

THE BOOZER LAW FIRM, LLC

Lance S. Boozer, Esq.*
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November 6, 2017

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

The Honorable Scott B. Suggs
Clerk of Court
1 Public Square
Darlington, SC 29532

RECEIVED

NOV 08 2017

S.C. SUPREME COURT

**RE: Marcus Addison, #257690, v. State of South Carolina
2015-CP-16-273**

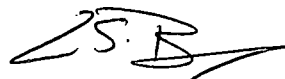
Dear Mr. Shearouse and Mr. Suggs:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Addison in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Addison in this appeal.

Yours very truly,



Lance S. Boozer

Enclosures

cc: Johnny E. James, Jr., AAG
Loriene French, OAD
Marcus Addison, #257690

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NOV 08 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

The Honorable Roger E. Henderson, Circuit Court Judge

Case No. 2015-CP-16-273

Marcus Addison, #257690,Petitioner,

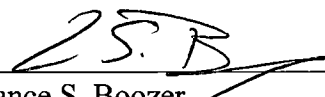
v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Roger E. Henderson's Order dated October 17, 2017, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on November 6, 2017. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,


Lance S. Boozer
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November 6, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

NOV 08 2017

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Roger E. Henderson, Circuit Court Judge

Case No. 2015-CP-16-273

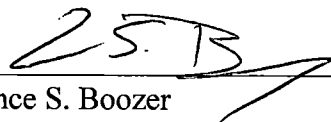
Marcus Addison, #257690,Petitioner,

v.

State of South Carolina,.....Respondent.

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Johnny E. James, Jr., P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 6th day of November, 2017.


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202

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) FOR THE FOURTH JUDICIAL CIRCUIT
COUNTY OF DARLINGTON)

Marcus Addison,)
S.C.D.C. No. 257690,)
) Case No.: 2015-CP-16-00273
)

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

2017 OCT 26 AM 9:52
SCOTT B. SUGGS
CLERK OF COURT/R.D.D.
DARLINGTON COUNTY, S.C.

FILED

This matter comes before the Court by way of an application for post-conviction relief filed by Marcus Addison (“Applicant”) on April 9, 2015. Respondent made its return on or about September 10, 2015. The Court convened an evidentiary hearing into the matter on July 16, 2017, at the Dillon County Judicial Center in Dillon, South Carolina. Applicant was present at the hearing and represented by Lance S. Boozer, Esquire. Johnny Ellis James Jr., of the South Carolina Attorney General’s Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant’s trial counsel, William E. Grove, Esquire (“Counsel”) also testified. The Court had before it Applicant’s records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Darlington County Clerk of Court regarding the subject convictions, Applicant’s direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. Applicant was indicted at the November 2008 term of the Darlington County Grand Jury for trafficking crack cocaine, 10-28

grams (2008-GS-16-01502), and two counts of contributing to the delinquency of a minor (2008-GS-16-01504, -01505). William E. Grove, Esquire, represented Applicant. Patti M. Parker and John Holt, of the Fourth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial before the Honorable Howard P. King and a jury on January 31, 2011. The jury found Applicant guilty as indicted on February 2, 2011. Judge King sentenced Applicant to imprisonment for consecutive terms of ten years for trafficking, and three years for each count of contributing to the delinquency of a minor.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Dayne C. Phillips, Esq. By opinion decided October 24, 2012, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Addison, Op. No. 2012-UP-577 (S.C. Ct. App. filed October 24, 2012). Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated January 15, 2015. The Remittitur was issued on February 9, 2015.

Present Application

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

1. "Ineffective assistance of counsel"
 - a. "not allowing me the opportunity to view video of drug buy"
2. "Failure to properly investigate alleged crime"
 - a. "law enforcement knew I wasn't on video nor did buy happen in my presence"
3. "Prosecution misconduct"
 - a. "withholding the dvd of drug buy from me and jurors"

By amendment filed October 19, 2015, Applicant further alleged:

4. Ineffective assistance of counsel, in that:
 - a. "Counsel failed to object to prejudicial testimony from Deputy Baird and to otherwise request a limiting instruction."



- b. "Counsel failed to challenge the search warrant affidavit pursuant to Franks v. Delaware, 438 U.S. 154 (1978)."

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Prosecutorial Misconduct

Applicant alleges that the State committed an act of prosecutorial misconduct by withholding the DVD video of the drug buy from both defendant and the jury. "The Brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment." Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012) (citation omitted). "Brady evidence is either favorable exculpatory evidence or favorable impeachment evidence." Id. "Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense." Id. Brady does not impose upon the State an obligation to disclose Brady evidence to a criminal defendant personally; service upon counsel is adequate. Id., 397 S.C. at 47, 723 S.E.2d at 381.

The uncontested testimony at the evidentiary hearing is that Applicant did not personally view the drug buy video because of a State policy to only disclose such videos to defense counsel, and that defense counsel himself did review the video. Hyman is dispositive in that this form of disclosure is appropriate and adequate to the satisfaction of the State's disclosure obligations. As to the State's decision to not publish the video the jury, the State is subject to no



obligation to itself introduce particular evidence at trial, only disclose. Accordingly, Applicant's request for relief based on the State's disclosure to only Counsel of the drug buy video is **DENIED**.

B. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed



ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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 at 117, 386 S.E.2d at 625 (citing Strickland at 688). 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 at 117-18, 386 S.E.2d at 625 (citing Strickland at 694). The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97. “[N]o prejudice occurs, despite trial counsel’s deficient performance, where there is otherwise overwhelming evidence of the defendant’s guilt.” Gibbs v. State, 416 S.C. 209, 218, 785 S.E.2d 455, 459-60 (2016).

IAC Allegation #1 – Failure to Review Drug Buy Video with Applicant, Play at Trial

Applicant alleges that Counsel was deficient for failing to review with him the video of the controlled drug buy before trial and have it submitted to the jury during trial. At the hearing, Applicant testified that Counsel told him about the video and that Applicant should not be worried, but never showed the video to him. Applicant claimed he never saw the DVD video in question but that he was aware he not was pictured in it. Applicant pointed out that he couldn’t



walk and that therefore he could not be the person described as in the video.¹ Applicant reported Applicant testified that the video was introduced for the suppression hearing prior to trial, but was not itself admitted to the jury and was never played to the jury. Applicant's PCR counsel introduced, without objection, the DVD video without objection and the portion capturing the controlled buy in question was played in open court. After the video was played, Applicant testified the video was important to his case because he never appeared in it. On cross-examination, Applicant conceded the house pictured in the video was his own, but argued the seller involved in the controlled buy was never pictured emerging from the house.

Counsel testified that the entire case hinged on the suppression of the drug buy video and resultant search of Applicant's residence. Counsel testified he did not believe he ever showed the video to Applicant prior to trial due to a policy in the Fourth Circuit Solicitor's Office—namely, that while defense counsel could review the video, drug buy videos were not provided to defendants themselves prior to trial. Counsel explained that the video was only introduced as part of the suppression hearing² as it provided the probable cause for the search of Applicant's residence and was not introduced at trial—the video was not necessary at trial because the crack cocaine in question was found on Applicant's person during the execution of the search warrant. On cross-examination, Counsel confirmed that he reviewed the video prior to trial but could not recall precisely where it was he reviewed it. Counsel argued against the search warrant extensively in a pre-trial suppression hearing and the ruling of the Court that the search warrant was valid was affirmed on appeal. Counsel testified that he reviewed all evidence disclosed with Applicant and explained the video to him, though Applicant did not watch it.

¹ Applicant is confined to a wheelchair and was so situated at the hearing.

² The trial judge reviewed the video on a computer in chambers. Tr. 62, ll. 15-22.



Applicant has failed to meet his burden as to either prong of Strickland by way of this allegation. The Court is satisfied that Counsel adequately reviewed the video and explained the contents of the video to Applicant; that he did not by some means subvert the legitimate policy of the Solicitor's Office does not constitute deficient performance. Nor does Applicant show how any prejudice resulted from his not personally viewing the drug buy. Applicant's observations that he does not personally appear in the video and that the seller is seen approaching the confidential informant from the porch of his residence was already apparent to defense counsel and argued at trial. There is no evidence to show anybody has ever claimed that Applicant personally appeared on the video and it does not capture the crime for which Applicant was convicted—it merely provided the probable cause to search his residence and, ultimately, Applicant's person.

Additionally, this Court finds no ineffectiveness on the part of Counsel for failing to require the State introduce the video as evidence or move to have the video played before the jury. As the video only pertained to the legal justification for the course of the investigation, and did not capture any part of the events for which Applicant was convicted, the Court cannot find any means by which displaying the video to the jury would have helped Applicant's defense. Accordingly, the Court finds no deficiency on the part of Counsel, no prejudice from the deficiency alleged, and Applicant's request for relief based upon this allegation is **DENIED**.

IAC Allegation #2 – Failure to Investigate

Applicant alleges Counsel was deficient for failing to adequately investigate his case by failing to discover that he never appears in the drug buy video. Substantially for the same reasons set forth in Section II.B.1, above, the Court finds no deficiency or prejudice on the part



of Counsel and, accordingly, Applicant's request for relief based upon this allegation is **DENIED.**

IAC Allegation #3 – Failure to Object to Deputy Baird's Testimony

Applicant alleges Counsel was deficient for failing to object to certain testimony by Deputy William "Tony" Baird. During cross-examination, Deputy Baird testified to concerns during the search that Applicant may have possessed a handgun:

Q. Why did you pick the right door?

A. Because when you are doing these entry type situations --- because like I said, we were told prior to the fact that [Applicant] had a handgun. The young guys with him, in particular Mr. [Minor] had made threats to the Darlington County Sheriff's Office about entry to his residence. From being in this home on previous accounts, on other things, I knew that that was the door that he was in. So, for an officer's safety issue, with my team going in the door, we didn't want to breach right on top of him, and him just laying in bed with a handgun facing the door. So we came in the door to the left side.

Q. How many handguns did you find?

A. None that day.

Tr. 137, ll. 10-25. Counsel concluded his cross-examination immediately thereafter.

At the evidentiary hearing, Applicant testified that Baird's testified belief Applicant might be armed with a gun was inadmissible and prejudicial to his case, and that Counsel should have objected. Counsel testified that though the testimony could have been damaging in certain circumstances, it wasn't in Applicant's case, as no gun was found. Furthermore, Counsel noted, the possibility that Applicant was armed had already validly come out on direct examination. See Tr. 132, ll. 7-14. Counsel conceded he could have requested a curative instruction. However, as noted above, Counsel testified that the entire case hinged on the validity of the

search warrant and the admissibility of its fruits—in particular, the large quantity of crack cocaine found in Applicant's diaper.

The Court finds no deficiency on the part of counsel. Counsel's judgment as to the testimony and whether or not it was damaging was reasonable in light of the fact that no gun was found, and that the issue was secondary to the charges to begin with. More than that, the Court agrees with Counsel's trial judgment, and finds the testimony did not prejudice Applicant's defense, especially as the evidence against him was overwhelming. See Gibbs v. State, 416 S.C. at 218, 785 S.E.2d at 459-60. Accordingly, Applicant's request for relief here, too, is **DENIED**.

IAC Allegation #4 – Failure to Challenge Search Warrant Pursuant to Franks v. Delaware

Finally, Applicant alleges that Counsel was deficient in failing to challenge the validity of the search warrant pursuant to Franks v. Delaware, 438 U.S. 154 (1978). Where a criminal defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by affiant in search warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. Id. However, the affidavit supporting a search warrant is presumptively true, and allegations of negligence or innocent mistake are insufficient to justify a hearing. Id. at 171. Franks does not provide for impeachment of any nongovernmental informant. Id.

The affidavit in support of the search warrant reads as follows:

That within the past 72 hours, a reliable confidential informant for the Darlington County Drug Unit has purchased a quantity of crack-cocaine *from the described residence located on "F" St.* in the Hartsville area of Darlington County. This event was monitored by law enforcement agents.

R. 92, State v. Addison (emphasis added).



Applicant testified at the evidentiary hearing that he believed Counsel should have argued pursuant to Franks on the basis that Applicant does not appear on the drug buy video and that he was uncertain of the veracity of the girl who set up the drug buy. Counsel, on direct examination, expressed that he was not familiar with Franks at the time, and could not recall if he challenged the affidavit on the basis that the sale occurred around, but not within, the house described. Counsel testified to his belief that the phrasing of the affidavit was misleading and the might could have made the argument in retrospect. Counsel testified to his belief that the warrant was supplemented by oral testimony to the magistrate.

The Court finds that Applicant has not met his burden of proving either prong of Strickland as to this allegation. To support a Franks allegation requires more than an allegation of mere negligence or, as is the case at present, a mere linguistic ambiguity in the search warrant—there must be a showing that a false statement was knowingly or intentionally, or with reckless disregard, was provided as part of the search warrant. Applicant's argument that the warrant is misleading in its vagueness does not rise to the level of falsehood or intent necessary to justify a Franks hearing. The Court sees no basis upon which Counsel would have been justified in demanding the hearing, and as a consequence, can see no fault in his failure to do so. The Court finds no deficiency on the part of Counsel or prejudice therefrom and, accordingly, Applicant's request for relief based upon this allegation is **DENIED**.

III. CONCLUSION


Based on all the foregoing, this Court finds and concludes that 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.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention 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 must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

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


ROGER E. HENDERSON
Presiding Judge
Fourth Judicial Circuit

Chesterfield, South Carolina

FILED
2017 OCT 26 AM 9:52
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA)
 COUNTY OF DARLINGTON)
 Marcus Addison,)
 Plaintiff(s),)
 -vs-)
 South Carolina State Of,)
 Defendant(s).)

IN THE COURT OF COMMON PLEAS
 Fourth JUDICIAL CIRCUIT
 CASE NO.: 2015CP1600273
 APPOINTMENT OF COUNSEL OR GAL
 (Select one.)

ORDER
 AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- | | | |
|---|---|--|
| <input type="checkbox"/> Post-Conviction Relief (PCR)/habeas case | <input type="checkbox"/> Adoption | <input type="checkbox"/> Juvenile |
| <input type="checkbox"/> SVP case | <input type="checkbox"/> Custody and/or Visitation | <input type="checkbox"/> Abuse and Neglect |
| <input type="checkbox"/> Minor Name Change | <input checked="" type="checkbox"/> Other: Post Convict Rel 500 | |

It appears Marcus Addison, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.
- counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on:
- counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
- court appointed counsel has obtained, Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
- Other: .


Therefore, it is ordered that Lance Boozer hereby is appointed as (Select one.)

counsel lead counsel (if capital PCR case) guardian ad litem
 for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

(If Death Penalty PCR Case) It is further ordered that, Esquire, is hereby appointed as second-counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED
 May 11, 2015

Scott B. Suggs 
 Circuit Judge Clerk of Court

Plaintiff Attorney:

Lance Boozer	
807 Gervais Street, Suite 203	
Columbia, SC 29201	

Defendant Attorney:

Joshua L. Thomas	
PO Box 11549	
Columbia, SC 29211	

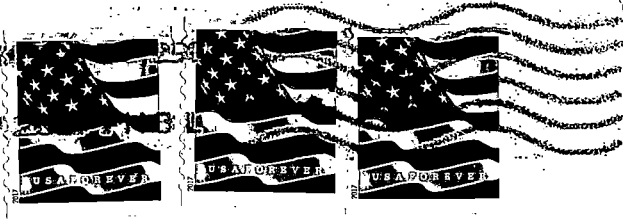
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 SCOTT B. SUGGS
 CLERK OF COURT/R.D.D.
 DARLINGTON COUNTY, S.C.

NOTICE: SC Supreme Court Order of September 29, 2004 requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

THE BOOZER LAW FIRM, LLC

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021111
06 NOV



The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
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29211-133030

