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| STATE OF SOUTH CAROLINA<br>COUNTY OF SPARTANBURG | IN THE COURT OF COMMON PLEAS<br>FOR THE SEVENTH JUDICIAL CIRCUIT |
| Darian S. Hill, SCDC No. 367057<br><br>Applicant,<br><br>v.<br><br>State of South Carolina<br><br>Respondent. | Case No. 2019-CP-42-02101<br><br>**ORDER OF DISMISSAL** |



This matter comes before the Court by way of Applicant Darian S. Hill's June 10, 2019 application for post-conviction relief. Respondent sent its return on November 5, 2019. The Court convened an evidentiary hearing on September 14, 2021 at the Spartanburg County Courthouse in Spartanburg, South Carolina. Applicant was present at the hearing and represented by Attorney Susannah Ross. 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 counsel, Attorney Richard W. Vieth, and Assistant Solicitor Spenser H. Smith, of the Seventh Circuit Solicitor's Office, also testified. The Court hade before it Applicant's records from the South Carolina Department of Corrections, the Spartanburg County Clerk of Court's Office, an original copy of the plea transcript, and the pleadings. The Court has reviewed the record and pleadings, observed the witnesses and heard their testimony, and finds as follows:

## I. 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 indicted at the February 2017 term of the Spartanburg County Grand Jury for assault and battery of a high and aggravated

nature (2017-GS-42-00611); burglary, first degree (2017-GS-42-00612); armed robbery, and possession of a weapon during the commission of a violent crime (2017-GS-42-00613, Cts. I & II). Richard W. Vieth, Esq. represented Applicant, and Spenser H. Smith, Esq., of the Seventh Circuit Solicitor's Office, prosecuted the case.

On March 28, 2018, Applicant entered an *Alford*[1] plea to the lesser-included offense of burglary, second degree, violent, and otherwise as indicted. Accepting the 10 to 20 year sentencing range negotiated between Applicant and the State, the Honorable Grace G. Knie sentenced Applicant to imprisonment for concurrent terms of 20 years for ABHAN, provided that upon service of 15 years the balance would be suspended upon 5 years of probation; 15 years for burglary, 15 years for armed robbery, and 5 years for the weapon. Applicant did not appeal his plea or sentence.

## II. FACTUAL HISTORY

The underlying facts of the crimes for which Applicant is incarcerated were articulated by the State during the plea proceeding as follows:

> This incident occurred on September 11th of 2015. At around three o'clock in the morning, deputies responded to an apartment complex on Fernwood-Glendale in Spartanburg County in reference to a home invasion. The victim's roommate had come back and found her severely beaten in her bedroom. Her four year old was also present, and had witnessed the beating.
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> [. . .] She was severely beaten around basically all over her face to the point that she probably was blind at the time.
>
> [. . .] The victim's four year old son was present during the home invasion. The victim and son were able to speak to police. They said that two black males had done the beating. The victim was very in and out of it at, at the time when she was on the scene. She was mostly saying that she didn't want to die. Not being very – giving information about who had done it. Just mainly hoping to leave.



[1] North Carolina v. Alford, 400 U.S. 25 (1970).

> The victim later stated that she had woke up with a man on top of her pinning her down. That man had begun to beat her while another man that was inside of her room was screaming for her to give up the money.
>
> That man that was screaming indicated that he was a Blood and was referring to her as a Crip. The victim believed this man was a man that she knew as Mack. That is Mr. Hill's codefendant, Lorenzo Gaines, who has still – has charges pending. Both of them were on the trial docket this week, Your Honor.
>
> She said that Mack had previously confronted her about dating a Crip member. She said she didn't know his real name, but her roommate and him had had a relationship. She said the struggle in the bedroom lasted for almost an hour. At least what she perceived to be an hour. She said that the man that was on top of her had a pistol and was using it to beat it with her. They were able to get her ATM card basically is what they got off of her.
>
> Your Honor, we believe that the motive for this was Ms. Moates was unfortunately involved in a, in a Felony DUI accident where her fiancé at the time passed away. It's a case I handled and she broke her femur bone in this, and she had gotten a settlement from that car injury prior to this, and we believe that they were out searching for that money potentially.



(Tr. 15-17). The State continued with its factual recitation by explaining a payment was attempted on Applicant's Charter Communications bill using her stolen ATM card. (Tr. 17, ll. 3-12). Police tracked the victim's financial records and pulled the video off an ATM used about twenty hours after the burglary, which captured video of Applicant using the ATM while a partially-disguised Lorenzo Gaines stood just "off of the camera view[.]" (Tr. 17, ll. 13-21). When law enforcement presented the victim with a still picture from the video, she identified Applicant and Gaines as the people, and that Applicant was the perpetrator. (Tr. 17-18). After the victim's roommate, Kesha Johnson, was arrested for shoplifting, she disclosed to law enforcement that Applicant admitted to her he had committed the robbery, and provided facts to corroborate her story. (Tr. 19-20).

## III. CURRENT APPLICATION

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

1. I never received my full motion of Discovery
   a. I asked my public defender on the kiosk in the county jail and my lawyer
2. I kept being housed with my co-defendant who was threatening me with his gang members.
   a. I asked for protective custody multiple times and explained my problem and the threats received to me by my co-defendant to say and what not to say regarding my case.
3. Certain facts were not said during my hearing that I believe would have helped.
   a. The fact that I lived at the residence that was burglarized was not explained.



At the evidentiary hearing Applicant, through counsel, stated that he was proceeding forward on a claims that his plea was not knowingly and voluntarily made because he thought he could come back and receive less time after providing substantial assistance to the State. Applicant did not proceed forward on his initial allegations. Those claims are therefore waived, and will not be addressed further. Before the Court are Applicant's records from the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the plea transcript, and the current application for post-conviction relief.

## IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented:

***Involuntary Guilty Plea***

Applicant alleges that his guilty plea was involuntarily made because he believed he would be able to receive a sentence reduction if he provided substantial assistance to the State in prosecuting other cases. This allegation is without merit.

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."). 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).



An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial instead. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001); *Richardson v. State*, 310 S.C. 360, 363, 362 426 S.E.2d 795, 797 (1993). Given Applicant's burden of proof and the analysis to be applied to this claim, Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it will be treated as such.

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.

South Carolina law allows for reduction of a sentence for substantial assistance to the State in certain circumstances. Specifically, S.C. Code Ann. §17-25-65 allows for the State to move the court for a sentence reduction within one year of sentencing if the defendant provides substantial assistance in investigating or prosecuting another person. The law specifically states that the motion for the reduction must be made by the circuit solicitor in the county where the defendant's case arose. S.C. Code Ann. §17-25-65(C).

Applicant indicated at the evidentiary hearing that he understood the relief of a time cut or sentencing reduction was not available to him in post-conviction relief proceedings. He testified that he entered his plea thinking that he may be entitled to a time reduction if he provided substantial assistance in prosecuting his co-defendant. He stated that his co-defendant has incurred many disciplinary issues in the department of corrections, whereas he has not. He stated that Counsel had discussed the possibility of receiving a sentencing reduction if he provided substantial assistance to the State. He acknowledged that he pled under *Alford* because it was a better option than going to trial. He admitted that he was not promised anything in exchange for his plea, both

at the plea hearing and again at the evidentiary hearing. He stated that all discussions about the sentencing reduction took place after he entered his plea.

Assistant Solicitor Spenser Smith testified that he prosecuted the case and only spoke with Applicant after the plea hearing. He stated that Applicant was upset about the amount of time he was serving, but no agreement was made for a reduction in exchange for assistance with prosecuting other cases. He stated that Applicant was facing life in prison for his offenses, but had agreed to the plea. He did not believe that he met with Applicant until after the co-defendant had pled guilty.

Counsel testified that he assumed representation of Applicant prior to trial and believed that a plea was in his best interest, given the solid evidence he was facing. He stated that he never talked about a lessened sentence prior to the plea hearing. He also stated that he did not promise Applicant anything about a sentencing reduction. No proffer was made and the only agreement was that Applicant would agree to cooperate after the plea was entered. He stated that he could not make the motion for the downward departure of the sentence under the statute. He acknowledged that Applicant's cooperation may have jeopardized his safety in the department of corrections, but he stated that he does not have control of how the prisons houses its inmates.

The testimony makes it clear that Applicant was not promised a sentencing reduction, and therefore the prospect of receiving a reduced sentence could not have rendered Applicant's plea involuntary when the State chose not to so move the court. All of the discussions about the matter took place after the plea was made, and it is only now that Applicant has not received the reduction that he claims his plea was invalid. The State's refusal to offer the reduction is within its prosecutorial discretion, and Applicant has offered no evidence that its failure to do so rendered his plea invalid. Furthermore, Applicant stated that he entered the plea because he was concerned

about his exposure at trial and believed it would be in his best interest to accept the offer. Applicant has therefore failed to meet his burden of proving deficiency or prejudice. The application for post-conviction relief is 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.

**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.

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SPARTANBURG COUNTY

**AND IT IS SO ORDERED this** 29 **day of** November **, 2021.**

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WILLIAM A. MCKINNON
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina