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January 8, 2014

VIA U.S. POSTAL

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

RECEIVED

JAN 13 2015

Re: Kevin Hardy vs. State of South Carolina
Case No.: 2013-CP-23-1426

S.C. SUPREME COURT

Dear Supreme Court Clerk:

I am writing to you regarding the above referenced case. Please find enclosed copies of the Notice of Appeal, Proof of Service, and Order of Dismissal. A copy of the Order of Dismissal was inadvertently left out of the original mailing that included the original Notice of Appeal and Proof of Service.

If you wish to discuss the foregoing or need additional information please contact me at 864-331-1630.

Thank you.

Sincerely,



Brian P. Johnson

BPJ/lf
cc: Karen Ratigan, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE LETITIA H. VERDIN

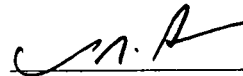
Case No.: 2013-CP-23-1426

KEVIN T. HARDY,)
)
 PETITIONER,)
)
 vs.)
)
 STATE OF SOUTH CAROLINA)
)
 RESPONDENT.)

NOTICE OF APPEAL

The Petitioner, Kevin T. Hardy, hereby appeals the Honorable Letitia H. Verdin's December 8, 2014, order denying post-conviction relief to the Petitioner. The order was received by counsel for the Petitioner on December 29, 2014. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner
SC Bar: 73996

Date: January 7, 2015
Other counsel of record: Karen Ratigan
P.O. Box 11549/Columbia, SC 29211

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JAN 13 2015

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE LETITIA H. VERDIN

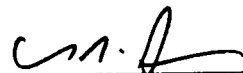
Case No.: 2013-CP-23-1426

KEVIN HARDY,)
)
 PETITIONER,)
)
 vs.)
)
 STATE OF SOUTH CAROLINA)
)
 RESPONDENT.)
)

PROOF OF SERVICE

I, Brian P. Johnson, Esq., certify that I have today served the within notice of appeal upon the Respondent by depositing a copy in the United States Mail, postage prepaid, addressed to the attorney of record, Karen Ratigan, at P.O. Box 11549 Columbia, SC 29211.

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner
SC BAR: 73996

Greenville, SC
January 7, 2015

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2013CP2301426

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 DEC 19 PM 4:36

Kevin Hardy vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other: _____
 Rule 12(b), SCRPC; Rule 41(a),
- ACTION STRICKEN (CHECK REASON):**
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other: _____
 Rule 40(j) SCRPC; Bankruptcy:
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - Letitia H Verdin

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

Brian P. Johnson 522 North Church Street
Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Kevin T. Hardy, S.C.D.C. No. 335620,)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS

C.A. No. 2013-CP-23-1426

ORDER OF DISMISSAL

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMMER
 2014 DEC 11 PM 4:35

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed March 12, 2013. The Respondent made its return on October 23, 2014. A hearing into the matter was held on October 22, 2014 before Judge Letitia H. Verdin at the Greenville County Courthouse. The Applicant was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Symmes Culbertson, Esquire. The Court had before it the transcript of the trial; the Greenville County Clerk of Court records, including the arrest warrant, indictment and sentencing sheet; the briefs and Order from the Applicant's direct appeal to the South Carolina Court of Appeals; the Applicant's South Carolina Department of Corrections Records; the PCR Application; the Applicant's Amendment to his PCR Application; and the Return.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the October 2005 term of the Greenville County Grand Jury for trafficking cocaine, 400 or

more grams (2005-GS-23-8183) and trafficking cocaine, more than 28 grams (2005-GS-23-8184). He was represented by Symmes Culbertson, Esquire, at trial. After the State called the case to trial, the Applicant was found guilty. On June 17, 2009, the Honorable Edward Welmaker sentenced him to twenty five (25) years.

A Notice of Appeal was timely filed in the South Carolina Court of Appeals. LaNelle C. DuRant, Esquire, perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Hardy, Op. No. 2012-UP-315 (S.C. Ct. App. May 23, 2012). The Remittitur was sent on June 12, 2012.

ALLEGATIONS

In his Application for PCR, the Applicant argues that he received ineffective assistance of counsel at both the trial and appellate levels. He additionally alleges that he is entitled to benefits from the passage of the Omnibus Crime Reduction and Sentencing Reform Act.

Regarding the ineffective assistance of counsel trial claim, the Applicant particularly alleges the following:

- a. Trial counsel "failed to pretrial the chemical analysis report listing the amount of drugs as this was a crucial stage of the Applicant's case to challenge the accuracy of the drugs confiscated alleged;"
- b. Trial counsel failed to investigate the officer based on his use of race as one factor relating to his identification of reasonable suspicion;
- c. Trial counsel failed to object to the evidence discovered during the traffic stop based on the officer's mention of race;
- d. Trial counsel failed to file pretrial motions to challenge affidavits, police reports, and the officer's statements to the Grand Jury.

Regarding the ineffective assistance of appellate counsel claim, the Applicant particularly alleges the following:

- a. Appellate counsel failed to file for a rehearing or petition for a writ of certiorari;
- b. Appellate counsel failed to brief every properly preserved issue for appeal.



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 (2014).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove 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 be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 686 (1984); Porter v. State, 368 S.C. 378, 629 S.E.2d 353, 356 (2006). Regarding the first prong, the Applicant must in essence show that counsel's advice was not “within the range of competence demanded of attorneys in criminal cases.” Hill v. Lockhart, 474 U.S. 52, 56 (1985). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). 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, 466 U.S. at 686).



Furthermore, the decisions and advice of trial counsel should be assessed for reasonableness under all the circumstances, with heavy deference given to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). There is a strong presumption that adequate assistance of counsel was rendered, and that reasonable care was exercised at trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007).

A defendant is also constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). In analyzing a claim of ineffective assistance of appellate counsel, courts apply the Strickland test just as they would when analyzing a claim of ineffective assistance of trial counsel. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009); Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Appellate counsel, however, is not required to raise every non-frivolous claim, but instead may select among them in order to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259, 288 (2000).

a. Trial counsel's failure to challenge the chemical analysis report.

The Applicant claims that trial counsel was ineffective because he did not challenge the chemical analysis report detailing the substances discovered in his vehicle. Particularly, the Applicant appears to take issue with the report's conclusion as to the weight of the substances tested. However, the Applicant presented no evidence on this subject prior to or during his PCR hearing. Since no error with the report has been shown, the Applicant's trial counsel had no basis upon which to challenge it.

Therefore, in the absence of any evidence demonstrating that the chemical analysis report was incorrect, this Court finds that the Applicant has failed to meet his burden of proving that counsel was ineffective in this regard.

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b. Trial counsel's failure to object or further investigate the officer's inclusion of racial information in his account of the traffic stop.

The Applicant argues that trial counsel was ineffective for not further investigating or challenging the arresting officer's potential racial bias. During his PCR hearing, the Applicant testified that he believed that he was initially pulled over while driving on I-85 "because [he] was black." The Applicant's trial counsel also stated it was his belief that the initial traffic stop only occurred because of the Applicant's race. The Applicant argues that the officer improperly considered his race as a factor when concluding that reasonable suspicion existed to detain him.

The arresting officer initiated a traffic stop because the Applicant was impeding traffic on the interstate and for driving with a cracked windshield. (Trial Tr. 8.) As he approached the Applicant in his car, the officer made several observations relating to the contents and occupants of the vehicle. (Trial Tr. 9.) One of these observations was that the driver, the vehicle's sole occupant, was a black male. (Id.) The Officer also noticed that the Applicant's heart rate was visibly accelerated and that his hands were shaking. (Id.) The officer testified that he developed his suspicion of criminal activity because the Applicant did not appear to calm after being told he was only receiving a warning. (Trial Tr. 11.) Rather, the Applicant's hands continued to shake, he continued to exhibit an elevated heart rate, and he began to breathe heavily. (Id.)

The Applicant's trial counsel questioned the officer concerning his consideration of "a black male, driving alone" as a factor he used to support reasonable suspicion. (Trial Tr. 30-31.) In response to these questions, the officer indicated that this observation was not the foundations for his suspicion. (Trial Tr. 31.) Rather, the officer's suspicion was formed as a result of the Applicant's continued nervous behavior as the traffic stop continued. (Trial Tr. 30-36.) The officer's suspicion grew as he discovered a large amount of cash on the Applicant's person,



noted irregularities in the Applicant's story, and observed the Applicant's body language when answering a question about the presence of illegal narcotics. (Trial Tr. 36-37.)

The Applicant has failed to meet his burden of proving that trial counsel was ineffective for not further pursuing this issue. The Applicant's trial counsel conducted a thorough cross examination of the arresting officer in this case. A substantial amount of this cross examination was devoted to attacking the officer's identification of reasonable suspicion during the early stages of the traffic stop. The Court of Appeals stated that the officer referenced the Applicant's race only when discussing his initial observations at the stop. The officer's subsequent testimony makes clear that the Applicant's race was not included as one of the factors to support reasonable suspicion to extend the stop. Therefore, the Applicant's trial counsel was not effective for not continuing to pursue the matter.

c. Trial counsel's inability to file pretrial motions to challenge police reports, affidavits, and the officer's statements presented to the Grand Jury.

The Applicant asserts that trial counsel was ineffective because he did not move to exclude certain pieces of evidence from presentation to the Grand Jury. However, the Applicant's attorney had no part in the presentation of evidence to the Grand Jury, and could not have been able to object to such a presentation. This argument provides no basis for an ineffective assistance claim.

d. Appellate counsel's failure to file for rehearing or petition for a writ of certiorari.

The Applicant asserts that appellate counsel was ineffective for failing to request a rehearing or to petition for a writ of certiorari. However, it appears that the decision of the Court of Appeals has been directly appealed to the South Carolina Supreme Court and that such a



hearing request is currently pending. In light of these direct appeals, the Applicant has not demonstrated that any further petition for certiorari should have or could have been filed.

e. Appellate counsel's failure to brief every issue preserved for appeal.

The Applicant asserts that appellate counsel was ineffective because she did not brief and argue every issue that was preserved for review. In the case at bar, appellate counsel raised two issues on appeal: the scope of the initial traffic stop and the use of the Applicant's race in the officer's evaluation of reasonable suspicion. Both issues were briefed and argued on appeal.

As discussed above, appellate counsel is not required to raise every meritorious claim in order to render effective assistance. Rather, appellate counsel may select those arguments which he or she believes to be most likely to generate a favorable outcome on appeal. Smith v. Robbins, 529 U.S. 259, 285–86 (1999). Such strategic decisions are entitled to substantial deference by reviewing courts. Id. This Court finds that appellate counsel rendered reasonably effective assistance in selecting the arguments she believed were most likely to generate a favorable outcome for her client.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test—that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed wither errors or omissions in his representation of the Applicant. This Court also finds that the Applicant has failed to prove the second prong of Strickland—that he was prejudiced by trial counsel's performance.

Omnibus Crime Reduction and Sentencing Reform Act

The Applicant asserts that he is entitled to benefits from the passage of the Omnibus Crime Reduction and Sentencing Reform Act. However, this argument does not fall within any



of the six grounds for relief set forth in the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160 (2003). Additionally, the Applicant has not presented any evidence indicating what particular relief might be afforded by this change in the law.

This Court finds that there is no statutory basis for the granting of post-conviction relief on this ground. Additionally, even if a ground for relief did exist, the Applicant has presented no evidence demonstrating that he is entitled to such relief. Therefore, the Applicant's final ground for PCR is dismissed, and the Applicant is not entitled to PCR on this basis.

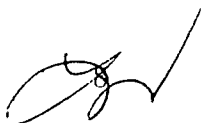
All Other Allegations

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 that the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by Counsel's representation at trial or on direct appeal. Furthermore, the relief requested under the Omnibus Crime Reduction and Sentencing Reform Act is not proper in a PCR action, and will not be granted today. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

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IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 8 day of ^{Dec.} November, 2014.



Letitia H. Verdin
Circuit Court Judge
Thirteenth Judicial Circuit




Law Office of Brian P. Johnson

522 North Church Street
Greenville, SC 29601

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



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