

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Case No. 2012-CP-23-3756

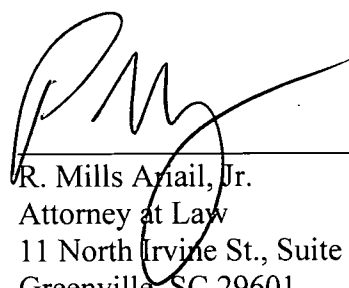
Erik Morrow ,..... Appellant,
SCDC # 00266037

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable G. Edward Welmaker's Order of Dismissal dismissing Appellant's application for post-conviction relief. On April 3, 2014, the Honorable G. Edward Welmaker signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on April 14, 2014. A copy of the Honorable G. Edward Welmaker's Order of Dismissal is attached.



R. Mills Arail, Jr.
Attorney at Law
11 North Irvine St., Suite 11
Greenville, SC 29601
Telephone (864) 232-9390
Facsimile (864) 232-9392
Attorney for Appellant

Greenville, South Carolina
April 15, 2014

Other Counsel of Record and Interested Parties:

Karen C. Ratigan, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
803-734-3970
Attorney for the State of South Carolina

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

SC Commission of Indigent Defense
Division of Appellate Defense
1122 Lady Street
Columbia, SC 29201-3218

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Case No. 2012-CP-23-3756

Erik Morrow, Appellant,
SCDC # 00266037

v.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this April 15, 2014, 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.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

SC Commission of Indigent Defense
Division of Appellate Defense
1122 Lady Street
Columbia, SC 29201-3218

Denise Tanner LaBeck

Denise Tanner LaBeck
Paralegal to R. Mills Ariail, Jr.
LAW OFFICE OF R. MILLS ARIAIL, JR.

April 15, 2014
Greenville, SC

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

JUDGMENT IN A CIVIL CASE

CASE NO: 2012CP2303756

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 APR -9 P 3:13

Erik M Morrow vs. South Carolina State Of

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.
- 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; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the . and a copy mailed first class this . to attorneys of record or to parties (when appearing pro se) as follows:

R. Mills Ariail Jr. 11 North Irvine St., Ste. 11
Greenville, SC 29601

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Erik M. Morrow,)
 S.C.D.C. No. 266037,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2012-CP-23-3756

ORDER OF DISMISSAL

2014 APR - 9 P 3:13

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMMER

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 7, 2012. The Respondent made its amended return on February 13, 2013.¹ An evidentiary hearing into the matter was convened on February 19, 2014 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, Elizabeth P. Wiygul, Esquire. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the amended return, the appellate records, and the Applicant's Exhibits 1-2.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted

¹ The Respondent originally made a return and motion to dismiss on September 11, 2012.

¹ 

at the October 2005 term of the Greenville County Grand Jury for distribution of cocaine (2005-GS-23-8109), possession with intent to distribute (PWID) cocaine (2005-GS-23-8185), trafficking crack cocaine (2005-GS-23-8186), escape (2005-GS-23-8188), and habitual traffic offender (2005-GS-23-8189). He was represented by Elizabeth P. Wiygul, Esquire.

After the State brought the case to trial, and the Applicant was convicted on four charges – the escape charge was dismissed as a result of counsel’s motion for directed verdict. On March 4, 2008, the Honorable Larry R. Patterson sentenced the Applicant to concurrent terms of twenty-five years for distribution of cocaine, third offense, twenty-five years for PWID cocaine, third, offense, twenty-five years for trafficking crack cocaine, third offense, and five years for habitual traffic offender.

A notice of appeal was filed at the South Carolina Court of Appeals. Elizabeth A. Franklin-Best, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant’s convictions and sentences. State v. Morrow, Op. No. 2011-UP-117 (S.C. Ct. App. filed March 23, 2011). The remittitur was sent on July 21, 2011.

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 investigate and prepare for trial.
 - b. Failure to advise Applicant on sentencing enhancements.
2. Ineffective assistance of appellate counsel.
 - a. Failure to raise all meritorious issues on appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the



testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

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

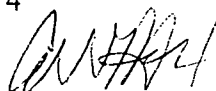
For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. 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).

The Applicant stated trial counsel was his third attorney and that she was appointed less than three weeks before trial. The Applicant stated he did not review the following with trial counsel: a complete set of discovery, his version of events, the charges against him, that these would be treated as third offenses. The Applicant stated trial counsel should have objected



because the first drug transaction took place in Spartanburg. The Applicant stated trial counsel should have made a motion to suppress. The Applicant stated trial counsel should have filed a motion to have the evidence testified because there was a problem with the weight of the drugs. The Applicant stated trial counsel should have called Sandy Smith, Joey Sims, Tammy Green, and Robert McMillan as witnesses because they were with the confidential informant that morning. The Applicant stated he gave these witnesses' names and phone numbers to trial counsel. The Applicant stated trial counsel never conveyed a plea offer for him to plead guilty without a recommendation.

Trial counsel testified she was appointed two and one-half weeks before trial. Trial counsel testified she had all of the discovery materials (which she received from the Applicant's prior attorney) except for those related to the confidential informant (which she received before trial and reviewed with the Applicant). Trial counsel testified she reviewed the discovery materials with the Applicant. Trial counsel testified she had the Applicant's NCIC report and that there were no issues with the current charges being treated as third offenses. Trial counsel testified she would have reviewed this information with the Applicant. Trial counsel testified she was aware the Applicant had charges in Spartanburg but did not recall there being a jurisdictional issue. Trial counsel testified she did not see any basis to file a suppression motion on the stop and search of the Applicant and his vehicle and that she reviewed with the Applicant the harmful impact of drugs being found on his person. Trial counsel testified she did not have any recollection of either the Applicant wanting the drugs to be tested or there being an issue regarding the weight of the drugs. Trial counsel testified she did not recall the witnesses mentioned by the Applicant and that she had ^{NO} updated contact information about them in her file. Trial counsel testified she would have had time to track down these witnesses for trial. Trial



counsel testified there was a February 2008 offer from the State for the Applicant to plead guilty without a recommendation and that she sent a copy of the offer to the Applicant. Trial counsel testified there was always an option of pleading guilty without a recommendation.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in her representation. This Court finds trial counsel had full discovery in this case and reviewed those materials with the Applicant. Trial counsel testified she received the information about the confidential informant shortly before trial and reviewed it with the Applicant. This Court finds trial counsel's testimony to be credible and further finds the Applicant has failed to demonstrate how additional time to investigate and prepare his case would have had an impact on his trial. See Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have filed a motion to suppress. Trial counsel testified she did not believe there was a basis to challenge the stop of the Applicant's vehicle and subsequent search of both the vehicle and his person. This Court agrees and notes the Applicant failed to articulate the grounds for a suppression motion. Regardless, this Court finds that, given the facts in this case and the overwhelming evidence of guilt, the Applicant cannot prove he was prejudiced by the lack of a suppression motion because such a motion would have been unsuccessful. See Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, defendant must show that

A handwritten signature in black ink, appearing to be "A. W. H. S.", is written over the page number 5.

such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded.”) (citation omitted).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have obtained an independent analysis of the drug evidence because of discrepancies in the weights. Trial counsel testified the weight of the drugs would have been an inconsequential issue at trial. This Court finds further investigation into this issue would have been unproductive. This Court further finds the Applicant has failed to meet his burden of proof because he presented no testimony or evidence that an independent evaluation by a defense expert would have changed the outcome of his case. See Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 777 (2008) (finding that, as the applicant failed to present any expert testimony at the PCR hearing, “it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense”); Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, “any finding of prejudice is merely speculative”).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have called witnesses who were with the confidential informant that morning. Trial counsel testified she did not have updated contact information for these witnesses in her file. Regardless, as these witnesses did not testify at the PCR hearing, this Court cannot speculate as to whether their testimony would have affected the outcome of the trial. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court “has repeatedly held a PCR 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.”) (emphasis in original).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have challenged jurisdiction in this case. The Applicant stated trial counsel should have objected because he was tried on events beginning in Spartanburg County and ending in Greenville County. Trial counsel testified there was no legal basis to make such an objection and noted the Applicant also had charges in Spartanburg County. This Court finds the Applicant has failed to articulate a cognizable legal basis for trial counsel to have made an objection to jurisdiction in this case. As such, the Applicant has failed to meet his burden of proof. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

This Court finds the Applicant failed to meet his burden of proving trial counsel did not explain that his charges would be treated as third offenses. Trial counsel testified she received the NCIC report of the Applicant's prior convictions and there was no basis to challenge that the current charges could be treated as third offenses. While the Applicant made a vague allegation that one of his prior convictions (from Spartanburg) was an illegal conviction, he provided no evidence to either corroborate this assertion or show that the current charges were not properly treated as third offenses. As such, the Applicant has failed to meet his burden of proof. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not convey a plea offer. Trial counsel testified her file reflected there was an offer for the Applicant to plead guilty without a sentence recommendation and that she relayed this to the Applicant. This Court finds trial counsel testimony is credible and that she satisfied her obligations in this regard. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance). Even assuming arguendo that the Applicant did not receive notice of the offer, this Court notes the Applicant

7


cannot prove prejudice because he did not testify that he would have accepted this offer and pled guilty without a sentence recommendation instead of going to trial.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in her representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial 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 and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel’s representation. 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 (30) 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

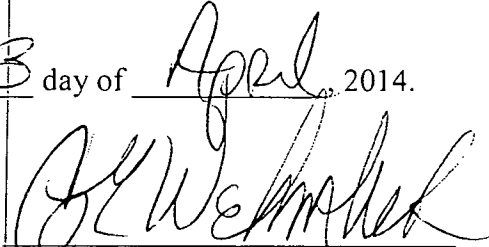


for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

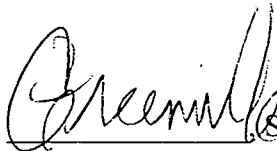
IT IS THEREFORE ORDERED:

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 8 day of April, 2014.



G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit

 South Carolina.

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

11 NORTH IRVINE STREET, SUITE 11 • GREENVILLE, SC 29601
PHONE 864.232.9390 • FAX 864.232.9392 • E-MAIL MILLS@RMALAWOFFICE.COM

April 15, 2014

Via US Mail

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

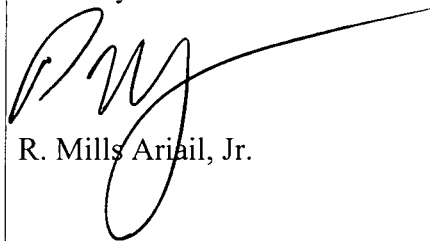
***Re: Notice of Intent to Appeal from Erik Morrow v. The State of South Carolina
C.A. No.: 2012-CP-23-3756***

Dear Mr. Shearouse:

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 the Honorable G. Edward Welmaker's Order of Dismissal to be challenged on appeal.

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: Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

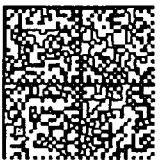
Karen C. Ratigan
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-11549

Eric Morrow SCDC# 00266037
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899

SC Commission of Indigent Defense
Division of Appellate Defense
1122 Lady Street
Columbia, SC 29201-3218

Law Office of R. Mills Atrial, Jr.
11 N. Irvine Street, Suite 11
Greenville, SC 29601

Priority Mail
ComBasPrice



UNITED STATES POSTAGE
PITNEY BOWES
\$005.050
02 1P
0000563972 APR 17 2014
MAILED FROM ZIP CODE 29601

Daniel E. Spearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia SC 29211

