

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

HONORABLE R. LAWTON McINTOSH

2013-CP-37-00290

TIMOTHY WALLACE #222935

APPELLANT,

vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

RECEIVED

DEC 23 2013

S.C. Supreme Court

NOTICE OF APPEAL

Timothy Wallace appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable R. Lawton McIntosh, Circuit Court Judge on September 16, 2013, and Order of Dismissal issued on November 26, 2013, and filed on December 16, 2013. The Appellant received Order of Dismissal on December 18, 2013.



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Attorney for the Appellant
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Attorney for Timothy Wallace

Other Counsel of Record:
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Office of Attorney General State of SC
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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM ANDERSON COUNTY
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TIMOTHY WALLACE #222935

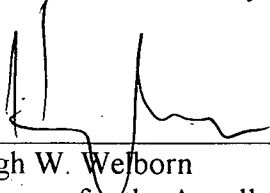
APPELLANT,

VS

STATE OF SOUTH CAROLINA,
RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail postage prepaid on December 18, 2013, addressed to its attorney of record Walt Whitmire, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549



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December 18, 2013

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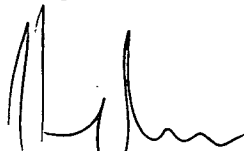
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Dear Sir/Madam:

In Re: Timothy Wallace #222935 vs State of South Carolina (PCR)

Please find enclosed herewith the original and one (1) copy of the Appellant's Notice of Appeal in connection with the foregoing matter which I ask that you file for record, returning the clocked copy to my office. I also enclose a copy of the Order of Dismissal and the original Proof of Service on Walt Whitmire, Esquire, Office of the Attorney General. Please use the enclosed self-addressed envelope to return the clocked copy to my office.

With kind regards,



Hugh W. Welborn

HWW/bmg

cc: Office of the Appellate Defense
cc: Office of the Attorney General

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-37-00290

Timothy Wallace

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. See Page 2 for additional information.
- 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 JUDGMENT 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 (List amount(s) below)
		\$
		\$
		\$

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.

ENTERED
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STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Case No. 2013-CP-37-290

Timothy L. Wallace,
S.C.D.C. No. 222985,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

2013-SEP 16 P 11:48

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed April 12, 2013. Respondent made its Return on August 2, 2013. An evidentiary hearing into the matter was convened on September 16, 2013 at the Oconee County Courthouse. The Applicant was present and was represented by Hugh Welborn, Esq. The Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General. Applicant and trial counsel testified at the hearing.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Oconee County. Applicant was indicted by the Oconee County Grand Jury at the January 2006 term of the Court of General Sessions for Oconee County for trafficking in cocaine, more than 400 grams (2006-GS-37-175). He was represented by Suzanne Earle, Esquire. The State called its case to trial on September 18, 2007. Applicant was represented by Suzanne Earle, Esq. He was found guilty as indicted. The Honorable J.C. Nicholson, Jr., sentenced Applicant to twenty-five years imprisonment for trafficking in cocaine, more than 400 grams.

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A timely Notice of Appeal was filed on Applicant's behalf. Katherine Hudgins, Esq., of the Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Wallace, Op. No. 4800 (S.C. Ct. App. filed March 2, 2011). A Petition for a Writ of Certiorari with the South Carolina Supreme Court was filed on Applicant's behalf. The Supreme Court granted certiorari on April 5, 2012. The South Carolina Supreme Court dismissed the appeal as improvidently granted State v. Wallace, Op. No. 27203 (S.C. Supreme Court filed December 19, 2012).

At the PCR hearing, the Applicant alleged he was being held in custody unlawfully for the following reason:

1. Ineffective Assistance of Plea Counsel:
 - a. Failure to investigate and advise on the applicability of self-defense;
 - b. Failure to advise Applicant to forego an immunity hearing and pled guilty.
 - c. Failure to advise Applicant on the impact of collateral federal charges.
 - d. Failure to file a notice of appeal.
2. Involuntary Guilty Plea:
 - a. Applicant did not understand the charges or the waiver of his constitutional rights.
3. Violation of Due Process: Applicant was not ensured a fair jury

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, (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, *supra*. 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.

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's 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 exhibits 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.

I.

This Court finds trial counsel's testimony credible and Applicant's testimony not credible. Applicant testified to several alleged instances during the trial where he alleged trial counsel was deficient for not making an objection. Trial counsel testified she vigorously defended Applicant and was competent in her performance. Trial counsel testified that after she reviewed the State's evidence, she advised Applicant to accept a favorable plea offer. Although trial counsel expressed dismay in the Court of Appeals ruling in affirming Applicant's conviction and sentence, trial counsel asserted that any change in her performance would not have resulted in a favorable outcome at trial for the Applicant.

A.

This Court summarily dismisses Applicant's allegations regarding trial counsel's performance in challenging the arrest and search seizure of the narcotics from the vehicle that Applicant operated. This Court finds trial counsel challenged the arrest and made a thorough motion to suppress the narcotics. (TT. pp.47-101). Furthermore, trial counsel properly preserved her objection to the admissibility of the narcotics at trial. See State v. Wallace, 392 S.C. 47, 707 S.E.2d 452 (Ct. App. 2012). Therefore, this Court summarily denies and dismisses this allegation.

This Court finds Applicant's allegation that trial counsel was ineffective for failure to object hearsay testimony from Officer Crompton regarding the police canine's qualification in narcotics detection is without merit. The rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted. Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001). At the PCR hearing, Applicant testified trial counsel did not object when Crompton referenced prior international training from the canine. This Court disagrees and finds the testimony in question was foundational and offered in the context to show continued steps

made by Crompton to ensure the propriety of the canine's use. See State v. White, 382 S.C. 265, 272, 676 S.E.2d 684, 687 (2009) ("While foundational requirements vary, "an overwhelming number [of jurisdictions] allow admission of dog tracking evidence in a criminal case to prove identity."). Therefore, this allegation is denied and dismissed.

This Court finds Applicant failed to meet his burden to prove trial counsel was ineffective for erroneously allowing Applicant's prior conviction to be brought out during Applicant's trial testimony. This Court finds Applicant's testimony not credible. At the PCR hearing, Applicant testified he discussed the matter with trial counsel. Applicant testified that trial counsel advised him the benefits of testifying outweighed the detriments at the juncture in the trial. Trial counsel testified she discussed the matter with Applicant along with the trial judge advising Applicant of the exposure in testifying. This Court finds Applicant made a knowingly, intelligent, and voluntary decision to testify. Applicant's defense was mere presence although he operated the vehicle from which nearly two pounds of cocaine were discovered. This Court finds trial counsel's advice concerning Applicant's prior convictions did not influence Applicant's decision to testify. Therefore, this allegation is denied and dismissed. See State v. Heller, 399 S.C. 157, 731 S.E.2d 312 (2012).

This Court finds Applicant failed to meet his burden to prove trial counsel was ineffective for failure to object to the solicitor's comments during the closing argument. At the PCR hearing, Applicant contended the solicitor improperly bolstered the arresting officer's experience and credibility. (TT pp.217). A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. *Id.* A solicitor has a right to state his

version of the testimony and to comment on the weight to be given such testimony. Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Id. During closing argument, the solicitor stated,

Not one officer said this, but two; two officers with combined more than 20 years experience in law enforcement. They are not gonna put their reputation and their jobs on the line to come into court and tell you something that's not true, ladies and gentleman, they're not going to do it.

(TT. p.217, line 22—p.218, line 2). At the PCR hearing, trial counsel testified it did not occur to her make an objection after the solicitor made the above mentioned comments. Trial counsel testified that although in retrospect she finds the comments improper, the comments in question were not blatantly improper. This Court finds the comments here constituted improper bolstering. See State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999). This Court finds that any deficient performance by trial counsel here in not objecting did not the trial with unfairness. First, the dash-cam video recording of Applicant's arrest was submitted at trial. (TT. P.173). The recording captured the substance of the traffic stop and arrest. The jury was able to view the conduct and demeanor of the officers in assessing the credibility of the State's witnesses. (TT pp.172-173). Second, Applicant's conviction was supported by overwhelming evidence of guilt. Therefore, this allegation is denied and dismissed.

B.

This Court finds Applicant failed to prove his allegation of prosecutorial misconduct. A

conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's judgment. Simpson v. Moore, 367 S.C. 587, 601, 627 S.E.2d 701, 708 (2006) (citing U.S. v. Bagley, 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). At the PCR hearing Applicant alleged State's expert witness, Mike Miller, misrepresented his qualifications. Applicant alleged Miller misrepresented his certification and referenced a document attached to his Application for PCR that stated Miller was not certified by SLED at the time of trial. Trial counsel testified she was familiar with the Miller. Trial counsel testified Miller supervised the SLED regional forensics laboratory and had testified in local circuit courts. Trial counsel testified Miller had testified as an expert in his field on at last forty previous occasions Trial counsel further testified she had no valid basis to believe Miller's credentials or his analysis of the cocaine was in dispute. At trial, Miller testified to the following qualifications as a forensic chemist at trial:

I've been trained and certified as a forensic chemist in the area of forensic drug analysis by the South Carolina State Law Enforcement Division, which most people in this State know as S.L.E.D. I've also been trained as a forensic chemist by the United States Department of Justice.

(TT p.186). First this Court finds Applicant failed produce credible evidence to support this allegation. Applicant referenced a document attached to his PCR Applicant that lacked authentication. See State v. Anderson, 378 S.C. 243, 662 S.E.2d 466 (Ct. App. 2008). Second, this Court finds Miller's trial testimony and trial counsel's testimony presented ample evidence that Miller was sufficiently competent to testify as an expert at trial. See Rule 702, SCRE. Therefore, this allegation is denied and dismissed.

II.

This Court finds Applicant also failed the second prong of Strickland – that he was prejudiced by trial counsel's performance. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial.) Applicant was the driver of the vehicle pulled over by police pursuant to valid traffic stop. Furthermore, Applicant claimed ownership of the bag found in the vehicle that contained over seventy-five thousand dollars of cocaine. Evidence was presented at Applicant's trial that showed Applicant was being acting in concert he trafficking drugs from a source city along an interstate passage notorious for narcotics trafficking. Subsequent to arrest, Applicant confessed his guilt and implicated his source. Applicant's story that he had no knowledge of the cocaine lacks any scintilla of credibility. Applicant has waived in casting blame on his passenger cousin to unknown sources for the cocaine ending up in his possession at the time of arrest.

III.

Except as discussed above, this Court finds that the Applicant affirmatively abandoned 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.

CONCLUSION

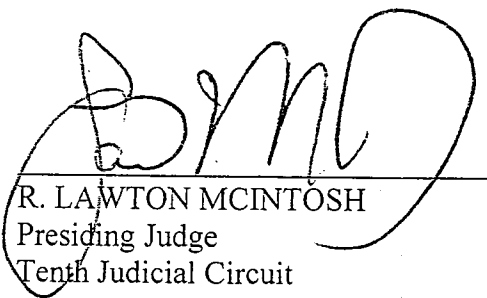
Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed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

AND IT IS SO ORDERED this 26 day of Nov, 2013.


R. LAWTON MCINTOSH
Presiding Judge
Tenth Judicial Circuit

Anders, South Carolina

ATTEST
DEC 16 2013
CLERK OF COURT - OCONEE COUNTY

FILED O'CONNOR, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 DEC 16 P 1:48

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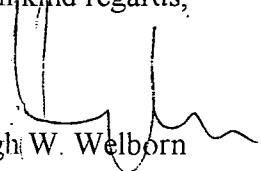
Dear Mr. Whitmire:

In Re: Timothy Wallace #222935 vs State of South Carolina (PCR)
Case No. 2013-CP-37-00290

Please find enclosed herewith a copy of the Appellant's Notice of Appeal and Proof of Service in connection with the foregoing matter. I also enclose copies of correspondence to the Appellate Defense Office and the Supreme Court. I have also forwarded copies of all documents to my client.

If you have any questions, please do not hesitate to contact my office.

With kind regards,


Hugh W. Welborn

HWW/bmg

cc: Office of the Appellate Defense
cc: South Carolina Supreme Court

Hugh W. Welborn

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December 18, 2013

Timothy L. Wallace #222935
Broad River Correctional Institution
Wateree #213-B

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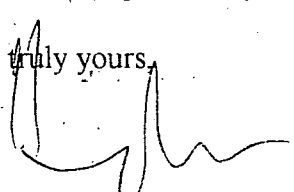
Dear Mr. Wallace:

In RE: Timothy L. Wallace #222935 vs State of South Carolina
Case No. 2013-CP-37-00290

In connection with the foregoing matter, please find enclosed herewith copies of the Notice of Appeal and Proof of Service. These copies are for your records. This concludes my representation of you in this matter.

The South Carolina Appellate Defense Office will now assign an attorney to represent you in the Appeal. Any questions you may have should be directed to the Appellate Defense Office.

Very truly yours,


Hugh W. Welborn

HWW/bmg

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December 18, 2013

South Carolina Office of Appellate Defense
P. O. Box 11589
Columbia, South Carolina 29211-1509

Dear Sir or Madam:

In Re: Timothy Wallace #222935 vs State of South Carolina

In connection with the foregoing matter, please be advised that I was the Court Appointed Attorney and enclose herewith a copy of my appointment. I also enclose copies of all documents you requested for filing a copy of the Appellant's Notice of Appeal in this matter together with a copy of the Order of Dismissal and Proof of Service. I ask that your office assume representation of this indigent Applicant.

Very truly yours,


Hugh W. Welborn

HWW/bmg
Enclosures

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South Carolina Supreme Court
Post Office Box 11330
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