ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAR 23 2017
S.C. SUPREME COURT

March 23, 2017

The Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: <u>Robert Shaver v. State of South Carolina</u>
2013-CP-46-1792

Dear Mr. Shearouse:

Enclosed are the following:

1. Notice of Appeal
2. Proof of Service of the notice of appeal on the Respondent
3. A copy of the order which is to be challenged on appeal.

Sincerely,

Justin J. Hunter
Assistant Attorney General

JJH/bea
Enclosures

cc: Nathan J. Sheldon, Esquire
The Honorable David Hamilton, Clerk of Court of York County
The Honorable Kevin S. Brackett, Sixteenth Circuit Solicitor
SCCID, Division of Appellate Defense
Barton J. Vincent, Esquire
Trisha Allen, Director of Victims Services

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAR 23 2017
S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Letitia Verdin, Circuit Court Judge

Case No. 2013-CP-46-1792

Robert Shaver, #234875, ...Respondent,

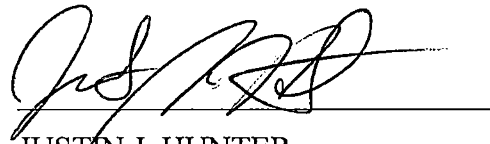
v.

State of South Carolina, ...Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the order of the Honorable Letitia Verdin dated September 22, 2016, and filed September 26, 2016. Petition received written notice of entry of this order September 29, 2016. Petitioner filed a Motion to Reconsider which was denied by an order dated February 22, 2017. Petitioner received written notice of entry of this order on February 22, 2017. The State received a copy of the PCR hearing transcript on October 27, 2016.

March 23, 2017



JUSTIN J. HUNTER
Assistant Attorney General
S.C. Bar No. 101254

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

Other Counsel of Record:

Nathan J. Sheldon, Esquire
PO Box 36682
Rock Hill, South Carolina 29732

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM YORK COUNTY
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Case No. 2013-CP-46-1792

Robert Shaver, #234875, ...Respondent,

v.

State of South Carolina, ...Petitioner.

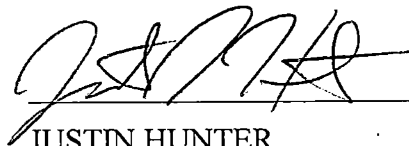
PROOF OF SERVICE

I, Justin Hunter, certify that I have served the within Notice of Appeal on Respondent Robert Shaver by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record at the following address:

Nathan J. Sheldon, Esquire
PO Box 36682
Rock Hill, South Carolina 29732

I further certify that all parties required by Rule to be served have been served.

March 23, 2017



JUSTIN HUNTER
Assistant Attorney General
S.C. Bar No. 101254

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Columbia, South Carolina 29211
(803) 734-3737

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP461792

Robert Shaver	**State of South Carolina**
PLAINTIFF(S)	**DEFENDANT(S)**
Submitted by:	**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (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. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (***CHECK REASON***): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ Other:

☐ **ACTION STRICKEN** (***CHECK REASON***): ☐ Rule 40(j) SCRCP; ☐ 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:

FILED-RECEIVED 2016 SEP 26 PM 1: DAVID HAMILTON C.C.C.P. & GS YORK COUNTY, SC

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; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☒ does not end the case.
Additional Information for the Clerk: ______

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	Judge Code	Date
[signature]	2162	9/22/2016

For Clerk of Court Office Use Only

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on, to attorneys of record or to parties (when appearing pro se) as follows:

Nathan J. Sheldon

ATTORNEY(S) FOR THE PLAINTIFF(S)

Justin Hunter

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton York County Clerk Of Court - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK)	
)	File Book No.: 2013-CP-46-1792
Robert Shaver #234875,)	
)	ORDER
Petitioner,)	
)	
vs.)	
)	
State of South Carolina,)	
)	
Respondent,)	

FILED-RECEIVED
2016 SEP 26 PM 1:31
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

The Applicant Robert Shaver pled guilty on March 31, 2011 before the Honorable John C. Hayes, III to Distribution of a Schedule II Narcotic (Morphine) and Distribution of a Schedule I (both first offense). Applicant was sentenced to fifteen years and one year concurrent respectively and that was suspended on a sentence of drug court. Applicant was terminated from drug court and on November 29, 2012 was sentenced by the Honorable John C. Hayes, III to fifteen years on the distribution of a Schedule II charge and one year on the Distribution of a Schedule I charge to run concurrently.

The Applicant filed this post-conviction relief application on June 7, 2013, wherein Applicant alleges ineffective assistance of trial counsel. The Applicant was represented by Phil Smith of the York County Public Defender's Office for his initial plea into Drug Court and by William Hancock of the York County Bar for the imposition of his sentence after failing out of Drug Court.

The parties stipulated to the fact that there is no transcript available from the initial plea in 2011. A transcript is available for the actual imposition of Applicant's sentence. The parties

agree that the transcript was requested timely and it is neither the fault of the applicant nor the State that no transcript exists from the original sentencing.

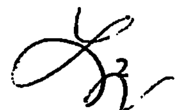
This matter was originally heard by The Honorable J. Ernest Kinard, Jr. on April 13, 2015. Judge Kinard instructed both attorneys to prepare orders following the testimony at that hearing. However, shortly thereafter Judge Kinard passed away prior to ruling on either order that was submitted to him.

The case was then assigned to The Honorable Brian M. Gibbons to review and determine if a ruling could be made on the transcript, or if an additional evidentiary hearing was needed. Judge Gibbons determined that a *de novo* hearing was needed due to the lack of an original transcript from the initial plea.

Ultimately, Judge Gibbons relinquished jurisdiction to York County and issued an Order instructing the Attorney General to schedule the case on the normal PCR docket in York County as soon as it could be heard. This matter was heard on a *de novo* basis before this Court on August 1, 2016.

The court heard testimony from the Applicant regarding his original sentencing. Applicant stated that his attorney, Phil Smith, said he could either accept a five year sentence or plead into drug court. Applicant testified that Mr. Smith did not explain to him everything involved with Drug Court. Applicant also testified that he believed that the suspended sentence would be similar to the active five year sentence that he turned down. Applicant stated that he did not know that the suspended sentence was going to be fifteen years and had he known that he would not have accepted drug court.

Applicant also testified that he hired Attorney Hancock for the sentencing hearing, and that Attorney Hancock told him he would be able to get him less time. The transcript from the



sentencing hearing reflects that the Applicant was sentenced to fifteen years, but that Mr. Hancock would be permitted to file a Motion to Reconsider the Sentence for downward departure. The Court allowed Mr. Hancock time to do this, but there is no evidence that this Motion was ever filed. Applicant testified that he had never received a copy of any Motion. The Court file does not contain any motion regarding the reconsideration of the sentence.

The Court then heard from Mr. Smith. Mr. Smith testified that he was the original plea attorney, but denied that he had forced Applicant to plea and stated that he did not promise him a five year suspended sentence. Mr. Smith was questioned about the sentencing sheets themselves, and he acknowledged that they simply listed "Drug Court" as the sentence and made no reference to the active time that could be imposed. Mr. Smith testified that this was not common and that absent a transcript, the only thing he could rely upon are the notes that he took at the plea. Mr. Smith acknowledged that the notes he took during the plea were minimal. Mr. Smith acknowledged that the "15" portion of his notes was written at a different time than the rest of the sentencing note and was most likely written sometime after his notes from the plea. Mr. Smith offered no other explanation. Mr. Smith also stated that he had an email from Drug Court referencing a fifteen year sentence, but this email was sent after the imposition of the sentence itself and was not an email prepared prior to sentencing as some sort of plea agreement. Mr. Smith acknowledged that absent the transcript there was no filed document referencing the fifteen year suspended sentence.

Mr. Smith also testified that he had done hundreds of pleas in front of Judge Hayes and that in his experience Judge Hayes always examined the defendant as to the voluntariness of the plea and the standard plea colloquy. Mr. Smith had never been part of a plea where Judge Hayes did not engage in this practice.

Mr. Hancock is deceased. Unfortunately, he was not alive for the original PCR hearing, so there is no testimony regarding the circumstances surrounding the reconsideration of the sentence other than the transcript from the imposition of the sentence.

STANDARD OF LAW

In an action for post-conviction relief, the burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence. Frasier v. State, 351 S.C. 385, 570 S.E.2d 172 (2002) (citing Rule 7.1(e), SCRCP); Butler v. State, 286 S.C. 441, 442 (1985). "To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different." Johnson v. State, 480 S.E.2d 733, 735 (1997)(citing Underwood v. State, 309 S.C. 560 (1992); Simmons v. State, 308 S.C. 481 (1992)). In this way, an ineffective assistance of counsel claim involves a two prong analysis: (1) that counsel's performance was deficient and (2) that counsel's performance prejudiced the Applicant. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Demonstrating error requires a showing that counsel's performance fell below the "reasonableness under professional norms." Id. at 117. In order to show prejudice, the Applicant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson, 480 S.E.2d at 735(citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984)). With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

I. Trial Counsel was ineffective for failing to offer reasonable and sound advice regarding the original plea into drug court.

It is unclear from the lack of transcript exactly which parts of the original plea, if any, were negotiated and because there is no transcript available it is impossible to tell. Applicant testified that he believed that when he turned down the five year active sentence offer from the State and accepted the pela into drug court that the suspended sentence would be substantially similar. Applicant also testified that had he known he would receive a suspended fifteen year sentence that he would not have accepted the plea.

It appears that Mr. Smith likely did not communicate the possible punishment of Applicant's plea into drug court and had he done so the outcome would have been substantially different in favor of the defendant. This is bolstered by the lack of communications regarding the original fifteen year sentence in trial counsel's file. The sentence itself was written in different colored ink and, by counsel's own admission, most probably written at a different time than the rest of the sentencing notes. The only other document that contains fifteen years on it is the email sent by drug court after the imposition of the sentence. Neither of these documents were produced prior to sentencing. Trial Counsel's actions constitute prejudice.

II. Trial Counsel was ineffective in not filing a Motion to Reconsider for downward departure.

At the sentencing hearing for the failure out of drug court, Mr. Hancock specifically asked the Court to reconsider the fifteen year sentence based on the downward departure portion of the drug court statute. The Court allowed him time to formally file that motion, but sentenced the Applicant in the interim. There is no evidence that motion was ever filed. The applicant testified that he never received that motion and that motion was not in the Court file. Mr.

Hancock was ineffective in not following through with filing a formal Motion to Reconsider Applicant's sentence. There is no way to say whether or not the Court would have reduced the sentence based on the reconsideration, but the Court did bend the rules in allowing him to have time to file the motion. He specifically asked for permission to file a motion reconsidering the sentence, was granted an extension of time to do so, and never actually did so. Mr. Hancock's actions constitute reversible error and prejudice.

There is also nothing in the record that indicates Mr. Hancock ordered a transcript from the original guilty plea into drug court. As a result, Mr. Hancock was left with accepting the fifteen year sentence as being accurate. Mr. Hancock's failure to order a transcript to confirm the fifteen year sentence constitutes reversible error and prejudice.

CONCLUSION

This Court finds the Applicant has satisfied the first prong of the Strickland test – that both Mr. Smith and Mr. Hancock failed to render reasonably effective assistance under prevailing professional norms. Mr. Smith failed to produce any evidence that he informed the applicant that the active five year plea would balloon to a fifteen year suspended sentence if he agreed to Drug Court. Mr. Smith's file contains nothing documenting a fifteen year suspended sentence prior to the imposition of the sentence.

Mr. Hancock asked the Court to allow him to file a motion for downward departure from the sentence but failed to ever do so. Clearly, applicant wanted him to do so. He paid Mr. Hancock to represent him at sentencing and was sentenced to the maximum sentence. It is a natural and reasonable inference to assume that applicant would want a maximum imposed sentence to be reconsidered if possible.

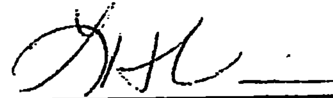
This Court also finds the Applicant has satisfied the second prong of the Strickland test – that he was prejudiced by counsels' performance. Applicant testified that he would not have taken the plea offer had he known that the suspended sentence was fifteen years. Absent a transcript, this Court has no way to know for sure that the sentence was fifteen years, but even if the Court assumes it was, it is likely that the defendant would have believed that the suspended sentence would be similar to the five year active sentence he was originally offered. The applicant testified to the same. Again, there is no evidence in counsel's file that the fifteen year suspended offer was relayed to applicant prior to the sentencing.

Furthermore, it is equally reasonable to conclude that applicant was prejudiced by Mr. Hancock's failure to file a reconsideration of the original sentence. The trial court went out of its way to allow him to do so. He received a maximum sentence on the charge. Yet, somehow, this motion was never filed and the reconsideration of the sentence was never heard. This Court concludes the Applicant has met his burden of proving counsel failed to render reasonably effective assistance.

Based on the testimony of the witnesses, a careful review of the record and all of the foregoing, the Court finds and concludes that the Applicant has met his burden in establishing that the Applicant is entitled to post-conviction relief. For the foregoing reasons, this application for post-conviction relief is granted.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Applicant has met his burden in establishing that he is entitled to post-conviction relief and the same is hereby granted. Applicant is ordered remanded to the custody of the York County Detention Center pending further proceedings on this case.

IT IS SO ORDERED.



Hon. Letitia Verdin
Presiding Judge
Sixteenth Judicial Circuit

Greenville, South Carolina
9/22, 2016

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013-CP-46-1792

FILED-RECEIVED
2017 MAR -9 PM 4:08
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

Robert Shaver	State of South Carolina
PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (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. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: ______

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ 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; (formal order to follow) ☒ Statement of Judgment by the Court: **Court denies Respondent's Motion To Reconsider.**

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: ______

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

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Circuit Court Judge	2162 Judge Code	2/22/2017 Date

For Clerk of Court Office Use Only

This judgment was entered on 3/9/17, and a copy mailed first class or placed in the appropriate attorney's box on 3/9/17 to attorneys of record or to parties (when appearing pro se) as follows:

Nathan J. Sheldon PO Box 36682 Rock Hill, SC 29732

ATTORNEY(S) FOR THE PLAINTIFF(S)

Justin James Hunter PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

David Hamilton

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.