

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

11 NORTH IRVINE STREET, SUITE 11 • GREENVILLE, SC 29601
PHONE 864.232.9390 • FAX 864.232.9392 • E-MAIL MILLS@RMALAWOFFICE.COM

September 11, 2017

RECEIVED

SEP 14 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

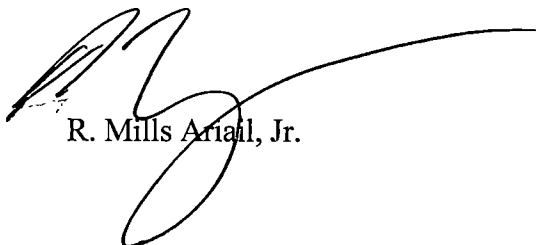
***Re: Notice of Intent to Appeal from David M. Johnson vs. State of South Carolina
C.A. No.: 2013-CP-04-842***

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 R. Scott Sprouse'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 Anderson 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)

RECEIVED
SEP 14 2017
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2013-CP-04-842

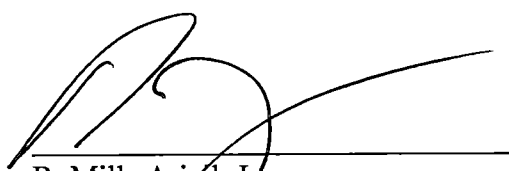
David M. Johnson,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable R. Scott Sprouse's Order of Dismissal dismissing Appellant's application for post-conviction relief. On July 17, 2017, the Honorable R. Scott Sprouse 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 August 31, 2017. A copy of the Honorable R. Scott Sprouse's Order of Dismissal is attached.



R. Mills Ariail, Jr.
Attorney at Law
11 North Irvine St., Suite 11
Greenville, SC 29601
Telephone (864) 232-9390
Facsimile (864) 232-9392
Attorney for David M. Johnson

Greenville, South Carolina
September 11, 2017

RECEIVED
SEP 14 2017
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No.2013-CP-04-842

David M. Johnson,..... 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 September 11, 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:

Lindsey A. McCalister, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

Anderson County Clerk's Office
Anderson County Courthouse
214 South Main Street
Anderson, SC 29624

David M. Johnson SCDC# 269185
McCormick Correctional Institute
386 Redemption Way Dorm F-2 Room 233B
McCormick, SC 29899

SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

September 11, 2017

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

David M. Johnson, #269185,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Case No. 2013-CP-04-0842

ORDER OF DISMISSAL

FILED-CLERK'S OFFICE
ANDERSON, SC
2017 JUL 21 AM 10:57
COMMON PLEAS AND
GENERAL JUDGE

Presiding Judge:
Applicant's Attorney:
Respondent's Attorney:
Trial Counsel:
Date of Hearing:
Court Reporter:

R. Scott Sprouse
R. Mills Ariail, Esquire
Lindsey A. McCallister, Esquire
Bruce A. Byrholdt, Esquire
February 27, 2017
Diane L. Marcengill

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed April 12, 2013. Respondent made its return on or about January 26, 2017. An evidentiary hearing on the matter was convened on February 27, 2017 at the Anderson County Courthouse. Applicant was present at the hearing and represented by R. Mills Ariail, Esquire. Lindsey A. McCallister, Esquire, of the South Carolina Office of the Attorney General represented Respondent.

Applicant testified on his own behalf. Also testifying was Bruce A. Byrholdt, Esquire. The Court had before it the trial transcript, the Anderson County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's application, Respondent's return, and Applicant's appellate records.

RSS

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Anderson County Clerk of Court. Applicant was indicted at the October 2009 term of the Anderson County Grand Jury for trafficking in ice, crack, or crack in an amount more than 10 grams but less than 28 grams (2009-GS-04-2668) and for possession of marijuana in an amount less than 28 grams. He was represented by Bruce A. Byrholdt, Esquire. On March 31, 2010, Applicant proceeded to trial before the Honorable R. Lawton McIntosh and a jury, and Applicant was found guilty as indicted. Judge McIntosh sentenced Applicant to a term of 30 years imprisonment.

A timely notice of appeal was filed on Applicant's behalf at the South Carolina Court of Appeals. Elizabeth Ann Franklin-Best, Esquire, of the Office of Appellate Defense represented Applicant on appeal. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. *State v. Johnson*, Op. No. 2012-UP-264 (S.C. Ct. App. filed May 2, 2012). The Remittitur was issued on May 18, 2012.

ALLEGATIONS

In his application and amendments thereto filed October 3, 2016, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Lack of Subject Matter Jurisdiction
2. Due Process Violation
 - a. Admission of tainted evidence
3. Ineffective Assistance of Counsel for failing to object various trial court errors, including improper burden shifting and failure to object to admission of drug evidence.

At the hearing, Applicant testified he was only going forward on the issues in his application related to the suppression of tainted evidence and the applicability of State v. Carter¹ to his case.

¹ 344 S.C. 419, 544 S.E.2d 835 (2001).

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel 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 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors,

RSJ

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 the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

A. Ineffective Assistance of Counsel

Applicant contends Counsel should have objected to the admission of the crack cocaine and the “Best Kit” evidence because the State failed to prove that the chain of custody was complete. On cross examination, however, Applicant conceded that Counsel did object to the admission of the evidence and did question witnesses on that issue, but Applicant stated that he felt Counsel failed to preserve the issue for appellate review. Applicant testified that before his trial, he understood the charges against him, the factual basis for the charges, and had reviewed evidence with Counsel. Applicant testified he was not present at trial because Counsel told him that “something” was happening, but Applicant didn’t “think it was important.”

Counsel testified that at the time of this trial, he had approximately 27 years of experience practicing law and 80% of his practice has been criminal work. He stated he reviewed the evidence before trial with Applicant. He also stated he notified Applicant that the trial had been moved up on the schedule, and he was not pleased when Applicant didn’t appear. He testified he did make efforts to notify Applicant, and he put all of those efforts on the record at trial. However, Counsel stated Applicant’s absence probably did not affect the outcome, at least as far as the issue of admissibility of the evidence.

Counsel testified he wasn’t made aware that the baggie in question was missing until the morning of trial, and he tried to take advantage of the best way to keep it out, which was arguing that all of the drug evidence should be inadmissible since the kit had been opened. Counsel testified he did not see any way to distinguish Applicant’s case from the judge’s interpretation of

RSS

State v. Carter. Counsel further testified that the missing evidence only related to the trafficking charge, the drugs themselves were not tainted, and there was eyewitness testimony at trial that Applicant dropped the bag containing the drugs while he was running from the officers. Counsel testified Applicant's only defense was to try to keep the drugs out.

Counsel testified Applicant rejected a plea offer of 20 years to a reduced charge, and Counsel advised him that he would be facing more time if he went to trial and lost. Counsel stated Applicant did not want to do any time and wanted a trial. Counsel also testified he sent materials to OAD after they took over on appeal and highlighted several issues he felt were meritorious, including the admission of the drug evidence. However, Counsel did not represent Applicant on appeal, so he was not involved in deciding which issues should be raised. Applicant did not have appellate counsel present to testify.

Regarding Applicant's claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet his burden of proof. This Court finds Applicant's testimony regarding Counsel's ineffectiveness is not credible, while also finding Counsel's testimony is credible. This Court finds Counsel provided effective assistance in this case. Counsel is a trial practitioner who has extensive experience in the trial of criminal offenses. Counsel conferred with Applicant on multiple occasions, during which Counsel discussed the pending charges, Applicant's constitutional rights, the State's evidence, and possible defenses.

Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by

Counsel's performance. Applicant's own testimony acknowledged Counsel did in fact object to the admission of evidence, made arguments to the judge regarding its admissibility (or lack thereof) and cross-examined the State's witnesses on the issue. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

B. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing on this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice. This Court also finds, as to all other allegations, that Applicant failed to present evidence of such claims and thus, this Court deems them abandoned.

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


RSS

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:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 17 day of July, 2017.



R. Scott Sprouse
Presiding Judge
Tenth Judicial Circuit

Walhalla, South Carolina.

FILED-CLERK'S OFFICE
ANDERSON SC
2017 JUL 21 AM 10:57
COMMON PLEAS AND
GENERAL DIVISION