THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

2020-CP-42-00233

Tamika Scott, ... Appellant,
v.
The State, ... Respondent.

NOTICE OF APPEAL

Tamika Scott appeals the Honorable Daniel D. Hall's Order of Dismissal filed March 21, 2022.

This 31 day of March, 2021.

Susannah Ross, Attorney at Law
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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Tamika Scott, #230814, Applicant,	)	Case No.: 2020-CP-42-00233
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter comes before this Court by way of Applicant's post-conviction relief application filed January 21, 2020, amended on January 31, 2022. Respondent made its return on May 8, 2020, requesting an evidentiary hearing be convened. An evidentiary hearing was held on February 8, 2022, virtually via Webex. Susannah C. Ross, Esquire, represented Applicant. Then-Assistant Attorney General William H. Ray, Esquire, represented Respondent.

Applicant testified on her own behalf at the evidentiary hearing. Counsel James A. Cheek, Esquire, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet her requisite burden of proof of establishing she is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In September 2019, the Spartanburg County Grand Jury indicted Applicant for shoplifting between two and ten thousand dollars (2019-GS-42-5624) and strong armed robbery (2019-GS-42-5625). James A. Cheek, Esquire represented Applicant. Assistant Solicitor Jennifer Jordan prosecuted the case. On September 26, 2019, Applicant pled guilty before the Honorable J. Mark Hayes, II, circuit court

judge. Applicant was sentenced to fifteen years' for strong armed robbery, suspended upon service of ten years' imprisonment followed by five years' supervision, and ten years' imprisonment for shoplifting, sentences running concurrently. Applicant did not appeal her conviction or sentence.

Summary of Relevant Facts

On December 28, 2018, officers responded to a call from a Home Depot, reporting a shoplifting. (Plea Tr. 11). On the call, Home Depot employees reported that two women and one man entered the store. (Plea Tr. 11). The women are mother and daughter were known among Home Depot employees as the "Battery Ladies". (Plea Tr. 11). They grabbed a cart, proceeded to the hardware section, grabbed a bunch of batteries, and started putting them in their purses. (Plea Tr. 11). They proceeded toward the middle aisle of the store where loss prevention approached them. (Plea Tr. 11-12). Loss prevention attempted to recover all merchandise from them, at which they abandoned the shopping carts and fled the store. (Plea Tr. 12). The man with them pushed loss prevention as they left. (Plea Tr. 12). The stolen items were not recovered. (Plea Tr. 12). The recovered merchandise from the cart valued $3,286.64 and the amount they left with was $2,775.00. (Plea Tr. 12). There was surveillance footage of the incident. (Plea Tr. 12).

On April 24, 2019, the same women and man as before walked into Home Depot with two carts and walked out of the store with two carts full of power tools without paying for them. (Plea Tr. 12). They also filled a bag with power tools as well. (Plea Tr. 12). The stolen items were valued at an estimated $7,000. (Plea Tr. 12).

On May 10, 2019, officers responded to the same Home Depot for another shoplifting. (Plea Tr. 13). Another loss prevention officer reported that on April 27, 2019, the two women and man entered the store, selected multiple power tools and accessories, placed them in two

separate carts and proceeded past the point of sale without paying for them. (Plea Tr. 13). They were valued at $4,250. (Plea Tr. 13).

Current Action Before this Court

In her current PCR application, Applicant alleges she is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Defense counsel was ineffective because:
    a. "Failure to file an appeal."
2. "Involuntary plea."
    a. "Promised a certain time and was not an open plea deal."

Applicant, through PCR Counsel, amended her application on January 31, 2022, alleging:

1. Ineffective assistance of counsel for:
    a. Failing to investigate or review discovery with the Applicant prior to her plea;
    b. Advising the Applicant that she would get probation if she plead guilty;
    c. Failing to explain the elements and nature of the strong armed robbery charge;
    d. Failing to present mitigating mental health evidence of post-traumatic stress disorder; and
    e. Failing to appeal the plea and sentence.

Applicant proceeded forward on the allegations raised in the amended application only. All other allegations raised in her initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

On direct-examination, Applicant stated she was represented by James Cheek during her plea proceedings. She stated she thought that if she pled, she would receive a probation-only sentence and that she told her family accordingly. She stated that she would not have pled if she thought she would have to serve time in prison. Specifically, she stated that she would have fought the strong-armed robbery charge at trial because her son committed the act, not her, and she did not think being convicted under hand of one hand of all was proper in her case.

Applicant stated that she did not review the discovery or videos in the case and was never provided a copy of the discovery. She stated that there was no proof she committed the thefts, that no evidence implicated her existed, and the only indication of her culpability was the warrant itself. Nevertheless, Applicant stated she decided to plead given her prior criminal history and because she was promised a probation-only sentence.

Applicant stated that she was off her medication when she committed the crime and is now on new medication that would prevent her from committing the crime again. She stated that she thought Counsel should have brought her being off her medication to the Court's attention at the plea hearing. She stated she thought she did not deserve the lengthy sentence she received because of her mental health issues. Applicant stated she wanted an appeal, that she asked Counsel for one, and was never given one.

On cross-examination, Applicant stated she met with Counsel twice. She stated they discussed sentencing ranges, but not the evidence against her. She stated she did not remember the facts being recited at the plea hearing or agreeing the prosecutor was substantially correct in her statement of the facts. She stated that her only concern in pleading was that she would be given a probation-only sentence if she pled. Applicant stated she did not realize she was sentenced to ten years' imprisonment until after the hearing. Applicant stated she remembered stating she understood she could face up to fifteen years' imprisonment for the strong-armed robbery charge, but stated she still thought she would only receive probation. She stated Counsel consistently told her she would only receive probation and that she would not have pled if she thought she would receive something other than probation. She stated that she told Counsel she was not satisfied with her sentence after the plea but declined to state whether she recalled asking for an appeal.

Counsel Testimony

Counsel stated he works at Spartanburg Public Defender's office and maintains his office in the jail to stand by for incarcerated individuals looking to enter a plea. Counsel stated he reviewed discovery with Applicant, which included pictures of her inside Home Depot with her daughter and son. Counsel stated that the photos were clearly of her. He stated she originally stated that she was not present with her children. Counsel stated that she and her daughter were known as the battery ladies.

Counsel stated that he discussed sentencing ranges for both strong-armed robbery and shoplifting with Applicant and never told her she would receive a probation-only sentence. He stated he discussed with Applicant the likelihood of her losing at trial. Counsel stated that he thought Applicant understood everything they discussed concerning the plea.

Counsel stated she was charged with strong-armed robbery under hand of one hand of all. Counsel stated that he had Applicant plead before Judge Hayes because he is the most lenient sentencer in the circuit.

In mitigation, Counsel stated that Applicant was a serial shoplifter and encouraged her to tell the court she understood she could not keep stealing if she wanted to be a part of society and that she now understood this and wanted to change for the better. He stated he told Applicant to throw herself upon the mercy of the court. Counsel stated that he told her to better herself when in prison by getting an education and work experience because she had nothing in her past to show for how she provided for her now-grown kids beyond thievery. Counsel stated that he told her there was no good reason to steal thousands of dollars' worth of goods and that she needed to get an actual job and ask the court for an opportunity to get an education. Counsel stated she received a lenient sentence by Spartanburg standards, which generally gives harsher sentences

than surrounding counties. Counsel stated he wished he had known Applicant was on medication at the time because that was a question asked during the plea colloquy that she answered negatively. Counsel stated that she never requested an appeal, and he does not recall receiving a kiosk message from Applicant after the plea.

At the close of direct examination, Counsel informed the Court that he "knows gang symbols", knew what Applicant was trying to tell him during the course of his testimony by crossing her arm over her heart, and that he did not alter his testimony based on the symbol she is gave him, and told her to stop because he knows people in Anderson and Spartanburg and that it was not in her best interest to continue to send a symbol to him.

On cross-examination, Counsel stated that he did not give Applicant a copy of the discovery, nor did he bring his laptop with him when he visited her. He stated he showed her still shot pictures of her in the store where she and her children were caught stealing from the store together. He stated that Applicant abandoned the cart before her son pushed the person at the store, but that she undoubtedly pushed a cart of stolen materials out of the store, which she abandoned in the parking lot.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the plea transcript, 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 because 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

Applicant also implies in her application that her plea was invalid. For a guilty plea to be valid, the record must establish the defendant had a full understanding of the consequences of her plea and the charges against her. *Dalton v. State*, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). Further, an applicant can attack the voluntary, knowing and intelligent character of a guilty plea entered on advice of counsel by showing counsel's advice in taking the plea fell below an objective standard of reasonableness. *Porter v. State*, 368 S.C. 378, 629 S.E.2d 353 (2006). "That a guilty plea must be

intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." *McMann v. Richardson*, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 771.

This Court finds that the plea was freely, voluntarily, knowingly, and intelligently entered into. At the plea hearing, when asked to stand if she was satisfied with the work Counsel did for her, Applicant stood. (Plea Tr. 6-7). Applicant did not respond when asked if anyone threatened, promised, or forced her into taking the plea. (Plea Tr. 7). When asked to stand if she wanted a jury trial, Applicant remained seated. (Plea Tr. 8). When asked to stand if she understood she was giving up her rights to call and confront witnesses, to present evidence, to establish a defense, to subpoena, and to remain silent, Applicant stood. (Plea Tr. 8-9). After the prosecutor read the facts on record, Applicant conceded they were substantially correct. (Plea Tr. 13). The Court asked if she understood she could be sentenced to up to ten years on the shoplifting charges and up to fifteen years on the robbery charge, to which Applicant stated she did. (Plea Tr. 13). Applicant stated she was guilty of the crimes charged and all answers to questions asked at the hearing were truthful. (Plea Tr. 13). At the PCR hearing, Counsel credibly testified that he thought Applicant understood all their discussions about the plea prior to the plea hearing and knew what she was doing by entering the plea. Thus, based upon the plea hearing transcript and PCR hearing testimony, this Court finds that the plea was freely, voluntarily, knowingly, and intelligently entered and, consequently, the claims Applicant seeks to maintain have been waived and cannot be reasserted now.

Failure to Explain Elements and Nature of Strong-Armed Robbery Charge

Applicant claims Counsel was ineffective for failing to explain the elements and nature of the strong-armed robbery charge, particularly as it relates to hand of one hand of all. However, Counsel credibly testified that he discussed hand of one hand of all theory with Applicant prior to the plea. Accordingly, this Court finds Applicant in her allegation to be not credible and declines to grant relief on this ground.

Failure to Review Discovery

Applicant claims Counsel was ineffective because Counsel failed to review discovery with her. However, Counsel credibly testified that he brought a copy of all printed materials, including still shots of her caught on surveillance footage inside Home Depot, and reviewed this discovery with her during their meetings. Accordingly, this Court finds that Applicant's allegation is not credible on this ground and relief is denied on this ground as a result.

Falsely advising her that she would receive probation

Applicant claims Counsel was ineffective for incorrectly advising her that if she pled she would receive a probation-only sentence. "When considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether information conveyed by the plea judge cured any possible error made by counsel." *Burnett v. State*, 352 S.C. 589, 592, 576 S.E.2d 144, 145 (2003) (citing *Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998)).

Counsel credibly testified that he informed Applicant of the potential sentences that could be imposed for each charge pled to and did not, under any circumstances, tell Applicant that she would receive a probation-only sentence. Accordingly, this Court finds Applicant's allegation that Counsel told her she would receive a probation-only sentence if she pled not credible.

Still, even if Counsel misadvised Applicant on this ground, this issue was rectified through the plea colloquy. Specifically, when announcing this case, the prosecutor announced that Applicant was entering a plea to the charges without negotiation or recommendation. (Plea Tr. 9-10). Additionally, the Court informed Applicant she could be sentenced up to ten years' imprisonment for shoplifting and fifteen years' imprisonment for strong-armed robbery. (Plea Tr. 13). After being informed of the potential sentences, Applicant stated she still wished to enter the pleas. (Plea Tr. 13-14). Thus, even if Counsel did advise Applicant she would receive a probation-only sentence, this was seemingly rectified through the plea colloquy. Accordingly, relief is denied on this ground.

Failure to present mitigating mental health evidence

Applicant claims Counsel was ineffective for failing to mitigate the sentence. Counsel may be found deficient for failing to sufficiently investigate and present mitigating evidence. *See Council v. State*, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008) (finding it unreasonable for counsel not to further investigate the defendant's background and present even minimal mitigating evidence obtained); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (finding it unreasonable when Counsel failed to investigate mitigating evidence beyond a couple retained records, including the presentence investigation report and social service records); *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (finding that Counsel was unreasonable for failing to evaluate the totality of available mitigation evidence). An applicant is prejudiced by this deficiency if there is a reasonable probability that a different sentence would have been imposed but for Counsel's failure to investigate and present mitigating evidence. *Council v. State*, 380 S.C. 159, 171, 670 S.E.2d 356, 362 (2008).

Counsel is not deficient on this ground because he both credibly testified that he was not

informed of Applicant being prescribed or otherwise on medication at the time of the plea and because he otherwise articulated a valid mitigation strategy. Specifically, Counsel testified that he told Applicant she should tell the court she understood she could not keep stealing if she wanted to be a part of society, that she now understands this and wants to change for the better, and that she should throw herself upon the mercy of the court. He also told her to use her time in prison to better herself in terms of education and work experience and that she should communicate this to the court at the plea hearing. Accordingly, this Court finds Counsel's strategy reasonable, because he was not told of Applicant's mental health issues or medication use and developed a valid mitigation strategy based upon what he did know about Applicant, her case, and the Judge she was pleading before. Thus, Counsel is not deficient on this ground.

Even if Counsel was deficient, Applicant was not prejudiced as a result. Specifically, Applicant failed to meet their burden of proof in showing a different sentence would have been imposed if Counsel had chosen Applicant's medication use and mental health issues as the mitigation strategy. Thus, because Applicant has failed to meet either prong of the *Strickland* analysis, relief is denied on this ground.

Failure to appeal sentence or plea

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

of the right to appeal. *Id.* Extraordinary circumstances may exist when there is reason to think that a rational defendant would want an appeal, such as when non-frivolous grounds for an appeal exist, or when the defendant reasonably demonstrates an interest in appealing. *Id.*; *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

This Court finds Counsel credible in his testimony that Applicant never requested an appeal. Accordingly, Counsel was not required to file one, barring extraordinary circumstances, which have not been shown here. Accordingly, relief is denied on this ground.

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Conclusion

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 15th day of March, 2022.

DANIEL D. HALL
Presiding Judge
Seventh Judicial Circuit

York, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

Tamika Scott, #230814 Applicant,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Order of Dismissal has been served upon applicant's counsel by mailing one copy in the United States mail, postage prepaid, addressed to:

Susannah C. Ross, Esquire
Ross & Enderlin, PA
330 East Coffee St.
Greenville, SC 29601

This 23rd day of March, 2022.

Grayson Horton
Legal Assistant for Respondent

SWORN to before me this 23rd day of March, 2022.

Notary Public for South Carolina.
My Commission Expires: 5/20/2025