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June 26, 2013

RECEIVED
JUN 28 2013
S.C. SUPREME COURT

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: Duval Cooper, #340970 v State of South Carolina
Case No. 2012-CP-46-3203

Dear Sir or Madam:

Enclosed herewith you will find the Notice of Appeal, Order of Dismissal, along with a Proof of Service in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,

Charles T. Brooks, III
CTB/srw

Enclosed as stated

Cc: J. Rutledge Johnson,Office of Attorney's General
South Carolina Office of Appellate Defense
Duval Cooper, 340970

THE STATE OF SOUTH CAROLINA
In the Supreme Court

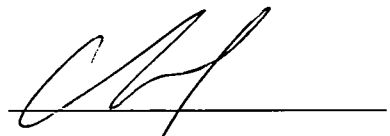
APPEAL FROM YORK COUNTY
Court of Common Pleas
Honorable John C. Hayes, III, Circuit Court Judge

Case No: 2012-CP-46-3203

Duval M. Cooper.....Appellant
S.C.D.C. 340970
v.
The State. . . . . .Respondent

NOTICE OF APPEAL

Duval M. Cooper, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable John C. Hayes, III, June 17, 2013, which I, Charles T. Brooks, III, received on June 26, 2013.



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
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Honorable John C. Hayes, III, Circuit Court Judge

Case No: 2012-CP-46-3203

Duval M. Cooper.....Appellant
S.C.D.C. 340970
v.
The State.....Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 27th day of June 2013, I served the foregoing **Notice of Appeal, Order of Dismissal** , as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on June 27, 2013, addressed to the following as indicated below:

South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

South Carolina Office of Appellate Defense
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29211-1589

Office of Attorney's General
Attn: J. Rutledge Johnson, Esquire
Post Office Box 11549
Columbia, South Carolina 29211-1549

Duval M. Cooper, 340970
Broad River Correctional Institution
4460 Broad River Road
Columbia, South Carolina, 29210

Dated: June 27, 2013

Charles T. Brooks, III
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309 Broad Street
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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMOM PLEAS
)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK)	Case No.: 2012-CP-46-3203
)	
Duval M. Cooper, #340970,)	
)	
Applicant,)	
)	
v.)	ORDER
)	
State of South Carolina,)	
)	
Respondent.)	
)	

Applicant filed his application for Post-Conviction Relief (PCR) on September 7, 2011. The case was heard by the undersigned on the 16th day of May 2013. The State of South Carolina was represented by J. Rutledge Johnson, Esquire, and the Applicant was represented by Charles Brooks, Esquire.

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. The Applicant was indicted by the September 2005 term of the York County Grand Jury for Trafficking Heroin (2005-GS-46-3486) and Trafficking Methamphetamine (2005-GS-46-3486). The Applicant was represented by Vick Meetze, Esq. On February 15-16, 2006, the Applicant proceeded to a jury trial *in absentia* pursuant to which he was found guilty of both charges as indicted. The sentence was sealed. On May 20, 2010, the sentence was unsealed and the Honorable Lee S. Alford sentenced the Applicant to confinement for twenty-five (25) years for each charge to run concurrently.

A notice of appeal was filed and an appeal perfected. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Cooper, Op. No. 2012-UP-465 (filed August 1, 2012). The Remittitur was issued on August 21, 2012.

II.

In his application for post-conviction relief, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel"
    a. "many instances"
2. "Ineffective Assistance of Appellate Counsel (No rehearing or cert filed)"
3. "Trial Court error of law"

III.

A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 227 S.C. 610, 524 S.E.2d 833 (1999). As with a claim of ineffective assistance of trial counsel, the Applicant bears the burden of proving ineffective assistance of appellate counsel.

At Applicant's PCR hearing, his only mention of any error of Appeal counsel was that Appeal counsel could have raised the suppression issue mentioned above, more specifically, the issue of the arresting officer leaning into Applicant's vehicle at the time of the stop.[1] Applicant presented no case law or testimony which would support the trial judge's ruling on the suppression motion being in error. The Court cannot pass judgment on a prior ruling by another circuit court judge. Therefore, without more than an allegation, this Court cannot, by finding an appealable issue as to the "second issue" assess appellate counsel's approach to Applicant's

[1] There was no testimony offered by others who had the opportunity to view the tape that the arresting officer leaned into the car at the time Applicant was stopped.

JCH #2

appeal. The Court finds that Applicant failed to meet his burden; therefore, the Court will not consider ineffective assistance of Appeal counsel when determining whether or not to grant Applicant's PCR.

VI.

The Applicant also alleges trial court error. This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). As stated above, this Court cannot assess another circuit court judge's ruling. Additionally, a post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The alleged trial court errors were not raised at trial or on appeal and are waived. This allegation as a ground for relief is without merit.

V.

Where ineffective assistance of trial counsel is alleged as a ground for relief, the Petitioner 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. The courts presume that counsel rendered professional judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

JC #3

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. 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, 386 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, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

Duval Cooper (Applicant) took the stand first on his own behalf. Applicant testified that he was not present at his trial and that he was not given notice of his trial date. Applicant testified that he met with Vick Meetze (trial counsel) and supplied his contact information. Applicant testified that he did receive calls from trial counsel but received none regarding his trial date.

The Court questioned the delay in the PCR, and it was explained to the Court that, while Applicant was found guilty on February 16, 2006, he was not sentenced until March 20, 2010, after having been arrested in the state of New York on January 6, 2010.

Applicant testified that it was not until his arrest on January 6, 2010 that he learned the trial on the charges in question had already taken place. Applicant testified that, prior to the time of his arrest, he had never been to Rock Hill, SC and that he was passing through. Applicant testified that he believed the outcome of the trial would have been different had he been there to testify. Applicant testified that trial counsel should have gotten the drugs found in the car suppressed as evidence, as the arresting officer only saw the marijuana, blunt clip, and "High

Times" magazine after improperly leaning inside of the car. The police officer's viewing such evidence lead to the search of the vehicle, which produced the evidence for the charges in question.

Applicant testified that he told trial counsel that his life was being threatened, but trial counsel never followed up or contacted law enforcement. Applicant testified that he told trial counsel that the owner of the drugs found in the car was the person who paid his bond. Applicant testified that trial counsel failed to have his indictment quashed. Applicant testified that the other person in the car with him was able to work out a deal with the prosecutor by testifying and that he had offered to give police information on a homicide, but trial counsel was unable to make a deal for Applicant.

On cross-examination, Applicant testified that he did not appear in court because his life was being threatened by people in New York, but he did return to New York after the arrest in question where Applicant has prior drug charges. Applicant testified that those in New York threatening his life also had ties to South Carolina and the Rock Hill area. Applicant testified that his co-defendant, the passenger in the car, had nothing to do with the presence of the drugs in the car.

Applicant then called trial counsel, Mr. Meetze, to the stand to testify. Trial counsel testified that he was appointed to represent Applicant in his trial and that he had no recollection of telling Applicant when his case was coming up for trial. Trial counsel testified, however, to sending a letter regarding a meeting and the trial term to Applicant's Columbia, SC address that he had on file, as well as several letters prior, and none of which were returned. Trial counsel testified that he did convey an offer by the solicitor of fifteen (15) years to Applicant, which Applicant refused. Trial counsel testified that Applicant stopped appearing in court. Trial

JCH #5

counsel testified that the Columbia address was the only physical address he had for Applicant, and he also had an alternate telephone number for Applicant with an 803 area code. Trial counsel testified that he had no recollection of Applicant telling him about any information he had concerning a homicide, and he testified that he did not make a motion to quash the indictment.

Concerning the search of the vehicle, trial counsel testified that, as he understood it, there was no argument of invasion; rather, based on the incident report, it was his understanding that the marijuana, magazine, and blunt clip were in plain view of the officer. Trial counsel did, however, argue for suppression of the evidence. Trial counsel testified that he does not recall having the video recording of the stop, but that he was sure he did review the video at one time.

The State called attorney Gary Lemel (assistant counsel) to testify. Assistant counsel testified that, at the time of Applicant's trial, he was employed by the York County Public Defender's office and that, at the time of Applicant's trial, it was common practice for trial counsel to bring on an assistant to help with a trial. Assistant counsel testified that this was the nature of his association with Applicant's trial. Assistant counsel testified that he handled the motion for suppression of the evidence and while he testified to having no independent recollection of the video of the stop, assistance counsel testified that he knew he had seen the video to argue the motion. Assistant counsel testified that the basis of his argument was that the police officer had no right to search the container under the case law at the time, but the presiding judge was not in agreement. Assistant counsel testified that he understood that the marijuana and blunt clip were in plain view and that he did not see intrusion as an issue at the time of the trial. Assistant counsel testified that case law issued subsequent to Applicant's trial would have made the suppression argument much stronger.

The record reflects that prior to the commencement of Applicant's trial, trial counsel gave a brief history of his contact with Applicant prior to trial. Some of which differs slightly from how trial counsel remembered the events, as far as mailings and phone calls, at Applicant's PCR hearing. Trial counsel informed the Court that Applicant did not have specific information that his case would be called for trial on the day that is was, in fact, called. (TR p. 4, LL 15-17). Trial counsel let the Court know that letters had been sent to Applicant and that many times they would come back, but Applicant would always show up when he was supposed to be in attendance or ask to reschedule. (TR p. 4, LL 22-25 – TR p. 5, LL 1-2). The record reflects that trial counsel presented to the Court that his client, Applicant, was told that he had until the January 3, 2006 term of court to accept the State's offer or Applicant's case would be called during that term. (TR p. 5, LL 8-11). Applicant did not accept the offer, and the case was placed on the docket for the January 3rd term of court. (TR p. 5, 11-15). The Solicitor was unable to call the case to trial that week, and Applicant had a death in his family which he conveyed to trial counsel and kept in contact with him about upcoming dates. (TR p. 5, LL 13-18).

The record reflects that trial counsel's last conversation with Applicant was sometime in mid-January prior to the January 30th term, and trial counsel told the Court that Applicant understood that his case could be called as early as January 30, 2006. (TR p. 5, LL 20-25). Trial counsel relayed to the Court at the time of the trial that he had not been able to or made any efforts to contact Applicant since the January 30th term, as Applicant had failed to show up to court during all terms leading up to the date Applicant's case was called to trial. (TR p. 6, LL 2-5). Trial counsel further presented and reiterated to the court, as reflected in the record, that the telephone numbers left with court officials and investigators at check-in were out-of-service or disconnected numbers, Applicant failed to provide alternate contact information when requested

with trial counsel's receptionist, and letters sent to Applicant's address that he provided were being returned as undeliverable. (TR p. 6, LL 13-20).

The record reflects that the Solicitor pointed out to the Court that, "Mr. Cooper did sign the bond paperwork which has the language after September 6, 2005, which was his bond returnable date, he shall appear or could be tried in his absence if he failed to appear before." (TR p. 6, LL 21-25). Trial counsel told the Court that he had not contacted Applicant's bondsman to see if he had located Applicant. (TR p. 7, LL 1-9). The Court suggested proceeding with voir dire and contacting the Applicant's bondsman to see if Applicant could be located overnight. (TR p. 7, LL 10-20). The Court then instructed bailiff, Howard Long, to announce Applicant's name three (3) times outside of the courtroom. Mr. Long did as instructed, as well as going outside of Moss Justice Center to announce Applicant's name, and there was no response. (TR p. 8, LL 2-14). The record reflects that the following day, trial counsel let the Court know that he had spoken to the bondsman and that they were searching for Applicant. (TR p. 32, LL 2-3). Being unable to locate Applicant, the case commenced with pre-trial motions in his absence.

Although trial counsel could not remember at the time of Applicant's PCR hearing, it is clear from the record that trial counsel viewed the video of the stop in question prior to Applicant's trial and vigorously argued his Jackson v. Denno motion based on his viewing of the video. (TR p. 35, LL 2-25 – TR p. 37, LL 1-15). Assistant counsel viewed the video as well, and the Court finds that assistant counsel vigorously and competently argued the motion for suppression of the contraband found as a product of the search incident to Applicant's arrest.

The Court finds that Applicant's trial counsel was effective in the defense of Applicant. While our Court of Appeals has found that the failure to move for a continuation of the case and

failure to object to the trial moving forward without the presence of the defendant is grounds for ineffective assistance of counsel in relation to a PCR hearing, the Court finds that this case differs greatly from the facts of Morris v. South Carolina, 371 S.C. 278, 639 S.E. 2d 53 (2006). Here, Applicant did not show for court at all in the weeks leading up to his case being called for trial, and, unlike Morris, there was no direction from Applicant to defense counsel to move for a continuance. Applicant, in his failure to maintain contact with trial counsel, gave no indication to counsel that, should a continuation be granted, he would make himself available to attend his trial. While speculation of how another circuit judge would rule if presented with an issue is outside the purview of this Court, the Court finds that there does not appear to be any meritorious grounds to support a motion for continuance, and, if requested, a motion for continuance would have likely been denied by the trial court. The Court finds that trial counsel was not deficient in his representation of Applicant at trial and that his representation of Applicant was reasonable under the circumstances and thus, effective.

The Court finds, however, that even if trial counsel was deficient in representation of Applicant, Applicant was not prejudiced by Trial counsel's ineffective assistance. The Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of trial; however, a case may be tried in an accused's absence should the he waive that right. See State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct.App.2007). Where a court finds that an accused has received notice of his right to be present at trial and where a court finds the accused was warned that trial would proceed in his absence, an accused's right to be present at trial may be waived. State v. Ravenell, 387 S.C. 449, 456, 692 S.E.2d 554, 558, citing Rule 16, SCRCrimP. The trial transcript shows that Applicant was aware of his right to be

JeH #9

Therefore, Applicant's Application for Post-Conviction Relief is denied and dismissed with prejudice.

IT IS SO ORDERED.

John C. Hayes, III
Presiding Judge
6/17/13

June 17th 2013
York, South Carolina

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