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RECEIVED

April 12, 2017

APR 17 2017

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

S.C. SUPREME COURT

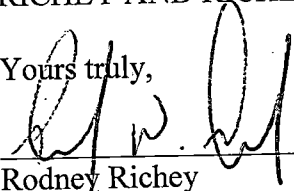
Re: Javan Fredrick Mays, SCDC# 250287 vs. State of South Carolina
Case No: 2015-CP-42-1784

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and a Proof of Service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please filed the copies that I have enclosed and return the copies to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,


Rodney Richey

RWR/

enclosures

cc: Alicia A. Olive, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

HONORABLE FRANK R. ADDY, JR

2015-CP-42-1784

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APR 17 2017

S.C. SUPREME COURT

JAVAN FREDRICK MAYS, SCDC#: 250287
A/K/A VON FREDRICK MAYS,

APPELLANT,

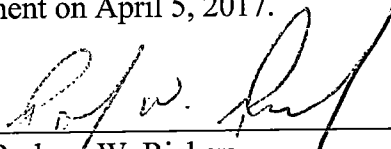
against

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Javan Fredrick Mays appeals the denial of his Post- Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Frank R. Addy, Jr., Circuit Judge on November 9, 2016 and Order issued on March 24, 2017 and filed on March 31, 2017. The Appellant received notice of the judgment on April 5, 2017.



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Other Counsel of Record:
Alicia A. Olive, Esquire
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Post Office Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

HONORABLE FRANK R. ADDY, JR

2015-CP-42-1784

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APR 17 2017

S.C. SUPREME COURT

JAVAN FREDRICK MAYS, SCDC#: 250287
A/K/A VON FREDRICK MAYS,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

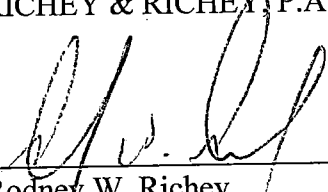
RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on April 12, 2017, addressed to their attorney of record, Alicia A. Olive, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: April 12, 2017

RICHEY & RICHEY, P.A.



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APR 17 2017

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Javan Fredrick Mays, #250287,)
 a/k/a Von Fredrick Mays,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

S.C. SUPREME COURT
 IN THE COURT OF COMMON PLEAS
 FOR THE SEVENTH JUDICIAL CIRCUIT

Case No. 2015-CP-42-1784

ORDER OF DISMISSAL

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2017 MAR 31 AM 11:43
 M. HOPE BLACKLEY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 28, 2015. Respondent made a Return on February 11, 2016. The Court convened an evidentiary hearing into the matter on November 9, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Rodney Richey, Esquire. Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's appellate counsel, Susan Hackett, Esquire also testified. The Court had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In October 2012, the Spartanburg County Grand Jury indicted Applicant for two counts of attempted murder (2012-GS-42-5314, and -5315), and armed robbery and possession of a firearm during the commission

of a violent crime (2012-GS-42-5316, count one and two). At trial, Applicant represented himself and J. Roger Poole, Esquire, acted as standby counsel. On November 18, 2013, Applicant proceeded to trial before the Honorable Alexander S. Macaulay and a jury. The jury found Applicant guilty as indicted. Judge Macaulay sentenced Applicant to imprisonment for concurrent terms of 20 years on each count of attempted murder, 20 years for armed robbery and five years for the firearm charge.

Applicant filed a timely notice of appeal. Susan B. Hackett, Esquire of the Office of Appellate Defense represented Applicant on appeal and filed a brief on his behalf pursuant to Anders v. California.¹ The South Carolina Court of Appeals dismissed Applicant's appeal in an unpublished opinion. State v. Mays, 2015-UP-179 (S.C. Ct. App. filed April 8, 2015). The Remittitur was returned on April 28, 2015.

II. ALLEGATIONS

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Appellate Counsel," in that:
 - a. Appellate Counsel failed "to argue on appeal that Appellant was deprived by the State of his right to a speedy trial as required by the Sixth and Fourteenth Amendments to the United States Constitution"
2. "Due Process violation," in that:
 - a. "Court failed to adequately explain dangers and disadvantages of self-representation as required by Sixth and Fourteenth Amendments to the U.S. Constitution."

At the evidentiary hearing, Applicant proceeded on only the allegations of ineffective assistance of appellate counsel for failure to argue preserved issues on appeal, and violation of

due process in that Applicant was not adequately advised of the dangers and disadvantages of proceeding pro se.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

A. Summary of Testimony

Applicant testified he felt Appellate Counsel did not argue preserved issues on appeal. Appellate Counsel explained the general process she follows when she is assigned a case on appeal, and specifically, how she determines what, if any, issues to raise and brief on appeal. Appellate Counsel explained that she files an Anders² brief for cases in which the record reveals no preserved or meritorious issues. Appellate Counsel explained that, in this case, because Applicant represented himself at trial, he was responsible for preserving appealable issues. She testified that she reviewed the entire record and determined there were no preserved issues, but that she briefed the only potentially meritorious issue she could ascertain. Appellate Counsel further testified that she had no basis to argue that Applicant was not adequately advised of the dangers and disadvantages of self-representation.

B. Involuntary Waiver of Trial Counsel

Applicant alleged in his application that he was denied due process of law in that he did not knowingly and voluntarily waive his right to counsel. This Court finds Applicant has

¹ 386 U.S. 738 (1967).

presented no evidence of this allegation and the record clearly reflects Applicant knowingly and voluntarily waived his right to counsel after being advised by several judges of the perils of self-representation.

Imbedded within the Sixth Amendment right to counsel is the implied right of self-representation. Faretta v. California, 422 U.S. 806, 821 (1975); Dearybury v. State, 367 S.C. 34, 625 S.E.2d 212 (2006). A defendant who elects to represent himself "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Faretta, 422 U.S. at 835 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269 (1942)). It is the trial judge's responsibility to determine whether there is a competent, intelligent waiver by the defendant. Watts v. State, 347 S.C. 399, 402, 556 S.E.2d 368, 370 (2001) (citing State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977)).

Here, Applicant appeared before three different judges on three separate occasions prior to trial, and, each time, Applicant reiterated his desire to relieve counsel and represent himself. (Tr. at 1-43). Applicant first appeared before Judge Cole on June 21, 2013. (Tr. at 1-13). Judge Cole questioned him about his education, whether he had faced criminal charges before, whether he had been represented by an attorney before, whether he had been to trial before, whether he understood the rules of court and rules of evidence, and what kind of experience or education he had concerning legal matters. (Tr. at 4-7). Judge Cole also asked Applicant if he thought he was capable of representing himself, (Tr. at 8:5-10), if he wished to represent himself if he could not afford to retain a different attorney, (Tr. at 8:11-9:6), whether he understood the "advantages and disadvantages and the pitfalls of attempting to represent" himself, (Tr. at 9:7-10), and whether he

² Anders v. California, 386 U.S. 738, 744 (1967).

understood that he "assumed the risk of deficient representation" by choosing to represent himself. (Tr. at 9:14-17). Applicant acknowledged that he understood that if he chose to represent himself, he would have to follow the same rules that a lawyer would follow in court and that if he did not understand what to do, he would be at a distinct disadvantage. (Tr. at 10:12-20). Applicant confirmed that he was sure he wished to represent himself; however, he then stated that he would be amenable to having a different attorney from the public defender's office as long as it was not his current attorney. (Tr. at 10-11). As a result, Judge Cole stated he would consult with the Chief Public Defender to determine whether another public defender could be appointed. (Tr. at 13).

Thereafter, on August 9, 2013, Applicant appeared before the Honorable Brian M. Gibbons to ask that his second appointed attorney be relieved. (Tr. at 15-19). Judge Gibbons again questioned Applicant about whether he understood the perils of representing himself and whether he understood he would be held to the same standards as an actual attorney and that he would have to know all of the rules of procedure, rules of evidence, and courtroom decorum. (Tr. at 18-21). Applicant acknowledged that he understood by representing himself he could severely impact his case. (Tr. at 19).

Lastly, on the third occasion, which was just prior to the start of trial, Judge Macaulay questioned Applicant and made a finding that Applicant "knowingly and intelligently and freely and voluntarily waived his right to counsel." (Tr. at 42:21-43:3).

This Court finds the record clearly reflects that the trial judge ensured that Applicant made a knowing choice to represent himself with "eyes open" after being appropriately advised of the dangers and disadvantages of self-representation. Accordingly, Applicant has failed to present any evidence in support of this allegation and it is therefore denied and dismissed.

C. Ineffective Assistance of Appellate Counsel

"A defendant is constitutionally entitled to effective assistance of appellate counsel." Evitts v. Lucey, 469 U.S. 387 (1985). This Court must analyze claims of ineffective assistance of appellate counsel according to the same standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) (citing Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999)). In other words, Applicant has the burden of proving Appellate Counsel's performance was deficient and that he was prejudiced by the alleged deficiency. Thrift v. State, 302 S.C. 535, 537, 397 S.E.2d 523, 525; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005) (citing Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003)). "[A]ppellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift, 302 S.C. at 539, 397 S.E.2d at 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Appellate counsel has a "professional duty to choose among potential issues" according to their merit. Barnes, 463 U.S. 745. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). Where an Applicant contends appellate counsel rendered ineffective assistance by failing to argue an issue, Applicant must show the failure to raise the issue was objectively unreasonable and that, but for this failure, his conviction or sentence would have been reversed. See Southerland v. State, 337 S.C. 610, 617, 524 S.E.2d 833, 836 (1999) (citing People v. Griffin, 687 N.E.2d 820 (Ill. 1997)).

Although Appellate Counsel must generally support her client's appeal to the best of her ability, "if counsel finds [the] case to be wholly frivolous, after a conscientious examination of it, [s]he should so advise the court and request permission to withdraw." Anders v. California, 386

U.S. 738, 744 (1967). "[T]he defendant must [then] be given time to respond and to raise any additional points after his attorney submits the Anders brief. The court then is obligated to conduct a 'full examination' of the record to determine whether the appeal is 'wholly frivolous.'" State v. McKennedy, 348 S.C. 270, 278, 559 S.E.2d 850, 854 (2002) (citing Anders v. California, 386 U.S. at 744) (citations omitted). "The purpose of filing a brief under Anders is to ensure the merits of the appeal are not overlooked. The court has to conclude independently, regardless of counsel's conclusion, whether or not the appeal has merit before it can dismiss the appeal." Id. at 279, 559 S.E.2d at 855.

Precisely this procedure was followed here. Appellate Counsel testified she filed an Anders brief in this case because based upon her review of the entire record, she could discern no preserved, meritorious issues and she saw no basis for arguing that Applicant was not adequately advised of the dangers and disadvantages of self-representation. As Counsel testified, she argued the only potentially meritorious issue she could ascertain, but that the issue was not preserved due to Applicant's failure to preserve the issue at trial. The Court of Appeals dismissed the appeal pursuant to Anders. State v. Mays, 2015-UP-179 (S.C. Ct. App. filed April 8, 2015). Had the Court discovered any meritorious issues upon its independent review of the record, it would not have dismissed the appeal. See Anders v. California, 386 U.S. 738, 744 (1967); State v. McKennedy, 348 S.C. 270, 278, 559 S.E.2d 850, 854 (2002).

In considering the record, the testimony and arguments presented at the evidentiary hearing, and this Court finds Applicant has shown neither deficiency nor prejudice with respect to this allegation. Appellate Counsel followed the procedure outlined in Anders and gave her basis for doing so and for raising the particular issue she addressed therein. Given that Applicant represented himself and clearly did so freely and voluntarily after appearing before three

different judges on three separate occasions who inquired as to his understanding of the dangers and disadvantages of self-representation, Appellate Counsel's choice to file an Anders brief was objectively reasonable. Furthermore, because the Court of Appeals was required to conduct its own independent review of the record and nevertheless chose to dismiss the appeal, Applicant has failed to demonstrate the outcome of the appeal would have been different but for the alleged error of counsel. Accordingly, this Court finds Applicant failed to satisfy his burden of proving his allegations, and this application for post-conviction relief is therefore denied and dismissed with prejudice.

D. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

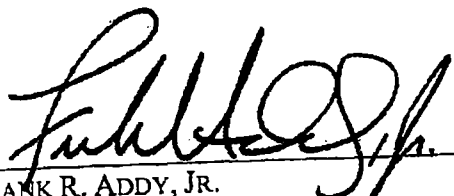
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek

appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

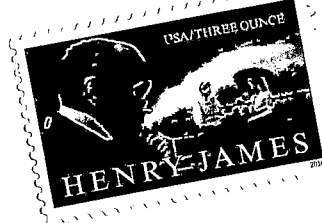
AND IT IS SO ORDERED this 24th day of March, 2017.


FRANK R. ADDY, JR.
Presiding Judge, Seventh Judicial Circuit

Greenwood, South Carolina

2017 MAR 31 AM 11:43
M. HOPE BLACKLEY
CLERK OF COURT
SEVENTH JUDICIAL CIRCUIT

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