FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP3202618

Joseph M White #306786	State of South Carolina
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. I there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge **Judge Code** 5/22/2013 **Date**

For Clerk of Court Office Use Only

This judgment was entered on **n/a**, and a copy mailed first class or placed in the appropriate attorney's box on **23rd of May 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

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Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ORIGINAL

FILED
2013 MAY 20 A 11:37

STATE OF SOUTH CAROLINA	)	**THE COURT OF COMMON PLEAS**
COUNTY OF LEXINGTON	)	**Civil Action No. 2011-CP-32-02618**
Joseph White,	)	
Applicant,	)	
vs.	)	**ORDER DENYING POST-CONVICTION RELIEF**
The State of South Carolina,	)	
Respondent.	)	

THIS MATTER IS BEFORE THE COURT on Joseph White's (White) Application for Post-Conviction Relief. The court held a hearing on this matter on April 16, 2012. White was represented by John E. Duncan, Esquire and the State was represented by Assistant Attorney General J. Walter Whitmire. After careful consideration of the record, the testimony at the hearing, and the pleadings, I find as follows:

FACTS

The State charged White with two crimes: possession with intent to distribute crack cocaine and possession with intent to distribute crack cocaine within the proximity of a school or park. White was arrested following a foot pursuit in Lexington County. When apprehended, police found White in possession of 1.89 grams of cocaine. He was charged with possession with intent to distribute based on the statutory presumption of intent derived from the weight of the drugs. See S.C. Code Ann. § 44-53-375(B).

The State tried White on March 19, 2009. White was represented by Sara Hahn, Esquire, of the Public Defender's Office. In Ms. Hahn's first trial as a public defender,[1] she sought to rebut the presumption of intent to distribute by arguing to the jury that the crack in White's possession was for personal consumption. The State sought to counter this argument with the testimony of the arresting officer, Detective Tracy, who stated that the amount of crack in White's possession was consistent with the amount a drug dealer would possess if he intended to sell the drugs. This testimony forms the crux of White's application. Ultimately, the jury convicted White of all charges and the trial judge sentenced him to fifteen (15) years in prison. Appellate Defender Robert Pacheck filed an Anders brief on appeal from this conviction, but the Court of Appeals dismissed the appeal in an unpublished opinion. See State v. Joseph White, Op. No. 10-UP-540 (S.C. Ct. App. filed Dec. 16, 2016).

White filed this PCR application in 2011, alleging ineffective assistance of trial counsel and ineffective assistance of appellate counsel. White alleges his trial counsel was deficient in failing to present any evidence to the jury referencing his personal and family history of drug addiction and abuse. He alleges appellate counsel was deficient for failing to challenge the trial court's admission of Detective Tracy's testimony characterizing the amount of crack in White's possession. White argues that he was prejudiced by both of these deficiencies and that absent such prejudice, the outcome would have been different in that, at the very least, he would have been convicted of possession instead of possession with intent to distribute. For the reasons below, the court disagrees.

LAW/ANALYSIS

A PCR applicant bears the burden of proof in showing he is entitled to relief. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Relief should only be granted where "counsel's conduct so undermined the proper functioning

[1] "Every experienced criminal defense attorney once tried his first criminal case." United States v. Cronic, 466 U.S. 648, 665 (1984).

of the adversarial process that the trial cannot be relied on as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668 (1984)). In determining whether relief is warranted, the court uses a two-prong analysis. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, "a defendant must show that counsel's performance was deficient." Id. Under this prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). The second prong "requires a showing that the deficient performance prejudiced the defendant to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 117-18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

A. Trial Counsel's Performance

A trial counsel is deficient if her "representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different." Glover v. State, 318 S.C. 496, 497, 458 S.E.2d 538, 539 (1995) (citing Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992)). Here, White argues that trial counsel was deficient for failing to introduce evidence of his prior drug abuse treatments and of his family history with drug abuse. The court disagrees.[2]

White contends that trial counsel should have introduced records from his participation in the Addictions Treatment Unit during his prior commitment to the Department of Corrections. However, had this evidence been introduced, the jury would have learned that White had prior criminal convictions for similar crimes. White also contends trial counsel should have introduced his records

[2] Although Ms. Hahn indicated that, in retrospect, she felt testimony concerning White's struggles with addiction may have altered the outcome of the trial, the court is convinced the trial strategy she employed was more appropriate.

from the Homesview Treatment center. Again, had these records been introduced, the jury would have been informed of his prior probationary sentence requiring his attendance at Homesview. The court can see no unreasonableness in counsel's trial strategy to not bring this evidence to the jury's attention. Counsel's decision to avoid informing the jury that White had a criminal record is certainly within the "exercise of reasonable professional judgment." If anything, introduction of this evidence would have made a conviction more likely, rather than less likely, because White's prior crimes were similar in nature.[3] Therefore, trial counsel was not deficient in failing to introduce this evidence.

Similarly, trial counsel was not deficient for failing to call White's mother and father to testify to their own struggles with drug abuse. Evidence of a third party's prior drug abuse, even if that party is such a close relative of the defendant, is not relevant to the issue of whether the defendant was a drug abuser himself. The decision not to present this irrelevant evidence is not an unreasonable trial strategy by counsel. Even if she had tried to introduce it, the trial judge would have likely excluded it. Therefore, White cannot show deficiency or prejudice from the failure to introduce his parent's testimony. Because trial counsel was not ineffective, White is not entitled to relief on these grounds.

B. Appellate Counsel's Performance

White next argues that appellate counsel was ineffective for not challenging Detective Tracy's testimony that the amount of crack White possessed was consistent with him being a drug dealer. White contends that Detective Tracy was never qualified as an expert, and therefore his testimony is improper lay testimony because it goes to the heart of the issue. Appellate counsel is only deficient if he "unreasonably failed to discover nonfrivolous issues." Smith v. Robbins, 528 U.S. 259, 285 (2000). Even if counsel fails to raise an issue on appeal, an applicant must show he would have prevailed on appeal had the issue been raised. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

[3] White had four (4) prior convictions for possession with intent to distribute marijuana and one (1) prior conviction for distribution of crack within proximity to a school or park.

The court agrees that appellate counsel failed to raise an arguable issue on appeal. However, the court can discern no prejudice from counsel's deficiency.

1. Deficiency

White's appellate counsel filed an Anders brief in this case. See State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991) (outlining briefing procedure under Anders v. California, 386 U.S. 738 (1967)). In his brief, counsel argued one issue: whether the arresting officers had reasonable suspicion to seize White. Counsel did not raise the issue of whether Detective Tracy's opinion testimony was proper. In this court's view, counsel's Anders brief should have raised the issue of whether the testimony was properly admitted.

At trial, the State proffered Detective Tracy as an expert in narcotics investigations. In response to trial counsel's objections, the court held a hearing outside the presence of the jury. During that hearing, the State outlined that it sought to have Detective Tracy testify that, in his experience, the amount of crack White possessed was consistent with a dealer. Presumably, this testimony was to counter trial counsel's anticipated argument that the crack was for White's personal use, and not for distribution. The trial judge initially stated that the witness may not need to be qualified as an expert to give an opinion as to whether the amount was consistent with a dealer. However, after trial counsel's further objection that such an opinion goes to the ultimate issue, the trial court stated that "based on [the officer's] experience, and his background, and his training, [the State] can ask that question." The jury then returned to the courtroom. However, the trial judge did not immediately state that he found the witness qualified as an expert nor did he give an immediate instruction to the jury indicating that Detective Tracy had been qualified as an expert. The State proceeded to elicit testimony that the amount of crack was consistent with a dealer, subject to trial counsel's renewed objection.

In this court's view, the question of whether appellate counsel should have raised this issue on appeal comes down to a simpler question: how does a trial court designate a witness as an expert qualified in a certain field? Normally the court would instruct the jury that it has found that witness qualified as an expert and that an expert may give opinion testimony. Here, the court gave no such instruction when the jury returned to the room. It appears that everyone at trial and on appeal presumed that the trial judge did in fact qualify Detective Tracy as an expert. However, a careful reading of the record would have indicated that the court never affirmatively designated Detective Tracy as an expert. At best, this ambiguity should have been raised on appeal if for no other reason than it is an "arguable issue." Therefore, appellate counsel was deficient in not raising the issue in his Anders brief.

2. Prejudice.

Having found appellate counsel deficient, the court must now decide whether White was prejudiced by the deficiency. The simple fact that the issue should have been raised does not guarantee that White would have been successful on appeal. See Robbins, 528 U.S. at 285 (an arguable issue that should be raised is one "arguably supporting the appeal *even though the appeal was wholly frivolous*" (emphasis added)). Here, Detective Tracy most certainly would have been qualified as an expert for the purposes of his testimony. See State v. Robinson, 344 S.C. 220, 224, 543 S.E.2d 249, 250 (Ct. App. 2001) (allowing the State to present expert testimony from police officers that "it was not typical for a simple user of crack cocaine to possess seven rocks of crack cocaine at one time"). White argues that the trial judge never exercised his discretion as a gatekeeper "in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." State v. Gary White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). The record does reflect that the judge heard testimony regarding Detective Tracy's qualifications in narcotics investigation. The judge also stated on the record that Detective Tracy could answer the question posited to him based on his training, background, and

experience. However, the record does not demonstrate that the judge instructed the jury upon its return to the courtroom that Detective Tracy had been designated as an expert.

In this court's view, the trial judge properly qualified Detective Tracy as an expert in narcotics investigation. The discussion between the judge and counsel demonstrates that the judge examined "the threshold foundational requirements of qualifications and reliability[.]" Id., 382 S.C. at 274, 676 S.E.2d at 689. Likewise, the trial judge was clear that he believed the testimony was the type that would assist the trier of fact. Id. Thus, the record is clear that the trial judge did not abuse his discretion in finding Detective Tracy qualified to offer expert opinion testimony about the crack in White's possession. The only conceivable deficiency was the failure to immediately inform the jury that Detective Tracy was designated as an expert.

This court would agree that the jury should usually be informed that a witness has been designated as an expert. However, in this case the jury was privy to the initial questioning that established Detective Tracy's qualifications. (Tr. 56:6 to 59:3). When asked if the amount of crack was consistent with a dealer, Detective Tracy testified that his conclusion was based on his experience. (Tr. 66:6). Thus, his testimony was clearly opinion testimony. Any error of the trial court in immediately instructing the jury regarding the witness's qualifications to give opinion testimony was cured by the judge's charge on expert witnesses at the close of the case. (Tr. 150:23-25 to 151:1-21). That charge clearly explained to the jury that opinion testimony such as Detective Tracy's is to be given no more weight than the testimony of any other witnesses. Accordingly, this court can find no error by the trial court in not immediately instructing the jury that Detective Tracy was an expert. C.f. United States v. York, 572 F.3d 415, 421 (7th Cir. 2009) (holding that although it would have been more efficient for the trial court to explain an expert's role prior to his testimony, "any error flowing from the district court's failure to formally anoint [him] an expert was harmless"). Ultimately, the admission of the testimony

was proper, and any conclusions to be drawn therefrom are left to the jury. White, 676 S.E.2d at 688 (citing State v. Myers, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990)). Therefore, White would not have succeeded on appeal even if appellate counsel had raised this issue in his brief.

This court's decision is supported by the fact that the court of appeals upheld White's conviction. Even though the issue was not raised in the Anders brief, the court of appeals reviews the entire record when presented with an Anders brief. See Williams, 305 S.C. at 117, 406 S.E.2d at 357. Ultimately, when faced with an Anders brief, the reviewing court is tasked with ensuring the appeal is not without merit. See, e.g. State v. Lyles, 381 S.C. 442, 445, 673 S.E.2d 811, 813 (2009) ("[T]he appellate court was unable to ascertain a non-frivolous issue which would require counsel to file a merits brief."); State v. McKennedy, 348 S.C. 270, 279, 559 S.E.2d 850, 855 (2002) ("[A]ccording to Anders, the reviewing court is obligated to make a full examination of the proceedings on its own. After such an examination, if the reviewing court agrees with the attorney, it may dismiss the appeal or proceed to a decision on the merits. On the other hand, if the court disagrees with the attorney's analysis of the appeal, it must afford the defendant 'the assistance of counsel to argue the appeal.' The purpose of filing a brief under Anders is to ensure the merits of the appeal are not overlooked. The court has to conclude independently, regardless of counsel's conclusion, whether or not the appeal has merit before it can dismiss the appeal." (citations omitted)). C.f. United States v. Martinez, 416 F. App'x 252, 253 (4th Cir. 2011) (unpublished opinion) ("However, counsel in the Anders brief identifies no flaws in the Rule 11 proceeding, and our review of the record discloses that the district court fully complied with Rule 11.").

Because the court of appeals reviewed the record, it follows that the court must have determined that any deficiency in the qualification of Detective Tracy was unimportant to the outcome of White's trial. This court does not wish to imply that the filing of an Anders brief automatically absolves appellate counsel of the requirements of diligent representation. Rather, the purpose of an Anders brief

is to guide the court in its review. See McCoy v. Court of Appeals of Wisconsin, Dist. 1, 486 U.S. 429, 452-53 (1988) ("Anders itself makes clear that the role of counsel writing an Anders brief, like his or her role in a 'typical advocate's brief,' is to advocate. [...] The Anders brief is supposed to aid the reviewing court, but not in the sense that an amicus does. Rather the Anders brief was *designed to spare the reviewing court from having to sift through 'only the cold record* ... without the help of an advocate[.]'" (emphasis added)). However, the issue regarding qualification of Detective Tracy as an expert was readily evident from a review of the record. Therefore, this court presumes the court of appeals recognized this issue and did not find it to be an error substantial enough to warrant a reversal of the conviction. See Towbridge v. State, 45 So. 3d 484, 487 (Fla. Dist. Ct. App. 2010) ("It is reasonable to presume that when the court affirms an Anders appeal it has fully considered and rejected all potential issues that were apparent on the face of the record."). After a careful review of the record, the court of appeals still dismissed White's appeal. This court will not second guess the decision of the court of appeals and grant White a second shot on appeal. See State v. Tillman, 696 N.W.2d 574, 579 (Wis. Ct. App. 2005) ("We conclude that when a defendant's postconviction issues have been addressed by the no merit procedure [...], the defendant may not thereafter again raise those issues or other issues that could have been raised [previously.]"). Where the court of appeals thoroughly reviewed the record and determined no further briefing was necessary, this court is hesitant to find prejudice in the form of a likelihood of reversal. See, e.g. Robbins, 528 U.S. at 286 ("[W]here, as here, the defendant has received appellate counsel who has complied with a valid state procedure for determining whether the defendant's appeal is frivolous, and the State has not at any time left the defendant without counsel on appeal, there is no reason to presume that the defendant has been prejudiced."); Poston v. State, 303 S.C. 167, 168, 399 S.E.2d 592 (1989) ("[T]his Court's full review of Poston's appeal, as provided for in Anders, accorded Poston his full constitutional and statutory rights."). Accord State v. Miller, 12-126, p. 11 (La.

App. 5 Cir. 10/16/12); 102 So. 3d 956, 963, ("Even assuming appellate counsel's performance has been deficient, defendant has not been prejudiced as a result. As discussed above, our review fails to disclose any non-frivolous appealable issues."); Bledsoe v. State, 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005) ("When faced with an Anders brief and if a later *pro se* brief is filed, the court of appeals has two choices. It may determine that the appeal is wholly frivolous and issue an opinion explaining that it has reviewed the record and finds no reversible error. Or, it may determine that arguable grounds for appeal exist and remand the cause to the trial court so that new counsel may be appointed to brief the issues. [...] Furthermore, this does not deprive Appellant of his right to file a petition for discretionary review. Appellant is free to file a petition for discretionary review with this Court claiming that the court of appeals erred in holding that there were no arguable grounds for review."). Here, not only has this court found that White's grounds for appeal would not have been successful, but apparently the court of appeals also found no merit in those grounds. Therefore, White has suffered no prejudice from appellate counsel's deficient performance, and he is not entitled to the relief sought.

CONCLUSION

WHEREFORE, for the above stated reasons, White's Application for Post-Conviction Relief is **DENIED**.

IT IS SO ORDERED.

Frank R. Addy, Jr.
Circuit Court Judge

May 15, 2013
Greenwood, South Carolina