

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Case No. 2013-CP-23-6846

RECEIVED

APR 13 2015

S.C. Supreme Court

Andrew Davion Burnside,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable Daniel Hall's Order of Dismissal dismissing Appellant's application for post-conviction relief. On March 4, 2015, the Honorable Daniel D. Hall signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on March 23, 2015. A copy of the Honorable Daniel D. Hall's Order of Dismissal is attached.



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Greenville, South Carolina
April 7, 2015

Other Counsel of Record and Interested Parties:

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Greenville County Courthouse
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SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
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Andrew Davion Burnside SCDC# 328129
Perry Correctional Institution
430 Oaklawn Road
Pelzer, South Carolina 29669

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CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this April 7, 2015, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Karen C. Ratigan, Esq.
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SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

April 7, 2015

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2013CP2306846

Andrew Davion Burnside vs. State Of South Carolina

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2015 MAR 19 PM 7:38

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):**
SCRCP (Vol. Nonsuit); Rule 43(k), SCRCP (Settled); Rule 12(b), SCRCP; Rule 41(a), SCRCP; Other: _____
- ACTION STRICKEN (CHECK REASON):**
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other: _____
 Rule 40(j) SCRCP; 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 10th day of March, 2015.

Court Reporter:

PRESIDING JUDGE - Daniel D Hall

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:

R. Mills Ariail Jr. 11 North Irvine Street, Suite 11
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)
)
 Andrew Davion Burnside,)
 S.C.D.C. No. 328129,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2013-CP-23-6846

ORDER OF DISMISSAL
 ENTERED COMPUTER

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMMER
 2015 MAR 19 PM 1 35

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 14, 2014. An evidentiary hearing was held on February 17, 2015 at the Greenville County Courthouse. The Applicant was present and represented by R. Mills Ariail, Jr., 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 trial transcript, the Greenville County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, the return, and the appellate records.

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 February 2012 term of the Greenville County Grand Jury for trafficking cocaine base (crack cocaine) (2011-GS-23-1738, count 1), possession of a weapon during the commission of a violent crime (2011-GS-23-1738, count 2), possession with intent to distribute (PWID) a

controlled substance (2011-GS-23-1739), distribution of cocaine base (crack cocaine) (2011-GS-23-1740), and PWID cocaine (2011-GS-23-1741). He was represented by Scott D. Robinson, Esquire.

After the State brought the case to trial,¹ the Applicant was found guilty. On May 16, 2012, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to concurrent terms of 25 years for trafficking crack cocaine (10-28 grams), third offense, 5 years for possession of a weapon during the commission of a violent crime, 1 year for possession of a controlled substance, 15 years for distribution of crack cocaine, third offense, and 5 years for possession of cocaine, second offense.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Pachak, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Burnside, Op. No. 2013-UP-409 (S.C. Ct. App. filed November 6, 2013). The remittitur was sent on November 22, 2013.

ALLEGATIONS

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

1. Ineffective assistance of trial counsel:
 - a. Counsel did not want to represent him.
 - b. Counsel failed to investigate.
2. "Search warrant and search and seizures."
 - a. "The search warrant was based on the CI buy and statement. That means the the warrant was no good because he said in went in the trailer on the left and warrant say's the trailer on the right."
3. "Suppression [sic] of evidence/warrants are invalid."
4. "Vitim/witness/statement."
5. Affidavit.

¹ The Applicant was jointly tried with his co-defendant, Dominique Shumate.

- a. "On my affidavit and search warrant have two diffamt [sic] signatures so that could only mean that the warrant(s) and affidavit went to another judge."
6. "A witness that toke the stand during trail/Jerry Drummond, Jr."
 - a. Witness "way not reliable to take the stand during trial never new nothing about what happen at his trailer he was in prison."

In a document captioned "Motion to Amend P.C.R." and filed December 31, 2013, the Applicant lists the following issues without argument or supporting authority:

1. Mere presence, dominion and control.
2. Actual and constructive possession.
3. "U.S. Const. 4, 14th Amendment, S.C. Const. Art. 1 section 10, and 3, Title 14-17-140, Title 22-3-110."
4. Search warrants and arrest warrants.

In two separate documents captioned "Motion to Amend P.C.R." and filed January 30, 2014 and April 2, 2014, the Applicant lists the following issues without argument or supporting authority:

1. Plain error.
2. Substantial rights.
3. Harmless error.
4. Subject matter jurisdiction.
5. Confrontation clause.

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 Trial Counsel

The Applicant alleges he received ineffective assistance of trial 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, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). 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 v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated trial counsel was his second attorney. The Applicant stated he had two meetings with trial counsel and that, while they reviewed his version of events, they did not review the discovery materials. The Applicant stated trial counsel did not explain the difference between actual and constructive possession. The Applicant stated he turned down both a 10- and 15-year plea offer because trial counsel said the State did not have a strong case. The Applicant stated he was unaware of a confidential informant in this case until the trial and that trial counsel should have moved to have the informant’s statement suppressed. The Applicant stated trial counsel should have made a motion to suppress the evidence. The Applicant stated he wanted to testify at trial but trial counsel told him it was not a good idea because of his prior record.

Trial counsel confirmed he was the Applicant's second attorney. Trial counsel testified he filed discovery materials and received those materials. Trial counsel testified his practice is to then send a copy of the discovery materials to his client. Trial counsel testified he met with the Applicant once or twice in his office and that his general practice would have been to review the case at that time. Trial counsel testified he and the Applicant did review his prior record, the sentence ranges for his charges, and the difference between actual and constructive possession. Trial counsel testified the Applicant's story was always that he was not involved in the drug activity and was merely in the wrong place at the wrong time. Trial counsel testified the plea offer in this case was actually for three years and was discussed in the solicitor's office with the Applicant and his uncle. Trial counsel testified the Applicant rejected this offer and stormed out of the solicitor's office. Trial counsel testified the confidential informant in this case was used to obtain a search warrant. Trial counsel testified the co-defendant's attorney filed a motion to suppress the evidence and he did not make his own motion because it would have been unnecessary. Trial counsel testified he had no other grounds upon which to move to suppress the evidence. Trial counsel testified he reviewed the right to testify with the Applicant and that the Applicant would have testified at trial if he had wished to do so.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not adequately meet with him and prepare for trial. Trial counsel testified he sent a copy of the discovery materials to the Applicant and also reviewed those materials with him. Trial counsel

testified they also discussed the Applicant's version of events, the sentence ranges of the charges, and the concepts of actual and constructive possession. Trial counsel indicated the Applicant would not meet with him after the meeting at the solicitor's office. This Court finds trial counsel's testimony is credible. This Court further finds the Applicant failed to articulate what more he wanted trial counsel to do in order to prepare his case for trial. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds the Applicant failed to meet his burden of proving trial counsel misadvised him about a plea offer. The Applicant stated he was unaware of a 3-year plea offer and refused 10- and 15-year offers because trial counsel indicated the State's case was weak. Trial counsel testified the sole plea offer in this case was a 3-year offer. Trial counsel testified he discussed this offer with the Applicant and his uncle at a meeting at the solicitor's office and that the Applicant and his uncle rejected the offer and stormed out. This Court finds trial counsel's testimony is credible. This Court finds trial counsel fulfilled his obligation to convey and explain the plea offer and that the Applicant chose not to accept. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have moved to suppress both the confidential informant's statement and the evidence. Regarding the statement, this Court notes its use at trial was merely during the suppression hearing and was entered only as a Court's Exhibit. The Applicant argues trial counsel should have moved to suppress this statement but has failed to present a legally sound basis upon which trial counsel

could have made such a motion. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (finding a PCR applicant bears the burden of proving the allegations in their application). Regarding the motion to suppress, trial counsel testified he did not make a separate motion to suppress because the co-defendant's attorney made and argued such a motion and it was denied. Trial counsel testified there were no other arguments to be made in favor of suppression and there was no way the trial judge would have granted his motion. This Court finds trial counsel provided a sound basis for not filing a separate suppression motion. Regardless, this Court notes the State had a strong case against the Applicant and finds he cannot prove he was prejudiced by the lack of a suppression motion because such a motion would have been unsuccessful. See Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded.") (citation omitted).

This Court finds the Applicant failed to meet his burden of proving trial counsel failed to advise or misadvised him about the right to testify at his trial. Trial counsel testified they reviewed the right to testify, as well as the Applicant's prior record. Trial counsel testified the Applicant would have testified if he wished to do so. This Court finds trial counsel's testimony is credible. This Court notes the trial judge advised the Applicant of the right to testify in his own defense and the Applicant stated it was his choice not to do so. (Trial transcript, pp.182-85). The Applicant's decision not to testify was both informed and voluntary. See Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (holding a defendant's decision to testify or not must be made with knowledge of the consequences of either choice).

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 the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 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

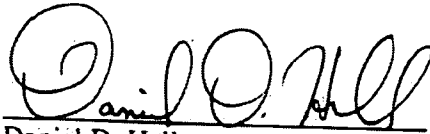
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel’s representation. Therefore, this 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 appropriate 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 4th day of March, 2015.



Daniel D. Hall
Presiding Judge
Thirteenth Judicial Circuit

York, South Carolina.

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

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April 7, 2015

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S.C. Supreme Court

Via US Mail

Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
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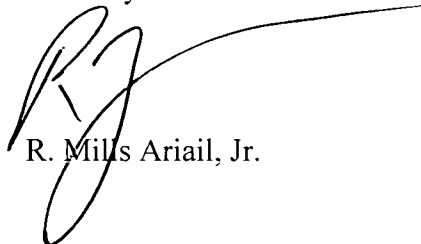
Re: Notice of Intent to Appeal from Andrew Davion Burnside vs. State of South Carolina C.A. No.: 2013-CP-23-6846

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable Daniel D. Hall's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law



R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

cc: Greenville County Clerk's Office
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