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ATTORNEYS AT LAW, LLC

RECEIVED

JUN 9 2015

S.C. SUPREME COURT
January 7, 2015

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Clerk of Court
Clerk of the Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

RE: *Carius K. Lomax v. State of South Carolina*
Case No.: 2012-DR-04-0650

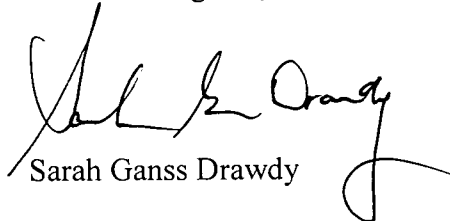
Dear Clerk:

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

1. Proof of Service of the Notice of Appeal on Respondent;
2. A copy of the Order Dismissing the Application for Post Conviction Relief.

This appeal is being filed with the Supreme Court pursuant to Rule 243(b), SCACR.

With kind regards,


Sarah Ganss Drawdy

SGD

Cc: J. Walt Whitmire, Esq.

Cc: Carius Lomax

NOTICE OF APPEAL IN CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Anderson County
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Case No.: 2012-CP-04-0650

Carius K. Lomax

Petitioner

v.

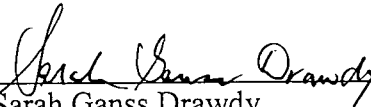
State of South Carolina,

Respondent

AMENDED NOTICE OF APPEAL

Carius K. Lomax appeals the Order of Dismissal of the Honorable J. Cordell Maddox, Jr., dated January 30, 2014. Petitioner received written notice of entry of this Order of Dismissal on December 10, 2014.

January 7, 2015

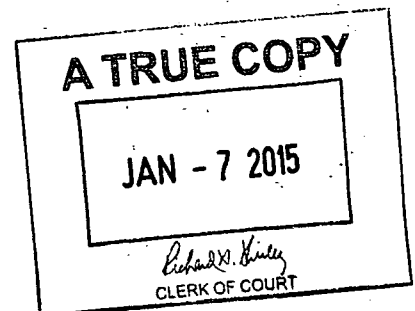

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Other Counsel of Record
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JAN 09 2015

S.C. SUPREME COURT



THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Family Court

The Honorable J. Cordell Maddox, Circuit Court Judge

Case No.: 2012-CP-04-0650

Carius K. Lomax,

Petitioner,

v.

State of South Carolina,

Respondent,

v.

PROOF OF SERVICE

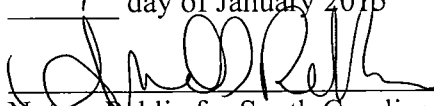
I certify that I, Bruce A. Byrholdt, of Byrholdt Drawdy, LLC, Attorney for Petitioner Carius K. Lomax did serve the NOTICE OF APPEAL on J. Walt Whitmire, Attorney for Respondent, by depositing a copy of it in the United States Mail, with proper postage affixed thereto, on January 7, 2015, addressed as shown below:

J. Walt Whitmire
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549



Bruce A. Byrholdt

SWORN to before me this
7 day of January 2015



Notary Public for South Carolina

My Commission expires: 8/15/2023



FILED-CLERK'S OFFICE
 STATE OF SOUTH CAROLINA ANDERSON SC IN THE COURT OF COMMON PLEAS
 COUNTY OF ANDERSON 2014 JAN 31) A 10: 26
)
) **Case No. 2012-CP-04-0650**

Carius Kenton Lomax,
 S.C.D.C. No. 262660,

Applicant,

v.

State of South Carolina,

Respondent.

PROCEEDINGS AND
 GENERAL SESSIONS

ORDER OF DISMISSAL

This matter comes to the Court by way of an Application for Post-Conviction Relief filed March 5, 2012. The Respondent filed its Return on August 2, 2012. An evidentiary hearing into the matter was scheduled on February 26, 2013 at the Anderson County Courthouse. Applicant was present and was represented by Sarah Ganss Drawdy, Esq., and Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General. Applicant and his trial attorney, Kurt Tavernier, Esq., testified at the PCR hearing.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted at the July 2008 term of the Anderson County Grand Jury for trafficking, less than 28 grams (2008-GS-04-1615) and possession with the intent to distribute (2008-GS-04-1617). Applicant was represented by Kurt Tavernier, Esq. On February 2, 2009, the State called its case to trial before the Honorable J.C. Nicholson. Applicant was tried in his absence and was found guilty as indicted. On April 7, 2009, his sentence unsealed. The sentences were amended to reflect concurrent

service. Applicant was sentenced to twenty years imprisonment for trafficking and five-years imprisonment on the possession charge.

A timely notice of appeal was filed on Applicant's behalf. Celia Robinson, Esq., of the Office of Appellate Defense, perfected the appeal pursuant to Anders v. California.¹ The South Carolina Court of Appeals affirmed his conviction and sentence. State v. Lomax, Op. No. 2011-UP-292 (S.C. Ct. App. filed June 14, 2011).

Applicant proceeded on the following allegations at his PCR hearing:

1. Ineffective Assistance of Counsel:
 - a) failure to investigate the State's evidence and file for discovery;
 - b) failure to subpoena Bobby Geer as a trial witness;
 - c) failure to make an untimely motion for continuance;

SUMMARY OF TESTIMONY

At the PCR hearing, Applicant alleged counsel was ineffective for failing to file a motion for discovery. Applicant stated that he did not know if counsel had requested discovery in his case. Applicant also alleged counsel was ineffective for failing to prepare for trial. Applicant stated that he never reviewed the State's evidence with him nor did counsel recognize him on the day of trial. Thus Applicant claimed he never discussed his version of the facts that led to his arrest. Applicant stated he met counsel at roll call and on the morning of the trial. Applicant stated he did not make efforts to contact the counsel or the public defender's office prior to his trial. Applicant stated counsel should have presented beneficial fingerprint evidence at trial.

Second, Applicant alleged counsel was ineffective for not presenting Bobby Geer as a defense witness at trial. Applicant stated counsel told him that he "forgot to subpoena" Geer, who was identified as Applicant's passenger during the traffic stop that led to the arrest. Applicant stated Geer would have testified on his behalf. Geer was only charged with possession

¹ Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

of alcohol while Applicant was charged for the narcotics. Applicant stated Geer would have told the jury the narcotics belonged to him, thereby absolving Applicant of culpability. Applicant elaborated he instructed Geer not to disclose his guilt during the arrest. Applicant stated that one reason he did not return to Court on February 2, 2009 was because he was upset counsel did not recognize him.

Applicant alleged counsel was ineffective for instructing him to locate Geer without advising him on the status of the trial. Applicant stated he was present for every court appearance while on bond. Applicant understood the conditions of his bond, one of which required him to appear at the June term of General Sessions and thereafter until his charges were disposed of. Applicant also understood he would be tried in his absence if he did not show up to trial. Applicant stated he left the Courthouse on February 2, 2009 with instructions from counsel to locate and ensure Geer would be available for the next court appearance. Applicant stated counsel did not explain to him that he had to return that afternoon. It was his impression that his case was premature for trial because both the solicitor and counsel were not prepared to the move forward. Applicant stated an undisclosed bailiff told him his case was not on the trial docket for that first February term of General Sessions. Thus, Applicant stated he immediately went home to nap and was shocked to subsequently learn he was tried and convicted in his absence. Applicant stated he never received a phone call from counsel that the case was moving forward without him present.

Third, Applicant alleged counsel was ineffective for failing to move for continuance in a timely matter. Applicant speculated that if the motion had been made in his presence, then he would have been on notice that his case was moving forward that day.

At the PCR hearing, counsel testified to his course of conduct regarding his representation in this matter. Counsel had practiced law for twenty years at the time of trial subsequent to his career as a narcotics police officer. Counsel explained the scope of his practice extended to handling drug cases for the Public Defender's Office. Applicant was in custody when counsel was appointed to the case in 2008. Counsel first met with Petitioner in June of 2008. Counsel filed for and received two packets of discovery materials in August, which included the incident reports, SLED lab results, and chain of custody documentation. Counsel investigated the materials and interviewed the arresting officer. Counsel summarized his impression of the State's case as follows: Applicant was driving a vehicle registered to his spouse when he entered a roadway and nearly struck a patrol car; a traffic stop resulted in the Applicant's arrest for driving under suspension; the police discovered prescription opiates and crack cocaine housed separately within the vehicle; the passenger, Geer, who was arrested on a minor unrelated offense, did not claim possession of the narcotics. Counsel scheduled an appointment with Applicant in September to discuss developments in the case. Applicant failed to show and never contacted counsel afterwards to reschedule. Counsel also made efforts to contact Applicant in November that proved unfruitful. Again, Applicant did not show after he was noticed for the second scheduled appointment.

Counsel developed a theory of defense absent Applicant's assistance on the element of possession. The strategy included eliciting testimony that Geer had the opportunity to move the narcotics while Applicant was outside the vehicle speaking with the police. Counsel noted the police were unable to get fingerprint lifts from the relevant compartments in the vehicle. Counsel investigated Geer's background and noted that Geer had a negligible relationship to Applicant. Geer's charges were disposed of prior to trial where he received the statutory minimum sentence

for his separate offense. Counsel did not interview Geer because he believed Geer would have been an adverse witness.

On January 26, 2009, Solicitor Rame Cambell noticed counsel that Applicant's case would be first up on the February trial docket. Applicant was also notified of the trial date. On the morning of trial, counsel discussed trial procedure with Applicant. During the conversation, Applicant told counsel Geer would take responsibility for the narcotics. Counsel stated that he had no basis to believe testimony from Geer would help the defense until the day of trial when Applicant told him Geer would confess on the stand. Counsel made a contemporaneous decision to direct Applicant to locate Geer within a specified window of time. Counsel told Applicant that, "he needed to be get Geer" because "the trial will start at 2:30." Counsel's investigator, Kendra Gurley, remained with him at the Courthouse to pick a jury. Counsel only made the decision to send Applicant to locate Geer because the issue came up "at the last minute." Counsel stated Applicant left the Courthouse when the venire panel arrived. When Applicant did not show that afternoon, calls were placed to his cell phone, his grandmother's phone, his mother's phone, and his aunt's phone. Counsel reiterated that he was clear with Applicant that he must return to the Courthouse that afternoon. Counsel stated he tried the best case he could for Applicant under the circumstances.

At the PCR hearing, Kendra Gurley testified to her involvement in Applicant's case. Gurley worked as a paralegal for the Public Defender's office. Gurley stated Applicant missed his two scheduled appointments with counsel in 2008 and did not make an effort reschedule. Gurley left a voice message on Applicant's cell phone on January 26, 2009 to notify him his case was set for trial on February 2, 2009. She was present with counsel and Applicant on the morning of trial. Gurley stated she witnessed counsel tell Applicant to leave and return with Geer

before 2:30 that afternoon. When Applicant failed to show, Gurley made numerous phone calls to locate Applicant.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, *supra*. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court's records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and exhibits from the prior proceedings, and, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds counsel and Gurley's testimonies to be credible and Applicant's testimony not credible. This Court finds it was manifestly clear Applicant understood his trial had commenced when he knowingly decided to voluntarily abandon his defense. See State v. Patterson, 367 S.C. 219, 230, 625 S.E.2d 239, 244 (Ct. App. 2006) ("[A] defendant may be presumed to waive or forfeit the right to be present by misbehaving in the courtroom or by voluntarily remaining away from trial."). Even Applicant's testimony on the matter was inconsistent. In comparison, counsel and Gurley fully detailed their interactions on February 2, 2009. This Court finds counsel exercised reasonable discretion in sending Applicant to locate Geer as a result of circumstances created by Applicant. This Court finds counsel's reputation and experience in representing clients facing narcotics charges to be high regarded and was apparent in the manner counsel made strategic decisions in investigating, preparing, and presenting Applicant's defense. This Court finds that although Applicant presented no credible evidence that showed he suffered any prejudice from counsel's representation, any possible detriment was borne from Applicant's conduct and actions. The duty to communicate, conduct a reasonable investigation, and prepare are predicated and judged upon a defendant's conduct. Because Applicant was released on bond, he has responsibility to attend

scheduled appointments, ensure his contact information was accurate, and aid counsel in the representation. This Court finds Applicant's failures on the above mentioned were unequivocal. See Strickland, 466 U.S. at 681, 104 S. Ct. at 2061 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.").

A.

This Court finds Applicant's allegation that counsel was ineffective for failing to investigate the State's evidence is without merit. "Moreover, while the scope of a reasonable investigation depends upon a number of issues, "at a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (emphasis supplied). This Court finds counsel's testimony on the matter credible and convincing. Counsel adequately investigated incident reports and the lab reports obtained by his discovery motion for a possible suppression defense. Addressing Applicant's more enunciated allegation that counsel was ineffective for failing to investigate possible fingerprint evidence, this Court finds it to is without merit. First, this Court finds counsel's trial strategy here valid. Counsel made a reasonable decision to elicit testimony from State witnesses at trial that the absence of fingerprint lifts on the vehicle's relevant compartments showed the possibility that Geer planted the narcotics could not be disproved. See Strickland, 466 U.S. at 681, 104 S. Ct. at 2061 ("Those strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based.") Second, Applicant failed to present credible evidence to show what beneficial impact the purported investigation would have had in his defense. Thus, the allegations rest on mere speculation. See Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) ("Failure to conduct an independent investigation does not

constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result.” Therefore, these allegations are denied and dismissed.

B.

This Court finds Applicant’s allegation that counsel was ineffective for failing to subpoena Geer to testify on Applicant’s behalf at trial is without merit. This Court finds counsel’s testimony credible and convincing. “So long as a defendant’s attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient.” Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). This Court finds counsel had a valid and strategic reason for not producing Geer as a witness at trial. Counsel interviewed the arresting officers as to Geer’s involvement and criminal history. Geer was charged with a misdemeanor unrelated to narcotics use or transactions. Counsel determined Geer did not have familial or substantial personal connection to the Applicant that could have indicated he would have been willing to forgo his own interests. Thus, this Court finds counsel’s reasoning valid to stray from involving Geer in Applicant’s case where the substantial detriment of calling him as a witness outweighed any foreseeable benefit. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) Applicant waited until the morning of his trial to convey his knowledge of Geer’s alleged intention to exculpate Applicant. See Strickland v. Washington, 466 U.S. at 681, 104 S. Ct. at 2061 (“[C]ounsel’s investigatory decisions must be assessed in light of the information known at the time of the decisions.”).

Regardless, Applicant failed to produce testimony from Geer on the matter. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) ([A]pplicant’s allegations, alone, will not support a finding of prejudice when applicant claims counsel was ineffective for failing to investigate

witnesses; instead, applicant must show the results of an investigation would have resulted in a different outcome at trial). Therefore, this allegation is denied and dismissed.

C.

Last, this Court summarily dismisses Applicant's allegation that counsel was ineffective for failing to move for a continuance at an earlier juncture in the trial. Applicant contends he would never have never been tried in absentia had counsel made the motion before he left to find Geer. This Court finds counsel's testimony credible and Applicant's testimony not credible. This Court finds a defense attorney is under no duty to make strategic decisions in anticipation that a defendant might to decide ignore a directive and condition of bond to the detriment of the presentation of his defense. Regardless, this Court finds counsel could not have foreseen that Applicant would not return and flee. Despite Applicant's hubris in neglecting to meet and discuss his case with counsel, he did however testify he attended his prior court appearances. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993) (This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.). Therefore, this allegation is denied and dismissed.

D.

Except as discussed above, this Court finds that the Applicant affirmatively abandoned the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's

failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

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


This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 30 day of January, 2014.

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ANDERSON SC
2014 JAN 31 A 10: 26
MOTION PLEAS AND
GENERAL SESSIONS

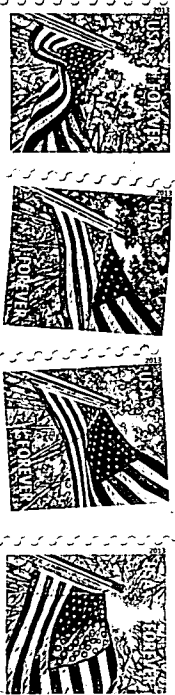


J. CORDELL MADDOX, Jr.
Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina

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