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January 09, 2017

RECEIVED

JAN 12 2017

S.C. SUPREME COURT

Via US Mail

Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *Notice of Intent to Appeal from Demetrius Simmons vs. State of South Carolina*
C.A. No.: 2015-CP-23-05741

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable John C. Hayes, III's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law


R. Mills Ariail, Jr.

RMJr/dl
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JAN 12 2017

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

John C. Hayes, III, Circuit Court Judge

Case No. 2015-CP-23-05741

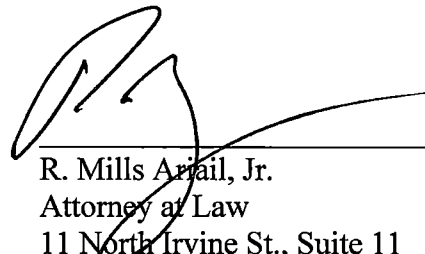
Demetrius Simmons,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable John C. Hayes, III's Order of Dismissal dismissing Appellant's application for post-conviction relief. On December 20, 2016, the Honorable John C. Hayes, III signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on January 9, 2017. A copy of the Honorable John C. Hayes, III's Order of Dismissal is attached.



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Telephone (864) 232-9390
Facsimile (864) 232-9392
Attorney for Demetrius Simmons

Greenville, South Carolina
January 09, 2017

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF GREENVILLE

CASE NO: 2015CP2305741

IN THE COURT OF COMMON PLEAS

Demetrius Simmons vs. South Carolina State Of

FILED-CLERK OF COURT
GREENVILLE, S.C.
PAUL B. WICKENSIMER
2017 JUN 5 PM 1:22

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:

R. Mills Ariail Jr. 11 North Irvine Street, Suite 11
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

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Demetrius Simmons,)
SCDC No. 283195,)

Applicant,)

vs.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2015-CP-23-5741

ORDER

ENTERED COMPUTER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL D. HICKMAN
2017 JAN 5 PM 1 22

Applicant filed this Application for Post-Conviction Relief September 17, 2015.¹ This matter was heard December 9, 2016. Applicant was represented by R. Mills Ariail, Jr., Esquire. The State was represented by Patrick Schmeckpeper, Esquire.

Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. Applicant was indicted by the October 2013 term of the Greenville County Grand Jury for one count of Resisting Arrest (2013-GS-23-004562), one count of Breaking and Entering a Motor Vehicle (2013-GS-23-004563), two counts of Larceny/Breaking into a Motor Vehicle (2013-GS-23-004564, -004565), one count of Grand Larceny (2013-GS-23-004566), and two counts of Burglary, First Degree (2013-GS-23-004567, -004568). Joey Maxwell, Esquire, and Sarah Henry, Esquire, represented Applicant.

On December 11, 2013, Applicant was tried in his absence and found guilty as indicted on all charges except the two counts of Larceny/Breaking into a Motor Vehicle. On October 16, 2014,

¹ Applicant filed an amendment to his application on August 10, 2016. It is addressed in this order.

The Honorable Victor Pyle, Jr. sentenced Applicant to confinement for one (1) year for Resisting Arrest, five (5) years for Break and Entering a Motor Vehicle, thirty (30) days for Grand Larceny, and fifteen (15) years on each count of Burglary, First Degree. The sentences are set to run concurrently. Applicant did not appeal his conviction or sentence.

In his Application for Post-Conviction Relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Failure to suppress evidence;
2. Ineffectiveness of counsel;
3. Failure to appeal subject matter jurisdiction;
4. Failure to investigate and prejudiced by counsel.

Applicant alleges ineffective assistance of counsel as a ground for relief. The crux of Applicant's argument is that trial counsel failed to have an incriminating recording of Applicant's voice suppressed at trial. In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. *See Butler v. State*, 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 on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 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. at 2066. The 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, the 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 trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland*, 466 U.S. at 688, 104 S. Ct. 2052 (1984)).

Applicant claims that the trial court lacked subject matter jurisdiction due to defects in his indictment. Defects in the indictment do not affect subject matter jurisdiction. *See U.S. v. Cotton*, 535 U.S. 625, 122 S. Ct. 1781 (2002); *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). *See also* S.C. Code Ann. § 17-19-20 (2003). Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. *See Gentry, supra; Dove v. Gold Kist, Inc.*, 314 S.C. 235, 442 S.E.2d 598 (1994). A circuit court has subject matter jurisdiction if there has been an indictment that sufficiently states the offense, there has been a waiver of indictment, or the charge is a lesser included offense of the crime charged in the incident. *Jones v. State*, No. 2004-MO-060, 2004 WL 6396025, at *1 (Nov. 11, 2004).

In post-conviction relief, an Applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003). A claim of this nature is subject to the procedural bars in the Uniform Post-Conviction Procedure Act B, notably the statute of limitations and successiveness. *See* S.C. Code Ann. § 17-27-45 and -90 (2003).

Applicant also alleges that he was denied due process of law as a result of being sentenced in his absence.

Applicant testified he was represented by attorneys Sarah Henry and Joey Maxwell. Applicant testified he dealt primarily with Mr. Maxwell. Applicant testified he did not discuss his case with Mr. Maxwell, who was appointed to the case after Ms. Henry. Applicant testified that he had talked with Ms. Henry. Applicant testified he would discuss the case with Mr. Maxwell at roll call.² Applicant testified Mr. Maxwell never went over discovery, the State's case, or the State's evidence with him. Further, Applicant testified that he discussed, with Mr. Maxwell, the time he was facing at roll calls. Applicant testified he was told that he would "get out" after six years while some "document" (not in the record) showed ten years.

Applicant testified he did not want to plead guilty and was going to get another lawyer (which he never did). Applicant testified he never got notice of the scheduling of his trial although he acknowledges that his mother told him a notice had come indicating he would be tried December 5, 2013. On cross examination Applicant acknowledged that after receiving his

² The court notes the inconsistencies of having "never" discussed the case with Mr. Maxwell and the testimony regarding discussions at roll calls.

information from his mother he did not go to see Mr. Maxwell nor did he go to court on December 5, 2013.

Applicant testified he was “picked up” in Georgia on December 21, 2016 by Greenville County.

Applicant isolated his claims of ineffective assistance of counsel into several categories discussed herein below.

Applicant testified he asked trial counsel to file an appeal and was told he could not do so until after the sealed sentence was imposed and that he would have to “go down the road and file down there³.” While trial counsel testified he did not recall any discussion with Applicant about an appeal, he does recall Applicant asking about post-conviction relief. Trial counsel testified that he saw no appealable issues but would have filed an appeal if Applicant had asked him to do so. The record reflects that no Notice of Appeal was filed. On this issue, trial counsel offered credible evidence that he was not asked by Applicant to file an appeal. Therefore Applicant has failed to carry his burden of proof on this ground.

Applicant testified that trial counsel failed to protect his Fourteenth Amendment rights.⁴ This ground is not specific and too general to support Applicant’s claim. Therefore, as to this claim, Applicant has failed to carry his burden of proof.

Applicant testified that the trial court lacked jurisdiction over his case. This claim is patently without merit.

³ This ground was one of two raised in his amendment to his post-conviction relief application.

⁴ While he referred only to the amendment by number, clearly his reference is to the Fourteenth Amendment to the Constitution of the United States of America.

Applicant testified he wanted a jury trial, which he got. He testified that he had no warning the State would proceed in his absence and did not waive his right to a jury. As set forth above, Applicant's case was tried by a jury.

Applicant's argument that he did not understand he could be tried in his absence is dispelled by the record. (See TR p. 5, l. 21 through p.12, l. 8).

By way of an amendment to his post-conviction relief application, Applicant contends trial counsel was ineffective for failing to request a continuance as, prior to trial, Applicant had met with counsel and signed a guilty plea for six years. Trial counsel testified he did discuss a plea offer of ten years with Applicant and that he was not aware of any six-year offer. Trial counsel further testified that the ten year offer was "the best he could get." There is no evidence in the record, save Applicant's testimony (which lacks credibility), that any offer of six years was extended by the State. Further, there is nothing in the record signed by Applicant evidencing his acceptance of a six-year offer.

Additionally, Applicant offered no evidence of any grounds for a continuance motion other than his claim he did not get notice of the impending trial. He of course did acknowledge his mother told him his trial was set for December 2013 and, while there may be confusion on his part as to the day of the trial, it is clear he responded to the notice in no way. Applicant did not contact trial counsel and did not appear at court on the date his mother gave to him. Finally, as to this claim, Applicant has established no viable grounds upon which trial counsel could request a hearing. Notice was properly established in the record. (See TR p. 5, l. 21 through p. 12, l. 8) and his mother had, as noted, advised him of the impending trial. That he simply did not show up constitutes no basis for a continuance. This ground is without merit.

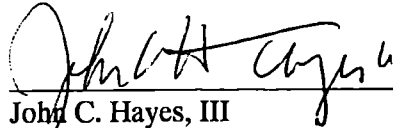
Applicant has failed to carry his burden of proof and has not proven trial counsel's representation of him was ineffective in any way.


Trial counsel provided to Applicant representation within the range of competence required in criminal cases and, in his representation of Applicant, exercised reasonable professional judgment. 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.

December 20th, 2016
Greenville, South Carolina



John C. Hayes, III
Presiding Judge


THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JAN 12 2017

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

John C. Hayes, III, Circuit Court Judge

Case No.2015-CP-23-05741

Demetrius Simmons,..... Appellant,

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State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this January 09, 2017, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Patrick Schmeckpeper, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

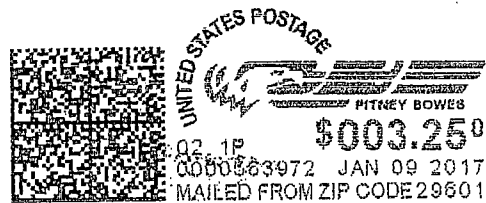
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SC Commission of Indigent Defense
Division of Appellate Defense
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Denise Tanner LaBeck
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January 09, 2017



MAIL, JR.

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