

The South Carolina Court of Appeals

Christopher W. Ashe, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2014-001407

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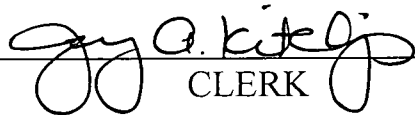
JUL - 2 2014

S.C. Supreme Court

ORDER

This case is transferred to the Supreme Court of South Carolina pursuant to Rule 204(a) of the South Carolina Appellate Court Rules.

FOR THE COURT

BY 
CLERK

Columbia, South Carolina

cc:
John Walter Whitmire, Esquire
Salley W. Elliott, Esquire
Alan McCrory Wilson, Esquire
C. Rauch Wise, Esquire
Robert Michael Dudek, Esquire

FILED
7/1/2014

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Honorable Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-32-1229

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S.C. Supreme Court

Christopher W. Ashe, Appellant,

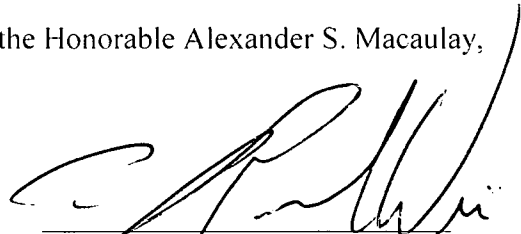
vs.

The State Respondent.

NOTICE OF APPEAL

Christopher W. Ashe, appeals the order of the Honorable Alexander S. Macaulay,
dated June 2, 2014, and filed on June 17, 2014.

June 26th, 2014



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Attorney for Appellant

Other Counsel of Record:
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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

S.C. Supreme Court

Honorable Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-32-1229

Christopher W. Ashe, Appellant,

vs.

The State Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Trayhnam who, after being duly sworn, deposes and says that she is the legal assistant for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on June 27, 2014, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Notice of Intent to Appeal in the above case addressed to J. Walt Whitmire, Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211, The Honorable Alexander S. Macaulay, P.O. Drawer 428, Walhalla, SC, 29691, and Beth Carrigg, Clerk, Lexington County Courthouse, 205 E. Main Street, Lexington, SC 29072.

SWORN to and Subscribed

Sandy Trayhnam

before me this 27 day

of June, 2014.

Alex J. Hunter (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22

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SC Court of Appeals

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STATE OF SOUTH CAROLINA)
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 COUNTY OF LEXINGTON)
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)
)
 Christopher W. Ashe,)
 S.C.D.C. No. 318402,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 ELEVENTH JUDICIAL CIRCUIT

Case No. 2009-CP-32-1229

FILED
 2014 JUN 17 A 11:36
 BETH A. CARRIGG
 CLERK OF COURT
 LEXINGTON, SC

ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post conviction relief (PCR) filed March 23, 2009. Respondent made its Return on December 16, 2009. An evidentiary hearing into the matter was convened on May 20, 2010 at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by C. Rauch Wise, Esquire. The Respondent was represented by A. West Lee, Esquire, of the South Carolina Attorney General's Office. Applicant, trial counsel, and Emily Homer testified at the hearing.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the July 2006 term of the Lexington County Grand Jury for Unlawful Possession of Pseudoephedrine—200 g or more, but less than 400 g (2006-GS-32-2155), Possession of Crank (2006-GS-32-2156), and Manufacturing Methamphetamine (2006-GS-32-2157). He was represented by Robert T. Williams, Esquire. On October 25, 2006, the Applicant underwent trial and was

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found guilty as charged. He was sentenced by the Honorable R. Farrell Cothran, Jr., to confinement for a period of twenty-five (25) years for the unlawful possession of pseudoephedrine, and concurrent terms of three (3) years for the possession of crank and fifteen (15) years for manufacturing methamphetamine. A timely appeal was filed on the Applicant's behalf, and an appeal was perfected. The South Carolina Supreme Court subsequently affirmed the Applicant's conviction in a Memorandum Opinion filed March 24, 2008 (No. 2008-MO-015).

At the PCR hearing, Applicant moved forward on the following allegations:

1. Ineffective assistance of counsel:
 - a. failure to investigate the prior record and background of Brian Jenkins.
 - b. failure to make a double jeopardy objection to the charges of possession of pseudoephedrine and manufacturing methamphetamine.
 - c. failure to object to testimony of Officer Thomas Hamilton's improper opinion testimony.
 - d. failure to object to the method employed in determining the weight of the pseudoephedrine.
 - e. failure to object to the jury charge that knowledge and possession may be inferred when a substance is found on the property under the defendant's control.

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.


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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. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

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 legal arguments of counsel, exhibits, and briefs submitted. Pursuant to S.C. Code Ann. §17-27-80

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(2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

I.

A.

This Court finds Applicant failed to meet his burden to prove trial counsel was ineffective for failing to investigate the background and arrest record of Brian Jenkins for impeachment purposes. This Court finds trial counsel's testimony regarding the allegation credible. Without a doubt, "[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir.1986);

At the PCR hearing, trial counsel testified he investigated the matter and was aware of Jenkins' arrest record. Trial counsel, through his reasonable investigation, learned Jenkins' owned the property in question and had previous dealings with law enforcement concerning methamphetamine. Trial counsel tactically decided to utilize this information to show the arresting narcotics officer failed to adequately investigate Jenkins' involvement in the offense when they brought charges against Applicant. (Trial Tr. 70-3). This Court finds trial counsel's strategy on the matter reasonable and effective. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992) ("Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance."). Therefore, this allegation is denied and dismissed.

B.

This Court finds Applicant failed to prove trial counsel was ineffective for failing to make a double jeopardy objection to the charges of possession of pseudoephedrine and manufacturing methamphetamine. Trial counsel testified he did not find the objection had merit. This Court agrees

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with trial counsel. "Where an act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180 (1932). South Carolina Code §44-53-375(E)(1)(d) states in relevant parts that it is unlawful to possess any product that contains one of a variety of substances or their combinations in excess of twelve grams. A conviction requires proof that a defendant was essentially operating a meth lab. Pseudoephedrine is one of numerous ingredients that the final methamphetamine substance is derived from. A conviction for manufacturing does not necessitate proof of a particular amount of pseudoephedrine. While a conviction for possession of pseudoephedrine in this instance necessitates proof a defendant possessed at least two-hundred grams of pseudoephedrine.

Furthermore, this claim lacks merit due to the posture of this case. Applicant failed to enunciate case law directly on point or applicable that would have substantiated a double jeopardy claim at trial. This Court finds Applicant's statutory interpretation certainly novel and creative; however it's inappropriate to apply in finding a reasonable attorney under the prevailing professional norms would have made an objection based on such an argument at trial. See Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). Therefore, this allegation is denied and dismissed.

C.

This Court finds Applicant failed to meet his burden to prove trial counsel was ineffective for failing to object to testimony of Officer Thomas Hamilton's improper opinion testimony. An "opinion may be offered on ultimate issue only where witness is otherwise qualified." State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001). Hamilton was properly qualified as an expert in the

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detection of meth, production of meth, dismantling of meth labs, and in handling hazardous by-products of meth labs. (Trial Tr. 210). Hamilton testified he had eight years of experience investigating narcotics crime (Trial Tr. 207). Furthermore, Hamilton testified to investigating over a hundred meth labs in his career. Hamilton also testified he received extensive local and federal training in the clandestine production of drugs. (Trial 208). Hamilton obtained a specialized certification from the DEA in clandestine labs. Trial counsel effectively challenged the scope of Hamilton's expert qualification. The trial judge agreed and did not qualify Hamilton as an expert on the effects of hazardous chemicals on the body. See State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996) (holding "[t]he admission of expert testimony is within the discretion of the trial court."). This Court finds there was no showing trial counsel was deficient for not objecting to sound testimony. See Gooding v. St. Francis Hosp., 326 S.C. 248, 253, 487 S.E.2d 596, 598 (Ct. App. 1995) ("Qualification depends on the particular witness' reference to the subject."). Therefore, this allegation is denied and dismissed.

D.

This Court finds Applicant has failed to meet his burden to prove counsel was ineffective for failing to object to the method employed in determining the weight of the pseudoephedrine. This Court finds trial counsel and Emily Homer's testimony on the issue credible. "An attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial." Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). At the PCR, Emily Homer of the Lexington County Sheriff's Dept. testified she performed a qualitative analysis of the drugs in this case and determined the mass percentages of the difference substances in unknown amounts. Homer testified the drugs she examined were in powder form. Homer did not conduct a quantitative analysis


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to determine the amount of pure pseudoephedrine contained in the drugs. Homer testified that to her knowledge, no one in this jurisdiction is certified by SLED to conduct a quantitative analysis. Trial counsel additionally testified that to his knowledge, law enforcement did not test for amount of the pure substance. Trial counsel further stated that if Applicant's premise held true, no one in South Carolina could ever be convicted of pseudoephedrine based on weight. This Court finds Applicant's legal claim novel and unpersuasive in this Court's deficiency analysis.

Furthermore, the record shows trial counsel thoroughly competent on how he approached the issue at trial. See Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) (finding trial counsel was not deficient in failing to procure an expert witness to challenge DNA evidence presented at trial where the record established that counsel vigorously cross-examined the State's DNA experts and attacked the accuracy of the evidence). Trial counsel vigorously cross-examined Homer at trial. Trial counsel attached the chain of custody, the presumptive analysis, the confirmatory analysis, and the GCMS (gas chromatograph mass spectrometer) utilized in substance identification. At trial, trial counsel argued the State's proof of guilt only consisted of evidence showing the presence and not amount of pseudoephedrine. Therefore, because case law firmly dictates trial counsel is under no duty to be clairvoyant to unascertainable legal theories not established by precedent, this Court denies and dismisses this allegation.

E.

This Court finds Applicant failed to prove trial counsel was ineffective for not objecting to the jury charge that knowledge and possession may be inferred when a substance is found on the property under the defendant's control. (Trial Tr. 427, lines 5-25). This Court finds the charge was proper. "If a charge is substantially correct and covers the law there is no need for reversal." Lowry

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v. State, 376 S.C. 499, 657 S.E.2d 760 (2008). A jury instruction violates due process if it is reasonably likely that the jury understood the charge to create a mandatory presumption requiring it to infer an element of the offense if the State predicate facts, thereby relieving the State's burden of proof on an element of the offense. Id. This Court finds the instruction regarding inference was permissive. The trial court instructed the jury that any inference was simply an evidentiary fact, to be taken into consideration along with the rest of the evidence in the case. Furthermore, this Court finds the jury was properly instructed on mere presence. Therefore, this allegation is denied and dismissed.


Thus, Applicant failed to meet his burden of proof trial counsel was ineffective under the first prong of the Strickland test – counsel failed to render reasonably effective assistance under prevailing professional norms.

II.

This Court finds Applicant also failed the second prong of Strickland – that he was prejudiced by trial performance. The record exhibits convincing evidence of Applicant's guilt. At trial, the State presented testimony regarding the discovery of materials used in the manufacture of methamphetamine found at the scene of the offense. (Trial Tr. p.86-9). Furthermore, Applicant's vehicle was parked at the scene of the offense. (Trial Tr. p.62; p.123). Additionally, Applicant fled from the scene. (Trial Tr. p.69).

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or

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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.

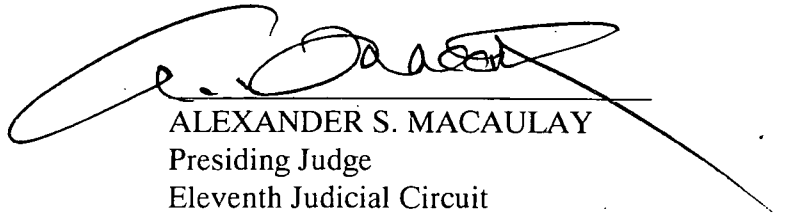
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's 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 2nd day of June, 2014.

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ALEXANDER S. MACAULAY
Presiding Judge
Eleventh Judicial Circuit

Walhalla, South Carolina

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June 27, 2014

Jenny Abbott Kitchings, Clerk
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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Re: Christopher W. Ashe vs. The State (2009-CP-32-1229)

S.C. Supreme Court

Dear Ms. Kitchings:

Enclosed herewith for filing is the original Notice of Intent to Appeal concerning the above referenced matter, together with the original Affidavit of Service.

Also, please be advised that we have received a copy of the transcript already. Therefore, it is my understanding that the initial brief will be due on July 28, 2014. If this is not correct, please let me know.

With kindest regards, I am

Very truly yours,



C. Rauch Wise

CRW/mjh

cc: J. Walt Whitmire
Honorable Alexander S. Macaulay
Lexington County Clerk of Court

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JUN 30 2014

SC Court of Appeals

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