NOTICE OF APPEAL FROM A PCR DENIAL BY THE COURT OF COMMON PLEAS

THE STATE OF SOUTH CAROLINA
In Supreme Court of SC

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case #2021-CP-43-0168

The State, Respondent,

v.

Jamacia Simon Appellant.

NOTICE OF APPEAL

Jamacia Simon, appeals the decision of the Court, in the order dated January 10, 2022, received by counsel on January 24, 2022, where Mr. Simon was denied his request for Post-Conviction Relief. Mr. Simon was represented at the hearing by Timothy L. Griffith, Attorney at Law who files this notice on behalf of the Appellant. The order herein attached and a copy of which is also forwarded to the SCCID Appellate Division.

Dated 1/25/2022

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STATE OF SOUTH CAROLINA COUNTY OF SUMTER	)	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT
Jamacia Simon, SCDC No. 383069	)	Case No. 2021-CP-43-0168
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina	)	
Respondent.	)	

This matter comes before the Court by way of Applicant Jamacia Simon's February 4, 2021 application for post-conviction relief. Respondent made its return and moved for a more definite statement on October 5, 2021. A virtual evidentiary hearing before the undersigned was convened on Wednesday, November 17 on the WebEx virtual platform. Applicant was present, consented to the virtual hearing, and was represented by Attorney Timothy Griffith. Assistant Attorney General William H. Ray, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf. Applicant's plea counsel, Attorney Katarzyna Timmons, also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, the records of the Sumter County Clerk of Court, a copy of the original plea transcript, and the pleadings. This Court has reviewed the record and pleadings, heard the testimony and observed the witnesses, and finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently incarcerated in the South Carolina Department of Corrections. Applicant was indicted by the Sumter County Grand Jury for armed robbery at its August 2019 term. (2019-GS-43-0713). Applicant was represented by Attorney Katarzyna Timmons and

Assistant Attorney General William Jason Corbett, of the South Carolina Attorney General's Office, prosecuted the case. On February 19, 2020 Applicant appeared before the Honorable George M. McFaddin and entered a guilty plea. Judge McFaddin sentenced Applicant to fifteen years' imprisonment the next day. Applicant did not pursue a direct appeal of his sentence or conviction.

II. FACTUAL HISTORY

Applicant agreed at his plea hearing that the following facts, as recited by the Assistant Attorney General, give rise to his conviction:

> [T]his incident took place here in Sumter County on or about November 29th of 2018. Specifically, at the Speedway gas station and convenience store located on Broad Street.
>
> In the nighttime hours, Mr. Simon, along with two other co-defendants, did enter that store. At that point in time – the clerk that night was Ms. McDonald. She was present in the store. All three individuals produced handguns. Two of the individuals approached the counter, ultimately either coming over or around the counter, and taking from the cash register by force or intimidation while armed with a deadly weapon the property of Speedway.
>
> (Tr. 11, 19 – Tr. 12, 13).

III. CURRENT APPLICATION

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

1. I don't feel like a statement and tattoo is enough to convict a person.
2. There were multiple statements in the case that didn't add up.
3. I wasn't read my Maranda rights.

In response to the State's motion for a more definite statement, Applicant, through counsel filed an amended application on November 4, 2021 and alleged as follows:

1. Mr. Simon did not have time to talk to his attorney and before plea and only spoke to her 3 times in her office.

Had he had more time and information, he would not have plead guilty and would have gone to trial.

2. Mr. Simon was Coerced into pleading guilty by his attorney and told he would be found guilty at trial. (He did admit that his attorney did tell him he had a right to a trial but did not really understand that).

   Had he understood that he would not have plead guilty and would have gone to trial.

Applicant proceeded forward on the allegations raised in his amended application at the evidentiary hearing. Therefore, the allegations raised in his initial application are deemed waived and will not be addressed herein, to the extent that they are not included in the amended application.

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, 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/~~her~~ 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)).

These standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before

examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Failure to adequately consult with Applicant

Applicant alleges that he did not have adequate opportunities to meet with his attorney prior to entering his guilty plea. This allegation is without merit.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. *Harris v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. *Id.* (citing *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); *Skeen v. State*, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.*, 377 S.C. at 75, 659 S.E.2d at 145 (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Counsel testified at the evidentiary hearing that she was appointed to represent Applicant after she began working at the public defender's office. He had previously been represented by Attorney Jason Bridges. She noted that the file indicated that Attorney Bridges met with Applicant at least six times during the course of his representation. She stated that she personally met with him three times. During those meetings they discussed his constitutional rights and the discovery in the case. She also discussed the evidence against him and advised him on the likelihood of

conviction should he go to trial. She noted that there was video evidence as well as incriminating statements made by his codefendants, who were expected to testify against him at trial.

Applicant acknowledged that he had met with counsel prior to his plea hearing, but stated that they did not discuss a trial or his constitutional rights. He stated that she did tell him he could plead guilty and that the case was not worth taking to trial. He also stated that they did not discuss the case, but puzzlingly stated that they did review the discovery. He stated that he felt that counsel was not representing him correctly. He had requested that she get him a plea for less time, but she told him that the only offer was for fifteen years. He stated that he felt he was under pressure and would not have pled with better representation. When pressed as to what counsel could have done differently he could not point to anything specific, other than simply not spending enough time on the case.

He acknowledged that he chose to enter the plea and was aware that he could have taken it to trial. He stated that he had enough time to make this decision, and would not have chosen to go to trial if he had more time. He acknowledged that he told the plea court that he was satisfied with his lawyer and that he did not need to spend more time speaking with her. He also acknowledged that he met with her three times, and met with prior counsel approximately six times. He stated that he pled because he did not want to go to trial and lose, and thought it was in his best interest to enter the plea.

This Court finds that Applicant has not met his burden of proving ineffective assistance of counsel for failing to spend adequate time meeting with Applicant and preparing the case for trial. It is undisputed that Applicant met with counsel and his previous attorney a total of nine times, that the discovery was reviewed with him, that he understood the evidence, and that he chose to enter a guilty plea rather than going to trial. The record shows that he told the plea court that he

was satisfied with his attorney, that he had enough time to speak with her, and that he wanted to enter his plea rather than go to trial. Applicant has offered no evidence that could have been discovered or explanation of what benefit would have derived from additional meetings with his attorney. Likewise, he has not shown why additional meetings with his attorney would have compelled him to take his case to trial rather than entering his guilty plea. Counsel's performance therefore cannot be deficient for failing to adequately meet with Applicant, and he has not shown prejudice resulting from the representation. The allegation must be denied and dismissed with prejudice.

Involuntary Guilty Plea

Applicant alleges that his counsel coerced him into entering a guilty plea. 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.

The plea court found that Applicant's plea was entered freely, knowingly, voluntarily, and intelligently. (Tr. 13, 18-20). The court made this finding after a thorough colloquy where Applicant was informed of the charges against him and advised of his constitutional rights. (Tr. 3, 3-12; Tr. 4, 16 – Tr. 5, 20). Applicant stated that he was satisfied with his attorney and specifically stated that nobody had promised him anything and was entering his plea freely and voluntarily. (Tr. 7, 7-12; Tr. 10, 15 – Tr. 11, 1).

As described above, Applicant stated that he felt pressured because his attorney advised him to enter his guilty plea rather than go to trial. He believed that at trial his codefendants would testify against him and he would be convicted. The significant likelihood of defeat at trial is what induced the plea.

Counsel testified that Applicant was initially hesitant to enter a guilty plea because of the severity of the offense, but ultimately made the decision to admit his guilt and avoid a trial. She stated that this decision came after discussions about the evidence against him, the likelihood of conviction, and the possibility of serious prison time. She stated that she did not promise him anything to get him to enter a plea, and it was his decision.

This Court finds no reason to deviate from the plea court's finding that Applicant's plea was freely and voluntarily made based upon the testimony presented at the evidentiary hearing. Applicant stated that he felt the plea was a better option than going to trial. Applicant pled *because*

it was the better option based upon the evidence against him, not because of any action or omission of counsel. The record clearly shows that Applicant's plea was made voluntarily, and the testimony shows that Applicant made the decision after a thorough review of the case and opportunity to consider the best path forward. Applicant has failed to show deficiency or prejudice resulting from counsel's performance in this regard. As such, the application for post-conviction relief must be denied and dismissed with prejudice.

V. CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant's 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 10 **day of** January, **2022.**

DIANE S. GOODSTEIN
Presiding Judge
Third Judicial Circuit

E. Gregg, South Carolina