

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2012-CP-39-0186

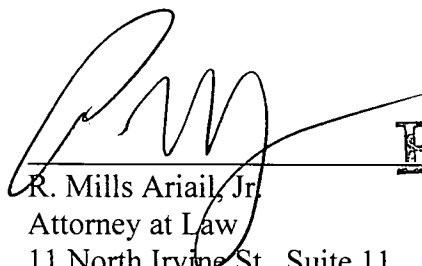
Israel Collecio.....Appellant,
S.C.D.C. No. 340535

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Israel Colecio appeals the Honorable Robin B. Stilwell's Order dismissing Appellant's application for post-conviction relief. On November 4, 2013, the Honorable Robin B. Stilwell signed an order dismissing Appellant's application for post-conviction relief with prejudice. This Order was filed with the Pickens County Clerk of Court on November 5, 2013. Appellant, through counsel, received written notice of entry of this order on January 6, 2014. A copy of Judge Stilwell's Order is attached.



R. Mills Ariail, Jr.
Attorney at Law
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Greenville, SC 29601
Telephone (864) 232-9390
Facsimile (864) 232-9392
Attorney for Israel Colecio

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JAN 15 2014

S.C. Supreme Court

Greenville, South Carolina
January 7, 2014

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JAN 13 2014

SC Court of Appeals

Other Counsel of Record and Interested Parties:

Karen C. Ratigan, Esq.
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Case No. 2012-CP-39-0186

Israel Collecio.....Appellant,
S.C.D.C. No. 340535

v.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this ___ day of January, 2014 I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Karen C. Ratigan, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

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Pickens, SC 29671

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Columbia, SC 29201-3218

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JAN 15 2014

S.C. Supreme Court

Denise LaBeck
Denise LaBeck, paralegal
LAW OFFICE OF R. MILLS ARIAIL, JR.

January 10th, 2014
Greenville, SC

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JAN 13 2014

SC Court of Appeals

R. MILLS ARIAIL, JR.
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January 7, 2013

Via US Mail

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

***Re: Notice of Intent to Appeal from Israel Colecio (SCDC #340535) v. State of
South Carolina, C.A. No.: 2012-CP-39-0186***

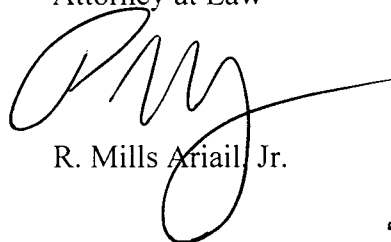
Dear Ms. Kitchings:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of Judge Stilwell's Order of Dismissal to be challenged on appeal. By copy of this letter, I am serving counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Pickens County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,

LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law



R. Mills Ariail, Jr.

RMAjr/dcd
Enclosures (as stated)

cc:

Karen C. Ratigan
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-11549

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JAN 15 2014

SC Supreme Court

RECEIVED

JAN 13 2014

SC Court of Appeals

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STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

Israel Colecio,
S.C.D.C. No. 340535,

Applicant,

v.

State of South Carolina,

Respondent.

COURT
CLERK
PICKENS COUNTY
SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

C.A. No. 2012-CP-39-0186

2013 NOV -5 P 2: 16

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed February 9, 2011. The Respondent made its return on July 31, 2012. An evidentiary hearing into the matter was convened on August 26, 2013 at the Pickens County Courthouse. The Applicant was present at the hearing and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, E.P. "Bill" Godfrey, Esquire. The Court had before it the trial transcript, the Pickens County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. The Applicant was indicted at the November 2009 term of the Pickens County Grand Jury for two (2) counts of trafficking methamphetamine (2009-GS-39-1750, -1751) and possession of a weapon during the

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commission of a violent crime (2009-GS-39-1752). He was represented by E.P. "Bill" Godfrey, Esquire.

After the State brought the case to trial, the Applicant was found guilty. On April 27, 2010 the Honorable G. Edward Welmaker sentenced the Applicant to concurrent terms of ten (10) years for trafficking methamphetamine (10-28 grams) (2009-GS-39-1750), nineteen (19) years for trafficking methamphetamine (28-100 grams) (2009-GS-39-1751), and five (5) years for possession of a weapon during the commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. LaNelle C. DuRant, Esquire of the South Carolina Commission on Indigent Defense perfected the appeal in the form of an Anders¹ brief. The Court of Appeals dismissed the appeal. State v. Colecio, Op. No. 2012-UP-101 (S.C. Ct. App. filed Feb. 22, 2010).

ALLEGATIONS

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

1. Ineffective assistance of trial counsel:
 - a. "Insuffecient evidence to convict."
 - b. Denial of Brady material.
 - c. "Not in possession of any drugs."

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

¹ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967).

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he 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).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he had three meetings with trial counsel before trial. The Applicant stated they discussed his version of events but did not review the discovery materials. The Applicant stated he knew the State had audio and video but that he never reviewed it. The Applicant stated trial counsel did not review what the State witnesses would testify to and also did not tell him that he could testify at trial. The Applicant stated trial counsel conveyed a seventeen year plea offer at their second meeting but that he rejected it. The Applicant stated they never discussed a motion to suppress. The Applicant stated trial counsel admitted to one of

the drug transactions at trial.

Trial counsel testified he filed discovery motions and reviewed the State's evidence. Trial counsel testified he reviewed the audio and video recordings in the solicitor's office and described their contents to the Applicant. Trial counsel testified there was no question the Applicant was on the videotape. Trial counsel testified he had three or four meetings with the Applicant before trial. Trial counsel testified they reviewed the State's evidence, the Applicant's version of events, and the elements and sentence ranges for the charges. Trial counsel testified the State made a seventeen year plea offer and the Applicant rejected it. Trial counsel explained it was difficult to negotiate a plea offer because the State had a recording of the Applicant attempting to solicit the murder of the confidential informant. Trial counsel testified there were no motions to be made in this case. Trial counsel testified he and the Applicant reviewed his right to testify, the confidential informant's potential testimony, and the discovery related to the witnesses. Trial counsel testified his strategy at trial was to accept the fourteen grams of methamphetamine sold to the confidential informant but dispute the gun and other drugs.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not adequately meet with him to review the case. Trial counsel testified they had several meetings and discussed the State's evidence, the Applicant's version of events, the elements and sentencing ranges for the charges, and the potential witnesses' testimony. This Court finds trial counsel's testimony is credible. This Court further finds the Applicant failed to articulate how he

was prejudiced by the number and content of his meetings with trial counsel. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly engage in plea negotiations. This Court notes both the Applicant and trial counsel confirmed the State made a plea offer for a seventeen year sentence and the Applicant rejected it. Trial counsel fulfilled his responsibilities in conveying that plea offer. Cf. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance). Trial counsel testified, however, that it was difficult to engage in plea negotiations in this case because of the Applicant's recorded conversation in which he attempted to solicit the murder of the confidential informant. This Court notes a criminal defendant does not have a constitutional right to plead guilty. See State v. Easler, 322 S.C. 333, 471 S.E.2d 745 (Ct. App. 1996), aff'd as modified, 327 S.C. 121, 489 S.E.2d 617 (1997). The Applicant has failed to meet his burden of proving trial counsel was deficient.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have filed a motion to suppress. The Applicant failed to articulate the grounds upon which a suppression motion should have been argued. Trial counsel testified there were no motions to be made in this case. This Court finds that, given the facts in this case, the Applicant cannot prove he was prejudiced by the lack of a suppression motion because such a motion would have been unsuccessful. See Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective

assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded.”) (citation omitted).

This Court finds the Applicant failed to meet his burden of proving trial counsel erred in admitting he was guilty of one of the charges. In closing argument, trial counsel concedes the evidence is clear with regard to the trafficking methamphetamine (10-28 grams) charge. (Trial transcript, pp.226-34). Trial counsel testified at the PCR hearing that his strategy was to accept guilt for the 14 grams of methamphetamine sold to the confidential informant but dispute the Applicant’s connection to the other drugs and the gun. This Court finds that, given the videotape evidence against the Applicant for the trafficking methamphetamine (10-28 grams) charge – and that the remaining drugs and gun were found scattered throughout a home not belonging to the Applicant – this was a valid trial strategy. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel); see also Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (“Counsel’s strategy will be reviewed under an objective standard of reasonableness.”).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

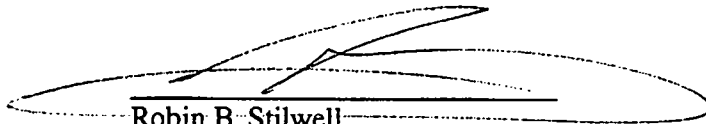
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 4 day of NOV, 2013.



Robin B. Stilwell
Presiding Judge
Thirteenth Judicial Circuit

COLUMBIA South Carolina.



R. MILLS ARIALL, JR.

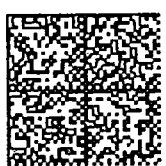
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GREENVILLE, SC 29601

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JAN 13 2014

SC Court of Appeals

The Honorable Jenny Abbot Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211



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