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November 9, 2016

VIA U.S. POSTAL

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NOV 16 2016

S.C. SUPREME COURT

Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Jerry W. Stewart vs. State of South Carolina
Case No.: 2016-CP-23-02182

Dear Supreme Court Clerk:

I am writing to you regarding the above referenced case. Please find enclosed the Notice of Appeal, Proof of Service, and Order of Dismissal.

If you wish to discuss the foregoing or need additional information please contact me at 864-331-1630.

Thank you.

Sincerely,



Brian P. Johnson

BPJ/lf
cc: Patrick Schmeckpeper, Esquire
Jerry W. Stewart

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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NOV 16 2016

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE JOHN C. HAYES, III

S.C. SUPREME COURT

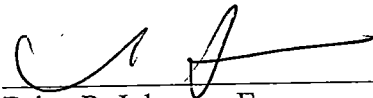
Case No.: 2016-CP-23-2182

JERRY W. STEWART,)
)
PETITIONER,)
)
vs.)
)
STATE OF SOUTH CAROLINA)
)
RESPONDENT.)

NOTICE OF APPEAL

The Petitioner, Jerry W. Stewart, hereby appeals the Honorable John C. Hayes, III's October 26, 2016, order denying post-conviction relief to the Petitioner. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner
SC Bar: 73996

Date: November 8, 2016
Other counsel of record: Patrick Schmeckpeper
P.O. Box 11549/Columbia, SC 29211

STATE OF SOUTH CAROLINA
In The Supreme Court

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NOV 16 2016

S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE JOHN C. HAYES, III

Case No.: 2016-CP-23-2182

JERRY W. STEWART,)
)
PETITIONER,)
)
vs.)
)
STATE OF SOUTH CAROLINA)
)
RESPONDENT.)

PROOF OF SERVICE

I, Brian P. Johnson, Esq., certify that I have today served the within notice of appeal upon the Respondent by depositing a copy in the United States Mail, postage prepaid, addressed to the attorney of record, Patrick Schmeckpeper, at P.O. Box 11549 Columbia, SC 29211.

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner
SC BAR: 73996

Greenville, SC
November 8, 2016

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Jerry W. Stewart,)
 S.C.D.C. No. 265973,)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2016-CP-23-2182

ORDER

ENTERED COMPUTER

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WIGENSIMMER
 2016 NOV 4 4 25 PM 2 54

Applicant filed this post-conviction relief application on April 1, 2016. The matter was heard October 25, 2016. Applicant was represented by Brian P. Johnson, Esq. The State was represented by Patrick Schmeckpeper, Esq.

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The December 2012 term of the Greenville County Grand Jury indicted Applicant for possession of methamphetamine (2012-GS-23-010115). Applicant pled guilty to this charge, as indicted, on September 17, 2013. The Honorable William H. Seals, Jr. sentenced Applicant to three (3) years confinement, provided that with credit for one day of time served, the balance was to be suspended with probation for two years.

The April 2015 term of the Greenville County Grand Jury indicted Applicant for manufacturing methamphetamine 2nd offense (2015-GS-23-002626). Applicant was represented by John Crangle.

On January 14, 2016, Applicant pled guilty to the manufacturing methamphetamine charge as indicted. Applicant's probation for the possession charge was also revoked on January 14, 2016, for violating terms of his probation on September 11, 2015. The Honorable J. Cordell Maddox sentenced Applicant to ten (10) years' imprisonment, provided that upon service of three (3) years, the balance is suspended with probation for six months. The Court credited Applicant with 191 days' of time served, and this sentence is to run concurrent to the sentence imposed for Applicant violating the terms of his probation. Judge Maddox revoked his original probationary sentence for the possession charge and ordered Applicant to serve two (2) years and 365 days' of the remainder of his probation sentence. Applicant did not appeal his convictions or sentences.

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Subject matter jurisdiction not vested."
2. Ineffective assistance of counsel.
3. "Failure to object to or suppress evidence."

However, at the post-conviction relief hearing, Applicant presented three arguments as the grounds for his requested relief, two of which were not listed above. Each of these arguments will be separately discussed below.

First, Applicant claims ineffective assistance of counsel. Specifically, Applicant claims that he was not provided with a copy of discovery after he made a request for the same from trial counsel.

When ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process

that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Strickland*, 466 U.S. at 690, 104 S. Ct. 2066. Applicant must overcome this presumption in order to receive relief. *See Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” *Cherry v. State*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065). 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

Applicant testified that he requested a copy of discovery from trial counsel and was not provided with the same, and that this constitutes ineffective assistance of counsel. Trial counsel testified that it is his usual practice to provide a copy of discovery to his clients when such a request is made. Further, trial counsel testified that, if he did not provide Applicant with a copy of discovery, he did review the discovery from the case with Applicant.

Second, Applicant alleges that his charge was improperly enhanced from a possession of methamphetamine, first offense to a possession of methamphetamine, second offense. Applicant bolstered this allegation by pointing to changes made in pen on the indictment at issue. These changes and Applicant's allegations about them are discussed further below. As this is solely a sentencing matter, it is not an appropriate ground for post-conviction relief. However, it is worth noting that this offense would actually have been Applicant's third offense, as he has other drug convictions on his record and was on probation for one of those convictions at the time the indictment in the present case was issued by the Grand Jury. As such, Applicant's allegations of improper enhancement do not serve as adequate grounds for relief.

Third, Applicant claims that the indictment at issue was improperly altered and that those alterations serve as grounds for relief. This claim is without merit. An inspection of a copy of the indictment at issue reveals three markings on the indictment which might appear out of the ordinary. The first is, for lack of a better term, a "squiggle" line like that made where one is testing a ballpoint pen. The second is a group of three letters to the right of the case name which do not appear to hold any specific meaning or have any significant effect on the face of the indictment. Third, the CDR code in the "Indictment for" section of the indictment has been crossed out and replaced with a new CDR code. It appears as though the original CDR code was 3776 and the replacement CDR code was 3777. As of the time the indictment was issued by the Grand Jury, CDR Code 3776 represented the charge "Drugs/Manufacture Meth, 1st" and CDR Code 3777 represented the charge "Drugs/Manufacture Meth, 2nd."

The record and testimony indicate that this was and is a proper indictment. The alteration of the CDR code did not result in any prejudice to the defendant, as the enhancement from the

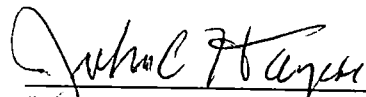
1st to 2nd offense was a mechanism of sentencing, and not the indictment itself. As such, Applicants allegations as to the altered indictment do not serve as adequate grounds for relief.

Wherefore, I find Applicant has not proved by a preponderance of the evidence that trial counsel was ineffective on the grounds presented by Applicant at the post-conviction relief hearing. Further, I find that Applicant has not shown by a preponderance of the evidence that the other two allegations – improper enhancement and altered indictment – presented at the post-conviction relief hearing qualify as grounds for relief. Therefore, Applicant’s application for Post-Conviction Relief is denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. *See* Rules 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant’s attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.

October 26th, 2016
Greenville, South Carolina



John C. Hayes, III
Presiding Judge *HS*

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2016CP2302182

Jerry W Stewart vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy: Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:
Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - John C Hayes, III

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

Brian P. Johnson 522 North Church Street
Greenville, SC 29601

Patrick Lowell Schmeckpeper PO Box 11549
Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

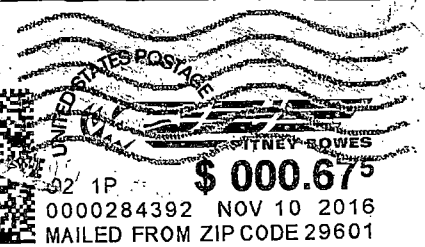
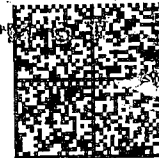
Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

Law Office of Brian P. Johnson

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GREENVILLE SC 296

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Supreme Court of South Carolina

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