

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
ROBERT HOOD, CIRCUIT COURT JUDGE
2013-CP-40-7117

RECEIVED

JAN 14 2015

S.C. Supreme Court

Darrell Williams,.....Petitioner.

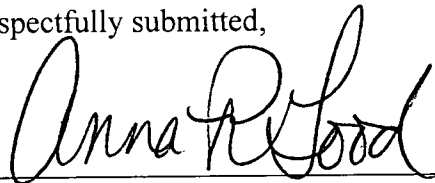
vs

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

NOTICE OF APPEAL

Darrell Williams appeals the Honorable Robert Hood's January 2, 2015, order denying post-conviction relief to the Petitioner. Undersigned counsel received notice of entry of the order on January 12, 2015. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Anna R. Good, Esquire
O'Neil, Good & Li, LLC
PO Box 7284
Columbia, South Carolina 29202
Telephone: (803) 661-6758
Fax: (803) 403-8752

Attorney for the Petitioner.

January 13, 2015.

OTHER COUNSEL OF RECORD:
Suzanne White
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, SC 29211-1549

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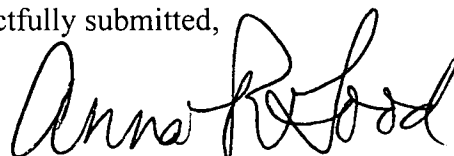
vs

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

PROOF OF SERVICE

I, Anna Good, 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 the attorney of record, Suzanne White, P.O. Box 11549, Columbia, South Carolina 29211-1549. I further certify that all parties required by Rule to be served have been served this 14th day of January 2015.

Respectfully submitted,



Anna R. Good, Esquire
O'Neil, Good & Li, LLC
PO Box 7284
Columbia, South Carolina 29202

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Darrell Williams, #219730,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT

2013-CP-40-7117

ORDER OF DISMISSAL

2015 JAN -2 PM 12:09
 JEANNETTE W. MCBRIDE
 CLERK, P. & G.S.
 RICHLAND COUNTY
 FILED

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 22, 2013. The Respondent made its Return on or about February 25, 2014. An evidentiary hearing into the matter was convened on September 2, 2014, at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Anna R. Good, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Dayne C. Phillips, Esquire, testified on behalf of the State. This Court also had before it a copy of the records of the Richland County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, Applicant's appellate records, the trial transcript, and the motion for new trial transcript.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted during the January 2008 term of the Richland County Grand Jury for Petit Larceny and Burglary in the First Degree (2011-GS-40-0884, -0866). On September 22-24, 2008, Applicant proceeded to a



jury trial *pro se*, with Joshua Kendrick, Esquire, and Hans Pauling, Esquire, assisting as stand-by counsel, before the Honorable J. Michelle Childs. Applicant was convicted as indicted and Judge Childs sentenced Applicant to life imprisonment without parole pursuant to S.C. Code Ann. § 17-25-45 (2008).

Applicant filed a Motion for New Trial and a hearing was held before Judge Childs. The Applicant appeared *pro se*. The Motion was denied and an Order was issued on March 26, 2010.

Applicant filed a timely notice of appeal and was represented by Appellate Defender Dayne C. Phillips. Following the submission of an Anders brief and a *pro se* brief, the South Carolina Court of Appeals dismissed Applicant's appeal. The Remittitur was sent on December 5, 2013.

ALLEGATIONS

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

1. Ineffective Assistance of Appellate Counsel;
2. Prior Conviction used to enhance unconstitutional; and
3. Use of Prior conviction under rule 404(b) invalid.

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 further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Appellate Counsel

The Applicant alleges he received ineffective assistance of appellate 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, 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 (1984); Butler, 334 S.E.2d 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. 668. 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 defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (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 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). 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 (4th Cir. 1985).

The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). 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). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Applicant testified that he never met with Appellate Counsel (“Counsel”), but communicated via letters and had numerous telephone conversations. Applicant testified that he believed the two issues that should be presented on appeal were the denial of the directed verdict motion and the use of his prior convictions to enhance his sentence. Applicant testified that the directed verdict motion focused on the State’s failure to prove that the incident occurred in the nighttime. Applicant testified that his two prior burglaries should not have been counted as two separate charges, but rather as one offense as a result of a crime spree. Ultimately, Applicant testified that his problem with Counsel was that Counsel filed an Anders¹ brief on Applicant’s behalf. However, Applicant acknowledged that Counsel explained the procedure to Applicant and Applicant filed a pro se brief in addition to the Anders brief.

Counsel testified that he spoke with the Applicant at least five times and expressed that Applicant was very active in his defense and very intelligent. Counsel testified that he reviewed with Applicant the various objections and motions made by Applicant during trial and discussed preservation law with Applicant. Counsel testified that he explained the process of an Anders brief with Applicant and the fact that the court would review the entire record. Counsel testified that Applicant wished Counsel to raise issues regarding the constitutionality of the statute providing for a three strikes, life without parole sentence. S.C. Code Ann. § 17-25-45 (2008).

¹ Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

However, Counsel testified that he informed Applicant that the case law was contrary to Applicant's position.

In Anders v. California, the United States Supreme Court announced the procedure an appointed attorney should follow if that attorney believes the client's appeal is frivolous and without merit. 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The Supreme Court held the attorney could petition for permission to withdraw from the case, but that the petition for withdrawal must be accompanied by a brief "referring to anything in the record that might arguably support the appeal." Id. at 744, 87 S.Ct. at 1400, 18 L.Ed.2d at 498. Under Anders, the defendant must be given time to respond and to raise any additional points after his attorney submits the Anders brief. Id. The court then is obligated to conduct a "full examination" of the record to determine whether the appeal is "wholly frivolous." Id. According to Anders, if the reviewing court finds the appeal is frivolous, "it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires." Id. at 744, 87 S.Ct. at 1400, 18 L.Ed.2d at 498.

As discussed previously, the Applicant was presented with and took advantage of the opportunity to file his *pro se* brief with the South Carolina Court of Appeals following Counsel's brief. The Applicant failed to present any evidence or testimony to establish that he suffered any prejudice as a result of Counsel's Anders brief. This Court finds that although the Applicant is clearly well researched and knowledgeable of the issues involved in his case, he has failed to meet his burden to establish that appellate counsel was ineffective. Therefore, this claim is denied and dismissed.

Prior Convictions for Enhancement Purposes

Applicant has also alleged that the use of his prior convictions to enhance his sentence is unconstitutional and violates the rule against introducing evidence of prior bad acts. This allegation raises a direct appeal issue that is procedurally based by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Specifically, the Applicant raised the issue of constitutionality of the statute at trial and in his *pro se* brief on appeal.

This Court finds that the doctrine of *res judicata* bars the Petitioner's claims. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id.

The Applicant had a full opportunity to argue both the constitutionality of the statute and whether the use of his prior burglary convictions violated the rule against evidence of prior bad acts at trial and on appeal. The public interest in finality of judgments requires that litigation must eventually come to an end. The Order denying Applicant's Motion for New Trial very thoroughly addresses each of the arguments Applicant raised.

Therefore, based upon the doctrine of *res judicata* and the fact that the issues raised are not appropriate for post-conviction relief, but rather direct appeal, this Court summarily dismisses these allegations.

CONCLUSION

Based on all the foregoing, 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. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 1 day of December, 2014.

Re Hood

Robert E. Hood
Presiding Judge