



WALLER LAW GROUP

April 9, 2018

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

RECEIVED

APR 11 2018

S.C. SUPREME COURT


Re: Timothy Johnson vs, State of South Carolina
C/A No: 2017-CP-21-0952

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Johnson in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,



Jonathan D. Waller

Cc: Lindsey A. McCallister, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Michael G. Nettles, Circuit Court Judge

2017-CP-21-0952

RECEIVED
APR 11 2018
S.C. SUPREME COURT

Timothy Leverne Johnson, # 370487,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Timothy Leverne Johnson, # 370487, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed March 20, 2018, issued by the Honorable Michael G. Nettles, Presiding Judge, Twelfth Judicial Circuit.



Jonathan D. Waller

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jonathan@wallergroupsc.com
ATTORNEY FOR PETITIONER

April 9, 2018

Other Counsel of Record:

Lindsey A. McCallister, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Michael G. Nettles, Circuit Court Judge

2017-CP-21-0952

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APR 11 2018

S.C. SUPREME COURT

Timothy Leverne Johnson, # 370487,

Appellant,

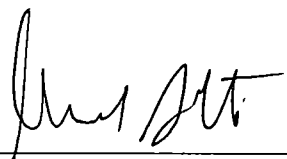
v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Lindsey A. McCallister, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to her office located at P.O. Box 11549, Columbia, SC 29211.



M. David Scott

April 9, 2018

FILED

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2017CP2100952

IN THE COURT OF COMMON PLEAS

Timothy Johnson

State Of South Carolina

MAR 21 AM 9:49
DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

3/21/2018

Date

For Clerk of Court Office Use Only

This judgment was entered on **March 20, 2018**, and a copy mailed first class or placed in the appropriate attorney's box on **March 21, 2018**, to attorneys of record or to parties (when appearing pro se) as follows:

CERTIFIED: A TRUE COPY
Doris Poulos O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

Jonathan D Waller 1116 Blanding Street Suite 2B
Columbia, SC 29201

Megan H. Jameson
~~Lindsey Ann McCallister~~ PO Box 11549 Columbia, SC
29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P. O'Hara

Court Reporter

Doris Poulos O'Hara - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FILED

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

) IN THE COURT OF COMMON PLEAS
) FOR THE TWELFTH JUDICIAL CIRCUIT

2018 MAR 20 PM 3:35

Timothy Johnson, SCDC #370487

) DORIS POULOS O'HARA
) COCP & GS
) FLORENCE COUNTY, SC

Case No.: 2017-CP-21-0952

Applicant,

) **ORDER OF DISMISSAL**

v.)

State of South Carolina,)

Respondent.)
_____)

This matter comes before the Court by way of an application for post-conviction relief filed April 13, 2017, by Timothy Johnson (Applicant). On October 6, 2017, the State (Respondent) made its return and partial motion to dismiss, seeking summary dismissal of all claims beyond whether counsel was ineffective for advising him to enter the written plea agreement waiving his rights to challenge his conviction through post-conviction relief pursuant to the written plea agreement. An evidentiary hearing into the matter was convened February 2, 2018, at the Florence County Courthouse. Applicant was present at the hearing and represented by Jonathan Waller, Esquire. Senior Assistant Deputy Attorney General Megan Harrigan Jameson from the South Carolina Attorney General's Office appeared on behalf of the State. Following the hearing, this Court denied the application from the bench. This order follows.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for the South Carolina State Grand Jury. On October 22, 2015, the State Grand Jury indicted Applicant for one count of trafficking in heroin greater than 28 grams, seven counts of

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Doris Poulos O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

distribution of heroin, one count of possession with intent to distribute heroin, and one count trafficking heroin greater than 28 grams (conspiracy) (2015-GS-47-0021, -0022), as part of a multi-count, multi-defendant indictments stemming from an investigation into a heroin trafficking ring. Brendan P. Barth, Esquire, represented Applicant. Assistant Attorney General David Fernandez, of the South Carolina Attorney General's Office, prosecuted the case.

On August 1, 2016, Applicant entered into a written plea agreement, in which he agreed to "fully and truthfully cooperate with the Office of the Attorney General of South Carolina, and any local, state and federal law enforcement agents in their investigation of importation, possession, and distribution of controlled substances and related unlawful activities," in exchange for a negotiated sentence range of an aggregate eighteen to twenty-two years imprisonment. As part of this plea agreement, Applicant expressly waived his right to both a direct appeal and post-conviction relief action. ("The Defendant, Timothy Leverne Johnson, agrees that as a part of the consideration for this plea he will not appeal his plea of guilty or any sentence he receives in General Sessions Court in South Carolina. The Defendant, Timothy Leverne Johnson, acknowledges that he understands that he has a right of direct appeal of his guilty plea or sentence and that he knowingly, voluntarily and expressly waives this right of direct appeal. Additionally, the Defendant, Timothy Leverne Johnson, understands that he has a right to file a post-conviction relief (PCR) action in this case but agrees to knowingly and voluntarily waive any post-conviction relief action except for claims that directly attack the effectiveness of advice to agree to this waiver.") Applicant initialed each page of this written plea agreement and signed this plea agreement.

The following day (August 2, 2016), Applicant appeared in the Florence County Court of General Sessions before the Honorable Roger E. Henderson, circuit court judge, and pursuant to the signed plea agreement, pled guilty to seven counts of distribution of heroin and one count of possession with intent to distribute heroin as indicted, and to the lesser-included offenses of trafficking in heroin (4-14 grams) and trafficking in heroin (4-14 grams) (conspiracy). Judge Henderson accepted Applicant's plea and deferred sentencing.

On November 14, 2016, Applicant again appeared before Judge Henderson for a sentencing proceeding. At this hearing, Judge Henderson sentenced Applicant to an aggregate nineteen years imprisonment. Applicant did not file a notice of appeal.

ALLEGATIONS RAISED

In his application, Applicant alleged the following allegations:

1. Ineffective assistance of counsel: "Trial counsel failed to conduct factual and legal investigation"
2. "State Grand Jury unconstitutional assembled, evidence inadmissible: Grand Jury lacked probable cause to indict and violate fair cross section"
3. "Conviction obtained in violation of constitutional rights: rights were violated when no warrants were served for arrest-detention"

On January 25, 2018, Applicant, through his counsel, amended his application to include the following additional allegations:

1. Counsel was ineffective for failing to properly advise Applicant regarding entry into a plea agreement that would constitute a waiver of Applicant's appellate and post-conviction relief rights.
2. Counsel was ineffective for failure to meet with Applicant in a sufficient amount for Applicant to understand the nature of the allegations against him, any potential defenses he may have had, and the State's burden of proof with respect to his charges, thus rendering Applicant's plea involuntarily entered into. Counsel was ineffective for misleading and misinforming Applicant that all other defendants alleged in the indictment had agreed to cooperate against Applicant and that Applicant was the final remaining defendant, thus rendering Applicant's plea involuntarily entered into.
3. Counsel was ineffective for failure to investigate the facts and circumstances of alleged

video and photographic evidence.

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 hearings. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

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.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption 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. 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. With respect to guilty plea counsel, the applicant must show that 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 (1985).

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action in regards to his allegations of ineffective assistance of counsel. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by Applicant.

Dismissal of All Other Allegations Beyond Whether Counsel was Ineffective for Advising Applicant to Waive his Right to Post-Conviction Relief

At the start of the evidentiary hearing, Respondent renewed its motion to dismiss all allegations beyond whether counsel was ineffective for advising Applicant to enter into the portion of the plea agreement waiving his rights to challenge counsel’s representation in a post-conviction relief action. Respondent argued that Applicant’s plea agreement was valid and enforceable, but that pursuant to Sanders v. State, 412 S.C. 611, 617, 773 S.E.2d 580, 583 (2015), Applicant was entitled to raise the narrow issue as to whether counsel was ineffective for advising him to enter into the plea agreement waiving his right to pursue post-conviction relief. In response, Applicant argued dismissal of all claims beyond this limited issue was improper and asked the Court to reserve ruling on the dismissal of all other claims until after the hearing on the limited issue as set forth in Sanders.

Under South Carolina law, a criminal defendant can choose to waive his right to collateral review of his conviction. Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008) (holding that a waiver of appellate rights is valid and enforceable as long as it is knowing and voluntary). Plea agreements in general operate under contractual principles, and are upheld when each party receives the benefit of the bargain. State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994). Here, Applicant chose to plead guilty and agreed to waive his appellate and collateral rights in exchange for a favorable negotiated sentence. Both parties received a benefit of the bargain, and this Court finds Applicant's plea agreement is valid under contractual law.

However, recent South Carolina case law holds that, while appellate waivers are enforceable, a criminal defendant who has waived his appellate and collateral rights is still entitled to raise the very narrow issue of challenging his attorney's conduct in advising him to enter into the waiver. Sanders v. State, 412 S.C. 611, 617, 773 S.E.2d 580, 583 (2015) ("Consequently, we hold that although a defendant may waive his right to collateral review, he is nevertheless still entitled to challenge whether the advice he received in agreeing to that waiver was constitutionally defective."). Therefore, this Court granted Respondent's motion to dismiss all allegations beyond the constricted issue as to whether counsel was ineffective for advising him to waive his right to post-conviction relief and allowed him to proceed forward only on that limited issue.

Whether Counsel was Ineffective for Advising Applicant to Waive his Right to Post-Conviction Relief

As this Court granted Respondent's motion to dismiss all other allegations pursuant to Sanders, Applicant proceeded forward at the evidentiary hearing on the claim of whether counsel was ineffective for advising him to waive collateral review of his convictions through post-

conviction relief in exchange for the favorable terms as set forth in the signed plea agreement. In support of this allegation, Applicant testified on his own behalf. Applicant testified Brendan Barth (counsel) was his second attorney and was appointed to represent him on his State Grand Jury Charges on June 10, 2016. He testified counsel came to see him at the detention center as soon as he was appointed and reviewed discovery with him but did not allow him to keep a copy pursuant to a protective order in place. He testified this was his only meeting with counsel aside from when he met with him briefly before his plea proceeding. He testified counsel would not do anything to assist him and refused to file any motions on his behalf, and therefore, he felt forced to accept the State's terms and plead guilty. Applicant testified he remembered signing the plea agreement, but stated that counsel did not explain any portion of the plea agreement to him, including the waiver of his right to post-conviction relief, and merely told him to sign. Applicant then changed his testimony, stating counsel did explain the cooperation agreement and forfeiture provisions to him, which he and counsel edited prior to signing. He elaborated that he met with counsel and a SLED agent immediately before the plea to discuss the plea agreement, and the SLED agent stepped outside long enough for counsel to instruct Applicant where to sign the plea agreement. He testified that after the plea agreement was signed, counsel immediately met with the SLED agent and the prosecutor, and the three were high-fiving and hugging each other.

Applicant testified he did not recall agreeing to waive his right to a direct appeal or post-conviction relief and never discussed these topics with counsel. He testified counsel never explained what a post-conviction relief action was or how to file one. He testified he had first learned that he waived these rights when he got to prison. He testified he then contacted counsel, who advised him against filing a post-conviction relief application because he expressly waived

his right to file one pursuant to his plea agreement and he was facing a mandatory minimum sentence of twenty-five years imprisonment if the plea agreement was invalidated.

Applicant testified he lied to the plea court, including saying he was satisfied with counsel's services and that he understood what he was doing, because he had been instructed to do so by counsel and the State. He further testified he lied under oath because he wanted the court to sentence him in accordance with the favorable terms set forth in the plea agreement.

Counsel testified next. He testified he was appointed to represent Applicant and this is the first State Grand Jury case he has handled, but that he had represented numerous clients on federal charges, which are handled in a similar manner. He testified he had also clerked with a federal judge and very familiar with the federal criminal system. He testified that the federal cases often have similar cooperation and plea agreements and he has handled these numerous times with prior clients. He testified he met with Applicant on a Saturday soon after he was appointed and at that time, Applicant explicitly instructed him not to enter into any plea negotiations with the State. He testified that he met with Applicant an additional four times, including a meeting where they reviewed discovery including videos of controlled drug buys that clearly showed Applicant. He testified that after viewing these videos, Applicant gave him permission to enter into plea negotiations with the State. He testified the State's initial offer was for twenty to twenty-five years imprisonment, but he was eventually able to negotiate a plea agreement for eighteen to twenty-two years imprisonment. He testified Applicant was facing a mandatory minimum sentence of twenty-five years imprisonment up to a sentence of one-hundred-and-seventy years and that this plea agreement was very favorable. He testified he met with Applicant to review the plea agreement and that he explained every term of the agreement,

including the waiver of direct and post-conviction relief. Counsel testified he explained what post-conviction relief was to Applicant and Applicant appeared to understand. He testified Applicant was not concerned with this portion of the plea agreement and never requested counsel ask the State to remove this portion of the agreement or otherwise edit it. Counsel testified Applicant's primary concern with the plea agreement was the recommended sentence and what he would be required to forfeit. He testified Applicant did request he edit the forfeiture requirements of the plea agreement, for which he was able to get the State to agree. He testified these conversations were in private with Applicant and no SLED agents, prosecutors, or other persons were present. He testified he never high-fived or hugged anyone involved in this case.

After reviewing the record and listening to the testimony presented, this Court finds counsel performed competently in advising Applicant to enter into the plea agreement including the waiver of post-conviction relief. This Court finds that counsel's testimony is credible and finds that Applicant's testimony is not credible. Counsel was very experienced with handling similar cooperation and plea agreements based on his significant federal criminal defense experience. Counsel's credible testimony establishes that counsel adequately and fully explained all portions of the plea agreement to Applicant including the waiver of post-conviction relief remedies and that Applicant knowingly and voluntarily waived his rights after these conversations with counsel. This Court also finds that counsel was thoroughly prepared and competent in his representation of Applicant generally. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this 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 is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record 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 post-conviction relief. Rule 71.1(g), SCRCR, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief must be denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 20 day of March, 2018.

France, South Carolina

Michael Nettles
MICHAEL G. NETTLES
Presiding Judge-Twelfth Judicial Circuit

CERTIFIED: A TRUE COPY
Janis R. O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

2018 MAR 20 PM 3:35
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