

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2013-CP-40-00233

RECEIVED

JUN 17 2015

S.C. Supreme Court

RECEIVED

JUN 17 2015

S.C. Supreme Court

Melinda Richmond, #331874,

Appellant,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Melinda J. Richmond appeals the order of the Honorable Brooks P. Goldsmith, dated May 8, 2015. Appellant received written notice of entry of this order on May 22, 2015.

June 17, 2015



William M. Saltzman
Merritt, Webb, Wilson & Caruso, PLLC
Post Office Box 24109
Columbia, SC 29224
(803) 255-0655
Attorney for Appellant

Other Counsel of Record:
J. Clayton Mitchell
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Attorney for Respondent

RECEIVED

JUN 17 2015

S.C. Supreme Court

RECEIVED

JUN ~~16~~¹⁷ 2015 *SS*

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2013-CP-40-00233

Melinda Richmond, #331874,

Appellant,

v.

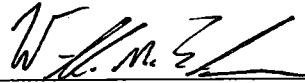
State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on June 16, 2015, addressed to its attorney of record, J. Clayton Mitchell, Post Office Box 11549, Columbia, South Carolina 29211.

June 17, 2015



William M. Saltzman
Merritt, Webb, Wilson & Caruso, PLLC
Post Office Box 24109
Columbia, SC 29224
(803) 255-0655
Attorney for Appellant

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

CASE NUMBER: 2013CP4000233

Melinda Jo #231874 Richmond

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (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 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 (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 19 May 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Melinda Jo #231874 Richmond William Martin Saltzman Megan Harrigan Jameson

Melinda Jo #231874 Richmond
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. [Signature]

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Melinda Richmond, #331874

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2013-CP-40-00233

ORDER OF DISMISSAL

RICHLAND COUNTY
FILED
2015 MAY 18 AM 9:45
JENNIFER W. HOGAN
C. C. P. & C. C.

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed January 11, 2013. Respondent made its Return on May 8, 2013, requesting an evidentiary hearing be convened. William M. Saltzman, Esquire was appointed by the Richland County Clerk of Court on January 29, 2013. Applicant filed an amended application on July 29, 2013. An evidentiary hearing was held on April 1, 2015, at the Richland County Courthouse. Applicant was present and represented by Counsel Saltzman. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on her own behalf. In addition, Applicant's trial counsel testified: Carolyn R. (Gripp) Sutherland, Casey M. Secor, and E. Deon O'Neil, Esquires. Applicant's appellate counsel, Wanda H. Carter, Esquire, also testified in her case. The State called Anna R. Good on its behalf. The Court had before it the Richland County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, and the trial transcript.

I. 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 July 2007 term of the Richland County Grand Jury for Murder (2007-GS-40-4073). Applicant was represented by: Carolyn R. (Gripp) Sutherland, Casey M. Secor, and E. Deon O'Neil, Esquires. On November 10, 2008, Applicant proceeded to a jury trial before the Honorable Edward W. Miller. On November 14, 2008, Applicant was convicted as indicted. Judge Miller sentenced Applicant to forty (40) years' imprisonment.

Applicant filed a notice of appeal and an appeal was perfected on her behalf. Following the submission of an Anders¹ Brief, the South Carolina Court of Appeals dismissed the appeal. State v. Richmond, Opinion No. 2012-UP-418 (S.C. Ct. App. filed July 11, 2012). The Remittitur was sent on July 27, 2012.

In this action, Applicant alleges that she is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of appellate counsel in failing to brief the trial court's denial of defense counsel's requests for a mistrial or a continuance due to lead Counsel Sutherland's sickness.
2. Ineffective assistance of trial counsel in proceeding with the trial while sick.

II. SUMMARY AND EVIDENCE PRESENTED AT THE PCR HEARING

Carolyn (Gripp) Sutherland's Testimony

Counsel Sutherland testified via telephone at the hearing as she currently resides and practices law in Memphis, Tennessee. She was sworn by this Court prior to her examinations. Counsel Sutherland testified she came to represent Applicant through her role as an Assistant Public Defender with the Fifth Circuit Public Defender's Office. She informed the Court that she was lead counsel throughout Applicant's proceedings beginning at her bond hearing in or around May 2007. Counsel Sutherland testified she spent many hours on Applicant's case, meeting with her over a dozen times. She believed the case was going to trial and was unlikely to be resolved

¹ 386 U.S. 738 (1967).



by a plea agreement. She testified she was the most prepared attorney to represent Applicant at trial.

Counsel Sutherland testified she had the flu the week before the trial started. She recalled that they picked a jury on Monday, Tuesday was a holiday, and that by Wednesday she had a severe sore throat and sinus infection and had nearly lost her voice. She described how she contacted the prosecuting solicitors the night before to apprise them of her condition but was unable to reach them. Counsel Sutherland recalled that Counsel O'Neil made a motion for a continuance and in the alternative a motion for a mistrial. This motion was strongly opposed by the prosecution as they had out of state witnesses and victims present. The prosecution also argued that the case had already started as the trial court had conducted a Jackson v. Denno hearing, both sides had presented opening statements, and a witness had already testified. Counsel Sutherland testified the trial court denied their motions for a continuance and mistrial and believed that co-counsel O'Neil and Secor were prepared to try the case if she was unable to go forward. Counsel Sutherland noted her disagreement with the trial court's ruling and assessment. Counsel Sutherland acknowledged that the trial court did instruct the jurors that if they had trouble hearing her to raise their hands as an attempt to remedy the situation.

Counsel Sutherland testified that due to her illness, she was unable to try Applicant's case to the best of her abilities. She testified she did not have an appropriate range of voice and that she lacked control of witnesses during cross examinations. Counsel Sutherland further recalled the defense's subsequent motions for a continuance to allow her to go to a doctor and that this was also denied. Her doctor diagnosed her with laryngitis, and she was prescribed antibiotics and other medications to help her deal with the illness.



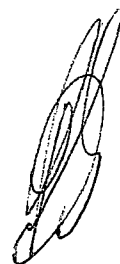
At that point, Counsel Sutherland testified, she knew the trial court was not going to grant a continuance or a mistrial, so she focused on how best to preserve the issue. She testified she wanted to preserve an audio copy of her voice for appellate purposes. She testified that another attorney with the public defender's office videotaped her speaking to show the tone and volume of her voice at the time of trial. Counsel Sutherland discussed this with her supervisor, Elizabeth Fielding Pringle, on how best to preserve the issues. Counsel O'Neil requested that the trial court allow a private court reporter to come in to ensure an accurate transcription and recording. (Trial Transcript p. 359-60). The trial court denied this request as well.

Counsel Sutherland testified she was initially going to handle all investigators and any witness who had contact with Applicant. She emphasized that co-counsels were not prepared to handle these witnesses since they had not been involved in the case for long enough to understand all of the facts. She testified that Counsel Secor was a young attorney that was sitting "third chair" as a training opportunity who was not expected to have significant responsibilities. Counsel Sutherland testified she presented closing arguments for the defense and that the jury likely had difficulty hearing her speak during her remarks.

Counsel Sutherland detailed the post-trial motions the defense filed including a motion for a new trial. She testified the defense team did all they could to preserve the issue for direct appeal.

Counsel Casey M. Secor's Testimony

Counsel Secor testified he came to represent Applicant through his role as an Assistant Public Defender. He testified that prior to this trial he had very little trial experience, mostly at the magistrate's court level. He stated that his role in representing Applicant was limited and that he may not have met Applicant until the first day of trial.



Counsel Secor testified that Counsel Sutherland's voice was difficult to hear and noted the court reported asked her to speak up multiple times. He explained that her voice was a hoarse whisper at times. Counsel Secor testified that the defense team made multiple motions for a continuance and for a mistrial due to Counsel Sutherland's illness. He testified he was not prepared to take over the case. Counsel Secor described the trial court's reaction to his numerous motions for a continuance and a mistrial as annoyed. He testified he believed the issues to be preserved and expected them to be raised on appeal.

Counsel E. Deon O'Neil's Testimony

Counsel O'Neil testified he "second chaired" Applicant's case. He testified that as the second chair attorney in a trial he would give the opening statement to the jury and handle less important witnesses, just as he did in this case. Counsel O'Neil testified the court reporter had to ask Counsel Sutherland to speak up and repeat herself during the trial. He testified that sometimes her voice was not above a whisper. He testified that he believed she could not take control of witnesses on cross examination. Counsel O'Neil testified he did not believe he was ready to try the case on his own and recalled that he declined to present the closing arguments as he was not as prepared as Counsel Sutherland. He recounted that the defense team made a motion for a mistrial and continuance and renewed those motions and objections numerous times. He noted that he believed the issues relating to Counsel Sutherland's illness were preserved for appeal and that they would be addressed then.

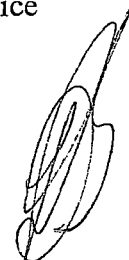
Counsel Wanda H. Carter's Testimony

Counsel Carter testified she represented Applicant through her role as an Assistant Appellate Defender at the South Carolina Office of Indigent Defense. She testified that it was her normal practice to review the entire transcript noting each objection and whether certain issues

were preserved and that she very likely followed that procedure in preparing Applicant's case. She testified she conducted a due process evaluation on this case. Counsel Carter testified she did not brief the issues of the trial court's failure to grant Applicant's motion for a continuance and mistrial because she did not believe they had any merit. Counsel Carter did believe the issues to be preserved. Counsel Carter emphasized that she filed a brief pursuant to Anders v. California and that if she missed any meritorious issues, that the Court of Appeals would not have granted her petition to be relieved and would have asked for briefs on those any meritorious issues. She testified she addressed the issue of whether the trial court erred in failing to charge the jury on self-defense because she believed that issue to be colorable. The issues relating to the motion for mistrial and continuance did not rise to that level. Counsel Carter testified she believed Applicant filed a *pro se* brief addressing these issues which would have clearly put the issues before the Court of Appeals when it made its determination to dismiss the appeal. Counsel Carter noted that the standard of review of a denial of a mistrial or continuance is an abuse of discretion and that she did not believe the issues had any merit under that standard. Counsel Carter also noted that the trial court instructed the jurors to raise their hand if at any time if they could not hear Counsel Sutherland.

Applicant's Testimony

Applicant testified she was charged and convicted of murder under a hand of one, hand of all theory of accomplice liability. She was represented by Counsel Sutherland throughout the entire case. She testified she met Counsel Secor the first day of trial and had met Counsel O'Neil some time prior to trial. Applicant recounted that Counsel Sutherland was her only attorney until the case was on track to go to trial. Applicant was reluctant to question her attorney's abilities as she believed they did all they could for her. Applicant stressed that Counsel Sutherland's voice



was barely above a whisper at times and that she was asked numerous times to speak into the microphone. Applicant testified she believed Counsel Sutherland did not want to leave her during the trial. Applicant testified she did extensive research into the matter and filed a *pro se* brief at the Court of Appeals attempting to address the trial court's failure to grant her motions for a continuance and a mistrial.

Anna R. Good's Testimony

Ms. Good testified that she was one of the prosecuting solicitors that tried Applicant's case. She testified that Counsel Sutherland was sick and was having troubling speaking. Good noted that she and her co-counsel, then Assistant Solicitor Vanessa Shipley, agreed to object to a continuance since a jury had been picked, opening statements had been delivered, a witness had testified, and there were a number of out of state witnesses and family members of the victim that were in attendance. She recalled the trial court ruling that Applicant had two other very capable attorneys who could try the case. Good testified that Counsel O'Neil handled a number of witnesses during the pretrial motions stage. Good testified Counsel Sutherland was asked to speak up or repeat herself, but that she could hear Counsel Sutherland for the most part. Good noted there was a microphone setup to accommodate her condition and to help with any problems the jurors may have had hearing her.

III. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the 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, 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, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

"Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is 'difficult to demonstrate that counsel was incompetent.'" United States v. Mason, No. 3:06-607-CMC, 2012 WL 5845807 at *1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While appellate counsel is required to provide effective assistance of counsel, "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, 526 (1990), citing Jones v. Barnes, 463 U.S. 745 (1983). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Jones, 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion that



appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. 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 deficient performance. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

“To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal.” United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct. at 764).

IV. 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 has reviewed the Clerk of Court records regarding the subject convictions, the guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. 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.



Ineffective Assistance of Appellate Counsel

Applicant argues Counsel Carter was ineffective in failing to brief the issue of whether the trial court erred in denying Applicant's motions for a new trial and motions for a continuance. Applicant argues Counsel Sutherland's performance at trial hindered the defense due to her illness and that this issue should have been raised on direct appeal. Applicant points specifically to the trial court's denial of the written post-trial motion filed on November 24, 2008.

Preservation

This Court notes that a detailed Motion for a New Trial was filed on November 24, 2008. The defense argued Applicant was prejudiced by the trial court's denial of the motions for a mistrial and a continuance. They argued the trial court abused its discretion in refusing to grant a continuance. The defense also argued the trial court erred in not allowing a private court reporter to record the proceedings. The defense submitted a video recording of Counsel Sutherland speaking and seven (7) affidavits of various employees of the public defender's office that all described Counsel Sutherland's voice and tone during the trial. The State filed a Response to Defendant's Motion for a New Trial on December 8, 2008, asking the trial court to deny the motion. The State argued that it only mattered if the jurors could hear her speak and noted that the trial court instructed the jurors to raise their hands if they had difficulty hearing Counsel Sutherland and that at no time did any jurors do so. The State attached an affidavit from two jurors that sat on the last row of the juror box that stated each were able to hear her during the trial. One juror attested that he had no difficulty following Counsel Sutherland during examinations or closing argument. The juror also noted that the court reporter and witness asked for clarification about five or six times when it was hard to hear her.



This Court finds the issue was adequately preserved for review on direct appeal. The defense made numerous motions for a mistrial and a continuance throughout the trial and at every appropriate stage. It is clear from the testimony and evidence presented at the hearing that the issues relating to the trial court's denial of the motions for mistrial and continuance were preserved for appellate review. All parties and witnesses agree with this conclusion.

Deficiency

Applicant alleges Counsel Carter was ineffective in failing to raise the contested issue on appeal. This Court finds this allegation without merit. This Court finds Applicant has failed to meet her burden in proving deficiency of appellate counsel and requisite prejudice. Counsel Carter testified that it is her standard practice to review the entire record for all preserved issues and that she did that in this case. She also testified she completed a due process analysis of the issues raised by trial counsel. Counsel Carter's persuasive testimony shows that she also believed the issues relating to the trial court's denial of motions for a mistrial and a continuance to be preserved but found them without any merit. She credibly testified she briefed the issue she found most colorable which was the trial court's failure to charge the jury on self-defense. She stressed that she did not believe any issues had merit and that was why she filed an Anders brief. 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). This Court finds Counsel Carter made the reasonable strategic decision to brief the issue she considered strongest and in filing a brief pursuant to Anders.

To grant relief, the reviewing court would have to find that the trial court abused its discretion in failing to grant a mistrial. This Court finds the trial court properly denied the

defenses motions for a mistrial and a continuance. See State v. Hawkins, 310 S.C. 50, 54, 425 S.E.2d 50, 52 (1992) (holding that the trial court did not abuse its discretion in refusing to grant a continuance due to trial counsel becoming ill and that co-counsel was familiar with the facts and had participated in pretrial motions). This Court finds Applicant has failed to meet her burden in proving deficiency. Counsel Carter's testimony is credible and persuasive on all matters. Counsel Carter emphasized that even if she somehow missed an issue that had merit, the Court of Appeals would not have granted her request to be relieved and would have instructed her to brief that issue.

This Court also finds in its experience that it is not uncommon to have court reporters, or witnesses, or even the judge to ask an attorney to speak up or to speak more clearly. After a thorough review of the record, this Court finds Applicant's due process rights were not violated. The trial court accommodated Counsel Sutherland by having a microphone placed in the court room where she could address the jury to aid her hindered voice. The trial court also instructed the jurors to alert him or the bailiffs if they had any problems hearing her by raising their hand. There is nothing in the record to suggest any jurors had to resort to that.

Prejudice

This Court finds Applicant has failed to meet her burden in proving she was prejudiced by the brief submitted by Counsel Carter because she would not have been successful on appeal had she argued the trial court erred in denying the motions for mistrial and motions for a continuance. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167 (no prejudice where there is no merit to arguments that were not briefed). The Court also finds that Applicant failed to meet her burden in proving the omitted issue was stronger than the issue of the trial court's failure to instruct the jury on self-defense.

Further, Applicant suffered no prejudice because the South Carolina Court of Appeals conducted an Anders review and ultimately dismissed the appeal. The Court of Appeals dismissal indicates it *also* found no reversible error in the trial court's rulings. In State v. McKennedy, 348 S.C. 270, 559 S.E.2d 850 (2002), this Court outlined the Anders procedure as follows:

[A]ccording to Anders, the reviewing court is obligated to make a full examination of the proceedings on its own. After such an examination, if the reviewing court agrees with the attorney, it may dismiss the appeal or proceed to a decision on the merits. On the other hand, if the court disagrees with the attorney's analysis of the appeal, it must afford the defendant 'the assistance of counsel to argue the appeal.' The purpose of filing a brief under Anders is to ensure the merits of the appeal are not overlooked. The court has to conclude independently, regardless of counsel's conclusion, whether or not the appeal has merit before it can dismiss the appeal.

McKennedy, 348 S.C. at 279, 559 S.E.2d at 855. A presumption of regularity attaches to judicial proceedings, and this presumption should extend to the Court of Appeal's review under the Anders procedure. See Pringle v. State, 287 S.C. 409, 410-11, 339 S.E.2d 127, 128 (1986) (citations omitted). This Court finds the Court of Appeals reviewed this preserved issue before dismissing Applicant's direct appeal and found that it had no merit. See McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 46 (2013) ("Under the Anders procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any preserved issues with potential merit." (citing State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991))). If the Court of Appeals believed the trial court's ruling was questionable, it would have directed counsel to file a merits brief.

Furthermore, the United States Supreme Court has indicated Applicants face a difficult burden to prove prejudice in cases where counsel has filed an Anders brief. Smith v. Robbins, 528 U.S. 259, 287 (2000) ("[I]n most cases in which a defendant's appeal has been found,

pursuant to a valid state procedure, to be frivolous, it will in fact be frivolous.”). The burden is high because “it is reasonable to presume that when the court affirms an Anders appeal it has fully considered and rejected all potential issues that were apparent on the face of the record.” Towbridge v. State, 45 So. 3d 484, 487 (Fla. Dist. Ct. App. 2010). The Anders procedure requires the court to independently examine the trial proceedings and consider “any errors apparent on the face of the record.” Id. at 486-87 (citations omitted); see also McHam, 404 S.C. at 475, 746 S.E.2d at 46 (appellate court reviews all preserved issues for merit). This Court notes that Applicant filed a *pro se* brief directly addressing the issue. Defense counsel moved for a mistrial or continuance no less than seven (7) separate times. This issue was clearly apparent on the face of the record and was reviewed by Counsel Carter and the Court of Appeals. Applicant failed to present any evidence the Court of Appeals overlooked this issue. Therefore, this Court must presume the Court of Appeals’ compliance with the Anders procedure included a review of the trial court’s denial of the motion for mistrial, and its dismissal indicated it found no fault with those rulings.

This Court also finds the State presented overwhelming evidence in support of its case at trial. Since this evidence overwhelmingly indicates Applicant’s guilt, she would not have been successful on appeal.

Accordingly, Applicant has failed to meet her burden in proving appellate counsel was ineffective. This allegation is denied and dismissed with prejudice.

Ineffective Assistance of Trial Counsel

To the extent that Applicant alleges Counsel Sutherland was ineffective due to her illness, this Court finds the allegation is without merit. Applicant must point to specific errors or omissions in the conduct of the trial that were the product of the illness. United States v. Eyman,



313 F.3d 741 (2nd Cir. 2002). Applicant failed to meet her burden in proving Counsel Sutherland was ineffective in any respect. Applicant also failed to show any resulting prejudice in this regard as she did not present any evidence that the result of the trial would have been different but for Counsel Sutherland's errors. The Court finds the affidavits submitted by the jurors on the case who indicated that they heard and could follow Counsel Sutherland throughout the trial to be persuasive on the issue.

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, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

V. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

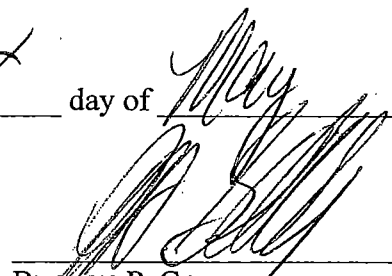
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek

appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of her sentence.

AND IT IS SO ORDERED this 8 day of May, 2015.



BROOKS P. GOLDSMITH
Presiding Judge

_____, South Carolina