

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

"Success is all that matters"

Stuart Mark Axelrod†
W. Christopher Castro*
Tristan M. Shaffer
Caitlin M. Epley

4701 Oleander Drive
Myrtle Beach, SC 29577
Phone: (843) 916-9300
Fax: (843) 916-9311

†Certified Family Court Mediator
*Currently on Active Military Leave

RECEIVED

July 28, 2015

AUG 03 2015

Daniel E. Shearouse
Clerk of Court
P.O. Box 11330
Columbia, SC 29211

S.C. SUPREME COURT

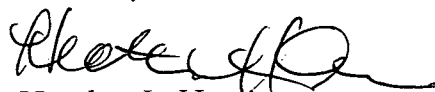
Re: *Danny Cortez Brown, #317608 vs. State of South Carolina*
Case No.: 2013-CP-26-5621

Dear Mr. Shearouse:

Enclosed please find the original and one (1) copy of a Notice of Appeal and Certificate of Service in the above-referenced matter. Please clock and file the originals and return the clocked copies to me in the self-addressed stamped envelope I have provided for your convenience.

Thank you for your assistance in this matter and should you have any questions, please do not hesitate to contact our office.

Sincerely,



Heather L. Harris
Paralegal

HLH/
Enclosures

Cc: South Carolina Appellate Defense
Joshua Thomas, Esq.
Horry County Clerk of Court
Danny Cortez Brown, #317608

SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM HORRY COUNTY
In The Court of Common Pleas

Honorable Michael G. Nettles
Common Pleas Judge of the Fifteenth Judicial Circuit

Case No.: 2013-CP-26-5621

Danny Cortez Brown, #317608, Petitioner,

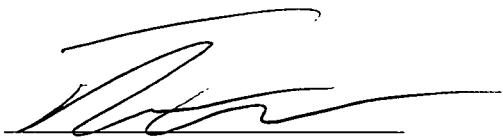
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Petitioner appeals the Order of Dismissal of the Honorable Michael G. Nettles, dated June 16, 2015, and received by Petitioner on July 10, 2015.

July 28, 2015



Tristan M. Shaffer, Esq.
AXELROD & ASSOCIATES P.A.
4701 Oleander Drive
Myrtle Beach, SC 29577
(843) 848-6708 Phone
(843) 848-6709 Fax
Attorney for Appellant

Respondent's Attorney:
Joshua L. Thomas, Esquire
S.C. Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

RECEIVED

AUG 03 2015

S.C. SUPREME COURT

SUPREME COURT OF SOUTH CAROLINA

RECEIVED

APPEAL FROM HORRY COUNTY
In The Court of Common Pleas

AUG 03 2015

Honorable Michael G. Nettles
Common Pleas Judge of the Fifteenth Judicial Circuit S.C. SUPREME COURT

Case No.: 2013-CP-26-5621

Danny Cortez Brown, #317608, Petitioner,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

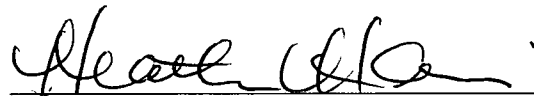
I, Heather L. Harris, do hereby certify that I am an employee of Axelrod & Associates, P.A., in Myrtle Beach, South Carolina, and that I have this date served the Petitioner's Notice of Appeal upon the Respondent, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

Joshua L. Thomas, Esquire
S.C. Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Danny Cortez Brown, #317608
Lieber Correctional Institution
136 Wilborn Ave.
Ridgeville, SC 29472

Horry County Clerk of Court
P.O. Box 677
Conway, SC 29528

Daniel E. Shearouse
Clerk of Court
P.O. Box 11330
Columbia, SC 29211



Heather L. Harris
Paralegal

July 29, 2015
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Danny Cortez Brown, #317608,)

Case No. 2013-CP-26-5621

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)
_____)

HORRY COUNTY
2015 JUN 26 PM 1:59
MELANIE HUBBINS-WARD
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 14, 2013. Respondent made a timely Return on or about June 11, 2014. The Court convened an evidentiary hearing into the matter on May 12, 2015, at the Horry County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Russell B. Long, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the pleadings, and portions of the transcript from Applicant's initial trial that ended in a mistrial. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In March 2006, the Horry County

copy

Grand Jury indicted Applicant for trafficking cocaine, 100-200 grams (2006-GS-26-1349). Russell B. Long, Esquire (“trial counsel”), represented Applicant. On September 7, 2006, Applicant proceeded to trial before the Honorable Steven H. John and a jury. Judge John declared a mistrial after beginning testimony in that trial. On September 12, Applicant again proceeded to trial before Judge John and a jury. On September 13, 2006, the jury found Applicant guilty as indicted. Judge John sentenced Applicant to twenty-five (25) years imprisonment.

Applicant filed a timely notice of appeal, and Elizabeth A. Franklin-Best, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals reversed Applicant’s conviction on June 14, 2010. State v. Brown, 389 S.C. 473, 698 S.E.2d 811 (Ct. App. 2010). The Court of Appeals denied the State’s petition for rehearing on September 24, 2010, and the South Carolina Supreme Court granted the State’s petition for writ of certiorari. The Supreme Court reversed the Court of Appeals and affirmed Applicant’s conviction on December 19, 2012. State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2012). The Supreme Court denied Applicant’s petition for rehearing and the remittitur was returned to the circuit court on January 24, 2013. The United States Supreme Court denied Applicant’s petition for writ of certiorari on June 3, 2013.

II. ALLEGATIONS

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

1. “Ineffective assistance of counsel for failure to raise the South Carolina Constitution”
 - a. “Failure to raise the South Carolina Constitution”
2. “Ineffective assistance of counsel”

- a. "Failure to argue suppression motion before the state introduce evidence"

At the evidentiary hearing, Applicant proceeded on the allegations in his application, as well as an allegation of ineffective assistance of counsel for failing to request a continuance to obtain a transcript of the prior trial.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The 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.

A. Summary of Testimony

Trial counsel testified he represented Applicant for six to eight months prior to trial. He testified his trial strategy was to attempt to suppress the drug evidence because of an illegal search. He recalled discussing this strategy with Applicant. Trial counsel testified Applicant's first trial on these charges ended in a mistrial. He recalled discussing with Applicant the possibility of seeking more time before the re-trial, but did not think about ordering a copy of the transcript from the mistrial. He testified he did not think he needed a copy of the transcript because the re-trial occurred soon after the mistrial and the mistrial was fresh in his mind.

Trial counsel testified the arresting officer's testimony was different at the second trial. He recalled the officer did not testify at the first trial that he was searching the vehicle for reasons of officer safety, but did in the second trial. However, he also testified Judge John recalled the officer's testimony in the initial trial and pointed out the testimony had changed.

Trial counsel testified he raised the issue of the changing testimony to Judge John when arguing to suppress the drugs.

Trial counsel testified he did not recall making an objection to the search under the South Carolina Constitution. He testified he generally does not make separate suppression arguments under the United States and South Carolina constitutions. However, he recalled Judge John ruling the search and seizure of the drugs did not offend the South Carolina Constitution.

Applicant testified trial counsel did not have a pre-trial suppression hearing in the second trial. He also testified the officer lied in his testimony at the second trial, and trial counsel should have objected to his testimony.

B. Ineffective Assistance of Trial Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Because the application alleges ineffective assistance of trial counsel as a ground for relief, Applicant must prove trial 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland,

466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

1. South Carolina Constitution

The Court finds Applicant failed to meet his burden to prove trial counsel ineffective for failing to argue the drugs should be suppressed based on the South Carolina Constitution. Applicant posits trial counsel should have argued the drugs should have been suppressed because the search of his duffel bag violated the privacy provision of S.C. Const. art. I, § 10, which states that "[t]he right of the people to be secure in their persons, houses, papers, and effects against [...] unreasonable invasions of privacy shall not be violated[.]" However, the record indicates trial counsel did argue, on numerous occasions, that Applicant had a privacy interest in the bag in which the drugs were found. (Sept. 12, 2006 Trial Tr. p. 148, line 10; p. 149, lines 14-17; p. 152, lines 6-7; p. 163, lines 6-13). Thus, trial counsel properly articulated his position that the search and seizure of the drugs violated Applicant's right to privacy, including the right to privacy found in the South Carolina Constitution. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it,

but it must be clear that the argument has been presented on that ground.” (citing State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001))). Furthermore, Judge John cited the South Carolina Constitution when denying the motion to suppress. (Sept. 12, 2006 Trial Tr. p. 180, lines 6-24). Because the right to privacy was raised to and ruled upon by Judge John, trial counsel was not deficient in this regard. Furthermore, because this issue was addressed at trial, it cannot now be raised as a ground for relief in post-conviction relief. See S.C. Code Ann. § 17-27-20(b) (post-conviction relief “is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.”); see also Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (“It is uniformly held that an application for post-conviction relief is not a substitute for an appeal.”).

Regardless, the Court would find the search in this case did not violate the South Carolina Constitution. Although the South Carolina Constitution may afford a greater degree of privacy protection than the United States Constitution, State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001), it still requires the reviewing court to analyze the reasonableness of the invasion of privacy. See State v. Drayton, 411 S.C. 533, 549, 769 S.E.2d 254, 263 (Ct. App. 2015), reh'g denied (Mar. 19, 2015) (requiring defendant to show he had a reasonable expectation of privacy to challenge search). At the time of Applicant’s trial,¹ authorities were allowed to search his bag once he was placed under arrest. New York v. Belton, 453 U.S. 454, 460 (1981). Thus, the search of Applicant’s bag was not an unreasonable invasion of privacy. Id. at 461 (“[T]he justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may

¹ The Court notes the law regarding searches incident to arrest changed after Applicant’s trial. Brown, 401 S.C. at 94, 736 S.E.2d at 269.

have.”). Because the search of Applicant’s bag was not unreasonable under the law at the time of the arrest, it did not offend the privacy provision of the South Carolina Constitution. Therefore, Applicant has not shown he was prejudiced by trial counsel not further arguing to suppress the drug evidence on this ground.

2. Suppression Motion at Second Trial

The Court finds Applicant failed to meet his burden to show trial counsel ineffective in failing to make a suppression motion at the second trial. The record clearly indicates trial counsel moved to suppress the drug evidence at the second trial. (Sept 12, 2006 Trial Tr. p. 81). Judge John indicated he would take the motion under advisement and rule on it at the close of all of the evidence. (Sept 12, 2006 Trial Tr. 87, line 21-p. 88, line 1). Although the motion hearing was not held before trial, all issues relating to the motion were addressed. Accordingly, the Court finds trial counsel was not deficient in this regard.

3. Mistrial Transcript

The Court finds Applicant failed to meet his burden to show trial counsel ineffective in failing to move for a continuance to obtain a copy of the transcript from the prior trial. The Court finds very credible trial counsel’s testimony he did not think he needed a copy of the transcript because the trial was fresh in his mind. The Court notes the initial trial occurred on September 7, 2006, and the retrial occurred on September 12, 2006. Counsel’s memory of events five days earlier was presumably sufficient for him to prepare for the second trial. Accordingly, the Court finds trial counsel articulated a valid strategic reason for not asking for a continuance to request a transcript from the mistrial. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (“Where, as here, counsel articulates a valid reason for employing certain

strategy, such conduct will not be deemed ineffective assistance of counsel.” (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))).

Furthermore, the fact the re-trial occurred five days later militates against a finding Applicant was prejudiced by not having a copy of the mistrial transcript. See Harris v. State, 377 S.C. 66, 78, 659 S.E.2d 140, 146 (2008) (no prejudice from lack of mistrial transcript where “counsel believed the events of the first trial were fresh in his mind during the second trial”). Furthermore, Judge John was clearly aware of the differences in testimony between the first and second trial. (Sept 12, 2006 Trial Tr. p. 84, line 9-p. 85, line 10). Therefore, Applicant has not shown how a copy of the mistrial transcript would have changed Judge John’s ruling on the suppression motion.

C. 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.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established by a preponderance of the evidence any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

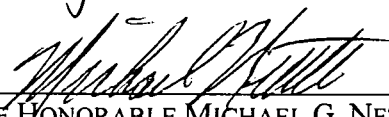
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel’s receipt of written notice of entry of judgment to secure the appropriate

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), SCRCR, 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 must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 16 day of June, 2015.



THE HONORABLE MICHAEL G. NETTLES
Presiding Judge

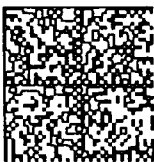
Winn, South Carolina

AXELROD

& ASSOCIATES
ATTORNEYS AT LAW

4701 Oleander Drive ♦ Myrtle Beach, SC 29577

Daniel E. Shearouse
Clerk of Court
P.O. Box 11330
Columbia, SC 29211



UNITED
PITNEY BOWES
\$ 002.080
02 1P JUL 30 2015
0001950239
MAILED FROM ZIP CODE 29577