THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Case No. 2010-CP-24-0389

State of South Carolina.....Respondent

vs.

Barry D. Williams.....Appellant

NOTICE OF APPEAL

Barry D. Williams appeals the Order of the Honorable R. Lawton McIntosh, signed and dated June 6, 2013 and filed June 11, 2013. Counsel for Appellant received written notice of entry of this Order on June 13, 2013.

June 19, 2013

Weston B. Rochester
Attorney at Law
P.O. Box 1563
Greenwood, SC 29648
864-506-1383
Attorney for Appellant

RECEIVED
JUN 24 2013
S.C. SUPREME COURT

Other Counsel of Record:
J. Rutledge Johnson
Assistant Attorney General, Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
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Honorable R. Lawton McIntosh, Circuit Court Judge

Case No. 2010-CP-24-0389

STATE OF SOUTH CAROLINA.....RESPONDENT

VS.

BARRY D. WILLIAMS.....APPELLANT

PROOF OF SERVICE

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

June 19, 2013

Weston B. Rochester
Attorney at Law
P.O. Box 1563
Greenwood, SC 29648
864-506-1383
Attorney for Appellant

STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
Barry Dwyane Williams, #350338, Applicant, v. State of South Carolina, Respondent.	)	2010-CP-24-0389 **ORDER OF DISMISSAL**

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2013 JUN 11 PM 3:49

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 29, 2010. This application was not received by the Respondent until July 20, 2012. Respondent made its Return and Motion to Dismiss for failure to state a claim cognizable in a PCR action on September 4, 2012. An evidentiary hearing into the matter was convened on November 28, 2012, at the Laurens County Courthouse. Weston B. Rochester, Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

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

PROCEDURAL HISTORY

The Applicant is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Greenwood County. The Applicant was indicted at the June 2007 term of the Greenwood County Grand Jury for Distribution of Crack

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GREENWOOD County
S. C.

Cocaine (2007-GS-24-0926) and Distribution of Crack Cocaine within proximity of a school or park. The Applicant was represented by Charles Grose, Esquire. On January 23, 2008, the Applicant proceeded to jury pursuant to which he was found guilty of both charges as indicted. The Honorable John C. Hayes, III sentenced Applicant to a period of confinement for thirty (30) years for Distribution of Crack Cocaine, 2nd offense and fifteen (15) years for Distribution of Crack Cocaine within a half of a mile of a school.

The Applicant filed a timely Notice of Appeal with the South Carolina Court of Appeals. The South Carolina Court of Appeals affirmed his conviction and sentence. State v. Williams, Op. No. 2010-UP-10 (S.C. Ct. App. filed January 21, 2010). The Remittitur was sent on February 8, 2010.

In his original application, the Applicant alleges he is being held unlawfully for the following reasons:

1. "Wasn't no transaction of money or drugs during the video"
   a. "Wasn't never once a hand-tot-hand transaction seen period after the jury watched the video 3 times."
2. "Someone on the video has a wad of money, saying he gave me a 20"
   a. "The C.I. admitted wasn't a transaction seen on the video. Greenwood Detective Steve McGee stated the crack weight to be .2 grams"
3. "Why and how can the drugs be two different weights .2 grams and .12 grams"
   a. "SLED analysis stated the crack weight to be .12 grams. A bug difference. The credibility of the C.I. and his motive."

Respondent filed a Return and Motion to Dismiss arguing the Applicant's claims were not cognizable under S.C. Code Ann. § 17-27-10 et seq. (1976).

Applicant, through counsel, filed a Return to Respondent's Motion to Dismiss (construed as an amended Application) alleging:

1. "Trial counsel was ineffective in advising the Applicant to reject a plea agreement offered by the solicitor, which the Applicant would have rejected had he fully understood the potential results of trial."
2. "Trial counsel provided ineffective assistance by failing to present an effective plea in mitigation of the Applicant's sentence."

At the PCR hearing, Applicant proceeded on both of the above-stated claims of ineffective assistance of counsel.

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 at the post conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. 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, 80 L.Ed.2d 674, 692 (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.

Rejection of plea agreement

The Applicant alleges Counsel was ineffective for advising him to reject a plea offer from the State because Counsel did not make the Applicant fully aware of the potential sentences he was facing. At the PCR hearing, the Applicant testified he met with Counsel on only two occasions. During these meetings, the Applicant stated he and Counsel did not discuss the potential sentences for the charged crimes. He testified Counsel relayed a ten-year plea offer from the State, but he rejected it. The Applicant stated at their second meeting, he and Counsel viewed and discussed the video, which was introduced at trial, in terms of its strengths and weakness. The Applicant stated the video was clear, but did not show a hand-to-hand drug transaction and based upon this, he decided to reject the plea offer and proceed to trial. The Applicant also testified Counsel said, "I think we can win [the trial], but it's your life." The Applicant further testified he told Counsel, "Let's roll with it," meaning he wanted to proceed with a trial. The Applicant testified the State offered a plea for seven years, but he rejected this offer as well.

Additionally, the Applicant stated he knew there was possibility he could get convicted at trial, but did not think he would receive a thirty-year sentence. He also testified, in hindsight, he doubted he would go to trial again. However, the Applicant stated because of the video, he still thinks trial was the correct avenue.

On cross-examination, the Applicant admitted he has many prior convictions. Quite a few of these prior convictions include crimes of dishonesty such as giving false information to police and fraudulent check. He also admitted it was his decision to reject both plea offers and proceed to trial. The Applicant further testified, because of his prior convictions, he is quite familiar with the criminal system.

Counsel testified he met with the Applicant on multiple occasions and while he does remember the exact conversations with the Applicant, he would have discussed the charges and penalties as is custom in his practice. Counsel stated he believes he might have told the Applicant the distribution charge carried a maximum twenty-five year sentence, although he is now aware the charge carries up to thirty years. Counsel also testified it was the Applicant's decision to reject the plea offers.

This Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. This Court had a copy of the Clerk's records and has read the trial transcript, all of which assists the Court in judging the witnesses' credibility. This Court finds Applicant's testimony, regarding Counsel's ineffectiveness, is not credible while also finding Counsel's testimony credible.

Counsel testified he advised the Applicant that Distribution of Crack Cocaine carried a sentence of five to twenty-five years. Counsel admitted he now knows the sentence is actually five to thirty years. As such, this Court finds Counsel was deficient in his sentencing advice to the

Applicant. However, under Strickland, the Applicant must also prove prejudice for this Court to grant relief. This Court finds the Applicant has not met his burden of proof that he was prejudiced by Counsel's erroneous advice.

At the PCR hearing, the Applicant admitted he decided to reject the plea offers from the State of ten and seven years. He also admitted that after he watched the video tape in the case two to three times, he told Counsel, "Let's roll with it," in reference to his trial. Additionally, he stated had he known of the maximum penalties, he would have considered pleading guilty, but still would have pursued a trial because of the video tape.

To prove prejudice, the Applicant must show that but-for counsel's errors, there exists a reasonable probability the outcome of the trial would have been different under Cherry and Strickland. In this case, the Applicant must show that but-for Counsel's erroneous sentencing advice, the outcome of his trial would have been different. He cannot do this. First, any advice Counsel rendered to the Applicant concerning sentencing, would have no effect on the trial itself. This Court finds Counsel was effective in his representation throughout the actual trial, and the Applicant can prove no resulting prejudice from Counsel's performance at trial. Nevertheless, the effect of sentencing advice would be a stronger factor in a guilty plea case, where the applicant is deciding whether or not to plead guilty. That is not the case in the case at bar because the Applicant testified he wanted a trial, even if Counsel had properly advised him on the penalties. Second, Counsel advised the Applicant, albeit erroneously, concerning the maximum penalties the Applicant faced at trial. In turn, the Applicant admittedly rejected both offers from the State. At no point during the PCR hearing did the Applicant claim that but-for Counsel's advice, he would have accepted the State's plea offer. To the contrary, the Applicant admitted, based on the video, that

even had he known the maximum penalty for Distribution of Crack Cocaine, 2nd offense was thirty years, he still would have pursued a trial. Based on the Applicant's own testimony, no prejudice can be shown where the Applicant pursued a trial after voluntarily rejecting the plea offers and admitted that even if he had known the correct maximum penalties, he still would have pursued a trial. Accordingly, the Applicant has failed to meet his burden of proof in this case.

Plea in mitigation of sentence

The Applicant alleges Counsel was ineffective for failing to offer an effective plea in mitigation of the Applicant's sentence. At the PCR hearing, the Applicant testified that Counsel did not offer any information during the sentencing phase of trial that potentially could have reduced his sentence. The Applicant stated that Counsel merely requested a lenient sentence under the circumstances.

The Applicant testified that he and Counsel never discussed the sentencing phase of trial. More specifically, the Applicant stated that Counsel did not advise him that both the Applicant and Counsel would have the opportunity to offer mitigating factors during sentencing. The Applicant further testified that Counsel did not ask the Applicant what mitigating factors Counsel could present on his behalf. The Applicant testified that, in retrospect, he would have told the Judge that he is not a drug dealer, but a drug user. He stated that he had struggled with drug addiction for quite some time.

On cross-examination, the Applicant admitted he has many prior convictions. The Applicant further testified that, because of his prior convictions, he is quite familiar with the criminal system.

Counsel testified that he does not recall discussing the sentencing phase of trial with the Applicant. Counsel stated that he does not recall asking the Applicant about mitigating factors that

Counsel could offer on his behalf. Counsel further testified that he does not recall advising the Applicant that both he and Counsel would have the opportunity to offer information in mitigation of his sentence at this stage of the trial.

Under Strickland, the Applicant must prove both that counsel's performance was deficient and that this deficiency caused prejudice to the Applicant. To prove prejudice, the Applicant must show that but-for counsel's errors, there exists a reasonable probability the outcome of the trial would have been different under Cherry and Strickland. In this case, the Applicant must show that but-for Counsel's omission of mitigating factors, the Applicant would have received a lesser sentence. This Court finds that the Applicant has not met his burden of proof to show that he was prejudiced by Counsel's omission of mitigating factors during the sentencing phase of trial.

First, the Applicant had many prior convictions, which the trial judge took under consideration in issuing the Applicant's sentence. Second, the Applicant offered only one possible mitigating factor at the PCR hearing: that he was a drug user rather than a drug dealer. In the face of the Applicant's criminal history, the Applicant was not prejudiced by the omission of this one potentially mitigating factor, as this would be insufficient to persuade a trial judge to reduce the Applicant's sentence. Accordingly, the Applicant has failed to meet his burden of proof in this case.

CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate

appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (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 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!

R. Lawton McIntosh
Presiding Circuit Court Judge
Eighth Judicial Circuit

6-6, 2013
Anderson, South Carolina

WESTON B. ROCHESTER
Attorney at Law

Phone: (864) 506-1383

P.O. Box 1563
Greenwood, SC 29648

rochester.law@gmail.com

June 19, 2013

PCR

Daniel E. Shearouse, Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: State vs. Barry D. Williams, Case No. 2010-CP-24-0389
Appeal of Post-Conviction Relief Order of Dismissal

Dear Mr. Shearouse,

Enclosed for filing are one original and one copy of Appellant's Notice of Appeal and Proof of Service regarding the post-conviction relief case referenced above. Please file stamp the extra copies and return them in the enclosed self-addressed envelope.

Thank you for your attention to this matter. Feel free to contact my office should you have any questions or concerns.

Sincerely,

Wes Rochester

Weston B. Rochester

Enclosures

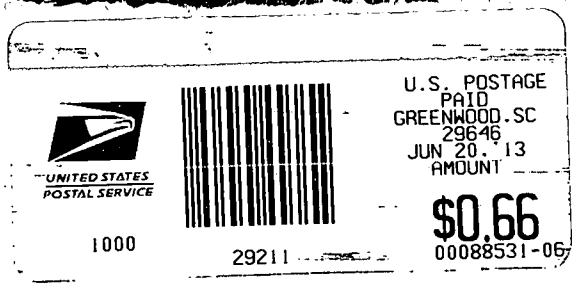
CC: J. Rutledge Johnson, Assistant Attorney General

RECEIVED

JUN 24 2013

S.C. SUPREME COURT

Weston B. Rochester
Attorney at Law
P.O. Box 1563
Greenwood, SC 29648



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Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

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