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May 26, 2016

The Honorable Daniel E. Shearouse
Clerk of the Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: *Loretta Galloway Branyon v. State of South Carolina*
Case No.: 2013-CP-04-1843

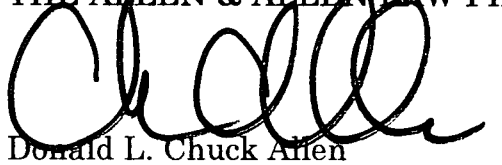
Dear Mr. Shearouse:

Enclosed for filing is a Notice of Appeal and one (1) copy in the above-captioned matter, along with a copy of the Order which is to be challenged on appeal. Also enclosed is the Proof of Service of the Notice of Appeal on the Respondent and one (1) copy.

Please file the originals and return the certified copies to me in the enclosed self-addressed stamped envelope. By copy of this letter, I am notifying opposing counsel and the South Carolina Office of Appellate Defense of this filing.

Sincerely yours,

THE ALLEN & ALLEN LAW FIRM



Donald L. Chuck Allen

DCA/rs

Enclosures

xc: Patrick Schmeckpeper, Esquire
Assistant South Carolina Attorney General's Office

Ms. Lorraine French
SC Office of Appellate Defense

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2013-CP-04-1843

Loretta Galloway Branyon, ... Applicant.

v.

The State of South Carolina. . . . . Respondent.

NOTICE OF APPEAL

Loretta Galloway Branyon appeals the Order of Dismissal in this case. The Order of Dismissal was imposed by the Honorable Brooks P. Goldsmith. on May 17, 2016.

THE ALLEN & ALLEN LAW FIRM

May 26, 2016

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAY 31 2016
SC SUPREME COURT

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2013-CP-04-1843

Loretta Galloway Branyon, ... Applicant.

v.

The 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 May 26, 2016 to its attorney of record, Patrick Schmeckpeper, Assistant Attorney General, South Carolina Attorney General's Office. Post Office Box 11549, Columbia, South Carolina 29211.

THE ALLEN LAW FIRM

Dated: May 26, 2016

Donald L. Chuck Allen, SC Bar #10421
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864-226-6184
Attorney for Applicant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ANDERSON	)	TENTH JUDICIAL CIRCUIT
	)	
Loretta Galloway Branyon, S.C.D.C. No. 352011	)	**C.A. No. 2013-CP-04-1843**
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL** **(with prejudice)**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on August 12, 2013. Respondent filed its Return on August 3, 2015. An evidentiary hearing into the matter was convened on February 8, 2016, at the Anderson County Courthouse. Applicant was present at the hearing and was represented by Donald "Chuck" Allen, Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted by the April 2011 term of the Anderson County Grand Jury for possession of methamphetamine with intent to distribute (PWID Meth.) (2011-GS-04-0604). Applicant was represented by Charles W. Whiten, Jr., Esquire. On August 14, 2012, the Applicant proceeded to trial before the Honorable R. Lawton McIntosh and a jury. She was found guilty as indicted. Judge McIntosh sentenced

Applicant to a term ten (10) years imprisonment and revoked her probation on an unrelated offense.[1]

A timely notice of appeal was filed and perfected on Applicant's behalf. Charles Whiten, Esquire, represented her on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Branyon, Op. No. 2014-UP-310 (S.C. Ct. App. filed August 6, 2014). The Remittitur was issued on August 22, 2014.

Allegations

In her application for post-conviction relief, Applicant alleged she was being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Legal Counsel"
   a. "No defense witnesses were called"

On February 5, 2015, Applicant filed an amended application, through counsel, raising the following additional allegations:

1. Ineffective assistance of legal counsel.
   a. Failure to object to prejudicial comment/argument made by the Solicitor during closing argument;
   b. Failure to object to search warrant and/or motion to suppress the contraband evidence;
   c. Failure to contemporarily object to the trial judge's inadvertent comment on the evidence.

At the evidentiary hearing, Applicant proceeded only on the failure to object to prejudicial comments and argument by the solicitor, and failure to object to the trial judge's inadvertent comment on the evidence.

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

[1] Applicant had been sentenced on October 15, 2008, to ten years suspended with probation for five years for PWID Meth and PWID other Substance (2007-GS-04-2060; -2061). These sentences were to run concurrently.

accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court makes the following findings of fact and conclusions of law based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the 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, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient

performance must have prejudiced the 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.

Failure to Object: Solicitor's Misstatement of the Law

Applicant first alleges counsel was ineffective for failing to object to the solicitor's statements during closing argument. This Court finds Applicant has failed to meet her burden, as any improper comments by the solicitor were adequately cured by the trial judge's instructions, and the evidence of Applicant's guilt was overwhelming.

An alleged impropriety of the solicitor's argument must be viewed in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the applicant has the burden of proving she did not receive a fair trial because of the alleged improper argument. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Id.

During opening arguments, the solicitor said to the jury that because Applicant was found in possession of more than one gram of methamphetamine, the law "requires the assumption that she intended to sell it." Tr. p. 58, l. 17-21. Later, during closing arguments, the solicitor told the jury that they had a "permissive inference," and that they were "allowed but not required to assume that because [Applicant] had six grams of meth on her that she intended to sell them." Tr. p. 215, l. 21-25. She subsequently repeated herself. Tr. p. 216, l. 1-5. The solicitor also told

the jury they were allowed to "presume that solely based on [the] weight [Applicant] was intending to sell the drugs. . . ." Tr. p. 223, l. 3-7.

This Court finds that the solicitor's comments were inappropriate, and that counsel should have objected. However, Applicant has failed to meet her burden to prove prejudice. First, the trial judge adequately cured the solicitor's misstatement by accurately stating the law to the jury. During the closing charge to the jury, the trial judge explained that

> "[p]ossession of one or more grams of methamphetamine creates an inference that the defendant possessed the methamphetamine with intent to distribute. This inference does not relieve the State from proving beyond a reasonable doubt that the defendant had the intent to distribute drugs. It is simply an evidentiary fact to be taken into consideration by you along with the other evidence in this case and to be given the weight that you decide that it should."

Tr. p. 199, l. 11-21.

Moreover, the judge told the jury multiple times that he was the sole judge of law. In his opening instruction, the judge charged the jury that he was the "instructor of the law," and that they "must apply the law" as he gave it to them in this case. Tr. p. 51, l. 22 - p. 52, l. 7. The judge charged the jury not to "be concerned with what you want to the law to be or what you think that it should be," but to "apply the law as I give it to you." Tr. p. 97, l. 17-21. Accordingly, this Court finds the solicitor's misstatements were adequately cured by the judge's instructions. See State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986) (jury presumed to follow the law as instructed) *overruled in part on other grounds*, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

This Court also finds that the evidence against Applicant was overwhelming. Applicant was caught in her home in close proximity to a large amount of methamphetamine, which had been divided up in a number of small plastic bags; several sets of drug scales; smoking pipes;

and over four thousand dollars' worth of cash. A significant portion of the evidence seized – including the cash – was found in her pocketbook alongside her South Carolina driver's license.

Due to the overwhelming nature of the evidence, as well as the trial judge's correct instructions concerning the law, this Court finds that there is no reasonable probability that counsel's failure to object to the solicitor's improper contributed to the outcome of the proceeding. See Simmons, supra. This allegation is therefore denied and dismissed.

Failure to Object to Trial Judge's Comments on the Facts

Applicant next alleges counsel was ineffective for failing to object to the trial judge's comment on the facts to the jury. This Court finds Applicant has failed to meet her burden with respect to this allegation, based on counsel's valid trial strategy and the overwhelming evidence of guilt.

Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). In addition, "every effort" must be made to "eliminate the distorting effects of hindsight and evaluate counsel's decisions at the time they were made." Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (*citing* Strickland, 466 U.S. at 689, 104 S.Ct. 2052). Reviewing courts must be wary of second-guessing trial counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

This allegation stems from comments made by the judge toward the end of Applicant's trial. In the context of informing the jury that they would have access to the evidence during their deliberations, the judge said:

> "Just remember that's methamphetamine and you don't need to have it on your fingers. It's accounted for going in, it's accounted for coming back out. So just don't handle it that way."

Tr. p. 236, l. 7-11.

At the evidentiary hearing, counsel testified that he should have objected to the judge's comments, and that his failure to object constituted ineffective assistance. On cross-examination, however, and in light of the state's evidence, counsel acknowledged that his strategy at trial had been to try and convince the jury Applicant was an addict rather than a dealer. He explained that the evidence against Applicant was "pretty solid," and that when searching her home, law enforcement found methamphetamine, roughly four thousand dollars in cash, and her ID inside her pocketbook. He said law enforcement also found three separate baggies on the couch where she was seated, as well as scales in the apartment. Counsel further testified that the drugs seized were sent to a lab and tested positive for methamphetamine. He said an expert witness testified at trial that the substance was, in fact, methamphetamine. Counsel said he did not object to the chain of custody because it "looked valid."

This Court finds counsel's testimony of trying to convince the jury Applicant was an addict, and not a dealer, was objectively reasonable given the circumstances. Additionally, as part of the strategy, this Court finds counsel basically conceded that the substance seized was actually methamphetamine. This was also objectively reasonable in light of the expert testimony presented at trial. This Court would note that even at this point in the proceedings, Applicant has not presented any evidence or testimony which would call into question that the substance was, in fact, methamphetamine, or that challenging the State's expert on this point would have been fruitful. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (ineffective assistance of counsel claim not valid when supported only by mere speculation as to the result. In addition, this Court declines to give any weight to counsel's current claims – based in

hindsight – that he believes he was ineffective in failing to object. See Edwards, supra. Applicant has therefore failed to meet her burden to show counsel's performance was deficient.

Applicant has also failed to show prejudice. As stated above, this is a case involving overwhelming evidence. See Council v. Catoe, 359 S.C. 120, 128, 597 S.E.2d 782, 786 (2004) (finding admission of inappropriate evidence did not prejudicially influence trial's outcome where evidence of guilt was overwhelming). Applicant has therefore failed to meet her burden with respect to this issue.

Alternatively, this Court finds the trial judge's instruction to the jury was not inappropriate. The trial judge specifically charged the jury that they were the "sole judges of facts." Tr. p. 51, l. 2-4. He further emphasized that

> "[i]f at any time during this case I do anything, say anything or make some type of gesture to you that indicates to you that I have a feeling one way or another as to how you are to find the facts, I'm going to ask you and I'm also going to tell you to disregard them. I can tell you that I have absolutely no feeling one way or the other as to how you find the facts, or as to how this case is supposed to end up. That is purely up to you.

Tr. p. 51, l. 4-14.

In light of that highly specific instruction, this Court fails to see how the jury could have reasonably interpreted the judge's comments as anything other than a necessary warning to take care in handling a potentially hazardous substance. Accordingly, this allegation is 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 her 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 the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 10 day of May, 2016.

BROOKS P. GOLDSMITH
Presiding Judge
Tenth Judicial Circuit

2
_____, South Carolina

A TRUE COPY
MAY 17 2016
Richard A. Kinney
CLERK OF COURT

COMMON PLEAS AND GENERAL SESSIONS
2016 MAY 17 AM 11:13
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The Allen & Allen Law Firm

The Allen Law Building
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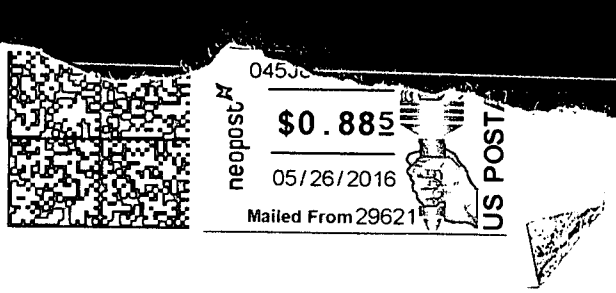

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