

SUPREME COURT OF  
THE STATE OF SOUTH CAROLINA

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MAR 14 2022

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Robert E. Hood, Circuit Court Judge

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Case No. 2020-CP-26-3336

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State of South Carolina,

Respondent,

V.

David M. Dixon

Appellant.

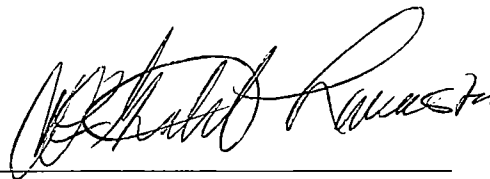
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**NOTICE OF APPEAL**

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David M. Dixon appeals the order of the Honorable Judge Robert E. Hood dated March 2, 2022. Appellant received written notice of entry of this order on March 10, 2022. Counsel is retiring and requesting that another attorney be appointed for the appeal.

March 11, 2022  
Myrtle Beach, South Carolina



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STATE OF SOUTH CAROLINA )  
 COUNTY OF HORRY )  
 )  
 David M. Dixon, SCDC No. 383201 )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina )  
 )  
 Respondent. )  
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IN THE COURT OF COMMON PLEAS  
 FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2020-CP-26-3336

**ORDER OF DISMISSAL**

**RECEIVED**  
 MAR 14 2022  
 S.C. SUPREME COURT

FILED  
 HORRY COUNTY  
 2022 MAR -9 PM 4:24  
 RENEEN N. ELVIS  
 CLERK OF COURT  
 HORRY COUNTY, SC

This matter comes before the Court by way of Applicant David M. Dixon's June 2, 2020 application for post-conviction relief. Respondent made its return and moved for a more definite statement on September 29, 2020. The Court convened an evidentiary hearing into the matter on October 28, 2021, at the Horry County Courthouse. Applicant was present at the hearing and represented by Attorney Carla F. Grabert-Lowenstein. Assistant Attorney General William H. Ray, of the South Carolina Attorney General's Office, represented Respondent.

Applicant was present at the hearing but did not testify. Attorney Kia T. Wilson and Assistant Solicitor Martin D. Spratlin were present and testified. The Court had before it Applicant's South Carolina Department of Corrections Records, a copy of the plea transcript, the records from the Horry County Clerk of Court's Office, and the pleadings. This Court has reviewed the record and pleadings, heard the testimony, observed the witnesses, and finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted by the Horry County Grand Jury for attempted murder at its March 2019 term. (2019-GS-26-01076). Applicant was represented by Attorney Kia T. Wilson and Assistant Solicitor Martin D. Spratlin, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On

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March 10, 2020, Applicant appeared before the Honorable Steven H. John, Circuit Court Judge, and pled guilty to the lesser-included offense of assault and battery of a high and aggravated nature with a negotiated cap of twelve years' imprisonment. Judge John sentenced Applicant to ten years' imprisonment. Applicant did not pursue a direct appeal of his conviction or sentence.

## II. FACTUAL HISTORY

On November 13, 2018, Applicant shot at a vehicle driven by the victim. (Tr. 11). On the morning of the shooting the victim was driving to work when he saw Applicant appear alongside him and fire at least seven shots into the side of the vehicle. (Tr. 11 – Tr. 12). One of the shots very nearly struck the victim in the head. (Tr. 12). Applicant had previously been in a relationship with the victim's wife and had been threatening and harassing the couple, and even shown up at their house unexpectedly. (Tr. 11).

## III. CURRENT APPLICATION

In his initial *pro se* PCR application, Applicant alleged he was being detained unlawfully for the following reasons:

1. Ineffective assistance of counsel
  - a. Counsel failed to conduct investigation and assist in defense.
2. Malicious prosecution
  - a. Charged with heavier charge than necessary by law
3. Due process violations
  - a. Not allowed by judge to represent myself *pro se* or relieve Counsel.
4. Not allowed to file motions.
  - a. Clerk refused to file motion on plaintiff's behalf.

Applicant, through counsel, amended his application on June 10, 2021, and alleged:

1. Ineffective Assistance of Counsel
  - a. Prior to the plea, trial counsel, Ms. Wilson, did not challenge a competency report. Ms. Wilson put on the record that neither she nor her client challenge the report plea transcript page number four (4). However, Ms. Wilson further states that Mr. Dixon does have some mental issue which she will put on the record on page number nine (9) of the plea transcript.

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Ms. Wilson outlined the factual circumstance prior to the shooting. This all paints to Mr. Dixon hitting "bottom."

The facts are Mr. Dixon was diagnosed with Post Traumatic Stress Disorder (PTSD), Bipolar Disorder, and Anxiety Disorder. Notwithstanding these medical impediments, Ms. Wilson at no time discussed his diagnosis regarding her duty to ensure her client (Mr. Dixon) was competent to understand and execute a plea or stand trial. [Please refer to the Plea Transcript page fifteen (15) to sixteen (16).]

- b. The facts recorded above also establish that Ms. Wilson was ineffective in not explaining additional facts that Mr. Dixon may not have been criminally responsible. With all relevant information known to Ms. Wilson, as defense counsel she failed to explain all aspects of the case and defenses to Mr. Dixon. As such counsel prejudiced Mr. Dixon in entering a plea to a lesser included offense of assault & battery for which he may well not have been criminally responsible. If he had fully understood the elements of this charge, he would not have entered a plea, thus prejudiced by a complete lack of communication from his trial attorney, Ms. Wilson.
- c. Mr. Dixon states in his petition that Ms. Wilson was uncommunicative, unavailable to investigate and advise Mr. Dixon. Absent proper investigation Mr. Dixon was left without proper advice and representation. Mr. Dixon's lack of counsel led to his entering a plea to which he lacked legal and reasonable knowledge, validity or intelligent consideration. He was thus prejudiced into an improper plea action to his detriment.

At the hearing, Applicant proceeded forward with the allegations raised in his amended application. The allegations raised in his initial application are waived to the extent that they are not alleged in the amendments, 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 at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes

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the following findings based upon all of the probative evidence presented.

***Ineffective Assistance of Counsel***

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland v. Washington*, 466 U.S. 668, 686 (1984). 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.

 4 of 12

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)).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).]

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is

11/12 5/12

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 Challenge the Competency Report***

Applicant asserts that Counsel was ineffective for failing to contest a competency report that found that he was fit to stand trial despite having knowledge that Applicant suffered from a mental illness. This allegation is without merit.

When a PCR applicant raises issues of competency in the context of a plea proceeding, the two-prong *Strickland* analysis applies; however, because of the nature of the claim, proof of deficiency of counsel is intertwined with prejudice. *Ramirez v. State*, 419 S.C. 14, 21, 795 S.E.2d 841, 844-45 (2017). Specifically, when establishing *Strickland* prejudice in the context of plea counsel's failure to request a mental competency evaluation, "the [applicant] need only show a 'reasonable probability' that he was . . . incompetent at the time of the plea." *Jeter v. State*, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992); *See also Matthews v. State*, 358 S.C. 456, 458-60, 596 S.E.2d 49, 50-51 (2004).

At the plea hearing, the Court referred to a competency to stand trial evaluation that found Applicant had the sufficient factual and rational understanding of the proceedings against him, and the capacity to rationally assist Counsel in his defense. (Tr. 3, 23 – Tr. 4, 10). Counsel stated that neither her nor Applicant challenged those findings, but also informed the Court that he had mental health issues. (Tr. 4, 13 – 20). Applicant indicated that he understood. (Tr. 5, 2-3). Applicant told the plea judge that he was not suffering from any kind of physical, mental, or emotional problem that would prevent him from knowing what he was doing by pleading guilty. (Tr. 7, 21-24).

After the Court accepted the plea, Counsel stated that Applicant was diagnosed with PTSD, bipolar disorder, anxiety, and was taking a variety of medications for those issues. (Tr. 16, 18-22).

*Walt* 6 of 12

She stated that he told her these medications “help keep him [stay] calm and relaxed.” (Tr. 16, 25 – Tr. 17, 1). She also stated that Applicant’s personal life caused him to “hit a spiral of sorts where he was somewhat depressed.” (Tr. 16, 4-8). However, she stated that he understood his responsibility concerning the crimes. (Tr. 18, 1-2).

Counsel testified at the evidentiary hearing that she was appointed to represent Applicant and met with him several times prior to the plea. She stated that he told her he was not in his right mind, but said that he did not want a mental health evaluation. She nevertheless had him evaluated for both mental health issues and competency. She did not recall the specifics of every mental health issue he had, but did recall that he suffered from PTSD and anxiety. She stated that she did not recall any expressing any indifference to his own wellbeing.

She stated that Applicant did not seem confused about his case at the time of the plea. She noted that Applicant was receiving medication at the time. She stated that she had spoken with Applicant about what effect his mental health issues might have on his case and he appeared to understand. She stated that she had no basis to challenge the report finding him competent. Assistant Solicitor Spratlin testified that he recalled the mental health issues and competency evaluation coming up, but there was nothing indicating he was not competent to stand trial.

This Court finds that Applicant has failed to prove that Counsel’s representation was deficient for failing to contest the competency report. The testimony shows that Counsel sought out the evaluation because of Applicant’s mental health history, but had no basis for challenging the report once it determined Applicant was competent. Applicant appeared to her to understand everything that she told him and was able to provide her with information to assist in his defense. Counsel nevertheless did make use of the mental health issues by offering them in mitigation. This was objectively reasonable under the circumstances.

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Additionally, Applicant has failed to prove that he was prejudiced by Counsel's performance. He has not produced the report itself, nor has he offered any evidence that conflicts its findings that he was competent. In short, Applicant has not met his burden of proving that there was a reasonable probability that he was incompetent to stand trial at the time of his guilty plea. Therefore the allegation must be denied and dismissed with prejudice.

***Failure to Adequately Explain Applicant's Criminal Responsibility***

Applicant asserts that Counsel did not adequately explain to Applicant that there may be a basis for him to be found not criminally responsible. This allegation is without merit.

At the evidentiary hearing, Counsel testified that she had no basis for contesting the competency report, nor did she have any basis for arguing that Applicant did not know right from wrong. She stated that she believed Applicant was evaluated for criminal responsibility and capacity to conform and was found both responsible and capable of conforming his behavior to the requirements of law. As mentioned above, the Assistant Solicitor stated that there were no red flags surrounding Applicant's competency or mental health that would have affected the plea.

Counsel testified that she met with Applicant numerous times, reviewed discovery, and discussed his mental health issues with him. She advised him on what effect that would have on his case. She stated that she tried to do everything he asked for and sought to have him evaluated. She discussed the charges with him, as well as what evidence the State had that could be used to meet its burden of proving his guilt beyond a reasonable doubt.

This Court finds that Applicant has failed to meet his burden of proving prejudice from Counsel's performance. It is unclear precisely from Applicant's allegations which facts that were not explained could have negated his criminal responsibility. However, it is clear that Counsel reviewed the evidence against him and discussed the elements of his offenses, based on her

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testimony. Her testimony also makes it clear that Applicant was competent and there was no basis for disputing his culpability on the basis of his mental health issues. Therefore, Applicant has failed to meet his burden of proving deficiency. Additionally, because Applicant failed to produce any reports indicating that he lacked criminal responsibility, or any facts supporting such a finding, he has not proven prejudice from Counsel's representation. As such, the allegation must be denied and dismissed with prejudice.

***Failure to Investigate and Adequately Communicate with Applicant***

Applicant asserts that Counsel failed to adequately communicate with him and investigate his case. At the evidentiary hearing Applicant focused on Counsel's failure to communicate with the victim of the shooting to investigate his story and his willingness to testify against Applicant at trial. This allegation is without merit.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* "In particular, what investigation decisions are reasonable depends critically on


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such information.” *Id.*

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)). Brevity of time spent in consultation with a defendant, without more, is insufficient to establish ineffective assistance of counsel. *Smith v. State*, 404 S.C. 493, 745 S.E.2d 378 (2012). 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)).

At the plea hearing, Applicant stated that he was represented by Counsel, had pretty much told her everything he wanted to tell her about the case, and had enough time to talk to her. (Tr. 9, 13-21). He took an opportunity to speak with Counsel at the hearing before stating that he did not need any more time. (Tr. 9, 22 – Tr. 10, 12). He stated that he was satisfied with her representation and did not have any complaints. (Tr. 10, 13-17). The Assistant Solicitor noted that at the plea hearing that the victim did not wish to speak, but wanted a lengthy sentence and nothing more to do with Applicant. (Tr. 12, 17-19).

Counsel testified at the evidentiary hearing that she met with Applicant approximately eight times, and also spoke with him over the phone. She reviewed the discovery with him and discussed his version of events. She noted that during these meetings Applicant never indicated

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that he wanted to go to trial.

She described the incident as a dispute between Applicant and his ex-girlfriend who was seeing the victim. She stated that Applicant committed the crime out of jealousy. She stated that she did not meet with the victim, who was a friend of Applicant's prior to the shooting. She stated that she spoke to the prosecutor about the victim after Applicant told her that the victim did not want him prosecuted. She was informed that this was not the case. The Assistant Solicitor testified that the evidence showed Applicant had lied in wait, ambushed the victim, and fired several shots. He stated that the victim was not pleased about this, and would have testified at trial if needed.

This Court finds that Applicant has failed to meet his burden of proving that Counsel's preparation or investigation was deficient. The evidence shows that she met with him multiple times, reviewed the evidence, and did attempt to contact the victim when Applicant told her that he did not want to pursue the charges. However, once she found out from the Assistant Solicitor that the victim did want to testify against Applicant, there was nothing that she could do. Interviewing an uncooperative witness would not only have probably been impossible, it would have been pointless, especially in light of the fact that Applicant never expressed a desire to go to trial. Applicant has failed to meet his burden of proving deficient representation.

Additionally, Applicant has failed to show that he was prejudiced by Counsel's performance. The victim did not testify at the evidentiary hearing. It is unknown whether his testimony would have been beneficial to Applicant. Without it, Applicant cannot show prejudice from Counsel's failure to interview the witness. The Assistant Solicitor's testimony indicates that it likely would not support Applicant's claims. Furthermore, there is no evidence rebutting Counsel's testimony that Applicant never intended to go to trial. Therefore, he has failed to meet his burden of proving that but for Counsel's errors he would not have pled guilty. 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 2 day of March, 2022.

W. J. ...

South Carolina

R. E. Hood

ROBERT E. HOOD  
Presiding Judge  
Fifteenth Judicial Circuit

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