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June 9, 2014

RECEIVED

JUN 11 2014

S.C. SUPREME COURT

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

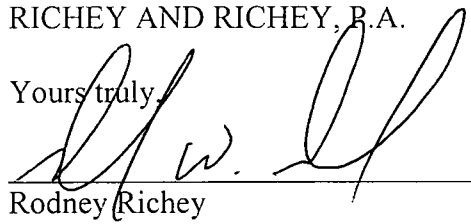
Re: Michael Wayne Henderson, SCDC# 348971 vs. The State of South Carolina
Case No: 2012-CP-23-02777

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and a Proof of Service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,



Rodney Richey

RWR/tlg
enclosures

cc: Karen Ratigan, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

HONORABLE D. GARRISON HILL

2012-CP-23-02777

Michael Wayne Henderson, SCDC # 348971,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

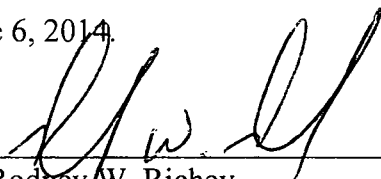
RECEIVED

JUN 11 2014

S.C. SUPREME COURT

NOTICE OF APPEAL

Michael Wayne Henderson appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable G. Garrison Hill, Circuit Judge on April 25, 2014 and Order issued on May 22, 2014 and filed on June 5, 2014. The Appellant receive notice of the judgment on June 6, 2014.



Rodney W. Richey
Attorney for the Appellant
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(864) 467-0503

Other Counsel of Record:
Karen Ratigan, Esquire
Office of Attorney General State of SC
Post Office Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

HONORABLE D. GARRISON HILL

2012-CP-23-02777

Michael Wayne Henderson, SCDC# 348971

against

STATE OF SOUTH CAROLINA,

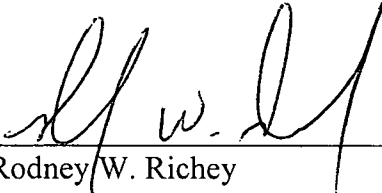
RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on June 9, 2014, addressed to their attorney of record, Karen Ratigan, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: June 9, 2014

RICHEY & RICHEY, P.A.



Rodney W. Richey
Attorney for the Appellant
Post Office Box 10916
Greenville, South Carolina 29603
(864) 467-0503

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF GREENVILLE

CASE NO: 2012CP2302777

IN THE COURT OF COMMON PLEAS

Michael Wayne Henderson vs. South Carolina State Of

FILED - CLERK OF COURT
GREENVILLE, S.C.
PAUL B. WICKENSIMER
2014 JUN 5 AM 10 13

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). SCRCP: Rule 41(a),
 - SCRCP (Vol. Nonsuit): Rule 43(k). SCRCP (Settled): Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRCP: 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 - D Garrison Hill

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:

Rodney Wade Richey PO Box 10916 Greenville,
SC 29603-0916

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)
)
 Michael Wayne Henderson,)
 S.C.D.C. No. 348971,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2012-CP-23-2777

ORDER OF DISMISSAL

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL D. HICKENSMIER
 2014 JUN 5 AM 10 13

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed April 23, 2012. The Respondent made its return on August 31, 2012. An evidentiary hearing into the matter was convened on April 25, 2014 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Rodney W. Richey, 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, H. Chase Harbin, Esquire. The Court had before it the trial and sentencing transcripts, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application and the return.

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 at the October 2010 term of the Greenville County Grand Jury for unlawful exposure of a minor

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child to manufacturing methamphetamine (2010-GS-23-5199), possession with intent to distribute (PWID) methamphetamine (2010-GS-23-5200), manufacturing methamphetamine (2010-GS-23-5201), and unlawful conduct towards a child (2010-GS-23-5202). He was represented by H. Chase Harbin, Esquire.

On December 7, 2011, the State brought the case to trial and the Applicant was found guilty of PWID methamphetamine and unlawful conduct towards a child. The Honorable Edward W. Miller deferred sentencing. On December 12, 2011, Judge Miller sentenced the Applicant to concurrent terms of ten years for PWID methamphetamine and ten years for unlawful conduct towards a child. The Applicant did not appeal.

ALLEGATIONS

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

1. Ineffective assistance of counsel:
 - a. Failed to file notice of appeal.
2. Unlawful search and seizure.
3. State unconstitutionally suppressed evidence.
4. Newly discovered evidence.

The Applicant, through counsel, submitted an amendment to his application dated September 11, 2012, in which he alleged the following:

1. Ineffective assistance of counsel:
 - a. Failed to conscientiously discharge professional responsibilities.
 - b. Failed to effectively challenge search and seizure.
 - c. Failed to act as a diligent and conscientious advocate.
 - d. Failed to give complete loyalty.
 - e. Did not have Applicant's best interest in mind.
 - f. Failed to serve the cause in good faith.
 - g. Neglected necessary investigations and preparation.
 - h. Did not do necessary factual investigations.
 - i. Did not do necessary legal research.

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- j. Did not conscientiously gather information to protect rights.
- k. Did not try to have the case settled in a manner that would have been to my best advantage.
- l. Did not advise me of all my rights or take any of the actions that were necessary to protect and preserve them.
- m. Never properly ascertained whether or not I actually understood or comprehended all of the issues involved in the case.
- n. Never properly consulted with me or kept me informed.
- o. Never explained to me or discussed with me any of the elements.
- p. Never made any attempt to ascertain whether or not I actually knew the elements of the crime charged or whether or not I understood exactly what "criminal element" meant.
- q. Never explained or discussed with me how the elements of the crime charged and the evidence that the prosecution planned to introduce into evidence against me related to one another and did not discuss how the sentencing would be done especially as it related to the elements of the crime as in State v. Boyd.
- r. Never informed me of any of the defenses that were available to me.
- s. Never intended to offer any defense to the court on my behalf.
- t. Never explained to me or discussed with me any kind of defense strategy.
- u. Never explained to me or discussed with me any of the tactical choices that were made or planned to be made.
- v. Dictated to me exactly how my case was going to be handled and offered no alternative options.
- w. Failed to properly acquaint herself with the law and facts surrounding my case and, as a result, there was a very serious error in the assessment of both the law and the facts.
- x. No defense at all was put in issue for me during the Court proceedings.
- y. Did not subject the prosecution's case to any adversarial testing.
- z. Failed to oppose the prosecution's case with any adversarial litigation.
- aa. Failed to function as the government's adversary in any sense of the word.
- bb. Failed to pursue any of the legal recourse that was available.
- cc. Failed to function as the counsel that the Constitution's Sixth Amendment guarantees.
- dd. Failed to call alibi witnesses on my behalf.
- ee. Failed to appeal my case.

At the PCR hearing, the Applicant proceeded solely upon the issue of ineffective

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assistance of counsel.

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).

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The Applicant stated he and trial counsel discussed the State's evidence, his version of events, the charges, and the possible penalties. The Applicant stated he told trial counsel that he wanted to accept the State's plea offer for a sentence of five years (with an ankle monitor) and probation. The Applicant stated he and trial counsel discussed their trial strategy. The Applicant stated trial counsel did not investigate that the State put the methamphetamines found in his home into two separate bags. The Applicant stated trial counsel should have explained the nature of an Alford¹ plea before he attempted to plead guilty at trial.

Trial counsel testified he filed discovery motions and received those materials from the State. Trial counsel testified he reviewed the State's evidence, elements and penalties of the charges, and the Applicant's story with the Applicant. Trial counsel testified he did not recall the plea offer mentioned by the Applicant and noted the ankle monitor would have been a point of contention with the State. Trial counsel testified the trial strategy regarding the PWID charge was to argue the methamphetamines belonged to his wife/co-defendant and stated his wife testified to this at trial. Trial counsel testified he did not recall discussing the issue of one versus two bags of methamphetamine. Trial counsel testified the Applicant attempted to plead guilty before the trial judge and that he had told the Applicant that he would need to admit guilt. Trial counsel testified the plea judge did not take the plea and would not allow an Alford plea.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

¹ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970).

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This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly review or investigate the case. Based upon the testimony at the PCR hearing, this Court finds trial counsel reviewed the facts and evidence with the Applicant, as well as the charges and possible penalties. This Court finds trial counsel and the Applicant also reviewed the Applicant's version of events and discussed the trial strategy. This Court finds the Applicant failed to meet his burden of proving trial counsel should have investigated that the methamphetamines from his home were put into two separate bags. This Court finds the Applicant cannot demonstrate either error or prejudice when the trial testimony clearly indicated the drugs were retrieved from two separate locations. See, e.g., Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly explain the guilty plea process. Initially, this Court does not find credible the Applicant's testimony that he wanted to plead guilty to an offer from the State for a sentence of five years on an ankle monitor and probation. The Applicant failed to present any evidence that this specific plea offer was ever made in this case. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (finding in a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application). Regardless, trial counsel was also not deficient in how he explained the guilty plea process to the Applicant shortly before trial. After the suppression hearing, the Applicant and his co-defendant appeared before the judge to plead guilty. (Trial transcript, pp.99-104). The Applicant, however, told the trial judge he was not

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guilty and the judge would not take his guilty plea (Trial transcript, pp.104-05). The trial judge denied trial counsel's request to plead guilty under Alford. (Trial transcript, p.105). Trial counsel testified he explained to the Applicant that he would have to admit guilt before the court and that he vaguely recalled discussing an Alford plea with the Applicant. This Court finds trial counsel's testimony is credible. This Court finds the Applicant has failed to meet his burden of proving trial counsel erred in explaining the guilty plea process to him.

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 his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by 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.

Appeal

Trial counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). Id. Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive their appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State. See Rule 243(i)(1),

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SCACR; Davis v. State, 288 S.C. 290, 291, n.1, 342 S.E.2d 60, 60, n.1 (1986) (“Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a White v. State review.”).

Both parties agreed the Applicant was denied his right to a direct appeal after his trial. The Court affirmatively finds the Applicant did not knowingly and voluntarily waive his right to a direct appeal. The Court concludes the Applicant is entitled to a review of his conviction, which can be remedied by a petition for review pursuant to White v. State.

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. The Applicant, however, is entitled to a review of direct appeal issues pursuant to White.

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.

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IT IS THEREFORE ORDERED:

1. That the Applicant is granted a review of direct appeal issues pursuant to White;
2. That all other issues in the application for post-conviction relief are denied and dismissed with prejudice; and
3. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 22^d day of May, 2014.

D. Garrison Hill

D. Garrison Hill
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

