THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM CHEROKEE COUNTY

Court of Common Pleas

HONORABLE WILLIAM A. MCKINNON

2020-CP-11-0350

GERALD L. SANDERS, SCDC# 381267

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Gerald L. Sanders appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable William A. McKinnon, Circuit Judge on September 15, 2021 an Order issued on October 13, 2021 and filed on October 21, 2021. The Appellant received notice of the judgment on November 29, 2021.

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STATE OF SOUTH CAROLINA COUNTY OF CHEROKEE	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Gerald L. Sanders, #381267,- Applicant, v. State of South Carolina, Respondent.	Case No.: 2020-CP-11-0350 **ORDER OF DISMISSAL**

This matter comes before this Court by way of Applicant's post-conviction relief application filed May 20, 2020. Respondent made its return on September 24, 2020, requesting an evidentiary hearing be convened. An evidentiary hearing was held on September 15, 2021, at the Spartanburg County Courthouse. Rodney W. Richey, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Richard Whelchel, 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 from the Cherokee County Clerk of Court. During its August 2019 term, the Cherokee County Grand Jury indicted Applicant for Second Degree Criminal Sexual Conduct with a Minor (2019-GS-11-01280). Applicant was represented by Richard Whelchel, Esquire. Assistant Solicitor Matt Kendall of the Seventh Circuit Solicitor's Office prosecuted the case. On August 28, 2019, Applicant appeared before the R. Keith Kelly, circuit court judge, and

pled guilty to a negotiated sentence of sixteen years imprisonment.[1] Judge Kelly sentenced Applicant to sixteen years' imprisonment. Applicant did not pursue a direct appeal.

Summary of Relevant Facts

On May 3, 2018, Yocevia Stokes, went to the police department with her daughter, Genevia Gomez. (Tr. 6). Gomez's daughter, Isabella Ross had genetic testing due to developmental delays, which showed that the father may have been a close family member to Gomez. (Tr. 6). Stokes questioned Gomez, who indicated that her grandfather, Applicant, had sex with her when she was fourteen. (Tr. 6). Gomez stated that in June 2015, she was spending the night at Applicant's house when she awoke from sleeping on the couch to Applicant touching her thigh. (Tr. 6). About a month later, she awoke again to finding her pants and underwear removed. (Tr. 7). Gomez stated Applicant put his fingers in her vagina. (Tr. 7). Gomez did not tell anyone because she did not want to make him angry. (Tr. 7). Gomez stated Applicant showed her pornography. (Tr. 7).

On October 15, 2015, Gomez was exiting the bathroom while at Applicant's house. (Tr. 7). While exiting, Applicant removed her pants, made her lie on the couch, removed his pants and sexual penetrated her with his penis. (Tr. 7). It lasted about five minutes and he ejaculated inside her. (Tr. 7). This behavior continued regularly into November. (Tr. 7). Upon receiving results of the paternity test, DNA samples were taken and the results ultimately showed that Applicant was most likely the father. (Tr. 7).

Current Action before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully

[1] Applicant was also indicted for another count of Second Degree Criminal Sexual Conduct with a Minor (218-GS-11-00904). This was dismissed pursuant to the plea negotiations.

because of ineffective assistance of counsel in that:

1. "Loss of evidence."[2]
    a. "Asked to submit additional DNA after loss of first taken samples."
2. "Could not read or write."[3]
    a. "Public defender gave plea bargain on day of hearing with no one to read it to me."
3. "Promised suspended sentence with time served and probation by Public Defender."
    a. "Was unaware that if I signed plea bargain it is what I would receive."

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

1. Ineffective Assistance of Counsel.
    a. Failure to investigate lost DNA evidence and procure another DNA sample.
    b. Public defender told him he would represent him in PCR proceedings.
2. Invalid plea
    a. Counsel promised him time served if he pled.
    b. Applicant could not understand the plea because he cannot read or write.

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

Summary of the Testimony

Counsel Testimony

Counsel represented Applicant on his relevant charges leading up to the plea. Counsel stated Applicant admitted his guilt to him leading up to the plea hearing. Counsel stated that he believed Applicant was given the initial DNA test prior to Counsel's involvement in the case and it was either lost or the chain of custody broken. Counsel testified that Applicant was adamant that the DNA test would not be inculpatory for him. Counsel stated that they consented to a second test and it came back showing he was the father. Counsel stated this second test was the only test he obtained the results of. Counsel stated that Applicant could have asked for a third

[2] This is interpreted as an ineffective assistance of counsel claim for failure to investigate and failure to assert a defense concerning loss of evidence.
[3] This is interpreted as a failure to properly advise on consequences of the plea negotiations, resulting in the plea being involuntarily entered and, thus, invalid.

test, but did not remember. Counsel stated he did not think Applicant had the money for a third test.

Counsel stated that no promises of a suspended sentence or probation only was promised to Applicant. Counsel stated that the State's initial offer was a negotiated seventeen years' imprisonment. Thereafter, Counsel stated that he went back to the prosecutor and worked the deal down to sixteen years' imprisonment. Counsel stated that everyone understood sixteen years' imprisonment would be imposed, including Applicant. Counsel stated that this offer was received on the evening of August 18, 2019, and delivered to Applicant the next day. Counsel stated that he reviewed the offer with Applicant the next day and that they may have signed the sentencing sheet that day. Counsel stated that, despite not being able to read or write, he understood everything. Counsel stated he never told Applicant he would represent him in a PCR matter.

On cross-examination, Counsel stated he met with Applicant at least six times prior to the plea hearing. Counsel testified that Applicant had a stroke sometime during the course of his representation and was unable to visit the office. However, Counsel testified they spoke on the phone many more times.

Counsel stated he and Applicant discussed the discovery and evidence in the case. Counsel stated that the DNA test was the main piece of evidence. Counsel testified that Applicant did not like the results of the DNA test because it was inculpatory in nature. Counsel stated that Applicant wanted another test, but could not find the money for another test. Regardless, Counsel asserted, another subsequent test would not have helped his case, given that the DNA profile showed it was 870 million times more likely that the father of the child was Applicant than anyone else. Accordingly, the DNA test results showed Applicant was the father

with 99.99% certainty.

Counsel stated he spoke with the victim at Applicant's request, because they thought she may not testify or appear at the trial. Counsel stated that the victim in the case was Applicant's granddaughter and their child was a byproduct of the incest. Counsel stated that he told Applicant that if the victim testified at trial, they would likely lose at trial. Counsel stated that if they lost at trial, Applicant would likely receive a higher sentence than he would by taking the negotiated guilty plea offer.

Counsel stated that he thought pleading, instead of going to trial, was in Applicant's best interest. Counsel stated that Applicant never indicated to him that he did not understand the plea process or what he was pleading to. Counsel stated they reviewed everything pertaining to the plea together. Counsel testified he informed Applicant that there was no way he would receive a time served sentence and, instead, he would receive the negotiated sixteen years' imprisonment sentence he pled to. Counsel stated the Solicitor's office could have brought more counts if they wanted to.

Applicant Testimony

Applicant testified that he always maintained his innocence throughout his criminal proceedings. Applicant stated he told the Judge at his plea hearing that he was guilty because Counsel told him to tell the judge that. Applicant stated he was coached in what to say because he cannot read or write. Applicant stated he pled so he could have more time in building his case.

Applicant stated he was not satisfied with Counsel's performance and stated he was because he was coached by Counsel to say that. Applicant stated Counsel told him to agree with everything at the hearing. Applicant stated he was not told all his answers were under oath, though he acknowledged he was placed under oath at the hearing. Applicant stated Counsel

never told him he should tell the truth.

Applicant stated that he never wanted to take a plea bargain, nor did he want to serve sixteen years in prison. Applicant stated Counsel told him he would continue representing him on appeal.

Applicant stated he wanted another DNA test, testifying that a subsequent test would have shown he was not the father. Applicant stated that his first test was lost and Counsel informed him he did not have time to procure another test. Instead, Applicant stated that Counsel told him that the best way to get more time was to plead guilty and accept the sentence. Applicant stated the judge wanted him to plead. Applicant stated he signed the plea bargain in the courtroom. Applicant testified he could not read and write and that he could not discuss the plea offer with his wife because there was not enough time.

This Court asked Applicant if Counsel instructed Applicant to lie to the Court at the plea hearing and if he actually lied at the plea hearing while under oath. Applicant's response to both questions was affirmative.

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

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Invalid Plea

This Court finds the plea was entered freely, knowingly, intelligently, and voluntarily. 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).

The plea hearing transcript reflects that Applicant entered his plea freely, voluntarily,

knowingly, and intelligently. Applicant stated he was not on any medication or substance interfering with his ability to think clearly. (Tr. 3). Applicant stated he understood that he was pleading to a violent and most serious crime, that it carries up to twenty years in prison, and that he was pleading to a negotiated sentence of sixteen years. (Tr. 4). Applicant then waived his right to a jury trial, to remain silent, and to call and confront witnesses. (Tr. 4-5). Applicant stated he was pleading because he was guilty and that no one threatened or otherwise forced him into pleading. (Tr. 5). Applicant stated he had enough time to speak with Counsel, Counsel shared all materials with Applicant, Counsel answered all his questions, did everything he could to help him, and that Applicant was satisfied with Counsel's services. (Tr. 5-6). When the plea judge asked if the Solicitor's statement of facts were true, Applicant conceded that they were. (Tr. 8). Thus, based upon everything laid out above, Applicant entered the plea freely, knowingly, intelligently, and voluntarily and, thus, Applicant has waived all non-jurisdictional defects and defenses and cannot reassert them now.

Applicant alleges the plea was invalid because no one read the plea bargain to him and he was under the impression that he would have a suspended sentence with time served and probation instead of a sixteen year sentence. However, the plea hearing transcript makes clear that Applicant freely, voluntarily, knowingly, and intelligently pled to a negotiated sentence of sixteen years' imprisonment. (Tr. 4). Accordingly, relief is denied on this ground.

DNA

Applicant claims Counsel was ineffective for failing to procure a subsequent DNA test. *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).

This Court finds Counsel was not ineffective on this ground. The record shows that the DNA profile showed it was 870 million times more likely that the father of the child was Applicant than anyone else. (Tr. 7). No showing that the test results were inaccurate or the process flawed has been made. Instead, the only issue Applicant seemingly takes with the test is that the results obtained were incriminating of him. Accordingly, this Court finds Counsel credibly testified that a subsequent test would have been unhelpful to Applicant. Consequently, Counsel was not deficient for failing to procure an additional test after one test was already taken and results obtained without any evidence indicating the test was flawed. If another test was obtained, it almost certainly would have produced the same result. Thus, the results would not have changed Counsel's recommendation as to the plea and, as a result, no prejudice can be found. Applicant cannot meet either prong of the *Strickland* test and, accordingly, relief is denied on this ground.

Counsel would Represent Him at PCR Proceedings

This Court finds Applicant's allegation that Counsel was ineffective for saying he would represent him at the PCR hearing when he did not is without merit. This Court finds Counsel's testimony that he never told Applicant he would represent him in a PCR matter credible.

Additionally, this Court finds it highly implausible that Counsel would inform a client he represented during criminal proceedings that he would represent that same client in a PCR matter, where the allegations raised generally target the performance of that same attorney. Accordingly, this Court finds this allegation is without merit and, accordingly, denies relief.

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 13 day of October, 2021.

WILLIAM A. MCKINNON
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina.

ALAN WILSON
ATTORNEY GENERAL

October 19, 2021

The Honorable Brandy W. McBee
Cherokee County Clerk of Court
Post Office Box 2289
Gaffney, South Carolina 29342

Re: Gerald L. Sanders, #381267 v. State of South Carolina
2020-CP-11-0350

Dear Ms. McBee:

Enclosed please find the original Order of Dismissal signed by the Honorable William A. McKinnon, in the above-captioned case, for filing in your office. Please forward a time stamped copy to our office for our records.

Should you have any questions, please do not hesitate to call me at (803) 734-3737.

Sincerely,

Chelsey F. Marto
Assistant Attorney General

CFM/ec

Enclosure