STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Christopher W. Johnson, SCDC No. 332825,	)	Case No. 2019-CP-42-04314
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina	)	
Respondent.	)	

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This matter comes before the Court by way of Applicant Christopher W. Johnson's application for post-conviction relief, filed December 9, 2019. Respondent made its return on February 26, 2020, moved for a more definite statement, and requested an evidentiary hearing. Applicant, through PCR Counsel, amended his application on September 8, 2021. An evidentiary hearing was convened on September 14, 2021, at the Spartanburg County Courthouse in Spartanburg, South Carolina. Applicant was present and was represented by Attorney Susannah Ross, and Assistant Attorney General William H. Ray, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Attorney E. Joshua Schultz, Applicant's grandmother Betty Johnson, and James Norman, his employer at the time of his plea also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records from the Spartanburg County Clerk of Court's Office regarding the subject convictions, and the pleadings. The Court has reviewed the record and pleadings, heard the testimony, observed the witnesses, and finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. During its May 2019 term, the Spartanburg County Grand Jury indicted Applicant for three counts of failure to stop motor vehicle (2019-GS-42-2733, -2734, and -2735), possession of a firearm or ammunition by a person convicted of a violent crime (2019-GS-42-2736), possession with intent to distribute cocaine base (2019-GS-42-2737), and possession with intent to distribute marijuana (2019-GS-42-2738). Applicant was represented by Attorney E. Joshua Schultz. Assistant Solicitor Katie Sieber, of the Seventh Circuit Solicitor's Office, prosecuted the case. On November 7, 2019, Applicant appeared before the Honorable J. Mark Hayes, II, and entered a guilty plea, as indicted, to all offenses, without any negotiations or recommendations. Judge Hayes sentenced Applicant to fifteen years' imprisonment, suspended upon the service of ten years' imprisonment, followed by five years' probation for possession with intent to distribute cocaine base; three years' imprisonment for each failure to stop a motor vehicle offense; five years' imprisonment for the weapon charge; and five years' imprisonment for possession with intent to distribute marijuana, with all sentences running concurrently. Applicant did not pursue a direct appeal.

II. FACTUAL HISTORY

On August 10, 2018, Applicant failed to stop after speeding off from an officer initiating a traffic stop for speeding and swerving out of the lane. (Tr. 17). On August 11, 2018, Applicant again failed to stop after the officer activated his blue lights after identifying the car as being the same car that failed to stop the night before. (Tr. 18). He was spotted again on September 12, 2018 and in an attempt to avoid the police, Applicant drove onto several peoples' yards and eventually was hit by another car, causing him to stop. (Tr. 18-19). Once stopped, the officers found a black

handgun, a bag of marijuana, and 1.96 grams of crack cocaine, a bottle of pills, and a set of black scales in Applicant's possession. (Tr. 19).

III. CURRENT APPLICATION

In Applicant's initial *pro se* application for post-conviction relief, he alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
   a. I asked my lawyer to contact my family and by Employer the day before my plea date [and] also the day of for my support and he did not.
   b. My lawyer also closed out his very unimpressive argument by degrading me when he stated "your Honor, Mr. Johnson is someone who is very pathetic."
   c. I pled guilty to charges that I did not agree with and in doing so I admitted guilt in the hopes that it might please the court. I was given the max on every non-violent charge.

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In Applicant's amended application, filed through counsel on September 8, 2021, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of trial counsel for
   a. failing to contact mitigation witnesses to address court on the Applicant's behalf.

Applicant indicated at the hearing that he was proceeding forward on the allegations raised in his amended application. Therefore the claims raised in his initial application are deemed to be waived and abandoned, and they will not be addressed further herein.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses, 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:

Ineffective Assistance of Counsel

In a PCR action, 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 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)).

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.

Failure to Call Mitigation Witnesses

Applicant alleges that his counsel provided ineffective assistance when he failed to call Applicant's grandmother and employer as mitigation witnesses at his plea hearing. This allegation is without merit.

A PCR Applicant alleging ineffective assistance of counsel for failure to present mitigation evidence cannot meet their burden simply by showing that counsel failed to present evidence that "numerous people who knew [Applicant] thought he was generally a good person." *Strickland*, 466 U.S. at 700. Instead, it must be shown that counsel failed to present strong evidence of mitigating circumstances, such as a history of mental health issues, drug abuse, childhood trauma, or limited intellectual capacity. *See Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008) (finding that a defendant was prejudiced by counsel's failure to investigate and present mitigating evidence beyond the brief testimony of the defendant's mother.).

At the plea hearing, Counsel stated in mitigation that Applicant was in his early thirties, had a ninth grade education, had three children, and had been trying to change his life around by working at a salvage dealership. (Tr. 24). He explained that Applicant had previously been the victim of a violent crime, was paralyzed from the waist down, and suffered from post-traumatic stress disorder as a result. (Tr. 24 – Tr. 25; Tr. 27). He explained that Applicant had been staying away from drugs and had done well on home detention. (Tr. 25). He also noted that Applicant only had a small amount of drugs and requested credit for over a year of time served. (Tr. 25 – Tr. 26). Counsel stated that Applicant knew he needed to reform his behavior because he was in a "very tough situation" and requested a probationary sentence because of his medical condition. (Tr. 26). Counsel also described Applicant as a "very pathetic individual." (Tr. 26). He stated that he meant no offense by that comment, but stated that Applicant "looks like pathos at least to me, and I – he's always been a very genial type of person." (Tr. 26).

Applicant stated that he agreed with the statements made by his lawyer. (Tr. 28). He then apologized to the officers involved in the case and stated that the crime was the result of inadequate psychiatric care he was receiving at the time. (Tr. 28). He stated that he ran from the police because he was afraid of going to jail. (Tr. 28 – Tr. 29). He stated that he was not a bad person and was "man enough to, to accept whatever is coming. . . ." (Tr. 29). Finally, he stated that his boss and his grandmother would have been present but were not because his lawyer was very busy and did not get a chance to call them. (Tr. 29).

At the evidentiary hearing Applicant testified that his attorney insulted him by calling him "pathetic." He stated that nobody was present to speak on his behalf at his plea hearing, even though he had spoken with his attorney about it the day before and the day of the hearing. He wanted his grandmother and employer to be present, and acknowledged that that was put on the

record. He stated that their testimony may have been helpful to him, and he did not like how it appeared that he had no support system. He stated that he was struggling from substance abuse and mental health disorders at the time he committed the crimes, but was still keeping a job. He explained that he had been receiving treatment for these issues while he was out on bond. He stated that he was not told that he would be unable to call witnesses if he entered a guilty plea. He stated that he wanted a negotiated plea, but never got any such offers or recommendations.

Applicant's grandmother, Betty Johnson, testified that she had spoken with Counsel about going to the plea hearing. She said that she would have been present, but did not know that he had entered his guilty plea. She stated that he had been living with her at the time, and that she had tried to support him. Applicant's employer, James Norman, testified that Applicant worked for him at the time of the crimes, and had been at the job for about six months. He stated that Applicant did a good job for him and noted his intelligence.

Counsel testified that he had met with Applicant after he was charged, and Applicant did not want to pursue a jury trial. He stated that a trial would have been disadvantageous, and that Applicant would have been facing enhanced penalties due to his prior record. He unsuccessfully attempted to negotiate a plea agreement with the State, so Applicant entered his plea without any negotiations or recommendations. He explained that the plea had not been scheduled when it was taken, but that he wishes he had told the mitigation witnesses so that they could have attended. He did not recall if he specifically told them that the hearing was taking place. He stated that, in light of Applicant's priors, he could have received more time, and noted that is generally the case with a guilty plea.

Counsel acknowledged that he used the word "pathetic" to describe Applicant, and recognized that it was a poor choice of words and offended Applicant. He reiterated that it was not

his intention to cause offense, but instead he was using the word sincerely, in an academic sense, to mean that Applicant was sympathetic.

This Court finds that Applicant has failed to meet his burden of proving ineffective assistance of counsel. Applicant has not shown any reasonable probability that the sentence he received would have differed if Counsel called Applicant's grandmother and employer to speak on his behalf. The record shows that counsel spoke at length in mitigation on Applicant's behalf, and described much of the information that the proffered witnesses would have provided. Namely, that Applicant was an intelligent, hard-working person who had fallen astray and was struggling with mental, physical, and behavioral problems. Applicant's concerns that it appeared he was without a support system are unpersuasive because he made the plea court aware of his supporters when he mentioned his grandmother and employer on the record. Counsel's failure to have Applicant's grandmother and employer present so they could speak on his behalf was not deficient under these circumstances.

Applicant does not assert that he would have proceeded to trial had he known that Counsel was not going to arrange for anyone to speak on his behalf. Nor does Applicant allege that his sentence exceeded the statutory limits. Instead, all he has presented is evidence that shows that people who knew him thought he was a good person. This is insufficient to show that he was prejudiced by Counsel's performance. As such, the application for post-conviction relief must be denied and dismissed with prejudice.

V. 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 application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the 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 a right to an 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 the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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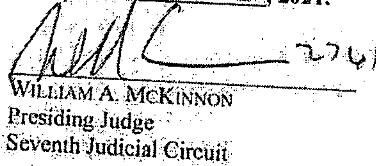
IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 24 **day of** November**, 2021.**



WILLIAM A. MCKINNON
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina