

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
HONORABLE WILLIAM A. MCKINNON
2019-CP-42-04320

GREGORY GREENE, SCDC# 3380642

APPELLANT,

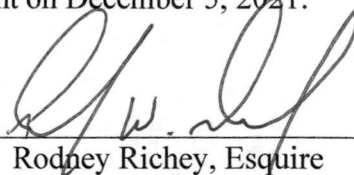
vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Gregory Greene 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 13, 2021 an Order issued on November 24, 2021 and filed on December 6, 2021. The Appellant received notice of the judgment on December 5, 2021.



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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
Gregory S. Greene, SCDC No. 380642)
Applicant,)
v.)
State of South Carolina)
Respondent.)

IN THE COURT OF COMMON PLEAS)
FOR THE SEVENTH JUDICIAL CIRCUIT)
Case No. 2019-CP-42-04320)
ORDER OF DISMISSAL)

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This matter comes before the Court by way of Applicant Gregory S. Greene's December 9, 2019 application for post-conviction relief. Respondent made its return on March 6, 2020, moved for a more definite statement, and requested an evidentiary hearing. A hearing was convened at the Spartanburg County Courthouse on ^{September} August 13, 2021. Applicant was present at the hearing and represented by Attorney Rodney Richey. 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 Andrea L. Price also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, the Clerk of Court's records, a copy of the original plea transcript, and the pleadings. This Court has reviewed the record, observed the witnesses, heard the testimony, and finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted for attempted murder, possession of a weapon during the commission of a violent crime, and kidnapping by the Spartanburg County Grand Jury at its December 2018 term. (2018-GS-42-6802; -6803). Applicant was represented by Assistant Public Defender Andrea Price

and Solicitor Barry J. Barnette prosecuted the case. On June 24, 2019, Applicant appeared before the Honorable Lee S. Alford and entered a guilty plea, as indicted, to all offenses without any negotiations or recommendations. Judge Alford sentenced Applicant to twenty years' imprisonment, to be served concurrently. Applicant did not pursue a direct appeal.

II. FACTUAL HISTORY

Applicant was a recently fired, former employee of Eggers' Funeral Home. (Tr. 16-17). On November 8, 2018, he entered the business's building before start time, with an AR-15, using a key given to him while he was still employed. (Tr. 17). He turned off the alarm system and sat in the lobby until the Mr. Gerald Hutchins (hereafter "the victim") appeared. (Tr. 17). When the victim entered the building, the Applicant raised his gun at him, pulled the trigger, and the rifle misfired, ultimately hitting either the floor or a clock. (Tr. 17-18). Applicant told the victim if he called the police he would shoot him. (Tr. 19). He also threatened to leave the building to shoot another former co-worker. (Tr. 19). That said, the victim contacted another employee through text about the situation, and police were contacted and arrived on scene shortly thereafter. (Tr. 19-20). Video documentation exists regarding this scene. (Tr. 18). The police surrounded the Applicant and took him into custody before he could flee. (Tr. 20-21). After being Mirandized, the Applicant confessed. (Tr. 16). An AR-15 was found in the Applicant's truck and a misfired shell casing or bullet was found in the building. (Tr. 21).

III. CURRENT APPLICATION

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

1. Defense counsel was ineffective because:
 - a. Counsel failed to investigate charges and prepare for case.
 - b. The 1993-1994 Art. No. 184/1995 Art. No. 7 is not affixed with the Great Seal.

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- c. The laws and statutes are void regarding what I am serving time for today.
- d. Insufficient evidence to accept plea.

At the evidentiary hearing Applicant, through counsel, stated that he was proceeding forward on the following allegations:

- 1. Ineffective Assistance of Counsel
 - a. Counsel did not discuss Applicant's right to a jury trial
 - b. Counsel did not discuss Applicant's kidnapping charge
 - c. Counsel did not effectively pursue a plea agreement
 - d. Counsel did not present a zealous defense.

Applicant did not present any evidence or argument on his initial allegations, therefore they are deemed abandoned and will not be addressed herein.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Applicant's allegations of ineffective assistance of counsel are without merit. 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.

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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.* “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; 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.

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Failure to Discuss Applicant's Right to a Jury Trial

Applicant alleges that his counsel provided ineffective assistance of counsel when she failed to advise him of his right to a jury trial. This allegation is without merit.

Due process requires that guilty pleas be entered into voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999). A defendant must be made aware of the right to a jury trial, as well as other constitutional rights. *Boykin*, 395 U.S. 238. The knowing and voluntary waiver of the constitutional rights may be accomplished by a colloquy with the Court and the defendant, between the Court and defendant's counsel, or both. *Pittman*, 337 S.C. at 599, 524 S.E.2d at 625.

Applicant testified that Counsel did not represent him well enough because she failed to explain certain circumstances of his case properly. He acknowledged that he was told by the judge at his plea hearing that he had a right to a jury trial. He stated that he entered his guilty plea because he thought he would get 65 years if he went to trial. He stated he did not want a jury trial, but may have if he had thought about it more. The plea transcript shows that Applicant was informed, and indicated his understanding, of his right to a jury trial. (Tr. 10-11).

Counsel testified that she represented Applicant as his public defender. She stated that she spoke with Applicant about a jury trial, informed him of his rights, and was told that he absolutely did not want to go to trial. Instead he wanted to enter a guilty plea.

This Court finds that Applicant's allegation that his counsel failed to inform him of his right to a jury trial is without merit. Counsel's testimony indicates that she did inform Applicant

of his right to a jury trial. The plea court also specifically informed him of this right at the plea hearing, he indicated that he understood, and chose to continue with the plea. Therefore, counsel's performance was not deficient in this regard. Furthermore, the testimony shows that any possible confusion about his right to a trial was not what caused him to enter the plea. His own testimony indicates that he did not want to proceed to trial and entered his guilty plea because of his sentencing exposure at trial. Applicant has failed to meet his burden of proving prejudice. As such, the allegation must be denied and dismissed with prejudice.

Failure to Discuss the Kidnapping Charge

Applicant alleges that counsel provided ineffective assistance of counsel when she failed to discuss his kidnapping charge with him. This allegation is without merit.

Applicant testified that he pled guilty to attempted murder, kidnapping, and possession of a weapon during the commission of a violent crime. He stated that he did not believe the kidnapping charge fit the facts of his case, because he did not prevent the victim from leaving the scene. He acknowledged that he held a gun to him, but stated that he did not use it to prevent movement, and pointed out that the victim called the police. He acknowledged that he entered the guilty plea to the kidnapping charge. Applicant stated that his lawyer visited him prior to the plea and told him that he would be charged with burglary and kidnapping if he did not enter the plea to the kidnapping charge. He stated that he did not understand that charge either, but chose to enter his plea to kidnapping. He stated that he did not know anything about the law on kidnapping at the time. He acknowledged that the plea court described the elements of kidnapping.

Counsel stated that she believed the State's case for kidnapping was weak, but she did discuss the charge with him and he asked her no questions. She did believe that the State had a case to charge him with a burglary offense, and stated that Applicant would have been charged

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with such an offense if he did not plead guilty. She stated that her advice was for him to enter a guilty plea and avoid the additional charge, and Applicant ultimately agreed. She stated that she attempted to get the State to dismiss the kidnapping charge, but was unsuccessful. She stated that the victim had been walking around the scene during the commission of the crime, and was threatened with a gun. She stated that kidnapping may have been a difficult charge for a jury to understand, but that the plea was nevertheless in Applicant's best interest.

The plea transcript shows that counsel reviewed the allegations in the indictments, and she specifically stated that "[Applicant]'s fully aware of the consequences and the elements of the kidnapping." (Tr. 6, lines 11-16). The record also shows that Applicant was informed that the offense was violent, most serious, non-parolable, and carried up to thirty years' imprisonment. (Tr. 8-9). After the recitation of the facts the plea court asked for clarification on the basis for the kidnapping charge. The exchange was as follows:

Solicitor: Kidnapping, Your Honor, is basically, you know, obviously he couldn't leave. He told him, said, you know, said I will kill you if you call the police or whatever and he held him against his will there, Your Honor.

Court: Okay.

Solicitor: In that case, basically you have to seize somebody and obviously he was seized at that time.

Court: Right.

Solicitor: Even though he was able to get out and text that from that standpoint, he said, you know, you call the police, do anything like that I will kill you. And he shot a bullet, showing that he could shoot the weapon once it had jammed on him from that standpoint.

(Tr. 21, 10-25).

This Court finds that Applicant was made aware of the elements of kidnapping, the consequences, and the factual basis for the State's case against him on that charge. Counsel stated

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at the plea hearing that she informed him of such. She stated at the PCR hearing that while the State's case may have been weak in that regard, it was nevertheless in his best interest to accept the plea. Applicant has not proven that she was deficient in her advice on this point. Furthermore, Applicant has not shown prejudice, because he stated that he entered his plea to avoid the risk of additional time and additional charges, not because he was confused about the nature of the kidnapping charge. The allegation must be denied and dismissed with prejudice.

Failure to Effectively Pursue a Plea Agreement

Applicant alleges that Counsel provided ineffective assistance because she failed to effectively pursue a plea agreement on his behalf. This allegation is without merit.

A criminal defendant is entitled to effective assistance of counsel during plea negotiations. *Judge v. State*, 321 S.C. 554, 471 S.E.2d 146 (1996). Failure to advise a client of a plea offer often constitutes a gross deviation from accepted professional norms. *U.S. ex rel. Caruso v. Zelnsky*, 689 F.2d 435, 438 (3d Cir. 1982).

Applicant testified that he entered his guilty plea upon Counsel's advice, because he did not want to receive additional charges and face additional time. He stated that he had spoken with Counsel about his guilty plea, but never discussed a plea offer. He stated that he did not request a better plea offer. He stated that he did not want a trial but may have changed his mind if he had given it more thought. He stated that his lawyer could have gotten him a better plea offer.

Counsel testified that she had discussed the case with Applicant, reviewed the evidence, and discussed his ability to enter a guilty plea or go to trial. She stated that she spoke with the Solicitor about a plea offer but no offers were made. The State was not amenable to offering anything other than an opportunity for him to pick the judge that presided over the guilty plea. She stated that she attempted to get his kidnapping charge dismissed, but was unsuccessful. She did

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state, however, that she was successful in avoiding an additional burglary indictment by having Applicant enter the plea. She stated that there was nothing in the case that she could have investigated further. Even without a better offer, she stated that the plea was in Applicant's best interest.

This Court finds that Applicant's allegations are without merit. The testimony shows that Counsel sought out a plea offer, was unable to obtain any offers, but was able to fend off an additional charge in exchange for Applicant's guilty plea. She also got the State to allow Applicant to go before the judge of his choice. While these may not be the concessions Applicant now desires, they nevertheless are evidence of her effective plea negotiations. Therefore Applicant has failed to prove his counsel was deficient. Furthermore, Applicant has failed to prove prejudice because he entered his plea to avoid going to trial, not because of any errors counsel made in the plea negotiations process. Applicant has simply failed to produce any objective evidence indicating that Counsel's plea negotiations prejudiced him in any way. On the contrary, the strong evidence against him and the State's intention to pursue additional charges at trial indicates quite the opposite. Counsel's plea negotiations were, as she stated, in Applicant's best interest. Therefore the allegation must be denied and dismissed with prejudice.

Failure to Present a Zealous Defense

Applicant alleges that counsel provided ineffective assistance by failing to present a zealous defense. This allegation is without merit.

Applicant testified that he did not believe counsel represented him well enough. As mentioned above, he stated that she did not discuss his right to go to trial and present a defense. Nevertheless, he stated that he did not want to exercise this right at the time. He stated that Counsel initially came to meet with him without any documents, but eventually did review the evidence

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with him. He stated that she told him his charges, but did not explain them to him. He acknowledged that he was at the scene of the crime, with an AR-15 loaded with 30 rounds of ammunition, because he was disgruntled about his relationship with his employer. However, he stated that he did not the facts fit the elements of kidnapping or burglary.

Counsel testified that she met with Applicant approximately six times, and reviewed the evidence against him. She stated that there were written statements from witnesses, camera footage, statements Applicant made in the back of the patrol vehicle after he was arrested, pictures, and police reports. She stated that they discussed potential defenses if they were to go to trial. She stated that Applicant did not want to go to trial. She implied that they may have been able to combat the kidnapping charge given the difficulty some juries have understanding its application, but they did not get that far because Applicant chose to enter his plea.

The plea court informed Applicant of his right to go to trial and put forth a defense against the charges. (Tr. 10-11). He indicated that he understood this right and chose to proceed with the plea hearing.

This Court finds that Applicant's claim that Counsel failed to present an adequate defense to be without merit. Applicant entered a guilty plea and knowingly waived his right to present a defense. Counsel's obligation to defend against the indictments does not go so far as to require her to exercise rights on Applicant's behalf that Applicant himself expressly waives in open court. The testimony shows that counsel prepared a defense against these charges with Applicant, considered the likelihood of success, and advised him to enter a guilty plea. This was very likely the proper assessment given the strong evidence the State could have presented at trial. In any event, it was objectively reasonable under the circumstances. Therefore Applicant has failed to prove his Counsel was deficient in this regard. Furthermore, Applicant has failed to prove that he was

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prejudiced because, as stated above, he entered his plea to avoid greater sentencing exposure and additional charges, not because he felt Counsel was not properly defending him. The application must be denied and dismissed with prejudice.

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IV. CONCLUSION

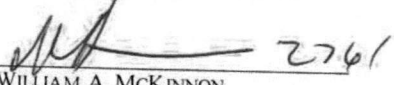
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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), SCRCR 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.

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


WILLIAM A. MCKINNON
Presiding Judge
Seventh Judicial Circuit

Spertanburg, South Carolina

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