

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable James R. Barber, III, Circuit Court Judge

Case No. 2012-CP-39-0993

RECEIVED

NOV - 7 2014

S.C. Supreme Court

Marshall Heath Collins, Respondent,

v.

State of South Carolina, Petitioner.

NOTICE OF APPEAL


The State of South Carolina appeals the Honorable James R. Barber, III's order dated October 16, 2014 and filed October 23, 2014 granting post-conviction relief to the Respondent. The State received notice of entry of the order on October 28, 2014. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

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By: 
Attorneys for the Petitioner

Columbia, South Carolina

November 7, 2014

Other counsel of record:

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PROOF OF SERVICE

I, Karen C. Ratigan, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

John Mussetto, Esquire
406 Pettigru Street
Greenville, SC 29601

I further certify that all parties required by Rule to be served have been served this 7th day of November, 2014.



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2014 OCT 23 PM 2 35

STATE OF SOUTH CAROLINA)
COUNTY OF PICKENS)
MARSHALL HEATH COLLINS)
S.C.D.C. NO. 322086,)
Applicant,)
v.)
THE STATE OF SOUTH CAROLINA)
Respondent.)

IN THE COURT OF COMMON PLEAS
C.A. NO. 2012-CP-39-0993

**ORDER GRANTING POST-CONVICTION
RELIEF**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by the Applicant on July 6, 2012. A hearing in this case was held on August 25, 2014, at which Karen C. Ratigan, Esquire, appeared on behalf of the Respondent and John M. Mussetto, Esquire, appeared for the Applicant. The Applicant testified on his own behalf, as did his trial counsel, John DeJong, Esquire. The Court had before it the trial transcript, the application for PCR, and the Respondent's return.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. The Applicant was indicted at the June 2010 term of the Pickens County Grand Jury for trafficking methamphetamine (2010-GS-39-0937) and at the November 2010 term for possession of a weapon during commission of a violent crime (2010-GS-39-2142). He was represented by John W. DeJong, Esquire.

After the State called the case to trial, the Applicant was found guilty.¹ On December 1, 2010, the Honorable G. Edward Welmaker sentenced the Applicant to concurrent terms of

¹ The State also brought to trial indictments for possession with intent to distribute Alprazolam and Oxycodone (2010-GS-39-0938, -0939). After the jury indicated they could not reach a verdict on those two charges, the parties agreed to accept the verdicts on the other two charges only.

twenty-five years for trafficking methamphetamine (10-28 grams), third offense and five years for possession of a weapon during commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. Dayne C. Phillips, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Collins, Op. No. 2012-UP-356 (S.C. Ct. App. filed June 13, 2012). The remittitur was sent on October 17, 2012.

ALLEGATIONS

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

1. Ineffective assistance of trial counsel:
 - a. Failed to contemporaneously object to the denial of the suppression motion.
 - b. Failed to request a curative instruction.
2. Ineffective assistance of appellate counsel;
 - a. Failed to raise the issue regarding the denial of the suppression motion.
3. Abuse of trial court's discretion.

At the hearing, the Applicant specifically alleged that Mr. DeJong was ineffective because Mr. DeJong (1) did not have enough time to prepare the Applicant for trial and failed to request a continuance to allow for more preparation time; (2) failed to provide Applicant with a plea offer that was made by the State; (3) failed to request a continuance after the Applicant was served with an indictment on the morning of the trial for the charge of possession of a weapon during commission of a violent crime; (4) never informed the Applicant of the consequences of an "enhanced" third drug conviction; (5) failed to inform the Court about the Applicant's prior business relationship with a juror; and (6) failed to sufficiently challenge the probable cause or the traffic stop at the suppression hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has also had the opportunity to observe each witness and to closely pass upon their credibility, and has weighed their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required under S.C. Code Ann. § 17-27-80 (2003).

In an action for PCR, the Applicant bears the burden of proving "his allegations by a preponderance of the evidence." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). For an applicant to prevail in his PCR action based on an allegation of ineffective assistance of counsel, he must show (1) his counsel failed to render reasonably effective assistance under prevailing professional norms and (2) his counsel's ineffective performance resulted in prejudice to him. *See Strickland v. Washington*, 466 U.S. 668, 1044 S.Ct. 2052 (1984); *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

To show prejudice, the Applicant must show that "but for counsel's errors, there is a reasonable probability the result would have been different." *Glaze v. State*, 366 S.C. 271, 621 S.E.2d 655, 656 (2005). This Court reviews applications must on a case-by-case basis to determine whether prejudice is shown. *Beckett v. State*, 278 S.C. 223, 294 S.E.2d 46 (1982).

The Applicant stated he was arrested in October 2009 and his first attorney was appointed in February 2010. The Applicant stated his first attorney "left" for reasons unknown to the Applicant. The Applicant was appointed another attorney in August or September 2010. The Applicant stated he first met with trial counsel in October 2010.

The Applicant stated they had a total of two meetings and two phone conversations before trial. The Applicant testified that during the first meeting, trial counsel only discussed the Applicant's contact information. The Applicant testified that during the second meeting, trial

counsel was busy taking other client's phone calls.

The Applicant stated at the second meeting in November 2010, trial counsel showed him a plea recommendation letter² that had been sent to his first attorney in May 2010 and stated he had never seen the letter. The plea offer expired on June 21, 2010. Trial counsel testified that he did not make any effort with the State to determine whether new negotiations could be reached. The Applicant also testified that the plea offer contained charges he was not aware of. Trial counsel testified that he subsequently learned that some of those charges were dismissed, other charges were plead to by other defendants and other charges were taken to trial.

The Applicant stated he learned of the trial date in mid-November and did not believe trial counsel was prepared for trial. The Applicant stated he was "directly given" the charge of possession of a weapon during commission of a violent crime on the morning of his trial and had no notice of this charge.

The Applicant stated he did not know the trafficking charge would be enhanced until after the jury returned a guilty verdict. The Applicant stated he told trial counsel that he had a legally binding agreement with one of the jurors. The Applicant stated trial counsel failed to sufficiently challenge the probable cause or the traffic stop at the suppression hearing.

Trial counsel confirmed he was not the first attorney to represent the Applicant and explained the first attorney had been a contract attorney and he was appointed after that attorney was relieved. Trial counsel also confirmed his first contact with the Applicant was on October 14, 2010. Trial counsel testified he did not have many meetings with the Applicant.

Trial counsel confirmed the Applicant was served with the weapons charge the morning of trial but that he was aware the solicitor was going to directly present the indictment.

This Court finds the Applicant has meet his burden of proving trial counsel should have

² Applicant's Exhibit 1.

requested a continuance based on the fact that the Applicant was served with an indictment for possession of a weapon during commission of a violent crime the morning of trial. Neither trial counsel nor the Applicant had sufficient time to prepare a defense for the new charge that carried significant and substantial penalties.

This Court finds the Applicant has demonstrated trial counsel should have requested a continuance in this case. Trial counsel only represented the Applicant for six weeks before the case went to trial. The Applicant faced a significant amount of time in prison and trial counsel only briefly met with the Applicant on two occasions prior to trial. This Court find the Applicant demonstrated he suffered prejudice from the lack of a continuance.

This Court finds the Applicant has meet his burden of proving trial counsel did not properly handle the issue of the expired plea recommendation. Applicant's Exhibit 1 indicates the assistant solicitor sent a plea recommendation to the Applicant's first attorney on May 26, 2010. Trial counsel testified he did not represent the Applicant until October 2010 and that the 15-year recommendation had expired on June 21, 2010. Trial counsel testified he was unsure that he discussed this expired offer with the assistant solicitor prior to trial. The offer had expired by the time trial counsel represented the Applicant. The Applicant testified that he was unaware of many of the charges listed on the plea offer. Additionally, other defendants plead guilty to some of the charges listed on the plea offer and other charges had been dismissed.

The Applicant has demonstrated trial counsel was deficient in this matter. The Applicant said he was unsure about many of the charges contained in the offer and that he "wanted more information" before he could have made an intelligent decision as to whether he should have accepted the offer.

This Court finds the Applicant has failed to meet his burden of proving trial counsel did

not advise him that the trafficking charge would be enhanced to a third offense. The Applicant stated trial counsel never advised him of such. Trial counsel testified, however, that he was certain they would have discussed the enhancement of this charge to a third offense. This Court finds trial counsel would have had the Applicant's prior criminal history, would have been well aware that the charge at issue was a third offense, and would have advised the Applicant.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the inclusion of a certain juror on his jury. While the Applicant stated he told trial counsel a juror had a "legally binding agreement" with him, trial counsel testified he did not recall this. This Court finds trial counsel's testimony is credible. This Court further finds the Applicant has failed to demonstrate he suffered any prejudice in this instance, as he failed to present any evidence that such an agreement even existed. See *Buller v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (holding a PCR applicant bears the burden of proving the allegations in their application); cf. *Palacio v. State*, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly argue his motion to suppress. The Applicant stated trial counsel failed to raise "points" during the suppression hearing to challenge the probable cause and vehicle stop. Trial counsel testified he would not have argued the motion to suppress any differently. This Court has examined the trial transcript and finds trial counsel made a proper motion to suppress and that a thorough hearing was held on the matter. This Court notes the Applicant failed to demonstrate any deficiency, as he did not articulate what points or issues or arguments trial counsel should

have made. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814. Further the Applicant has failed to demonstrate any additional argument on the suppression motion would have resulted in a different outcome. See Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) (“When the defendant claims that counsel’s failure to articulate a Fourth Amendment claim was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded.”) (citation omitted).

Accordingly, this Court finds the Applicant met the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant presented specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has proved the second prong of Strickland – that he was prejudiced by trial counsel’s performance. This Court concludes the Applicant has met his burden of proving counsel failed to render reasonably effective assistance.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

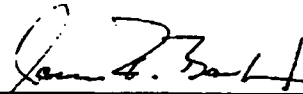
CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has established constitutional violations and/or deprivations before or during his trial and sentencing proceedings. Counsel was deficient and the Applicant was prejudiced by counsel’s representation. Therefore, this PCR application is granted.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be granted; and
2. That the Applicant be given a new trial.

AND IT IS SO ORDERED this 16th day of OCTOBER, 2014.



James R. Barber, III
Presiding Judge
Thirteenth Judicial Circuit



ALAN WILSON
ATTORNEY GENERAL

November 7, 2014

RECEIVED
NOV - 7 2014
S.C. Supreme Court

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

Re: Marshall Heath Collins, Respondent v. State, Petitioner
Case No. 2012-CP-39-0993

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. A letter ordering the PCR transcript from the court reporter.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General

cc: John Mussetto, Esquire
South Carolina Department of Corrections
Pickens County Clerk of Court
Solicitor Walt Wilkins
Office of Appellate Defense
Trisha Allen, Victim Services