

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Erick Hewins,)
 #297728,)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2016-CP-23-2656

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMMER
 2016 NOV 4 PM 2 56

ORDER

ENTERED COMPUTER

Applicant filed this Application for Post-Conviction Relief on April 26, 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 presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court of Greenville County. Applicant was indicted for trafficking in Cocaine base (greater than 10 grams) (2010-GS-23-8295) and possession of a schedule IV Controlled Substance (clonazepam) second offense (2010-GS-8296). He was tried by jury January 14-17, 2013. Upon conviction he was sentenced by the Honorable L. Edward Welmaker to twenty-five years for trafficking cocaine and one year for possession of cocaine, consecutive, for an aggregate term of twenty-six years. A notice of appeal was served January 25, 2013, and the direct appeal perfected. The Court of Appeals affirmed the conviction and sentence. *State v. Hewins*, Op. No. 2014-UP-478 (filed Dec. 23, 2014). A petition for rehearing was filed January 6, 2015 and was denied February 24, 2015. The Petition for writ of certiorari followed. The Supreme Court granted the petition for writ of certiorari on Applicant's issues 1-4 on November 5, 2015. On March 23, 2016 the Supreme Court dismissed as improvidently

granted. Applicant filed for Post-Conviction Relief on April 26, 2016 and subsequently amended his application on May 26, 2016.

In his Application, and in amended applications (filed May 20, 2016 and May 26, 2016), Applicant alleges he is being held in custody unlawfully for a number of reasons. The Court will address those presented at the hearing. All other reasons set forth in his application, having not been presented at the hearing, are deemed abandoned.

Applicant claims ineffective assistance of counsel in his application. In a Post-Conviction Relief action, the Applicant bears the burden of proving the allegations in their complaint. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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*, 446 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984); *Butler*, 334 S.E.2d 813.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that the counsel’s performance was deficient. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” *Cherry*, 300 S.C. at 117-118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced 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.*

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. *Strickland*, 446 U.S. 668. The applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Applicant asserts that trial counsel failed to properly object to law enforcements' second search of his pants pocket¹ and that the failure to object resulted in any issue as to the second search not being preserved for appeal. That the issue was not preserved for appellate review is evidenced by the opinion of the South Carolina Court of Appeals in *State v. Hewins*, Op. No. 2014-UP-478 (2014).

Trial counsel, when at trial was asked what were the issues that needed to be addressed pre-trial, stated "...a suppression issue." (Trial Record p. 40, ll. 18-19).

At trial transcript page 139, lines 23-24, the trial judge stated "I'll be glad to hear from you about the suppression issue Mr. Harbin." Thereafter, trial counsel presents a lengthy and cogent argument for suppression which, in candor, focuses on the first search, referred to by counsel and the Court of Appeals as a *Terry*² frisk. (See particularly Trial Record p. 148, ll. 10-11). However, in rebuttal to the State's counter-argument to trial counsel's argument, trial counsel, addressing Applicant's consent specifically questions whether or not any consent extended to the "second time." (Trial Record p. 155, ll. 21-230).

In his ruling, the trial judge stated that a *Terry* frisk was warranted and allowed "the evidence in." (Trial Record p. 160, ll. 13-15). This, according to the Court of Appeals was a "general ruling" and because trial counsel did not request a specific ruling on the issue of consent for the second search, that constitutionality of the second search is not preserved. *State v. Hewins*, Op. No. 2014-UP-478 (2014).

¹ The Court of Appeals has upheld the constitutionality of the first search of applicant's pants pocket. *State v. Hewins*, Op. No. 2014-UP-478 (2014).

² *Terry v. Ohio*. 392 U.S. 1, 88 S. Ct. 1868 (1968).

Based on the analysis above, it is hard for the undersigned to find, despite the Court of Appeal's holding, that trial counsel was not diligent in his attempt to suppress the result of the second search. The second search was the one in which the pills were found. It seems illogical to believe that trial counsel did not expect the trial court to make a ruling on the seizure of the pills, the things giving rise to the prosecution. However, the undersigned must live with the Court of Appeals', the ultimate authority, holding that trial counsel did not preserve for appeal the issue of consent for the second search.

Applying the *Strickland*, supra, test as applied in *Cherry*, supra, the fact that the Court of Appeals has, by its decision in *Hewins*, found that trial counsel's conduct affected the adversarial process to the prejudicial detriment of Applicant. The Court must find in favor of Applicant on the unpreserved issue argument. This case is hard to fit into the parameters set forth in *Strickland*, supra, and *Cherry*, supra. However, looked at it in totality, the test ultimately is: did trial counsel fail in his representation, and did it prejudice Applicant. This leaves out the reasonableness prong. In this case trial counsel diligently sought to suppress the evidence which constituted the bases for the drug charge. This is what is expected of a reasonable attorney. The question then becomes whether or not a reasonable attorney would have asked the trial judge, who has denied the attorney's motion to suppress, to break down with specificity separate rulings on the *Terry* frisk and the consent issue as to the second search. Since case law as cited by the Court of Appeals requires such, trial counsel is ineffective for not doing so regardless of what a reasonable attorney would have done under the same or similar circumstances.

Applicant raises a second issue relating to the trial court's *Allen*³ charge. Applicant alleges trial counsel was ineffective for not objecting to the court's *Allen* charge. Procedurally, the jury sent a note to the trial judge late on the second day of trial (based on the record after

³ *Allen v. U.S.*, 164 U.S. 492, 17 S. Ct. 154 (1896).

approximately 5:30 and before 5:55 (Trial Record pp. 410 and 412)). At some point (not reflected in the record) the jury indicated that it had reached a verdict on the possession charge but not on the trafficking charge. (Trial Record p. 411, ll. 3-5). At that time, the trial judge indicated he did not want to give an *Allen* charge that late in the day and did not want to accept only one verdict. The trial judge, without objection of counsel, released the jury for the day to return for further deliberation the next day, which they did.

At some time after 9:06 a.m. on the third day, before 11:00 a.m., the jury indicated their deliberations stood as they had when they adjourned the night before. Thereafter, without objection from either of the parties, the trial judge brought in the jury and gave the *Allen* charge.

Trial counsel's representation of Applicant regarding the trial judge's decision to give an *Allen* charge was not ineffective assistance of counsel but rather it was well within the range of competence required of counsel in a criminal case. See *Strickland*, supra; *Cherry*, supra.

Applicant's third ground for relief was framed as an issue with trial counsel's representation of Applicant in a *Jackson v. Denno*⁴ hearing. The record reflects that that was no *Jackson v. Denno* hearing. The trial judge asked if there needed to be pre-trial hearings and did use the term "*Jackson v. Denno*...hearing." (Trial Record p. 41, ll. 10-11). However, there is no other allusion to *Jackson v. Denno*, nor by content do any of the issues argued evidence a *Jackson v. Denno* hearing was held. There is no merit to this last "issue" as there is no issue.

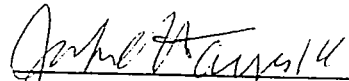
Based on trial counsel's ineffective assistance in failing to preserve a pivotal issue for appellate review, the Applicant is granted a new trial.

IT IS SO ORDERED.

Perlt #5

⁴*Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774 (1964).

October ~~27~~^{27th}, 2016
Greenville, South Carolina



John C. Hayes, III
Presiding Judge #6

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2016CP2302656

Erick Hewins 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

ATTORNEY(S) FOR THE PLAINTIFF(S)

Patrick Lowell Schmeckpeper PO Box 11549
Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

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