

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

APPEAL FROM EDGEFIELD COUNTY  
Court of Common Pleas

JUL 11 2013

Honorable Frank R. Addy, Jr., Circuit Court Judge

**S.C. Supreme Court**

Case No.: 2011-CP-19-00233

Steven Whitt, #255456, .....Petitioner,

v.

State of South Carolina, .....Respondent.

**NOTICE OF APPEAL**

The Petitioner Steven Whitt, #255456, appeals the Honorable Frank R. Addy, Jr.'s June 25, 2013, order denying post-conviction relief to the Respondent. Undersigned counsel received notice of entry of the order on June 26, 2013. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

*Dorothy H. Hogg*

\_\_\_\_\_  
Dorothy H. Hogg  
S.C. Bar No. 71710  
Attorney for Applicant

July 8, 2013

FULCHER HAGLER, LLP  
Post Office Box 1477  
Augusta, GA 30903  
(706) 724-0171

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM EDGEFIELD COUNTY  
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Honorable Frank R. Addy, Jr., Circuit Court Judge

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Case No.: 2011-CP-19-00233

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Steven Whitt, #255456, .....Petitioner,

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PROOF OF SERVICE

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I, Dorothy H. Hogg, certify that I have today served the within notice of appeal by depositing a copy of it in the United States Mail, postage prepaid, addressed to:

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

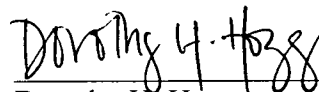
South Carolina Commission on Indigent Defense  
P.O. Box 11433  
Columbia, SC 29211-1433

Office of the Attorney General  
Attn: J. Walter Whitmire  
P.O. Box 11549  
Columbia, SC 29211-1549

Steven Whitt  
Wateree River Correctional Institution  
P.O. Box 189  
Rembert, SC 29128

Edgefield County Court of Common Pleas  
P.O. Box 34  
Edgefield, SC 29824-0034

Dated: July 8, 2013

  
\_\_\_\_\_  
Dorothy H. Hogg  
S.C. Bar No. 71710  
Attorney for Applicant

W  
11

EDGEFIELD COUNTY  
CLERK OF COURT  
STATE OF SOUTH CAROLINA  
2013 JUN 25 AM 9:50  
COUNTY OF EDGEFIELD

IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

Case No: 2011-CP-19-223  
233

Steven Whitt,  
S.C.D.C. No. 255456,  
  
Applicant,  
  
v.  
  
State of South Carolina,  
  
Respondent.

**ORDER OF DISMISSAL**

This matter comes before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed July 25, 2011. Respondent made its Return on February 25, 2012. An evidentiary hearing into the matter was convened on April 15, 2013 at the Lexington County Courthouse. Applicant was present at the hearing and was represented by Dorothy H. Hogg, Esquire. Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. W. Gregg Seigler, ("plea counsel") Esquire, testified. This Court also had before it the records of the Lexington County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Edgefield County Clerk of Court. The Applicant was indicted at the February 2010 term of the Edgefield County Grand Jury for Distribution of Crack Cocaine, Second Offense (2010-GS-19-073). Applicant was represented by W. Gregg Seigler, Esquire. On

February 22, 2011, the Applicant pled guilty as charged. The Honorable R. Knox McMahon sentenced the Applicant to confinement for a period of seven (7) years. Applicant did not appeal his conviction or sentence.

At the PCR hearing, Applicant alleged he was being held unconstitutionally for the following reasons:

1. Ineffective Assistance of Counsel
  - a. failure to investigate the sufficiency of the State's evidence;
  - b. failure to challenge the sufficiency of the indictment;
  - c. failure to inform Applicant of the right to file an appeal

## II. SUMMARY OF TESTIMONY

At the PCR hearing, Applicant testified he was arrested pursuant to an alleged control buy of narcotics. Applicant stated the police connected him to the offense with marked currency. Applicant stated plea counsel was ineffective for not investigating the currency to see if it in fact connected Applicant to the offense.

Applicant testified plea counsel was ineffective for failing to challenge the sufficiency of the indictment. Applicant stated the guilty plea hearing court did not have subject matter jurisdiction to accept his guilty plea and render a sentence. Applicant stated he was neither arrested for distribution, second offense, nor was he charged with distribution, second offense.

Applicant testified plea counsel was ineffective for failing to advise him of his right to file an appeal. Applicant stated he would have insisted plea counsel file an appeal if he was properly advised on the matter.

At the PCR hearing, plea counsel testified. Plea counsel testified he was originally appointed to represent Applicant on his pending Edgefield charges. Plea counsel inherited Applicant's pending Saluda charges when the health of Applicant's other attorney on those charges declined. Plea counsel filed for discovery and discussed the State's evidence with



Applicant. Plea counsel met with Applicant on numerous occasions prior to Applicant's guilty plea hearing. Plea counsel discussed Applicant's version of the offenses. Plea counsel investigated the marked twenty dollar bill used by law enforcement in one of the two control buys of which Applicant was charged with distribution. Plea counsel stated the control buy was standard and found no deficiency that would have aided in Applicant's defense. Plea counsel advised Applicant that the State would have most likely obtained convictions if the Applicant contested the charges at trial. Plea counsel discussed Applicant's potential exposure of thirty years imprisonment on his pending charges. Plea counsel pursued guilty plea negotiations with the solicitor and obtained a guilty plea offer of a recommended seven year sentence on a distribution, second offense, where all other pending charges, including an additional distribution charge, would be *nolle prosequi*. Plea counsel advised Applicant of the benefit and detriments of pleading guilty. Subsequently, Applicant voluntarily pled guilty and the guilty plea hearing judge followed the solicitor's recommendation.

Plea counsel testified that as a matter of practice, he advises his clients of their appellate rights during representation. Plea counsel stated that he did not recall Applicant requesting and appeal. Plea counsel stated he saw no reason why Applicant would have desired an appeal because the guilty plea hearing judge followed the solicitor's recommendation.

### III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, 692 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

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 adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance 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 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

#### IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the



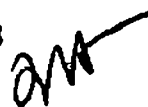
application for post-conviction relief, the transcripts and documents from the prior proceedings, and, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

**A.**

This Court finds Applicant has failed to meet his burden to prove plea counsel was ineffective for failing to investigate any alleged impropriety with the marked currency used in the control buy. This Court finds plea counsel more credible than Applicant. This Court finds plea counsel filed for discovery and testified that Applicant's arrest was pursuant to a valid and standard controlled buy. To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). ). The Applicant failed to produce any witnesses or offer any other evidence from which this Court could conclude that the outcome of the case would likely have been different had that evidence been developed. Therefore, this allegation is denied and dismissed.

**B.**

This Court finds Applicant's allegation that plea counsel failed to challenge the subject matter of the guilty plea hearing court based on an alleged defective indictment is without merit. Defects in the language of an indictment do not divest an otherwise proper court of subject matter jurisdiction over a case. U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). Citation of the proper statute in the indictment's body is sufficient to fulfill the notice and jurisdictional requirements. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001). Here, Applicant was properly charged under S.C. Code § 44-53-375(b)(3) where he was allowed to enter a guilty plea to its lesser included offense. Additionally, this Court finds the plea colloquy shows Applicant



was on sufficient notice he was pleading guilty to the lesser included distribution, second offense, of the charged and indicted distribution, third offense. (Guilty Plea Tr. 3, lines 4—15). Furthermore, Applicant told the guilty plea judge plea that counsel had explained the charges and possible punishments with Applicant. (Guilty Plea Tr. 5, lines 10-14). Therefore, this allegation is denied and dismissed.

### C.

Last, this Court find Applicant failed to meet his burden to prove plea counsel was ineffective for failing to advise him of his right to appeal. This Court finds plea counsel's testimony credible and Applicant's testimony not credible. "[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S.Ct. 1029 (2000). Plea counsel diligently and successfully obtained a favorable guilty plea offer during the course of representation. Plea counsel persuasively testified he had no reason to believe a defendant would have desired an appeal because the guilty plea judge followed the solicitor's recommendation. Applicant freely and voluntarily entered his guilty plea. Furthermore, Applicant failed to prove he conveyed a desire to appeal to plea counsel. Therefore, this allegations is denied and dismissed.

### All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas



Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

#### V. CONCLUSION

Based on all the forgoing, 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 for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

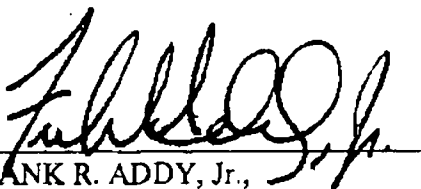
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

#### IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent



**IT IS SO ORDERED** this 14<sup>th</sup> day of June, 2013.

  
FRANK R. ADDY, Jr.,  
Presiding Judge  
Eleventh Judicial Circuit

Laurens, South Carolina

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

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STEVEN WHITT, 255456,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**Dorothy H. Hogg, Esquire**  
**Post Office Box 1477**  
**Augusta, GA 30903**

This 1<sup>st</sup> day of July, 2013.

  
Troyeshi Bailey, Legal Assistant  
For Respondent

**SWORN to before me this 1st day of July, 2013.**

  
Notary Public for South Carolina.  
My Commission Expires: May 11, 2014

**Fulcher Hagler LLP**  
ATTORNEYS AT LAW SINCE 1946

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS  
Post Office Box 1477 • Augusta, Georgia 30903-1477  
One 10th Street, Suite 700 • Augusta, Georgia 30901  
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**Dorothy H. Hogg**  
Direct Fax No: (706) 396-3638  
E-mail Address: [Dhogg@fulcherlaw.com](mailto:Dhogg@fulcherlaw.com)  
Admitted in Georgia and South Carolina

July 8, 2013

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JUL 11 2013

**S.C. Supreme Court**

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

RE: *Notice of Appeal for Steven Whitt v. State of South Carolina*  
2011-CP-19-00233  
Our File No. 1016/200

Dear Mr. Shearouse:

Enclosed please find an original and one copy of each of the Notice of Appeal and Proof of Service for filing in the captioned case. Once the originals have been filed, please return the date-stamped copies to me in the envelope provided for your convenience.

Thank you for your assistance.

Very truly yours,

  
Dorothy H. Hogg  
For the Firm

DHH/  
Enclosures  
cc: J. Walter Whitmire  
Edgefield County Court of Common Pleas  
South Carolina Commission on Indigent Defense  
Steven Whitt

**Fulcher Hagler LLP**  
ATTORNEYS AT LAW SINCE 1946

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Post Office Box 1477 • Augusta, Georgia 30903-1477  
One 10th Street, Suite 700 • Augusta, Georgia 30901  
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July 8, 2013

Shirley F. Newby, Clerk  
Court of Common Pleas  
P.O. Box 34  
Edgefield, SC 29824-0034

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JUL 11 2013

**S.C. Supreme Court**

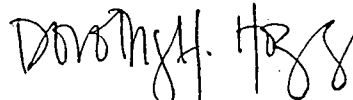
RE: *Notice of Appeal for Steven Whitt v. State of South Carolina*  
Case No. 2011-CP-19-00233  
Our File No. 1016/210

Dear Ms. Newby,

Enclosed please find two copies of each of the Notice of Appeal and Proof of Service for filing in the captioned case, which was also filed with the Supreme Court of the State of South Carolina. Please date-stamp one copy of each and return them to me in the envelope provided for your convenience.

Thank you for your assistance.

Very truly yours,



Dorothy H. Hogg  
For the Firm

DHH/  
Enclosures

cc: J. Walter Whitmire  
Daniel E. Shearouse, South Carolina Supreme Court  
South Carolina Commission on Indigent Defense  
Steven Whitt

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## Fulcher Hagler LLP

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TO:

Daniel E. Shearouse, Clerk  
Supreme Court for the State of South Carolina  
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Columbia, SC 29211

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