

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2012-CP-39-1159

RECEIVED

JAN 23 2014

S.C. Supreme Court

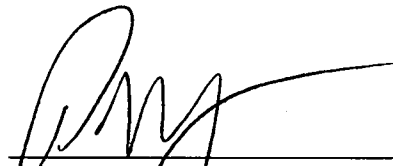
Jason Turmon Appellant,
S.C.D.C. No. 285665

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Jason Turmon appeals the Honorable Edward W. Miller's Order dismissing Appellant's application for post-conviction relief. On December 6, 2013, the Honorable Edward W. Miller 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 December 11, 2013. Appellant, through counsel, received written notice of entry of this order on December 12, 2013. A copy of Judge Miller's Order is attached.



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Attorney for Jason Turmon

Greenville, South Carolina
December 13, 2013

Other Counsel of Record and Interested Parties:

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1122 Lady Street
Columbia, SC 29201-3218

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Jason Turmon Appellant,
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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 December, 2013 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.
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Attorney for the State of South Carolina

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SC Commission of Indigent Defense
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Denise LaBeck
Denise LaBeck, paralegal
LAW OFFICE OF R. MILLS ARIAIL, JR.

December 13, 2013
Greenville, SC

STATE OF SOUTH CAROLINA)

COUNTY OF PICKENS)

Jason Turmon,
S.C.D.C. #285665,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

COURT
COUNTY
IN THE COURT OF COMMON PLEAS
C.A. No. 2012-CP-39-1159

REC 11 A 9 13

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 13, 2012. The Respondent made its return on March 28, 2013. An evidentiary hearing into the matter was convened on October 24, 2013 at the Greenville 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, Scott D. Robinson, 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 and amendment, 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 May 2009 term of the Pickens County Grand Jury for trafficking cocaine, 400 or more grams (2009-GS-39-0595). Scott D. Robinson, Esquire, represented the Applicant.



After the State took the case to trial, the Applicant was found guilty. On March 17, 2010, the Honorable G. Edward Welmaker sentenced the Applicant to twenty-five years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Tristan M. Shaffer, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders¹ brief. The Court of Appeals dismissed the appeal. State v. Shepherd, Op. No. 2012-UP-188 (S.C. Ct. App. filed March 14, 2012).

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. Failure to cross-examine witnesses.
 - b. Failure to object to jury instruction for "hand of one, is hand of all."
 - c. Failure to properly investigate and prepare for trial.
2. Ineffective assistance of appellate counsel.
 - a. Failure to raise directed verdict issue.

In a pro se amendment filed March 5, 2013, the Applicant made the following additional allegations:

1. Ineffective assistance of trial counsel:
 - a. Requested an erroneous jury charge "on possession, actual and constructive."
 - b. Failed to object to the "Trial Courts constructive amending of the applicants indictment during the charge phase."
2. Ineffective assistance of appellate counsel:
 - a. Failed to "raise the preserved denial of mistrial motion."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record and has heard the testimony and

¹ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

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 (2003).

Ineffective Assistance of Trial 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).

A.

The Applicant stated he had two meetings with trial counsel before the trial. The Applicant stated he told trial counsel his version of events but that they never reviewed the elements of the charges or the trial strategy. The Applicant stated trial counsel failed to cross-

examine Darrell Lewis (his co-defendant) to clarify his statement that the Applicant called him three weeks before the drug deal. The Applicant stated trial counsel should have objected to the "hand of one is hand of all" jury instruction because in order for the jury to consider this, Lewis would have to have been found guilty first. The Applicant stated trial counsel should have objected to the trial judge's "constructive amendment" of the indictment. The Applicant stated the trial judge broadened the indictment at trial. The Applicant stated trial counsel should not have requested a jury charge of possession.

Trial counsel testified he filed discovery motions and received those materials from the State. Trial counsel testified he gave the Applicant a copy of the discovery materials, which did not include the videotape. Trial counsel testified his practice would have been to review the video independently. Trial counsel testified the Applicant relayed his version of events. Trial counsel testified it would have been his practice to explain the concept of "hand of one is hand of all" to the Applicant. Trial counsel testified he explained to the Applicant that he was still culpable even if he never touched the drugs. Trial counsel testified there was no basis to object to the "hand of one" jury charge. Trial counsel testified he could not recall the strategy behind asking for a jury charge on possession (but that it may have been in order to achieve a verdict on a lesser-included offense). Trial counsel testified he did not recall pursuing plea negotiations with the State and that this case was difficult because of the videotape and audiotape evidence against the Applicant.

B.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not adequately cross-examine Lewis. Lewis testified at trial the Applicant called him three weeks

before drug transaction and asked if he wanted to “make a buy.” (Trial transcript, p.215). On cross-examination, trial counsel questioned Lewis about the fact that he had not been charged with any offense as a result of this transaction. (Trial transcript, pp.225-26). While the Applicant argued trial counsel should have more thoroughly questioned Lewis about the “three weeks” statement, this Court finds he has failed to demonstrate that trial counsel erred in not pursuing that line of questioning (and instead focusing on attacking Lewis’s credibility with the information that he had not been charged). This Court notes that when the assistant solicitor stated Lewis and the Applicant were dealing drugs three weeks before this incident, trial counsel properly objected to the mischaracterization of his testimony and moved for a mistrial. (Trial transcript, pp.277-79). This Court finds the Applicant has failed to demonstrate that (1) trial counsel was deficient in not more thoroughly cross-examining Lewis and (2) his case was prejudiced as a result.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the “hand of one” jury instruction. This Court finds the State presented a strong case at trial that the Applicant worked with other individuals in order to facilitate a drug transaction. This Court finds that, based on the facts of the case, there was no basis for trial counsel to have objected to the accomplice liability (or “hand of one is hand of all”) jury instruction. See State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999) (holding that under the theory of accomplice liability, “one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.”).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the “constructive amendment” of the indictment. The Applicant stated the trial

judge said constructively amended the indictment between the time he read it to the jury at the start of trial and the time of the jury charge. (Trial transcript, p.5; pp.307-08). This Court finds this allegation is without merit. This Court finds the trial judge did not amend the indictment. The trial judge merely read aloud the written verbiage of the indictment at the beginning of trial and the proper jury instruction for trafficking at the end of trial. There was no reason for trial counsel to have objected.

This Court finds the Applicant failed to meet his burden of proving trial counsel should not have requested the jury charge for possession. The State presented evidence at trial that a "reverse buy" was set up where an undercover officer would provide the drugs and the confidential informant would arrange for Lewis and the Applicant to buy them. The phone calls setting up the transaction were recorded and the transaction itself was videotaped (with law enforcement in the next room watching the event as it happened). The Applicant never actually touched the narcotics. Trial counsel requested a jury charge on actual and constructive possession and this was charged to the jury. (Trial transcript, pp.269-70; p.308). Trial counsel testified he could not recall why he asked for this charge. This Court finds this request was clearly part of trial counsel's strategy. One of the key points argued by the defense at trial was that the Applicant never touched either the drugs or money in this case. Clearly trial counsel was hoping the jury would find that, as such, he was never in possession of the drugs. See Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) ("Courts must be wary of second-guessing counsel's trial tactics.").

With respect to each of the above four issues, this Court finds the Applicant has failed to meet his burden of proving either prong of the Strickland test.

C.

However, this Court finds that – with regard to trial counsel’s preparation of the case and execution of the strategy at trial – the Applicant has met his burden of proving counsel was deficient under the first prong of the Strickland. This Court finds that, while the Applicant failed to prove deficiency on the specific issues discussed above, he demonstrated to this Court that trial counsel’s overall representation fell below a reasonable standard. This Court notes trial counsel did not refute the Applicant’s testimony that they only had two meetings before trial. This Court notes trial counsel did not review the audiotape or videotape evidence with the Applicant before trial. This Court notes there is no evidence trial counsel attempted to obtain a plea offer from the State on this serious charge. Most importantly, this Court notes that while trial counsel’s strategy was to argue an entrapment defense at trial, he actually elicited testimony from Lewis that he and the Applicant had previously dealt drugs together. (Trial transcript, pp.226-27).

This Court also finds, however, that the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. The State presented overwhelming evidence of the Applicant’s guilt. The State put together a “reverse buy” in this case and presented ample and compelling evidence to the jury in the form of testimony, audiotape, and videotape evidence. 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); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). This Court also notes the Applicant at sentencing told the plea judge “I knew what I was doing was wrong.”

(Trial transcript, p.330). As such, this Court concludes the Applicant has not met his burden of proving both prongs of the Strickland test. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Ineffective Assistance of Appellate Counsel

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). In analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009); Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (noting courts apply the Strickland test to determine if appellate counsel was deficient for failing to raise an issue and whether the defendant was prejudiced from the failure to raise the issue). Appellate counsel, however, is not required to raise every non-frivolous claim, but instead may select among them in order to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000).

The Applicant argued appellate should have raised two specific issues on appeal: (1) the denial of the motion for directed verdict and (2) the denial of the motion for mistrial.

This Court finds the Applicant failed to meet his burden of proving appellate counsel should have briefed these two specific issues. "Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is "difficult to demonstrate that counsel was incompetent." United States v. Mason, No. 3:06-607-CMC, 2012 WL 5845807 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective

assistance of counsel be overcome." Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (internal quotation omitted). This Court finds that, based upon the overwhelming evidence of the Applicant's guilt, the Applicant has failed to meet his burden of proving appellate counsel erred in not raising the two issues he wanted.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that appellate counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that appellate 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 appellate 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, sentencing, and appellate proceedings. 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

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 6 day of July, 2013.



Edward W. Miller
Presiding Judge
Thirteenth Judicial Circuit

Swain, South Carolina.

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

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December 13, 2013

RECEIVED

JAN 23 2014

Via US Mail

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

S.C. Supreme Court

**Re: Notice of Intent to Appeal from Jason Turmon (SCDC #285665) v. State of
South Carolina, C.A. No.: 2012-CP-39-1159**

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 Miller'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
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January 20, 2014

RECEIVED

JAN 23 2014

S.C. Supreme Court

Via US Mail

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Notice of Intent to Appeal from Kent R. Clayton (SCDC #331402) v. State of South Carolina, C.A. No.: 2012-CP-39-0001

Notice of Intent to Appeal from Monica Yazid (SCDC #352121) v. State of South Carolina, C.A. No.: 2012-CP-23-6443

Notice of Intent to Appeal from Jason Turmon (SCDC #285665) v. State of South Carolina, C.A. No.: 2012-CP-39-1159

Notice of Intent to Appeal from Roger Eugene Shephard (SCDC #344029) v. State of South Carolina, C.A. No.: 2012-CP-39-1100

Notice of Intent to Appeal from Billy Deon-Andre Hodge v. State of South Carolina, C.A. No.: 2012-CP-39-0885

Dear Mr. Shearouse:

Please find attached two copies of the appeals that were filed in the above referenced cases. Apparently, these were sent to the South Carolina Court of Appeals instead of the Supreme Court. These were previously sent to the Court of Appeals within the designated time. Please file these with the Supreme Court and return a copy to me in the envelope provided for your convenience. I have copied the Attorney General's Office and the Office of Indigent Defense with this letter.

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

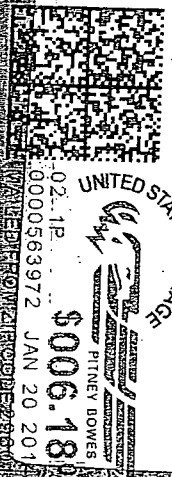
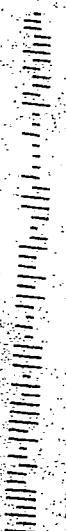
A handwritten signature in black ink that reads "R. Mills Ariail". The signature is written in a cursive, slightly slanted style.

R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

cc:

Karen Ratigan (without enclosures)
SC Commission on Indigent Defense (without enclosures)



\$006.18

02 1P
0000563972 JAN 20 201

PTNEY BOWES

R. MILLS ARIAIL, JR.

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