applicant's arrest, and according to her notes, met with Applicant approximately twenty-six times over the course of her representation. Plea Counsel testified she extensively reviewed the elements of the offense, sentence exposure, relevant evidence, and discovery with Applicant. Plea Counsel indicated the goal was to prepare for trial because Applicant was not extended any plea offers from the State. Plea Counsel stated she reviewed the statements, videos, and other information with Applicant in preparation for trial. Plea Counsel testified Applicant knew he could get life, but the day of the plea, they really discussed the number. Plea Counsel stated she had no question Applicant understood life was a possibility but there was a time crunch and the plea offer did not come until that day. Plea Counsel indicated the State's theory was never that Applicant was the fatal shooter, but he was liable under the hand of one hand of all theory. Plea Counsel testified she hired a crime scene analyst, and went out to look at the truck and worked on the case with two other public defenders. Plea Counsel was unsure of the sentences received by the co-defendants but she recalled fatal shooter received twenty-two years. Plea Counsel testified she had sufficient time to prepare for trial. Plea Counsel indicated she went to speak to Applicant about the plea offer, and the two of them discussed risks. Plea Counsel stated Applicant was free to ask questions and never told her that he was nervous about a life sentence. Plea Counsel acknowledged nervousness would be appropriate in Applicant's situation. Plea Counsel also acknowledged she was nervous for Applicant.

Plea Counsel stated she was prepared and ready for trial, as she had pre-trial motions, direct, and cross examination ready. Plea Counsel testified she thought taking the plea was in Applicants best interest because he would have been facing thirty years at a minimum at trial and the Judge was forthright with his opinion on sentencing. Plea Counsel indicated she discussed this with Applicant and ultimately it was a risk-benefit analysis. Plea Counsel testified the decision to plea was Applicant's alone, but she shared her opinion with him. Plea Counsel stated she did not believe there were proper grounds to file a motion to reconsider Applicant's sentnece. Plea Counsel additionally testified the second SLED analysis did not change anything and was a non-issue. Plea Counsel stated the analysis merely confirmed guns were fired within the vehicle so there would be gunshot reside in the vehicle. Plea Counsel affirmed that accepting the plea was Applicant's choice and she would make the suggestion under those circumstances again.

On cross-examination, Plea Counsel acknowledged Applicant received handwritten notes from his co-defendants that she and Applicant discussed. Plea Counsel testified the notes indicated the co-defendants claimed to have Applicant's back. Plea Counsel indicated she and Applicant discussed that if the codefendants testified the notes would be introduced and used against them. Plea Counsel testified the trial strategy was mere-presence, and the plan was to argue Applicant was with people who randomly decided to start shooting. Plea Counsel testified she and Applicant never had a conversation about a motion for reconsideration, and there are not facts to her knowledge that would have formed the basis for a successful motion. Plea Counsel indicated she believed Applicant was happy with the time he got. Plea Counsel testified she and Applicant reviewed all of the discovery together. Plea Counsel stated the biggest problem was that Applicant was shot five days prior, and the co-defendants were going to testify the incident was motivated

by retaliation for Applicant's shooting. Plea Counsel testified this would give Applicant motive and would be a problem in making their case to the jury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court further had the opportunity to observe the witnesses at the evidentiary hearing and evaluate their credibility, and the Court has weighed their testimony accordingly in its discussion below. This Court finds the combined record of the plea transcript and the testimony and evidence presented at the evidentiary hearing establishes Applicant received effective assistance of counsel, and this application should be denied. Set forth below are the relevant findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "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 the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. 668. As such, an applicant must overcome this presumption in

order to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

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." *Id.*, 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 would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). 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 conclusive, 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)).

This Court finds Applicant has failed to meet his burden of proving he is entitled to post-conviction relief on any of his allegations of ineffective assistance of counsel. Applicant has failed to prove both deficiency on the part of Plea Counsel and any prejudice therefrom. Therefore, for the reasons stated below, the Court denies relief and dismisses the allegations with prejudice.

Failure in advising Applicant to plead guilty on the day of trial

Applicant alleges Plea Counsel was ineffective for advising him to plead guilty the day of trial when he and Plea Counsel had discussed being prepared for trial. This Court finds Applicant failed to meet his burden in proving Plea Counsel was ineffective, and any deficiency suffered therefrom. Rather, this Court finds Plea Counsel credibly testified she and Applicant extensively discussed the risk-benefit analysis of accepting the plea offer rather than going to trial. Plea Counsel credibly testified she met with Applicant approximately twenty-six times during the course of her representation and reviewed all discovery evidence, including conflicting statements and the fact that Applicant's co-defendants may testify against him, with Applicant. Plea Counsel credibly testified Applicant was fully aware of the possible sentence range for the offense, and the burden the State would have to prove at trial. This Court additionally finds credible Plea Counsel's testimony that she was concerned Applicant would receive life due to the implication of retaliation as a motive for the shooting.

Conversely, this Court finds Applicant's testimony he did not want to plea to be not credible. Applicant testified he wished to proceed to trial primarily because he did not feel he should have been charged with the offense. Applicant additionally claimed he pled guilty because he was afraid he would receive a life sentence if he went to trial after Plea Counsel engaged in a risk-benefit analysis with him and shared her opinion regarding the sentence possibilities. Applicant testified he was ultimately afraid to plea and afraid to proceed to trial, but chose what,

at the time, he believed Plea Counsel's correct advice was. The Court notes that Applicant additionally testified there was nothing he believed Plea Counsel should have or could have done to benefit his case. Additionally, the record reflects during the plea hearing Applicant informed the court he could not have asked for a better attorney, which he confirmed during the PCR hearing.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish Applicant had a full understanding of the consequences of the plea and the charges against him or her. *Dover v. State*, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991); *see also Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (Courts must make sure defendants have "a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought, and forestalls the spin-off of collateral proceedings that seek to probe murky memories."). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." *Ray*, 310 S.C. at 437, 427 S.E.2d at 174; *see also Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997).

To ensure the defendant understands the consequences of his guilty plea, the trial judge "usually questions the defendant about the facts surrounding the crime and punishment that could be imposed." *Dover*, 304 S.C. at 434–35, 405 S.E.2d at 392. However, the trial judge "does not have to direct the defendant's attention to every consequence of his plea provided the record reveals affirmative awareness of the consequences of a guilty plea." *Carter*, 329 S.C. at 362, 495 S.E.2d at 776. In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. *See Harris v. Leeke*, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984). When a defendant pleads guilty on the advice of counsel, the plea may only be

attacked through a claim of ineffective assistance of counsel. *Roscoe*, 345 S.C. at 20, 546 S.E.2d at 419.

The Court finds Applicant knew the nature of the charges against him, the terms of the plea agreement, and the consequences of pleading guilty pursuant to the requirements of *Boykin* and *Pittman*. Moreover, this Court finds Applicant has failed to show how Plea Counsel was deficient as Plea Counsel's advice to Applicant regarding the plea offer was reasonable. Plea Counsel accurately advised and informed Applicant of the relevant discovery, strategy, likely testimony from co-defendants, and possible sentence exposure regarding trial, and fairly expressed her opinion that the plea offer was in Applicant's best interest as it significantly lowered his exposure from a minimum thirty-year sentence to fifteen years. Applicant's statement that he did not want to plead guilty or go to trial on the indicted charges are not realities for a criminal defendant. Further, Applicant's assertion he pled guilty due to Counsel's failure to advise him does not reflect the reality of the record – that Applicant chose to plead guilty to avoid a harsher sentence if convicted at trial. Accordingly, Applicant cannot establish he is entitled to relief. *See Goins v. State*, 397 S.C. 568, 726 S.E.2d 1 (2012) (noting an applicant cannot establish prejudice where the defendant did not choose to plead guilty on basis of erroneous advice, but rather on basis of the State's offer to dismiss two charges and recommend a 10-year sentence); *Bennett v. State*, 371 S.C. 198, 203–04, 638 S.E.2d 673, 675 (2006) ("Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial.").

Accordingly, this Court finds Applicant has failed to show any deficiency on behalf of Plea Counsel, and has additionally failed to establish any resulting prejudice. The record reflects Applicant ultimately made a beneficial decision, and pled to less time than the mandatory

minimum he would have faced at trial. Therefore, Applicant has failed to meet his burden to prove Plea Counsel was ineffective and this allegation is denied and dismissed with prejudice.

Failure to file a motion for reconsideration of sentence

Applicant additionally alleges Plea Counsel was ineffective for failing to file a motion for reconsideration of the sentence. This Court finds this allegation to be without merit, and accordingly, dismisses it with prejudice.

Strickland "does not guarantee perfect representation . . . only a 'reasonably competent attorney.'" *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (quoting *Strickland*, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington*, 562 U.S. at 110.

During the PCR hearing, Applicant testified he did not remember discussing filing a motion for reconsideration with Plea Counsel. Applicant admitted he never asked Plea Counsel to file a motion for reconsideration and only submitted his post-conviction relief application after speaking with Plea Counsel over the phone and learning his co-defendants recieved lesser sentences, which he felt was unfair. This Court finds Applicant failed to elaborate any grounds aside from his percieved unfairness of the sentence differences with his co-defendants that he alleges Plea Counsel should have used as a basis for the motion. Ultimately, Applicant acknowledged he never asked Plea Counsel to file a motion despite believing she should have.

This Court additionally finds credible Plea Counsel's testimony confirming Applicant never asked her to file a motion to reconsider. Plea Counsel credibly testified if Applicant had

asked her to file a motion she would have followed up with him to discuss the grounds for the motion. Plea Counsel testified there were no proper grounds for a motion for reconsideration, and that Applicant was satisifed with the time he recieved after the plea.

This Court finds Applicant has failed in his burden to establish Plea Counsel was inffective for failing to file a motion for reconsideration when Applicant never asked Plea Counsel to file, and where Applicant provided no valid grounds for the motion. Plea Counsel's representation and assessment of a lack of proper grounds to support a motion for reconsideration was reasonable and was not ineffective. Applicant has therefore failed to prove any alleged deficiency on behalf of Plea Counsel, or prejudice resulting therefrom. As such, this Court dismisses this allegation with prejuice.

AFTER DISCOVERED EVIDENCE

Applicant alleges he is being held in custody unlawfully as a result of newly-discovered evidence. This Court finds this claim is without merit. The Uniform Post-Conviction Procedure Act states a person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). An applicant requesting a new trial based on after-discovered evidence following a guilty plea must show:

> (1) [T]he newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea to be vacated. In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions."

Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014).

The alleged after discovered evidence Applicant raised in his application consists of information that the SLED forensic analyst who performed the initial gunshot reside analysis in this case had been terminated for alleged issues with how she handled evidence. At the PCR hearing, both the original and second report conducted by SLED reviewing the analysis were admitted into evidence. The record reflects the second analysis of the gunshot reside confirmed the accuracy of the original analysis. The analysis establishes that gunshot residue particles were found inside the vehicle used during the shooting, consistent with several firearms being discharged during the incident. The Court notes the question of whether guns were fired from within the vehicle was never an issue at the guilty plea. Applicant acknowledged during his plea that he fired a gun along with his co-defendants.

Applicant testified he filed his PCR application on the possibility the evidence was tampered with in his case. Applicant testified he was aware and had the opportunity to review the second report. Thereafter, Applicant acknowledged the second report confirmed the accuracy of the first report, and presented no other significant findings. Applicant admitted with this information, he had no issues with the evidence. This Court therefore finds the claim of after discovered evidence to be moot. Applicant acknowledged there was no existing issue with the evidence, as such, his claim fails to satisfy the *Jamison* standard and warrant relief pursuant to S.C. Code Ann. § 17-27-20(A)(4). Accordingly, this allegation is denied and dismissed with prejudice.

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 relief. The Court

finds Plea Counsel's representation was neither deficient nor prejudicial. The Court finds Applicant knew the meaning and consequences of pleading guilty to the charge against him. The Court further finds Applicant voluntarily pled guilty. His voluntariness is evinced by the plea transcript and testimony given at the PCR hearing.

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

IT IS THEREFORE ORDERED:

1. Post-conviction relief is denied and the application for post-conviction relief be dismissed with prejudice; and

2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 2 day of [illegible], 2021.

GEORGE M. MCFADDIN, JR.
Presiding Judge
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

XAVIER U. BRANNON, #371454 Applicant,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

Nancy Carol Fennell, Esquire
Post Office Box 2176
Irmo, SC 29063

This 16th day of August, 2021.

Katie Wade
Legal Assistant for Respondent

LAW OFFICE OF NANCY C. FENNELL, LLC

P.O. Box 2176
Irmo, SC 29063

nancyfennell1@gmail.com (803) 553-1772

September 16, 2021

Jeanette McBride
Richland County Clerk of Court
1701 Main Street, Room 205
P.O. Box 2766
Columbia, SC 29202

Re: Xavier U. Brannon, #371454 v. State of South Carolina
2017-CP-40-07665

Dear Ms. McBride:

Please find enclosed for filing a Notice of Appeal in the above case.

Sincerely,

Nancy C. Fennell

cc: Yasmeen E. Klein, Esq.
Xavier Brannon