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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Phillip Lenski, Administrative Law Judge
13-ALJ-15-0025

Case No.: 14-001097

JEREMIAH DICAPUA APPELLANT,

v.

S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES RESPONDENT.

RECORD ON APPEAL

Jeremiah DiCapua, #105096
McCormick Correctional Inst.
386 Redemption Way
McCormick, South Carolina 29899

APPELLANT, PRO SE

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Jeremiah DiCapua, 105096,

Docket No. 13-ALJ-15-0025-AP

The Appellant,

vs.

ORDER

South Carolina Department of Probation,
Parole and Pardon Services,

Respondent.

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court ("ALC" or "Court") pursuant to the appeal of Jeremiah DiCapua ("The Appellant"), an inmate incarcerated with the South Carolina Department of Corrections. On April 3, 2013, the South Carolina Department of Probation, Parole and Pardon Services ("Department") notified the Appellant that the South Carolina Parole Board ("Board") rejected him for parole. The Appellant filed a Motion for Rehearing which was denied by a letter dated June 7, 2013. On July 1, 2013 the Appellant filed a Notice of Appeal with the ALC seeking review of the Board's denial of parole. On July 3, 2013, Tommy A. Thomas, Esquire, filed a duplicate Notice of Appeal. The court consolidated the two Notices of Appeal into the present case.

The Appellant has a unique parole history which is the basis of his appeal. The Appellant was sentenced to life in prison for the offense of murder in 1980. At the time, South Carolina law allowed an individual parole eligibility upon the service of ten (10) years. The Appellant was granted parole on August 9, 2000. In 2005, the Appellant was arrested and convicted on drug charges. This conviction was set aside by the Honorable Michael Baxley. The State appealed Judge Baxley's decision before the Court of Appeals. The Court of Appeals reversed Judge Baxley's decision. State v. DiCapua, 373 S.C. 452, 646 S.E.2d 150 (Ct. App. 2007). The Supreme Court of South Carolina granted a Writ of Certiorari and proceeded to reverse the decision of the Court of Appeals, ruling that Judge Baxley has the authority to sua sponte order a new trial. State v. DiCapua, 383 S.C. 394, 680 S.E.2d 292 (2009).

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SC ADMINISTRATIVE LAW COURT

During the appeal process, the Appellant served a two year sentence for the drug charges. Upon the conclusion of his sentence in 2007, the Department revoked his parole because of the new conviction. The Appellant appeared before the Department for parole hearings on March 16, 2011 and April 3, 2013 and brought the 2009 reversal of his drug charges to the attention of the Department on both occasions. On both occasions, the Department declined to grant the Appellant parole. The Appellant now argues that the Department has deprived him of a state created liberty interest by failing to re-instate his parole. The Appellant further argues that the Department erred in its most recent denial of parole because the basis for its denial, (1) the nature and seriousness of his current offense and (2) his that his prior criminal record indicates poor community adjustment, no longer exist because the conviction for drug charges has been reversed.

DISCUSSION

An individual has a right to ALC review of a final decision of the Board only when that decision affects a liberty interest for which due process is required. See Furtick v. S.C. Dep't of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146, 149, 150 (2003); see also Sullivan v. South Carolina Dep't of Corrections, 355 S.C. 437, 586 S.E.2d 124, 127 (2003) (explaining the nature of the right to ALC review). In Furtick, the South Carolina Supreme Court held that although an inmate has a liberty interest in parole *eligibility* pursuant to S.C. Code Ann. § 24-21-620, the statute creates no such liberty interest in the granting of parole itself. Furtick, 352 S.C. at 598, 576 S.E.2d at 149 n.4. Therefore, claims arising from the Board's decision denying parole are not appealable to the ALC, only claims that the Board failed to consider the appropriate criteria so as to be tantamount to an abrogation of parole eligibility. Cooper v. S.C. Dep't. of Probation, 377 S.C. 489, 661 S.E.2d 106 (2008).

The Appellant challenges the sufficiency of the Board's decision on two factors. First, the Appellant alleges that the Department is depriving him of a vested liberty interest in the parole that was originally revoked in 2007. The Appellant claims that when parole was granted, it created a vested liberty interest. The Appellant argues that, when the conviction for which his parole was revoked in 2007 was reversed in 2009, his parole should have been reinstated. The Department's failure to reinstate his parole, the Appellant argues, is a deprivation of the Appellant's state created liberty interest in that parole. Next, the Appellant alleges that the

Department based its decision to deny parole on criteria that no longer exists since his conviction for drug charges was reversed. The Department based its decision to deny the Appellant parole on the basis of (1) the nature of seriousness of the current offense and (2) that his prior criminal record indicates poor community adjustment. The Appellant argues that, because his conviction for drug charges was reversed, the "current offense" no longer exists. The Appellant also argues that the Department based its finding of poor community adjustment on the parole revocation which, according to the Appellant, the Department should no longer consider since the conviction for which the revocation was based has been reversed.

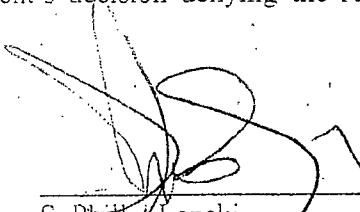
As outlined in Furtick and Cooper, this court only has jurisdiction over claims that an appellant was denied eligibility for parole and claims that the Board failed to consider the appropriate criteria so as to be tantamount to a denial of parole eligibility. Therefore, this court may not consider the Appellant's argument regarding the reinstatement of his original parole. Further, this court may not consider whether the Department's decision to deny parole was based on sufficient findings of fact. This court may only address whether the Board failed to consider the appropriate criteria in making its decision. The court in Furtick established that, although parole is a privilege and not a right, inmates still have a liberty interest in parole eligibility. 352 S.C. at 598, 576 S.E.2d at 149 n. If the Board fails to consider the criteria set forth in S.C. Code Ann. § 24-21-640, the inmate is denied his liberty interest in parole eligibility. Cooper, 377 S.C. 489, 661 S.E.2d 106 (2008). However, as long as the Board considers all of the factors required by statute, it has protected the inmate's liberty interest in parole eligibility and it has the discretion to deny parole based on any of the factors found in § 24-21-640 or its own criteria. Id. The Board's decision indicates that it considered all the appropriate factors before making its decision to deny the Appellate parole. Therefore, the court cannot grant relief to the Appellate.

ORDER

For the foregoing reasons, the Department's decision denying the Appellant parole is **AFFIRMED.**

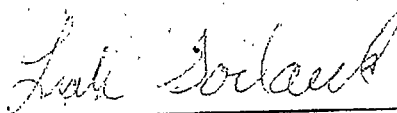
AND IT IS SO ORDERED.

April 16, 2014
Columbia, South Carolina


S. Phillip Lenski
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Leah E. Garland, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Leah E. Garland
Judicial Law Clerk

April 16, 2014
Columbia, South Carolina

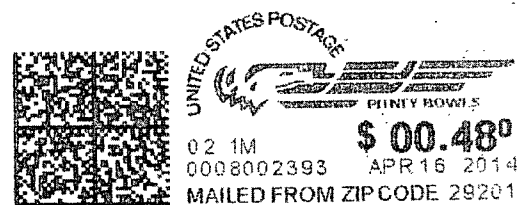
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APR 16 2014

SC JUDICIAL LAW COURT

STATE OF SOUTH CAROLINA
Administrative Law Court
EDGAR A. BROWN BUILDING
1205 PENDLETON STREET, SUITE 224
COLUMBIA, SOUTH CAROLINA 29201

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SC 290
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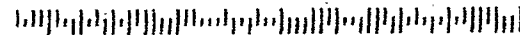
PM 214

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MCCI
MAIL ROOM

JEREMIAH DICAPUA, 105096
McCORMICK CORRECTIONAL INSTITUTION
Rt. 2, Box 100
386 REDEMPTION WAY
McCORMICK, SC 29899

29899



STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS)
FIFTEENTH JUDICIAL CIRCUIT)

Jeremiah Dicapua, # 105096,)

2010-CP-26-2664)

Applicant,)

v.)

**ORDER GRANTING
POST-CONVICTION RELIEF**

State of South Carolina,)

Respondent.)

This matter came before the Court pursuant to an Application for post-conviction relief filed March 29, 2010. Respondent made a Return on April 28, 2010. An evidentiary hearing was convened at the Horry County Courthouse on February 1, 2011. The Applicant was present in court and represented by Paul Archer, Esquire. Respondent was represented by Christina J. Catoe, Assistant Attorney General.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to a parole violation from a Horry County murder conviction from 1980. The Applicant was initially released to parole in 2000. In January 2004, the Applicant was indicted in Horry County for distribution of crack cocaine (2004-GS-26-303). In April 2004, the Applicant was indicted for possession with intent to distribute crack cocaine (2004-GS-26-1549). He was represented by Thomas D. Guest, Jr., Esquire. On January 10-13, 2005, the Applicant was tried before the Honorable J. Michael Baxley. The jury found him guilty, and Judge Baxley sentenced the Applicant to thirty months (2 ½ years) on each charge, with the sentences to run concurrently. He also imposed a \$25,000.00 fine regarding each charge. The convictions at issue in this PCR were later considered a violation of the Applicant's parole for murder. Therefore, after he served his sentence on these charges, his parole was revoked on his previous murder charge.

The day after trial, on January 14, 2005, Judge Baxley issued a *sua sponte* Order Vacating Conviction and Sentence. The Order was based upon what Judge Baxley believed was the erroneous admission of a videotape of the drug transaction. The Order also reinstated the Applicant's bond. The State appealed from the Order vacating the convictions. The Applicant was represented by Eleanor Duffy Cleary, Esquire, in this appeal. On April 23, 2007, the South Carolina Court of Appeals reversed Judge Baxley's Order. On June 6, 2007, Judge Baxley held a hearing re-sentencing the Applicant pursuant to the same sentence terms previously imposed on January 13, 2005.¹ On July 13, 2009, the South Carolina Supreme Court affirmed the reversal of Judge Baxley's Order. The case was remitted to the circuit court on or about July 29, 2009.

A notice of appeal from the convictions was filed, and Wanda H. Carter, Esquire, was appointed to represent the Applicant. However, thereafter, the Applicant moved to withdraw and dismiss his appeal. On January 29, 2010, the Court of Appeals entered an Order of Dismissal of the appeal. The case was remitted to the circuit court on February 23, 2010.

STANDARD OF REVIEW

In a post-conviction relief proceeding, the applicant bears the burden of proving his or her allegations by a preponderance of the evidence. Caprood v. State, 338 S.C. 103, 109-110, 525 S.E.2d 514, 517 (2000); Rule 71.1(e). 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The correct measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, supra. "There is a strong

¹ At the PCR hearing, the State agreed that Judge Baxley had no jurisdiction to hold this re-sentencing hearing while the appeal was still pending. Therefore, the sentence imposed pursuant to that hearing is null and void. However, in any event, the sentence imposed in that hearing was exactly the same as the sentence that was subsequently reinstated when the South Carolina Supreme Court affirmed the Court of Appeals' opinion.

presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case." Caprood, supra, at 109, 525 S.E.2d at 517 (citations omitted). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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. When a defendant challenges his conviction after a trial, the proper consideration is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt. Smith v. State, 375 S.C. 507, 515, 654 S.E.2d 523, 527-28 (2007). (citations omitted). In order to receive relief, an applicant must prove both ineffective assistance and resulting prejudice. See, e.g., Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

Allegations and Relief Sought

In his PCR Application, Mr. Dicapua alleged that his custody is unlawful for the following reasons:

- (1) Ineffective assistance of trial counsel;
- (2) Ineffective assistance of appellate counsel;
- (3) Lack of subject matter and personal jurisdiction; and
- (4) Violation of constitutional and statutory rights.

The Applicant stated that he was seeking vacation of his convictions and sentences, dismissal of his charges with prejudice, release from custody, and remand to parolee status.

Review of PCR Hearing

In considering the Applicant's case, this Court had before it the Applicant's PCR file, the records of the Horry County Clerk of Court regarding the convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the direct appeal documents from the South Carolina Court of Appeals and the South Carolina Supreme Court. No testimony was taken at the PCR hearing. However, the parties stipulated that trial counsel did not renew his pre-trial objection to the introduction of the videotape of the alleged drug buy; instead, counsel stated that there was "no objection" when the tape was admitted into evidence during trial. (See Trial Transcript, page 60, line 11; see also p. 18, line 12 - p. 26, line 14). The Applicant also introduced three exhibits as follows: Applicant's # 1: Judge Baxley's Order Vacating Conviction and Sentence; Applicant's # 2: South Carolina Court of Appeals opinion reversing Judge Baxley's Order; and Applicant's # 3: South Carolina Supreme Court opinion upholding the Court of Appeals' decision.

At the PCR hearing, the Applicant's counsel raised only one issue, waiving all of the other issues set forth in the PCR Application. Counsel argued that trial counsel was ineffective for failing to renew his objection to the videotape of the alleged drug transaction. He argued that if counsel had interposed a timely objection to the admission of the tape during trial, Judge Baxley would have probably not allowed the tape into evidence, and the case would have been dismissed since the videotape was the only evidence of a drug transaction involving the Applicant. PCR counsel argued that prejudice to the Applicant was clear because of Judge Baxley's "Order Vacating Conviction and Sentence" (Applicant's Exhibit # 1), i.e., if counsel had objected to the videotape using the grounds set forth in Judge Baxley's post-trial Order, Judge Baxley would have disallowed the videotape and dismissed the case. Specifically, these grounds were as follows: (1) the videotape had no audio; (2) the video recorded from a poor angle that did not clearly depict the transaction; (3) the informant was allowed to make telephone calls from the room and it was not known to whom these calls were placed; and (4) the informant was allowed to leave the room unaccompanied

by law enforcement during the sting operation and was completely off camera for a duration of time. (See Applicant's Exhibit # 1, page 1).

In response, counsel for the State argued that the Applicant's analysis was flawed because it erroneously used a "hindsight" approach to evaluate trial counsel's performance. The State argued that in order for counsel to be deficient for failing to renew his pre-trial objection to the videotape, counsel had to have had valid and non-frivolous grounds for suppression of the tape. The State argued that the four reasons for suppression set forth in Judge Baxley's post-trial Order were not valid reasons for suppression of the tape. The State further argued that the four issues raised by Judge Baxley pertaining to flaws in the videotape and flaws in the State's case went to the weight of the evidence and not its admissibility. The State argued that Judge Baxley's initial, pre-trial ruling regarding the tape was proper, and that Judge Baxley would have reiterated this ruling had counsel objected during trial. (See Trial Transcript, page 22, lines 2-8). Further, the State argued that the tape was, in fact, admissible because: (1) it was relevant visual proof which served to corroborate the testimony of the officers; (2) it was properly authenticated by Detective Donald; and (3) it contained nothing unduly prejudicial under Rule 403, SCRE.

The State also argued that even assuming that trial counsel had valid grounds to object to the tape, the Applicant was still required to prove that the outcome of his case was prejudiced because of admission of the tape. The State argued that the Applicant could not prove prejudice where the tape was merely cumulative to Detective Donald's testimony; where Detective Donald could have testified about his contemporaneous observation of the drug transaction based upon watching the television screen as the transaction unfolded (thus, the State's case did not fail if the tape were excluded); and where the tape did not clearly show the drugs, therefore counsel was able to use this to the Applicant's advantage in his cross-examination and his closing argument. (See Trial Transcript, pages 75-80; page 103; pages 194-201). Arguably, the State contended, the "flaws" in the videotape made the State's case weaker and the defense case stronger; therefore, the admission

of the videotape did not prejudice the outcome of the Applicant's trial.

Set forth below are the relevant findings of fact and conclusions of law, as required by S.C. Code Ann. § 17-27-80 (2003):

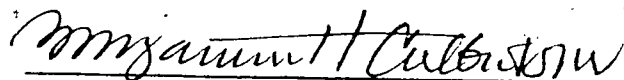
FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court rejects the State's arguments, and finds that trial counsel was ineffective for failing to contemporaneously object to admission of the videotape during trial. This Court finds that counsel should have objected to the videotape using the four reasons set forth in Judge Baxley's Order Vacating Conviction and Sentence. This Court finds that the Applicant was prejudiced by trial counsel's failure to object because it is apparent from the post-trial Order that had counsel contemporaneously objected, Judge Baxley would have excluded the videotape and dismissed the case.

CONCLUSION

Based upon the foregoing, this Court finds and concludes that the Applicant has met his burden of proof as to sole the claim raised; therefore, he is entitled to post-conviction relief. The Applicant's PCR Application is **GRANTED**. His convictions are hereby **VACATED** and the cases are **REMANDED** to the trial court so that the Applicant may receive a new trial on the charges of distribution of crack cocaine (2004-GS-26-303) and possession with intent to distribute crack cocaine (2004-GS-26-1549).

AND, IT IS SO ORDERED this 23rd day of February, 2011.



Benjamin H. Culbertson
Presiding Judge
Fifteenth Judicial Circuit

Conway, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

Jeremiah Dicapua,

Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 26684
Heard February 3, 2009 – Filed July 13, 2009

AFFIRMED

Appellate Defender Robert M. Pachak, of South Carolina
Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster; Chief Deputy
Attorney General John W. McIntosh; Assistant Deputy Attorney
General Salley W. Elliott; Senior Assistant Attorney General
Norman Mark Rapoport, all of Columbia; and Solicitor John
Gregory Hembree, of Conway, for Respondent.

JUSTICE KITTREDGE: As a result of a videotaped sting operation, Jeremiah Dicapua was convicted and sentenced for distribution of crack cocaine and possession with intent to distribute crack cocaine. On the day following sentencing, the trial court *sua sponte* vacated the jury's verdict and ordered a new trial on the basis of perceived weaknesses in the videotape evidence, even though the tape was admitted without objection. Moreover, the trial court ruled that the videotape could not be admitted in evidence in the new trial. The State appealed, contending the *sua sponte* grant of a new trial constituted legal error warranting reversal.

Because Dicapua waived any direct challenge to the videotape by consenting to its admission, the court of appeals reversed the trial court's *sua sponte*, new trial order and reinstated the sentence. *State v. Dicapua*, 373 S.C. 452, 455-56, 646 S.E.2d 150, 152 (Ct. App. 2007). We granted a writ of certiorari. We affirm.

I.

The Horry County Police Department and the Myrtle Beach Police Department conducted a drug sting in a hotel. One hotel room was a control room where the officers observed the suspects and the informant. The adjoining hotel room served as the transaction room, which was set up with separate video and audio recording devices. On the day in question, the audio equipment malfunctioned.

The hotel room was initially searched by the police for drugs, and the informant was searched as well. The informant was given one hundred and eighty dollars in marked money by the police. The informant and another woman in the hotel room were arrested earlier that day for prostitution.

The informant briefly left the room and reentered with Dicapua. The informant counted out the money and placed it on the bed. Next, Dicapua counted the money and appeared to drop something on the bed. The informant then placed an unknown substance in her pocket. After the police entered the transaction room, the police searched Dicapua and found drugs. The police also located drugs on the informant for a total of 2.4 grams of

crack cocaine. Dicapua admitted the informant gave him one hundred and sixty dollars.

Dicapua was tried for and convicted of distribution of crack cocaine and possession with intent to distribute crack cocaine. At trial, Dicapua did not object to the admission of the videotape. Following the State's case, Dicapua made multiple motions: for a dismissal and a mistrial due to the lack of a link between the drugs found on the informant and Dicapua, for a directed verdict due to the "totality" of the State's case, and for dismissal due to entrapment. Notably, these motions did not refer to the admission of the videotape.

Following the jury's guilty verdicts, Dicapua moved to set aside the verdict as there was no evidence Dicapua intended to sell additional drugs and "the objections and request going back to the [informant], the chain, and all those things." Again, these motions did not implicate the admission of the videotape. The trial court sentenced Dicapua to thirty months for both charges to run concurrently.

The next day the trial court *sua sponte* ordered a new trial because of concerns about the videotape. The trial court additionally ordered, "it is the decision of this Court to suppress the introduction of the videotape in any new trial to be had on the charges."¹ The State served its notice of appeal. The trial court subsequently held a hearing to supplement the record and further explain its decision.²

The State appealed the trial court's *sua sponte* order. The court of appeals reversed. *State v. Dicapua*, 373 S.C. 452, 456, 646 S.E.2d 150, 152 (Ct. App. 2007). The court of appeals majority found an abuse of discretion by the trial court's granting of a new trial for a waived issue, the admission of the videotape. *Id.* at 455, 646 S.E.2d at 152. One panel member of the court

¹ Counsel for Dicapua conceded at oral argument that it was error to preemptively suppress the videotape at a new trial.

² Because the filing of the appeal deprived the trial court of jurisdiction, we may not consider the trial court's post-appeal explanation.

of appeals concurred, addressing the matter of appealability. *Id.* at 457, 646 S.E.2d at 153. This Court granted Dicapua's petition for certiorari.

II.

We first address the threshold matter of appealability. "The State may only appeal a new trial order if, in granting it, the trial judge committed an error of law." *State v. Johnson*, 376 S.C. 8, 10, 654 S.E.2d 835, 836 (2007). To determine if an error of law occurred, it is necessary to examine the merits of the case. *Id.* at 11, 654 S.E.2d at 836. We find an error of law occurred when the trial court granted a new trial on the basis of evidence admitted with Dicapua's consent. Because of the error of law, the matter is appealable.

We now turn to the legal issue which resolves this case—may a trial court in a criminal case *sua sponte* order a new trial on a ground not raised by a party? We answered this question "no" in the context of a civil proceeding in *Southern Railway Co. v. Coltex, Inc.*, 285 S.C. 213, 214, 329 S.E.2d 736, 736 (1985) ("The sole issue is whether a trial judge *ex mero motu*³ can grant a new trial on a ground not raised by a party. We hold he cannot.")⁴ We hold the same result must follow in a criminal case.⁵ Moreover, to affirm the grant

³ *Ex mero motu* is a synonym for *sua sponte*. Black's Law Dictionary 596 (7th ed. 1999).

⁴ As in the case at hand, in *Southern Railway*, Southern waived the ground on which the trial court *sua sponte* granted a new trial. 285 S.C. at 215-16, 329 S.E.2d at 737-38. Specifically, the trial court in *Southern Railway* stated that "[t]his new trial is not granted on the grounds as contended by [Southern]" *Id.* at 215, 329 S.E.2d 737. In reversing the *sua sponte* grant of a new trial, we held "Southern waived the right to claim the omitted charge was error by not objecting to its omission at the trial level. Therefore, the omitted charge was not properly before the trial court, the Court of Appeals, or this Court." *Id.* at 216, 329 S.E.2d at 737-38.

⁵ We acknowledge Rule 59(d), SCRPC, allows a civil trial court to order a new trial within ten days of the entry of judgment for "any reason for which [the trial court] might have granted a new trial on motion of a party." We further acknowledge that when a civil trial court exercises its discretionary right to sit as a thirteenth juror and grants a new trial when the verdict is

of a new trial on a waived issue in a criminal case would lend this Court's imprimatur to a trial court's impromptu grant of post conviction relief.

By consenting to the admission of the videotape evidence, Dicapua waived any direct challenge to the admission of the evidence. Concomitantly, the trial court lacked authority to grant relief on the basis of a ground not raised by Dicapua. We hold the granting of a new trial *sua sponte* on a ground waived by a party is an error of law.

AFFIRMED.

TOAL, C.J., WALLER, PLEICONES and BEATTY, JJ., concur.

contrary to the evidence, its decision will be upheld if there is any evidence to support it. *Southern Railway*, 285 S.C. at 216, 329 S.E.2d at 738.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Jeremiah Dicapua, Respondent.

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 4239
Heard March 6, 2007 – Filed April 23, 2007

REVERSED

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Salley W. Elliott,
Senior Assistant Attorney General Norman Mark
Rapoport, all of Columbia; and Solicitor John
Gregory Hembree, of Conway, for Appellant.

Appellate Defender Eleanor Duffy Cleary, of
Columbia, for Respondent.

GOOLSBY, J.: The State appeals the trial court's *sua sponte* grant of a new trial to the respondent Jeremiah Dicapua following his convictions for distribution of crack cocaine and possession with intent to distribute crack cocaine. We reverse and reinstate Dicapua's sentence.

FACTS

On October 16, 2003, the Horry County Police Department and Myrtle Beach Police Department organized a sting operation in Myrtle Beach. They rented connecting rooms at a Red Roof Inn in Myrtle Beach. One room was to be used as a transaction room and the other as a control room where the officers, using surveillance equipment consisting of a hidden camera and a microphone, would monitor what occurred in the transaction room.

The police issued a female informant \$180 in "marked police buy money" with which to buy drugs from Dicapua, a person from whom the informant claimed to have purchased drugs on a prior occasion. The police had arrested the informant and another woman whom the record describes as a "cooperating witness" earlier that day, charging them with prostitution. Before Dicapua ever entered the transaction room, the police conducted a search of the room and of the informant and the other woman. Once the officers had everything in place for the sting operation, the informant left the room.

Detective Kent Donald of the Narcotics and Vice Division of the Horry County Police Department saw Dicapua and the informant enter the transaction room as he watched from the control room next door using the hidden camera. Once inside the transaction room, the informant gave Dicapua money and Dicapua tossed "something" onto the bed. Either the informant picked up whatever Dicapua dropped onto the bed or Dicapua handed the "something" to her. Regardless, the informant placed what Dicapua dropped or handed to her inside her pocket. The officers entered the room and arrested Dicapua as he prepared to leave.

The police immediately searched Dicapua and found 0.8 grams of crack cocaine and \$160 in marked bills on his person. The informant turned over two bags of crack cocaine. All total, the police recovered 2.4 grams of crack cocaine.

Before the start of trial, Dicapua sought to suppress the videotape because it did not have any audio. The audio surveillance system had failed to record what was said in the transaction room because of a machine malfunction. The trial court, however, refused to suppress the videotape.

Once the trial began, the State introduced the videotape through its first witness, Detective Donald. When the trial court asked what the defense's position was regarding the introduction of the videotape, Dicapua's counsel specifically stated, "We have *no objection*, Your Honor." (Emphasis added.) Whereupon, the trial court entered the videotape into evidence "[w]ithout objection."

After the jury found Dicapua guilty on both charges, he "renew[ed] all of [his] prior Motions . . . made during the course of the trial, as well, as at the end of the State's case." Dicapua also moved for a new trial "on the basis of what else was set out before the Court, the objections and request going back to the CI, the chain, and all those things." The trial court denied Dicapua's motions, ruling that the jury's verdict was supported by the evidence. The trial court sentenced Dicapua to two concurrent sentences of thirty months in prison and fined him \$25,000 on each offense.

The trial court vacated Dicapua's convictions and sentences the next day, acting *sua sponte*. The trial court focused upon the videotape, finding its introduction "inappropriate for multiple reasons."¹

¹ The trial court also suppressed the introduction of the videotape in any subsequent trial of Dicapua on the charges, an issue we need not address in view of our decision to reverse the grant of the new trial.

LAW/ANALYSIS

The State argues the trial court abused its discretion when it granted Dicapua a new trial. We agree.

It is well settled that the grant or refusal of a new trial is within the discretion of the trial judge and will not be disturbed on appeal absent a clear abuse of that discretion.² Where there is no evidence to support a conviction, an order granting a new trial should be upheld.³ “The State may appeal the grant of a new trial when it appears it is based ‘wholly upon an error of law.’”⁴

As the record reflects, Dicapua’s sole objection to the videotape came in the form of a motion *in limine* to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua’s counsel specifically stated he had “no objection.” We find this amounted to a waiver of any issue Dicapua had with the videotape.

In Martelly v. State, a case similar to the one here, the defendant’s counsel not only failed to object to the introduction of evidence that he had previously moved to suppress through a pretrial motion, but affirmatively stated that he had no objection to its introduction.⁵ The Court of Appeals of Maryland, in finding the defendant waived his objection, held:

² State v. Prince, 316 S.C. 57, 63, 447 S.E.2d 177, 181 (1993).

³ State v. Smith, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993).

⁴ State v. Johnson, 363 S.C. 184, 189, 610 S.E.2d 305, 307 (Ct. App. 2005) (emphasis in original) (quoting State v. Dasher, 278 S.C. 395, 400, 297 S.E.2d 414, 417 (1982)).

⁵ Martelly v. State, 187 A.2d 105, 107 (Md. 1963).

[A]ppellant's express waiver of objection to the admission of the evidence now in question was tantamount to a withdrawal of his previous motion to suppress, and . . . consequently the issue of admissibility is not now before us. To hold otherwise would be to say that a defendant could not change his mind and affirmatively consent to the admission of the evidence at trial. It is settled law that when an accused is present in court and represented by competent counsel, he is bound by the actions and concessions of counsel, and that even constitutional rights may be waived in the course of a trial.⁶

REVERSED.

⁶ Id. at 108. See Southern Ry. Co. v. Coltex, Inc., 285 S.C. 213, 215-16, 329 S.E.2d 736, 737-38 (1985) (reversing a trial court's grant of a new trial *ex mero motu* on the ground that the party's waiver of the issue upon which the trial court granted a new trial meant the issue "was not properly before the trial court, the Court of Appeals, or this Court" and holding that the grant of a new trial on a waived issue constitutes an error of law requiring reversal); see also State v. Patino, 12 S.W.3d 733, 740 (Mo. Ct. App. 1999) (ruling that the defendant, by announcing he had no objection to the introduction of evidence he previously attempted to suppress in a pretrial motion, affirmatively waived his objection); State v. Scott, 858 S.W.2d 282, 285 (Mo. Ct. App. 1993) (holding that counsel, by affirmatively stating he had no objection to the admission of evidence, as compared to merely failing to object, waived his prior objection); Dean v. State, 749 S.W.2d 80, 83 (Tex. Crim. App. 1988) (ruling an issue was not preserved for appellate review where defense counsel, after losing at the suppression hearing, expressly stated that defense had no objection to the admission of fingerprint evidence when the evidence was later offered at trial); cf. State v. Adkisson, 899 S.W.2d 626, 635 (Tenn. Crim. App. 1994) ("When . . . a party abandons the ground asserted when the objection was made and asserts completely different grounds in the motion for a new trial . . . the party waives the issue.")

CURETON, A.J., concurs.

STILWELL, J., concurring in result only in a separate opinion.

STILWELL, J., (concurring in result): I concur with the majority in its decision to reverse the grant of a new trial, but write separately to explain why I would reverse on a different ground.

Dicapua raises the issue of the ability of the State to appeal the grant of a new trial. This is a threshold issue not addressed in the majority opinion. The State's ability to appeal the grant of a new trial is closely circumscribed by precedent. If the grant of a new trial by the trial court is based on the insufficiency of the evidence, the State has no right to appeal. State v. Lynn, 120 S.C. 258, 261, 113 S.E. 74, 75 (1922). On the other hand, the State may appeal the grant of a new trial when it appears it is based wholly upon an error of law. State v. DesChamps, 126 S.C. 416, 418, 120 S.E. 491, 492 (1923).

Although the grant or refusal of a new trial motion lies within the discretion of the trial court, "[a]n abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." State v. Walker, 366 S.C. 643, 656, 623 S.E.2d 122, 129 (Ct. App. 2005).

In this instance, I agree the State may appeal because the ruling of the trial court that the videotape is not admissible is, in my view, an error of law. The flaws in the videotape go to the weight of the evidence and not to its admissibility. The trial court's grant of a new trial was premised solely on the finding that the videotape was inadmissible. I believe that ruling to be an error of law that allows the appeal, and its prejudicial nature compels the reversal.

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF HORRY) Indictment Numbers 2004-GS-26-303,
2004-GS-26-1549

State of South Carolina,)

ORDER VACATING CONVICTION
AND SENTENCE

v.)

Jeremiah DiCapua,)

Defendant.)

2008 MAR 20 AM 9:04
CLERK OF COURT
HORRY COUNTY
Melanie H...
CERTIFIED COPY

Jeremiah DiCapua was convicted by jury trial of Distribution of Crack Cocaine and Possession With Intent to Distribute Crack Cocaine in Horry County on January 13, 2005. He was sentenced by this Court to serve thirty (30) months imprisonment and pay a \$25,000 fine on each of these convictions, to be served concurrently, during a sentencing hearing held on January 13, 2005.

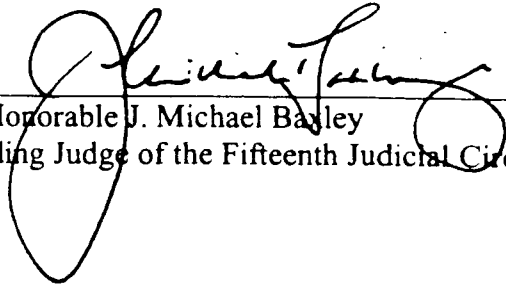
The primary evidence upon which the defendant was convicted was a videotape of an alleged controlled buy of crack cocaine. The tape shows the defendant enter a hotel room in which a female informant and an accompanying female witness, both of whom had been arrested for prostitution earlier in the day, allegedly purchase \$160.00 worth of crack cocaine from the defendant. The Court did not view the tape prior to trial and admitted the tape into evidence. Upon further reflection, this Court finds that the introduction of the videotape was inappropriate for multiple reasons. First, the audio portion of the taping equipment malfunctioned and there was no audio. Second, the video recorded the defendant and the informant from a poor angle and it cannot be said with certainty what transaction, if any, occurred between the two, a situation that renders the missing audio most important. Third, the informant was allowed to make telephone calls from the hotel room and it is not known to whom these calls were placed. Further, in something never seen before by this Court, the informant was allowed to leave the hotel room unaccompanied by law enforcement during the sting operation and was completely off camera for a duration of time. Thus, this Court cannot with certainty affirm that the crack cocaine discovered at the scene was the property of the defendant, for neither the informant nor the female witness testified at trial. In light of these facts, this Court finds that the introduction of the videotape and the admission of Detective Kent Donald's testimony as to what was depicted on the videotape as it was played for the jury was inappropriate evidence.

Therefore, this Court, *sua sponte*, vacates the jury conviction on the above two charges. This decision does not dismiss the charges against the defendant, but it is the decision of this Court to suppress the introduction of the videotape in any new trial to be had on the charges. This decision does not affect the Court's earlier decision to lift Mr. DiCapua's bench warrant on January 13, 2005, and this Court hereby reinstates and imposes a ten thousand dollar (\$10,000) surety bond upon the defendant, with the further requirement that if he is able to meet bond, the defendant shall not leave Horry County

JMB
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without the written permission of assistant solicitor Donna E. Elder until such time as these charges are concluded.

IT IS SO ORDERED.



The Honorable J. Michael Baxley
Presiding Judge of the Fifteenth Judicial Circuit

Hartsville, South Carolina
January 14, 2005

The State of South Carolina

In the Court of Appeals

Appeal from the Administrative Law Court

S. Phillip Lenski, Administrative Law Judge

Case No. 13-ALJ-15-0025-AP

Jeremiah DiCapua, #105096, Appellant,

v.

South Carolina Department of
Probation, Parole and Pardon Services, Respondent.

Notice of Appeal

Jeremiah DiCapua, #105096, appeals the decision of the Honorable
S. Phillip Lenski, dated April 16, 2014. Appellant received a copy of
this decision on April 21, 2014.

Dated: May 19, 2014

Jeremiah DiCapua
Jeremiah DiCapua, #105096, ProSe
McCormick CI: F4B-214
386 Redemption Way
McCormick, SC 29849

Other Counsel of Record:
Tommy Evens, Jr., Esq.
S.C. Dept. Prob., Par. & Pdn. Svs.
P.O. Box 50666
Columbia, SC 29250
Attorney for Respondent

State of South Carolina
Department of Probation, Parole and Pardon Services

NIKKI R. HALEY
Governor



KELA E. THOMAS
Director

2221 DEVINE STREET, SUITE 600
POST OFFICE BOX 50666
COLUMBIA, SOUTH CAROLINA 29250
Telephone: (803) 734-9220
Facsimile: (803) 734-9440
www.state.sc.us/ppp

June 7, 2013

Attorney Tommy Thomas
Attorney And Counselor At Law
P.O. Box 88
Irmo, SC 29063

RE: [REDACTED]
Jeremiah Dicapua(SCDC#105096)

Dear Attorney Thomas:

I am writing this letter on behalf of the S.C. Board of Probation, Parole and Pardon.

The Parole Board heard your request for a rehearing on June 5, 2013. After thorough consideration, and after having reexamined the parole files, the Parole Board decided that the reasons stated in your request did not affect the decision of the Parole Board, and would not affect the decision of the Parole Board if they were to rehear your case. Your request for a rehearing was denied by the Parole Board. The Board's decision is final.

Sincerely,

A handwritten signature in cursive script that reads "Robert Mitchell".

Robert Mitchell
Deputy Director of Parole Board Support

RM/eaw

TO:

State of South Carolina
Department of Probation, Parole and Pardon Services
2221 Devine Street, Suite 600
Post Office Box 50666
Columbia, SC 29250

P E T I T I O N F O R R E H E A R I N G

FROM:

Jeremiah DiCapua, #105096
McCormick Correctional Institution
386 Redemption Way
McCormick, South Carolina 29899

May 3, 2013

STATEMENT OF CASE

Petitioner is currently confined to the South Carolina Department of Corrections pursuant to a Parole Revocation hearing dated July 25, 2007. Petitioner asserts that the following facts, chain of events, are relevant to this Petition for Rehearing.

- 1... In August of 2000, Petitioner was Paroled from the South Carolina Department of Corrections.
- 2... On October 16, 2003, Petitioner was arrested in Horry County, South Carolina for Distribution and Possession with Intent to Distribute Crack Cocaine.
- 3... On October 13, 2004, Local Authorities, Horry County Probation & Parole, sought revocation of Petitioner's Parole for the arrest listed in #2. **The finding of the State Parole Board at that hearing was to allow Petitioner to Continue on Parole unless convicted.** (See Exhibit A).
- 4... On January 11, 2005, Petitioner was found Guilty of the Charges listed in #2.
- 5... On January 13, 2005, Petitioner was Sentenced to 30 months incarceration on each Conviction (listed in #2), to run concurrent. (See Exhibit B).
- 6... On January 14, 2005, **Petitioner's Convictions & Sentences were VACATED (sua sponte) by the trial Judge. Petitioner was again allowed to Continue on Parole.** (See Exhibit C).
- 7... On January 24, 2005, the State appealed Judge Baxley's Order Vacating Petitioner's Conviction and Sentence.
- 8... On April 23, 2007, the South Carolina Court of Appeals Reversed Judge Baxley's Order and reinstated Petitioner's convictions. (See Exhibit D).
- 9... On July 25, 2007, Petitioner's Parole was Revoked because of the Court of Appeals' reinstatement of Petitioner's Convictions & Sentences (#2). (See Exhibit E).
- 10... On February 23, 2011, **Petitioner's Convictions & Sentences were again VACATED.** (See Exhibit F).
- 11... On March 16, 2011, at Petitioner's next scheduled Parole hearing after his Convictions were again Vacated, **Petitioner's request for Parole to be reinstated was Denied.** (See Exhibit G).
- 12... On April 3, 2013, at Petitioner's Subsequent Parole hearing, **Petitioner's request for his Parole to be reinstated was Again Denied.** (See Exhibit H).

DISCUSSION

Jeremiah DiCapua, #105096, Pro Se, hereinafter referred to as **Petitioner**, respectfully Petitions the South Carolina Parole Board for a Rehearing from the denial of his request for Reinstatement of Parole on April 3, 2013.

Petitioner herein respectfully incorporates for consideration a Statement of Case and Facts with supporting Legal Documentation that were **NOT** for some reason viewable for the Parole Board members to adjudicate a decision on the entire Facts of the Case.

FACTS

On October 13, 2004, Petitioner was brought before the South Carolina Parole Board by Local Authorities (Horry County Probation & Parole) seeking revocation of Petitioner's Parole for the October 16, 2003 arrest for Possession with Intent and Distribution of Cocaine.

The findings of the Parole Board that day were **to allow Petitioner to Continue on Parole** for the above mentioned arrest, and the Board's decision that day likewise **forgave** any and all prior charges that may have been considered a parole violation and any and all charges against Petitioner that were complained of in Warrant# W-26-03-515. (See Statement of Case, #3 & Ex. A).

In support of the above Statement of Facts, Petitioner respectfully submits this assertion with Documentation Substantiating...

- 1... That on January 11, 2005... Petitioner was found guilty of the above charges, Possession with Intent & Distribution, for which he was previously allowed **to Continue on Parole**
- 2... That on January 13, 2005... Petitioner was sentenced to 30 months incarceration on each of the convictions (to run concurrent). (See Statement of Case, #5 & Ex. B).
- 3... That on January 14, 2005, Petitioner's Convictions & Sentences were **Vacated** by the trial Judge and Petitioner was **released** and **again allowed to Continue on Parole**. (See Statement of Case, #6 & Ex. C).

Petitioner asserts that the above Chain of Facts / Events dating from October 13, 2004 thru January 14, 2005, defines there was an Agreement between Parties Not to revoke Petitioner's Parole unless convicted.

Supporting Facts:

- When... After being arrested (2003) Petitioner was allowed to Continue on Parole (re: revocation hearing, 2004);
- When... Thereafter, Petitioner was convicted of the charges that allowed him to Continue on Parole (2005);
- When... Thereafter, Petitioner's Convictions & Sentences were Vacated and Petitioner was again allowed to Continue on Parole (2005).

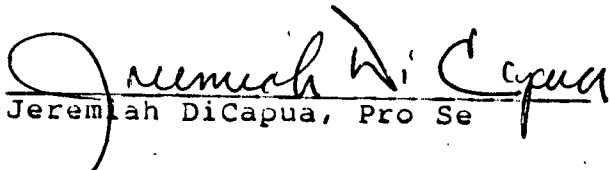
Petitioner remained on Parole until April 23, 2007 when the South Carolina Court of Appeals Reversed Judge Bailey's Order Vacating Petitioner's Conviction & Sentence. (See Ex. D). Subsequently, on July 25, 2007, Petitioner's Parole was revoked. (See Ex. E).

In an effort to regain his freedom and profess his innocence through the legal system, Petitioner's Convictions & Sentences were again Vacated on February 23, 2011.

Since February 23, 2011, now well over two (2) years, Petitioner has again been deemed Legally Innocent and has NOT Violated Laws of the Land since being allowed to Continue on Parole in 2004 (re: revocation hearing, Ex. A).

Petitioner respectfully now further submits the enclosed Documents, marked Exhibits A,B,C,D,E & F, that were NOT and should have been available for the Parole Board's consideration of Petitioner's request for Parole reinstatement and Honorably asks for a hearing on the entire merits of Petitioner's case.

Whereas on the 3rd day of May, 2013,
Petitioner prays for a Rehearing.


Jeremiah DiCapua, Pro Se

TO:

State of South Carolina
Department of Probation, Parole and Pardon Services
2221 Devine Street, Suite 600
Post Office Box 50666
Columbia, SC 29250

DOCUMENTS SUPPORTING
PETITION FOR REHEARING

FROM:

Jeremiah DiCapua, #105096
McCormick Correctional Institution
386 Redemption Way
McCormick, South Carolina 29899

May 3, 2013

State of South Carolina
Department of Probation, Parole and Pardon Services

NIKKI R. HALEY
Governor



KELA E. THOMAS
Director

2221 DEVINE STREET, SUITE 600
POST OFFICE BOX 50666
COLUMBIA, SOUTH CAROLINA 29250
Telephone: (803) 734-9220
Facsimile: (803) 734-9440
www.dppps.sc.gov/

June 28, 2012

Jeremiah DiCapua, 105096
McCormick CI
386 Redemption Way
McCormick, SC 29899

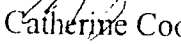
Dear Mr. DiCapua:

I was forwarded your letter in which you were inquiring about a copy of a parole continuation order from your hearing dated October 13, 2004.

After review of your closed case file information, the document which you are requesting was unable to be located. However, hearing roster records do indicate that your case was heard related to violations charged in warrant # W-26-03-515 dated October 23, 2003 and that you were continued on parole at that time.

I hope this information is helpful and apologize for any inconvenience.

Sincerely,


Catherine Cooper
Director, Parole Board Support

DOCUMENT SUPPORTING EXHIBIT "A"
Tommy A. Thomas

ATTORNEY AND COUNSELOR AT LAW

**TELEPHONE:
(803) 732-5507
(803) 732-5508**

**FACSIMILE:
(803) 781-4226**

**HARRINGTON BUILDING
7588 WOODROW STREET
IRMO, SOUTH CAROLINA 29063**

**PLEASE REPLY TO:
PO BOX 88
IRMO, SC 29063**

**INMATE LINE
(803) 732-6542**

March 6, 2013

Ms. Gwendolyn Bright
SC Dept. of Probation, Parole and Pardon Services
P.O. Box 50666
Columbia, S.C. 29250

Re: Jeremiah DiCapua #105096

Dear Gwen:

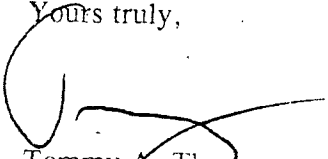
I am representing Mr. Jeremiah DiCapua. Mr. DiCapua comes up for another parole hearing on April 3, 2013. He recently wrote me concerning a letter he received from Heyward Hinton dated April 20, 2012 and a letter from Catherine Cooper dated June 28, 2012, copies of which are enclosed.

Mr. DiCapua was paroled on August 9, 2000. He was later revoked on July 27, 2007. His revocation was based on a conviction for additional charges. His conviction on the additional charges has been overturned. Mr. DiCapua believes that the reason for his revocation no longer exists. He further believes that Ms. Cooper's letter saying he was continued on parole is evidence that he was only revoked after his conviction.

I believe that Mr. DiCapua was concerned that the Board may not realize that the reason for his revocation in 2007 is no longer viable, as a result of the case being overturned.

I hope this letter finds you well. Should you have any questions, or need any additional information, please do not hesitate to contact me.

Yours truly,


Tommy A. Thomas,
Attorney at Law

TAT/jem

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF HORRY)

Indictment Numbers 2004-GS-26-303,
2004-GS-26-1549

State of South Carolina,)

v.)

~~ORDER VACATING CONVICTION
AND SENTENCE~~

Jeremiah DiCapua,)

Defendant.)

Jeremiah DiCapua was convicted by jury trial of Distribution of Crack Cocaine and Possession With Intent to Distribute Crack Cocaine in Horry County on January 11, 2005. He was sentenced by this Court to serve thirty (30) months imprisonment and pay a \$25,000 fine on each of these convictions, to be served concurrently, during a sentencing hearing held on January 13, 2005.

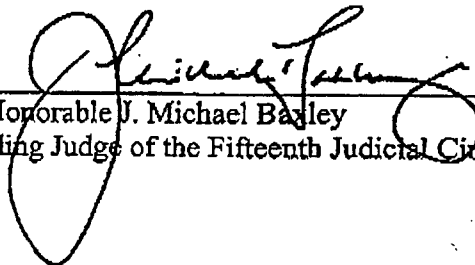
The primary evidence upon which the defendant was convicted was a videotape of an alleged controlled buy of crack cocaine. The tape shows the defendant enter a hotel room in which a female informant and an accompanying female witness, both of whom had been arrested for prostitution earlier in the day, allegedly purchase \$160.00 worth of crack cocaine from the defendant. The Court did not view the tape prior to trial and admitted the tape into evidence. Upon further reflection, this Court finds that the introduction of the videotape was inappropriate for multiple reasons. First, the audio portion of the taping equipment malfunctioned and there was no audio. Second, the video recorded the defendant and the informant from a poor angle and it cannot be said with certainty what transaction, if any, occurred between the two, a situation that renders the missing audio most important. Third, the informant was allowed to make telephone calls from the hotel room and it is not known to whom these calls were placed. Further, in something never seen before by this Court, the informant was allowed to leave the hotel room unaccompanied by law enforcement during the sting operation and was completely off camera for a duration of time. Thus, this Court cannot with certainty affirm that the crack cocaine discovered at the scene was the property of the defendant, for neither the informant nor the female witness testified at trial. In light of these facts, this Court finds that the introduction of the videotape and the admission of Detective Kent Donald's testimony as to what was depicted on the videotape as it was played for the jury was inappropriate evidence.

Therefore, this Court, *sua sponte*, vacates the jury conviction on the above two charges. This decision does not dismiss the charges against the defendant, but it is the decision of this Court to suppress the introduction of the videotape in any new trial to be had on the charges. This decision does not affect the Court's earlier decision to lift Mr. DiCapua's bench warrant on January 13, 2005, and this Court hereby reinstates and imposes a ten thousand dollar (\$10,000) surety bond upon the defendant, with the further requirement that if he is able to meet bond, the defendant shall not leave Horry County

JMB
1

without the written permission of assistant solicitor Donna E. Elder until such time as these charges are concluded.

IT IS SO ORDERED.



The Honorable J. Michael Bayley
Presiding Judge of the Fifteenth Judicial Circuit

Hartsville, South Carolina
January 14, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Jeremiah Dicapua, Respondent.

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 4239
Heard March 6, 2007 – Filed April 23, 2007

REVERSED

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Salley W.
Elliott, Senior Assistant Attorney General Norman
Mark Rapoport, all of Columbia; and Solicitor
John Gregory Hembree, of Conway, for
Appellant.

Appellate Defender Eleanor Duffy Cleary, of
Columbia, for Respondent.

GOOLSBY, J.: The State appeals the trial court's *sua sponte* grant of a new trial to the respondent Jeremiah Dicapua following his convictions for distribution of crack cocaine and possession with intent to distribute crack cocaine. We reverse and reinstate Dicapua's sentence.

FACTS

On October 16, 2003, the Horry County Police Department and Myrtle Beach Police Department organized a sting operation in Myrtle Beach. They rented connecting rooms at a Red Roof Inn in Myrtle Beach. One room was to be used as a transaction room and the other as a control room where the officers, using surveillance equipment consisting of a hidden camera and a microphone, would monitor what occurred in the transaction room.

The police issued a female informant \$180 in "marked police buy money" with which to buy

South Carolina

-vs-

Jeremiah Dicapua

ORDER

Whereas the above named Parolee has been charged with violating the conditions of parole ordered on 8-31-00 by the South Carolina Board of Probation, Parole and Pardon Services, as set forth in the warrant or citation filed herein.

After hearing the evidence and being duly advised, we find the Parolee has violated one or more of the conditions of supervision as set forth in the affidavit filed herein and dated 4-26-07 a copy of which is incorporated by reference.

The South Carolina Board of Probation, Parole and Pardon Services now finds that the Parolee has violated the conditions of Parole number:

- 1
- 2
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- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- Special Conditions
- Additional Conditions which were agreed to by the Parolee on the above date
- 16

In consequence whereof, the South Carolina Board of Probation, Parole and Pardon Services hereby orders the parole revoked and orders the above named Parolee be returned to the South Carolina Department of Corrections to serve the remainder of the original sentence imposed by the Court, said sentence to run from the date of commitment until the final date of expiration of the maximum active sentence. The parole is revoked in the (Presence Absence Waiver) of the Parolee by the panel of the full Board.

IT IS ORDERED that the above named Parolee is continued on parole as provided for in the sentence identified above and subject to the conditions set forth therein and not inconsistent with the order. This action is taken in the (Absence Presence Waiver) of the Parolee.

Additional Conditions ordered by the Board.

Additional Conditions:

INMATE RECORDS OFFICE
2007 JUL 30 AM 11:27

Ordered this 25th, day of July, 2007.

Karen A. Walts
Chairman

C. David Beck
J.P. Hedger

This is to certify that I have read or have had read to me the Order and the Conditions set out therein. If I have been continued under supervision, I agree to comply with the above conditions and all conditions of my original parole order not inconsistent with this order.

Ordered this _____, day of _____

Agent

Parolee

STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)
 Jeremiah Dicapua, # 105096,)
)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT

2010-CP-26-2664

**ORDER GRANTING
 POST-CONVICTION RELIEF**

This matter came before the Court pursuant to an Application for post-conviction relief filed March 29, 2010. Respondent made a Return on April 28, 2010. An evidentiary hearing was convened at the Horry County Courthouse on February 1, 2011. The Applicant was present in court and represented by Paul Archer, Esquire. Respondent was represented by Christina J. Catoe, Assistant Attorney General.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to a parole violation from a Horry County murder conviction from 1980. The Applicant was initially released to parole in 2000. In January 2004, the Applicant was indicted in Horry County for distribution of crack cocaine (2004-GS-26-303). In April 2004, the Applicant was indicted for possession with intent to distribute crack cocaine (2004-GS-26-1549). He was represented by Thomas D. Guest, Jr., Esquire. On January 10-13, 2005, the Applicant was tried before the Honorable J. Michael Baxley. The jury found him guilty, and Judge Baxley sentenced the Applicant to thirty months (2 ½ years) on each charge, with the sentences to run concurrently. He also imposed a \$25,000.00 fine regarding each charge. The convictions at issue in this PCR were later considered a violation of the Applicant's parole for murder. Therefore, after he served his sentence on these charges, his parole was revoked on his previous murder charge.

of the videotape did not prejudice the outcome of the Applicant's trial.

Set forth below are the relevant findings of fact and conclusions of law, as required by S.C. Code Ann. § 17-27-80 (2003):

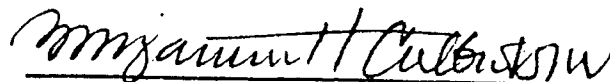
FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court rejects the State's arguments, and finds that trial counsel was ineffective for failing to contemporaneously object to admission of the videotape during trial. This Court finds that counsel should have objected to the videotape using the four reasons set forth in Judge Baxley's Order Vacating Conviction and Sentence. This Court finds that the Applicant was prejudiced by trial counsel's failure to object because it is apparent from the post-trial Order that had counsel contemporaneously objected, Judge Baxley would have excluded the videotape and dismissed the case.

CONCLUSION

Based upon the foregoing, this Court finds and concludes that the Applicant has met his burden of proof as to sole the claim raised; therefore, he is entitled to post-conviction relief. The Applicant's PCR Application is **GRANTED**. His convictions are hereby **VACATED** and the cases are **REMANDED** to the trial court so that the Applicant may receive a new trial on the charges of distribution of crack cocaine (2004-GS-26-303) and possession with intent to distribute crack cocaine (2004-GS-26-1549).

AND, IT IS SO ORDERED this 23rd day of February, 2011.



Benjamin H. Culbertson
Presiding Judge
Fifteenth Judicial Circuit

Conway, South Carolina

THE STATE OF SOUTH CAROLINA
DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES

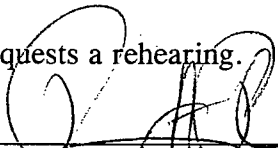
In the matter of)
)
Jeremiah DiCapua#105096,)
)
_____)

MOTION FOR REHEARING

Now comes Tommy A. Thomas, for Jeremiah DiCapua #105096, petitioning the Parole Board of and for the State of South Carolina for Rehearing. The Petitioner would show the following:

1. That Mr. DiCapua appeared before the Parole Board on April 3, 2013.
2. That Mr. DiCapua's family has requested a CD of the hearing and have placed it in the mail to me so that I can review it. Their interpretation of the CD is that the Board was confused about Mr. DiCapua's revocation and subsequent re-incarceration. Attached please find a letter that was mailed on March 6, 2013 where I tried to inform the Board of the events that have taken place regarding Mr. DiCapua's incarceration.
3. That the Petitioner wishes to preserve his request for rehearing within the thirty (30) day time limitation, but would further request that he be allowed to supplement this motion with the grounds for reconsideration upon receipt of the hearing CD.

WHEREFORE, the Petitioner respectfully requests a rehearing.

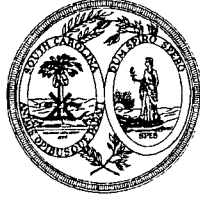


Tommy A. Thomas, Esq.
Attorney for Petitioner

April 29, 2013

State of South Carolina
Department of Probation, Parole and Pardon Services

NIKKI R. HALEY
Governor



KELA E. THOMAS
Director

2221 Devine Street, Suite 600
Post Office Box 50666
Columbia, South Carolina 29250
Telephone: (803) 734-9220
Fax: (803) 734-9440
www.dppps.sc.gov

April 3, 2013

Mr. Jeremiah Dicapua #00105096
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899

RE: NOTICE OF REJECTION

Dear Mr. Dicapua:

It is my responsibility to inform you, on behalf of the South Carolina Parole Board, that the Board has reached a decision regarding your parole hearing. The Board hereby makes the following CONCLUSION OF LAW:

After careful consideration of: (1) the characteristics of your current offense(s), prior offense(s), prior supervision history, prison disciplinary record, and/or prior criminal record, as described in the findings of fact below; (2) the factors published in Department Form 1212 (Criteria for Parole Consideration); and (3) the factors outlined in Section 24-21-640 of the South Carolina Code of Laws, the Parole Board concludes that parole must be denied.

You will be notified 30 days prior to your next scheduled parole consideration date.

FINDINGS OF FACT:

Nature And Seriousness Of Current Offense
Prior Criminal Record Indicates Poor Community Adjustment

Sincerely,

A handwritten signature in cursive script that reads 'Catherine Cooper'.

Catherine Cooper
Director of Parole Board Support

4/3/2013

State of South Carolina
Department of Probation, Parole and Pardon Services

NIKKI R. HALEY
Governor



KELA E. THOMAS
Director

2221 DEVINE STREET, SUITE 600
POST OFFICE BOX 50666
COLUMBIA, SOUTH CAROLINA 29250
Telephone: (803) 734-9220
Facsimile: (803) 734-9440
www.dppps.sc.gov/

June 28, 2012

Jeremiah DiCapua, 105096
McCormick CI
386 Redemption Way
McCormick, SC 29899


Dear Mr. DiCapua:

I was forwarded your letter in which you were inquiring about a copy of a parole continuation order from your hearing dated October 13, 2004.

After review of your closed case file information, the document which you are requesting was unable to be located. However, hearing roster records do indicate that your case was heard related to violations charged in warrant # W-26-03-515 dated October 23, 2003 and that you were continued on parole at that time.

I hope this information is helpful and apologize for any inconvenience.

Sincerely,


Catherine Cooper
Director, Parole Board Support

AFFIDAVIT

STATE OF SOUTH CAROLINA)

ARREST WARRANT # 1798828
Possession Crack Cocaine W.I.T.D.

HORRY COUNTY)

44-53-375

Now comes the affiant, Detective Kent Donald, after being duly sworn and deposes that:

There is probable cause to believe that the defendant did commit the offense set forth, and that such probable cause is based on the following facts:

That on October 16, 2003, Jeremiah Dicapua had in his actual possession, a quantity of crack cocaine while in the Myrtle Beach section of the county.

To wit: On October 16, 2003, Jeremiah Dicapua was arrested for distribution of crack cocaine during an undercover operation in Myrtle Beach. During a search incident to arrest, officers located a clear plastic bag containing an off-white rock-like substance believed to be crack cocaine in his right front pants pocket. The substance weighed approximately .8 grams and field-tested positive for cocaine attributes.

In this Jeremiah Dicapua did violate the South Carolina code of laws specifically 44-53-375.

SWORN TO AND SUBSCRIBED BEFORE ME
ON 10-17-03

SIGNATURE OF ISSUING JUDGE
[Signature]

SIGNATURE OF AFFIANT
[Signature]
CASE 0384257

CERTIFIED COPY
2007-AUG-28 AM 9:06
CLERK OF COURT
HORRY COUNTY

TRANSMITTED TO CLERK OF COURT
DEC - 5 2003

RECORDED - 4 PM 9:00
TELETYPE UNIT

AFFIDAVIT

STATE OF SOUTH CAROLINA)

ARREST WARRANT # 19-8890

Distribution Crack Cocaine

HORRY COUNTY)

44-53-375

Now comes the affiant, Detective Kent Donald, after being duly sworn and deposes that:

There is probable cause to believe that the defendant did commit the offense set forth, and that such probable cause is based on the following facts:

That on October 16, 2003, Jeremiah Dicapua sold a quantity of crack cocaine while in the Myrtle Beach section of the county.

To wit: On October ¹⁶, 2003, officers from the Horry County Police Department and Myrtle Beach Police Department conducted an undercover operation at the Red Roof Inn in Myrtle Beach. The room was fitted with electronic audio and video recording devices. Jeremiah Dicapua arrived at room 433 and met with the occupants and sold 1.6 grams of a rock-like substance he represented as crack cocaine for an agreed upon amount of money.

In this Jeremiah Dicapua did violate the South Carolina code of laws specifically 44-53-375.

SWORN TO AND SUBSCRIBED BEFORE ME

ON 10-17-03

SIGNATURE OF ISSUING JUDGE

[Signature]

SIGNATURE OF AFFIANT

[Signature: Kent Donald]

CASE 0384257

Jeremiah Dicapua
CLERK OF COURT
HORRY COUNTY

2007 AUG 28 AM 9:06

REGISTERED COPY

TRANSFERRED
TO CLERK

DEC - 5 2003

CLERK OF COURT
2003 DEC - 5 PM 2:00

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Phillip Lenski, Administrative Law Judge
13-ALJ-15-0025

Case No.: 14-001097

JEREMIAH DICAPUA APPELLANT,

v.

S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES RESPONDENT.

CERTIFICATE OF COUNSEL

RECEIVED
SEP 16 2014
SC Court of Appeals

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Jeremiah DiCapua
Jeremiah DiCapua, #105096
Appellant, pro se
McCormick Correctional Inst.
386 Redemption Way
McCormick, South Carolina 29899

12 day of September, 2014