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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

HONORABLE H. STEVEN DEBERRY, IV

2019-CP-42-01478

Sam Bunch, #352590

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Sam Bunch appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable H. Steven DeBerry, IV, Circuit Judge on August 3, 2021 an Order issued on September 9, 2021 and filed on September 14, 2021. The Appellant received notice of the judgment on September 20, 2021.

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Sam Bunch, #352590, Applicant, v. State of South Carolina, Respondent.	Case No.: 2019-CP-42-01478 **ORDER OF DISMISSAL**

This matter comes before this Court by way of Applicant's post-conviction relief application filed April 22, 2019. Respondent made its return on June 12, 2019, requesting an evidentiary hearing to be convened. An evidentiary hearing was held on August 3, 2021, at the Spartanburg County Courthouse. Attorney Rodney W. Richey represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel James A. Cheek also testified. After reviewing all records and evidence before this Court, the Court finds Applicant cannot meet his requisite burden of proof entitling him to post-conviction relief. The Court denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was charged for possession with intent to distribute cocaine within one-half mile of a school (2018-GS-42-04545), possession with intent to distribute marijuana (2018-GS-42-04546), possession with intent to distribute cocaine, third offense (2018-GS-42-04547); resisting arrest (2018-GS-42-04548); possession with intent to distribute cocaine base, third offense (2018-GS-42-04549), possession

with intent to distribute marijuana within one-half mile of a school (2018-GS-42-04550), and possession with intent to distribute cocaine base within one-half mile of a school (2018-GS-42-04551). Attorney James A. Cheek represented Applicant. Attorney Tatyana Stepanova Ustimchuk prosecuted the case. On August 29, 2018, Applicant pled guilty before the Honorable J. Derham Cole as indicted on all charges with a recommendation of concurrent sentencing and the cocaine and cocaine base charges being dropped from third to second offenses. Judge Cole sentenced Applicant to imprisonment for concurrent terms of five years for PWID cocaine within a half-mile, five years for PWID marijuana, twenty years for PWID cocaine, one year for resisting arrest, ten years for PWID cocaine base, five years for PWID marijuana within a half-mile, and ten years for PWID cocaine base within a half-mile. Applicant did not appeal his plea or sentence.

Summary of Relevant Facts

On June 30, 2018, Officer Lawrence Smith was on foot patrol when he saw Applicant, whom he knew had a warrant out for his arrest. (Tr. 13). Deputy Smith approached Applicant, told him he was under arrest, and told him to put his hands behind his back. (Tr. 13). Applicant failed to comply and attempted to flee. (Tr. 13). Officer Smith subdued Applicant after a brief scuffle and placed him in handcuffs. (Tr. 13). Officer Smith performed a search on Applicant's person, which revealed a field weight of seven grams of marijuana, two scales, a purple Crown Royal bag containing five clear baggies with an off-white substance, and multiple bills consisting of various denominations. (Tr. 13-14). The drugs found on Applicant consisted of 5.95 grams of marijuana, two baggies containing .12 grams of cocaine, and one baggie containing .30 grams of cocaine base. (Tr. 14).

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Current Action before this Court

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

1. "Denied the right to direct appeal"
2. "Denied of Due Process"
    a. "Court ignored the variance in the amount of drugs stated in the indictment in the actual amount stated in the lab report"
    b. "Counsel failed to do a proper investigation, counsel failed to request a lesser charge based on the evidence presented"
    c. "Denied Due Process when I were sentenced based on what were in the indictment instead of what the amount actually proven"

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective Assistance of Counsel
    a. Failure to seek reduced charges
        i. Failure to argue or otherwise get charges reduced to simple possession, as opposed to possession with intent to distribute
    b. For incorrectly telling Applicant he would either be sentenced to less time than what was actually imposed
2. Coerced guilty plea
    a. Counsel told Applicant he would face more time if he went to trial, thereby threatening him into pleading

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant testified he entered a guilty plea. He testified that the police officer stopped him and did not present a warrant. Applicant fled, was caught, and was found with cocaine and marijuana in his pockets. Applicant stated he wanted Counsel to ask for a lesser sentence, but Counsel did not. Applicant also stated that he should have been charged and convicted of simple possession, not possession with intent to distribute. Applicant stated that Counsel told him he

would only be sentenced to ten years' imprisonment. Applicant stated he did not want to go to trial because he thought he would receive more time than he did by pleading.

Applicant stated that he discussed the scales, bag, and drugs with his attorney and stated it was all because he was a user, not a distributor. Applicant also testified that one of the scales did not work. Applicant stated that he discussed the scale with Counsel, who said it would support a possession with intent to distribute charge. Applicant stated he told Counsel that users can still possess scales without intending to distribute.

Applicant stated he talked to Counsel about the trial; specifically, that he needed time to think about either plea or trial. Applicant stated he did not agree with the charges and sentence relative to his prior record.

Applicant stated that Counsel at one point became angry with him and told him he was going to trial. Applicant stated he refused. Applicant said his then-girlfriend saw them arguing as they entered the courtroom. Applicant stated that Counsel told him he would make sure he is sentenced to twenty-five years if he proceeded to trial. Applicant testified that Counsel looked at his then-girlfriend with "hand expressions" to see what he should do. Applicant stated she was taken out of the room and then came back in and told Applicant to listen to Counsel.

Applicant stated he was not threatened into pleading, but said he was coerced and pressured by his lawyer to plead. Applicant stated he did not want a new trial but, instead, wanted a sentence reduction or a vacated sentence.

On cross-examination, Applicant stated he met with Counsel three times before the plea to discuss pleading or going to trial. He stated he remembered being told he could face up to thirty years imprisonment for one of the charges, but still thought he would get less time. He stated he decided to plea because he felt threatened by Counsel. Applicant stated that Counsel

told him he would likely serve more time by going to trial. He stated he wants a lesser sentence, but failed to state he would rather have gone to trial. Applicant stated Counsel was against him and was upset that the plea hearing was before Judge Cole. Applicant stated that Counsel requested he serve the minimum sentence, but Counsel really should have requested home detention. Applicant stated that he was informed of the sentencing ranges that were associated with the charges.

Counsel Testimony

Counsel stated that he did not threaten Applicant, but instead let him know that his main charge carried twenty-five to thirty years' imprisonment. Counsel informed Applicant that if he went to trial, he likely would have been sentenced to less than twenty-five years. He stated he reviewed the facts of the case, and that Applicant was facing significant time because of circumstantial evidence against him. Counsel stated he had prior convictions for unrelated drug crimes, had just been paroled, and that he has seen very few drug addicts who carry around a crown royal bag with multiple drugs and scales. Counsel stated that a jury would likely find him guilty beyond a reasonable doubt and would not view him favorably due to his presentation. Counsel stated that he did not demonstrate a person of addiction that he claimed to be, and that he had money on him. Counsel claims that if it was simply an addiction and he was not dealing, he would not be buying a small amount of drugs while also leaving money in his pocket.

Counsel stated that if he went to trial it would have been before a traveling judge; likely Judge Verdin, though he does not recall for certain. Regardless, Counsel stated that if Applicant was found guilty at trial the Judge would have had no choice but to sentence him to the mandatory minimum and that his other pending charges would have remained unaddressed. Specifically, Counsel said his resisting arrest charge would have been presented to the grand

jury. Counsel stated that he would have loved it if this case went to trial because then another attorney would have handled it, given that Counsel only handles criminal cases involving pleas. Counsel stated that Applicant is an articulate and intelligent person who understood their discussions. Counsel stated he understands this to be true because Counsel personally adopted Applicant's biological brother. Counsel stated that Applicant had a twelve-year-old daughter he wanted to get back to as soon as possible. Counsel stated that a lesser sentence would be great, but he could not get one given his background and charges. Counsel stated a new trial would not be in Applicant's best interest.

On cross-examination, Counsel stated he has been practicing criminal law for forty years and that his experience indicated to him that Applicant would have lost at trial. Counsel stated he made Applicant well aware of the potential sentencing ranges and encouraged him to plea on that basis. Counsel stated it was Applicant's decision to plead and that he was not threatened or coerced into pleading. Counsel stated he spoke with Applicant's then-fiancé, who ultimately supported his decision to plead.

Court Colloquy with Applicant

After testimony, the Court engaged Applicant in a colloquy, informing him that it cannot reduce his sentence, but can only put him in the position he was in before the plea, where he can either plea again or proceed to trial. Applicant insists he can get a lesser sentence because he has read it in a law book. The Court, after confirming with both Applicant's PCR Counsel and the State, informed him that the court cannot give him a sentence reduction. Applicant began deliberating whether or not he wanted to withdraw or proceed forward with the hearing. The Court, recognizing this deliberation, stated that he was going to deny relief for Applicant's

failure to meet his burden of proof anyway, which would put him in the same position as if the application was withdrawn. Accordingly, the Court denied relief.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the plea transcript, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Effective assistance of counsel does not mean perfect or mistake-free representation. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.'" (citation omitted)); *Burt v. Titlow*, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-688.

When an applicant asserts ineffective assistance of counsel as a ground for relief, the

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applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Under the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show a deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690); *see Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting counsel's strategic decisions are to be afforded "strong presumption" of reasonableness that the defendant must overcome); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances to overcome the presumption of adequate representation). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent

representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

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

In the context of a guilty plea, the applicant must show there is a reasonable probability that but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Applicant's right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the guilty plea process. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Absent valid reasons why the applicant is entitled to depart from previous judicial admissions

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made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

Validity of Plea

For a plea to be valid, the applicant must have been aware of the nature and crucial elements of the offense the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama,* 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29 (2000). A plea is not knowing or voluntary if a defendant "lacks knowledge of material evidence in the prosecution's possession." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "'[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.'" *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, "guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea." *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

This Court finds Applicant's plea was entered freely, voluntarily, intelligently, and knowingly. Applicant stated he understood the charges and indictments and that he was informed of the charges and possible sentencing ranges involved in each charge. (Tr. 4). He stated he told

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Counsel all relevant facts associated with the charges and that he and Counsel talked about the fact that he did not have a plausible defense. (Tr. 4). Applicant waived the presentment of the charges before the grand jury. (Tr. 5). He also stated he knew he was waiving his rights, including the right to remain silent, to call and confront witnesses, and to proceed to a jury trial. (Tr. 5-7). He stated no one threatened, promised, or coerced him into pleading, that it was being freely and voluntarily entered, that he wanted to plead guilty because he was guilty of all charges pled to and that he understood the sentencing ranges and fines. (Tr. 7-9). Applicant stated he understood the serious offense distinction associated with his main charge. (Tr. 7-9). After this, Applicant stated he still wants to plead guilty. (Tr. 9). Applicant stated he has not used drugs the fifty days he has been in jail leading up to the plea hearing, that his addiction nor his paranoid schizophrenia did not impact his ability to understand the plea, that his mental health is not as severe as it used to be, and the last time he took medication under a doctor's care in 1996. (Tr. 11-13). Thus, the plea transcript indicates that Applicant knowingly, intelligently, freely and voluntarily entered his plea.

Coerced into Pleading

Applicant claims Counsel threatened him into pleading by informing him that he would likely serve more time if he went to trial. However, at the plea hearing, Applicant stated that he was not threatened, promised, or coerced into pleading. (Tr. 7-9). Additionally, when asked, in retrospect, if he would have rather proceeded to trial, Applicant stated he did not want to go to trial but wanted a sentence reduction. Further, at the PCR hearing, Counsel stated that he informed Applicant he would likely serve more time if convicted at trial as opposed to pleading but denied he threatened Applicant into pleading. Accordingly, this Court finds that Applicant freely and voluntarily plead and was not coerced into pleading by Counsel informing him he

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would likely face a harsher sentence if he was found guilty at trial because the sentencing range permitted was twenty-five to thirty years. A harsher sentence at trial was a consideration in deciding to plea, and does not affect the plea's validity, voluntariness, or knowingness of the plea. Accordingly, relief is denied on this ground.

Informing Applicant, He Would Serve Less Time

Applicant claims his plea was invalid and Counsel ineffective. Applicant claimed he was promised by Counsel that he would serve a lesser sentence than he received. Applicant's statements concerning the sentence fluctuated between: "he thought he would receive ten years' credit for time served with the rest being served while on probation", and "that he thought it would be served on home detention instead". However, he recognized that the Judge did inform him he could face up to thirty years for the possession with intent to distribute cocaine charge. (Tr. 9). He also told the Judge at the plea hearing that no one promised him anything in order for him to plea. (Tr. 7-9). At the PCR hearing, Counsel rejected the idea that he told Applicant that he would serve a shorter sentence if he pled and, instead, stated that he informed Applicant of the sentencing ranges and that he would likely serve less time if he pled. Further, Applicant stated he did not want a new trial because he would likely serve more time than he received by pleading. Thus, this Court finds that Applicant knowingly, intelligently, freely, and voluntarily pled while knowing the potential sentence he was being exposed to. Regardless, no prejudice is found because Applicant was seemingly unwilling to proceed to trial. Accordingly, relief is denied on this ground.

Failure to Seek Reduced Charges

Applicant claims Counsel was ineffective for failing to get the charges reduced to simple possession. However, Applicant stated he understood he pled to possession with intent to

distribute charges, as applicable, and that he decided to plea because he thought he would get less time than proceeding at trial. Additionally, Counsel testified that he thought that circumstantial evidence indicated that Applicant intended to distribute, given that he had two scales, a good amount of cash, and a Crown Royal bag containing multiple different types of drugs. Counsel stated that regardless of whether Applicant intended to keep all the drugs to himself or distribute them, he thought the State had enough evidence to convict because it is rare a user has that much cash on their person and a crown royal bag full of different types of drugs. Thus, Applicant decided to plead while knowingly he was pleading to possession with intent to distribute; not simple possession. Additionally, because the evidence supported the possession with intent to distribute charge, Counsel was not deficient for failing to seek a lesser charge. Regardless, Applicant stated he did not want to go to trial and, accordingly, no prejudice is found. Thus, relief is denied on this ground.

Failure to Seek Lesser Sentence

Applicant claims Counsel failed to properly mitigate the sentence so he would serve less time or be released on probation or home detention instead. At the plea hearing and in mitigation, Counsel stated Applicant suffered several tragedies in his life that caused him to cope through drug use, that the amount of actual drugs involved is .9 grams, and that the scales used were for personal use only. (Tr. 15-17). Counsel requested the Court consider the minimum sentence and requests the Court consider the possibility of home detention. (Tr. 17). Thus, the allegation that Counsel failed to seek a lesser sentence is refuted by the record. Accordingly, relief is denied on this ground.

Conclusion

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

This Court notifies 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 Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 9th day of September, 2021.

H. STEVEN DEBERRY, IV
Presiding Judge
Seventh Judicial Circuit

Florence, South Carolina.