

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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MAR 28 2016

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Honorable D. Craig Brown, Circuit Judge

Case No.: 2014-CP-26-8292

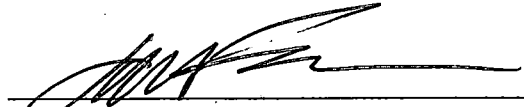
Lynel Witherspoon 254076.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Lynel Witherspoon appeals the Honorable D. Craig Brown's March 7, 2016, Order of Dismissal. Undersigned counsel received notice of entry of the order on March 25, 2016. A copy of the order on appeal is attached hereto.


James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

March 25, 2016

Jessica E. Kinard, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
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APPEAL FROM HORRY COUNTY
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Honorable D. Craig Brown, Circuit Judge **MAR 28 2016**

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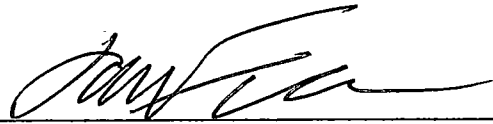
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PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Jessica Kinard, Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this 25th day of March, 2016.



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March 25, 2016

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

MAR 28 2016

Re: Lynel Witherspoon v. State, 2014-CP-26-829 **S.C. SUPREME COURT**

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Horry County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc: Jessica Kinard, Esq.; Lynel Witherspoon 254076.

HORRY COUNTY
2016 MAR 11 PM 1:21
MELANIE SUGGS-WARD
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
Lynel Witherspoon, #254076,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS)
FOR THE FIFTEENTH JUDICIAL CIRCUIT)
Case No. 2014-CP-26-8292)

ORDER OF DISMISSAL
(Ends action)

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 12, 2014. Respondent made a timely Return on or about June 15, 2015. The Court convened an evidentiary hearing into the matter on February 9, 2016, at the Horry County Courthouse. Applicant was present at the hearing and represented by James K. Falk, Esquire. Jessica E. Kinard, Esquire of the South Carolina Attorney General's Office, represented Respondent.

Applicant and his trial counsel, Kia T. Wilson, Esquire testified at the hearing. 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, and the pleadings. At the close of the cases in chief, the Court left the record open for counsel to submit memoranda on the competence of certain testimony, its potential classification as hearsay, and the need for curative instruction. A memorandum was submitted by each party before the ruling was issued in this matter. 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 February 2013, the Horry County Grand Jury indicted Applicant for Distribution of Cocaine, third or subsequent offense (2013-GS-26-



00857). Kia T. Wilson, Esquire, represented Applicant. On July 24, 2013, Applicant proceeded to trial before the Honorable Larry B. Hyman, Jr., and a jury. On July 25, 2013, the jury found Applicant guilty as indicted. Judge Hyman sentenced Applicant to seventeen (17) years imprisonment.

Applicant filed a timely notice of appeal. Benjamin J. Tripp, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of an Anders¹ brief. The South Carolina Court of Appeals dismissed the appeal on October 8, 2014. State v. Witherspoon, Op. No. 2014-UP-354 (S.C. Ct. App. filed October 8, 2014). The remittitur was returned to the circuit court on October 27, 2014.

II. ALLEGATIONS

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

1. "Ineffective assistance of counsel"
 - a. "Counsels failure to effectively utilize pretrial motions, or establish an assertive defense, and raise significant objections in the criminal process"
2. "Due process"
 - a. "denial of directed verdict motion was error of law"
3. "Ineffective assistance of counsel, performance on appeal"
 - a. "Counsels failure to perform and raise meritorious issues on Appeal"

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

¹ Anders v. California, 386 U.S. 738 (1967).

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 was called first by Applicant's counsel, and her testimony began with a review of the evidence in this case, which consisted primarily of an audio/video recording of a controlled drug buy. She testified that she did not believe a suppression hearing pursuant to Neil v. Biggers² was necessary because the video did not seem detrimental, as it did not show Applicant's face with any clarity, nor did it show a hand-to-hand transaction. In fact, trial counsel thought that the best evidence for the state was the testimony of the confidential informant, who had several crimes of dishonesty on her record, all of which trial counsel brought out at trial. Trial counsel believed that there were enough problems with the confidential informant's record and credibility that it was possible to discredit her testimony. Applicant questioned trial counsel extensively about whether Agent Pellerin, the law enforcement officer that was the key witness at trial and who set up the controlled buy, had direct knowledge of the drug sale. Trial counsel stated that she elicited on cross examination the fact that Agent Pellerin did not, in fact, witness the actual drug sale transaction, to which Applicant followed up by asking trial counsel why she did not object to hearsay or request a curative instruction from the judge about the allegedly improper nature of Agent Pellerin's testimony. Trial counsel testified that she did not think any of these measures were appropriate or necessary. Applicant also questioned trial counsel about the Allen³ charge that the jury received when they began deliberations on the second day of trial. To this, trial counsel testified that she

² Neil v. Biggers, 409 U.S. 188 (1972).

³ Allen v. United States, 164 U.S. 492, 17 S. Ct. 154 (1896).

objected strenuously in chambers to the court's suggestion of an Allen charge, and that she reiterated this objection on the record after the charge was issued. She further testified that she had a great amount of difficulty being heard on the record during this trial, and felt that many of her objections were cut off or not considered. The Applicant did not testify on his own behalf.

B. Ineffective Assistance of Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his 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)). Where 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 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, 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.

The Court finds Applicant failed to meet his burden of proof to demonstrate trial counsel was ineffective in any manner. Specifically, the Court finds Applicant failed to demonstrate that trial counsel was deficient in any way. The Court finds very credible trial counsel’s testimony regarding her trial strategy and how she was prepared to handle different elements of the evidence and witnesses at trial. The Court also finds persuasive and credible trial counsel’s testimony that she attempted to object at all appropriate times, as the transcript reflects her recitation of the events. Trial counsel had a valid and clearly articulable trial strategy that was in line with the prevailing norms of professional conduct.

Because Applicant failed to prove that trial counsel was deficient, he does not reach the second prong of the Strickland test regarding prejudice. However, assuming *arguendo* that deficiency had been proven, Applicant failed to prove that he was in any way prejudiced by trial counsel’s representation. Applicant presented no evidence of trial counsel representing him in a manner that was anything but professional and beneficial. Therefore, had this matter reached the second prong of the test, Applicant could not have proven that he was prejudiced by trial counsel’s ineffective performance.

C. All other allegations

This Court notes that Applicant put forth other allegations including a due process violation, in that the denial of the directed verdict motion was error of law, and ineffective assistance of appellate counsel for failure to raise meritorious issues on Appeal. However, this Court finds Applicant either failed to meet his burden of proving Counsel was ineffective or failed to show how Counsel’s actions prejudiced Applicant’s case thereby. Accordingly, these allegations are denied.

IV. CONCLUSION

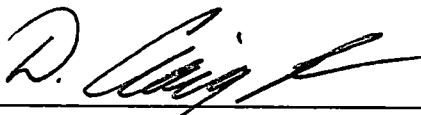
Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. There is nothing in this record to show that trial counsel was anything but prepared. Therefore, this application 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 7 day of March, 2016.



The Honorable D. Craig Brown
Presiding Judge

Florence, South Carolina

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