

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Honorable Brian M. Gibbons, Circuit Court Judge

RECEIVED

MAR 28 2014

S.C. Supreme Court

Case No: 2012-CP-32-1282

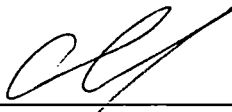
George T. Middleton.....Appellant
S.C.D.C. 307254

v.

The State.....Respondent

NOTICE OF APPEAL

George T. Middleton, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable Brian M. Gibbons, February 28, 2014, which I, Charles T. Brooks, III, received on March 25, 2014.


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PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 27th day of March, 2014, I served the foregoing **Notice of Appeal, Order of Dismissal**, as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on March 27, 2014, addressed to the following as indicated below:

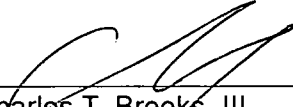
South Carolina Supreme Court
Post Office Box 11330
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George Middleton, 307245
Lee Correctional Institution
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Dated: March 27, 2014


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ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Case No: 2012-CP-32-1282

George T. Middleton,
S.C.D.C. No. 307254,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

FILED
2014 MAR 13 A 10:50
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

This matter comes before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed March 21, 2012. Respondent made its Return on December 3, 2012. An evidentiary hearing into the matter was convened on at the Lexington County Courthouse on January 21, 2014. Applicant was present at the hearing and was represented by Charles T. Brooks, III., Esq. Respondent was represented by Walt Whitmire, Esq., of the South Carolina Attorney General's Office. This Court also had before it the records of the Lexington County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

Applicant is presently confined in the Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the July 2008 term of General Sessions for distribution of crack cocaine, third or subsequent offense. He was represented by Wayne Floyd, Esq. The State called its case to trial on May 28, 2009. Applicant



was found guilty as indicted. The Honorable R. Knox McMahon sentenced Applicant to a term of twenty-one years for distribution.

A timely Notice of Appeal was filed on Applicant's behalf and perfected by Benjamin A. Stitley, Esq. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion. State v. George Thomas Middleton, Op. No. 2012-UP-373 (S.C. Ct. App. filed July 21, 2011). The Remittitur soon followed. At the PCR hearing, Applicant moved forward on the following allegations:

1. Ineffective assistance of counsel:
 - a. failure to provide Applicant a copy of discovery;
 - b. failure to advise Applicant on the merits of accepting the guilty plea offer;
 - c. failure to make a motion suppress fruits of an alleged unlawful search and seizure;
 - d. failure to make a motion for continuance after the first trial resulted in a mistrial.

SUMMARY OF TESTIMONY

First, Applicant alleged counsel failed to provide discovery disclosure materials to him. As a result, he claims he did not appreciate the State's evidence. Second, Applicant alleged counsel was ineffective for failing to adequately apprise him on whether or not to accept the State's plea offer. Applicant stated counsel conveyed to him the State's offer to plead Applicant to a lesser-included offense for a five year term of imprisonment. Applicant stated counsel should have done a better job in explaining the benefits in pleading guilty. Applicant stated he would have accepted the plea offer but for counsel's deficient performance.

Third, Applicant alleged counsel was ineffective for failing to make a motion to suppress evidence pertaining to the surveillance system equipped at Applicant's residence. Applicant stated his surveillance equipment was improperly seized and used against him at trial.



Last, Applicant alleged counsel was ineffective for failing to make a motion for continuance after the first mistrial. Applicant claimed the remaining venire panel was tainted and resulted in the unfair and impartial jurors being seated in his second trial.

Counsel testified he has practiced criminal law for thirty-nine years. His experience encompasses the full spectrum of criminal practice from magistrate court to capital trials. Counsel testified that he personally liked Applicant and believed he engaged in narcotics distribution as means to survive. Counsel recalled his course of conduct throughout the representation. He met with Applicant on several occasions prior to trial at the scheduled court appearances. In addition, counsel ventured to Applicant's home to discuss developments in the case. Counsel recalled the prosecuting solicitor, Howard, making a favorable plea offer in this case. Counsel conveyed the offer to Applicant. Counsel testified to his general practice in advising a client of an available plea offer. Counsel explained he discusses the constitutional implications through the requisite waiver of rights in entering a plea with his clients. Counsel further explained he apprises the client of the benefits and detriments of accepting a particular offer. Counsel was adamant that he rarely advises a client not to accept a plea offer. Counsel recalled his discussions with Applicant regarding the State's offer. Counsel apprised Applicant of the full sentencing exposure. He did not recall the details of the offer, but noted that it was for less prison time than necessitated on the indicted offense of distribution, third or subsequent offense. Counsel testified that Applicant unequivocally rejected the State's plea offer because he did not feel like he was capable of serving an active prison sentence in the Department of Corrections. As part of counsel's trial preparations, he conducted in-home consultations with Applicant. Counsel independently reviewed the State's evidence and discussed it with Applicant. Counsel's defense theory of the case was to show reasonable doubt through the use of an



unreliable informant. Applicant was arrested as a result of a controlled buy interdiction procedure. Counsel postulated that a suppression defense was not relevant to the facts in the case.

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 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.

As a matter of general impression, this Court finds that Applicant was not deprived of effective assistance of counsel. This Court finds counsel's testimony credible where counsel detailed his conduct during the representation. Counsel independently investigated and apprised Applicant of all aspects of the State's evidence. Due to Applicant's medical conditions, counsel took the additional step of conducting in-home consultations with Applicant. Counsel properly advised Applicant of the State's plea offer. Simply, Applicant rejected it because he did not want to serve active jail time. Applicant's allegation that counsel was ineffective for failing to make a motion to suppress as the result of an alleged unreasonable search and seizure is wholly without merit. Last, Applicant's allegation that counsel was ineffective for failing to move for a continuance after the first mistrial is without merit where the objection was properly preserved and raised by Appellate counsel.

A.

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Applicant failed to meet his burden to prove counsel was deficient for failing to apprise him of the State's evidence. "From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984). This Court finds counsel's testimony credible and Applicant's testimony not credible here. Counsel has a plethora of experience as a criminal defense attorney. He explained his general practices and procedures in handling a case at the outset of representation. This Court finds the manner of representation here more than competent within the standard professional norms. Counsel met with Applicant to discuss the case more than a sufficient numbers of times. Counsel's conducted quality consultations with Applicant that resulted from his independent investigation of the State's evidence, Applicant's version of the facts that led to his arrest, and diligent trial preparations. Counsel notified Applicant of developments in his case as they arose. This Court finds Applicant's allegation here relies on the common misconception that a criminal defense attorney must provide his client with a copy of the discovery. Strickland does not require such a mandate. Instead, the scope of review concerns a criminal defense attorney's conduct in communicating all relevant and significant matters to the client during the course of representation. Here, this Court is convinced counsel met his duty to communicate with Applicant. Regardless, Applicant failed to specifically outline the alleged discovery disclosure materials obtained from the State that counsel allegedly failed to communicate the existence of to Applicant. Therefore, this allegation is denied and dismissed.

B.

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Applicant failed to meet his burden to prove counsel failed to properly advise him on the State's guilty plea offer. "Where a defendant shows ineffective assistance has caused the rejection of a plea leading to a more severe sentence at trial, the remedy must "neutralize the taint" of a constitutional violation, United States v. Morrison, 449 U.S. 361, 365, 101 S.Ct. 665, but must not grant a windfall to the defendant or needlessly squander the resources the State properly invested in the criminal prosecution." Lafler v. Cooper, 132 S. Ct. 1376, 1381, (2012). During plea negotiations defendants are "entitled to the effective assistance of competent counsel." Lafler, 132 S. Ct. at 1384 (citing McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441 (1970)). "Before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. In addition to the requirements of Boykin, a defendant entering a guilty plea must be aware of the nature and **crucial elements** of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000). This Court finds counsel's testimony credible and Applicant's testimony here not credible. As a result of plea negotiations, the State conveyed a favorable guilty plea offer to Applicant. Counsel apprised Applicant of the offer and the benefits and detriments inherent in a guilty plea disposition. Counsel conducted consultations on the matter with Applicant and his family. Simply, Applicant made a knowing, intelligent, and voluntarily decision to proceed to trial because he steadfastly held the belief that he could not survive a prison term due to his physical disability. This Court finds counsel's testimony compelling that he never *per se* advises a client to reject a guilty plea offer. Counsel met his duty to thoroughly review the strength of the State's case with Applicant prior to Applicant's decision to reject the offer. Applicant's sullen disposition of buyer's remorse



on the matter and had no bearing on the quality of counsel's representation. Therefore, this allegation is denied and dismissed.

C.

This Court finds Applicant's allegation that counsel was ineffective for failing to make a motion to suppress fruits from an allegedly unreasonable search and seizure is without merit. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.... U.S. Const. amend. IV. The South Carolina Constitution also provides a safeguard against unlawful searches and seizures." State v. Weaver, 374 S.C. 313, 321, 649 S.E.2d 479, 483 (2007). To claim protection under the Fourth Amendment of the U.S. Constitution, defendants must show that they have a legitimate expectation of privacy in the place searched. Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978). Upon review of the trial transcript, this Court finds Applicant had no reasonable expectation of privacy in the wire worn by the informant's person. The record clearly shows that the Applicant invited the informant into his home for the narcotics transaction. Applicant's arrest and conviction were supported by a standard controlled buy procedure utilized by law enforcement. Furthermore, relevant observations made by trial witnesses were reasonable. A criminal defense attorney is under no duty to make frivolous objections just for the sake of protecting himself from a subsequent PCR action. This Court also notes that Applicant's conviction was supported by overwhelming evidence of his guilt. Therefore, this allegation is denied and dismissed.

D.



Last, this Court summarily dismisses Applicant's allegation that counsel was ineffective for failing to make a motion for continuance after the first trial. The merits of the issue were addressed in Applicant's direct appeal. See Bozeman v. State, 307 S.C. 172, 176, 414 S.E.2d 144, 146 (1992) ("[P]etitioner's allegations regarding the jury instructions were issues that could or should have been raised at trial or on appeal and, thus, were not proper for PCR."). Regardless, the record shows a motion for continuance was not warranted at any phase of the trial. Therefore, this allegation is denied and dismissed.

E.

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

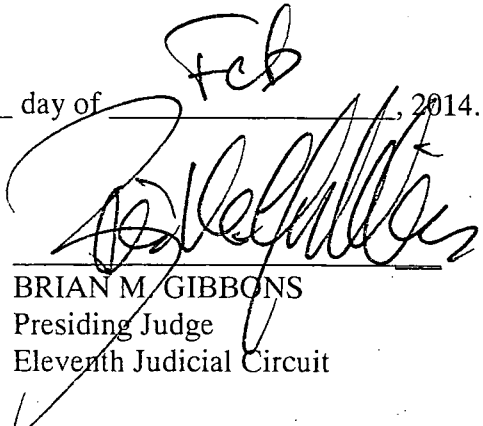


thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed 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 Feb, 2014.


BRIAN M. GIBBONS
Presiding Judge
Eleventh Judicial Circuit

_____, South Carolina

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

2014 MAR 13 A 10:50

FILED

The Brooks Law Office, LLC

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RECEIVED

MAR 28 2014

March 27, 2014

S.C. Supreme Court

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: George Middleton, 307245 v State of South Carolina
2012-CP-32-1282

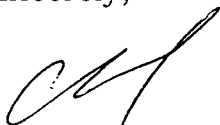
Dear Sir or Madam:

Enclosed herewith you will find the **Notice of Appeal, Order of Dismissal**, along with a **Proof of Service** in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

With kind regards, I am

Sincerely,



Charles T. Brooks, III
CTB/srw

Enclosed as stated

cc: Walt Whitmire, Office of Attorney's General
South Carolina Office of Appellate Defense
George Middleton, 307245

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