

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

11 NORTH IRVINE STREET, SUITE 11 • GREENVILLE, SC 29601
PHONE 864.232.9390 • FAX 864.232.9392 • E-MAIL MILLS@RMALAWOFFICE.COM

June 13, 2018

RECEIVED

JUN 18 2018

S.C. SUPREME COURT

Via US Mail

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

***Re: Notice of Intent to Appeal from State of SC v. Antonio Ochoa-Tavera
C.A. No.: 2015-CP-23-4441***

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable J. Cordell Maddox's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law


R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

RECEIVED

JUN 18 2018

J. Cordell Maddox, Jr., Circuit Court Judge

S.C. SUPREME COURT

Case No. 2015-CP-23-4441

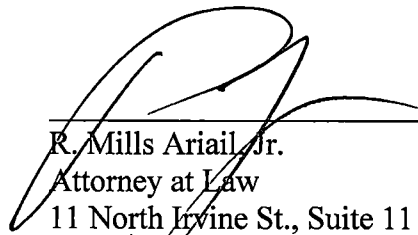
Antonio Ochoa-Tavera,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable J. Cordell Maddox, Jr.'s Order of Dismissal dismissing Appellant's application for post-conviction relief. On May 25, 2018, the Honorable J. Cordell Maddox, Jr. signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on June 6, 2018. A copy of the Honorable J. Cordell Maddox, Jr.'s Order of Dismissal is attached.



R. Mills Ariail, Jr.
Attorney at Law
11 North Irvine St., Suite 11
Greenville, SC 29601
Telephone (864) 232-9390
Facsimile (864) 232-9392
Attorney for Antonio Ochoa-Tavera

Greenville, South Carolina
June 13, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

RECEIVED

JUN 18 2018

J. Cordell Maddox, Jr., Circuit Court Judge SUPREME COURT

Case No.2015-CP-23-4441

Antonio Ochoa-Tavera,..... Appellant,

v.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this June 13, 2018, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

DeShawn Mithcell, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

Antonio Ochoa-Tavera SCDC# 00363134
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

June 13, 2018

RECEIVED

JUN 18 2018

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS)
IN THE THIRTEENTH JUDICIAL CIRCUIT)
U.C. SUPREME COURT)

Antonio Ochoa-Tavera, #363134,)
)
Applicant,)

Case No.: 2015-CP-23-4441

v.)

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

State of South Carolina,)
)
Respondent.)

18 MAY 31 PM 2:49
PAUL WICKENS/MSMER COC GUL SC

This matter comes before the Court by way of an application for post-conviction relief filed on July 16, 2015 by Antonio Ochoa-Tavera (Applicant). Respondent made its Return on or about January 29, 2016. An evidentiary hearing into the matter was convened on April 16, 2018, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by R. Mills Ariail, Jr. 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 Scott D. Robinson, Esquire also testified. A translator, Yanet Chavez, was sworn in to interpret for Applicant. 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 and Applicant's records from the Department of Corrections. 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).

mailed copies to attorneys

to orders of commitment of the Greenville County Clerk of Court. In November 2014, the Greenville County Grand Jury indicted Applicant for Trafficking Methamphetamine (2014-GS-23-9505). Scott D. Robinson, Esquire represented the Applicant. Assistant Solicitor Joyce Monts, Esquire prosecuted the case. On February 9, 2015, Applicant to trial before the Honorable Daniel D. Hall and a jury. The jury found Applicant guilty. On February 11, 2015 Judge Hall sentenced Applicant to twenty-five years imprisonment for trafficking methamphetamine, 200-400 grams. 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. Failure to advise to testify in his defense.
 - b. Failure to file an appeal.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Applicant's Testimony

Applicant testified he retained Trial Counsel for his charge. He testified he never got out of jail on bond and that Trial Counsel only came to see him twice. Applicant testified during those meetings Trial Counsel would tell him how much time he was facing for the charge if he was convicted and said if he pled guilty he would get eighteen to twenty years. He testified the State did not have any evidence against him and only had evidence against his co-defendants. Applicant testified he told Trial Counsel his co-defendants were guilty but not him and that he did not know his co-defendants. He testified Trial Counsel told him not to testify and that they discussed what would happen if the jury believed his testifying co-defendant. Applicant testified Trial Counsel did not provide information to him and that he told Trial Counsel he had evidence

he wanted to present at trial. He testified there were finger prints on the drugs but the police did not do a finger print analysis of the drugs. Applicant testified he told Trial Counsel he wanted him to show evidence that he was not living at the location where the drugs were found. He testified Trial Counsel told him not to testify. Applicant testified he had a lot of questions that needed to be answered that did not get answered by Trial Counsel.

On cross-examination, Applicant testified he met with Trial Counsel twice prior to trial. He testified it was his decision to go to trial and that Trial Counsel went over the discovery in his case with him. Applicant testified he was not living at the location where the drugs were found. He testified the trial judge did instruct him about whether he wanted to testify at trial. Applicant testified he rejected a plea offer.

Trial Counsel's Testimony

Trial Counsel testified he had been practicing law for twenty-two years and ninety percent of that time had been devoted to criminal law. He testified he was retained to represent Applicant. Trial Counsel testified concerning the facts of the case and that police found drugs in a house right next to where Applicant was located in that house. He testified during the course of his representation he met with Applicant at least three or four times and provided the discovery to him. Trial Counsel testified during those meetings he discussed the indictment, the elements of the offense, the possible punishment, Applicant's constitutional rights, and the State's burden of proof. He testified Applicant appeared to understand their conversations and that Applicant was pretty intelligent. Trial Counsel testified this case involved a confidential informant who was working with the police. He testified he went over legal theories of mere presence, constructive possession and conspiracy with Applicant. Trial Counsel testified he met with DEA or a drug unit about a potential offer but Applicant turned down the deal. He testified he had sufficient

time to prepare for trial. Trial Counsel testified he made a motion to suppress the drugs because he did not believe there were exigent circumstance in Applicant's case but that the motion was denied as Applicant did not have standing to challenge it. He testified Applicant did not have any competency issues. He said it was Applicant's decision to not testify at trial and that they talked about him having the last argument.

On cross-examination, Trial Counsel testified he met with Applicant a number of times. He testified it was not a surprise when Applicant's co-defendant testified at trial against Applicant and that Applicant was disheartened when his co-defendant testified. Trial Counsel testified he did not believe there were any issues with regard to fingerprinting. He testified there was an offer from the State that if Applicant testified against his co-defendant, he would get a reduced sentence but Applicant turned it down.

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 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:

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 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 review of Applicant’s trial pursuant to White. Id. 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

Advice not to testify

Applicant alleged Trial Counsel was ineffective for failing to advise him regarding testifying in his defense. This Court finds Applicant has failed to show deficiency or prejudice with respect to this allegation. Trial Counsel testified it was Applicant’s decision to decide to not testify. Notwithstanding, the trial judge fully advised Applicant of his right to testify at trial. The record indicates clearly that the Applicant made a choice, of his own free will and volition, not to testify after having been fully advised of his rights and ramifications of testifying or, in the alternative, not testifying. Applicant chose not to testify. Accordingly, he has also failed to show prejudice with respect to this allegation, and it is denied and dismissed.

Additionally, having reviewed the record, this Court finds that Trial Counsel was well-versed in the factual allegations, that Trial Counsel asked appropriate questions which were

relevant to Applicant's theory of the case, and that Trial Counsel's pretrial discussions with Applicant were sufficient and were not deficient in any respect. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test - that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland - that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Trial Counsel was ineffective. The 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), SCRPC, 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:

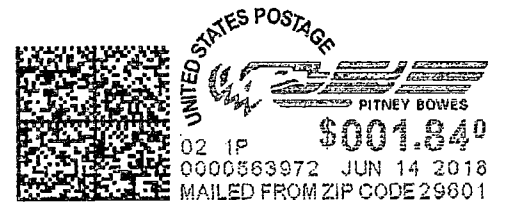
1. That the application for Post-Conviction Relief is denied and dismissed with prejudice in regard to all allegations.
2. Within **thirty (30) days** of service of this Order, counsel for Applicant must file a notice of appeal to secure the appropriate review of Applicant's conviction. Counsel and Applicant 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.

AND IT IS SO ORDERED this 25 day of May, 2018.



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

Anderson, South Carolina



[REDACTED]
R. MILLS ARIAIL, JR.

11 NORTH IRVINE STREET, SUITE 11
GREENVILLE, SC 29601

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