

LAW OFFICE OF BRIAN P. JOHNSON, LLC

P. 864.331.1630
F. 864.672.4009
www.brianpjohnsonlaw.com

522 North Church Street
Greenville, SC 29601
brian@brianpjohnsonlaw.com

January 13, 2015

VIA U.S. POSTAL

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

Re: Marlin Hutley vs. State of South Carolina
Appellate Case No.: 2013-CP-23-6842

Dear 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 signed December 8, 2014.

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

Thank you.

Sincerely,



Brian P. Johnson

RECEIVED

JAN 16 2015

S.C. SUPREME COURT

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-23-6842

MARLIN HUTLEY,)
)
PETITIONER,)
)
vs.)
)
STATE OF SOUTH CAROLINA)
)
RESPONDENT.)

NOTICE OF APPEAL

The Petitioner, Marlin Hutley, hereby appeals the Honorable Letitia H. Verdin's December 8, 2014, order denying post-conviction relief to the Petitioner. The order was received by the undersigned counsel on December 29, 2014. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

RECEIVED

JAN 16 2015

S.C. SUPREME COURT



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

Date: January 12, 2015
Other counsel of record: Karen Ratigan
P.O. Box 11549/Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

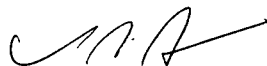
Case No.: 2013-CP23-6842

MARLIN HUTLEY,)
)
 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 12, 2015

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF GREENVILLE

CASE NO: 2013CP2306842

IN THE COURT OF COMMON PLEAS

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 DEC 19 PM 4:30

Marlin Hutley 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):**
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- 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

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

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)
)
 Marlin Jamelle Hutley,)
 S.C.D.C. # 240707,)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS

C.A. No. 2013-CP-23-6842

ORDER OF DISMISSAL

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMMER
 2014 DEC 15 PM 4 39

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 30, 2013. The Respondent made its return on May 21, 2013. 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, Scott D. Robinson, Esquire. The Court had before it the transcript of the bench trial, the Greenville County Clerk of Court records, including the arrest warrant, indictment and sentencing sheet; the Applicant's South Carolina department of Corrections Records; the PCR Application, and the Return.

PROCEDURAL HISTORY

The Applicant was confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Greenville County Grand Jury indicted the Applicant at the December 2010 term of General Sessions for trafficking

cocaine base (crack cocaine) (2010-GS-23-2817) and possession with intent to distribute (PWID) cocaine (2010-GS-23-2819). Scott D. Robinson, Esquire represented the Applicant.

When the case was called to trial, the Applicant requested—and was afforded—a bench trial. The Applicant was found guilty on both charges. On October 10, 2011, the Honorable Robin B. Stilwell sentenced the Applicant to concurrent terms of twenty-five years for trafficking cocaine (10-28 grams), third offense and fifteen years for PWID cocaine, third offense.

A notice of appeal was filed at the South Carolina Court of Appeals. Dayne C. Phillips, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal in the form of an Anders brief. See Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed the Appeal. State v. Hutley, Op. No. 2013-UP-293 (S.C. Ct. App. June 26, 2013).

ALLEGATIONS

In this Application, the Applicant alleges that he is entitled to PCR because he received ineffective assistance of trial counsel. Particularly, the Applicant argues that counsel was ineffective because:

- a. He failed to make minimal inquiries of substantial investigation, which would have revealed that the Applicant's initial arrest was a "predicated omission of warrant affidavit" which was insufficient to establish probable cause;
- b. He denied "defendants constituent parts of elements [sic] of crime for prima facie;"
- c. He failed to object to the prosecutor "vouching for the state's case of impeachment evidence of state witness;"
- d. He failed to prepare and present numerous pieces of essential evidence, specifically the audio tape of law enforcement's dispatch center relating to the initial traffic stop; and
- e. The trial court relied on legal precedent which has been overturned.

Of these allegations, the Applicant presented evidence relating only to the last two points.



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). A criminal defense attorney has a duty to conduct a reasonable investigation so that he may discover all reasonably available mitigation evidence, as well as any reasonably available evidence tending to rebut evidence produced by the state. McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 361 (2008). There is a strong presumption that adequate assistance of counsel was rendered, and that reasonable care was exercised—particularly in the arena of professional judgments. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007).

- a. **Failure to make minimal inquiries of substantial investigation, which would have revealed that the Applicant's initial arrest was a "predicated omission of warrant affidavit" which was insufficient to establish probable cause.**

This issue was not raised during the Applicant's PCR hearing. Furthermore, the Applicant did not present any additional evidence in his PCR application in support of this contention. Therefore, this Court finds that the Applicant has failed to meet his burden of proving that trial counsel failed to offer a proper defense, and therefore the first prong of Strickland has not been satisfied. PCR on this ground will not be granted.

- b. **Denial of "defendants constituent parts of elements [sic] of crime for prima facie."**

This issue also was not raised during the Applicant's PCR hearing. Additionally, the Applicant did not present any evidence in his PCR application in support of this contention. Therefore, this Court finds that the Applicant has not met his burden of proving that trial counsel failed to offer a proper defense.




c. Failure to object to the prosecutor “vouching for the state’s case of impeachment evidence of state witness.”

The Applicant did not raise this issue during his PCR hearing. Furthermore, the Applicant did not present any additional evidence in his PCR application in support of this contention. This Court therefore finds that the Applicant has failed to meet his burden of proving that trial counsel failed to offer a proper defense.

d. Failure to prepare and present numerous pieces of essential evidence, specifically the audio tape of law enforcement’s dispatch center relating to the initial traffic stop.

The Applicant argues at his PCR hearing that his case would have been materially advanced by a more thorough challenge to the arresting officer’s credibility. For example, the Applicant pointed out that the officer did not follow the proper procedure during the initial traffic stop. Similarly, the Applicant argues that the discrepancies between his traffic tickets would also have put the officer’s credibility at issue. Finally, the Applicant asserts that his case would have been strengthened by the presentation of an audio recording of law enforcement’s dispatch center. The Applicant asserts that this recording would have revealed that there was no basis for his initial traffic stop. The Applicant testified that he did not tell his attorney about his belief that this recording would be helpful to the preparation of his defense.

The Applicant’s trial counsel testified that he had no knowledge of such a recording. Trial counsel was appointed during the later portion of the discovery process, after the Applicant’s prior counsel was unable to continue his representation. The Applicant’s trial counsel also testified that his trial strategy focused on trying to suppress evidence of the traffic stop completely, or in the alternative to bring out the discrepancies between the officer’s reasons for the Applicant’s arrest. As trial counsel indicated, the arresting officer at times indicated that



the Applicant was being arrested for running a stop sign or for giving a false name to law enforcement.

The Applicant's trial counsel further testified that his trial options were somewhat limited, because the Applicant had previously pled guilty to giving a false name to law enforcement from the same incident. Therefore, trial counsel asserted, there was no way he could have suppressed the traffic stop in its entirety, and his only option at trial was to attack the officer's credibility through the use of the conflicting statements.

This Court finds that the Applicant has failed to meet his burden of proving counsel was ineffective for failing to procure the dispatch center tape and failing to further challenge the arresting officer's credibility. The Applicant has not demonstrated that trial counsel's performance fell below the representation expected under prevailing professional norms. The evidence presented at the PCR hearing demonstrates that trial counsel conducted a reasonable investigation into the facts of the Applicant's case, as required by McKnight v. State, 378 S.C. at 46, 661 S.E.2d at 361. Furthermore, there was no evidence presented that proved that the result of the proceeding would have been different, had trial counsel adopted a different strategy. This Court therefore finds that trial counsel's preparation and presentation of evidence at trial and his challenge to the credibility of the arresting officer were reasonably effective under the prevailing professional norms of the legal community.

e. The trial court relied on legal precedent which has been overturned.

The Applicant argues that the State's reliance on State v. Snowdon, 371 S.C. 331, 638 S.E.2d 91 (Ct. App. 2006) during his bench trial was improper, as the case was subsequently overturned by State v. Hewins, 409 S.C. 93, 760 S.E.2d 814 (July 16, 2014).

In Snowdon, the Court of Appeals held that a defendant's entry of a guilty plea in magistrate's court constituted a waiver of any constitutionally-based objections to his initial



arrest. 371 S.C. at 334, 638 S.E.2d at 93. Therefore, the Court concluded that the defendant was collaterally estopped from re-litigating the issue of the validity of his arrest. Id. Several years later, in Hewins the State relied on Snowdon to prevent the defendant from suppressing evidence of narcotics discovered during a traffic stop after he had been convicted in municipal court for an open container charge. The Supreme Court distinguished, rather than overturned, Snowden with the following language:

[T]he waiver that results from the entry of a guilty plea is confined to the offense that is the subject of the plea. Thus, by implication, a defendant who pleads guilty waived any assertion of an unlawful search that precipitated the offense to which he pled guilty. Accordingly, even if Hewins pled guilty to the open container violation, his plea would have constituted a waiver of any challenge he may have had to that offense but could not be extended to constitute a waiver of a challenge to the charge of possession of crack cocaine.

Hewins, 409 S.C. at 105–06, 760 S.E.2d at 820. In short, the traffic stop in Hewins involved reckless driving and law enforcement’s discovery of an open container. A K-9 unit’s walk around the vehicle during the traffic stop generated the narcotics charge. Conversely, the defendant in Snowdon was arrested for breach of the peace, and narcotics were discovered on his person during a search incident to the arrest.

This Court finds the facts of this case to be more analogous to Snowdon, rather than Hewins. Here, the Applicant was stopped and subsequently arrested for giving a false name. A search incident to the arrest revealed the narcotics. The Applicant pled guilty to providing a false name to law enforcement some time prior to his bench trial on the narcotics charges. This guilty plea involved the same underlying facts as the charges which were brought to trial in this case. During the bench trial, the State correctly argued that, under Snowden, the Applicant waived his right to challenge the probable cause for the underlying arrest by pleading guilty. Thus, the Applicant was collaterally estopped from challenging the same arrest at his later trial,



since the facts involved in the prior case and the bench trial were inextricably linked. The Applicant's argument that Hewins should have controlled the trial court's ruling is without merit.

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 either 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. This Court concludes that the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier, 351 S.C. at 389, 570 S.E.2d at 174.

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. 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

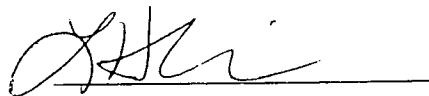


also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

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



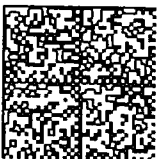
Law Office of Brian P. Johnson

522 North Church Street
Greenville, SC 29601

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