



ALAN WILSON
ATTORNEY GENERAL

October 21, 2013

RECEIVED

OCT 21 2013

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Tobias Aaron Jones, Respondent v. State, Petitioner
Case No. 2010-CP-23-9887

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. A letter ordering the PCR transcript from the court reporter.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General

cc: Beattie B. Ashmore, Esquire
South Carolina Department of Corrections
Greenville County Clerk of Court
Solicitor Walt Wilkins
Office of Appellate Defense
Trisha Allen, Victim Services

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Case No. 2010-CP-23-9887

Tobias Aaron Jones,.....Respondent,

v.

State of South Carolina, Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Robin B. Stilwell's order filed September 24, 2013 granting post-conviction relief to the Respondent. The State received notice of entry of the order on September 30, 2013. A copy of the order on appeal is attached to this notice.

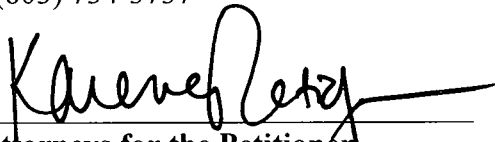
Respectfully submitted,

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

By:



Attorneys for the Petitioner

Columbia, South Carolina

October 21, 2013

Other counsel of record:

Beattie B. Ashmore, Esquire
650 East Washington Street
Greenville, SC 29601

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Case No. 2010-CP-23-9887

Tobias Aaron Jones, Respondent,

v.


State of South Carolina, Petitioner.

PROOF OF SERVICE

I, Karen C. Ratigan, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Beattie B. Ashmore, Esquire
650 East Washington Street
Greenville, SC 29601

I further certify that all parties required by Rule to be served have been served this 21st day October, 2013.


KAREN C. RATIGAN
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
Attorney for the Petitioner

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Tobias Aaron Jones, # 39627)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

Case No. 2010-CP-23-09887

FILED - CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKESHAVER

2013 SEP 24 PM 4:28

ORDER

This matter comes before the Court by way of an Application for Post-Conviction Relief filed on December 3, 2010. The Respondent filed its Return on or about March 7, 2011. On August 28, 2013, the Court held an evidentiary hearing. The Applicant was present at the hearing and was represented by Beattie B. Ashmore. The Respondent was represented by Assistant Attorney General Karen C. Ratigan.

The Applicant testified at the hearing. No other testimony was taken at the hearing, and the Applicant's testimony was therefore uncontroverted. The Court carefully observed the Applicant and listened to his testimony and finds that the Applicant was credible and his testimony was truthful. The Court took judicial notice that on the day of the Post-Conviction Relief hearing, the Applicant's trial counsel, Richard Breibart, pled guilty in Federal Court. Breibart was charged with offenses involving the defrauding of numerous clients with losses well in excess of one million dollars, evidencing a pattern of lies and deceit in dealing with his clients. See United States v. Richard Breibart, 3:12-cr-00723 (D.S.C.). Breibart's Federal criminal case was delayed in order for a competency examination to be conducted by the Bureau of Prisons. This Court also reviewed the Applicant's Post-Conviction Relief Application as well as the entire record to include the plea and sentencing transcript.

PROCEDURAL HISTORY

The Applicant was indicted on April 14, 2009, for knowingly selling, manufacturing, delivering or bringing into the State, or knowingly providing financial assistance or otherwise aiding, abetting,

attempting, or conspiring to sell, manufacture, deliver or bring into the State, or knowingly being in actual or constructive possession of more than 400 grams of Cocaine, in violation of S.C. Code Ann. § 44-53-370. The Applicant was stopped on the Interstate, and cocaine was found in his automobile during a search. The Applicant testified that he found Attorney Richard Breibart on the Internet and that Breibart represented that he had "connections" to law enforcement, prosecutors and the South Carolina legislature. A preliminary hearing was conducted and the case was dismissed. It was then indicted through direct presentment. The case hinged upon the illegality of the traffic stop as Breibart indicated when he told the Judge at sentencing that "[t]he whole case turned around the search and seizure question." (Sentencing transcript at 11).

The Applicant testified that Breibart informed him that a Suppression Motion had been filed and denied by the Court. In fact, Breibart never filed a Suppression Motion, and no such Motion had been ruled upon by the Court. Based on the representation that a critical component of his defense had failed as well as other material misrepresentations, on March 4, 2010, the Applicant pled guilty to Trafficking in Cocaine, more than 28 grams. He was sentenced to ten years imprisonment. The Applicant timely filed his Application for Post-Conviction Relief alleging ineffective assistance of counsel. The Applicant is presently confined in the South Carolina Department of Corrections.

This Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the Post-Conviction Relief hearing. This Court has further had the opportunity to observe the Applicant who testified at the hearing and to closely pass upon his credibility. This Court has weighed his testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

"The Sixth Amendment, applicable to the States by the terms of the Fourteenth Amendment, provides that the accused shall have the assistance of counsel in all criminal prosecutions. The right to counsel is the right to effective assistance of counsel." Missouri v. Frye, -- U.S. --, 132 S.Ct. 1399, 1404,

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157

182 L.Ed.2d 379 (2012) (citing Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The two-prong test for determining effective assistance of counsel has been set forth by the United States Supreme Court in Strickland v. Washington. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624 (1989). First, the applicant must show that counsel's performance was deficient. Cherry, 300 S.C. at 117. "Under this prong, the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. at 2065). "The second prong of the Strickland test 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." Cherry, 300 S.C. at 117-18 (internal quotations omitted). "The defendant is required to overcome the presumption that counsel was effective in order to receive relief." Cherry, 300 S.C. at 118. "The 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).

This Court took judicial notice that on the same day as the Applicant's Post-Conviction Relief hearing, Breibart pled guilty in Federal Court to defrauding his clients and he is now a convicted felon. See United States v. Richard Breibart, 3:12-cr-00723 (D.S.C.). The only testimony presented at the Post-Conviction Relief hearing was from the Applicant, and this Court finds the Applicant's testimony credible. This Court further finds that the Applicant has met his burden of proof in demonstrating that his trial counsel was deficient and the deficient performance prejudiced the Applicant.

Specifically, the evidence shows that Breibart made a representation to the Applicant that a Suppression Motion had been filed and ruled upon by the Court. Based on the false representation that a critical component of his defense had failed, the Applicant elected to plead guilty. The Applicant's plea was therefore not knowingly and intelligently made, and the Applicant's testimony is clear that he would not have pled guilty but for the presumed negative ruling on his Suppression Motion in addition to other

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160

material misrepresentations. The evidence shows that a Suppression Motion was meritorious, in part because the case was dismissed at a preliminary hearing.

The Court further finds that Breibart misrepresented to the Applicant that he would serve no more than five years of the ten-year recommendation. Breibart told the Applicant that although the statute provided that a Defendant must serve 85% of his sentence, the legislature was in the process of changing the statute by eliminating this provision, and he would not actually be subject to the 85% rule.

Further, the Applicant was in a position to cooperate with law enforcement officials. He testified that he spoke with an agent from the DEA who was willing to utilize him in an undercover capacity. However, Breibart told the Applicant that then Solicitor Bob Ariail was under Federal investigation and therefore Ariail would not allow the Applicant to cooperate with Federal officials in an effort to achieve a reduced sentence. Therefore, the Applicant abandoned his plans to render cooperation to the DEA in order to obtain a reduced sentence.

At the guilty plea, Breibart directed the Applicant not to address the Court with any concerns, or else he would face the full twenty-five year sentence. Lastly, although the Applicant's parents were present on the day of sentencing, Breibart discouraged them from speaking with the same threat of having the maximum sentence imposed.

Breibart's actions, statements to the Applicant, statements to the Court and eventual guilty plea in Federal Court to lying to clients in order to steal their money completely undermine the integrity of the criminal justice system and leave this Court with no confidence that the Applicant received adequate representation. The record is clear that Breibart made material misrepresentations to the Applicant. Based on those misrepresentations, the Applicant pled guilty and received a considerable sentence.


This Court specifically finds that counsel's deficient performance prejudiced the Applicant such that there is a reasonable probability that but for these unprofessional errors, the result of the proceeding would have been different. Even further, a knowing misrepresentation by an officer of the court certainly undermines confidence in the outcome of legal proceedings. See Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

4
165

CONCLUSION

Based on the foregoing, the Applicant's Application for Post-Conviction Relief is GRANTED. The Applicant's guilty plea and sentence is hereby vacated, and the original charge against the Applicant is restored.

IT IS SO ORDERED.



Robin B. Stilwell

September 24, 2013
Greenville, South Carolina

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

JUDGMENT IN A CIVIL CASE

CASE NO: 2010CP2309887

2013 SEP 24 PM 4: 28
FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

Tobias Arron Jones vs. South Carolina State Of

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; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this 24th day of September, 2013.

Court Reporter:

PRESIDING JUDGE - Robin B Stilwell

This judgment was entered on the 24th day of September, 2013, and a copy mailed first class this 24th day of September, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Beattie B. Ashmore 650 E. Washington Street
Greenville, SC 296012931

Karen Ratigan Attorney General Office

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court