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January 30, 2014

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FEB 03 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

S.C. SUPREME COURT

Re: Christopher Robinson, #265006 v. The State of South Carolina
2011-CP-46-1841

Dear Mr. Shearouse:

Enclosed are the original and one copy of the Order of Dismissal in the above captioned case. The Order of Dismissal was inadvertently not attached to the Notice of Appeal. Please send a clocked in copy back to me along with the clocked in copy of the Notice of Appeal.

Please contact me if additional information is needed.

Sincerely,

Eleanor D. Cleary
Eleanor Duffy Cleary

EDC/kde

Enclosure

cc: J. Rutledge Johnson, Esquire

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS)
SIXTEENTH JUDICIAL CIRCUIT)

Christopher Robinson, #265066,)

2011-CP-46-1841)

Applicant,)

ORDER OF DISMISSAL)

v.)

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State of South Carolina,)

FEB 03 2014

Respondent.)

S.C. SUPREME COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 16, 2011. The Respondent made its Return on September 15, 2011. An evidentiary hearing into the matter was convened on October 12, 2012, at the Moss Justice Center in York, SC. Eleanor Cleary, Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Melissa Inzerillo, Esquire also testified. This Court had before it a copy of the records of the York County Clerk of Court, records from the South Carolina Department of Corrections, and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. The Applicant was indicted at the August 2007 term of the York County Court of General Sessions for Possession of Cocaine Base with intent to distribute (PWID)(2007-GS-46-2616) and Possession of Marijuana (2007-GS-46-2618). He was represented by Melissa Inzerillo, Esq. On October 4, 2007, the Applicant underwent

trial by jury, pursuant to which he was convicted of PWID crack cocaine, 3rd offense and Possession of Marijuana, 2nd offense. The Honorable John C. Hayes, III sentenced Applicant to confinement for twenty (20) years for PWID crack cocaine, 3rd offense and one (1) year, concurrent, for the Possession of Marijuana, 2nd offense.

A Notice of Appeal was filed on the Applicant's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed his conviction and sentence. State v. Robinson, 2010-UP-324 (S.C. Ct. App. filed June 23, 2010). The Remittitur was issued on July 7, 2010.

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

1. Ineffective Assistance of Appellate Counsel
 - a. "Appellate Counsel failed to argue that state failed to prove element of intent"
2. Ineffective Assistance of Counsel
 - a. "Trial counsel failed to challenge prior conviction as being unconstitutional in violation of right to counsel and prior drug convictions did not constitute as drug convictions."
 - b. "Trial counsel failed to make objections to testimony by Chief of Police and other officer which had no relevance to case."
 - c. "Trial counsel failed to ask court to sentence Defendant under Blakely v. Washington which counsel should have known about."

At the hearing, the Applicant proceeded on his claims of ineffective assistance of trial counsel.

SUMMARY OF TESTIMONY

The Applicant testified he was arrested on June 7, 2007 and met with Counsel (Inzerillo) approximately two weeks after his arrest. He stated his trial was held on October 4, 2007 and only met with Counsel once prior to trial. The Applicant testified when he met with Counsel, he was relayed an offer of eleven years, was not advised of the minimum and maximum penalties he faced,

and did not understand his prior drug convictions could be used to enhance his current charges. He also stated he told Counsel his version of the facts: he was talking with 'someone' at the top of an alley and buying marijuana from that person; police approached in an unmarked car; he was stopped by police, approached by another officer and then detained; police did not explain to him why he was being detained, but was told by one of the officers that they found crack cocaine. The Applicant claimed Counsel never interviewed witnesses even though some of their names were listed in the discovery. The Applicant stated he and Counsel visited the scene of the crime during the daytime, but did not stay very long. He testified he told Counsel he was employed at the time of his arrest and gave his pay stubs to her. He also said Counsel asked him about the gold Cadillac which was near the scene of the crime, but Counsel never interviewed the driver of that car. The Applicant then testified he did not testify at trial because of his prior convictions. He stated he told Counsel of these convictions, and she simply 'jotted down' on a note not testify. The Applicant asserted that he wanted to testify.

On cross-examination, the Applicant admitted he had a prior conviction for giving false information to police officers. He also admitted it was his decision not to testify. The Applicant stated he was buying marijuana in the alley before police approached him. The Applicant admitted the pay stubs he gave to Counsel to show he was employed only covered the months of April and May, but not June, the month he was arrested.

Counsel testified she was appointed to the Applicant's case and met with the Applicant on four occasions. She stated the Applicant did not show up for their initial meeting. Counsel testified she visited the scene with an investigator. She stated she met with the Applicant to convey plea offers of eleven years and nine years, but the Applicant rejected both offers. Counsel testified she

met with the Applicant to get his version of the facts and for him to draw a map of the scene. Counsel also testified she obtained statements from witnesses in the discovery and tried to locate the witnesses, but was unable to do so.

Additionally, Counsel testified she discussed the discovery in the case with the Applicant including the allegations, the charges and the penalties they carried. She explained to the Applicant these would be third offenses based on his prior record and would be no-parole offenses. Counsel also stated she did not advise the Applicant whether or not he should testified at trial and left this decision to the Applicant. She stated she explained to the Applicant that his prior record was minimal and because the prior drug convictions were juvenile convictions, they could not be used to impeach him. Moreover, Counsel testified the Applicant did provide pay stubs from April and May of 2007 but failed to provide pay stubs from the pay period of his arrest. She also stated the issue concerning the money found on the Applicant was raised during the trial and the trial judge allowed testimony of the money as evidence of intent to distribute. Counsel further stated she moved for a mistrial based on the money as evidence; however, the trial judge denied her motion for a mistrial. Counsel testified she did not file a suppression motion of the crack cocaine because of the Applicant's conflicting statements. She stated she did not have the Applicant's version of his story given at the hearing in her notes. Counsel stated the Applicant said the crack was found under the car, but when at the scene, the Applicant claimed he did not know where the crack was located.

Moreover, Counsel testified her trial strategy was for the Applicant to admit he possessed the marijuana, but not the crack cocaine. Also, the strategy was to show the State could not prove there was intent to distribute. Counsel lastly testified she asked for a jury charge that would not include constructive possession; thus, making the State prove actual possession.

On cross-examination, Counsel testified she has been a public defender for almost six years and had handled numerous drug cases. She stated she advised the Applicant he was facing at least fifteen to thirty years in prison for the PWID crack cocaine, 3rd offense charge, but it was the Applicant who decided to reject both of the plea offers. She testified the Applicant wanted a jury trial. Counsel also testified she found weaknesses in the State's case and tried to expose them. The State's case was based mainly on the police officers' testimony. She stated there were witnesses' names in the discovery packet, but both she and her investigator were unable to locate them. Counsel testified on a few different occasions the State mentioned a gold Cadillac that was near the scene, but she never got the impression the State was trying to show gold Cadillacs are driven by drug dealers. She also explained there were no scales or plastic baggies found on or around the Applicant as further evidence of intent to distribute. Counsel also testified the Applicant was not seen inside of the car, but was the only person who walked away from the area when police approached.

Counsel further stated she did not contact Chester Wood Products concerning the Applicant's pay stub, but her investigator might have. She testified she asked the Applicant to explain the pay stubs and the money found on him, but the only pay stubs he produced were from March, April, and May. The Applicant could not produce the June pay stubs. Counsel also testified, as to the Applicant not testifying at trial, that portions of the Applicant's prior record would have been admissible. She testified she discussed testifying at trial with the Applicant and does not tell her clients whether or not to testify. In addition, Counsel testified she relayed the two offers to the Applicant and the nine-year offer was a 'dead-drop' offer, meaning it was the final offer from the State. She also asserted the Applicant decided to reject these offer and insisted on a jury trial.

Moreover, Counsel testified she did not move for a suppression motion because she was never told the version of the Applicant's story which he portrayed at the hearing. She also explained she did not have a good-faith basis for moving for a suppression hearing. She lastly testified her investigator went to the scene of the crime, but not at night.

On redirect examination, Counsel testified her strategy at trial was based on the facts the Applicant relayed to her. She also stated she used the lack of scales and baggies to attack the State's case, specifically concerning the intent to distribute. Additionally, Counsel testified the Applicant failed to produce the pay stubs he claims shows he was employed at the time of his arrest. Counsel testified it was the Applicant's decision not to testify, but that she discussed with him the fact of the Applicant's prior conflicting statements to her and his prior conviction for giving false statements to police in 2003. She lastly testified she did not ask for a suppression hearing based on her experience as a public defender and the facts of this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court also has read the trial transcript, all of which assists the Court in judging their credibility. The Court finds the testimony of the Applicant concerning ineffective assistance of counsel not credible while finding the testimony of Melissa Inzerillo, Applicant's trial counsel, very credible.

Set forth below are the relevant findings of facts and conclusions of law as required pursuant to 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) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged 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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. 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.

Failure to Interview/Call witnesses on the Applicant's behalf

The Applicant alleges Counsel was ineffective for failing to interview witnesses on his behalf.

At the PCR hearing, the Applicant testified Counsel failed to interview witnesses from the scene the night of his arrest. He stated the names of the witnesses were listed in the discovery as some of them gave statements to law enforcement.

Counsel testified she reviewed the witnesses' statements given to law enforcement with the Applicant. She also stated she and her investigator attempted to locate and interview witnesses, but were unable to contact or find them.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

This Court finds Counsel was not ineffective for failing to interview witnesses on the Applicant's behalf. She made a reasonable effort to locate the witnesses listed in the discovery. This Court also finds the Applicant failed to produce any testimony or evidence at the PCR hearing to show what these witnesses would have testified to at trial or how their testimony would have altered the outcome of his trial. Additionally, the Applicant has failed to prove any resulting prejudice from Counsel's alleged shortcoming. Accordingly, this allegation is denied.

Failure to advise the Applicant about testifying at trial

The Applicant also alleges Counsel was ineffective for not advising him about testifying at trial.

The Applicant testified Counsel did not advise him about testifying at trial and that he wanted to testify. The Applicant also stated he did not testify because his prior convictions could be used against him during cross-examination. Counsel testified she discussed with the Applicant the right to testify at trial. She also stated she does not tell clients whether or not to testify at trial. Counsel further stated it was the Applicant's decision not to testify.

This Court finds the Applicant's claim wholly without merit. First, this Court finds Counsel's testimony credible that she discussed the right to testify with the Applicant and did not advise him whether to testify or not. She also stated it was the Applicant's decision. More importantly, the record directly refutes the Applicant's claim that he was not advised of his right to testify. On pages 144-146 of the trial transcript, the trial court clearly and thoroughly explained to the Applicant his right to testify or remain silent. The Applicant testified under oath that he understood his rights and had no question about them. Tr. p. 166 line 2-5. The Applicant then unequivocally stated he did not wish to testify. Tr. p. 166 line 11. This Court finds the record refutes the Applicant's claim, Counsel effectively advised the Applicant about his rights and the Applicant decided not to testify on his own accord. Accordingly, this allegation is denied.

Pay Stubs

Additionally, the Applicant alleges Counsel was ineffective for not using his pay stubs effectively in his defense.

The Applicant testified Counsel failed to utilize the Applicant's pay stubs from Chester Wood Products to show the money found on his person during his arrest came from his employment. He also testified he gave Counsel these pay stubs at one of their meetings. Counsel testified, although the Applicant did give her some pay stubs from Chester Wood Products, the Applicant only gave her stubs from the months of March, April, and May. The Applicant failed to give her a pay stub from June, the pay period in which the Applicant was arrested.

At trial, the State introduced evidence that the Applicant was found with \$531 on his person when he was arrested. Counsel, in a preliminary hearing, moved to suppress evidence of the money being entered into evidence. The trial court ruled the State could have a witness testify money was found on the Applicant upon arrest, but not introduce the money. Counsel also objected to the witness's (Mark Schurig) testimony concerning the money, but the trial court allowed a proffer and then allowed the testimony into evidence. Counsel also objected to the testimony concerning the money pursuant to a Rule 5 violation based upon the State's not turning over documents about seizure and forfeiture of the money. After an *in camera* hearing, the trial court overruled Counsel's objection. Counsel further requested a jury instruction for the jury to disregard any testimony about the money found on the Applicant, but the trial court denied her request.

This Court finds Counsel was not ineffective with regards to the pay stubs or the money issue at trial. Presumably, the State introduced testimony about the money as circumstantial evidence of the Applicant's intent to distribute. This Court finds Counsel made a preliminary suppression motion concerning the money, objected to testimony concerning the money, moved for a Rule 5 violation and asked for a jury instruction to not allow the jury to consider the money. Cleary,

Counsel not only rendered adequate assistance with reference to the money issue, but she also went above and beyond the standard required in trying to keep any testimony about the money from the jury's consideration. Additionally, the Applicant failed to provide evidence of the pay stubs at the hearing and thus, can prove no resulting prejudice from Counsel's alleged failure to utilize these in his defense. This Court finds Counsel did not render ineffective assistance of counsel on this issue. Further, this Court finds no resulting prejudice from Counsel's representation. Accordingly, this allegation is denied.

Failure to request a suppression motion

The Applicant further alleges Counsel was ineffective for not requesting a suppression motion concerning the crack cocaine.

Counsel testified she did not seek a suppression hearing for the crack cocaine as she did not have a good faith basis for doing so. Counsel also stated the version of the facts the Applicant presented at the PCR hearing was different than the version she told him during their meetings. Counsel additionally testified the Applicant had conflicting statements about the crack: in one statement, the Applicant said the crack was under the car and in another, he did not know where the crack was located.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information."

Strickland at 691, 104 S.Ct. at 2066.

This Court finds Counsel's failure to request a suppression hearing was not ineffective assistance of counsel. Counsel testified she did not have a good faith basis for a suppression motion due to the Applicant's inconsistent statements during the course of this case. For Counsel to advance an argument with no factual or legal basis could be construed as attempting to commit a fraud upon the court. Further, the Applicant provided no evidence that had Counsel moved for a suppression hearing, the crack cocaine would have been excluded. This Court finds the Applicant has failed to meet his burden of proving Counsel was ineffective and also failed to prove any resulting prejudice. Accordingly, this allegation is denied.

CONCLUSION

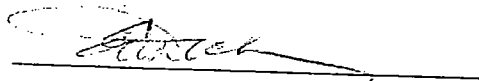
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

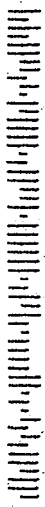
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!



Edgar W. Dickson
Presiding Circuit Court Judge
Sixteenth Judicial Circuit

2/14, 2013
Charleston, South Carolina



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