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April 15, 2018

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

Re.: Brown v. State
2016-CP-46-03011

Dear Clerk Shearouse:

Please find enclosed the Notice of Appeal and Proof of Service on the above referenced case along with the Order of Dismissal that is being appealed. Please file the original Notice of Appeal and Proof of Service and mail the copies back to me in the also enclosed self-addressed stamped envelope. Please note that I also sent this information to Appellate Defense and have asked them to handle the appeal going forward. Thank you and please contact me with any additional concerns.

Sincerely Yours,

Nathan Sheldon
The Law Office of Nathan J. Sheldon

RECEIVED

APR 19 2018

S.C. SUPREME COURT

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APR 19 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2016-CP-46-03011

State of South Carolina, Respondent,

v.

Kenyon Jemel Brown, Appellant.

NOTICE OF APPEAL

Kenyon Jemel Brown appeals the order of the Honorable J. Cordell Maddox, Jr. dated April 4, 2018 denying his request for post-conviction relief. Appellant received written notice of entry of this order on April 6, 2018.

April 16, 2018



Nathan J. Sheldon
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Attorney for Appellant

Other Counsel of Record:
Justin J. Hunter, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549
Attorney for Respondent
(803) 734-3970

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APR 19 2018

APPEAL FROM YORK COUNTY
Court of Common Pleas

S.C. SUPREME COURT

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2016-CP-46-03011

State of South Carolina,

Respondent,

v.

Kenyon Jemel Brown,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Justin J. Hunter with the Attorney General's Office by depositing a copy of it in the United States Mail, postage prepaid, on April 16, 2018 mailed to Post Office Box 11549, Columbia, South Carolina 29211-1549.

April 16, 2018



Nathan Sheldon
331 E. Main St., Suite 200
Rock Hill, SC 29730
803-909-9343
Attorney for Appellant

For Clerk of Court Office Use Only

This judgment was entered on 4/4/2018, and a copy mailed first class or placed in the appropriate attorney's box or 4/4/2018, to attorneys of record or to parties (when appearing pro se) as follows:

Nathan James Sheldon PO Box 36682 Rock Hill, SC 29732

Justin James Hunter PO Box 11549 Columbia, SC
29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - 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-RECEIVED

STATE OF SOUTH CAROLINA)
COUNTY OF YORK -4 AM 11: 27)

Kenyon J. Brown, #257742)
C.C.P.)
Applicant,)
York County, SC)

v.)

State of South Carolina,)

Respondent.)
_____)

THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL CIRCUIT

2016-CP-46-3011

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed October 12, 2016. An evidentiary hearing into the matter was convened on November 6, 2017, at the Moss Justice Center in York, South Carolina. Applicant was present at the hearing and represented by Nathan Sheldon, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Melissa Inzerillo, Esquire, also testified. This Court also had before it a copy of Applicant's PCR application and amendment, the records of the York County Clerk of Court regarding the subject convictions, Respondent's Return, and the plea transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined to South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the July 2015 term of the York County Grand Jury for habitual traffic offender (2015-GS-46-2138). Applicant was subsequently indicted at the October 2015 term for two counts of distribution of crack cocaine (2015-GS-46-3020 and 3021), possession with intent to distribute crack cocaine (2015-GS-46-3022), possession with intent to distribute cocaine (2015-GS-46-3023) possession with intent to distribute clonazepam (2015-GS-46-3024); and possession of oxycodone (2015-

GS-46-3025). Mellissa Inzerillo, Esquire, represented Applicant. On April 26, 2016, Applicant pled guilty as indicted before the Honorable John C. Hayes, III. Pursuant to a negotiated sentence, Judge Hayes sentenced Applicant to imprisonment for concurrent terms of ten years for each count of distribution of crack cocaine, ten years for possession with intent to distribute crack cocaine, ten years for possession with intent to distribute cocaine, five years for habitual traffic offender, five years for possession with intent to distribute clonazepam, and five years for possession of oxycodone. Applicant did not appeal his guilty plea or sentence.

Allegations

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

1. Ineffective Assistance of Counsel
 - a. "failure to articulate a fourth and fifth amendment claim"
2. "Violation(s) of 4th, 5th, 6th, 14th constitutional right(s)"
 - a. "failure to articulate and assert fourteenth amendment claim"
3. "Illegal/unlawful arrest. Invasion of privacy"
 - a. "Defective arrest affidavit, warrantless arrest and seizure of property"

Applicant, through his counsel, filed an amendment, adding the following grounds for relief:

1. Counsel was ineffective during the pretrial Jackson v. Denno¹ hearing. Counsel failed to advise client that he could testify on his behalf at the pretrial hearing.
2. Counsel was ineffective for failing to properly argue issues during the suppression hearing.
 - a. Counsel failed to cross-examine the hotel employee and/or law enforcement officer about the inconsistency in the testimony and the law enforcement narrative.
 - b. Counsel failed to investigate and inquire as to the State's failure to produce the actual luggage bag that was allegedly searched when the drugs were recovered.

¹ Jackson v. Denno, 378 U.S. 368 (1964).

- c. Counsel failed to advise defendant of his right to testify to the facts and circumstances surrounding his stay at the hotel and subsequent arrest prior to the drugs being found.
3. Counsel was ineffective in failing to handle the issues surrounding the appeal effectively.
 - a. Counsel failed to inform applicant that if he pled guilty, then he would abandon his right to appeal the outcome of both the Denno hearing and the suppression hearing.
 - b. Counsel failed to speak with applicant about his right to appeal the guilty plea and never filed an appeal on his behalf

II. APPLICABLE 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).

III. SUMMARY OF THE TESTIMONY AT PCR HEARING

Counsel Melissa Inzerillo's Testimony

Counsel testified law enforcement said Applicant gave a statement implicating himself with the drugs. She testified Applicant denied making the statement and there was no physical evidence of this statement, but she was unsure whether she believed Applicant because he did admit to using drugs regularly. Counsel testified Applicant did not testify at the Denno hearing. She testified she discussed with Applicant his right to testify at the Denno hearing. She testified the judge was never presented with Applicant's denial of making the statement. Counsel testified the statement was general and she was not sure how relevant it was. She testified the statement just said Applicant was doing drugs during this time but was not specific to the drugs found in the room.

Counsel testified she had a strategy to argue that the offers manufactured Applicant's absence from the hotel where the drugs were found. She testified at the suppression hearing the actual luggage was not produced. Counsel testified she argued that the luggage was not clearly abandoned property. Counsel testified she discussed with Applicant his right to testify at the suppression hearing.

Counsel testified all appeals stemming from motions would have to be interlocutory appeals. She testified they discussed that if Applicant pled guilty then he could not appeal and

reopen those motions. She testified they would have gone over this in the plea affidavit. Counsel further testified Applicant initiated the discussions concerning pleading guilty. She testified Applicant asked about the plea offers after the suppression motion concluded. She testified Applicant rejected a straight up plea but took the ten-year plea. Counsel further testified she went over Applicant's appellate rights and he never asked for an appeal.

Applicant's Testimony

Applicant testified he never had a conversation with Counsel about testifying at trial or at the Denno hearing. He testified he never made a statement to police. He testified he requested Counsel investigate the luggage and how the officers found it. He testified officers arrested him and told him he had outstanding warrants, but he believed this was for another individual. Applicant testified Counsel did not do well at the suppression hearing and the State could not show the property was his.

Applicant testified Counsel did discuss plea offers with him. He further testified Counsel did not discuss appealing the judge's decision from the Denno and suppression hearings. He testified he would have gone to trial had he known that would be the only way to appeal those rulings. Applicant further testified he never filed an appeal.

IV. 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 Clerk of Court records regarding the subject convictions, the plea transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief and amendment, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the

following findings of fact based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

Counsel failed to advise client that he could testify at the Jackson v. Denno hearing

Applicant alleged Counsel failed to advise him about his right to testify at the Denno hearing. He alleged if Counsel had properly advised him, then he would have taken the stand to refute that the statement was ever made. He further alleged if he had testified then the court could consider the other witnesses' credibility. Applicant also alleged Counsel failed to advise him of his right to testify to the facts and circumstances surrounding his stay at the hotel and subsequent arrest prior to the drugs being found.

This Court finds Applicant has failed to meet his burden of proving Counsel was deficient for failing to advise him that he could testify at the Denno hearing and testify to the facts and circumstances surrounding his stay at the hotel. This Court finds Counsel's testimony persuasive that she did discuss with Applicant his right to testify at the Denno hearing, and thus she was not deficient. This Court finds Applicant has failed to show that Counsel's actions were unreasonable or that she gave incorrect advice concerning his right to testify. Furthermore, this Court finds Applicant has failed to show that he was prejudiced by Counsel's actions. Applicant testified his failure to testify at the hearing prevented him from contesting that he made the statement. This Court finds it is unlikely the statement would have been kept out, given the officer's testimony at the hearing, simply because Applicant would have testified that he did not make the statement. This Court finds Applicant has failed to prove he was prejudiced by Counsel's actions, and this allegation must be dismissed.

At the suppression hearing, Counsel failed to cross-examine the hotel employee and/or law enforcement officer about the inconsistency in the testimony and the law enforcement narrative

Applicant alleged Counsel was ineffective during the suppression hearing. Applicant

alleged Counsel failed to cross-examine the hotel employee and law enforcement about the inconsistency in the testimony and the law enforcement narrative. Cross-examination is a matter of trial strategy, and as such, this Court must presume that counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690). In making a fair assessment of attorney performance, a court must make every effort to “eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland, 466 U.S. at 689. There is a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance and the “[applicant] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” Id.

This Court finds Counsel’s cross-examination was not unreasonable and was not deficient where she questioned Marie Sledge, General Manager of the Econolodge, about her version of events, that she did not look through Applicant’s items, and that she did not know where Applicant was when she cleaned out Applicant’s room. This Court finds Counsel also adequately cross-examined Investigator Leland Harrleson about his version of events on the days in question. Applicant has failed to show what inconsistencies Counsel should have cross-examined these witnesses about. Furthermore, this Court will not speculate whether a “better” cross examination would have helped Applicant. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997). As Applicant has failed to show Counsel’s cross-examination was deficient, or that different cross-examination would have changed the outcome of his case, this Court finds Counsel was not ineffective and this allegation must be dismissed.

Counsel failed to investigate and inquire as to the State's failure to produce the actual luggage bag that was allegedly searched when the drugs were recovered

Applicant alleged Counsel failed to investigate and inquire as to the State's failure to produce the actual mesh bag that was searched where the drugs were found. This Court finds this allegation is without merit. Counsel testified, and the record reflects, that Counsel argued extensively at the suppression hearing that the drugs were found as a result of a warrantless search of a trash bag that contained Applicant's personal items including a mesh bag, and Applicant still had possessory and privacy rights in the bag. Counsel also argued the mesh bag was not see-through and the plain-view doctrine should not apply. Counsel also cross-examined Investigator Harrleson concerning the fact that he did not log any of the items in the trash bag. Transcript 42. Counsel also cross-examined Officer Harrleson concerning the fact he did not show any of the items, including the mesh bag, to Applicant. Transcript 43.

This Court finds Applicant has failed to meet his burden of proving Counsel's actions were deficient. This Court finds Counsel argued to the Court and elicited testimony on cross-examination concerning the mesh bag and the officers' search. This Court finds Counsel's actions concerning the mesh bag were not unreasonable. Furthermore, this Court finds Applicant has failed to prove he was prejudiced by Counsel's actions in this regard. This Court finds the outcome of the suppression hearing would not have been different had Counsel more effectively inquired as to the mesh bag's whereabouts when she elicited testimony concerning the search of the bag, the officer testified he smelled marijuana coming from the bag and could see it through the bag, the State produced a picture of the bag, the court ruled the hotel had a right to remove the bag and the officers had every right to search the bags, and the court ruled the officers had sufficient reasonable suspicion to search upon smelling the marijuana. As Applicant has failed to prove Counsel's performance was deficient, or that different cross-examination would have

changed the outcome of his case, this Court finds Counsel was not ineffective and this allegation must be dismissed.

Counsel failed to inform applicant that if he pled guilty, then he would abandon his right to appeal the outcome of both the Denno hearing and the suppression hearing.

Applicant alleged Counsel failed to inform him that if he pled guilty, he would abandon his right to appeal the outcome of the Denno hearing and the suppression hearing. Applicant testified he would have gone to trial had he known that would be the only way to appeal those rulings. This Court finds Applicant has failed to meet his burden of proving Counsel's performance was deficient in this regard. Counsel testified she discussed with Applicant that if he pled guilty then he could not appeal and reopen those motions, and she testified they would have gone over this in the plea affidavit. This Court finds Counsel's testimony to be credible that she discussed this with him and finds she was not deficient. Furthermore, the plea waiver form reflects Applicant acknowledged he understood he would waive challenging the evidence and the voluntariness of his statement if he pled guilty. Plea Affidavit Form, p. 5. The plea court also advised Applicant he would be giving up any defenses by pleading guilty. Transcript p. 65.

This Court further finds Applicant has failed to meet his burden of proving he was prejudiced by Counsel's actions. He has failed to show that appealing the ruling from the Denno and suppression hearings would have been meritorious after a trial. As Applicant has failed to prove Counsel was deficient and that he was prejudiced by Counsel's actions in this regard, this allegation must be dismissed.

Counsel failed to speak with applicant about his right to appeal the guilty plea and never filed an appeal on his behalf

Applicant alleged Counsel was ineffective for failing to discuss Applicant's appellate rights and file an appeal on his behalf. This Court finds this allegation is without merit. This

Court finds Counsel provided credible testimony that she went over Applicant's appellate rights and he never asked for an appeal.

Counsel has a constitutionally-imposed duty to consult with defendant about appeal when there is reason to think either (1) that rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Id. 528 U.S. at 480, 120 S. Ct. at 1036. Furthermore, "there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995). Our courts have held relief will only be granted when the defendant has shown "proof that extraordinary circumstances exist such that the defendant should have been advised of the right to appeal." Id. "One extraordinary circumstance which would require counsel to advise a defendant of the right to appeal from a guilty plea would arise when the defendant inquires about an appeal." Id. This Court finds Counsel's testimony to be credible that Applicant did not ask for an appeal from his negotiated guilty plea. This Court would also point out Applicant pled guilty to a negotiated minimum sentence on his charges. As Applicant has failed to show Counsel's actions were deficient, or that he did in fact ask for an appeal, he has failed to prove both prongs of Strickland and this Court finds this allegation must be dismissed.

V. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any


constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate Counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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), SCRCR, provides that if Applicant wishes to seek 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 THAT:

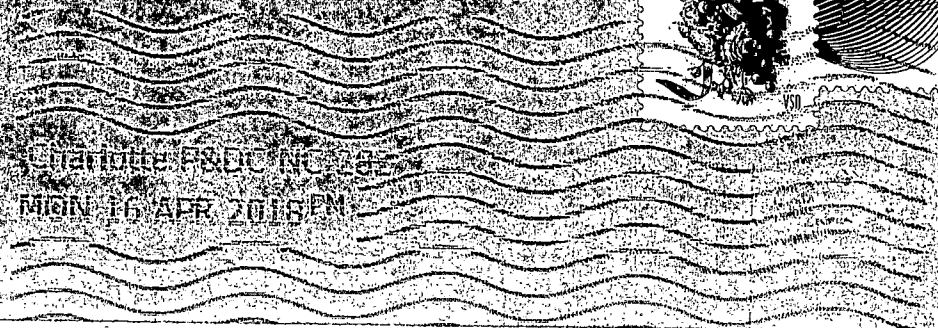
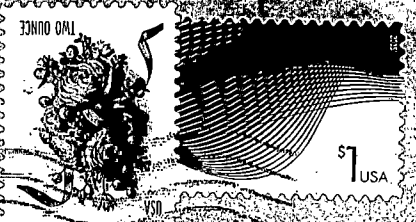
1. The application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 30 day of March, 2018.

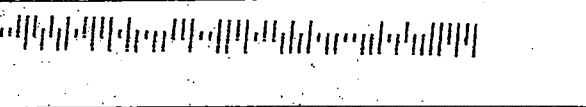


J. CORDELL MADDOX, JR.
Presiding Judge
Sixteenth Judicial Circuit

Anderson, South Carolina



Charlotte FSDC NC 28
MON 16 APR 2016 PM



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