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RECEIVED

January 5, 2015

JAN 08 2015

Daniel E. Shearouse
Clerk of Court – SC Supreme Court
Supreme Court
P.O. Box 11330
Columbia, SC 29211

S.C. SUPREME COURT

Re: Tyrone Beaty v. State of South Carolina, Case No.: 2013-CP-26-5929; John Elvis Bostic vs. State of South Carolina, Case No.: 2012-CP-26-7917; Keion Griffin vs. State of South Carolina, Case No.: 2011-CP-26-10757; Lorenzo Cross vs. State of South Carolina, Case No.: 2013-CP-26-3958; Nelson H. Castro vs. State of South Carolina, Case No.: 2013-CP-26-1591; Jeffrey Riebe vs. State of South Carolina, Case No.: 2013-CP-26-5292; Shannon T. Parker vs. State of South Carolina, Case No.: 2013-CP-26-2547; and Nearim Blackwell-Selim vs. State of South Carolina, Case No.: 2013-CP-26-6066.

Dear Mr. Shearouse:

Enclosed please find the original Notice of Appeal in each of the above-entitled actions and two copies for each. Please file and return one copy to me in the self addressed stamped envelope enclosed.

If you should have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Daniel A. Selwa, II

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable John C. Hayes, III, Circuit Court Judge

Case No.: 2013-CP-26-3958

Lorenzo Cross, #261862,..... Petitioner,

v.

State of South Carolina,..... Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable John C. Hayes', III, November 17, 2014, order, denying the Applicant's Petition for post-conviction relief. Undersigned counsel received notice of entry of the order on December 9, 2014. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Daniel A. Selwa, II
1053 London Street, Suite A
Myrtle Beach, SC 29577
Attorney for the PCR Applicant

January 5, 2015

Other counsel of record:

Alan Wilson, Attorney General

Joshua L. Thomas, Assistant Attorney General

Post Office Box 11549

Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM Horry COUNTY
Honorable John C. Hayes, III, Circuit Court Judge

Case No.: 2013-CP-26-3958

Lorenzo Cross, #261862..... Petitioner,

v.

State of South Carolina,..... Respondent.

PROOF OF SERVICE

I, Daniel A. Selwa, II, certify that I have served the within Notice of Appeal on the Respondent, the State of South Carolina, by depositing a copy of the same in the United States Mail, postage prepaid, addressed to his attorney of record, Alan Wilson, Attorney General, Post Office Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this 5th day of January 2015.



Daniel A. Selwa, II
1053 London Street, Suite A
Myrtle Beach, SC 29577
Attorney for the PCR Applicant

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 Lorenzo Cross,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT

C.A. No.: 2013-CP-26-3958

HORRY COUNTY
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 MELANIE HUGHES-WARD
 CLERK OF COURT

ORDER

This is a Post-Conviction Relief Proceeding

Applicant filed an application for Post-Conviction Relief (PCR) on June 6, 2013. The case was heard by the undersigned on the 27th day of October 2014. The State of South Carolina was represented by Josh Thomas, Esquire, and the Applicant was represented by Daniel Selwa, II, Esquire.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the May 2008 term of the Horry County Grand Jury for trafficking in cocaine base (2008-GS-26-1777). Kia T. Wilson, Esquire represented the Applicant. The State took the case to trial, and on November 4, 2009 the Applicant was found guilty *in absentia*. The Honorable Steven H. John sentenced the Applicant to twenty-five (25) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Lanelle C. Durant, Esquire, of the South Carolina Commission on Indigent Defense perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence. *State v. Cross*, Op. No. 2012-UP-370 (S.C. Ct. App. Filed June 20, 2012). The Remittitur was sent on July 6, 2012.

In his appeal, Applicant raised as an issue the Court proceeding with a trial of Applicant in his absence. The unpublished opinion states that Applicant argues "the circuit court erred in proceeding with his trial in his absence when Cross had previously signed the paper work to plead guilty to a lesser offense." The Court of Appeals dismissed Cross's appeal pursuant to *Anders v. State of Cal.*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) and *State v. Williams*, 305 S.C. 116, 116, 406 S.E.2d 357 (1991). By virtue of this dismissal the Court of Appeals has found that the issue of Applicant's trial in his absence has no arguable merit. See *Williams* at 358.

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

1. Seven (7) year plea agreement was not honored.
2. Conviction is only second offence, not third.

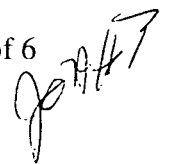
Applicant's allegations are claims of ineffective assistance of counsel. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C.115, 386 S.E.2d 624 (1989).

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625, *citing Strickland*. 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.E. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984)).

As to a plea deal, the State may withdraw a plea offer at any time prior to the court accepting the defendant's plea. *Reed v. Becka*, 333 S.C. 676, 688, 511 S.E.2d 396, 402 (Ct. App. 1999) ("A plea agreement is only an 'offer' until the defendant enters a court-approved guilty plea. A defendant accepts the 'offer' by pleading guilty. Thus, until formal acceptance of the plea by the court has occurred, the plea binds no one, not the defendant, the State, or the court." (citing *Harden v. State*, 453 So.2d 550 (Fla. Dist. Ct. App. 1984))). *Reed*, while helpful, is not dispositive of the issue raised by Applicant. This is so, as in *Morris v. State*, 371 S.C. 278, 639 S.E.2d 53 (Ct. App. 2006), the court seems to give efficacy to a signed plea deal.

In *Morris*, the Applicant signed a sentencing sheet on his trial date for the crime of assault and battery of a high and aggravated nature (ABHAN) as a lesser offense than the charge he was facing, assault and battery with intent to kill (ABWIK). After signing the sentencing sheet based on what appears to be poor communication Morris left the courthouse, did not return and was tried and convicted *in absentia* for ABWIK. The *Morris* court found counsel ineffective



under these facts as counsel did not move for a continuance of Applicant's case when the State proceeded to trial in spite of there being a signed plea deal seemingly accepted by Morris based on his signing of the sentencing sheet. In *Morris*, a continuance would have been justified based on Morris' mistaken belief.

Under *Reed*, Morris would have not been prejudiced by his counsel's failure to request a continuance as no rights would inure to Morris's benefit simply by his acceptance of a plea offer signified by him signing a sentence sheet. The *Morris* court recognized continuance motions are reviewed under an abuse of discretion rubric and determined that the denial of a motion for a continuance under the *Morris* facts would have constituted an abuse of discretion.

In the instant case, trial counsel did not move for a continuance. I cannot find a denial of motion for continuance, had one become made, would have amounted to an abuse of discretion as that is not before me. However, the undersigned must observe the facts at the time in question and may assess how they would have impacted a motion for continuance.

What may be a drastic distinction between Morris and Applicant is that Morris did not appear at trial based on his understanding that his sentencing was being deferred to a later date. Here, Applicant admitted he simply skipped based on his fear of harm due to his prior cooperation with the State on some drug deals. Applicant's testimony was that he fled and remained absconded until he was arrested in Florida. After he fled, the rather intense efforts to find Applicant by his counsel and the State were futile as no one in the system had any contact information for Applicant and could not scrounge any up. In the vernacular, Applicant "flew the coop."

Counsel's inability to contact Applicant had been related to Judge Larry Hyman the week before trial through a request by the state for a bench warrant. Judge Hyman held off issuing the



bench warrant so efforts could be made over the weekend to locate Applicant. The record reflects that efforts were made to locate Applicant over the weekend.

Under the facts of this case, it is doubtful that a continuance would have been granted if requested. Applicant had been absconded for 63 days, a bench warrant for his arrest had been issued (and held by the State), adequate, if not more than adequate efforts to locate Applicant had taken place, no one had contact information for Applicant, and Applicant made it clear he was gone. A continuance would not have been justified under the facts of Applicant's case.

Here trial counsel had no legitimate grounds upon which to bottom a request for a continuance. Trial counsel could not, by such a motion, suggest to the court a later time to which to continue the case as she had no contact with Applicant. Judge Hyman had determined sufficient grounds existed for the issuance of a bench warrant. By virtue of language on his bond paperwork, Applicant knew that if he took leave, as he did, he would be tried in his absence.

While this case does, to a degree, parallel *Morris*, where it diverges it does so in great degree. I find to such a degree the *Morris* is not controlling, that trial counsel, who acknowledges she should have requested a continuance, was not ineffective in her representation of Applicant as the facts of this case overwhelmingly lead to the conclusion that a motion for continuance would have had no merit.

While of no merit in the analysis of the issue of a motion for continuance it is of interest that after the verdict trial counsel reiterated her dilemma regarding Applicant and expressed, indirectly, concern for his wellbeing. (TR p. 99 LL 11-17). At the PCR hearing, trial counsel candidly testified that she did not think any extra time for locating Applicant would have been helpful.



In addition to the continuance issue, Applicant asserts his conviction should have been to a second offense, not a third. Trial counsel testified that by virtue of proper enhancement Applicant's current offense was properly categorized as a third. The State at the hearing also placed on the record sufficient prior enhancement offenses.

Applying the *Strickland* test, I find trial counsel's representation of Applicant was effective in her representation of Applicant as to the charges presented in his application for post-conviction relief. Additionally, looking at the prejudice prong of *Cherry* even if trial counsel was ineffective such would not have prejudiced Applicant. Under the facts of this case it does not appear that Applicant was entitled to a continuance.

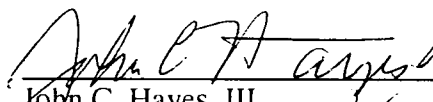
Additionally, by virtue of Applicant's appeal alleging error by the trial judge in proceeding to try him in his absence, the appellate court has found no merit to this claim. While this is a different issue than that of alleged ineffective assistance of counsel it is recognition by the Court of Appeals that Applicant was not entitled to have his case continued. *See State v. Cross, supra.*


Wherefore, Applicant's Application for Post-Conviction Relief is denied and dismissed with prejudice.

Applicant is hereby placed on notice that any petition for certiorari to the South Carolina Supreme Court must be filed within thirty (30) days. See Appellate Court Rules 203, 206, and 227(b).

IT IS SO ORDERED.

November 10th, 2014
Conway, South Carolina



John C. Hayes, III
Presiding Judge 

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)
)
)
LORENZO CROSS, #261862)
 vs)
)
STATE OF SOUTH CAROLINA,)
)
 Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

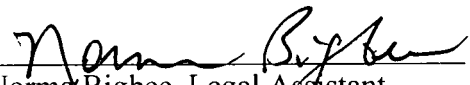
2013-CP-26-3958

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a filed copy of the Order in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Daniel A. Selwa, II, Esquire
1053 London St., Suite A
Myrtle Beach, SC 29577

DATED this 3rd day of December, 2014.



Norma Bigbee, Legal Assistant
For Respondent



DANIEL A. SELWA, II
ATTORNEY AT LAW, L.L.C.

1053 London Street, Ste. A
Myrtle Beach, S.C. 29577

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211



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