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June 4, 2013

RECEIVED

JUN 06 2013

S.C. SUPREME COURT

Via Regular Mail

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: TIJUAN PEAKE v. State

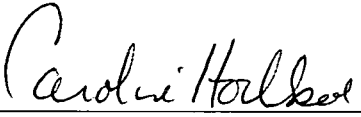
Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,



Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General
Office of Appellate Defense

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM UNION COUNTY
Court of Common Pleas
THE HONORABLE Edgar W. Dickson

CA No. 2011-CP-44-489

TIJUAN PEAKE,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA

RESPONDENT.

RECEIVED

JUN 06 2013

S.C. SUPREME COURT

WILLIAM F. GAULT
CLERK OF COURT
UNION, SC

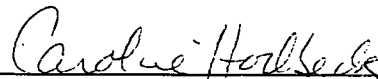
2013 MAY 28 PM 12 59

FILED FOR RECORD

NOTICE OF APPEAL

Appellant TIJUAN PEAKE, appeals from the Order of the Honorable Edgar W. Dickson, Circuit Court Judge clocked May 9, 2013.

Respectfully submitted,



Caroline M. Horlbeck, Esq.
101 Whitsett St
Greenville, SC 29601

Date: May 23, 2013

Other Counsel of Record: Karen Ratigan, Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA)
 COUNTY OF UNION)

IN THE COURT OF COMMON PLEAS)
 SIXTEENTH JUDICIAL CIRCUIT)

Tijuan Peake, #307699,)

2011-CP-44-0489)

Applicant,)

ORDER OF DISMISSAL)

v.)

State of South Carolina,)

Respondent.)

WILLIAM F. GAULT
 CLERK OF COURT
 UNION, SC

2013 MAY 9 PM 1 29

FILED FOR RECORD

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 9, 2011. The Respondent made its Return on March 23, 2012. An evidentiary hearing into the matter was convened on October 9, 2012, at the Moss Justice Center in York, SC. Caroline Horlbeck, 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. Ross Burton, Esquire also testified. This Court had before it a copy of the records of the Union 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 Union County Clerk of Court. The Applicant was indicted at the March 2008 term of the Union County Court of General Sessions for Distribution of Crack Cocaine (2008-GS-44-0332) and Distribution of Crack Cocaine within proximity of a school (2008-GS-44-0333). He was represented by Ross Burton, Esq. On October 15, 2008, the Applicant



underwent trial by jury, pursuant to which he was convicted of Distribution of Crack Cocaine, 2nd Offense and the corresponding proximity charge. The Honorable John C. Hayes, III sentenced Applicant to confinement for twenty (20) years for Distribution of Crack Cocaine, 2nd offense and fifteen (15) years, concurrent, for the proximity charge.

A Notice of Appeal was filed on the Applicant's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed his conviction. State v. Peake, 2011-UP-297 (filed June 14, 2011). The Remittitur was issued on July 1, 2011.

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

1. Ineffective Assistance of Counsel
 - a. "Counsel's failure to object to trial judge's improper comments on the facts"
 - b. "counsel's failure to object to the trial judge's erroneous instruction to the applicant that his prior drug convictions could be used to impeach him if he exercised his right to testify in his defense"
 - c. "Counsel conceded guilt [or] made improper comments that [were] damaging to Applicant"
 - d. "counsel elicited... testimony that bolstered the witness and testimony credibility"
2. Subject Matter Jurisdiction
 - a. "The Trial Court was not presented indictments on Applicant's drug distribution and drug proximity offense for trial of these offenses under its criminal jurisdiction."
3. Prosecutorial Misconduct
 - a. "Deputy Solicitor Anthony knew he was participating in an ex parte grand jury proceeding which was not being held at a Court of General Sessions in accordance with law..."

At the hearing, the Applicant proceeded on his claims of ineffective assistance of trial counsel and subject matter jurisdiction.

SUMMARY OF TESTIMONY

The Applicant testified he met with Counsel (Burton) and reviewed the discovery on the Friday before trial, although he claims he never received a copy of the discovery. He stated Counsel was ineffective for not eliciting testimony from the confidential informant (CI) in the case, and Counsel did not cross-examine the CI concerning his prior criminal record. The CI had a 1987 conviction for burglary, and the Applicant claimed Counsel never discussed with him why this conviction could not be used for impeachment of credibility. The Applicant also testified discussed the fact that the CI had different aliases and dates of birth, but Counsel failed to utilize this information at trial. The Applicant stated Counsel should have objected to the trial judge's improper comments, although he failed to point out exactly where in the transcript he was referencing. The Applicant further testified Counsel failed to object to the indictments as he claimed there was no term of general sessions during the time his indictment were 'true-billed' by the grand jury. The Applicant also stated Counsel, in closing argument, put in the minds of the jurors that the Applicant sold drugs by the way he presented his argument. Additionally, the Applicant testified Counsel failed to object to his prior convictions being admitted if he testified, and he stated he wanted to testify, but the jury did not need to hear about his prior convictions. He, lastly, stated Counsel failed to explain to him that his prior convictions would be admissible for impeachment.

On cross-examination, the Applicant admitted he had two prior 2005 convictions Distribution of crack cocaine and two 2005 convictions for Distribution of crack cocaine within proximity of a school or park. However, as the Applicant pled to both of these sets of charges at the same guilty plea, the current conviction was treated as a second offense.

Counsel testified he was appointed to this case as a public defender in Union County. He stated he has over twenty years of experience in criminal law and tried over eighty cases before a

jury. Counsel testified he met with the Applicant and gave him a copy of his discovery. Counsel also asserted he would have reviewed the audio and video recording with the Applicant, reviewed the SLED (South Carolina Law Enforcement Division) report, and discussed the entire case with the Applicant. He stated the solicitor did not give him the video recording until the morning of trial, which he then viewed and found to be a weak evidentiary video. Counsel testified he vigorously cross-examined the CI concerning the video and his role in this case. Counsel stated he thought the CI was acting as a vigilante in this case, using deception and lies as his means. Counsel also stated he could not use the CI's prior conviction for impeachment, as it was too remote under the rules of evidence. Counsel testified he did not attack the credibility of the CI using his various aliases or dates of birth because he did not want to upset the jury or the judge, thus, taking away from the real issue in the case. Counsel asserted this was a tactical decision.

Additionally, Counsel testified he did not object to the trial judge's 'comments' or questions as a judge is permitted to ask questions of the witnesses. Counsel also stated he found no issue with the indictments as they were signed by the foreman of the grand jury. Counsel testified during closing argument he tried to show that the CI was a liar and used a hypothetical situation to show the CI's deception should be viewed as a lie. He stated he does not think this hypothetical prejudiced the Applicant's case. Counsel testified it was the Applicant's decision not to testify and by doing so, the defense was able to keep the Applicant's prior conviction from being introduced to impeach the Applicant.

On cross-examination, Counsel testified he did not remember exactly when he received discovery in this case. He stated he normally received any audio or video recordings approximately one week before trial. Counsel also reasserted he strategically decided not to impeach the CI using his

aliases, and that he did not think this prejudiced the Applicant's case. Counsel also stated, as to the Applicant's prior convictions, that no judge would exclude prior conviction if they are within the last ten (10) years. Counsel, lastly, testified he believed his closing argument was proper and persuasive and that he did not concede the Applicant sold drugs, as the Applicant claimed.

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 Ross Burton, 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).

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.

Cross-examination of the CI

The Applicant alleges Counsel was ineffective for failing to elicit testimony from the CI and cross-examine concerning his prior record and his other aliases.

At the PCR hearing, the Applicant testified Counsel failed to elicit testimony from the CI concerning his prior 1987 conviction for burglary. He also stated Counsel did not discuss with him why Counsel could not use it for impeachment. The Applicant also testified Counsel did not utilize the CI's different aliases for impeachment.

Counsel testified he could not use the CI's prior conviction for impeachment as it is not permitted under the South Carolina Rules of Evidence. *See* SCRE 609(b). Additionally, Counsel stated he tactically decided not to cross-examine the CI concerning his other aliases and dates of birth as he did not want to upset the judge or jury and digress from the core issue of the case.

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel

undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions Counsel allegedly failed to ask, and did not present any testimony showing the CI's answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense.

Additionally, 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). Counsel articulated valid strategic reasons for not cross-examining the CI concerning his aliases. Further, Counsel was able to discredit the CI using other tactics and angles. The Applicant has not shown that Counsel was deficient in that choice of tactics.

This Court finds the Applicant has failed to show that the outcome of his case would have been different had Counsel cross-examined the CI in a different manner. *Cherry, supra*. This Court also finds Counsel thoroughly discredited the CI in direct relation to the theory of the Applicant's defense: that the CI was a deceptive vigilante, only arranging drug deals to earn money. Additionally, the Applicant has failed to prove any resulting prejudice from Counsel's choice of tactics. Accordingly, this allegation is denied.

Failure to object to the trial court's comments concerning questioning a witness

The Applicant also alleges Counsel was ineffective for not objecting to the trial court's comments on the proper questioning of a witness.

The Applicant testified Counsel should have objected to the trial court's comments instructing counsel how to ask a certain question. On page 90 of the transcript, after Counsel objected to a question from the solicitor based on lack of foundation, the trial court stated: "Ask him, 'did you use a ruler?' Did you--." Whereupon the solicitor asked the witness how he took a measurement in relation to the proximity charge. Counsel testified although it is improper for a judge to comment on the facts of a case, it is proper for a trial judge to ask questions to a witness.

This Court finds Counsel was not ineffective for not objecting to the trial court's comments. The comment made by the trial court simply directed the solicitor to ask the question properly in order to lay a foundation for the witness's answer. Had it desired, the trial court could have properly asked this question itself. 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 trial court's comments. Cherry, supra. This Court further finds no resulting prejudice from this harmless comment. Accordingly, this allegation is denied.

Closing Argument

Additionally, the Applicant alleges Counsel was ineffective in his closing argument.

The Applicant testified Counsel, in his closing argument, admitted the Applicant's guilt. Specifically, the Applicant asserted, by the presentation of the argument, Counsel alluded to the fact that the Applicant sold drugs.

Counsel testified he used a hypothetical situation to support his claim that the CI was a liar. On pages 116-117 of the trial transcript, Counsel presented a hypothetical involving a twenty-dollar bill.

A court's review of closing arguments must be "highly deferential," for "counsel has wide latitude in deciding how best to represent a client" and "deference to counsel's tactical decisions in his [trial counsel's] closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." Yarborough v. Gentry, 540 U.S. 1, 5-6, 124 S.Ct. 1, 4 (2003).

This Court finds the Applicant's claim on this issue meritless. Counsel testified he used this hypothetical to discredit the CI concerning the drug deal. Counsel has wide latitude of argument which he deems most appropriate in defense of his client. Additionally, this hypothetical in no way even comes close to admitting the Applicant's guilty or proving the Applicant was selling drugs. It was simply utilized to argue the crack cocaine sold was not crack cocaine at all. This Court finds Counsel did not render ineffective assistance of counsel on this issue. Further, this Court finds no resulting prejudice from Counsel's closing argument. Accordingly, this allegation is denied.

Failure to object to the use of the Applicant's prior record

The Applicant alleges Counsel was ineffective for not objecting to the use of his prior record for impeachment purposes. Additionally, the Applicant wanted a hearing to address the prior convictions under a SCRE 403 analysis.

At the hearing, the Applicant testified he wanted to testify at trial, but did not want the jury to know about his prior convictions for two counts of distribution of crack cocaine and corresponding

proximity charges. The Applicant asserted Counsel was ineffective for not objecting to his prior convictions and for not asking for a hearing to determine whether the probative value of such convictions would be substantially outweighed by the unfair prejudice. On cross-examination, he admitted he had two prior crack cocaine convictions from 2005. Counsel testified it was the Applicant's decision not to testify. Counsel also stated, by not testifying, the Applicant was able to keep his prior convictions from the jury's knowledge.

This Court finds this allegation is also wholly without merit. "The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. On the other hand, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions. Rule 609, SCRE." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Id. The Applicant was questioned by the trial court whether he understood the State could ask questions about his prior convictions if he testified, to which he replied he did. He also stated he understood his right to remain silent. (Tr. p. 99 line 24- p. 100 line 9). The Applicant also asserted he had no questions about his rights and then stated he wanted to exercise his right to remain silent. (Tr. p. 100 lines 10-17). The record demonstrates the Applicant decided not to testify understanding the consequences of his choice and directly refutes his claims. Moreover, the Applicant has presented no evidence to support how the outcome of his trial would have been different had Counsel moved for a hearing concerning his prior convictions. Further, the Applicant can prove no prejudice as he made an informed decision not to testify. Accordingly, this allegation is denied.

Subject Matter Jurisdiction

The Applicant further alleges Counsel is ineffective for failing to object to the subject matter jurisdiction in this case.

The Applicant testified Counsel failed to object to the indictments as he claims a term of general session was not convened during the time his indictment were issued by the grand jury. Counsel testified he did not object to them because he viewed them as proper, as the foreman of the grand jury had signed them.

Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong. Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994). An indictment is adequate and valid on its face if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent prosecution. State v. James, 472 S.E.2d 38 (S.C. 1996); State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952). Additionally, "whenever provision is made for holding the court of common pleas the presiding judge, during the time allowed for the holding of the court of common pleas, may open the court of general sessions and transact all or such business of the court of general sessions..." S.C. Code Ann. § 14-5-410 (1962).

This Court finds a review of the record clearly indicates that there is no basis upon which to conclude that the trial court lacked subject matter jurisdiction. The Applicant's indictments are facially valid and proper. The indictments in this case are facially valid because they contain all the necessary elements of the offenses intended to be charged, state the date of the offenses, and the

name of the accused. Further, because there was a term of common pleas during the week of March 24-28, 2008, a grand jury was permitted to convene pursuant to S.C. Code Ann. § 14-5-410. The foreman of the grand jury clearly signed the indictment, making it a properly 'true-bill' indictment. Thus, Counsel was not ineffective for not object to the indictments as they were properly signed by the foreman of the grand jury. Further, the Applicant cannot prove any resulting prejudice.

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

JUDGEMENT SIGNED AND
ENTERED UP 5-9-13



CLERK OF COURT



STATE OF SOUTH CAROLINA)
)
COUNTY OF UNION)

IN THE SUPREME COURT

Tijuan Peake,)
)
)
Appellant,)

C.A. No. 2011-CP-44-489

-vs-)

CERTIFICATE OF SERVICE

State of South Carolina,)
)
)
Respondent.)
_____)

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorneys for Appellant, and that I have this day caused to be served upon the person(s) named below Appellant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Lorie French
S.C. Office of Appellate Defense
P.O. Box 11433
Columbia, SC 29211

J. Rutledge Johnson, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211



Caroline M. Horlbeck

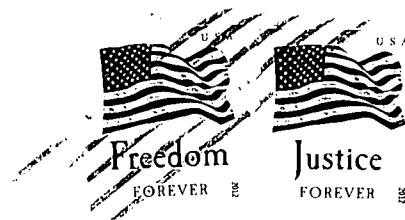
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