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April 16, 2012

RECEIVED

APR 16 2012

HAND DELIVERED

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

S.C. Supreme Court

Re: Dante Rashad Smith, #294901 vs. State of South Carolina
Civil Action No.: 2010-CP-40-5827

Dear Mr. Shearouse:

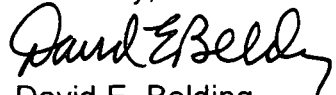
Enclosed for filing is a *Notice of Appeal* in the above-referenced case. Also enclosed are the following:

1. Proof of Service of the *Notice of Appeal* on the Respondent.
2. A copy of the *Order of Dismissal* which is challenged on appeal.

Since the Appellant is indigent, and the undersigned appeared as Court-appointed counsel in this matter, I respectfully request that the filing fee be waived pursuant to Rule 203(d), *South Carolina Appellate Court Rules*.

Thank you very much for your assistance.

Sincerely,



David E. Belding
Attorney for Appellant

DEB/ym

cc: Brian T. Petrano, Esquire
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable J. Ernest Kinard, Jr., Circuit Court Judge

RECEIVED

APR 16 2012

S.C. Supreme Court

Case No. 2010-CP-40-5827

Dante Rashad Smith, #294901.....Appellant,

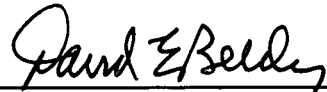
v.

State of South Carolina.....Respondent.

NOTICE OF APPEAL

Dante Rashad Smith, #294901, appeals from the *Order of Dismissal* of the Honorable Clifton B. Newman, Circuit Court Judge, in this case, dated March 27, 2012, and filed March 27, 2012, dismissing Appellant's post-conviction relief application. Appellant's counsel received notice of entry of this *Order* on April 9, 2012.

BY:



David E. Belding (S.C. Bar #00623)
Post Office Box 11964
Columbia, South Carolina 29211
(803) 665-3161
ATTORNEY FOR APPELLANT

Columbia, South Carolina
April 16, 2012

Other Counsel of Record:
Brian T. Petrano, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-3970
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

APR 16 2012

The Honorable J. Ernest Kinard, Jr., Circuit Court Judge

S.C. Supreme Court

Case No. 2010-CP-40-5827

Dante Rashad Smith, #294901.....Appellant,

v.

State of South Carolina.....Respondent.

PROOF OF SERVICE

I certify that I have served the *Notice of Appeal* on Brian T. Petrano, Esquire, counsel for Respondent, by depositing a copy of same in the United States Mail, postage prepaid, on April 16, 2012, addressed to him as counsel of record at Post Office Box 11549, Columbia, South Carolina, 29211-1549.

April 16, 2012



David E. Belding
Post Office Box 11964
Columbia, South Carolina 29211
(803) 665-3161
ATTORNEY FOR APPELLANT.

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

JUDGE _____ IN A CIVIL CASE

CASE NUMBER: 2010CP4005827

Dante Rashad #294901 Smith

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.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; 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 PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If 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 |
|---|---------------------------------------|--------------------------------|
| | | \$ |
| | | \$ |
| | | \$ |

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 _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 28 March 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Dante Rashad Smith
David E Belding

Robert L Brown

Brian T Petrano

Robert Daniel Corney

Dante Rashad Smith

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W McBride

RICHLAND COUNTY
 FILED
 2012 MAR 28 AM 10:40
 JEANETTE W. MCBRIDE
 C. C. P. & G.

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
)
 Dante Smith, # 294901,)
)
 Applicant,)
)
 v.)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

2010-CP-40-05827

ORDER OF DISMISSAL

JEANETTE M. McBRIDE
 C.C.P. & G.S.
 2012 MAR 27 PM 2:48
 RICHLAND COUNTY
 FILED

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 26, 2010. The Respondent made its Return on February 8, 2011. An evidentiary hearing into the matter was convened on Monday, February 13, 2012, at the Richland County Courthouse. The Applicant was present at the hearing and was represented by David Belding, Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was Applicant's plea counsel, Edward Longshore, Esquire ("counsel"). This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Richland County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was indicted at the October 2008 term of the Richland County Grand Jury for two (2) counts of Trafficking Marijuana, 10 – 100 lbs (3rd Offense),

Possession with Intent to Distribute Marijuana – 3rd Offense, Arson – 2nd Degree and Failure to Stop for a Blue Light (2008-GS-40-7328, 7330, 7346, 7464, 7491). Edward Longshore, Esquire, represented him on the charges. On September 2, 2009, Applicant appeared before The Honorable J. Michelle Childs at which time the case was continued and the court’s decision on Applicant’s Motion to Relieve Counsel was held in abeyance. On September 8, 2009, Applicant came back before Judge Childs at which time he revoked his Motion to Relieve and pled guilty pursuant to negotiations with the State to Possession with Intent to Distribute – 3rd Offense, Arson- 2nd Degree and Failure to stop for a Blue Light as indicted, as well as to two (2) counts of the lesser included Trafficking Marijuana, 10 – 100 lbs (2nd Offense). Applicant was sentenced to one (1) year imprisonment for Failure to Stop for a Blue Light and twelve (12) years on each of the remaining charges, all sentences to run concurrently. Applicant did not appeal his plea or sentence.

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

- 10 (a) That counsels REPRESENTATION fell below an objective standard of reasonableness and, but for counsels ERROR, the applicant would not have pled guilty but would have insisted on going to trial.
- (b) That the conviction and sentence is in violation of the U.S. constitution, S.C. Constitution and laws of this state.
- (c) That the applicant made an unintelligent and involuntary Plea.

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 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test 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, 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. With respect to guilty plea counsel, the Applicant must show that 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)

Involuntary Guilty Plea

Applicant alleged his guilty plea was entered involuntarily as a result of counsel's failure to prepare a proper defense to be used at trial. Applicant testified he is currently serving twelve (12) years imprisonment of which he realizes he will serve at least eight-five (85%) percent as a result of "a lot of charges stacked up against" him. Applicant stated he was originally represented by a Richland County public defender, but relieved him/her to retain counsel sometime around February 2009. Applicant said he faced two distinct sets of charges which Longshore represented him on, the second set having come about while Applicant was out on bond for the first set of charges. Applicant stated he met with counsel two (2) or three (3) times for fifteen to twenty (15 - 20) minutes each time to discuss the charges, during which counsel only talked about Applicant accepting a plea offer from the state. Applicant went on to say he was originally offered a plea deal for eighteen (18) years in prison, but counsel told Applicant he would try to get an offer for under ten (10) years through continued negotiations. Applicant testified he found out about his plea hearing the Saturday before he was to appear on Monday, at which time he was able to talk with counsel for roughly ten (10) minutes and able to see his discovery materials for roughly five (5) minutes. He alleged he had asked counsel to investigate the traffic stop that led to Applicant's arrest because Applicant believed it was an unlawful stop. Applicant alleged

counsel never investigated that concern. Applicant stated although he was hesitant to enter the plea on September 8th, he did so on the advice of his counsel because he believed he didn't have a choice as he believed counsel wasn't prepared to go to trial the next day as scheduled.

Counsel testified at the PCR hearing that he was retained to represent Applicant by Applicant's girlfriend and/or mother around February of 2009. He went on to say he met with Applicant roughly two (2) or three (3) times for roughly thirty (30) minutes each time during which they reviewed the charges, indictments, potential sentences, and risks of proceeding to trial versus taking a plea. Counsel stated he had the discovery "in a timely manner" and reviewed the discovery materials with Applicant as he received them. He said he talked in depth with Applicant about potential defenses to each charge, but stated he believed this was a "very clear cut case" in which the police had watched Applicant load drugs into his car after which they pulled him and found the drugs in plain view. Counsel stated that although he did not investigate whether the police had initiated a pretextual stop, he stated that was something he discussed with Applicant and would have challenged at trial. Counsel also noted Applicant wrote a letter to the solicitor while incarcerated essentially confessing to the crimes which was very damaging to the potential defenses he would have prepared. Counsel went on to say the solicitor was very hesitant to extend any plea offers in this case, but eventually he was able to secure the plea offer for a negotiated twelve (12) year sentence. Counsel stated he believed the solicitor had a "slam dunk" case against Applicant on the Trafficking Marijuana (3rd Offense) charges which would have carried a twenty-five (25) year minimum sentence, so he believed the plea offer was very advantageous to Applicant. Counsel also said there was no real discrepancy over the facts leading to the charges and there was very little background investigation to do as it was a very simple case and there were no witnesses to track down. Counsel testified he did not see what

benefit would have come from filing a motion to suppress as it would not have been successful, nor did he see any basis for challenging the warrant used during Applicant's arrest for the second set of drug charges. Counsel stated ultimately Applicant wanted to plea to get the least amount of time he could and that it was entirely Applicant's decision to take the plea offer extended. He finished by stating he very seriously doubted the case would have proceeded to trial the next day had Applicant not pled, and stated he believed he gave Applicant all the information and advice to make a voluntary and intelligent decision whether to accept the plea or proceed to trial.

Based on the testimony presented at the hearing in conjunction with a thorough review of the trial transcript, this Court finds counsel was not ineffective and Applicant entered this plea voluntarily and intelligently after being fully advised by competent counsel acting within the range of reasonableness based on professional norms. Further, this Court finds counsel's testimony to be credible while finding Applicant's testimony to be wholly incredible. Counsel took all the appropriate steps to investigate and prepare Applicant's case despite having the odds clearly stacked against him at trial, and gave Applicant all the advice and information necessary to make an informed and voluntary decision whether to enter the plea or proceed to trial. Counsel plainly stated he would have further investigated and pursued a motion to suppress based on the alleged pretextual stop had Applicant decided to proceed to trial. It is important to note Judge Childs gave Applicant a full week from his original appearance date to decide whether to accept the plea offer or not, after which Applicant came back before the Judge and entered the plea without hesitation. Applicant pled pursuant to a negotiated cap sentence which he was well aware of. Based on all of this and a review of the record, this Court finds Applicant failed to prove counsel was deficient in his performance in any regard.

Further, this Court finds Applicant has failed to sufficiently prove resulting prejudice based on any alleged deficiencies. Applicant clearly entered the plea to avoid receiving a minimum twenty-five (25) year sentence on charges counsel credibly stated the solicitor had a “slam dunk” case on. Applicant has failed to convince this Court that, had counsel taken some further action, Applicant would have proceeded to trial to face such a severe sentence rather than take the benefit of a plea offer. See Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985) (*With respect to guilty plea counsel, the Applicant must show that 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.*) Applicant also failed to establish his arrest was in fact made pursuant to a pretextual stop by police or that a motion to suppress the drugs found under such a theory would have been successful at trial (especially in light of the testimony before this Court regarding how the police came to make the arrest). Accordingly, this Court finds Applicant has failed to carry his burden in proving either counsel was ineffective or that this plea was entered involuntarily, and therefore this application is denied and dismissed with prejudice.

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.

Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. 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

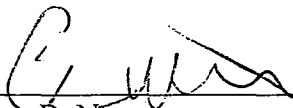
be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue 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.

This Court notes Applicant 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), SCRCR, 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 this 27th day of March, 2012.



Clifton B. Newman
Presiding Judge
Fifth Judicial Circuit


_____, South Carolina.