(9).

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
	)	
	)	2008-CP-26-0489
	)	
Michael A. Dukes, # 311176,	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL WITH PREJUDICE**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

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SC Court of Appeals

This matter came before the Court pursuant to an Application for post-conviction relief filed January 18, 2008, by Michael A. Dukes. Respondent made its Return on March 31, 2008. An evidentiary hearing was convened at the Horry County Courthouse on Monday, November 17, 2008. The Applicant was present in court and represented by Brana J. Williams, Esquire. The Respondent was represented by Christina J. Catoe, Assistant Attorney General.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to an order of commitment from Horry County. The Applicant was indicted at the November 2003 term of the Horry County Grand Jury for trafficking in crack cocaine, 10-28 grams (2003-GS-26-3445). Paul Archer, Esquire, represented him on the charge. On August 8-9, 2005, the Applicant proceeded to trial, and was found guilty as indicted. He was sentenced by the Honorable Edward B. Cottingham, as a third-time drug offender, to eighteen years.[1] The Applicant timely filed a Notice of Appeal, and an

[1] The Applicant's offense occurred prior to the revision of the drug statutes in July 2005. The trial judge sentenced the Applicant under the old law, believing that the old law carried 0-30 years and a fine of at least $100,000. (See Transcript, page 124, lines 15-24). However, in fact, the revisions in July 2005 did not change the penalty for third-offense trafficking; instead it revised the penalty for PWID third offense, raising the penalty from 0-30 years and a fine of at least $100,000, to 15-30 years and a fine of not more than $50,000. See S.C. Code Ann. § 44-53-375(B)(3); § 44-53-375(C)(1)(c). Although it was erroneous, the State agreed with the trial court's assessment of the applicable penalty. (See Transcript, page 124.)

appeal pursuant to Anders v. California, 386 U.S. 738 (1967), was perfected on Applicant's behalf by Aileen P. Clare, Esquire. The Anders brief raised the issue of whether the trial court erred in denying the directed verdict motion, which was based upon a failure to prove actual or constructive possession of the drugs in question. The Applicant also raised numerous issues in a *pro se* Brief and *pro se* Petition for Rehearing. However, his conviction and sentence were both affirmed by the South Carolina Court of Appeals on October 8, 2007, see State v. Dukes, 2007-UP-423, and rehearing was denied on November 16, 2007. The case was remitted to the circuit court on December 21, 2007.

STANDARD OF REVIEW

In a post-conviction relief proceeding, the applicant bears the burden of proving his or her allegations by a preponderance of the evidence. Caprood v. State, 338 S.C. 103, 109-110, 525 S.E.2d 514, 517 (2000); Rule 71.1(e). 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 S.C. 441, 334 S.E.2d 813 (1985); see also Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Dawkins v. State 346 S.C. 151, 551 S.E.2d 260 (2001). The correct measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, supra. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case." Caprood, supra, at 109, 525 S.E.2d at 517 (citations omitted). 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. When a defendant challenges his conviction after a trial, the proper consideration is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt. Smith v. State, 375 S.C. 507, 515, 654 S.E.2d 523, 527-28 (2007. (citations omitted). In order to receive relief, an applicant must prove both ineffective assistance and resulting prejudice. See, e.g., Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

Set forth below are the relevant findings of fact and conclusions of law, as required by S.C. Code Ann. § 17-27-80 (2003):

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In his PCR Application and subsequent Amendment, Mr. Dukes alleged numerous grounds for relief. However, at his PCR hearing, he abandoned, withdrew, and waived all issues except for the following: (1) that counsel was ineffective for failing to make a motion to suppress the drugs; (2) that counsel was ineffective for failing to challenge the arrest warrant; and (3) that counsel was ineffective for allowing, without objection, the jury to be selected in his absence. At the PCR hearing, this Court had before it the Applicant's PCR file, the records of the Horry County Clerk of Court regarding the conviction, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the pertinent appellate records. Both the Applicant and his former trial attorney testified at the hearing. The Applicant also called Officer Ray Atwood, of the North Myrtle Beach Police Department, to testify at the hearing. This Court carefully listened to all of the testimony presented, and evaluated the credibility of the witnesses.

Issue # 1 – Motion to Suppress

The Applicant claimed that his trial counsel should have made a motion to suppress the drug

evidence, which was found in his passenger's red bag, on the ground that there was insufficient probable cause. Based upon the trial record and the testimony at the PCR hearing, this Court finds that the police conduct in this case was reasonable and that the ultimate search of the bag was valid under the Fourth Amendment. The Applicant's car was stopped initially because it was involved in a four-car collision. After the officer had the cars move out of the roadway, he detected an odor of marijuana surrounding the Applicant's vehicle. The officer thereafter deployed his certified drug detection dog, and the dog alerted to Applicant's vehicle, indicating the presence of illegal substances inside the vehicle. Although the Applicant denied that any drugs were in the vehicle, and did not give consent for the officer to search the car, the officer deployed the dog to the interior of the Applicant's car. The dog gave a positive alert to the red bag located on the passenger floorboard. The officer then conducted a hand-search of the bag and found drugs inside.

The Applicant presented no evidence that his vehicle was detained outside the scope of the accident investigation. However, even if it had been detained beyond that scope, the detention was reasonable where the officer twice detected the odor of marijuana emanating from the Applicant's vehicle. His subsequent deployment of the canine around the vehicle was not a "search" under the Fourth Amendment, because the certified drug detection dog was trained only to alert to the presence of illegal substances. See Illinois v. Caballes, 543 U.S. 405 (2005). Therefore, regardless of the Applicant's consent to search the vehicle, the hand-search of the red bag that followed the dog's positive alert first to the car, and then to the bag itself, was based upon sufficient probable cause of illegal substances. See id. Therefore, this Court finds that the warrantless search of the bag was valid under the Fourth Amendment, considering that the drugs were within a readily movable automobile. See, e.g., State v. Weaver, 374 S.C. 313, 320, 649 S.E.2d 479, 482 (2007) ("If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more.") (citation omitted).

Additionally, this Court finds that the Applicant would have lacked standing to challenge the search of the red bag, since he had no legitimate privacy interest in a bag that he denied owning or possessing. See e.g., State v. McKnight, 291 S.C. 110, 114-115, 352 S.E.2d 471, 473 (1987) (a defendant seeking to suppress evidence on Fourth Amendment grounds must demonstrate a legitimate privacy interest in the items searched in order to have standing to challenge the search); see also Rakas v. Illinois, 439 U.S. 128 (1978); State v. Hiott, 276 S.C. 72, 276 S.E.2d 163 (1981); Minnesota v. Carter, 525 U.S. 83 (1998).

For all these reasons, this Court finds that a motion to suppress the drugs would have been futile. Therefore, counsel's failure to make such a motion was not deficient nor did it prejudice the Applicant.

Issue # 2 – Invalid Arrest Warrant

The Applicant also claimed that his trial counsel was ineffective for failing to move to quash the arrest warrant (Applicant's Exhibit # 1), since it was not signed by a judicial officer and since the affiant, "James E. Brown," had no personal knowledge of the events set forth in the warrant because he was not involved in the Applicant's arrest. Officer Ray Atwood's testimony at the PCR hearing confirmed that the arrest warrant was, in fact, faulty for these two reasons, and this Court so finds. However, it is clear that the Applicant's subsequent indictment by the Horry County Grand Jury on November 20, 2003, superceded the warrant and rendered its deficiencies immaterial. See, e.g., State v. McCoy, 255 S.C. 170, 177 S.E.2d 601 (1970); Thompson v. State, 251 S.C. 593, 164 S.E.2d 760 (1968). This Court would further note that no evidence was obtained as a result of the faulty warrant.

The Applicant also claimed that he was never arraigned, and therefore the indictment was not sufficient to cure the defects in the arrest warrant. This Court takes judicial notice that formal arraignments do not typically take place in the current judicial system in South Carolina. However, it is clear that the indictment supercedes the arrest warrant regardless of whether the Applicant was formally arraigned. See State v. Ariail, 311 S.C. 35, 426 S.E.2d 751 (1993) (arraignment is not a constitutional

or statutory right, but a "mere formality"). The Applicant in this case received the indictment prior to trial and had adequate notice of the charge for which he was being tried. See State v. Gentry, 363 S.C. 93, 102 610 S.E.2d 494, 499 (2005) (presentment of indictment is not needed to confer subject matter jurisdiction, although the indictment is needed to give notice to defendant). Accordingly, this Court finds the Applicant's argument on this ground is without merit.

Issue # 3 – Jury Selection in Applicant's Absence

Lastly, the Applicant claimed that his attorney was ineffective for allowing the jury selection to go forward, without objection, in the Applicant's absence. He testified that initially, his attorney told him that he did not need to be present on the morning of trial; however, he called back an hour later and told the Applicant to come to court for trial. The Applicant was living in North Carolina, and by the time he arrived at the courthouse, the jury had been selected. This Court did not find credible the Applicant's testimony that his attorney only notified him to be present the morning of trial. Instead, this Court found the counsel's testimony on this issue to be credible. This Court finds that counsel spoke with the Applicant several days in advance of trial, and notified him that his case was on the trial roster and that he would be tried before Judge Cottingham. Counsel never told the Applicant that he did not have to appear on the day of trial. Furthermore, although counsel did not make a motion on the record to continue the jury selection until the Applicant arrived from North Carolina, he did make such a request to the trial judge either in chambers or off-the-record. Judge Cottingham denied his request; therefore, a formal motion would have been futile and counsel was not deficient for failing to make such a motion.

This Court also finds that the Applicant did not establish any prejudice from the jury selection taking place in his absence. He did not establish that he knew any of the jurors selected; he failed to assert any particulars regarding what he could have done had he been present; and he failed to point to any errors in the proceeding. This Court would also note that the South Carolina Supreme Court has

held "the process of jury selection inherently falls within the expertise and experience of trial counsel." Magazine v. State, 361 S.C. 610, 618, 606 S.E.2d 761, 765 (2004). The Applicant failed to prove that he did not receive a trial by a competent, fair, and impartial jury. Accordingly, this Court finds that the Applicant failed to show prejudice with respect to the jury selection in this case. See Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999).

CONCLUSION

For all of the reasons discussed above, this Court finds and concludes that Mr. Dukes' post-conviction relief Application must be denied and dismissed with prejudice for failure to meet his burden of proof under Strickland v. Washington, 466 U.S. 668 (1984), and Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), with respect to each of his three grounds for relief.

Counsel's attention is directed to Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), and Rule 59(e), SCRCP, regarding the filing of a Motion to Alter or Amend should counsel believe this Order fails to adequately address all issues raised as required by S.C. Code Ann. § 17-27-80 (2003). This Court further advises that if Applicant desires to secure appellate review of this Order, a notice of appeal must be filed and served **within thirty (30) days** of the service of this Order. **Pursuant to Rule 71.1(g), SCRCP, PCR counsel must file a notice of appeal on Applicant's behalf if Applicant wishes to pursue appellate review.** Applicant and counsel are directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

IT IS THEREFORE ORDERED THAT:

1. Michael Dukes' Application for post-conviction relief is **DENIED and DISMISSED with PREJUDICE**.

2. The Applicant must remain in the custody of the State for the completion of his sentence.

AND, IT IS SO ORDERED this ______ day of __________________, 2008.

____
Michael G. Nettles
Presiding Judge, Fifteenth Judicial Circuit

_________________, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT FOR

TRAFFICKING CRACK COCAINE
MORE THAN 10 GRAMS, LESS THAN 28 GRAMS

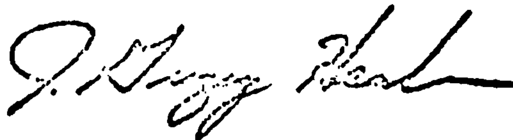
At a Court of General Sessions, convened on November 20, 2003 the Grand Jurors of Horry County present upon their oath:

TRAFFICKING CRACK COCAINE MORE THAN 10 GRAMS LESS THAN 20 GRAMS

(CDR: 0452 44-53-0375(C)(1)(c)

That Michael Andre Dukes did in Horry County on or about September 11, 2003, knowingly, sell, deliver, purchase, or bring into this State; or did aid, abet, attempt or conspire to sell, deliver, purchase or bring into this State, or was in actual or constructive possession or attempted t become in actual or constructive possession of a quantity of Crack Cocaine in an amount of more than ten grams but less than twenty-eight grams, same being a controlled substance all within the meaning of Section 44-53-110, et. seq., S.C. Code of Law, (1976), as amended, such possession not having been authorized and in violation of Section 44-53-375 (c)(2), S.C. Code of Laws, 1976, as amended, for the crime of trafficking.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



SOLICITOR

DOCKET NO. 2003-GS-26- 3445

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

GD 71872

COURT OF GENERAL SESSIONS

NOVEMBER TERM 2003

THE STATE

VS.

MICHAEL ANDRE DUKES B/M

510 GOVENORS ROAD

WILMINGTON, NC 28411

SSN 247-41-9038 DOB 12-08-78

Attorney

INDICTMENT FOR:
TRAFFICKING CRACK COCAINE
MORE THAN 10 GRAMS, LESS THAN 28 GRAMS

J. GREGORY HEMBREE, SOLICITOR

ORIGINAL

WITNESSES

BROWN/NMBPD

ARREST WARRANT NO. H-299368

CDR: 0452 44-53-0375 (C) (1) (c)

DOA: 9-12-003

ACTION OF GRAND JURY

TRUE BILL

NOV 20 2003

Foreman of Grand Jury

VERDICT

Guilty

8-9-05

Claude E Belcher

Foreman of Petit Jury Date:

ARREST WARRANT

H-299368

STATE OF SOUTH CAROLINA
☐ County/ ☐ Municipality of
NO MYRTLE BCH MUNICIPAL COURT

THE STATE
against

MICHAEL ANDRE DUKES
Address: GOVERNORS ROAD
WILMINGTON, NC 28411
Phone: (910) 397-0357 SSN:
Sex: M Race: B Height: 5'06" Weight: 150
State: NC DL #: 26512364
DOB: 12/08/1973 Agency ORI#: SC0260700
Prosecuting Agency: NO MYRTLE BCH DEPT PUBLIC SFTY
Prosecuting Officer: RAY ATWOOD
Offense: TRAFFICKING IN CRACK COCAINE
Offense Code:
Code/Ordinance Sec. 44-53-375

This warrant is CERTIFIED FOR SERVICE in the ☐ County/ ☐ Municipality of ________. The accused is to be arrested and brought before me to be dealt with according to law.

________ (L.S.)
Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant [signature]
on 9-[illegible]

[signature]
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:
CLIFFORD L. WELSH, MUNICIPAL JUDGE
1015 SECOND AVENUE SOUTH
NORTH MYRTLE BEACH, SC 29582
803-280-5520

Form Approved by S.C. Attorney General July 26, 1990 SCCA 518

STATE OF SOUTH CAROLINA
☐ County/ ☐ Municipality of
NO MYRTLE BCH MUNICIPAL COURT

AFFIDAVIT

Personally appeared before me the affiant JAMES BROWN who being duly sworn deposes and says that defendant MICHAEL ANDRE DUKES did within this county and state on September 11, 2003 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of NO MYRTLE BCH MUNICIPAL COURT) in the following particulars.

DESCRIPTION OF OFFENSE: TRAFFICKING IN CRACK COCAINE

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:
ON OR ABOUT SEPTEMBER 11, 2003, THE DEFENDANT MICHEL ANDRE DUKES, [redacted] AND DURING A LAWFUL SEARCH WAS FOUND TO BE IN POSSESSION OF 20.2 GRAMS OF CRACK COCAINE WHICH FIELD TESTED POSITIVE.

Sworn to and subscribed before me on 09/12/2003

________ (L.S.)
Signature of Issuing Judge

[signature: James E Brown]
Signature of Affiant
Affiant's Address 1015 SECOND AVE SOUTH
NORTH MYRTLE BEACH, SC 29582
Affiant's Telephone 843-280-5511

SEP 30 2003

STATE OF SOUTH CAROLINA
☐ County/ ☐ Municipality of
NO MYRTLE BCH MUNICIPAL COURT

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on September 11, 2003 defendant MICHAEL ANDRE DUKES did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of NO MYRTLE BCH MUNICIPAL COURT) as set forth below:

DESCRIPTION OF OFFENSE: TRAFFICKING IN CRACK COCAINE

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

________ (L.S.)
Signature of Issuing Judge
Judge Code:

Judge's Address 1015 SECOND AVENUE SOUTH
NORTH MYRTLE BEACH, SC 29582
Judge's Telephone 803-280-5520
Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

ORIGINAL

H-299368 Xref #: 200328867