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June 11, 2014

Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: State of South Carolina v. Oduri Lytes
Edgefield County, Court of General Sessions; Case No.: 2012-CP-19-296
Our File No.: 13-11

Dear Sir or Madam:

Enclosed please find the original and one copy of Appellant's Notice of Appeal in the above-captioned matter. I have also enclosed a copy of the Order of Dismissal signed by Judge McIntosh on May 19, 2014 and filed in the Edgefield County Clerk's Office on May 29, 2014. Please file the original and return the stamp-filed copy to me in the enclosed self-addressed, stamped envelope. Given the fact that my client is indigent and this case was appointed to me, it is my understanding that the filing fee is waived.

If you have any questions regarding the enclosed or this matter, please do not hesitate to contact me. As always, thank you for your assistance.

Sincerely,

F. Adam Nelson

FAN/brj

Enclosures

cc: John Walter Whitmire, Esq. (w/encl.)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2012-CP-19-296

Odouri L. Lytes,
S.C.D.C. No. 282918, Appellant

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Odouri L. Lytes appeals the order of the Honorable R. Lawton McIntosh, dated May 19, 2014. Appellant received notice of entry of this order on May 30, 2014.

This 11th day of June, 2014.

F. ADAM NELSON
Fleming & Nelson, LLP
Post Office Box 2208
Evans, Georgia 30809
706-434-8770
Attorney for Appellant

Other Counsel of Record:

John Walter Whitmire
Assistant Attorney General
Office of the Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211-1549

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF EDGEFIELD	)	ELEVENTH JUDICIAL CIRCUIT
	)	
Odouri L. Lytes, S.C.D.C. No. 282918,	)	C.A. No. 2012-CP-19-296
	)	
Applicant,	)	
	)	
v.	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

1. I am the attorney for the Applicant in the above-captioned matter.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have on this day served a copy of the NOTICE OF APPEAL in the above-captioned matter on the following person by depositing same in the United States Mail, postage prepaid:

John Walter Whitmire
Assistant Attorney General
Office of the Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211-1549

Dated this 11th day of June, 2014.

F. ADAM NELSON
Attorney for Applicant

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF EDGEFIELD) ELEVENTH JUDICIAL CIRCUIT
)
Odouri L. Lytes,) C.A. No. 2012-CP-19-296
S.C.D.C. No. 282918,)
)
Applicant,)
)
v.) **ORDER OF DISMISSAL**
)
State of South Carolina,)
)
Respondent.)

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed September 10, 2012. Respondent made its Return. An evidentiary hearing into the matter was convened on November 15, 2013 at the Lexington County Courthouse. Applicant was present and was represented by Frank A. Nelson, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Edgefield County. The Applicant was indicted at the December 2007 term of the Court of General Sessions for Edgefield County for trafficking crack cocaine, greater than 28 grams but less than 100 grams (2007-GS-19-753). James R. Snell, Esq., 'counsel' represented Applicant. On August 12, 2009, a jury convicted Applicant as indicted. The Honorable William P. Keesley sentenced Applicant to twenty-five years imprisonment.

Applicant appealed his conviction and sentence to the SC Court of Appeals and was represented by Wanda H. Carter, Esq., of the Office of Appellate Defense. On January 25, 2012,

the South Carolina Court of Appeals dismissed Applicant's appeal in unpublished opinion (No. 12-UP-11) The remittitur soon followed.

At the PCR hearing, Applicant proceeded on the following allegations:

1. Prosecutorial misconduct
   a. untimely disclosure of evidence related to the C.I. used in the controlled buy;
   b. improper disclosure of only part of Applicant's oral statement to police.
2. Ineffective Assistance of Counsel:
   a. failure to make a successful motion to suppress the narcotics.

SUMMARY OF TESTIMONY FROM THE PCR HEARING[1]

Counsel testified at the PCR hearing and outlined his criminal practice and prior experiences handling narcotics cases in Edgefield County. It was his recollection that Applicant received a copy of the discovery disclosures in this case from his first attorney. He noted the discovery disclosures encompassed forty-four (44) pages of materials. He could not recall why Applicant's first attorney was relieved from case. Applicant's second attorney approached counsel about a substitution. As a result, counsel took on the representation here.

Counsel outlined his initial involvement in Applicant's case. He stated that he sent Applicant an introductory letter on June 16, 2009. Out of an abundance of caution, counsel made certain to apprise Applicant of the charge and elements of the offense. Counsel further filed a motion concerning Applicant's pre-trial detention and bond. Counsel filed his own discovery motions and began his investigation of the case. Counsel independently reviewed and evaluated the State's evidence, inspected the actual evidence, and interviewed the arresting officer. Counsel noted that he spoke with all of the officers prior to trial that testified during the State's case-in-chief.

[1] This Court notes that Applicant did not testify on his behalf at the PCR hearing.

He summarized the State's case as a standard controlled buy police investigation where the police utilized a confidential informant 'C.I.' to effectuate a narcotics transaction as a buyer. The C.I. wore a wire and was provided marked currency from the police. Counsel testified to two specific occasions he met with Applicant to discuss the case. He could not immediately recall other meetings but stated he may have met with Applicant on other occasions.

Counsel stated that he evaluated the C.I.'s redacted statement prior to trial. He discussed the matter with Applicant during a pre-trial consultation. He did not recall whether Applicant disclosed information regarding the C.I. that would have been helpful to the case. Counsel opined that it was indisputable that Applicant was in the vehicle that was identified in the controlled buy. Furthermore, it was also indisputable that Applicant had made or received a series of phone calls from the C.I. prior to the controlled buy. He reviewed the C.I.'s phone records with Applicant. Applicant disclosed the substance of his oral statement to police. In his spontaneous statement to police, he exculpated others at the scene. Further details of the statement were disclosed during pre-trial motions. Counsel asserted the additional details did not constitute a material variance in the substance of the inculpatory statement.

Counsel testified that plea negotiations were unfruitful. The solicitor offered to plead Applicant to a negotiated sentence of twenty-two (22) years imprisonment. He stated that Applicant was only willing to accept a plea that exposed him to eight (8) years or less of imprisonment. Thus, counsel prepared Applicant's case for trial. He asserted that he was fully prepared to effective try Applicant's case when the solicitor called it to trial. The solicitor disclosed protective discovery materials regarding the C.I. on the eve of trial. Counsel traveled to the solicitor's base of operations, an Airport hangar in Saluda County, to inspect the previously protected discovery materials. Counsel stated that he had the opportunity to discuss the matter

with Applicant on the morning of trial. Counsel requested a continuance when the State called its case. Counsel stated that impeaching the C.I.'s credibility was instrumental to his trial strategy. The motion was ultimately denied but yielded counsel a partial success in a directive from the trial judge to allow counsel any additional time during the course of the trial to review the materials.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, *supra*. 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.

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 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 documents from the prior proceedings, and, 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 counsel exhibited competent representation on the issues of ineffective assistance of counsel at issue. This Court notes that the solicitor could have disclosed discovery materials to counsel in a more expedient manner. However, this Court places great emphasis on counsel's detailed testimony concerning his pre-trial preparations and trial performance. Furthermore, Applicant's conviction and sentence were supported by overwhelming evidence of his guilt.

A.

This Court finds Applicant has failed to meet his burden to prove the solicitor committed prosecutorial misconduct that resulted in prejudice. "Challenges alleging prosecutorial misconduct typically involve a prosecutor's improper efforts to collect evidence or unfair trial tactics." State v. Needs, 333 S.C. 134, 145, 508 S.E.2d 857, 862 (1998) holding modified by State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004). "Rule 5 permits inspection of evidence in the State's possession "which [is] material to the preparation of his defense or [is] intended for

use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant" upon request by the defendant." Hyman v. State, 397 S.C. 35, 47, 723 S.E.2d 375, 381 (2012) (citing Rule 5(a)(1)(C), SCRCrP). "Although the State is generally privileged from revealing the name of a confidential informant, disclosure may be required when the informant's identity is relevant and helpful to the defense or is essential for a fair determination of the State's case against the accused." State v. Humphries, 354 S.C. 87, 90, 579 S.E.2d 613, 614–15 (2003).

First this Court finds counsel made a timely pre-trial motion to suppress evidence related to the C.I. that was protected until the eve of trial. The trial judge noted the proper remedy here was to provide counsel the opportunity to request time to review the evidence at issue during the course of the trial. (Trial Tr. pp.87-97). This Court notes that the evidence at issue was not proven to be exculpatory, ergo within the purview of Brady[2]. Thus, the cognizable matter before this Court here concerns whether the manner in which the solicitor disclosed sensitive evidence appertaining to the C.I. materially affected Applicant's right to a fair trial. What is of importance is that Applicant failed to produce credible evidence that showed the trial judge's remedy was grossly inadequately and thereby constituted an abuse of discretion. See Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 776 (2008). Furthermore, counsel was properly provided the C.I.'s prior record during the course of the trial.

Second, this Court finds Applicant failed to prove the incomplete pre-trial disclosure of Applicant's oral statement to police to counsel constituted a discovery violation.

> Statement of Defendant. Upon request by a defendant, the prosecution shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the prosecution, the existence of which is known, or by

[2] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

> the exercise of due diligence may become known, to the attorney for the prosecution; **the substance of any oral statement which the prosecution intends to offer in evidence at the trial made by the defendant whether** before or after arrest in response to interrogation by any person then known to the defendant to be a prosecution agent.

Rule 5(a)(1)(A), SCRCrimP (emphasis added). Counsel testified that the undisclosed portion of the statement was not material where the police officer had already provided him with the substance of Applicant's oral statement. This Court agrees with counsel and finds his testimony on the matter convincing. Applicant told the police that narcotics did not belong to others at the scene, which readily showed by deduction that he was culprit. Therefore, additional statements as to possession were merely surplusage. This Court finds counsel's testimony on the matter credible. In light of counsel's diligent preparations, the additional disclosure did not materially impact counsel's ability to effectively represent Applicant at the Denno[3] hearing. Neither did the matter materially impact counsel's ability to effectuate his valid trial strategy, a piecemeal attack to prove reasonable doubt. Furthermore, counsel had discussed the matter with Applicant. Applicant made the decision to not tell counsel about the extent of his brief statement to police. See U.S. v. Pellerito, 878 F.2d 1535, 1543 (1st Cir. 1989) ("Applicant could made the decision to not tell counsel about his brief statement to police. If counsel was ineffective in any sense, it was only because the client rendered him so, first by keeping Noriega in the dark, and then, by refusing to heed his advice. That is not the sort of "ineffectiveness" for which relief can be granted."). The issue did not warrant a continuance. See State v. Tanner, 299 S.C. 459, 462, 385 S .E.2d 832, 834 (1989). Therefore, these allegations are denied and dismissed.

B.

[3] Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964).

Applicant's allegation that counsel was ineffective for failing to make a motion to suppress the narcotics based upon a defective chain of custody is without merit. Counsel made a timely objection to the admission of the narcotics. (Trial Tr. pp.209-39; pp.243-44). See Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993) ("[E]rrors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."). Regardless, Applicant has failed to make a credible argument that narcotics were improperly admitted into evidence because of a defective chain of custody. See State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). Therefore, this allegation is denied and dismissed.

C.

Except as discussed above, this Court finds that the Applicant affirmatively abandons 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 19 day of May, 2014.

R. LAWTON MCINTOSH
Presiding Judge
Eleventh Judicial Circuit

Anderson, South Carolina

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