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SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

January 21, 2014

RECEIVED

JAN 21 2014

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: Corey Jawan Robinson v. State of South Carolina – Appellate case No. 2013-001391

Dear Mr. Shearouse:

Enclosed are an original and six copies of the Motion for Appointment of Outside Counsel in the above-captioned case. Thank you for your assistance in this matter.

Sincerely,

Carmen V. Ganjehsani
Appellate Defender

CVG

Enclosure

cc: Joshua L. Thomas, Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Georgetown County

Larry B. Hyman, Jr., Circuit Court Judge

COREY JAWAN ROBINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

Appellate Case No. 2013-001391

MOTION FOR APPOINTMENT
OF OUTSIDE COUNSEL

Undersigned counsel respectfully moves this Court to exercise its discretion in determining whether to appoint outside counsel to represent Petitioner in his appeal of his post-conviction relief matter. Representation of Petitioner presents a potential conflict of interest among the attorneys within the Office of Appellate Defense (hereinafter "Office") due to the Office's employment of Wanda H. Carter who represented Petitioner in his direct appeal to the South Carolina Court of Appeals and undersigned counsel who has been appointed to represent Petitioner in his post-conviction relief appeal.

Relevant facts

On March 16, 2009, Petitioner was tried before the Honorable Steven H. John in Georgetown County on the charges of possession with intent to distribute crack cocaine, possession with intent to distribute marijuana, and assault on a police officer while resisting arrest. Prior to trial, Judge John granted Petitioner's motion to proceed *pro se*. The jury found Petitioner guilty on all three charges, and Judge John sentenced Petitioner to imprisonment for an aggregate period of fifteen years.

Wanda H. Carter of the Office filed an appellant's brief on Petitioner's behalf pursuant to Anders v. California, 386 U.S. 738 (1967) with the South Carolina Court of Appeals. Petitioner also submitted a *pro se* brief. The Court of Appeals dismissed Petitioner's appeal on April 28, 2011.

On July 11, 2011, Petitioner filed an application for post-conviction relief ("PCR"). On February 15, 2013, Petitioner filed an amended PCR application raising issues of ineffective assistance of appellate counsel for Ms. Carter's failure to raise certain issues in his direct appeal and her failure to file a merits brief.

On April 26, 2013, Petitioner's application proceeded to an evidentiary hearing before the Honorable Larry B. Hyman, Jr. Petitioner was represented by Jason P. Boan. The State was represented by Assistant Attorney General Tyson Andrew Johnson. Ms. Carter did not testify, but at the hearing, Petitioner testified as to his allegations against her. See Ex. A (Excepts of PCR hearing, pp.14, l. 24 – 19, l. 2).

Judge Hyman issued his Order of Dismissal on May 9, 2013 denying and dismissing Petitioner's PCR application with prejudice. In this Order, Judge Hyman

specifically addressed Petitioner's claims against appellate counsel and found no basis for Petitioner's claims against appellate counsel. See Ex. B. (Order of Dismissal).

Petitioner filed a notice of appeal of the denial of his PCR application. Due to his indigent status, the Office was appointed to represent him. In preparing to draft Petitioner's PCR appeal, the undersigned counsel realized that Petitioner had a claim against Ms. Carter who is also employed by this Office.

The petition for writ of certiorari is currently on a second extension due on January 27, 2014. Undersigned counsel has already prepared the Appendix and is willing to furnish that Appendix to outside counsel if this Court grants the motion.

Law and Analysis

Rule 1.7(a)(2) of the Rules of Professional Conduct explains that a lawyer has a concurrent conflict of interest "if ... there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities ... by a personal interest of the lawyer." Rule 1.7(a)(2), RPC, Rule 407, SCACR. Due to the employment of Ms. Carter and undersigned counsel by the Office, a potential current conflict of interest exists among the attorneys in the Office of Appellate Defense. Additionally, undersigned counsel is concerned that representation of Petitioner by the Office may result in a Sixth Amendment conflict of interest in light of the claims of ineffective assistance presented to the lower court. The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to conflict-free counsel. Mickens v. Taylor, 535 U.S. 162, 168 (2002); Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

Conclusion

Undersigned counsel is prepared to move forward with Petitioner's PCR appeal, but out of an abundance of caution is providing notice of the potential conflict of interest to this Court and requesting this Court to exercise its discretion in determining whether the appointment of outside counsel to represent Petitioner in his PCR appeal is necessary in this case. Undersigned counsel requests this Court hold the timelines for filing in abeyance pending a decision on this motion.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

Attorney for Petitioner

This 21st of January, 2014

EXHIBIT A

1 Q: When you -- when you and Reuben Goude parted ways, was
2 there any questioning by the Court of your understanding about
3 your right to proceed pro se or your right to have counsel?
4 What was your understanding of your right to have counsel at
5 the time you moved forward representing yourself?

6 A: I don't understand the question.

7 Q: Well, you have alleged that you didn't knowingly waive
8 your right to counsel.

9 A: No, I just ask for him to be relieved.

10 Q: Explain how that would've prejudiced your case or how that
11 affected your case?

12 A: When asked to relieve him, they -- they automatic made me
13 represent myself. The Judge like either I was gonna take him
14 or I wasn't gonna take him so therefore I felt mistreated in
15 court with -- to represent myself because my lawyer wasn't
16 helping me at all and I'm looking at all this time and I know
17 I'm in the right and they got all this evidence to prove my
18 innocence but therefore he wasn't doing nothing for me so I
19 felt prejudiced because they allowed me to represent myself
20 knowing that I just have them relieve him. So, they made me
21 represent myself cause he say he wasn't gonna give me, this
22 weren't gonna stop the trial or whatever. So, I know my
23 lawyer wasn't gonna help me, so...

24 Q: You have raised some allegations regarding appellate
25 counsel and their failure to raise certain issues on your

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COREY JAWAN ROBINSON - DIRECT BY MR. BOAN

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1 behalf; is that correct?

2 A: Yes, sir.

3 Q: One of them is the argument that they should have raised
4 the issue that you should not have been sentenced to second
5 offenses when in fact there was no evidence ever presented
6 that you had any priors?

7 A: Uh-huh (affirmative response).

8 Q: Is that one of the issues you would ask Judge Hyman to
9 consider as ineffective assistance of counsel?

10 A: Yeah, that was one of the issues but that wasn't my big
11 issue. My big issue was the direct verdict issue, it was
12 preserved it -- I move for direct -- I move for direct verdict
13 twice in my trial so for direct appeal and review cause that I
14 was legally entitled to hear from the officer because he
15 didn't had no real suspicions or probable cause to stop me
16 based on an anonymous tip and I -- the case that I used
17 Illinois v. Gates, Adams v. Williams, Florida v. JL, Florida
18 v. Bostick.

19 Q: And you also make the argument that she failed to properly
20 brief your voluntarily and free, knowingly waiver of your
21 right to counsel?

22 A: Yeah, I said, under Penson v. Ohio, she -- my case warrant
23 a merit brief and she erroneously failed to file a merit brief
24 and if she had filed a merit brief, I would prevail at trial,
25 I mean I would've prevailed in my direct appeal.

1 THE COURT: A what kind of brief?

2 A: A merit brief.

3 THE COURT: What is that?

4 A: That's a brief saying my case had merits. She filed a
5 Anders brief. A Anders brief ---

6 THE COURT: You keep saying she; who is she?

7 A: Wanda Carter. She filed a Anders brief saying my ---

8 THE COURT: Who is she? Wanda Carter?

9 A: My appellate counsel.

10 THE COURT: Okay.

11 A: She filed a Anders brief saying my case -- my case didn't
12 have any merits. So, before she had filed a Anders brief, I
13 had called her and I write her letter saying that my case do
14 have merits under the trial judge error in not granting my
15 motion to suppress the evidence. And the direct verdict issue
16 of failure to prove actual constructive possession and I was
17 illegal -- I was legal to try to flee from the officer because
18 he didn't have probable cause or real suspicions to even stop
19 me based on the anonymous tip.

20 BY MR. BOAN:

21 Q: A couple of other allegations that we -- you have raised,
22 that we have raised in your complaint involves the Solicitor.
23 You argue that the Solicitor elicited testimony from the
24 witnesses ---

25 MR. JOHNSON: Your Honor, I'm gonna object to any

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1 testifying of counsel on behalf of the Applicant. He can ask
2 him what his allegations are but he can't testify for him.

3 MR. BOAN: Your Honor, I'm not trying to present ---

4 A: I didn't finish ---

5 MR. BOAN: Let the Judge rule on an objection, first, Mr.
6 Robinson.

7 THE COURT: Repeat your question.

8 MR. BOAN: My question was, and maybe I was phrasing it
9 wrong. I was trying to state for ---

10 A: The violation for the motion in limine that the money
11 wasn't supposed to be contributed as me dealing drugs and I
12 objected to it coming into trial and he presented the money as
13 evidence because it was incriminating statement ---

14 Q: What motion in limine did you make?

15 A: I made a motion in limine saying that no money can be used
16 as saying I was consisted [sic] in any drugs or any drug
17 dealings or whatever.

18 Q: And what did Judge John rule?

19 A: It wasn't Judge John, it was Benjamin.

20 Q: What did the trial judge rule?

21 A: The trial judge ruled that the Solicitor can use no
22 evidence or no witness saying that I was -- anything that said
23 I was guilty of drugs consistent with the money.

24 Q: And what did they do in spite of that instruction during
25 the trial?

1 A: Well, they presented the money as evidence and I objected
2 to it and he overruled my objection. And I felt like I was
3 prejudiced because this money contributed to the verdict
4 obtained of finding me guilty and I felt that if the jury
5 didn't know about this money then they probably would've
6 changed their verdict.

7 Q: And what would you have asked your appellate counsel to do
8 regarding that issue?

9 A: I would've asked her to raise a merit brief on the wrongly
10 admission of the money into evidence and I was prejudiced.

11 Q: Mr. Robinson, what else, if ---

12 A: Abuse of Trial Judge discretion allowing money into
13 evidence.

14 Q: What else would you ask the Court to consider regarding
15 your appellate counsel?

16 A: The perjury statements and the inconsistency statements of
17 the officer.

18 Q: Okay. Let's break that down for the Court.

19 A: That was -- he give three different location where the
20 drugs was found. First, he said the drugs was found in the
21 woods; then he said the drugs was found behind the club; then
22 he said the drugs was found not in the woods but on the edge
23 of the woods. And then he said the warrant said the drugs was
24 found in the parking lot. So, we had a club with all these
25 individuals and he used inconsistent statements and perjury

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1 statements where the drugs was found. And the Solicitor allow
2 him to make these statements and knowing they were false.

3 Q: Mr. Robinson, in your complaint, you allege you didn't
4 receive a fair trial because the indictments on their face
5 were insufficient to inform you that you were being charged
6 with second offense. Explain that.

7 A: Repeat that question.

8 Q: It's alleged that the indictments for possession with
9 intent to distribute cocaine base and possession with intent
10 to distribute marijuana were on their face insufficient to
11 inform you that you were facing charges of possession with
12 intent to distribute second offense and cocaine base and
13 possession with intent to distribute marijuana second offense.

14 A: Oh, yeah, I said that statute, the statute and the CDR
15 Code is invalid. I mean, the statute say -- the statute on my
16 indictment said possession with intent to distribute cocaine
17 base but under Title 44-53-3 -- under Title 44 -- under the
18 Statute 44-53-375, possession, manufacture, distribution --
19 cocaine base and it said first offense is a misdemeanor and
20 second offense is -- less than one gram you should not
21 receive more than five years. Therefore, what I said, I was
22 gave too -- I was sentenced to too much time because on my
23 indictment on CDR Code read 314 that I believe for number one,
24 it'd be 315. And that's possession, manufacture and
25 distribution.

EXHIBIT B

STATE OF SOUTH CAROLINA)
 COUNTY OF GEORGETOWN)
 Corey Jawan Robinson, 294233)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 11-CP-22-884

ORDER OF DISMISSAL

This matter is before this Court by way of an application for post-conviction relief (PCR) filed December 2, 2011. The State made a timely Return. A hearing on the matter was convened at the Horry County Courthouse on April 26, 2013. Applicant was present and represented by Jason P. Boan, Esquire. The State was represented by Tyson Andrew Johnson, Sr., Esquire, of the South Carolina Office of the Attorney General.

Applicant testified on his own behalf at the hearing. His trial counsel, C. Reuben Goude, Esquire, also testified. In addition, this Court had before it the trial transcript, the Clerk of Court's records regarding the subject convictions, the Applicant's records from the Department of Corrections, the PCR application and the State's return.

ALLEGATIONS

Applicant alleged in his Application for PCR that he is being held in custody unlawfully as a result of ineffective assistance of counsel. Applicant provided numerous allegations in his "Amended Attachments to Petition for Post Conviction Relief." Applicant also alleged this appellate counsel was ineffective in failing to file a merits brief on his issues.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FILED
 GEORGETOWN COUNTY, S.C.
 2013 JUN -4 AM 11:35
 ALENA Y. WHITE
 CLERK OF COURT

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.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1985).

Ineffective Assistance of Counsel

Applicant alleges his conviction at trial is the result of ineffective assistance of counsel. The burden of proof is on the applicant in a PCR proceeding to prove the allegations in his application. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRPC.

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. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996).

In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

This Court will now address the allegation of ineffective assistance of counsel:

Applicant represented himself

Applicant alleges that his counsel was ineffective, and refers to him as "pre-trial counsel" in his PCR because Applicant represented himself for his trial. It is clear to this Court that Applicant by making an informed and voluntary decision to fire his lawyer and choosing to represent himself after being thoroughly advised and questioned about this decision by the trial judge, that Applicant's decision was knowing and voluntary, and that Applicant created the peril for which he now complains and blames "pre-trial counsel" for.

First, in the period leading up to trial, Applicant claimed counsel did not convey the state's offer to plea to PWID second to Applicant. This is sharply disputed by counsel, who testified that Applicant was charged with PWID third, resisting arrest, assault and battery of high and aggravated nature, and assaulting an officer, and that he made it clear to Applicant that he had the opportunity to enter a plea to PWID second, but Applicant refused.

Counsel testified that on November 4, 2008 the assistant solicitor handling the case for the State mailed counsel a letter advising that as Applicant has two prior drug convictions for second offense, that if Applicant rejected the plea offer, the State would ask the judge to sentence Applicant under a third offense. Counsel testified he relayed this information and offer to Applicant, but that the offer made no difference to Applicant, who still chose a trial where he represented himself.

Counsel indicated that when the case was called the solicitor announced the charge would be a third offense, and that Applicant was told this and that he was facing a fifteen year minimum. Regarding the offer to plead to PWID second, counsel testified "I told Defendant" and "he said no, I ain't pleading guilty." Applicant now attempts to blame his trial counsel for the resulting verdict consequences of his decision to represent himself.

This Court finds counsel's version of events credible and Applicant not credible. This Court finds Applicant was aware of the consequences of waiving counsel, of proceeding as his own counsel, and the dangers of representing himself and Applicant's testimony to the contrary is not credible. This Court further finds Counsel's testimony credible and gives it great weight. This Court finds counsel relayed the plea offer to Applicant and that Applicant rejected the offer and elected to go to trial, where he lost. This claim is therefore denied.

Next, Applicant claims that counsel failed to argue his motions. The transcript reflects all of Applicant's motions were properly before the trial court, and that counsel gave competent representation in the face of a difficult client who sought to have him relieved. The Court notes that page 23 and 28-29 of the trial transcript reflect counsel submitted all of Applications motions, as well as his own, and the trial court ruled upon all of counsel and Applicants' motions. It is clear all of Applicant's motions were properly before the trial court, and the trial court dealt with those motions, but the court simply disagreed and ruled against Applicant. The record supports counsel's version of the trial, and casts a shadow over the credibility of Applicant's testimony and version of events. Therefore for this and the abovementioned reasons, this Court denied this allegation.

Finally, Applicant claims counsel struck a black male from the jury in some attempt to intentionally sabotage Applicant's case. Counsel in referring to his notes from the jury selection indicated the black male was struck because he was the son of a deputy, and a black female was the cousin of a deputy. In addition to failing to show errors of counsel in this regard, Applicant has failed to show prejudice resulting therefrom. This Court is not moved by Applicant's claims and is instead persuaded by counsel's version of the events, therefore this claim is denied.

Claims against Appellate counsel

Applicant claims his appellate counsel was ineffective for failing to file a merit brief on all Applicant's issues. Applicant provided no legal or factual support for this allegation. It is clear that appellate counsel appointed to represent an indigent defendant in his appeal from a criminal conviction does not have a constitutional duty to raise every non-frivolous issue requested by the defendant. Jones v. Barnes, 463 U.S. 745 (1983). Indeed, an indigent defendant has no constitutional right to compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points. Id. Appellate counsel's representation will not be deemed ineffective if he makes an informed decision based on reasonable professional judgment not to pursue a particular issue on appeal. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). Furthermore, under the two part test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), an Applicant must show not only that counsel's performance was deficient, but that this deficiency prejudiced his defense. Applicant has failed to show with credible evidence either error or prejudice resulting therefrom, therefore this claim is denied.

CONCLUSION

Based on 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.

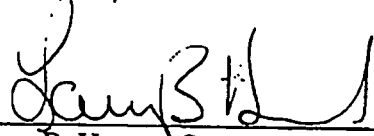
This Court advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right

to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf.

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 9 day of May, 2013.


Larry B. Hyman, Sr.
Presiding Judge
15th Judicial Circuit

Conway, South Carolina

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County
Larry B. Hyman, Jr., Circuit Court Judge

COREY JAWAN ROBINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Motion for Appointment of Outside Counsel in the above referenced case has been served upon opposing counsel, Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Corey Jawan Robinson, #294233, at Lieber Correctional Institution, PO Box 205 Ridgeville, SC 29472, this 21st day of January, 2014.



Carmen V. Ganjehsani
Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 21st day of January, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.