

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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MAR 28 2018

S.C. SUPREME COURT

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

G. Thomas Cooper, Jr., Circuit Court Judge

Case No.: 2017-002180

Demario Cunningham #296848,..... Appellant,

vs.

State of South Carolina,Respondent.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CASES

Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963)

Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969)

Butler v. State, 286 S.C. 441, 334 S.E. 2d 813 (1985)

Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989)

Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986)

Hill v. Lockhart, 474 U.S. 52, 59 (1985)

Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001)

State v. Kennerly, 331 S.C. 442, 452, 503 S.E. 2d 214, 220 (Ct. App. 1998)

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed. 2d 674, 692 (1984)

United States v. Wolf, 839 F. 2d 1387 (10th Cir. 1988)

United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375 (1985)

White v. State, 263 S.C. 110, 208 S.E. 2d 35 (1974).

Wilson v. State, 348 S.C. 215, 559 S.E.2d 581

QUESTION PRESENTED

- 1. Did the Lower Court err in not granting Post Conviction Relief on the basis that the State refused to provide Rule 5 and Brady Motion evidence of a dismissed companion charge?**
- 2. Did the Lower Court err in not granting Post-conviction Relief on the failure of counsel to object to the change or manipulation of drug evidence?**
- 3. Did the Lower Court err in not granting the Appellant a belated Appeal pursuant to White v. State?**

STATEMENT OF ISSUES ON APPEAL

- 1. That the Trial Court erred in not granting a continuance on the basis that the lack of any African American juror in the entire jury pool violated the Appellant's constitutional rights.**
- 2. That the Trial Court erred in not granting the Defendant Counsel's Motion regarding the initial search warrant based on a companion charge that was later dismissed.**

STATEMENT OF THE CASE

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for York County. The Applicant was indicted at the May 2015 term of the York County Grand Jury for trafficking cocaine (2015-GS-46-1542) and Possession of a weapon during the commission of a violent crime (2015-GS-46-1542A). Applicant was represented by Mindy Lipinski, Esq. On January 12, 2016, Applicant pled guilty as indicted. Pursuant to a recommendation, The Honorable John C. Hayes, III, sentenced Applicant to imprisonment for eight (8) years for trafficking cocaine and five (5) years for Possession of a weapon during the commission of a Violent Crime.

The conviction was not appealed.

STATEMENT OF THE FACTS

This matter came before the Court pursuant to an Application for Post- Conviction Relief filed on June 23, 2016. The State filed their Return dated November 9, 2016. An evidentiary hearing was convened on April 18, 2017. The Court issued it's order of dismissal on June 27, 2017. This Order was filed on July 3, 2017 and received by counsel for Petitioner on July 10, 2017. A Notice of Motion and Motion to Alter or Amend the Judgement was filed on July 19, 2017. An Order Denying Plaintiff's Motion to Alter or Amend the Judgment was filed on September 18, 2017.

The Applicant testified that he was represented by Ms. Mindy Lipinski. That he was initially offered a plea offer of seven (7) years trafficking, first offense and five (5) years for possession of a weapon. The Applicant, however, testified that he always wanted to take this case to trial and that he turned down the original plea offer. (App. p. 137, line 1-17)

The Applicant testified that he did not know why he was placed under arrest and that law enforcement officers took him to his Mother's home and searched the house where they eventually found drugs. (App. p. 139, line 10-22) He testified that he had concern about the chain of custody of the drugs. That the description of the drugs changed. The arrest warrant indicated one bag of drugs, but SLED's report showed that there were two bags. The Applicant testified that he brought this to the attention of his Defense Attorney, but there was not a pre-trial motion made to suppress. The Applicant stated that this issue was presented at sentencing as a minor clerical issue. (App. p. 118, lines 1-25) but that he believed that this compromised the chain of custody of this evidence. In addition, he went on his own to discuss this matter with the South Carolina Law Enforcement Division. (App. p. 140, line 10-25, p. 141, lines 1-25, p. 142, lines 1-22)

Applicant also testified that he had issues with the search warrant, because it was based on a prior drug charge that was dismissed prior to his plea. He felt that the charges that he pled to were based on the search warrant on this Distribution charge that was dismissed.

The Applicant also was concerned about counsel's inability to view the buy video, from the distribution charge. That eventually lead to his arrest. The Solicitors office refused Counsel's request because of the fact that the charges had been dismissed. (App. p. 145, lines 2-25, p. 146, lines 1-16)

The Applicant testified that the State contended that he had given three (3) oral statements. Two in the home and one at the booking office. None of the statements were recorded, nor was there a written statement.

The Applicant testified that his guilty plea was not freely and voluntarily given, nor was it knowingly and intelligently entered into. (App. p. 146, lines 17-21) That the Applicant was in

special education classes while he attended public school and he had mental health issues. In fact, he had been evaluated regarding competency to stand trial (App. p. 6, lines 16-24). The Court did however, find him competent for trial. (App. p. 11, lines 6-9)

The Applicant also testified regarding other pre-trial issues. One being that there were no African Americans in the Jury Pool. That argument was made that this was a violation of the 14th Amendment and that it gave the appearance of impropriety. (App. p. 16, lines 15-20) And this motion was eventually denied by the Court. (App. p. 20)

DISCUSSION OF LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (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, 104 S. Ct. 2052, 2064 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E. 2d 813.

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. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E 2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. At 117, 386 S.E. 2d at 625. First, the applicant must prove counsel’s performance was deficient. Id. Under this prong, courts measure an attorney’s performance by its “reasonableness under prevailing professional norms.” Id. (citing Strickland, 466 U.S. at 688).

Second, any 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.” Id. At 117-18, 386 S.E.2d at 625. 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).

An Applicant who pled guilty on the advice of counsel may collaterally attack the plea by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel’s errors, the applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). An Applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel’s advice was not “within the range of competence demanded of attorneys in criminal case.” Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969).

ARGUMENT #1

Did the Lower Court err in not granting Post Conviction Relief on the basis that the State refused to provide Rule 5 and Brady Motion evidence of a dismissed charge?

Defense Counsel testified that she raised the issue of the search warrant. However, the discovery violation went beyond the issue of just the search warrant. She testified that she wanted access to view the buy video that lead to the search warrant to see if the search warrant was justified. She testified that the State eventually dropped the Distribution Charge that the

statement that stemmed from the buy video. Counsel testified that the plea Judge ruled against her regarding the search warrant issue. (App. p. 174, lines 20-25, p. 175, lines 7-25, p. 176, lines 1-25, p. 177, lines 1-5)

In Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963), it states that the applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F. 2d 1387 (10th Cir. 1988) states 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 of punishment. State v. Kennerly, 331 S.C. 442, 452, 503 S.E. 2d 214, 220 (Ct. App. 1998). Favorable evidence includes both exculpatory evidence and evidence which may be used for impeachment. United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375 (1985).

Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark v. State, 315 S.C. 385, 434 S.E. 2d 266 (1993). "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Bagley. The Appellant would assert that the Rule 5 and Brady violations prejudiced his case.

ARGUMENT #2

Did the Lower court err in not granting Post-conviction Relief on the failure of Counsel to object to the change or manipulation of drug evidence?

Applicant testified that he believed that the State's evidence has been tampered with or changed. He stated that he thought the evidence had changed (App. p. 141, lines 22-25.) He stated that the picture showed two plastic bags (App. p. 142, lines 1-7.) He stated that he

actually went to SLED in Columbia regarding this matter (App. p. 142, lines 3-22) See Exhibit #1.

Counsel testified that she was appointed to represent the Applicant. She received an initial plea offer for seven (7) year sentence and that the Applicant had some concern about the evidentiary issue, because the evidence noted one bag of cocaine, but the draw in the house showed two bags. She testified that the Applicant believed that this was proof that the police had manipulated the evidence. The Defense Counsel did confirm the fact that the Applicant had discussed the evidentiary issue with SLED. (App. p. 164, lines 23-24, p. 165, lines 1-6)

The Appellant is informed and believes that counsel was ineffective, which prejudiced his case.

ARGUMENT #3

Did the Lower Court err in not granting the Appellant a belated Appeal pursuant to White v. State?

Counsel testified that she told the Applicant that he did have ten (10) days to file an appeal. She stated that she did not recall him asking for an Appeal. That if any calls were made to her office regarding an Appeal, she was unaware of them.

The Applicant also testified that he believed that he was entitled to a belated appeal. That he desired an appeal and requested his attorney to file an Appeal on his behalf. He was notified by his Defense Counsel that an Appeal would be filed on his behalf. He also testified that he had written the Clerk of Court regarding this appeal, but was unable to obtain any information regarding his appeal status. See exhibit #2, Applicant's letter to York County.

“Q - Now regarding your appeal, did you ever contact Ms. Lipinski after your plea?

A – I might a wrote her a letter but the – to make sure that, you know, that it was, you know, done. And I had to get my mother and them to call a couple of times. But they said they can't get in contact with her. All I can get is contact with the secretary.

Q. So did you ever contact someone from her office?

A. Yes.

Q. Okay. Basically saying that you wanted to appeal this case?

A. Yes.”

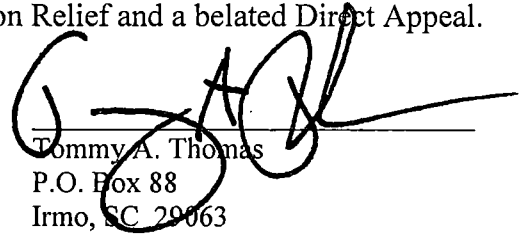
(App. p. 155, line 25, p. 156, lines 1-11)

Mr. James Cunningham testified that he was the brother of the Applicant. He stated that after the plea hearing, that he called the Public Defender’s office to ask about an Appeal. He also testified that he left voice mails, but no one ever returned his calls.

An applicant who meets the burden of showing that he did not knowingly and voluntarily waive his right to a direct appeal of his trial conviction is entitled to a belated appeal. Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002); Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986); White v. State, 263 S.C. 110, 208 S.E. 2d 35 (1974).

CONCLUSION

Therefore, based upon the foregoing arguments the Petitioner respectfully requests that the Court grant the Petitioner’s request for Post-Conviction Relief and a belated Direct Appeal.



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March 26, 2018

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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 the Petition for Writ of Certiorari and Appendix, with postage prepaid and the return address clearly shown on said envelope to the Attorney General's Office, at:

Justin Hunter, Esq.
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March 26, 2018

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S.C. SUPREME COURT

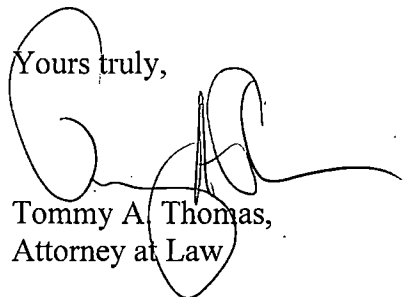
RE: Demario Cunningham #296848 v. State of South Carolina
Case No.: 2017-002180

Dear Mr. Shearouse:

Enclosed please find for filing an original and six copies of the Petition for Writ of Certiorari, an unbound Appendix and two bound Appendix as well as a Certificate of Service by Mail.

Thank you.

Yours truly,


Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Justin Hunter, Esq.
Demario Cunningham #296848