STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Kevin Casey, #349715, Applicant, v. State of South Carolina, Respondent.	Case No.: 2012-CP-42-4389 **ORDER OF DISMISSAL**

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This matter comes before this Court by way of Applicant's post-conviction relief application filed October 18, 2012. Respondent made its return on January 9, 2014, 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. Applicant's Aunt Teresa Pickens, Counsel Richard Warder, and Solicitor Barry Barnette 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. In December 2011, the Spartanburg County Grand Jury indicted Applicant two counts of felony DUI – death and reckless homicide (2011-GS-42-6361, -6362) and felony DUI – great bodily harm (2011-GS-42-6363). Richard Warder, Esquire represented Applicant. Solicitor Barry Barnette prosecuted the case. On February 14, 2012, Applicant pled guilty to two counts of felony DUI – death and

felony DUI – great bodily harm. The two counts of reckless homicide were dismissed as part of the plea agreement. He was sentenced by the Honorable J. Mark Hayes II, to confinement for twenty-five years for each of the felony DUI – death charges and fifteen years for felony DUI – great bodily injury, sentences running concurrently. Applicant did not appeal his convictions or sentences.

Applicant filed an application for post-conviction relief on October 18, 2012, alleging ineffective assistance of counsel and that his guilty plea involuntarily given. On November 1, 2012, Petitioner filed a *pro se* amended application alleging prosecutorial misconduct. On November 9, 2012, Petitioner filed a second *pro se* amended application alleging after-discovered evidence. Respondent made its return on January 14, 2014.

Applicant was represented by court-appointed attorney, Leah H. Moody. On June 9, 2014, Applicant filed a motion to relieve Ms. Moody as his PCR counsel and have the court appoint new counsel. Applicant appeared before the Honorable Roger L. Couch, circuit court judge, on September 17, 2014, to be heard on the motion. Judge Couch informed Applicant that he was willing to relieve counsel, but would not provide Applicant a different court-appointed attorney. Judge Couch informed Applicant that it was Applicant's decision to make. Applicant stated he understood the court's instruction and made the decision to have Ms. Moody relieved as counsel.

On February 13, 2015, Applicant filed an amended PCR application. On March 26, 2015, Applicant appeared before Judge Couch again, to ask for a new attorney. Judge Couch found insufficient reason to appoint Applicant a new attorney, as Applicant informed him that he needed help subpoenaing witnesses and medical records. Judge Couch offered to assist in this process and was informed by Applicant that there was nothing else to address at the hearing.

On June 12, 2015, an evidentiary hearing was held before the Honorable R. Scott Sprouse, circuit court judge, in Spartanburg County, South Carolina. At the beginning of the hearing, Applicant moved for a continuance because he had not subpoenaed any witnesses or victim toxicology reports. Applicant also stated to Judge Couch that he never requested to proceed *pro se*. Judge Sprouse denied Applicant's motion for a continuance and proceeded with the evidentiary hearing. Applicant and plea counsel, Richard Warder, Esquire, testified at the hearing. On June 22, 2015, Judge Sprouse issued an order of dismissal. Petitioner filed a timely appeal.

On May 17, 2017, a petitioner for writ of certiorari was filed on Petitioner's behalf by Appellate Defender Lara R. Baer of the South Carolina Commission on Indigent Defense – Division of Appellate Defense. Respondent filed its return on August 31, 2017. The appeal was transferred to the South Carolina Court of Appeals on October 30, 2017, pursuant to SCACR Rule 243(i). On June 29, 2018, Certiorari was granted on the following issue:

> "Whether the PCR court erred in failing to ensure that Petitioner's waiver of PCR counsel was knowing and intelligent by informing him of the right to counsel and dangers of self-representation?"

Applicant requested relief in the form of a new PCR hearing and the assistance of PCR counsel. Respondent moved to consent to a remand of this case and the appointment of PCR counsel on October 2, 2018, agreeing that prior to the PCR hearing, Applicant was not informed of his right to counsel and was not made aware of the dangers of self-representation. Respondent also agreed that the PCR court failed to seek a valid waiver of Applicant's right to counsel and moved that this case be remanded to the Court of Common Pleas for the appointment of new PCR counsel and a new evidentiary hearing. Applicant consented to this request on October 8, 2018. The South Carolina Court of Appeals issued an order vacating the circuit court order

dismissing PCR and remanding back for new evidentiary hearing on November 20, 2018. The remittitur was issued on December 7, 2018.

Summary of Relevant Facts

On October 15, 2011, Trooper Thornton was dispatched to a crash scene where Applicant was found driving a Nissan at 91 miles per house at the time of impact where the speed limit was 45 miles per hour. (Tr. 10). Applicant crashed into a motorcycle driven by Mr. Simmons. (Tr. 10). Steven Mills and Megan Warren were on the motorcycle. (Tr. 10). Warren and Mills were killed and Simmons was severely injured. (Tr. 10). Applicant was on bond for a third DUI at the time and his blood alcohol came back as .21 in a blood sample taken immediately after the crash. (Tr. 11).

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. Ineffective assistance of counsel, in that;
   a. Counsel failed to insure that Applicant understood the waiving of his three constitutional rights,
   b. Counsel failed to apprise Applicant of the sentencing consequences of his guilty plea,
   c. Counsel failed to place Applicant's plea agreement on the record,
   d. Counsel failed to use Applicant's medical history as mitigating evidence,
   e. Counsel failed to put the State's case through adversarial testing,
   f. Counsel failed to advise Applicant of the lesser included offenses which the jury would be instructed on if he went to trial,
   g. Counsel failed to challenge the chain of custody of Applicant's blood,
   h. Counsel failed to challenge the fraudulent indictments,
   i. Counsel failed to interview victim & witnesses,
   j. Counsel advised Applicant to plead guilty when valid defenses existed to proceed to trial;
2. Involuntary guilty plea, in that;
   a. Plea was unlawfully induced and not made voluntarily or with a complete understanding of the nature of the charge and the inadequacies of the plea potential.
3. "Reserve the right to Amend PCR Application Pro-Se upon receipt of transcript."

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The amended application was filed July 26, 2021, through PCR Counsel, alleging:

1. Ineffective assistance of trial counsel for:
    a. Failure to investigate and prepare for trial
    b. Advising that if he pled he would receive a ten year sentence
    c. Failure to make a motion to reconsider the sentence
    d. Failure to advise Applicant of his right to appeal, and
    e. Failure to appeal the plea and sentence on behalf of Applicant.
2. Due process violations because the State misrepresented to the Court as to which of the three people were driving the moped and the recommended sentence in the case.

At the PCR hearing, Applicant proceeded forward on the allegations raised in the amended application. Additionally, Applicant proceeded forward on the claim that Counsel was ineffective for failing to challenge the chain of custody of Applicant's blood. All other allegations raised in his initial application and amendments 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 stated he understood the relief afforded in PCR actions and still wanted to proceed forward. Applicant stated that his charges stemmed from an incident where he hit a moped with no lights. He stated that the State did not present a factual basis for the plea and the driver was not the person referenced in the statement, though they were all on the same moped. He stated that this constituted prosecutorial misconduct. Applicant claims that Counsel was ineffective because he did not conduct a proper investigation. Applicant testified he did not consent to a blood draw. Applicant stated the blood collection report was entered in at the plea hearing and that there was a break in the chain of custody. Applicant stated he did not discuss the chain of custody with Counsel. He stated that the Court could have determined whether this would have made a difference. He stated it would not have affected his actions, but then stated

he probably would have gone to trial instead of taking the guilty plea.

Applicant claimed Counsel did not review discovery with him and they only met three times. He stated the second visit was on February 1, where they discussed a plea in exchange for the reckless homicide being ditched. Applicant stated that Counsel met with him prior to the plea hearing and asked personal questions about where he worked and where he was employed. He testified he was under the impression that there would be a ten year sentence. Applicant stated he was a diabetic and this should have been reviewed. Applicant stated Counsel did not challenge the indictment or interview any witnesses. Applicant testified that he was not satisfied with his sentence and did not see Counsel again after the plea until the PCR hearing. He stated he signed the sentencing sheets two weeks prior to the hearing with a negotiated ten year sentence, though he acknowledged that the plea judge warned him he could face up to twenty five years in prison.

On cross-examination, Applicant stated that he did not remember agreeing with the facts as stated by the State at the plea hearing. After reviewing the transcript, Applicant stated he did not know he could object to the State's statement of the facts and stated he did not know why the State misstated the facts. He stated he thought the outcome of the proceedings would have been different if the right driver was identified and if the right driver was identified he would have proceeded to trial instead. Applicant stated he entered the plea because he thought he would receive a ten year sentence, which he thought was negotiated. Applicant stated he did not attempt to clarify this at the plea hearing because he did not know he was pleading straight up until he took the stand at the PCR hearing. Applicant stated that he said something to Counsel after the plea hearing about the sentence, but Counsel told him they would speak later and then did not see or hear from Counsel again until the PCR hearing.

Applicant stated he received his discovery in the mail at the detention center, but did not

know what it was. He stated he asked Counsel about who was driving and if they were intoxicated. He stated Counsel told him he would look into it, but the next time he saw him they just discussed the plea. Applicant stated he entered the plea under advice of Counsel, who told him it was the best thing for him, because otherwise he could be facing up to sixty-five years' imprisonment.

Applicant stated he was not satisfied with Counsel at the time, but told the Court he was because Counsel told him to say yes to most questions asked if he wanted to receive the ten year sentence. This Court ~~wants~~ wanted to know how he knew what to answer, and Applicant ultimately stated he was making the decision as to what questions to say yes to and what questions to answer with a no.

Applicant stated he wanted Counsel to investigate his entire case. He stated nothing was investigated in the case, but he did not realize this until the last visit when Counsel asked him questions about where he worked. Applicant testified that it was during this meeting that he realized Counsel was inadequately prepared for the case. Applicant stated he did not tell Counsel he needed more time on the case because he thought he would receive a ten years' imprisonment sentence. Applicant stated he wanted Counsel to investigate his Aunt Teresa Pickens and Kenneth Gehre. He testified he wanted the first responders on the scene to be investigated, but admitted he did not know what they would have said at trial or what would have been recovered through further investigation.

Applicant stated he was driving and hit the back of something, but did not know what he hit. He stated he had been drinking at a family member's house that night and does not know how much he had. Applicant did not remember what happened that night, but learned of the facts through family members. Applicant stated that some people died after they were hit, but not

everyone died. Applicant stated he asked Counsel to file an appeal through written correspondence while he was in jail, but could not remember when he wrote this request. Applicant stated he did not ask for Counsel to file a motion for reconsideration.

On re-direct examination, Applicant stated he recognized the incident notification form identified Simmons as the driver. Applicant stated that both Mills and Simmons were also allegedly intoxicated. Applicant again stated that if the right driver was identified he would have gone to trial instead.

Teresa Pickens Testimony

Pickens stated that Applicant is her nephew. She stated she was present for the guilty plea. She testified that they were in the hallway prior to the plea with Applicant, Counsel, and Applicant's daughter. She testified that Applicant's daughter asked about how long the prison sentence would be and Counsel stated ten years. She testified that the daughter started crying and Counsel stated it would not be long. Pickens testified that after the hearing they all went into a side room and she asked Counsel what happened to the ten year sentence. She stated that he brushed her off and did not respond. She testified that Applicant's daughter lives in California and could not be present.

On cross-examination, Pickens testified that she did not recall speaking at the plea hearing because she was there for moral support only. She stated she did not remember why she did not speak up when the Judge imposed twenty-five years' imprisonment instead of ten. She stated she did not remember speaking with Counsel until they were at the courthouse the day of the plea hearing.

Counsel Testimony

Counsel testified that he has been practicing for forty-seven years and has been practicing

criminal law the entire time. He stated he does not recall when he was retained, but it was shortly after Applicant was charged. He stated they met on several occasions to discuss the facts of the case and their options concerning resolution of the case.

Counsel stated he reviewed the discovery with Applicant, including the MAIT report, witnesses, and highway patrolman's statement. He stated he understood all the facts and investigated everything, but they were dealt a bad hand with the facts. He testified that there was bad evidence against him and he pled because there was a slim chance of success at trial. Counsel stated that he was never given a plea offer. He stated he remembered discussing it with the solicitor, but there was never a negotiated ten year sentence. He stated he did not tell Applicant he would get ten years. Counsel stated that they spoke after the plea hearing, but did not recall specific topics discussed. He stated he was sure Applicant did not ask for an appeal because, if he had, he would have filed one. Counsel stated Applicant did not ask for him to file a motion for reconsideration. Counsel stated that there was some confusion about the facts, but that he believed it was straightened out at the plea hearing. Counsel stated he likes Applicant as a person and thought he was a hard-working family man, even on the day of the crime. He stated he thought his client lived a good life, despite being in a difficult situation. Counsel stated he is sure they discussed sentencing ranges. He stated he was not aware of any break in the chain of custody with the blood sample. Counsel stated that Applicant made the decision to plead himself, but that he spoke about the decision with his family. Counsel stated Applicant was not threatened into pleading. Counsel stated that they agreed pleading was the best interest. Counsel stated that any potential witnesses were people who were with him the night of the incident and who saw him drinking.

On cross-examination, Counsel stated he did not object when the Solicitor stated that

Applicant was out on bond for a third DUI. Counsel stated he mailed Applicant the discovery and gave him a copy before they met to facilitate review. Counsel stated he knew he did not discuss a ten year sentence with Applicant and, though he may have considered ten years as a part of the potential sentencing range, he did not recall doing that specifically. Counsel stated that twenty-five years' imprisonment is a stiff sentence for a felony DUI case, but acknowledged there were two deaths in this case. Counsel confirmed he never filed an appeal or motion for reconsideration. Counsel could not recall if he ever discussed the impact of a broken chain of custody on the blood form. Counsel stated that he was sure Applicant was advised of the maximum sentence.

On re-direct examination, Counsel stated he could have objected to the Solicitor saying Applicant was out on bond for another DUI, but did not think it would make a difference with plea proceedings.

Solicitor Testimony

Solicitor stated he prosecuted this case. He stated he spoke with Counsel and informed him he was not extending a plea offer because two people died and another was seriously hurt. He stated he entered ten exhibits at the plea hearing that showed there was no question that Casey hit the people on the motorcycle. He stated he would drop the reckless homicide charges, but it would otherwise be a straight up plea. He stated he did not agree to a ten year sentence. Solicitor testified that everyone knew the evidence and even though there was some confusion about the facts at the plea hearing, it was cleared up later on in the hearing. Solicitor testified there was no broken chain of custody on the blood.

On cross-examination, Solicitor testified that the boxes and signature are not on the blood form, but that does not mean that they were not there. Solicitor stated that the discovery showed

they were there and the signature indicates transport, not presence.

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, PCR appeal records, 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). 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 "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 deficiencies; if it is

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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 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)).

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 pled freely, knowingly, intelligently, and voluntarily. Applicant stated he intended to enter a straight up guilty plea concerning three indictments with the two reckless homicide charges being dismissed. (Tr. 4-5). Applicant stated he did not take any substances impacting his decision making or understanding of the plea decision and process prior to the plea hearing. (Tr. 7-8). Applicant stated he was never treated for a drug or alcohol problem. (Tr. 8). Applicant stated he has satisfied with Counsel, had enough time to talk to counsel about the case, no threats or promises were made to get Applicant to plead, and the plea was being entered freely and voluntarily. (Tr. 8). Applicant stated he knew he was waiving the presumption of innocence, his right to a jury trial where he would have to be found guilty by unanimous verdict and where the State would bear the burden of beyond a reasonable doubt. (Tr. 8-9). Applicant agreed to the facts of the case, as stated by the Solicitor. (Tr. 10-13). Applicant was informed that the maximum sentence that could be imposed is twenty-five years for the DUI resulting in death and the sentencing range for DUI resulting in great bodily injury was between thirty days and fifteen years. (Tr. 13-14). Applicant stated he talked to Counsel about the ramifications of the serious distinction attacked to the offense and still wanted to enter the plea. (Tr. 14-15). Applicant stated he was pleading guilty because he was guilty of the crimes pled to.

(Tr. 15). Applicant stated he heard all questions posed at the plea hearing and answered them truthfully and honestly. (Tr. 15). The Solicitor stated the discovery was shared with the defense. (Tr. 15). Accordingly, this Court finds that the plea was entered freely, knowingly, intelligently, and voluntarily and, thus, the plea remains valid and Applicant is not entitled to withdraw it now.

Ten Year Sentence

Applicant alleges Counsel was ineffective for advising him that if he pled, he would be sentenced to ten years' imprisonment. This claim is refuted by the plea transcript and by testimony elicited at the PCR hearing. At the plea hearing, Applicant acknowledged his intention to enter a straight up plea concerning three charges. (Tr. 4-5). Applicant was informed by the court that the maximum sentence that could be imposed is twenty-five years for the DUI resulting in death and the sentencing range for DUI resulting in great bodily injury was between thirty days and fifteen years. (Tr. 13-14). There was no mention of any negotiations beyond the dismissal of the two reckless homicide charges discussed, nor of any negotiated sentence.

At the PCR hearing, Counsel stated that he was never given a plea offer. He stated he remembered discussing it with the solicitor, but there was never a negotiated ten year sentence. He stated he did not tell Applicant he would get ten years. The Solicitor stated he dropped the reckless homicide charges, but it was otherwise a straight up plea and that he did not offer nor agree to a ten year sentence. Thus, this Court finds that Applicant was not offered nor promised a ten years' imprisonment offer. Thus, this Court finds this claim is without merit and, accordingly, denies relief on this ground.

Failure to Investigate

Applicant claims Counsel was ineffective for failing to investigate the case. *Strickland* makes clear that defense counsel "has a duty to make reasonable investigations or to make a

reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. When highlighting failure to investigate as a ground for a larger ineffective assistance of counsel claim, judicial determination of this claim's validity is evaluated for "reasonableness [under] all the circumstances" with "a heavy measure of deference to counsel's judgments" applied. *Id.* At the PCR hearing, Applicant is required to present evidence or witnesses he alleges Counsel did not properly investigate. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Additionally, whether Applicant was prejudiced by Counsel's failure to investigate is contingent on whether the evidence presented would have led Counsel to change his recommendation regarding the plea. *Stalk v. State*, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009).

Applicant claims he wanted Counsel to investigate his entire case. Specifically, Applicant stated that he wanted Counsel to investigate the blood draw and blood collection report, a break in the chain of custody concerning the draw, wanted him to investigate his Aunt Teresa Pickens and a man Called Kenneth Gehre, and the first responders on scene.

Concerning the blood draw, Solicitor credibly testified that there was no break in the chain of custody concerning the blood draw report and that the form presented in Court was not a chain of custody report, but a blood draw form. Solicitor stated that consent to the draw was not needed at the time and nothing about the form or the blood draw itself was improper. Thus, there was seemingly no issue to be investigated on this form. Even if there were, Applicant has made no showing of what further investigation would have produced or how that would have changed Counsel's recommendation as to the plea. Accordingly, relief is denied on this ground.

Concerning failure to investigate witnesses, including Teresa Pickens, Kenneth Gehre, and the first responders, Applicant seemingly waived his right to call and confront witnesses when he entered an otherwise valid plea. Additionally, with the exception of Teresa Pickens,

Applicant did not call any of these witnesses to testify at the PCR hearing or otherwise present what Counsel would have discovered through further investigation or how that would have changed Counsel's recommendation as to the plea. Teresa Pickens was called to testify at the PCR hearing, but the scope of the testimony was limited to her observation of a ten year negotiation sentence to Applicant which has already been deemed incredible by this Court. Accordingly, nothing Pickens testified to was presentable at trial or otherwise would have led Counsel to change his recommendation as to the plea. Accordingly, relief is denied on this ground.

Failure to Prepare for Trial

Applicant claims Counsel was ineffective for failing to prepare for trial. However, because Applicant freely, knowingly, intelligently, and voluntarily entered the plea, waiving his right to a jury trial and to establish a defense at trial, Counsel was not ineffective on this ground. Accordingly, this claim is without merit and relief denied on this ground.

Failure to File an Appeal or Move to Reconsider the Sentence

Applicant claims Counsel was ineffective for failing to file an appeal. Counsel is required to make certain the defendant is made fully aware of the right to appeal following a trial. *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). However, absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. *Weathers v. State*, 319 S.C. 59, 459 S.E.2d 838 (1995). The bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief. *Id.* Instead, there must be proof that extraordinary circumstances exist such that the defendant should have been advised of the right to appeal. *Id.* Extraordinary circumstances may exist when there is reason to think that a rational defendant would want an appeal, such as when non-frivolous grounds for an

appeal exist, or when the defendant reasonably demonstrates an interest in appealing. *Id.*; *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

At the PCR hearing, Counsel credibly testified that he spoke with Applicant after the plea hearing and was positive that Applicant did not request an appeal because, if he had, Counsel would have filed a notice of appeal. Counsel also testified that Applicant never requested he file a motion for reconsideration. Thus, this Court finds that Applicant never requested an appeal. Additionally, even if Counsel did not inform Applicant of the right to appeal, Applicant has failed to show that there was an appealable basis in this case or that extraordinary circumstances warranting an appeal existed. Thus, this Court finds Applicant is not entitled to relief on this basis.

Due Process Violations

Applicant claims he is entitled to relief based upon due process violations concerning the State misrepresenting who was driving the moped Applicant struck when driving while intoxicated. This Court finds this misstatement is of no consequence. Specifically, even if there was an initial misstatement by the State concerning who was driving, all individuals named were on the moped and the driver of the moped has zero impact on the underlying basis for the charge and subsequent conviction. Additionally, even if this misstatement had an impact on the charges or convictions, this was seemingly remedied when the Court clarified that Jason Simmons was not the driver, but that Mr. Steven Mills was driving during the plea hearing. (Tr. 21-22). Upon recognition that he may have acknowledged the wrong person as the driver, Solicitor Barnette spoke with Mr. Jason Simmons for a moment at the plea hearing before addressing the Court on the record again, acknowledging he had mistakenly notated the wrong person as the driver. (Tr. 22). Thus, though there was an initial misunderstanding, this point was clarified on record by the

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end of the plea hearing. No prosecutorial misconduct is found on the part of Solicitor Barnette, who clarified on record who the driver was as soon as he was informed of their identity. Further, there has been no showing that this misunderstanding affected the plea proceedings at all or otherwise would have caused Applicant to proceed to trial instead, despite Applicant's testimony that he would have proceeded to trial if the correct driver was initially identified. Thus, relief is 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), SCRCP 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 29 day of November, 2021.

WILLIAM A. MCKINNON
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina.

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