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May 13, 2013

RECEIVED

MAY 23 2013

S.C. SUPREME COURT

Mr. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29221

RE: Derrick Tyrone Blake v. State of South Carolina
C.A. No.: 2011-CP-46-3430

Dear Mr. Shearouse:

My office represented Derrick Tyrone Blake in his Post Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the Notice of Appeal and the Proof of Service in the above-referenced case. Please return the clocked copies to me copies in the enclosed self-addressed, stamped envelope. Also enclosed is a copy of the Order of Dismissal.

Thank you for your assistance with this matter.

Sincerely,

Leah B. Moody

LBM/jow

Enclosure

cc: Derrick Tyrone Blake
Rutledge Johnson, Esquire

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Edgar W. Dickson, Presiding in York County

Case No. 2011-CP-46-3430

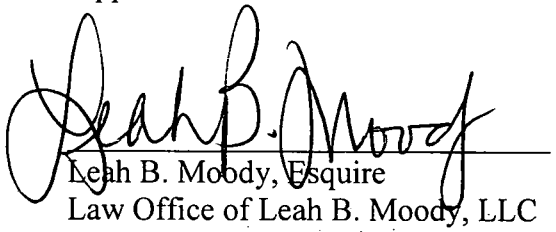
Derrick Tyrone Blake, ... Appellant,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Derrick Tyrone Blake appeals the order of the Honorable Edgar W. Dickson, dated April 18, 2013 and mailed on May 3, 2013. Appellant received written notice of entry of the final order on May 5, 2013.



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Other Counsel of record:
J. Rutledge Johnson, SC Attorney General's Office
Attorney for Respondents
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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
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Edgar W. Dickson, Presiding in York County

Case No. 2011-CP-46-3430

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on J. Rutledge Johnson by depositing a copy of it in the United States Mail, postage prepaid, on May 20, 2013, addressed to its attorney of record, J. Rutledge Johnson, Post Office Box 11549, Columbia, South Carolina, 29211-1549.

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Rock Hill, South Carolina 29731

cc: Sharon A. Graham
Derrick Tyrone Blake

STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
Derrick Tyrone Blake, #332138, Applicant, v. State of South Carolina, Respondent.	2011-CP-46-3430 **ORDER OF DISMISSAL**

FILED-RECEIVED
2013 MAY -3 AM 11:15
DARLA MOORE HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed September 7, 2011. The Respondent made its Return on September 21, 2012. An evidentiary hearing into the matter was convened on October 9, 2012, at the Moss Justice Center in York, SC. Leah Moody, Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Jim Boyd, Esquire also testified. This Court had before it a copy of the records of the York County Clerk of Court, records from the South Carolina Department of Corrections, and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. The Applicant was indicted at the August 2008 term of the York County Grand Jury for Distribution of Cocaine Base (2008-GS-46-3048) and Distribution of Crack Cocaine within proximity of a park. He was represented by Jim Boyd, Esq. On December 3, 2008, Applicant was tried by a jury and convicted of both charges as

indicted. The Honorable John C. Hayes, III sentenced the Applicant to confinement for fifteen (15) years for each charge. The sentences run concurrently.

Thereafter, the Applicant appealed his conviction and sentence. A brief was filed on his behalf pursuant to Anders v. California[1]. The South Carolina Court of Appeals affirmed his conviction. State v. Blake, 2011-UP-54 (filed February 10, 2011). The Remittitur was issued on March 1, 2011.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Trial Counsel/ Failure to investigate indictments"
   a. "failure to investigate indictments subject matter jurisdiction"
2. "Failure to challenge chain of custody"
   a. "failure to challenge steps in the chain of custody"
3. "[F]ailure to object to statement by the prosecutor that were(sic) not in evidence"
   a. "failure to object to statement by prosecutor in closing argument"

At the hearing, the Applicant proceeded on his claims of ineffective assistance of trial counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court also has read the trial transcript, all of which assists the Court in judging their credibility. The Court finds the testimony of Jim Boyd, Applicant's trial counsel, very credible. This Court finds the Applicant's testimony concerning ineffectiveness of trial counsel is not credible.

Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

1 Anders v. California, 386 U.S. 738 (1967).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the 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.

Failure to challenge the chain of custody

The Applicant alleges Counsel was ineffective for failing to challenge the chain of custody of the narcotics found during a controlled drug buy set up by the Multi-Jurisdictional Drug Enforcement

Unit involving a confidential informant (CI) and the Applicant.

At the PCR hearing, the Applicant testified Counsel (Boyd) failed to object to the physical chain of custody of the crack cocaine in this case. Specifically, the Applicant stated Counsel failed to object to the dates listed on the "Best Bag." The Applicant also stated Counsel did not stipulate to the chain of custody and did not object to the drugs being admitted into evidence.

Counsel testified he has been practicing law since 1977. Counsel stated he has dealt a great deal with criminal law, having been a Public Defender for six years and a part-time solicitor for three years. Counsel testified he has tried numerous drug cases. He also stated his current practice consists of fifty percent criminal law. Counsel testified he reviewed the discovery packet prior to trial and found nothing objectionable about the chain of custody. Counsel also stated if he had discovered something objectionable, he would have made an objection. Counsel further asserted the chain of custody was complete, and he found no reason to object to the introduction of the crack cocaine.

Counsel also testified he based his trial strategy on the Applicant's theory of the incident. The theory was that the Applicant met with the CI, but the CI handed him a marijuana cigarette and not crack cocaine. He also stated on the video, produced at trial, there was no showing of a hand-to-hand transaction. In the trial transcript, Counsel moved for a directed verdict on the basis of the State's failure to prove any exchange occurred on the video. Additionally, in the transcript, Counsel argued the CI lacked credibility, had motive to set up the Applicant, and the State failed to prove the CI and the Applicant exchanged crack cocaine. Counsel attacked the completeness of the video along with the insufficient search of the CI. Further, Counsel argued no bag of crack cocaine was ever seen on the video as well as the State could not prove the Applicant called the CI on the audio

tape.

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Additionally, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information" Strickland, at 691, 104 S.Ct. at 2066.

This Court finds the Applicant has failed to show that the outcome of his case would have been different had Counsel objected to the admission of the crack cocaine. Cherry, *supra*. Counsel stated his strategy was to attack the State's case by showing the CI and the Applicant exchanged marijuana, but not crack cocaine. This was based on the information the Applicant provided to him. Counsel is clearly permitted to base the defense theory of the case on the information the Applicant provides. Counsel also testified he reviewed the discovery packet and found nothing objectionable. Counsel further testified had he found an objectionable issue, he would have made an objection. This Court finds Counsel was effective in his representation of the Applicant. Further, the Applicant has failed to prove any resulting prejudice from Counsel's failure to object to the chain of custody in this case. Accordingly, this allegation is denied.

Failure to object to the Solicitor's closing argument

The Applicant also alleges Counsel was ineffective for not objecting to the Solicitor's closing

argument.

The Applicant testified Counsel should have objected to the Solicitor's closing argument as the Applicant asserts the Solicitor's comments inflamed the jury, and the Solicitor also argued evidence not supported by the record. Specifically, the Applicant stated Counsel should have objected to the comments on pages 154 line 10, where the Solicitor references a "controlled buy," page 156 lines 17-18, where the Solicitor refers to the Applicant as a "forty-four year old business man," and page 158, where the Solicitor alluded to a hand-to-hand transaction between the CI and the Applicant. Counsel testified while the comment about the Applicant being a business man might have been improper, the Solicitor made the comments in context. The drug exchange was for financial gain which could be construed as a business transaction, albeit an illegal one.

The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Additionally, the solicitor's closing argument must not appeal to the personal biases of the jurors. Id. "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Smith v. State, 375 S.C. 507, 523, 654 S.E.2d 523, 531-32 (2007) (quoting Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). Further, to be entitled to a new trial for improper closing arguments, the test is whether "the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (2001).

This Court finds Counsel was not ineffective for objecting to the Solicitor's closing argument. First, the record and the evidence at trial support the Solicitor's version of the facts and the allowable inferences therefrom. As to the comment about a controlled buy, the State presented

evidence that law enforcement initiated this transaction, through the CI, to buy crack cocaine from the Applicant. Law enforcement equipped the CI with video and audio recording devices, searched the CI, provided the CI with money to purchase the drugs, monitored the situation, and retrieved the drugs from the CI after the transaction. *See* Tr. pp. 40-43, 47-50, 63-75. Clearly, there is evidence of a "controlled buy" to support the Solicitor's closing argument. As to the comment about the Applicant being a businessman, there is evidence in the record that the Applicant sold crack cocaine for one hundred and fifty dollars to the CI. *See* Tr. p. 63-66, 68-70. Therefore, there is testimony to support the Solicitor's comments that a transaction made where the Applicant sold the CI drugs for money; hence, the reasonable inference that the Applicant is a form of a businessman, or one who engages in the activity of buying and selling[2]. As to the comment that there was a hand-to-hand transaction, although the transaction was not recorded by the video camera, the CI testified, "Yes, sir. [the Applicant] handed me the drugs and I took a look at them and agreed top(sic) what I saw and handed him some money." (Tr. p. 70 lines 5-6). Undoubtedly, the Solicitor had the right to reference a hand-to-hand transaction of the crack cocaine.

For the reasons above, this Court finds the Applicant has failed to meet his burden of proving the outcome of his trial would have been different had Counsel objected to the Solicitor's comments. Cherry, *supra*. This Court also finds the Solicitor's comments did not infect the trial with unfairness as to make the Applicant's conviction a denial of due process. Hamilton, *supra*. This Court further finds no resulting prejudice in Counsel's alleged failure in this case. Accordingly, this allegation is denied.

Failure to object to the True-billed Indictments

2 According to Webster's II *New Riverside* Dictionary 97 (Rev'd 1996), business is defined as "trade; commerce."

The Applicant further alleges Counsel was ineffective for failing to object to the true-billed indictments in this case.

The Applicant claims the indictments were signed by the foreperson of the grand jury on a day that no grand jury was scheduled to meet. Counsel testified he did not see anything objectionable about the indictments as they were properly presented to and signed by the grand jury.

"Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood..." S.C. Code Ann. § 17-19-20 (1962). "In the absence of evidence to the contrary, the regularity of the proceedings of a court of general jurisdiction will be assumed." Pringle v. State, 287 S.C. 409, 410-11, 339 S.E.2d 127, 128 (1986). Additionally, the chief administrative judges have been encouraged to convene the grand jury when the court of general session is not in session pursuant to an Administrative Order of the Chief Justice. Brown v. State, 316 S.C. 258, 260, 449 S.E.2d 494, 495 (1994).

This Court finds this allegation is wholly meritless. The Applicant's indictments were true-billed on August 21, 2008 and signed by the foreperson of the grand jury. The indictments are sufficient and proper pursuant to § 17-19-20. While there was no general sessions term that week, pursuant to the Administrative Order, the chief administrative judge was acting in accordance with an administrative order of the Chief Justice, and the assembling of the grand jury was proper. Thus, Counsel was not ineffective for not objecting to the indictments. The Applicant has filed to produce any evidence to the contrary. Counsel was not ineffective for failing to object to the indictments as

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Commerce is then defined as "the buying and selling of goods."

they were properly true-billed. The Applicant can prove no prejudice from counsel's alleged failure. Accordingly, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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 (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. 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 Respondent.

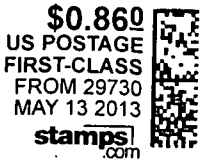
AND IT IS SO ORDERED!

Edgar W. Dickson
Presiding Circuit Court Judge
Sixteenth Judicial Circuit

April 18, 2013

Orangeburg, South Carolina

Law Office of Leah B. Moody, LLC
P. O. Box 1015
Rock Hill, SC 29731



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