
The State of South Carolina

Supreme Court

APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS – Sixteenth Judicial Circuit

◆◆◆◆

Devon Miles Brown,

Applicant,

v.

2012-CP-46-3762

State of South Carolina,

Respondent.

NOTICE OF APPEAL

DEVON MILES BROWN hereby appeals the ORDER DENYING PLAINTIFF'S MOTION TO AMEND OR ALTER & PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT of the Honorable John C. Hayes, III, dated March 11, 2014. Mr. Brown received written notice of the order and judgment on April 9, 2014.

April 16, 2014

Yours, etc.,



DALE LIONEL SMITH, ESQ.

99 Park Avenue, Suite 1600

New York, New York 10016

(212) 219-1000

Attorney for Devon Miles Brown

To: Rutledge Johnson
Assistant Deputy Attorney General
Office of the Attorney General
1000 Assembly Street, Room 519
Columbia, South Carolina 29201
Attorney for Respondent
(803) 734-1867

RECEIVED

APR 18 2014

S.C. SUPREME COURT

The State of South Carolina

RECEIVED

Supreme Court

APR 18 2014

APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS – Sixteenth Judicial Circuit

S.C. Supreme Court

◆◆◆◆

Devon Miles Brown,

Applicant,

v.

2012-CP-46-3762

State of South Carolina,

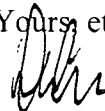
Respondent.

PROOF OF SERVICE

I certify that I have served the NOTICE OF APPEAL, Judgment, Order Denying Plaintiff's Motion to Amend or Alter & Plaintiff's Motion for Relief from Judgment, and Rule 243 (c), SCACR Explanation re Statute of Limitations Expiration on the following persons and entity by delivering a copy for each to Federal Express for overnight delivery to (i) Rutledge Johnson, Assistant Deputy Attorney General, P.O. Box 11549, 1000 Assembly Street, Room 519, Columbia, South Carolina 29201; (ii) Court of Commons Pleas, 300 West Liberty Street, York, SC 29745; and (iii) Hon. John C. Hayes, III, Circuit Court – Sixteenth Judicial Circuit, Moss Justice Center, 2nd Floor, 1675-1H York Highway, York, SC 29745 on April 16, 2014.

April 16, 2014

Yours, etc.,



DALE LIONEL SMITH, ESQ.

99 Park Avenue, Suite 1600

New York, New York 10016

(212) 219-1000

Attorney for Devon Miles Brown

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP4603762**

Devon Miles Brown

South Carolina State of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Court

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

ORDER DENYING PLAINTIFFS MOTION TO AMEND OR ALTER AND PLAINTIFFS MOTION FOR RELIEF FROM JUDGMENT

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
n/a	n/a	n/a

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

David Hamilton

Clerk of Court

2049

Judge Code

3/13/2014

Date

For Clerk of Court Office Use Only

This judgment was entered on **March 13, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **March 13, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

Dale Lionel Smith Attorney At Law
99 Park Ave Ste 1600
New York, NY 10016

James Rutledge Johnson
PO Box 11549
Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 Devon Miles Brown, #327309,)
)
 Applicant,)
)
)
)
)
)
 -V-)
)
 State of South Carolina,)
)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SIXTEENTH JUDICIAL CIRCUIT

2014 MAR 13 AM 9:23
 RECEIVED
 CLERK OF COURT
 YORK COUNTY, SC

Order Denying Plaintiff's
 Motion to Amend or Alter and
 Plaintiff's Motion for Relief
 From Judgment

File Number: 2012-CP-46-3762

This matter comes before the undersigned on Post-Conviction Relief Applicant's Rule 59(e) Motion for Order to Alter or Amend Judgment as well as Applicant's Rule 60 Motion for Order for Relief from Judgment. Dale L. Smith, Esquire, represents the Applicant and J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represents the Respondent.

Procedural History

Applicant was sentenced to twenty-five years imprisonment upon being convicted for trafficking marijuana. Applicant's conviction was affirmed by the South Carolina Court of Appeals on June 7, 2011. Applicant then filed a petition for Post-Conviction Relief on October 24, 2012. An evidentiary hearing into the matter was convened on December 12, 2013. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, David Cook, Esquire, also testified. On January 10, 2014, this Court issued an Order dismissing the Applicant's petition for Post-Conviction Relief. The Order was filed by the York County Clerk of Court on

[Handwritten signature]

January 10, 2014, and mailed to Applicant's Counsel no later than January 11, 2014. Counsel for the Applicant stated that he did not receive the Judgment and Order of Dismissal until January 29, 2014, approximately nineteen days after being placed in the mail. Counsel for Applicant then filed these motions on February 7, 2014. To date, the office of the undersigned has not received a copy of Applicant's motions. Additionally, the filed proof of service with the Clerk of Court's Office does not indicate that a copy of such motion was ever sent to the undersigned as required by SCRCP 59(g). However, Counsel for the Appellant has indicated by email that his office mailed a copy of such motions to the undersigned's office on February 9, 2014. Under the circumstances, the Court will address the motions regardless of whether they were timely received or not.

Ruling

Applicant's initial PCR Petition alleged ineffective assistance of trial counsel under two separate items – Item 1 and Item 2. At the evidentiary hearing convened on December 12, 2013, Applicant pursued only those allegations alleged in Item 1 on his PCR Petition. In Item 1 of his petition, Applicant alleges that trial counsel was rendered ineffective

(i) when he failed to inform me that if convicted at trial I would be sentenced to mandatory 25 years in prison and which caused me to reject a plea offer of five years imprisonment and (ii) when prior to and at the sentencing hearing he failed to conduct an adequate investigation and to challenge two prior misdemeanor convictions as unconstitutionally obtained in violation of due process in that they were not knowing, intelligent, and voluntary and thus permitted the use of invalid convictions to unlawfully enhance my sentence to a mandatory 25 years in violation of the laws of South Carolina and the Constitution of the United States.

Applicant failed to pursue any of the allegations in Item 2 of his PCR Petition at the hearing and therefore is barred from now asserting or "bootstrapping" such allegations to the claims alleged in Item 1. This is further evidenced by the following statement from Applicant's Motion Brief:

J. H. H. 2

"At the PCR Application Hearing which took place on December 12, 2013, counsel for Brown made clear that because he respectfully disagreed with the Court of Appeals conclusion that trial counsel failed to preserve the errors set forth in Item 2 of the application, Brown would not be pursuing the allegations in the Item 2 of the application." Thus, the Court is limited to reviewing only the arguments alleged in Item 1 of Applicant's PCR Petition. The Court is cognizant of these other issues but can only rule on allegations that were actually pursued by the Applicant at the PCR hearing. This Court is also bound by any rulings from the South Carolina Court of Appeals.

In Paragraph (5) of his Motions Brief, Applicant requests that this Court address "the merits of the ineffective assistance of counsel claim that counsel's failure to investigate and to object to the prior convictions in enhancing the sentence prejudiced Brown and violated his constitutional rights – an issue this court describes as interesting." Applicant contends that the plea transcripts of the prior convictions introduced into evidence at the PCR hearing "demonstrated that the convictions were invalid in that the pleas were not knowing, intelligent, and voluntary." The Court disagrees with this allegation and finds it is without merit. The plea transcripts introduced at trial, on their face, do not demonstrate the unconstitutionality of Applicant's prior convictions. There is no evidence in the plea transcripts introduced at the PCR Hearing that indicates that such prior convictions were invalid by virtue of not being knowing, intelligent, and voluntary. Additionally, at the PCR Hearing Applicant's trial counsel testified that "he discussed Applicant's prior convictions from New York with Applicant and determined that they were constitutional because Applicant said he had defense lawyers representing him during both pleas" (Pg. 7 of Order of Dismissal). Trial counsel testified that not only was he aware of the prior offenses in New York, but he had discussed these offenses and the

JCH#3

consequences of such offenses with the Applicant in trying to convince him to accept the five year plea offer. Trial counsel also testified that the Applicant had told him he had defense attorneys for his past offenses as well. In its Order dismissing Applicant's PCR Application this Court found that "Counsel stated he first learned of Applicant's prior record during discovery and that this issue was the crux of the case." The failure of trial counsel to obtain the trial transcripts, in itself, does not render his assistance of counsel ineffective. The testimony of trial counsel was credible and made clear that trial counsel adequately investigated and advised Applicant of the effect of his prior convictions. Therefore, Applicant's assistance of Counsel was not ineffective on the basis of trial counsel's failure to investigate and failure to object to the prior convictions used to enhance the Applicant's sentence.

Applicant argues that the Court did not, and should, rule on the Constitutionality of Applicant's sentence based on his claims of constitutional flaws in two New York convictions used by the State for enhancement of his South Carolina charge. This claim is not within the purview of a Lafler review. Also, the issue of the effect of any defect in the New York convictions, even though clothed as ineffective assistance of counsel, were claims which fall under Post-Conviction Relief. (17-27-20(A)(1), S.C. Code of Laws, 1976).

In Paragraph (8) of Applicant's brief, Counsel has requested this Court "to rule on the merits of the ineffective assistance of counsel claim that trial counsel failed to litigate the sentencing hearing competently in the first instance since it observed first-hand the testimony of the witnesses and is in the best position to make critical credibility determinations, and thus making it more likely to lead to an accurate and reliable determination in a proceeding seeking to vindicate important constitutional rights." While the Court is cognizant of these other issues it is bound to rule only on the claims alleged in Item 1 of Applicant's PCR Petition.

JHH
4

In Applicant's brief, Applicant also contends that "the record evidence at the hearing does not support the factual finding that trial counsel made Brown aware that he would receive a mandatory 25-year sentence if he were convicted after trial." This contention is based on the assertion that Applicant's trial counsel was ineffective under Lafler v. Cooper, 566 U.S., 123 S. Ct. 1376 (2012) (holding counsel ineffective where his advice led defendant to reject a plea offer and but for this advice, a defendant would have accepted the offer and the offer's terms were less severe than the actual sentence imposed).

In its Order dismissing Applicant's PCR Application this Court found that "Counsel advised Applicant that if he pursued a jury trial he was facing a mandatory minimum of twenty-five years." The court also found that "counsel advised Applicant regarding his efforts to suppress the drugs at issue," and additionally that "under the parameters of Lafler, Counsel's pre-suppression hearing advice regarding the five year offer establishes effective assistance of counsel" (Order of Court, Page 11). The Court disagrees with this contention and finds that trial counsel's oral testimony during the PCR hearing provided more than sufficient evidence to support a finding that trial counsel made Defendant aware on multiple occasions that he would receive a twenty-five year sentence if convicted at trial. Counsel for the Applicant contends that "in one letter to his client admitted at the PCR hearing counsel was more concerned with being paid than informing his client of the sentence he faced." The Court also disagrees with this contention as trial counsel did admit to being concerned about being paid at one point during the hearing, but never stated or implied that he was more concerned with being paid than he was with upholding his ethical obligations to his client. While no written evidence was presented which supports such a finding, the oral testimony of trial counsel at the hearing clearly supports the finding that trial counsel made Applicant aware that he would receive a twenty-five year

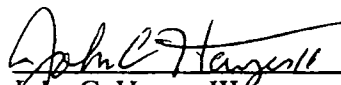
JCH #5
5

sentence if convicted at trial. This Court found trial counsel's testimony credible at the evidentiary hearing and declines to change this position now.

Conclusion

Therefore, for the reasons stated above, the Undersigned declines to alter or amend its original order. Additionally, the Court declines to relieve Applicant from Judgment. The Court holds that Applicant failed to pursue the allegations alleged in Item 2 of his PCR application and is therefore barred from attempting to pursue such claims now. The only allegations pursued by Applicant at the PCR hearing were the ineffective assistance of counsel claims which this court has already ruled on, based on *Lafler v. Cooper*, and the argument that trial counsel failed to investigate and challenge the prior convictions of the Applicant from the State of New York. The Court finds that Applicant was informed of the sentence he was facing and the fact that Applicant rejected a five-year plea offer, proceeded to trial, and received a sentence substantially greater than the plea offer rejected lies with him and him alone. The court also finds that trial counsel for Applicant properly investigated and addressed Applicant's prior convictions. The introduction of the plea transcripts of such prior convictions do not in themselves render such convictions invalid or unconstitutional. Also, such grounds were not timely raised by Applicant through a timely filed Post-Conviction Relief application. The Court hereby declines to Alter or Amend the original Judgment or to relieve Applicant from Judgment.

IT IS SO ORDERED.



John C. Hayes, III
Presiding Judge

#6

March 11th, 2014
York, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF YORK
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2012CP4603762

Devon Miles Brown

South Carolina State of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: **ORDER OF DISMISSAL**

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

s/ John C. Hayes, III.
 Circuit Court Judge

2049
 Judge Code

1/9/2014
 Date

For Clerk of Court Office Use Only

This judgment was entered on **January 10, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **January 10, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

Dale Lionel Smith Attorney At Law 99 Park Ave Ste 1600
New York, NY 10016

James Rutledge Johnson PO Box 11549 Columbia, SC
29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
))
))
Devon Miles Brown, #327309,)
))
Applicant,)
))
v.)
))
State of South Carolina,)
))
Respondent.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

2012-CP-46-3762

ORDER OF DISMISSAL

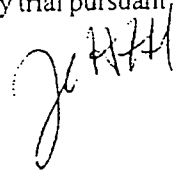
RECEIVED
CLERK OF COURT
YORK COUNTY, SC
MAY 10 10 53 AM '13

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 24, 2012. The Respondent made its Return and Motion to Dismiss on February 15, 2013. An evidentiary hearing into the matter was convened on December 12, 2013, at the Moss Justice Center in York, SC. Dale L. Smith, Esquire represented Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the hearing, Applicant testified on his own behalf. David Cook, 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, the trial transcript and the appellate records.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. The Applicant was indicted by the January 2008 term of the York County Grand Jury for Trafficking Marijuana (2008-GS-46-0406). David Cook, Esquire, represented him. On March 19, 2008, the Applicant proceeded to a jury trial pursuant



to which he was found guilty of Trafficking Marijuana, 10-100 lbs., 3rd offense. The Honorable Lee S. Alford sentenced the Applicant to confinement for twenty-five (25) years Trafficking Marijuana, 3rd 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. Brown, 2011-UP-265 (S.C. Ct. App. filed June 7, 2011). The Remittitur was issued on June 23, 2011.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Trial counsel rendered ineffective assistance of counsel in violations of the 6th & 14th Amendments to the U.S. Constitution, which guarantees an accused the right to effective assistance of counsel and due process of law, (i) when he failed to inform me that if convicted at trial I would be sentenced to a mandatory 25 years in prison and which caused me to reject a plea offer of 5 years imprisonment and (ii) when prior to and at the sentencing hearing he failed to conduct an adequate investigation and to challenge two prior misdemeanor convictions as unconstitutionally obtained in violation of due process in that they were not knowing, intelligent, and voluntary and thus permitted the use of invalid convictions to unlawfully enhance my sentence to a mandatory 25 years in violation of the laws of South Carolina and the Constitution of the United States."
 - a. "Trial counsel neither informed me of nor made me aware that if I was convicted after trial that the charged offense would represent a third trafficking offense because of my two prior misdemeanor marijuana-related convictions in New York and as a result I would be sentenced to a mandatory 25 years in prison. Had trial counsel made me aware that the charged offense would be considered a third trafficking or marijuana-related offense I would have accepted the State's plea bargain offer of 5 years imprisonment to resolve the case and I would have not proceeded to trial. Moreover, trial counsel neither investigated my criminal history nor did he obtain a record of the transcripts of my guilty plea which would have revealed that the pleas were defective and obtained in violation of the constitution as not knowing, intelligent, and voluntary and further trial counsel failed

JCH-2

to object to the use of the prior invalid convictions to enhance my sentence to a mandatory 25 years as a third trafficking conviction although the two prior convictions were obtained in violation of due process. Accordingly, trial counsel rendered deficient performance both prior to and at the sentencing hearing and as a result of his deficient performance I was prejudiced."

2. "Trial counsel rendered ineffective assistance of counsel in violations of the 6th & 14th Amendments to the U.S. Constitution, which guarantees an accused the right to effective assistance of counsel and due process of law when he failed to make contemporaneous and specific objections (i) to exclude the admission of the marijuana based on the State's failure to present sufficient evidence supporting the police dog's training and reliability in the search warrant affidavit and at the suppression hearing (ii) to exclude the admission of the uncharged crimes evidence of marijuana possession as irrelevant and unduly prejudicial, and (iii) to the trial court's erroneous jury instruction that the uncharged crimes evidence could be used to prove elements of the charged offense and thus trial counsel failed to preserve the issues for direct review on appeal and as a result of his deficient performance I was prejudiced."

- b. "Trial counsel failed to make a contemporaneous and specific objection (i) to exclude the admission of the marijuana based on the State's failure to present sufficient evidence supporting the police dog's training and reliability in the search warrant affidavit and at the suppression hearing (ii) to exclude the admission of the uncharged crimes evidence of marijuana possession as irrelevant and unduly prejudicial, and (iii) to the trial court's erroneous jury instruction that the uncharged crimes evidence could be used to prove the elements of the charged offense and thus he failed to preserve the issues for direct review on appeal and as a result of his deficient performance I was prejudiced."

In its Return and Motion to Dismiss, the Respondent alleged Applicant is barred by the Statute of Limitations and S.C. Code 17-27-20 from bringing his claims. The Applicant filed a Reply in Opposition to the Conditional Order of Dismissal on March 11, 2013, claiming his application was timely filed as he received an Order from the South Carolina Supreme Court dated October 25, 2011, stating the South Carolina Supreme Court had no authority to recall the Remittitur

JH 3

from the Court of Appeals as the Remittitur was properly issued. Additionally, in the Applicant's Reply, the Applicant asserts Counsel was ineffective under Lafler v. Cooper, 566 U.S. -, 132 S.Ct. 1376 (2012) (holding counsel ineffective where his advice led defendant to reject a plea offer and but for this advice, defendant would have accepted the offer and the offer's terms were less severe than the actual sentence imposed).

At the hearing, Applicant proceeded only on his claim of ineffective assistance of trial counsel for not properly advising him concerning the plea offer from the State under Lafler v. Cooper.

SUMMARY OF TESTIMONY

Applicant testified he was convicted for trafficking Marijuana and received a twenty-five year sentence. He stated that after he was arrested, Applicant hired Counsel and spoke with Counsel only three times before his trial. Applicant testified he discussed the charges and trial with Counsel and received a copy of his indictment. Applicant claimed Counsel never told him that if he was unsuccessful at trial that he was facing twenty-five years' imprisonment. He also stated the State conveyed a five-year plea offer to him. Applicant admitted that Counsel advised him to accept the plea offer, but did not explain to him that if he did not accept the offer, that he would be facing twenty-five years' imprisonment if he pursued a jury trial. Applicant further stated that if he had known he was facing twenty-five years if he rejected the plea offer ^{than} he would have accepted the five-year offer.

Applicant testified he discussed trial strategy with Counsel and that the strategy would be to challenge an alleged Fourth Amendment violation during a suppression hearing. Applicant stated

[Handwritten signature]

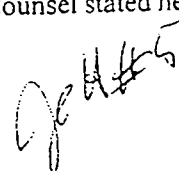
Counsel did not inform him about the consequences of losing the suppression hearing. He testified that after the trial judge's ruling to deny the suppression of the evidence, Counsel failed to inform him of the trial strategy going forward. Applicant also testified he did not know if the five-year plea offer was still available after the suppression hearing, but that he would have accepted it because the State had a strong case.

Applicant then testified Counsel did not discuss with him Applicant's prior convictions from New York nor whether he had counsel when he pled guilty in New York. He also stated Counsel did not explain to him the seriousness of a third drug conviction in South Carolina. Applicant also testified there were other people present when he discussed his case with Counsel but there were no discussion about the trial itself.

On cross-examination, Applicant admitted that he, in fact, had two prior marijuana convictions from New York. He also admitted that he trafficked over fifteen pounds of marijuana in South Carolina.

On re-direct examination, Applicant testified the two prior convictions were guilty pleas. He also stated Counsel never discussed obtaining records from those prior convictions. He further testified the solicitor recited his criminal history during the trial.

Counsel testified he has been practicing criminal law for eight years and has won a drug trafficking case prior to this case. He stated Applicant retained him, and he met with Applicant in his office to discuss the retainer agreement and the Rule 5 material. Counsel testified the State offered Applicant a plea agreement for twelve years. Counsel also testified he was able to negotiate with the State for a plea agreement of five years. This was the State's final offer. Counsel stated he



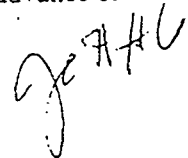
met with Applicant around three to five times, but spoke with Applicant on the phone over twenty times.

During their discussions, Counsel testified he provided a copy of the video to Applicant wanted Applicant to watch the video because in Counsel's opinion, the video was not going to be suppressed at trial. Counsel also discussed the fact that if Applicant pursued a trial, the State would take the five-year plea "off of the table." Counsel testified he adamantly implored Applicant to accept the five-year plea offer, but Applicant did not want to accept the offer.

Counsel testified he explained to Applicant the trafficking statute in South Carolina and that Applicant was facing a mandatory twenty-five year minimum sentence. Counsel stated he once again relayed the State's offer to Applicant, but it was Applicant's decision to reject the plea offer. Counsel testified he neither threatened nor coerced Applicant in that decision.

Counsel then testified he prepared for trial, discussed the trial strategy with Applicant and tried to blur the case for the jury. He stated he explained to Applicant the five-year offer would no longer be available if Applicant pursued a trial and proceeded to a suppression hearing. Counsel also testified he discussed Applicant's prior convictions with Applicant, along with the fact that this conviction would be enhanced to a third offense by his prior convictions. Counsel admitted he did not research the prior convictions from 1994 and 1996 to check if they were valid. Counsel then explained that it would not matter if the convictions were felonies or misdemeanors for the purpose of enhancement in South Carolina.

Counsel stated he first learned of Applicant's prior record during discovery and that this issue was the crux of the case. He also stated he was aware of these convictions well in advance of the



trial. Counsel testified he remembers speaking with Applicant's girlfriend about payment as well as the five-year offer.

Counsel lastly testified as soon as the suppression hearing began, he knew the five-year offer was no longer available and that the State would not re-offer the plea deal.

On cross-examination, Counsel testified he accepted this case less than one year after he began practicing law, but had been a public defender for eight months and had tried drug cases. Counsel also testified he discussed this with Applicant and the two agreed to his representation and fee. Counsel stated he knew about Applicant's prior convictions from New York in early December 2007. Counsel also stated he asked Applicant about whether he had had counsel at his prior guilty pleas. Counsel admitted he did not review the New York's penal laws or order the transcripts from Applicant's guilty pleas. Counsel testified the solicitor showed him certified conviction sheets from New York, and this satisfied him. Counsel also stated he objected at trial when the solicitor attempted to introduce Applicant's sentencing sheets from New York because the sheets did not contain references to drug offenses.

Counsel also testified he, as a lawyer, has a duty to investigate his client's case, including reviewing any prior convictions. He stated one can review the transcript of a guilty plea to ascertain whether the plea was knowingly and voluntarily entered. He admitted he did not look into the transcripts of Applicant's guilty pleas. Counsel testified he discussed Applicant's prior convictions from New York with Applicant and determined they were constitutional because Applicant said he had defense lawyers representing him during both pleas. While Counsel admitted he had not read

Handwritten signature or initials, possibly "JPH", written in black ink.

the transcripts of Applicant pleas, he testified there are other ways to determine whether the plea were constitutional, including through discussions with Applicant and through the sentencing sheets.

Counsel testified Applicant was facing a mandatory twenty-five year sentence, but did not order the plea transcripts. He also stated he had several conversations with the solicitor, but the solicitor did not have the transcripts. Counsel testified he explained to Applicant that he was facing a mandatory minimum of twenty-five years at the same time he relayed a plea offer from the State. Counsel stated the five-year offer was presented to him one to two months before Applicant's trial. Counsel also stated he did not recall receiving an email from the solicitor concerning a ten-year offer.

Counsel then testified concerning a letter he wrote to Applicant on January 24, 2008, explaining to Applicant that Counsel needed to be paid for his services and that Applicant had an outstanding bench warrant. Counsel admitted that in the letter he did not advise Applicant that Applicant was facing a mandatory twenty-five year sentence, but Counsel testified vehemently that he advised Applicant on numerous occasions concerning the possible penalties.

Counsel testified he did not tell Applicant he had a good chance of winning the suppression motions, but did discuss with Applicant the offense and the trial strategy. Counsel's strategy was to blur the lines for the jury and challenge Applicant prior bad acts under SCRCrimP 404(b), the search warrant, and the canine search.

While Counsel admitted he has not read Lafler v. Cooper yet, he affirmed that he gave Applicant sound legal advice to accept the State's five-year plea offer instead of risking a trial and made Applicant very aware of the fact that if Applicant rejected the five-year offer, he would face a mandatory twenty-five sentence at trial. Counsel also stated that after the suppression hearing was

Handwritten signature or initials, possibly "J. H. H. 8", located in the bottom right corner of the page.

unsuccessful, he did not advise Applicant he should then take the guilty plea because Counsel explained to Applicant numerous times that there would be no other offers if Applicant proceeded to a trial, including a suppression hearing.¹

On re-direct examination, Counsel testified he discussed with Applicant his prior convictions and that Applicant was surprised to learn that he would be facing twenty-five years if convicted at trial. Counsel also stated Applicant told him that Applicant was represented at both prior guilty pleas. Counsel stated he received copies of Applicant's certified conviction sheets from the Solicitor. Counsel further testified he advised Applicant and investigated this case based on the information Applicant provided him in their discussions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

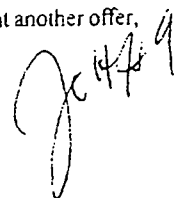
The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court also has read the trial transcript and the pleadings, all of which assists the Court in judging their credibility. This Court finds Applicant's testimony concerning Counsel's alleged ineffective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

¹ Counsel also testified he made a "puppy-dog face" to the solicitor in hopes that she would give Applicant another offer, but solicitor in no uncertain terms, gestured that she would not be willing to do so.



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 properly advise Applicant concerning the plea offer pursuant to Lafler.

First, this Court finds the sole issue before it was whether Counsel was effective in his representation under the standard set forth by Lafler v. Cooper, 132 S.Ct. 1376 (2012).

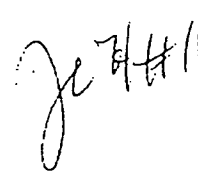
This Court finds Applicant has not carried his burden of proof and has failed to prove, as he alleges, that in the plea bargaining process of his underlying criminal charge, Counsel was

JCH#10

ineffective. This Court finds Counsel conveyed the five-year offer from the State to Applicant. This Court finds Counsel advised Applicant that if he pursued a jury trial that he was facing a mandatory minimum of twenty-five years. This Court also finds Counsel made diligent efforts to convince Applicant to accept the five-year offer. This Court finds Counsel advised Applicant regarding his efforts to suppress the drugs at issue. This Court finds that at the time Applicant testified, he would have accepted the five-year offer, post the trial court's ruling on the suppression hearing, that there is no evidence the offer was at that time extant and the testimony of Counsel was that the offer was "off the table." This Court also finds credible Counsel's testimony that in response to his post-eye contact with the solicitor after the suppression hearing, she (solicitor) gave Counsel a "no nod." This Court finds that under the parameters of Lafler, Counsel's pre-suppression hearing advice regarding the five-year offer establishes effective assistance of counsel.

The issue of the enhancement impact of Applicant's two prior drug offenses in New York is not before this Court. This issue is outside of the rubric of Lafler. This issue could have been raised by Applicant by a timely filed application for post-conviction relief, pursuant to § 17-27-20, South Carolina Code of Laws 1976, as amended.²

This Court finds the facts that Applicant rejected the five-year offer, proceeded to trial, and received a sentence substantially greater than the plea offer he rejected lies with him and him alone. This Court further finds that Counsel performed effectively in conveying the five-year offer, advising



Applicant to accept the offer and advising Applicant of the potential mandatory twenty-five year sentence Applicant could and would receive if he was found guilty at trial.

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), SCRPC, 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.

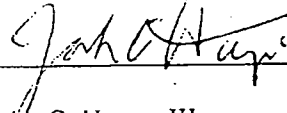
IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

² This Court finds the issue of the use of the New York adjudication for enhancement interesting, but has no bearing on whether trial counsel conveyed to Applicant a plea offer and advised Applicant to accept the State's plea offer.

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!



John C. Hayes, III
Presiding Circuit Court Judge
Sixteenth Judicial Circuit

1/9, 2013
[Signature], South Carolina

To reuse, cover or mark through any previous shipping information.

ORIGIN ID:EGXA (212) 219-1000
DALE LIONEL SMITH ESQ
99 PARK AVE RM 1600
NEW YORK, NY 10016
UNITED STATES US

SHIP DATE: 17APR14
ACTWGT: 0.4 LB
CAD: 6990881/SSF01400
BILL CREDIT CARD

Part # 156287-106 RITE 02/14
FEDEX 0007 1362

TO SOUTH CAROLINA SUPREME COURT

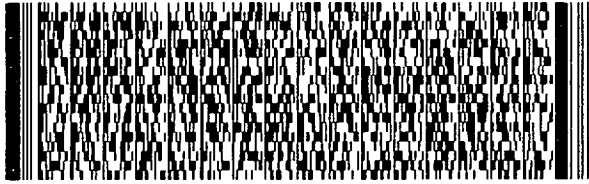
1231 GERVAIS ST

COLUMBIA SC 29201

(803) 734-1080
IMU:
PO:

REF:

DEPT:



FedEx
Express



REL#
3785346

Reusable

FRI - 18 APR AA

STANDARD OVERNIGHT

TRK# 7985 7318 3485
0201



29201



209022 18Apr 01:01 MEMH 512C1/78D9/CF60

CAE
SC-US
29201

XH USCA

TRK# 7985 7318 3485
0201

FRI - 18 APR AA
STANDARD OVERNIGHT

FedEx

RT 105 1
FZ 104
A
3485
04.18

Align bottom of peel and stick airbill or pouch here.