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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

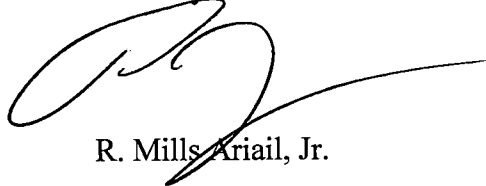
Re: *Notice of Intent to Appeal from State of SC v. Michael Bishop*
C.A. No.: 2016-CP-23-2652

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.

RMAjr/dl
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

John C. Hayes, III, Circuit Court Judge

Case No. 2016-CP-23-2652

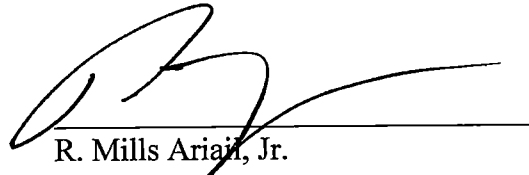
Michael Bishop,..... Appellant,

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.



R. Mills Ariaj, Jr.
Attorney at Law
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Attorney for Michael Bishop

Greenville, South Carolina
January 09, 2017

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2016CP2302652

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2017 JAN 5 PM 1:52

Michael R Bishop 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:

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)

Michael R. Bishop,
SCDC No. 163177,)

Applicant,)

vs.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2016-CP-23-2652

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. SCHMECKPEPER
2017 JUN 5 PM 1 21

ORDER

ENTERED COMPUTER

Applicant filed this Application for Post-Conviction Relief April 26, 2016. 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 February 2013 term of the Greenville County Grand Jury for Grand Larceny (2012-GS-23-05048). Timothy Sullivan, Esquire, represented Applicant. On July 17, 2014, Applicant proceeded to a jury trial and was found guilty as indicted. The Honorable C. Victor Pyle, Jr. sentenced Applicant to confinement for 10 years.

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to *Anders v. California*, 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal. *State v. Bishop*, Op. No. 2015-UP-200 (filed April 15, 2015). The Remittitur was issued on May 1, 2015.

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

1. "Lack of Probable Cause"
 - a. "Arresting Officer lacked probable Cause to arrest the Applicant"
2. "Subject Matter Jurisdiction"
 - a. "The Court of General Sessions lacked jurisdiction to entertain the charges against the Applicant in this case..."
3. "Prosecutorial Misconduct"
4. "Ineffective Assistance of 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 testified that he was represented by trial counsel for about a year. During that year, Applicant testified, he and trial counsel went over discovery and the charges against Applicant "a couple times." Trial counsel testified that he gave discovery to Applicant. He further testified that he had Applicant come to his office so that they could listen to the recording which was the key piece of evidence against Applicant.

Applicant testified that the digital recording of his voice introduced at trial was not "authenticated." Applicant testified that trial counsel did attempt to exclude the recording at trial. Applicant conceded that trial counsel's argument to exclude the recording was good, but maintained that the record shows no indication of the authenticity of the recording. Applicant testified that he believes that trial counsel should have challenged the authenticity of the recording at trial. During cross exam, Applicant acknowledged that the record reflects a Mr. Chavis testifying to Applicant's voice being audible in the digital recording.

Trial counsel testified that the recording was the key piece of evidence against Applicant. Trial counsel explained that the recording was taken at a flea market in North Carolina. Trial counsel testified that, during the recorded conversation, Applicant essentially admitted to the charges against him. Finally, trial counsel testified that he argued to suppress the recording prior to trial.

Applicant also testified as to a 7 year plea deal that he received from the Solicitor's office. Applicant stated that he received the offer directly from the Solicitor at a roll call. Applicant also testified that, at the time of the offer, he was not represented by trial counsel or any other attorney. Applicant testified that he never discussed pursuing a plea deal with trial counsel because he and trial counsel believed that the recording was going to be thrown out. Trial counsel testified that he does not recall Applicant expressing an interest in pleading guilty. Trial counsel testified that his usual practice when a client wants to plead guilty is to get the offer from the Solicitor in writing and review it with his client.

Applicant claims that that the arresting officer lacked probable cause to arrest him. This argument is without merit. This argument is not a matter for post-conviction relief. Rather, it is a ground for direct appeal. Because this issue is not properly before this court, it cannot serve as grounds for post-conviction relief.

Applicant claims that the Court of General Sessions lacked jurisdiction to entertain the charges against Applicant. This claim is without merit. 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). Provided to the Court at Applicant's post-conviction relief hearing was an indictment for grand larceny. The indictment

J. A. H. K.

bears Applicant's name and provides a brief description of the offense. As there is an indictment that sufficiently states the offense, the trial court had jurisdiction to hear Applicant's case.

Applicant also claims that there was prosecutorial misconduct committed during his trial. This claim is without merit. While Applicant makes a number of allegations in his Application for Post-Conviction Relief, none were substantiated with evidence or testimony at the post-conviction relief hearing. This court cannot grant relief based on bald assertions.

Applicant's claim that trial counsel was ineffective is without merit. The trial record clearly indicates that trial counsel made a cogent argument in favor of suppressing the recording before trial on two grounds. First, trial counsel argued that there was a break in the chain of custody. (Trial Record p. 9, l. 11 through p. 11, l. 11). Next, trial counsel argued that the individual who made the recording was "acting under the color of law" in violation of South Carolina law. (Trial Record p. 11, l. 12 through p. 23, l. 21). Neither of these claims persuaded the trial judge to suppress the recording. The fact that an attorney's argument is not successful does not automatically render that attorney ineffective.

Applicant's claim, made at the post-conviction hearing, that trial counsel failed to argue that the recording was not authenticated is also without merit. The recording was entered into evidence while Mr. Chavis was testifying. (Trial Record p. 80, l. 21). Mr. Chavis testified that he made the recording and that the Applicant's voice is present on the recording. (Trial Record p. 80, ll. 5-9; p. 81, ll. 8-13; p. 81, ll. 19-25). Mr. Chavis testified that the recording entered into evidence was an accurate recording of the conversation. (Trial Record p. 80, l. 18-20). It would appear from the record that the recording was properly authenticated and the trial judge clearly agreed. Additionally, trial counsel revived his pre-trial argument that the recording should be suppressed at the time the State offered the recording into evidence.

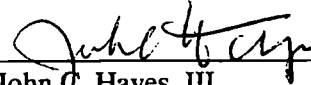
Applying the *Strickland* and *Cherry* standard to trial counsel's representation, I find that trial counsel provided to Applicant representation within the range of competence required in criminal cases. I find trial counsel's performance in his representation of Applicant reasonable under professional norms.

I find Applicant has failed to carry his burden of proof as to any of the claims in his Application for Post-Conviction 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.

December 26th, 2016
Greenville, South Carolina
John



John G. Hayes, III
Presiding Judge *H6*

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JAN 12 2017

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

John C. Hayes, III, Circuit Court Judge

Case No. 2016-CP-23-2652

Michael Bishop,..... Appellant,

v.

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

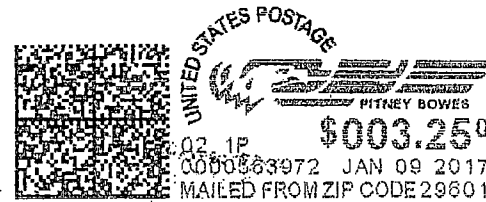
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Michael Bishop SCDC# 163177
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SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

January 09, 2017



MAIL, JR.

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