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June 15, 2017

The South Carolina Supreme Court
Daniel E. Shearouse, Clerk of Court
P.O. Box 11330
Columbia, SC 29211

RE: Billy Joe Griggs #124983 v. State

Dear Sir or Madam:

Enclosed please find for filing an original and a copy of a Notice of Appeal and a Certificate of Service in the above matter. Also enclosed is a request for Mr. Griggs transcript.

Kindly return the clocked copy to me in the enclosed envelope. Thank you and should you have any questions, please feel free to contact me.

Yours truly,

Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Johnny Ellis James, Jr., Esq.
Billy Joe Griggs #124983

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
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S.C. SUPREME COURT

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas
Post-Conviction Relief

G. Thomas Cooper, Jr., Circuit Court Judge

Case No.: 2015-CP-13-0061

Billy Joe Griggs #124983,..... Appellant,

vs.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

Billy Joe Griggs #124983appeals the order of the Honorable G. Thomas Cooper, Jr. dated March 31, 2017 and filed on April 3, 2017. Appellant received written notice of entry of this order on May 26, 2017.

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Other Counsel of Record:

Johnny Ellis James, Jr., Esq.
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Irmo, South Carolina
June 15, 2017

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHESTERFIELD COUNTY
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CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant, hereby certify that I placed in the United States Mail, a copy of an Notice of Appeal, with postage prepaid and the return address clearly shown on said envelope to the Attorney General's Office, at:

Johnny Ellis James, Jr., Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549

Jacquelyn E. Miller
Secretary to Tommy A. Thomas
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June 15, 2017

STATE OF SOUTH CAROLINA COUNTY OF CHESTERFIELD	)	IN THE COURT OF COMMON PLEAS FOURTH JUDICIAL CIRCUIT
Billy Joe Griggs, #124983, Applicant, v. State of South Carolina, Respondent.	)	2015-CP-13-0061 **ORDER OF DISMISSAL WITH PREJUDICE**

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Billy Joe Griggs (Applicant) on February 2, 2015. The State (Respondent) made its return on December 2, 2016, requesting an evidentiary hearing be held.[1] An evidentiary hearing into the matter was convened on January 9, 2017 at the Marlboro County Courthouse. Applicant was present and represented by Tommy A. Thomas, Esquire. Valerie Garcia Giovanoli, Esquire, represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Franklin B. Joyner, Jr. ("J.R."), Esquire, also testified. This Court had before it a copy of the Chesterfield County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the PCR application, Respondent's return, the trial transcript, and Applicant's direct appeal records.

[1] On May 15, 2015, Respondent filed its first return which included a motion to dismiss without prejudice based on a pending direct appeal. However, Applicant had already withdrawn his direct appeal. The Court of Appeals dismissed his appeal by order dated January 13, 2015, but the remittitur was not issued until February 4, 2015. Applicant filed this PCR application on February 2, 2015.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chesterfield County Clerk of Court. Applicant was indicted during the November 2013 term of the Chesterfield County Grand Jury for possession with intent to distribute a controlled substance (2013-GS-13-0591). Applicant proceeded to trial, and was found guilty as indicted. Franklin B. Joyner, Jr., Esquire, represented Applicant. On November 13, 2013, the Honorable Clifton Newman sentenced him to a term of imprisonment of thirteen years.

Applicant filed a notice of appeal on March 13, 2014. Applicant filed this PCR application on February 2, 2015, while his direct appeal was pending before the South Carolina Court of Appeals. Applicant withdrew his appeal, and the South Carolina Court of Appeals dismissed his appeal on January 13, 2015. The remittitur was issued on February 4, 2015.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
    a. Trial Counsel failed to investigate the facts
    b. Trial Counsel failed to put up a meaningful defense
    c. Trial Counsel deprived Applicant the right to present adverse witnesses in his defense

At the evidentiary hearing, Applicant proceeded on his claims of ineffective assistance of trial counsel contained in his application and an additional claim that trial counsel failed to clarify the enhancement statute for the Court at the time of sentencing and as such, his sentence had been improperly enhanced.

SUMMARY OF TESTIMONY

I. Applicant testified to the following:

Applicant is fifty-five (55) years old. He was arrested in 2010. At that time, he worked construction and helped at his dad's store. Before this arrest, he had not had a drug offense since 1989. After his arrest, he retained Franklin B. Joyner, Jr. ("J.R.") and got out on bond for over three (3) years. He met with J.R. during the summer of 2011 and the summer of 2012, but not in 2013. J.R. represented him on another, unrelated driving under suspension ("DUS") charge. He was sentenced in 2012 for DUS and claimed that J.R. told him that the drug charges would be dropped in exchange for his guilty plea on the driving under suspension. He believed he was entrapped by the confidential informant ("CI") in this case. He did not hire a private investigator, but he wanted to pursue the entrapment defense. The CI, who Applicant thought to be a friend, had begged him for pain pills that Applicant used for his hip pain because the CI was suffering from back pain. He believed the CI set him up because the CI had written a bad check to Applicant's father and his father turned the bad check into the courts. The CI also later propositioned Applicant to help with his brother's wife's traffic ticket in exchange for not testifying.

Applicant testified that J.R. told him before trial that he did not want to put up a defense. Applicant also felt that J.R. was only concerned with Applicant pleading guilty, not having a trial. Prior to trial, there was a plea offer from the Solicitor for three (3) years. Applicant did not accept offer. Applicant believed Judge used § 44-53-370 for enhancement, but the correct section was § 44-53-470(A)(3). Applicant also believes that J.R. was ineffective for not questioning State's witnesses about the color of the pills, when the CI said the pills were white

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and the SLED drug analyst said they were green. Applicant also believed J.R. was ineffective when he stipulated to the chain of custody because the pills he gave to the CI were white and the pills the analyst analyzed were green. Applicant and his nephew, Ronald, were willing to testify in Applicant's defense, but J.R. advised them not to testify and Applicant decided not to testify based on that advice. Applicant stated that it was his decision and J.R. did not "twist his arm." J.R. did not call any defense witnesses at trial.

J.R. filed a notice of appeal on behalf of Applicant. Then, J.R. wrote Applicant a letter saying he could not represent him on appeal because Applicant could not afford it, but Applicant testified that his father could have paid. J.R. told Applicant he was working on getting his sentence reconsidered, but he never filed a motion to reconsider. Applicant dropped his appeal because he thought he would be out on parole before his appeal came up. He felt comfortable with his parole date and he thought he would get out. He found out he was not parole eligible the month before he came up for parole.

Applicant recommended his friend to J.R. who had the same charges and same prior record, but J.R. was able to get him a better deal. Applicant claims he was the only one who got serious time.

On cross examination, Applicant admitted he had a DUI conviction in 1997. He denied a 1993 conviction for trafficking in cocaine, more than 10 grams and less than 28 grams, and stated that he had his lawyer's secretary get that expunged. He denied going to court on that charge and receiving a sentence of three years suspended upon the service of drug treatment and two years' probation. Applicant did admit to a 1991 unlawful drug conviction in which he received a sentence of three years suspended to eighteen months. Applicant admitted he had a

1984 trafficking cocaine conviction in which he received a sentence of ten years' imprisonment. He admitted he had a 1990 possession with intent to distribute cocaine charge that he insists was pled to a simple possession of cocaine conviction in which he received a four month sentence. He also admitted to a 1992 possession of cocaine conviction.

Applicant claimed that he has held drugs or helped skim some from law enforcement for the CI, but that did not occur in this case. He never told J.R. that he was only holding the pills for the CI. The pills he sold to the CI were white and they were prescription drugs. After he gave them to the CI, the CI paid him $50 or $60 in cash. There was conflicting evidence with regard to the color of the pills at trial. In video, the pills appeared white, but the law enforcement drug analyst said pills were green. Applicant believes J.R. was ineffective by not cross examining drug analyst specifically about color of pills. Instead, J.R. only raised the issue of color in his closing. He also believes J.R. was ineffective for stipulating to the chain of custody during trial.

II. Franklin B. Joyner, Jr. ("J.R.") testified to the following:

J.R. has practiced law since 2003, primarily criminal law. J.R. was retained to represent Applicant on these charges. He had represented Applicant previously several times. J.R. had ample time to put this case together for trial. Applicant was very difficult to get in touch with to discuss his case. J.R.'s office called him at least 10 times to schedule meetings. Applicant would also miss scheduled meetings with J.R. so they only met twice with regard to these charges.

J.R. represented him on a driving under suspension ("DUS") charge in which he recalls going to court for Applicant's guilty plea. J.R. does not recall any discussion of having the drug

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charges dropped in exchange for Applicant's guilty plea to the DUS and it was never J.R.'s understanding that the drug charges would be dropped. The DUS was a habitual offender charge for something like a 7th-9th offense for Applicant, which carried five years' imprisonment. J.R. was able to negotiate a plea deal to less time.

Applicant had three separate drug sale charges pending during the time of this trial. This particular charge had a very damaging video as evidence against him, which is why J.R. thinks the Solicitor chose it to try and weren't more amenable to an offer of minimal time. The Solicitor's offer was three (3) years and Applicant had no interest in accepting it. The Solicitor's office turned over the video to J.R., but not until after giving him other discovery, because they did not want to reveal the identity of their CI. J.R. thought it was one of the best CI drug sale videos he had ever seen. The video clearly shows the CI handing Applicant money and Applicant handing him the pills. The pills were a very light green, almost white. They appeared white on the video. J.R. purposefully brought up the color issue in his closing argument because it was a weak argument and he agreed with the Solicitor's position regarding the hue/color being different between video and real life. He argued the color issue anyway, because there was not really any other argument. Also, he did not want to give the State the opportunity to explain why the pills appeared to be a slightly different color on the video. This was a trial strategy. J.R. believed that had he pointed that out during cross examination of the drug analyst, it would draw more attention to what he considered a slight variation in color due to the video. The solicitor would then be able to rebut the color distinction argument both via testimony from the drug analyst and in closing argument.

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The case was a very difficult case to win and the likelihood of conviction was high. He did not want to reinforce the strength of the State's case by requiring them to call each of the six people on the chain of custody and instead stipulated so that the State need only call three witnesses. J.R. was aware the Solicitor was in compliance with Rule 6, SCRCrimP, and had subpoenaed every person contained in the chain of custody and each person was ready to testify.

J.R. discussed the three year plea offer with Applicant and explained that there was no parole eligibility because it was a third offense. J.R. studied the code section regarding sentencing enhancement and understood that § 44-53-370 of the South Carolina Code of Laws was what Applicant was indicted for and contained sentencing information. That section was also used by the Judge in sentencing. § 44-53-470, S.C. Code Ann., was the enhancement portion. J.R. explained that the section had been modified in 2016, but that he had a copy in his trial file of the section in effect at the time of this trial. J.R. testified that he spent a significant amount of time during his preparation studying the statute. J.R.'s understanding of the enhancement section was that even just two of Applicant's uncontested drug convictions, not including the contested conviction, would qualify him for enhancement under this statute.

With regard to Applicant's allegation that he was singled out in sentencing, Solicitor told J.R. that Applicant was a lifelong criminal. J.R. is unaware of other charges against other defendants because there was no conspiracy charge and no others were ever involved in Applicant's case. J.R. testified that he heard Applicant testify in the instant PCR hearing that the pills belonged to Applicant and that he sold them to the CI for back pain, but that Applicant told him that Applicant would hold the CI's pills to help CI skim some drugs from all of his undercover buys in exchange for money. J.R. testified that Applicant never told him the story of

selling his own prescription medication to a friend in pain. Applicant wanted J.R. to put that up as his defense, but J.R. advised him against it because that would still make him guilty under the broad statute. J.R. also did not understand the story given by Applicant today, that Applicant was holding CI's pills for him because CI would not have paid for something that was already his. (At this point, Respondent introduced State's Exhibit 2, disc with attorney/client call, into evidence.) The recording contained a phone call from the day before trial, in which Applicant told J.R. that only his nephew, "Ronald" was willing to testify and that their defense would be that Applicant was holding CI's pills because CI was buying more drugs than what he was telling law enforcement about. Applicant agreed to hold CI's pills in exchange for pay.

J.R. further testified that the State put together a good case and the evidence against Applicant was bad. J.R. advised Applicant that his testimony would do more damage than good, but left the ultimate decision up to Applicant, who decided not to testify. Applicant provided him a few names of people to call in his defense, but later informed J.R. that only one, his nephew, Ronald, would be willing to testify that Applicant was only holding CI's drugs for him for money.

J.R. filed a notice of appeal on Applicant's behalf, but did not represent him on appeal. Respondent introduced State's Exhibit 1, a letter written by Billy Griggs to J.R. asking him to help him in a post-conviction relief action. J.R. testified that the week prior to this PCR hearing, Applicant's father dropped off an envelope at J.R.'s father's store, for J.R., containing $2,000 in cash to help out on the post-conviction relief. J.R. did not accept the money because he does not represent Applicant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

As a matter of general impression, this Court finds the testimony of Counsel J.R. to be credible. This Court further finds that the testimony by Applicant is not credible, especially with regard to Applicant's version of the facts of the underlying conviction.

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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 upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive

relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. 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.

This Court finds that Applicant has failed to meet his burden in proving either prong of Strickland and that Counsel rendered effective assistance in his representation of Applicant. Applicant's claim that Counsel failed to investigate the case is contradicted by the record of the trial. Counsel was well-prepared at trial. His opening argument at the start of Applicant's trial coincided with the version of the facts as given to him by Applicant. He conducted a thorough cross examination of the CI regarding his past convictions and prior, extensive drug use, the benefit he received in pending criminal charges in exchange for his cooperation with law enforcement, and his knowledge about his sister-in-law having a traffic ticket with which she needed help. His cross-examination of the S.L.E.D. drug analyst was equally thorough. Counsel demonstrated an in-depth understanding of the science involved in drug analysis, including the molecular testing of gas chromatography and mass spectroscopy. Furthermore, Counsel testified that any lack of communication with regard to the case was the fault of Applicant because he was hard to get in touch with and he would fail to show up to scheduled meetings. Despite this difficulty, Counsel was well prepared to try Applicant's case and very familiar with the facts of the case.

This Court finds that Applicant's claim that failed to put up a meaningful defense also lacks merit. Counsel testified and the record shows that the State built a solid case against Applicant. Every possible argument, however weak, that could be made against the charges at trial were well-argued by Counsel. Applicant complains of trial counsel's failure to more thoroughly cross examine the drug analyst with regard to the color of the pills Applicant sold. Counsel testified that this was a purposeful trial tactic in order to preempt the State's ability to reply to the argument that the color was different in the video from what the drug analyst testified to. Counsel knew this was a weak argument because the actual color of the pills was a light green and they only appeared to be a white hue on the video. If the State was afforded the opportunity to dive into that issue and explain the discrepancy, Counsel would be left with little argument. Counsel testified that he had very few arguments given the strength of the State's case and evidence against the Applicant. This Court finds that Counsel's trial strategy was a sound one and very reasonable in light of prevailing professional norms.

This Court finds that Counsel's trial strategy in advising Applicant not to testify was also sound. Applicant's version of the facts prior to trial, as testified to from Counsel and as evidenced by the audio recording of a phone call between Counsel and Applicant prior to trial, and Applicant's changed version of the facts as testified to by Applicant at the PCR hearing both would have been more damaging than helpful to Applicant's defense. Both sets of facts support a guilty verdict under the possession with intent to distribute a controlled substance statute. As such, this Court finds that it was sound advice for Applicant not to testify.

This Court finds Counsel did not render ineffective assistance in failing to present adverse witnesses in Applicant's defense. Although Applicant claims that he could provide

witnesses that would corroborate his story of holding the pills that the CI skimmed from law enforcement from undercover buys in exchange for pay, the record shows that he ultimately only offered up one – his nephew, Ronald. Similar to the testimony Applicant wanted to give, the testimony that Ronald would have offered would be more damaging than helpful. This Court finds Counsel's decision to not call Ronald to testify on behalf of Applicant at his trial to be a prudent one.

Applicant's remaining claim that he was sentenced under the wrong statute and that Counsel should have corrected it at the time of his sentencing is merit-less. During sentencing, Counsel cited § 44-53-370(a) of the South Carolina Code of Laws when asked by the Court about enhancement. While § 44-54-470(a) is actually the enhancement statute and § 44-53-370(a) is the offense and penalty statute, Counsel defined the enhancement statute correctly to the Court at the time of sentencing. This Court finds that the enhancement statute was applied properly and Applicant was sentenced appropriately. Despite the dispute over prior drug convictions, even the convictions Applicant does not contest (1991 unlawful drug conviction in which he received a sentence of three years suspended to eighteen months, 1984 trafficking cocaine conviction in which he received a sentence of ten years' imprisonment, 1990 possession with intent to distribute cocaine charge that Applicant insists was pled to a simple possession of cocaine conviction in which he received a four month sentence) qualify him for enhancement under the statute. § 44-53-470(a)(4), S.C. Code Ann., says that if at *any time* there was a conviction for a "second" non-marijuana drug offense, then the offense would be a "subsequent" offense and enhanced as such. This Court finds Counsel was effective during the sentencing and enhancement phase of Applicant's trial.

This Court finds that Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove any prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice. This Court also finds that Applicant failed to present evidence as to the other allegations, and thus, this Court deems the other allegations abandoned.

[*Remainder of page left blank intentionally*]

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This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 31 day of March, 2017.

G. THOMAS COOPER, JR.
Presiding Judge
Fourth Judicial Circuit

Camden, South Carolina

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