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July 12, 2016

RECEIVED

JUL 14 2016

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

RE: Samuel Brown v. State of South Carolina
Case No.: 2014-CP-10-5417

Dear Mr. Shearouse:


Please find enclosed the Notice of Appeal, proof of service and copy of the order being appealed in the above referenced matter. Pursuant to Rule 203(d)(2)(B)(iii) no filing fee is enclosed as this is an appeal from a PCR application denial. I respectfully request that you file this Notice of Appeal and return a date stamped copy to me in the envelope provided for your convenience.

By copy of this letter to J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office as set forth in the enclosed Certificate of Service, I am hereby serving her with this Notice of Appeal pursuant to Rule 203 SCACR.

I am also enclosing a copy of this Notice to the Office of Appellant Defense pursuant to Rule 602(e) and request that I be relieved of counsel and appellate counsel appointed for Mr. Brown.

If you require any additional information from me, please do not hesitate to let me know.

Very truly yours,


William H. Nixon, Jr.

ENC

CC: J. Rutledge Johnson, Esq.
Office of Appellate Defense
Samuel Brown

THE STATE OF SOUTH CAROLINA

In the Supreme Court

RECEIVED

JUL 14 2016

APPEAL FROM CHARLESTON COUNTY **S.C. SUPREME COURT**
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2014-CP-10-5417

State of South Carolina.....Respondent,

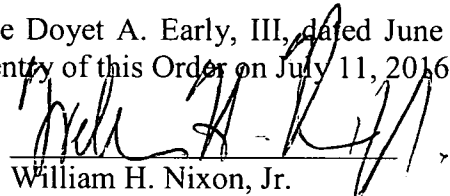
v.

Samuel Brown #254907.....Appellant.

NOTICE OF APPEAL

Samuel Brown appeals the Order of the Honorable Doyet A. Early, III, dated June 21, 2016 and filed July 5, 2016. Appellant received notice of entry of this Order on July 11, 2016.

July 12, 2016



William H. Nixon, Jr.
One Cool Blow Street, Suite 201
Charleston, South Carolina 29403
843-414-5450
Attorney for Appellant
bill@billnixonlaw.com

Other Counsel of Record:

J. Rutledge Johnson, Esq.
S.C. Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211

CERTIFICATE OF SERVICE

I, William H. Nixon, Jr., attorney for the Appellant, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the Notice of Appeal to:

J. Rutledge Johnson, Esquire
S.C. Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211

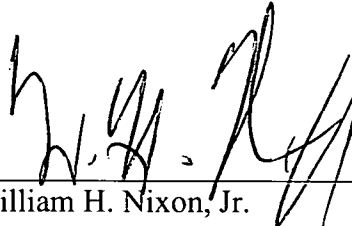
Office of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Samuel Brown #254907
MacDougall Correctional
1516 Old Gilliard Rd
Ridgeville, SC 29472

RECEIVED

JUL 14 2016

S.C. SUPREME COURT



William H. Nixon, Jr.

July 12, 2016
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
 COUNTY OF CHARLESTON)
)
 Samuel Brown, #254907,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

2014-CP-10-5417

**ORDER OF DISMISSAL OF
 PCR AND GRANTING BELATED APPEAL**

FILED
 2016 JUL -5 PM 2:07
 CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed September 5, 2014. The Respondent made its Return on November 6, 2015. An evidentiary hearing into the matter was convened on April 18, 2016, at the Charleston County Courthouse. William H. Nixon, Jr., Esquire represented Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. James Smiley, IV, Esquire also testified. This Court had before it a copy of the records of the Charleston County Clerk of Court, records from the South Carolina Department of Corrections, the trial transcript and the appellate records.

PROCEDURAL HISTORY

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

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indicted by the Charleston County Grand Jury for trafficking cocaine 10-28 grams- first offense (2012-GS-10-6790). The Applicant was represented by James Smiley, IV, Esquire.

On September 10-12, 2013, the Applicant proceeded to trial and was found guilty. The Applicant was sentenced by the Honorable J.C. Nicholson to confinement for a period of ten years. The Applicant did not appeal his conviction or sentence.

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

1. Ineffective assistance of counsel.
 - a. Failure to notify and accept plea offer.
 - b. Failure to call witnesses.
 - c. Failure to investigate and prepare for trial.
 - d. Failure to object to evidence.
 - e. Failure to file an appeal.
 - f. Failure to object to jury instructions.
 - g. Failure to object to arguments.
 - h. Failure to move for a mistrial.
 - i. Failure to object and preserve Rule 5 and Brady violations.
 - j. Failure to communicate plea offer and acceptance.
2. Rule 5/ Brady Violations.

SUMMARY OF TESTIMONY

At the evidentiary hearing, Counsel testified he advised Applicant concerning a third offense and also explained that Applicant could receive 5-30 years on a second offense. Counsel testified the plea negotiations were intense, and that the last official offer was seven years to a second offense plea, which Applicant rejected on the record approximately one year before trial, on October 3, 2012; however, Counsel still attempted to get a five year offer. There was never a clear offer of 5 years on a

first offense, and Applicant admitted he would not have accepted an offer of 5 years on a second offense. The proposed sentencing sheet from October 3, 2012 reflected there was a negotiated offer.

Counsel then testified this was a buy/bust case using a confidential informant. The buy money and drugs were found in the confidential informant's car. There was testimony at trial that law enforcement conducted a search of the confidential informant and his car prior to the confidential informant buying drugs from Applicant. Counsel stated this case hinged upon the confidential informant's credibility. Counsel testified he filed for Rule 5 discovery materials, but did not receive the identification of the confidential informant until the day of the trial. Counsel stated he did not ask for a continuance, but should have in hindsight. However, he did not ask for a continuance because he did not think Judge Nicholson would give him any extra time. Counsel also stated Applicant knew the confidential informant but not very well and did not know how to locate him prior to trial, and that there was no investigation done on the confidential informant because he did not have the information until right before the trial.

According to Counsel, Applicant told him that Applicant went to a party the night before the buy/bust and as a result, the confidential informant started pushing Applicant about getting cocaine. Applicant said he did not sell cocaine. The next day, the confidential informant called the Applicant to meet at a local bar. The transaction occurred at the confidential informant's car in the bar's parking lot.

Counsel testified he filed specific discovery including information on the confidential informant and was shocked that no other files were available because the Mt. Pleasant Police Department usually kept very meticulous files on confidential informants. Counsel then stated in

retrospect, he should have done more to find out information on the confidential informant, which could have created a bias if he could talk to other witnesses that were at the incident location that day. Counsel stated he only received one report from Mt. Pleasant Police Department and did not know about these other witnesses until right before the trial, especially the identification of the confidential informant.

Additionally, Counsel testified he urged Applicant to accept the plea offer, but was prepared for trial. Counsel speculated that if he had the case continued, he might have asked for and obtained another offer; however, the State was not willing to put the five-year offer back on the table. Counsel also stated one of the issues at trial was the time between when confidential informant's car was searched and when the buy/bust occurred. Counsel then articulated that in the incident report, just the confidential informant said that Applicant threw the drugs into the car; nevertheless, officers testified they saw drugs in the car during the trial. Counsel stated that he did not object to the officer's testimony, but vigorously cross-examined both officers. Counsel stated recording of the audiotape did work and that he did not object to the cocaine coming into evidence. Counsel lastly stated that if he had had the confidential informant's identification, he would have asked for another offer from the State.

On cross-examination, Counsel admitted that there was testimony that Applicant threw the drugs into the confidential informant's car, and admitted that none of the discovery materials contained any information that the cocaine was thrown back into the car by Applicant. There was also testimony that Applicant knew the confidential informant prior to the drug transaction.

Applicant testified that the five-year offer was made the Friday before the trial for either a first or second offense. At this time, he did not have the confidential informant's information. Applicant stated Counsel was consistently receiving evidence and that he asked Counsel about another plea offer. Applicant stated the State made the offer that week, but there was a full year between plea negotiations. Applicant stated he got a letter a month or two before the plea about the actual plea offer. Applicant stated he did not visit Counsel's office until the Friday before his trial began. Applicant claimed that if he had known the confidential informant's information, he would have pled guilty to the five-year offer and would have pled guilty to a second offense; although he was hoping for first offense.

Applicant then testified he listened to the audio recordings, but there was no information concerning cocaine and that his attorney did not object to witness testimony stating that the audiotape contained a discussion of an agreement for the Applicant to sell cocaine to the confidential informant. Applicant stated law enforcement did not say they saw the confidential informant throw the cocaine in the car in their incident reports, and he did not know the officers would testify to this information. Applicant claimed had he known the officers would testify that they saw the confidential informant throwing the cocaine in the car, he would have accepted a plea. Applicant also stated he wanted counsel to investigate the meeting between the confidential informant and the females who were at the bar on the day the incident. Applicant stated he only met the confidential informant one time before the transaction. Applicant claimed these females could tell Counsel what happened and he thought Counsel should have conducted a more thorough investigation. Applicant admitted he did not testify because of his prior convictions.

On cross-examination, Applicant admitted he did not bring the females or the audio recording to the PCR hearing.

Applicant finally stated that while Counsel filed an appeal his behalf, it was not timely perfected and that he wanted a full appeal of this case. The State stipulated based on documents from the South Carolina Court of Appeals that Applicant is entitled to a belated review of direct appeal issues pursuant to White v. State¹.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court also has read the trial transcript and the appellate records, all of which assists the Court in judging their credibility.

Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, “[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCPP). 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286

¹ 348 S.C. 215, 559 S.E.2d 581 (2002).

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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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Further, "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct **from counsel's perspective at the time.**" State v. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985) (emphasis added), *citing* Strickland v. Washington, 104 S.Ct. 2052, 890 L.E.2d 674(1984). Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Id.

In this case, Applicant's main contention is that Counsel was ineffective for failing to obtain information on a confidential informant prior to the beginning of trial. Both Counsel and Applicant

testified they did not receive the information until the day of the trial, even though Counsel had filed specific discovery asking for this information. While Counsel admitted that he should have done a more thorough investigation into the confidential informant, Applicant presented no credible evidence that any further investigation would have been fruitful.

To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (Applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

Applicant has simply failed to meet his burden of proving that had Counsel been more fully prepared, the outcome of his trial would have been different under Strickland.

Additionally, prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the

rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Applicant presented no witnesses, namely the confidential informant and the females at the bar on the day of the incident, to show that Counsel's failure to call or interview these witnesses would have changed the outcome of the trial. Accordingly, the allegation that Counsel was ineffective for failing to further investigate and interview the confidential informant is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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.

Nevertheless, this Court grants a belated review of direct appeal issues pursuant to White v. State, *supra*. The State conceded, based on documents from the South Carolina Court of Appeals dismissing the appeal for being untimely, that Applicant is entitled to his full bite of the apple.

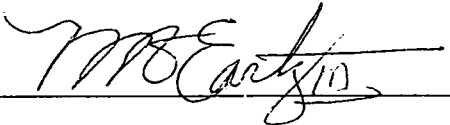
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR.

Rule 71.1(g), SCRCPC, provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED!

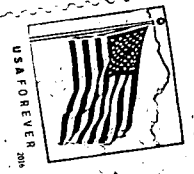
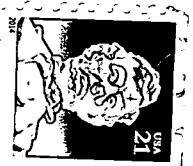


Doyet A. Early, III
Presiding Circuit Court Judge
Ninth Judicial Circuit

June 21, 2016
Charleston, South Carolina

2014-CP-10-5417

William H. Nixon, Jr.
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One Cool Blow Street, Suite 201
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The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
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