

Shawn M. Campbell
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ATTORNEYS AT LAW

OF COUNSEL:
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RECEIVED

SEP 04 2015

S.C. SUPREME COURT

Monday, August 31, 2015

VIA CERTIFIED MAIL

The Honorable Daniel Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

**RE: Wilbur Summers, # 318793 vs. State of South Carolina
2010-CP-42-6503**

Dear Mr. Shearouse:

Enclosed for filing are an original and a copy of a notice of appeal in the above-referenced case. I have been appointed to serve as attorney for the PCR applicant, Wilbur Summers, in this action. Also enclosed are the following:

- 1) Proof of service of the notice of appeal on the respondent.
- 2) A copy of the order which is to be challenged on appeal.

The Order of Dismissal was never received by office however I received two copies of a Form 4, Judgment in a Civil Case. I contacted the Spartanburg County Clerk's Office on August 28, 2015 to notify them the Order had not been received at which time they emailed me a copy. I am enclosing the Certificate of Service provided to me by the Clerk's Office as well as the email where they forwarded me the Order on August 28th.

Insofar as this is an appeal from a Post-Conviction Relief case, I am not enclosing a filing fee, as I believe such fees are waived in these cases.

Best Regards,



Kenneth P. Shabel, Esq.
Campbell & Shabel, LLC
175 Magnolia Street, Suite 201
Spartanburg, S.C. 29304
Telephone: 864-583-0001
FAX: 864-583-1199
Attorney for Appellant

cc: client
Ms. Suzanne H. White, Assistant Attorney General

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Circuit Court

The Honorable R. Scott Sprouse

Case No. 2010-CP-42-6503

RECEIVED

SEP 04 2015

S.C. SUPREME COURT

State of South Carolina,

Respondent

vs.


Wilbur Summers,

Appellant

NOTICE OF APPEAL

Wilbur Summers, South Carolina Department of Corrections Number 318793, hereby appeals the order of the Honorable R. Scott Sprouse, dated July 22, 2015 in Case Number 2012-GS-42-2818.

August 31, 2015


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Telephone: 864-583-0001
FAX: 864-583-1199
Attorney for Applicant

Other Counsel of Record:

Suzanne H. White, Esq.
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Circuit Court

The Honorable R. Scott Sprouse

Case No. 2010-CP-42-6503

RECEIVED

SEP 04 2015

S.C. SUPREME COURT

State of South Carolina,

Respondent

vs.

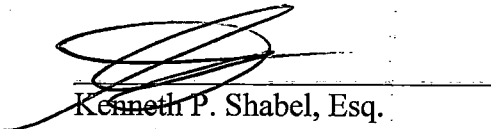
Wilbur Summers,

Appellant

PROOF OF SERVICE

I certified that I have served the Notice of Appeal by depositing a copy of it in the United States Mail, postage prepaid, on the State of South Carolina, addressed to its attorney of Record, Suzanne H. White, Esq., SC Attorney General's Office, PO Box 11549 Columbia, SC 29211.

August 31, 2015


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Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239



M. Hope Blackley
Clerk of Court
August 4, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH JUDICIAL CIRCUIT

Wilbur Summers
318793

CASE # 2010-10503

Applicant

CERTIFICATE OF SERVICE

VS
State

Respondent

I certify that, on this date, I served a copy of the Final Order Dismissal
In this action dated 7-22-2015 on 8-4-15

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Robert Hawthorth
Keeth Shalshel

8-4-15
(Date)

Coree Self
(Signature)

Jennifer Moss

From: Courtmail42_DoNotReply@sccourts.org
Sent: Friday, August 28, 2015 2:11 PM
To: Jennifer Moss
Attachments: 2010CP4206503_ODISML_445467.PDF

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
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 Wilbur Summers, #318793, )  
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 Applicant, )  
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 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
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IN THE COURT OF COMMON PLEAS  
 SEVENTH JUDICIAL CIRCUIT

2010-CP-42-6503

**ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed December 9, 2010. Respondent made its Return on or about February 16, 2012. The Court convened an evidentiary hearing into the matter on June 12, 2015, at the Spartanburg County Courthouse. Applicant was present and represented by Ken Shabel, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Applicant testified on his own behalf and through the approved Spanish interpreter Yanet Chavez. Pat Anderson, Esquire, also testified. This Court had before it the Spartanburg County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the pleadings in this matter.

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 H. J. P. CLERK

**I. PROCEDURAL HISTORY**

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. Applicant was indicted at the February 2006 term of the Spartanburg County Grand Jury for trafficking in marijuana, more than 2000 lbs. (2006-GS-42-0740). George P. Trejo, Jr., Esquire, admitted *pro hac vice* to

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practice in South Carolina, and J. Patricia Anderson, Esquire, local counsel, represented Applicant at trial. On November 16, 2006, Applicant was convicted of this charge by a jury. The Honorable Lee S. Alford sentenced Applicant to confinement for twenty-five years and a \$50,000 fine.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Appellate Defender LaNelle C. Durant. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Summers, Op. No. 2009-UP-138 (filed March 10, 2009). A Petition for Rehearing was filed by the Applicant and denied by the Court on May 4, 2009. Applicant then filed a Petition for Writ of Certiorari with the South Carolina Supreme Court, which was denied on January 22, 2010. The Remittitur was returned on January 29, 2010.

In his application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that;
  - a. Counsel failed to move for directed verdict for State's failure to prove actual or constructive possession of the marijuana filled pottery,
  - b. Counsel failed to obtain a handwriting expert to challenge the signed waiver of rights presented by the State,
  - c. Counsel failed to object to the improper jury instructions by the court regarding the facts of the case addressing knowledge and strong evidence,
2. Ineffective assistance of appellate counsel, in that;
  - a. Counsel failed to apprise the Court of the State's erroneous manipulation of the facts in their initial brief,
3. Violation of Due Process.

## II. SUMMARY OF EVIDENCE PRESENTED AT THE PCR HEARING

Applicant's local trial counsel, Pat Anderson, Esquire ("Counsel") testified that she has been practicing law since 1987 and devotes half of her case load to criminal matters. She testified that she started on this case when George Trejo, Esquire, contacted her about appearing *pro hac vice*. She testified that she was pleased with Applicant's first trial on this charge which

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H. JOE BLANKLEY  
CLERK OF COURT

resulted in a hung jury. Counsel testified that six months elapsed between the first trial and the second trial. She testified that there was a motion to be relieved filed which was denied. She testified that in the second trial, <sup>Trejo RS</sup> she made all the right motions but Applicant was nevertheless convicted by the jury. Counsel further testified that during the second trial, the jurors went to see the marijuana that Applicant was accused of trafficking.

Applicant testified that his family lives in California and retained Mr. Trejo to represent him but understood why Counsel was also involved. He testified that he believed both attorneys did a good job in the first trial. He testified that between the two trials, Mr. Trejo came to see him four times and said he would not continue to represent him without payment. Applicant testified that he had no problem with the motion made by Counsel during trial to dismiss the case for insufficient evidence.

Applicant testified that he never saw a waiver of Miranda rights form and denied ever signing one. He testified that he wanted Counsel to get a handwriting expert to analyze whether it was in fact his signature on the form. Applicant also testified that at the time of the PCR hearing, an expert has looked at his signature, however he disagrees with the expert's conclusions.

Applicant testified that when he was arrested the officers did not speak any Spanish to him until he arrived at the Sheriff's Office. He testified that he is a native of Mexico and was never advised of his rights to speak with the Mexican consulate. He testified that he asked to speak with the consulate but law enforcement denied his request.

### III. 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

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accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial 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.

As a matter of general impression, this Court finds Counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

**A. Ineffective Assistance of Trial Counsel**

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 an trial counsel's

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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.

This Court finds Applicant failed to meet his burden to prove Counsel was ineffective in any way. This Court finds Counsel's testimony credible and persuasive on all matters. This Court finds Counsel is a criminal practitioner who has experience in the trial of serious offenses. This Court finds that Counsel did raise the issue of the court charging conspiracy as it relates to the trafficking charge. Trial Transcript, p. 311, ll. 10-14. The trial court then gave a detailed explanation as to why it was going to charge conspiracy as it relates to the trafficking charge, finding that evidence had been presented that would warrant the charge. Counsel then raised his objection to the conspiracy charge again. Trial Transcript, p. 320, ll. 7-9. Thus the record clearly reflects that Counsel was not ineffective for failing to object to the jury instructions concerning conspiracy and Applicant's knowledge.

This Court finds that Applicant has also failed to prove that Counsel was ineffective for failing to move for a directed verdict. First, the record reflects that Counsel did make this motion before the trial court. Trial Transcript, p. 305, ll. 8-16. Secondly, Applicant stated at the PCR Hearing that he had no problem with Counsel making this motion. Accordingly, this Court finds that Applicant has wholly failed to prove that Counsel's performance was deficient and that he was prejudiced by the result. Thus, this allegation must be dismissed.

This Court further finds that Applicant's allegation that his Counsel should have obtained a handwriting expert to challenge the signed waiver of rights form is without merit. This waiver form was offered into evidence without objection and was actually admitted into evidence by

stipulation. Even if Counsel's failure to obtain a handwriting expert constituted ineffective assistance, this Court finds that Applicant cannot show that any prejudice resulted. Applicant has since had an expert look at his signature but disagrees with the expert's conclusions. Even if an expert had been hired, it is unlikely that the expert would have been able to provide favorable testimony for Applicant. Accordingly, this Court finds that Applicant has failed to show that the outcome of his case would have been different had a handwriting expert been obtained.

**B. 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 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), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf.

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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 22 day of July, 2015.



THE HONORABLE R. SCOTT SPROUSE  
PRESIDING JUDGE

Waltham, South Carolina

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M. HOPE BLACKLEY

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The Honorable Daniel Shearouse  
Clerk, Supreme Court of South Carolina  
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