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"Success is all that matters"

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November 5, 2014

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

RE: Azikiwe Archie #269814 v. State of South Carolina
Case No.: 2013-CP-22-572

Dear Clerk of Court:

Enclosed please find an original and one copy of a Notice of Appeal in the above referenced matter. If you would, please file the Notice of Appeal and return a clocked copy to me in the envelope provided.

Thank you for your assistance in this matter. If you have any questions or concerns, please feel free to contact my office.

With kind regards,


Tristan M. Shaffer

TMS/cdc

cc: Joshua L. Thomas, Esquire
Georgetown County Clerk of Court
Loreen French
Azikiwe Archie

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NOV 07 2014
S.C. SUPREME COURT

SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM GEORGETOWN COUNTY
In The Court of Common Pleas

Honorable Kristi Lea Harrington
Common Pleas Judge of the Fifteenth Judicial Circuit

Case No.: 2013-CP-22-572

Azikiwe Archie, #269814,

Petitioner,

v.


State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner appeals the Order of Dismissal, dated October 7, 2014 of the Honorable Kristi Lea Harrington, filed October 20, 2014 and received by Petitioner on October 27, 2014.

November 5, 2014


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NOV 07 2014

S.C. SUPREME COURT

Respondent's Attorney:
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SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM GEORGETOWN COUNTY
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Honorable Kristi Lea Harrington
Common Pleas Judge of the Fifteenth Judicial Circuit

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S.C. SUPREME COURT

CERTIFICATE OF SERVICE

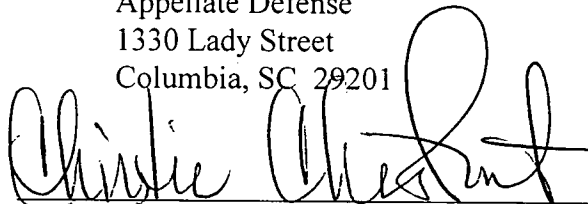
I, Christie Chestnut, do hereby certify that I am an employee of Axelrod & Associates, P.A., in Myrtle Beach, South Carolina, and that I have this date served the Petitioner's Notice of Appeal upon the Respondent, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

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Christie Chestnut
Paralegal to Tristan M. Shaffer

November 3, 2014
Myrtle Beach, South Carolina

Georgetown County Grand Jury indicted Applicant for distribution of cocaine base, third or subsequent offense (2007-GS-22-1204). Richard F. Colvin, Esquire (“trial counsel”), represented Applicant. On February 28, 2011, Applicant proceeded to trial before the Honorable Steven H. John and a jury. The jury found Applicant guilty as indicted. On March 1, 2011, Judge John sentenced Applicant to fifteen (15) years in the State Department of Corrections with credit for time served.

Applicant filed a timely notice of appeal. Breen R. Stevens, Esquire (“appellate counsel”), of the Office of Appellate Defense perfected the appeal with the filing of an *Anders*¹ brief. The South Carolina Court of Appeals dismissed Applicant’s appeal on February 20, 2013. *State v. Archie*, Op. No. 2013-UP-075 (S.C. Ct. App. filed February 20, 2013). The remittitur was returned to the circuit court on March 15, 2013.

II. ALLEGATIONS

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

1. “Ineffective Assistance of Counsel.”
 - a. “Whether counsel failure to timely object and motion to quash the indictment where the solicitor was the sole witness before the grand jury constituted ineffective assistance?”
 - b. “Whether trial counsel were ineffective in failing to communicate the State’s initial seven-year plea offer to applicant?”
2. “Ineffective Assistance of Appellate Counsel.”
 - a. “Was appellate counsel ineffective in failing to raise and brief the issue of the trial judge erred in admitting the crack cocaine into evidence because the State failed to prove a sufficient chain of custody?”

¹ *Anders v. California*, 386 U.S. 738 (1967).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

A. Summary of Testimony

Trial counsel testified he was a full time public defender for several years when he was appointed to Applicant's case. He recalled a significant delay between his appointment and trial based on Applicant's incarceration in another state. Trial counsel did not recall specifically how many meetings he had with Applicant, but felt he was prepared to go to trial. He did recall sharing the tape of the drug buy with applicant. Trial counsel testified the Solicitor initially offered to allow Applicant to enter a plea in exchange for a three (3) year sentence. Trial counsel testified Applicant was facing a significant sentence if convicted at trial, and advised Applicant to accept the plea. Trial counsel recalled Applicant rejecting the plea offer. He also recalled Applicant rejecting a second offer to enter a plea in exchange for a range of three (3) to seven (7) years. Plea counsel adamantly maintained he conveyed these plea offers to Applicant and Applicant made the decision to reject them. Trial counsel also testified he did not see anything wrong or out of the ordinary with the indictment. He testified the indictment lists the Georgetown County Sheriff's Office as the witness that presented the indictment to the grand jury.

Applicant testified he had two prior incarcerations for drug offenses. He recalled meeting with trial counsel quite a few times. Applicant testified he did not learn of the three year offer

until trial. He testified trial counsel rejected the plea offer without consulting with him. He further testified he never learned of an offer for a three (3) to seven (7) year range. Applicant testified he would have accepted either offer. However, on cross-examination, Applicant admitted he never approached trial counsel about attempting to negotiate a plea offer. He also admitted he never spoke up on the record about the three (3) year offer he learned of at trial.

Applicant testified he did not receive a complete copy of discovery until he arrived at the Department of Corrections. However, he recalled listening to the tape of the drug buy prior to trial. He testified trial counsel advised him they had a good case and could win at trial. Applicant admitted he never discussed any challenge to the indictment with trial counsel. However, he did testify he spoke with appellate counsel about challenging the ruling on the chain of custody objection. On cross-examination, Applicant admitted he raised the challenge to the chain of custody in his *pro se* response to the *Anders* brief.

B. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing *Griffin v. Martin*, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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." *Id.* at 442, 334 S.E.2d at 814 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Id.* (citing *Strickland*, 466 U.S. at

687; *Turner v. Bass*, 753 F.2d 342 (4th Cir. 1985); *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* (citing *Strickland*, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. *Id.* at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. *Id.* Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." *Id.* (citing *Strickland*, 466 U.S. at 688). Second, any 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." *Id.* at 117-18, 386 S.E.2d at 625.

1. Failure to Move to Quash the Indictment.

The Court finds Applicant failed to meet his burden of proving trial counsel ineffective for failing to move to quash the indictment because the Solicitor was the sole witness before the grand jury.² A presumption of regularity attaches to grand jury proceedings. *Pringle v. State*, 287 S.C. 409, 410-11, 339 S.E.2d 127, 128 (1986) (citing *State v. Britt*, 235 S.C. 395, 111 S.E.2d 669 (1959); *State v. Jones*, 211 S.C. 319, 45 S.E.2d 29 (1947); *State v. Waring*, 109 S.C. 52, 95 S.E. 143 (1918)). Absent evidence to the contrary, the Court must presume a properly returned indictment is valid. *State v. James*, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996) (citing

² See *State v. Anderson*, 312 S.C. 185, 187, 439 S.E.2d 835, 836 (1993) (explicitly prohibiting the solicitor from appearing as the sole witness before the grand jury).

Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995); *State v. Thompson*, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991). Applicant's indictment is valid on its face because it states all the necessary elements of the crime, the date of the offense, and the name of the accused. *Id.* at 75, 472 S.E.2d at 40. The indictment is stamped "True Billed" and signed by the foreman. *Pringle*, 287 S.C. at 410, 339 S.E.2d at 128. Applicant presented no evidence, other than his own testimony, to support his contention the Solicitor appeared before the grand jury. The indictment specifically indicates a representative from the Georgetown County Sheriff's Office appeared as the witness when Applicant's indictment was presented to the grand jury. The Court agrees with trial counsel's analysis that the indictment was not objectionable and finds trial counsel was not deficient. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992))). The Court also finds Applicant failed to demonstrate he was prejudiced by trial counsel's decision to not move to quash the indictment. *Palacio v. State*, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (no prejudice where allegation based on applicant's "mere speculation and conjecture" (citing *Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998))).

2. Failure to Convey Plea Offer.

The Court finds Applicant failed to carry his burden to prove trial counsel ineffective for failing to convey a seven (7) year plea offer. To be successful on an allegation of an un-conveyed plea offer, Applicant must prove: (1) trial counsel's failure to communicate the State's initial plea offer constituted deficient performance, and (2) Applicant was prejudiced by the deficient performance, or there was a reasonable probability that but for this deficient

performance, he would have accepted he original plea offer. *Davie v. State*, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009). Generally, failure to convey a plea offer constitutes deficient performance, although the existence of prejudice needs to be evaluated on a case-by-case basis. *Id.* at 613, 675 S.E.2d at 422. To show prejudice from a failure to convey a plea offer, Applicant must:

demonstrate a reasonable probability [he] would have accepted the earlier plea offer had they been afforded effective assistance of counsel. [He] must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Missouri v. Frye, ___ U.S. ___, 132 S.Ct. 1399, 1409 (2012).

The Court finds Applicant failed to demonstrate trial counsel was deficient in failing to convey the State's initial offers. Trial counsel testified he independently recalled receiving the three (3) year offer and conveying it to Applicant, who rejected it. He testified similarly regarding the offer for a three (3) to seven (7) year range. Regarding an alleged seven (7) year offer, Applicant presented no competent evidence the State made such an offer. The Court finds trial counsel relayed all plea offers to Applicant, and Applicant made the decision to decline them.

Assuming, *arguendo*, Applicant never received these offers, the Court finds Applicant failed to demonstrate any prejudice. Specifically, he has not demonstrated he would have accepted any plea had one been offered. *Frye*, 132 S.Ct. at 1409. Applicant testified he did not learn of any pleas until the day of trial. However, nowhere in the record does Applicant indicate he did not want to go to trial. Furthermore, he admitted at the evidentiary hearing that he did not

ask trial counsel to actively pursue a plea offer. Trial counsel also testified he advised Applicant to enter a plea to avoid a harsher sentence, and would not have gone to trial if Applicant had not requested a trial. The Court finds Applicant has not demonstrated a reasonable probability he would have entered into any plea agreement that the State offered. *Davie*, 381 S.C. at 608, 675 S.E.2d at 420. Applicant has not shown he was prejudiced by trial counsel's performance regarding plea negotiations.

C. Ineffective Assistance of Appellate Counsel.

A defendant is constitutionally entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing *Jones v. Barnes*, 463 U.S. 745 (1983)). Appellate counsel has a professional duty to choose among potential issues according to their merit. *Jones*, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. *Griffin v. Aiken*, 775 F.2d 1226, 1235 (4th Cir. 1985).

The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. *Thrift*, 302 S.C. at 537, 397 S.E.2d at 526; *Strickland*, 466 U.S. at 687. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). Furthermore, the applicant must prove prejudice by showing "there is a reasonable

probability he would have prevailed on appeal.” *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (citations omitted).

The Court finds Applicant failed to meet his burden of showing ineffective assistance of appellate counsel for failing to challenge Judge John’s admission of the drug evidence over trial counsel’s chain of custody objection. The Court notes Applicant failed to present any testimony from appellate counsel on this issue. The Court cannot speculate as to why certain issues were not briefed. *Cf. Dempsey v. State*, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, without a witness’s testimony, “any finding of prejudice is merely speculative”).

The Court also finds Applicant has not proven an irregularity in the Court of Appeals *Anders* procedure such that he would be entitled to a new trial. In *State v. McKennedy*, 348 S.C. 270, 559 S.E.2d 850 (2002), the South Carolina Supreme Court outlined the *Anders* procedure as follows:

“[A]ccording to *Anders*, the reviewing court is obligated to make a full examination of the proceedings on its own. After such an examination, if the reviewing court agrees with the attorney, it may dismiss the appeal or proceed to a decision on the merits. On the other hand, if the court disagrees with the attorney’s analysis of the appeal, it must afford the defendant ‘the assistance of counsel to argue the appeal.’ The purpose of filing a brief under *Anders* is to ensure the merits of the appeal are not overlooked. The court has to conclude independently, regardless of counsel’s conclusion, whether or not the appeal has merit before it can dismiss the appeal.”

McKennedy, 348 S.C. at 279, 559 S.E.2d at 855. A presumption of regularity attaches to judicial proceedings, and this presumption should extend to the Court of Appeal’s review under the *Anders* procedure. *Pringle*, 287 S.C. at 410-11, 339 S.E.2d at 128. Accordingly, this Court must presume the Court of Appeals reviewed the chain of custody issue before dismissing Applicant’s

appeal.³ *McHam v. State*, 404 S.C. 465, 475, 746 S.E.2d 41, 46 (2013) (“Under the *Anders* procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any preserved issues with potential merit.” (citing *State v. Williams*, 305 S.C. 116, 406 S.E.2d 357 (1991))). The Court also notes Applicant raised this issue in his *pro se* response to the *Anders* brief. (Respondent’s Exhibit No. 1). The Court of Appeals’ compliance with the *Anders* procedure here creates a presumption of regularity, which the Court finds has not been rebutted by Applicant. Applicant cannot challenge the admission of the drug evidence on collateral review when he has previously challenged it on these same grounds on direct appeal. See S.C. Code Ann. § 17-27-20(b) (post-conviction relief “is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.”); see also *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (“It is uniformly held that an application for post-conviction relief is not a substitute for an appeal.”).

Applicant has not demonstrated he would have been successful had appellate counsel challenged the admission of this evidence. See *Smith v. Robbins*, 528 U.S. 259, 287 (2000) (“[I]n most cases in which a defendant’s appeal has been found, pursuant to a valid state procedure, to be frivolous, it will in fact be frivolous.”). For drug evidence to be admitted, the State must merely establish the chain of custody as far as practicable. *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (citing *State v. Sweet*, 374 S.C. 1, 647 S.E.2d 202 (2007); *Benton v. Pellum*, 232 S.C. 26, 100 S.E.2d 534 (1957)). However, “every person handling the evidence

³ Trial counsel objected to the introduction of the drugs based on the chain of custody (Trial Tr. p. 141, lines 8-9) and renewed his objection at the close of the evidence.

need not be identified in all cases.” *Id.* at 95, 708 S.E.2d at 755. Here, the State established a chain of custody for the drugs up to the point they were analyzed. This chain is sufficient to admit the drug evidence. *See State v. Pollard*, 261 S.C. 389, 391, 200 S.E.2d 233, 234 (1973) (drug evidence admissible where chain of custody proven up to the chemist who analyzed it (citing *Benton*, 232 S.C. 26, 100 S.E.2d 534; T. W. Cousens, Annotation, *Proof of Identity of Person or Thing where Object, Specimen, or Part is Taken from a Human Body, as Basis for Admission of Testimony or Report of Expert or Officer Based on Such Object, Specimen, or Part*, 21 A.L.R.2d 1216 (1952))). Accordingly, Applicant has not shown he would have been successful if this issue had been raised. *Anderson*, 354 S.C. at 434, 581 S.E.2d at 835.

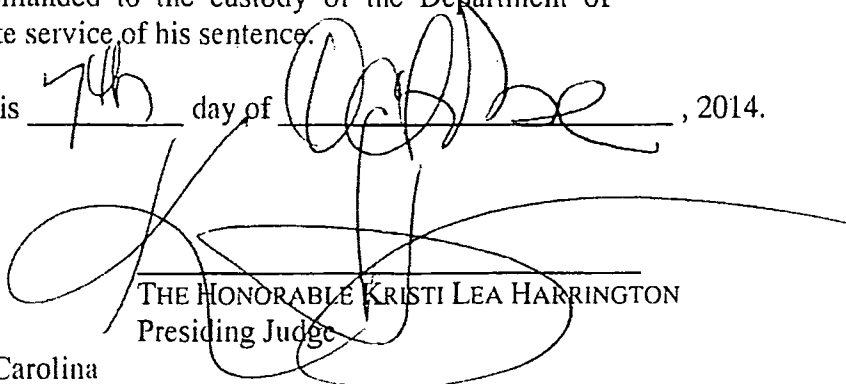
IV. CONCLUSION

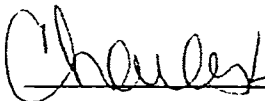
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. This application for post-conviction relief is denied and dismissed with prejudice.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 7th day of October, 2014.


THE HONORABLE KRISTI LEA HARRINGTON
Presiding Judge


South Carolina

AXELROD

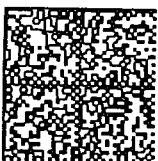
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