

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

William A. McKinnon, Circuit Court Judge

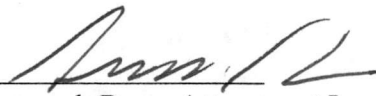
2019-CP-42-3713

Anthony Banks , ..... Appellant,  
v.  
The State, ..... Respondent.

NOTICE OF APPEAL

Anthony Banks appeals the Honorable William A. McKinnon's Order of Dismissal filed October 22, 2021.

This 11 day of November, 2021.

  
Susannah Ross, Attorney at Law  
330 E. Coffee St.  
Greenville, SC 29601  
(864) 242-0029  
Attorney for Appellant

Other Counsel of Record:  
Chelsey Marto, Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-3970  
Attorney for Respondent

STATE OF SOUTH CAROLINA )  
 COUNTY OF SPARTANBURG )  
 )  
 )  
 Anthony Banks, #214073, )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 Respondent. )  
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IN THE COURT OF COMMON PLEAS  
 FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-42-03713

**ORDER OF DISMISSAL**

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This matter comes before this Court by way of Applicant's post-conviction relief application filed October 21, 2019. Respondent made its return on March 6, 2020, requesting an evidentiary hearing be convened. An evidentiary hearing was held on September 16, 2021, at Spartanburg County Courthouse. Susannah C. Ross, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Brendan M. Delaney, Esquire, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

**Procedural History**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. During the August 2018 term, the Spartanburg County Grand Jury indicted Applicant for first degree criminal sexual conduct with minor or attempt with victim under eleven years of age (2018-GS-42-04499). During the October 2019 term, the Spartanburg County Grand Jury indicted Applicant for possession with intent to distribute marijuana (2018-GS-42-5784), possession with intent to

distribute methamphetamine (2018-GS-42-5783), trafficking in cocaine more than ten but less than twenty eight grams (2018-GS-42-5782), and escape (2018-GS-42-5781). Brendan M. Delaney, Esquire represented Applicant. Assistant Solicitor Wendy Hallford prosecuted the case. On February 13, 2019, Applicant pled before the Honorable J. Mark Hayes, II, circuit court judge, to a negotiated seventeen years' imprisonment. Judge Hayes accepted the plea and sentenced Applicant to seventeen years' imprisonment. Applicant did not appeal his conviction or sentence.

**Summary of Relevant Facts**

Applicant was charged with escape based upon a text alert sent to home detention on June 19, 2018, alerting them Applicant entered victim's zone and the home detention monitor was tampered with. (Plea Tr. 9-10). They were unable to get in touch with him and ultimately located the device with a cut strap. (Plea Tr. 10). On July 11, 2018, officers approached him to issue a warrant while he was in his car. In the car, they found 2.8 grams of marijuana, 18.2 grams of cocaine, and 5.6 grams of crack cocaine on him. (Plea Tr. 10). They also found sandwich bags, a bottle of powder, a scale, a police scanner, and currency on him. Defendant was arrested on aforementioned charges. (Plea Tr. 10).

**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 in that:

1. Defense counsel was ineffective because:
  - a. "evidence exists that shows flaws in the indictment process."
  - b. "[the] original plea offer expired prior to counsel's presentation to Applicant."
  - c. "Failure to investigate, develop and present evidence critical to Applicant's decision to plead or proceed to trial."

Applicant amended his application on August 13, 2020, alleging:

1. Ineffective assistance of trial counsel for failure to:

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- a. Move to quash the indictment or investigate the grand jury proceedings; and
- b. Properly communicate and advise applicant regarding the State's plea offer and failure to accept the plea offer prior to its expiration.

At the PCR hearing, Applicant proceeded forward solely on the allegations raised in the amended application. All other allegations raised in his initial application and amended application are deemed waived and abandoned and, accordingly, will not be addressed in this order.

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**Summary of the Testimony**

***Applicant Testimony***

Applicant testified he knew the remedy afforded in PCR actions and still wanted to proceed. Applicant stated his plea attorney was Brendan Delancy. Applicant stated Counsel presented him a plea offer for fifteen years. Applicant stated that the day he was presented with the fifteen year plea offer he was cussing his attorney out because he was trying to get him to plead to something he did not want to plead to. Applicant testified Counsel wrote the plea offer on a notepad and gave it to him to think about. Applicant stated he has since lost that paper. Applicant stated he asked for time to think about the offer and that he ultimately told Counsel he would accept the offer. Applicant stated that a couple days went by, he spoke with his wife, and then asked Counsel to come see him, but he never came. Applicant stated that on October 3 he was told by Counsel that he would meet with him soon. However, Applicant testified that by the time he came back the deadline had passed and the offer was bumped up to seventeen years' imprisonment.

Applicant stated that Kiosk reports are developed as a part of the mail system within the department of corrections. Applicant testified that Counsel came to see him and offered him the plea on August 15. Applicant stated that the second time he wrote Counsel he asked that he come see him on September 9 and he again wrote Counsel on September 15. Applicant testified that

Counsel did not answer him. He stated he wrote Counsel again on October 1 and Counsel finally answered on October 3. Applicant testified that Counsel told him he would visit him soon. Applicant stated this conversation took place a month and a week later. He testified he does not know what happened with the plea offer, but that if he had a chance to accept it, he would have received fifteen years' imprisonment, not seventeen.

Applicant stated that the date on his indictment does not correlate with the grand jury calendar dates. Applicant stated this means that they could not appropriately true bill the indictment when they stated they did because of the discrepancy in dates. He stated Counsel could have caught that and brought it up prior to the plea. He alleges they were fraudulent indictments. He stated he understood Counsel should have objected to the indictments prior to the plea, and says his failure to do so was ineffective assistance. Upon examination, this Court discovered that the dates on the indictment and on the court calendar did line up and no discrepancy was found, which Applicant conceded upon further examination.

On cross-examination, Applicant stated he spoke with Counsel approximately three times twice in person and once over the phone. Applicant state they discussed the case and he told him that he wanted a trial on the criminal sexual conduct charge because he thought he would win, but that it was ultimately dismissed. Applicant stated he requested a plea for the drug charges. Applicant stated he was told that he was looking at a third strike life sentence. He testified that Counsel told him about the fifteen year offer and then did not follow up.

He stated Counsel is a good attorney "on the low", but believes he messed up because his workload may be too heavy. Applicant stated he was served with an I.WOP notice. He testified he entered a plea to seventeen years' imprisonment because he did not know he was going to court that day. Applicant stated that he was dissatisfied with Counsel's performance and that

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they talked about his concerns privately during the plea hearing. Applicant stated Counsel told him he could not get a better plea deal. Applicant stated he still proceeded forward because they were in the plea hearing and everything was happening on the spot. Applicant stated he wished he did not take extra time to think about his options, because it led to the fifteen year offer lapsing. Applicant stated he would have taken the offer but could not get in touch with Counsel until after it lapsed. Applicant stated he did not care if the criminal sexual conduct charge was dropped in the original offer because he thought it was made up and he would win at the trial. Applicant stated he wanted his brother at the plea hearing but that there was no time to ensure his family was present at the hearing. Applicant testified he did not know what was going on with Counsel during the time when he would not get back in touch with him, but it cost him the offer.

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*Counsel Testimony*

Counsel stated that he works for the public defender's office and has been practicing law for twenty-one years. He stated he began representing Applicant in 2017 or 2018. At the time, Counsel testified Applicant was incarcerated with a very high bond.

Counsel stated there were serious child sexual abuse allegations made by Applicant's girlfriend's six-year-old child. Counsel testified that the State's theory of the criminal sexual conduct charge was that the mother was in denial about the abuse and had subjected the child to the abuse. Counsel stated that though there was denial by the mother about the abuse, the people at the Child Advocacy Center said that she had acknowledged the allegations. Counsel stated that from his review of the evidence, he did not believe the allegations were fabricated.

Counsel stated that he had numerous conversations with Applicant's brother about the case, whom he knew personally. In these conversations, Counsel said they discussed issues like bond and the charges. Counsel stated that Applicant was released from jail and at one point cut

off his ankle monitor. Counsel stated they found him two days later with large quantities of cocaine. Counsel testified he was put back in the detention center shortly thereafter.

Counsel stated he entered his appearance and received discovery for the drug charges. Counsel opined that the State had a very strong case because Applicant was caught literally holding up the drugs and a scale when the police approached him, as if to say "I surrender."

Counsel stated that the most serious charge Applicant was facing was the child sexual conduct charge, for which he was served with a notice of intent to seek life without parole. Counsel stated he was surprised at the offer. Counsel stated that in child sexual assault cases the State usually offers something to avoid having the child testify. However, Counsel testified in this case they offered to dismiss the charge entirely in exchange for a negotiated plea on the drug charges. He stated that Applicant dodged a bullet on this charge. Counsel stated he was curious whether something happened with this charge that caused the State's case to implode, but was unsure whether or not that was the case. Counsel stated that, given the circumstances, he did not want to take the gamble.

Counsel stated he took this offer to Applicant. Counsel testified that the original offer was a plea to the drug charges for twenty years' imprisonment and dismissal of the sexual conduct charge. Counsel stated that there was no expiration date concerning acceptance of the offer. Counsel stated that Applicant told him he wanted a fifteen years' imprisonment sentence. Counsel stated he asked the prosecutor for a fifteen years' imprisonment sentence. After several weeks of back and forth, Counsel testified that he talked the prosecutor down to seventeen years' imprisonment before they refused to lower it any more. Counsel stated that on the court date he asked for sixteen years' imprisonment and was told no. Counsel stated that the fifteen years' imprisonment sentence was only posed as a counteroffer, not an actual offer from the State.

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Counsel testified that it is common for kiosk messages to age out of relevance before a response is sent. Counsel stated that typically if you write a client back immediately and inform him that there is no new information they will immediately write back with new questions. Counsel stated he would set up a visit with his client if he had new information to provide him with. Counsel stated that the kiosk is not a good way to confidentially communicate with incarcerated clients. Counsel stated it is best to reserve the kiosk for general information about scheduling or to make them feel satisfied that their attorney is continuing to work on their case.

On cross-examination, Counsel stated that the plea offer was made casually through email, but no formal offer sheet was produced. Counsel stated that no deadline for acceptance was placed on the plea, which is not necessarily the norm, but Counsel stated he thought that was done this way because Applicant was out on bond and then re-arrested. Counsel stated that both parties knew Applicant was not going anywhere until the case was resolved. Thus, Counsel stated he did not think the State viewed it as a time sensitive issue.

**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

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application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the 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*.

Pursuant to 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 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). 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

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"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. Realistically, this matters "only in the rarest case" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

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 deficiency; it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice than course should be followed. *Id.* at 696-97.

***Failure to Communicate Plea Offer***

Applicant claims Counsel was ineffective for failing to communicate a fifteen years' imprisonment offer to him before it lapsed. "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 134, 145 (2012). Further, ineffective assistance is given "[w]hen defense counsel allow the [plea] offer to expire without advising the defendant or allowing him to consider [the plea]." *Id.* at 145.

When determining prejudice for failure to convey a plea, a case-by-case determination is made "assessing whether but for counsel's deficient performance a defendant would have accepted the State's proposed plea bargain and that he would have benefited from the offer."

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*Bell v. State*, 410 S.C.436, 443, 765 S.E.2d 4, 7 (2014). Prejudice is found if applicant "would have taken the plea offer had [he] been afforded effective assistance of counsel", if "the plea would have been entered without prosecution canceling it or the trial court refusing to accept it", and "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Collins v. State*, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (quoting *Frye*, 566 U.S. 147) (quotations omitted). Presumed prejudice is reserved to limited situations. *Bell*, 410 S.C. at 443, 765 S.E.2d at 7.

This Court finds it unlikely than a plea offer was ever extended to Applicant at all. Counsel credibly testified that the only mention of a fifteen years' imprisonment plea offer was as a counteroffer and that the original offer from the State was twenty years' imprisonment, which was then reduced to seventeen years' imprisonment. Counsel is not deficient for failing to communicate a non-existent plea offer and Applicant was not prejudiced as a result. Applicant has not offered any proof of this offer's existence other than his own self-serving testimony and therefore has failed to meet the burden imposed upon him. The allegation shall be denied and dismissed with prejudice.

#### *Issues with Indictments*

Applicant alleges he is entitled to PCR relief because there were flaws in the indictment process, as it pertains to the date on the indictment sheet and the court calendar not lining up. Challenges to the indictment must be raised before a jury is sworn in. S.C. Code Ann. § 17-19-90 (2003). If non-jurisdictional defects apparent on the face of the document are not raised before then, they are waived. *Hooks v. State*, 353 S.C. 48, 577 S.E.2d 211, (2003), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *State v. Young*, 243 S.C. 187, 133 S.E.2d 210 (1963). Sufficiency of indictment is found when the offense is stated with

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enough specificity that the court knows what judgement to announce and the defendant knows what he has to answer to and whether he can plead acquittal or conviction upon it and whether it apprises defendant of offense that is intended to be charged. *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) citing *State v. Wilkes*, 353 S.C. 462, 465, 578 S.E.2d 717, 19 (2003).

This Court finds this argument is without merit because the dates on the indictment and on the calendar correspond with one another. The discrepancy Applicant alleged of does not exist. Applicant acknowledged as much during the evidentiary hearing. However, even if the discrepancy existed, this was waived when Applicant freely, knowingly, and voluntarily entered the guilty plea. Thus, this claim is without merit and relief denied on this ground.

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Conclusion

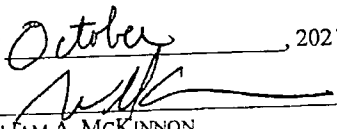
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies the 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), SCRCR provides that if the 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 12 day of October, 2021.

  
WILLIAM A. MCKINNON  
Presiding Judge  
Seventh Judicial Circuit

Spartanburg, South Carolina.

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