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May 21, 2018

RECEIVED

MAY 25 2018

S.C. SUPREME COURT

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

Re: Michael Richardson, SCDC# 268870 vs. State of South Carolina
Case No: 2017-CP-23-3732

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,


Rodney Richey

RWR/
enclosures

cc: DeShawn Mitchell, Esquire

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

HONORABLE FRANK R. ADDY, JR.

2017-CP-23-3732

MICHAEL A. RICHARDSON, SCDC# 268870,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

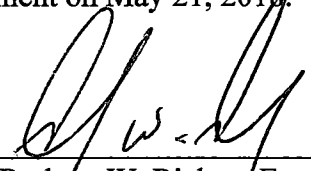
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MAY 25 2018

S.C. SUPREME COURT

NOTICE OF APPEAL

Michael A. Richardson appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Frank R. Addy, Jr., Circuit Judge on February 23, 2018 an Order issued on May 7, 2018 and filed on May 17, 2018. The Appellant received notice of the judgment on May 21, 2018.



Rodney W. Richey, Esquire
Attorney for the Appellant
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Attorney for Applicant

Other Counsel of Record:
DeShawn H. Mitchell, Esquire
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Post Office Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

HONORABLE FRANK R. ADDY, JR.

2017-CP-23-3732

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MAY 25 2018

S.C. SUPREME COURT

MICHAEL A. RICHARDSON, SCDC# 268870,

APPELLANT,

against

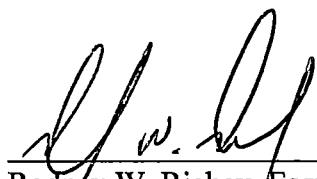
STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on May 21, 2018, addressed to their attorney of record, DeShawn Mitchell, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: May 21, 2018



Rodney W. Richey, Esquire
Attorney for the Appellant
33 Market Point Drive
Post Office Box 10916
Greenville, South Carolina 29603
(864) 467-0503
Attorney for Applicant

STATE OF SOUTH CAROLINA)
 COUNTY OF GREENVILLE)
)
 Michael A. Richardson, #268870,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 IN THE THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2017-CP-23-3732

**ORDER OF DISMISSAL AND
 GRANT OF APPEAL PURSUANT TO
WHITE V. STATE¹**

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ENTERED COMPUTER

This matter comes before the Court by way of an application for post-conviction relief filed on June 8, 2017 by Michael A. Richardson (Applicant). Respondent made its Return on or about October 20, 2017. An evidentiary hearing into the matter was convened on February 23, 2018, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by Rodney W. Richey, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's Trial Counsel Stuart B. Sarratt, Esq. also testified. This Court had before it a copy of the records of the Greenville County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's trial, the PCR application, Respondent's Return, Applicant's records from the Department of Corrections and Applicant's appellate records. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

PROCEDURAL AND FACTUAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant

¹ White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974).

to orders of commitment of the Greenville County Clerk of Court. In August 2016, the Greenville County Grand Jury indicted Applicant for distribution of cocaine-base (crack cocaine) (2016-GS-23-2216) and conspiracy (2016-GS-23-2217). The charges resulted from a December 2015 incident in which Applicant, along with a codefendant, conspired and sold crack cocaine to an undercover police officer. (Tran. p. 37-38). Stuart Sarratt, Esquire represented Applicant. Assistant Solicitor Walker Miller, Esquire prosecuted the case. On January 18, 2017, Applicant proceeded to trial before the Honorable Roger Henderson. The jury found Applicant guilty as indicted of both charges. Judge Henderson sentenced Applicant to imprisonment for twenty years for distribution of crack cocaine, third offense and five years for conspiracy, to be served concurrently. Applicant did not appeal his conviction or sentence.

ALLEGATIONS

In his application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
 - a. "Trial counsel was ineffective for [not] filing a notice of appeal when asked to do so, and Applicant did not waive his right to appeal."
 - b. "Failing to conduct an adequate and factual pretrial investigation and failing to prepare for trial."
 - c. "Failing to object to juror misconduct."
 - d. "Failing to move to suppress evidence seized without a proper chain of custody."
 - e. "Failing to move for a directed verdict on the unbelievable evidence of the witness for the state and the use of tainted evidence."
 - f. "Failing to object to evidence without a sufficient chain of custody."
 - g. "Failing to move for Franks v. Delaware hearing prior to trial."
2. "The court was without jurisdiction to impose sentence."
 - a. "The applicant never had a third offense."
3. "Denied a fair and impartial jury – jury misconduct."
 - a. "The court allowed the alternate juror into the jury room during deliberation."

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Trial Counsel's Testimony

Trial Counsel testified he was currently employed by the public defender's office. He testified about the facts surrounding Applicant's case and how Applicant was ultimately arrested because of an undercover drug transaction by the police. Trial Counsel testified Applicant had other drug convictions on his record and this charge was a third offense. He testified he discussed with Applicant his past drug convictions and how they would impact his current charges. Trial Counsel testified the State had extended a plea offer to drop Applicant's charge to a second instead of a third offense for five years imprisonment. He testified Applicant refused to accept the plea offer. Trial Counsel testified he failed to file a notice of appeal in Applicant's case even though Applicant had asked him to. He also testified he did not see any issues with the chain of custody in this case.

On cross-examination, Trial Counsel testified at the time he represented Applicant he had been retained to do so. He testified he had practiced law for six years. Trial Counsel testified he met with Applicant some six or seven times prior to going to trial. He testified he discussed with Applicant the elements of the crimes for which he was charged, the possible punishments for them, his constitutional rights, and the State's burden of proof. Trial Counsel testified there was never any indication that Applicant did not understand the things they discussed. Trial Counsel testified there was also phone calls from the detention center Applicant made in which he discussed being caught. He testified he made a motion for new trial after learning the alternate jury went back to the jury room during deliberations.

Applicant's Testimony

Applicant testified Trial Counsel represented him on the charges he was facing. He


testified he believed Trial Counsel did not do any investigation into his case with regards to the store where the drug transaction took place. Applicant testified there was a five year plea offer extended to him that he did not take. He testified his main issue with the case was that he was being charged with a third offense but this was only his second offense. Applicant testified he had previously been convicted of drug charges but this was only his second offense. Applicant also testified that an alternate jury was allowed into the jury room during deliberations.

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 hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive

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relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 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, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel. This Court finds as follows on the following grounds presented by Applicant at the evidentiary hearing:

Belated Review of Appellate Issues

Applicant alleges Trial Counsel failed to file a notice of appeal on his behalf. This Court finds Applicant did not knowingly and intelligently waive his right to a direct appeal. Counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by Anders v. California, 386 U.S. 738 (1967). Id. Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive their appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White

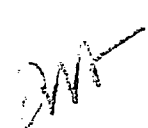
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v. State. See Rule 243(i)(1), SCACR; Davis v. State, 288 S.C. 290, 291 n.1, 342 S.E.2d 60, 60 n.1 (1986) (“Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a White v. State review.”).

In the present case, the State consented to a belated review of Applicant’s trial pursuant to White. Id. Trial counsel also testified that he recalls Applicant making this request, yet trial counsel did not file the notice. As such, this Court finds Applicant did not knowingly and voluntarily waive his appellate rights and is entitled to an appeal from his conviction. Applicant’s lack of an appeal shall be remedied pursuant to White v. State. Id.

Ineffective Assistance of Counsel

Applicant alleges that the offense for which he was convicted of was not a third offense distribution charge. Based upon a review of the record and evidence presented at the PCR hearing, this Court denies relief. Although Applicant pled guilty to several narcotics charges prior to this charge, and although the prior charges were all treated as first offense charges at the time of the plea, this Court finds the separate convictions do enhance rendering Applicant’s present offense to a third narcotics offense. State v. Boyd. 288 SC 206 (1996); Section 17-25-50. (For these reasons we hold that where a defendant has been convicted on two or more counts for the violation of the Controlled Substance Act arising out of simultaneous acts committed in the course of a single incident, the convictions will be considered as only one for the purpose of sentencing under a subsequent conviction for a violation of the Controlled Substance Act. We hasten to add that where multiple convictions are obtained for violations of the Controlled Substance Act where the violations are unrelated to one another and do not arise out of a single incident that there be no prohibition of counting for sentencing purposes each conviction separately.) Accordingly, this allegation is denied and dismissed.

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Applicant also alleges that Trial Counsel erred by not moving for a mistrial when the trial judge mistakenly left the alternate juror in the jury room for deliberations. This Court finds that Trial Counsel made a request for a new trial due to this irregularity. (Tr.p.194). Additionally, this Court finds Trial Counsel sufficiently preserved this issue for appellate review. This Court would note that should the Court of Appeals find that Trial Counsel did not sufficiently preserve this issue for appellate review and thereby refuse to consider this issue on appeal, this issue may be raised again on a successive PCR by Applicant. Furthermore, this Courts finds Applicant has not shown he was prejudiced by the alternate's presence. This Court further finds that, upon questioning by the trial judge, the alternate stated that he did not participate in the jury's deliberations despite his presence. Accordingly, the trial judge handled this irregularity appropriately and was satisfied with the alternate's statements. Accordingly, this allegation is denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court grants Applicant a belated review of his conviction pursuant to White v. State. With regard to all other claims, this Court finds Applicant has not established any violations that would require this Court to grant further relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's

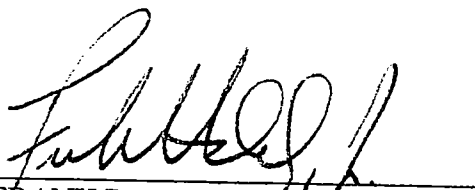


behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice in regard to all allegations.
2. Within **thirty (30) days** of service of this Order, counsel for Applicant must file a notice of appeal to secure the appropriate review of Applicant's conviction. Counsel and Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986), and Rule 243(i), SCACR, for the appropriate procedure for securing appellate review; and
3. Applicant must be remanded to the custody of South Carolina Department of Corrections.

IT IS SO ORDERED this 7th day of May, 2018.



FRANK R. ADDY, JR.
Presiding Judge
Thirteenth Judicial Circuit

Laurens, South Carolina

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POST OFFICE BOX 10916
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The Honorable Daniel E. Shearouse
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