

EXHIBIT A

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ANDERSON SC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON)
) 2016 MAR 18 AM 10:08
) COMMON PLEAS AND
) GENERAL SESSIONS
) TENTH JUDICIAL CIRCUIT

Joey Johnson,)
S.C.D.C. No. 214306)
))
Applicant,)
))
v.)
))
State of South Carolina,)
))
Respondent.)

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C.A. No. 2011-CP-04-1849
APR 04 2016
SC Court of Appeals

ORDER OF DISMISSAL

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MAR 18 2016

Richard S. Kiley
ANDERSON CLERK OF COURT

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed July 12, 2013. Respondent made its Return on or about April 15, 2015. An evidentiary hearing into the matter was convened on August 31, 2015, at the Anderson County Courthouse. Applicant was present and was represented by Wade S. Kolb, III, Esquire. Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's PCR appellate counsel, Katherine Hudgins, Esquire, also testified. This Court had before it a copy of Applicant's guilty plea transcript, the records of the Anderson County Clerk of Court regarding the subject guilty pleas, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. The Applicant

was indicted on June 14, 2005 term of the State Grand Jury for trafficking methamphetamine (conspiracy) (greater than 400 grams), two counts of trafficking methamphetamine (10-28 grams), and trafficking methamphetamine (greater than 400 grams) (2005-GS-47-09). The Applicant was represented by Druanne D. White, Esquire, and James Todd Rutherford, Esquire. On July 20, 2006, Applicant pled guilty to two (2) counts of trafficking methamphetamine (28-100 grams) and two (2) counts of trafficking methamphetamine (10-28 grams). He was sentenced by the Honorable Wyatt T. Saunders to confinement for a period of fifteen (15) years. Applicant did not appeal his sentence or conviction.

First PCR Application

Applicant subsequently filed an application for post-conviction relief (2006-CP-04-3937) on May 17, 2006, alleging the following:

1. Applicant pled guilty because Applicant thought he was going to receive a seven (7) year sentence;
2. Ineffective assistance of counsel for failure to file a direct appeal;
3. Applicant pled guilty because Applicant was coerced and under duress;
4. Guilty plea rendered involuntary because Applicant was not competent to plead guilty;
5. Ineffective assistance of counsel because Applicant relied upon unfulfilled promise from attorneys that Applicant would be housed in a prison close to his home;
6. Inadequate conditions of confinement;
7. Ineffective assistance of counsel for failure to investigate possible defenses; and
8. Ineffective assistance of counsel for failure failing to communicate with Applicant about his case.

Respondent filed its Return on May 2, 2007. An evidentiary hearing into the matter was convened on July 22, 2008, at the Anderson County Courthouse. Applicant was present and was represented by Hugh Welborn, Esquire. Gregory P. Jones, Esquire, represented the Respondent. On September 2, 2008, the Honorable R. Knox McMahon issued an Order denying and dismissing Applicant's application with prejudice.

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Applicant subsequently appealed the denial of his first PCR Application. Applicant was represented on appeal by Katherine H. Hudgins, Esquire, of the Appellate Defender's Office. Ms. Hudgins filed a Petition for Writ of Certiorari raising the following issue: "Was the guilty plea rendered involuntary by the fact that trial counsel promised Applicant that if he pled guilty he would receive special housing consideration within the Department of Corrections when in fact Applicant could only be housed in one Department of Corrections facility because of his HIV status?" On June 9, 2010, the South Carolina Supreme Court issued an Order granting the petition for a writ of certiorari. Applicant and Respondent filed briefs. The South Carolina Supreme Court dismissed the appeal as improvidently granted. Johnson v. State, Op. No. 2011-MO-013 (S.C. Cup. Ct. filed April 25, 2011). The remittitur was issued on May 13, 2011.

Current Application

Applicant filed this application on July 12, 2013, alleging, *inter alia*,¹ Applicant alleged at the evidentiary hearing that his PCR appellate counsel was ineffective for failing to raise the following issues on appeal:

- Trial court erred in refusing to dismiss defendant's indictments where SLED agents recorded conversations between defendant and his attorney;
- Ineffective assistance of counsel and involuntarily entered guilty plea due to coercion, duress, and inducement;
- Guilty plea involuntarily, unknowingly, and unintelligently entered due to counsel's erroneous advice;
- Ineffective assistance of counsel in failing to consult, communicate, and investigate possible defenses with Applicant;
- Applicant did not knowingly, intelligently, and/or voluntarily waive his right to a direct appeal;
- Ineffective assistance of counsel in failing to investigate mental competency of Applicant at time of plea;

¹ Applicant raised a number of other issues, all of which were summarily dismissed as time barred and successive by the Honorable Edgar W. Dickson in a written order signed August 26, 2015, and filed September 3, 2015. Applicant's remaining issue involving ineffective assistance of appellate counsel was set for an evidentiary hearing.

- Ineffective assistance of counsel in failing to adequately consult and communicate with Applicant and adequately investigate charged offenses.

The Constitutional right to counsel does not extend to discretionary appeals on collateral attack. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990 (1987).² Accordingly, this Court finds Applicant's allegation that his PCR appellate counsel was ineffective in failing to raise specific issues on appeal is entirely without merit and unsupported by law. Just as the ineffective assistance of PCR counsel is not a "sufficient reason" to warrant the filing of a successive application, see Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991), the allegation that appellate counsel was ineffective in failing to make specific arguments on his appeal does not justify a successive filing. This is categorically distinguishable from cases, such as Austin,³ where an applicant was denied the right to appeal *in its entirety*. Under those circumstances, an applicant may be able to bypass certain procedural bars. Those circumstances are not present here.

This court further finds that even if it were to find ineffective assistance of collateral appellate counsel a sufficient reason to warrant a successive application, Applicant has failed to meet his burden to show any actual deficient performance or prejudice. Although appellate counsel is required to provide effective assistance,⁴ "appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would

² But see Johnson v. State, 394 S.C. 310, 364 S.E.2d 201 (1988) (holding that procedures outlined in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), are still required for counsel to withdraw in cases of meritless post-conviction relief appeals.)

³ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

⁴ This Court notes that this decision is one involving the assistance of appellate counsel in a direct appeal to a conviction, rather than on collateral review.

disserve the very goal of vigorous and effective advocacy....” Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754, 103 S.Ct. 3308 (1983)).

Applicant said that he remembered calling his collateral appellate counsel several times. He said that he wanted his issues preserved for federal appeal. Counsel sent Applicant a letter telling him that it was in her discretion as to which issues were presented on appeal. She spoke to Applicant and Applicants’ family when certiorari was initially granted by the Supreme Court of South Carolina.

This Court finds Applicant has failed to meet his burden to prove PCR appellate counsel was ineffective in failing to brief the remaining allegations dismissed during his initial PCR proceedings, particularly in light of the record on appeal, as well as evidence and testimony presented at the evidentiary hearing. Applicant has failed to prove there were any issues – not presented – that were meritorious, or even any stronger than the issue he ultimately proceeded with. He has also failed to overcome the “strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case.” Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). This allegation is therefore denied and dismissed.

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.





CONCLUSION

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

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

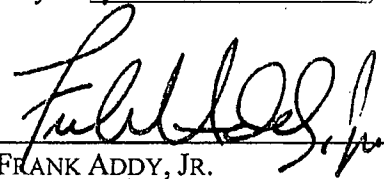
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 7th day of March, 2016.

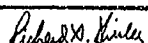
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SC Court of Appeals


 FRANK ADDY, JR.
 Presiding Judge
 Tenth Judicial Circuit

Frankwood, South Carolina

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