

THE BOOZER LAW FIRM, LLC

Lance S. Boozer, Esq.*
*Also admitted in Florida

1419 Pendleton Street
Columbia, SC 29201

Telephone: 803-608-5543
Fax: 803-926-3463

Email: lsb@boozerlawfirm.com
Website: www.boozerlawfirm.com

November 15, 2018

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

RECEIVED

NOV 19 2018

S.C. SUPREME COURT

The Honorable James C. Campbell
Clerk, Sumter County
215 N. Harvin Street
Sumter, SC 29150

RE: Leroy Gibbs, #208448, v. State of South Carolina
2016-CP-43-1275

Dear Mr. Shearouse and Mr. Campbell:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Gibbs in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Gibbs in this appeal.

Yours very truly,



Lance S. Boozer

Enclosures

cc: Megan Jameson, AAG
Loriene French, OAD
Leroy Gibbs, #208448

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

NOV 19 2018

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Kristi F. Curtis, Circuit Court Judge

Case No. 2016-CP-43-1275

Leroy Gibbs, #208448,Petitioner,

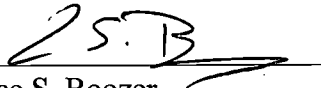
v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Kristi F. Curtis's Order dated October 18, 2018, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on November 12, 2018. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



Lance S. Boozer
The Boozer Law Firm, LLC
1419 Pendleton Street
Columbia, SC 29201
Tele: 803-608-5543

November 15, 2018

RECEIVED

NOV 19 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis, Circuit Court Judge

Case No. 2016-CP-43-1275

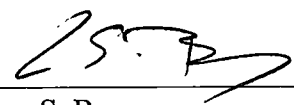
Leroy Gibbs, #208448,Petitioner,

v.

State of South Carolina,.....Respondent.

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Megan Jameson, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 15th day of November, 2018.



Lance S. Boozer
The Boozer Law Firm, LLC
1419 Pendleton Street
Columbia, SC 29201
Tele: 803-608-5543

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

RECORDED

2018 NOV -03 PM 2:05

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

Leroy Clifton Gibbs, III, #208448,) CAMPBELL 2016-CP-43-1275
CLERK OF COURT
SUMTER COUNTY, S.C.

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on July 1, 2016. Respondent submitted its Return on February 14, 2017. Applicant filed an amended application on June 29, 2018. An evidentiary hearing was convened on July 26, 2018, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from Dianne Williams and Latroy Gibbs. Respondent presented testimony from Charles T. Brooks, III, Esquire ("Trial Counsel"). This Court had before it the records of the Sumter County Clerk of Court regarding the subject convictions, the transcript from Applicant's first and second trial, Applicant's appellate records, Applicant's records for the Department of Corrections, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Applicant was indicted by the July 2011 term of the Sumter County Grand Jury

for trafficking cocaine base (10-28g), three counts of possession with intent to distribute cocaine base within a half mile of a school or park, manufacturing cocaine base, possession with intent to distribute cocaine, two counts of possession of a firearm or knife during commission of a violent crime, and possession of marijuana (2011-GS-43-1125). Applicant was represented at trial by Charles T. Brooks, III, Esquire. On June 5, 2013, Applicant proceeded to a jury trial before the Honorable W. Jeffrey Young and was convicted of trafficking cocaine base (10-28g), manufacturing cocaine base, and possession with intent to distribute cocaine. Judge Young sentenced Applicant on June 5, 2013 to fifteen years' imprisonment for possession with intent to distribute cocaine, fifteen years for manufacturing cocaine base, and ten years for trafficking cocaine base (10-28g), to be served concurrently.

Applicant filed a timely notice of appeal. An appeal was perfected by Lara Caudy, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction in an opinion filed March 2, 2016. State v. Gibbs, Op. No. 2016-UP-121 (S.C. Ct. App. 2016). The Remittitur was returned on March 21, 2016.

II. ALLEGATIONS

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

1. Ineffective Assistance of Counsel
 - a. "Failure to object to the evidence presented at my trial."
2. Prosecutorial Misconduct
 - a. "Improper remarks during closing arguments."
3. Judicial Prejudice
 - a. "Improper remarks during sentencing."

Applicant filed an amended application on June 29, 2018, adding the following allegation:

- i. Trial counsel failed to present favorable witnesses at trial.

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

Applicant's testimony

At the evidentiary hearing, Applicant testified he was first represented on these charges by David Sullivan, but after he left the Public Defender's Office, Trial Counsel was appointed to represent him. He stated he was offered a plea deal for a twelve year sentence in December, 2012, but he rejected the offer. He testified he was given another offer in February, 2013 for seven years, but he rejected that, as well. Applicant stated he was given a final offer two days before his first trial for a three year sentence, but he rejected it. Applicant testified that his defense at trial is that he did not actually live at the residence where the drugs were found, so they were not his drugs. He testified that at his first trial, which ended in a mistrial, Trial Counsel called three witnesses—a friend, his brother, and his mother—to testify that Applicant lived with his mother, not at the residence. He stated Trial Counsel did not call these three witnesses at the second trial, but he should have, and if he had he would not have been convicted.

Applicant testified Trial Counsel filed a motion to be relieved from his case because he did not think Applicant was indigent and could have afforded to pay for retained counsel. A copy of the motion was admitted as Applicant's Exhibit #1. He testified that they had a hearing over the motion before Judge James, and the motion was denied. Applicant opined that the filing of this motion changed their relationship because Trial Counsel did not want to represent him.

Applicant testified that he asked Trial Counsel to have his three witnesses testify at the second trial, but they did not testify. He stated that when he asked Trial Counsel why they weren't ~~not~~ going to testify, Trial Counsel told him he did not prepare his case. Applicant testified that Trial Counsel failed to object to evidence at the trial which prejudiced him. He

stated that he chose to testify at trial and tell his side of the story even though his attorney advised him not to take the stand.

Dianne Williams' testimony

Dianne Williams testified at the evidentiary hearing that she is Applicant's mother, and she testified on his behalf at his first trial. She stated that her son asked her to testify for him, but she did not testify at the second trial because Trial Counsel told her that he did not need them. She stated Trial Counsel did not explain why he did not need them. She stated that she would have said all of her testimony from the first trial again at the second trial if she had testified.

Latroy Gibbs' testimony

Latroy Gibbs testified at the evidentiary hearing that he is Applicant's brother and he testified on his behalf at his first trial. He stated that his testimony from the first trial is still true, and Applicant lived with their mother at the time of the crime. He testified that he would have testified again at the second trial, but he did not do so because Trial Counsel said he would not represent Applicant unless they paid him because he needed funds.

Trial Counsel's testimony

At the evidentiary hearing, Trial Counsel testified that he represented Applicant for both of his trials, for a significant period of time. He stated that Applicant did not listen to anything he said and he did not want to follow his advice, and their relationship was contentious from the very beginning. Trial Counsel testified the State made some plea offers; some were too high, but they got better offers as time went on. He stated that he advised Applicant to take the plea offer for three years based on his exposure at trial and because Applicant had other pending charges from drug buys, but Applicant was adamant that he did not want to plead guilty. Applicant either wanted the charges dismissed or he wanted a trial.

Trial Counsel testified that their defense at both trials was that Applicant did not live at the residence where the drugs were found, they were not his drugs; that Applicant stayed at the house some with his ex-wife, but he lived at his mother's house and other places. He stated that he called three witnesses at the first trial to show Applicant was living with his mother. However, he stated the difference between the first and second trial was the testimony of Applicant's ex-wife. The drugs in question were found at the ex-wife's house while executing an arrest warrant for Applicant, but they were found in another room from where Applicant was arrested. Trial Counsel testified the wife was a co-defendant in this case, and she testified for the State. He opined that her testimony was much stronger for the State at the first trial, but at the second trial, she said things that were consistent with Applicant's defense which helped him. He stated her testimony showed that Applicant did not stay at the house all the time.

At this point in the second trial, Trial Counsel was confident that they could win based on her testimony because she was a critical witness for the State and she testified in a way that was more favorable to Applicant. Trial Counsel testified that he begged Applicant not to take the stand at trial at this point because, he advised him, when he took the stand, it would open the door for the State to question him on his other pending drug charges. He stated that the State could not get into the other charges unless Applicant took the stand, but despite his advice not to testify, Applicant insisted on testifying at trial to tell his side of the story. Trial Counsel testified that he believed Applicant's testimony at trial is the reason he was convicted, not the fact that he did not have the testimony from the three witnesses from the first trial.

Trial Counsel testified he believed he did not need the three witnesses from the first trial to testify at the second trial because the ex-wife had already said what he needed her to at the second trial. He stated he had the witnesses there at the second trial because he thought they were

going to say the same things they did at the first trial, but he thought their testimony would be overkill because the wife had already said it. Trial Counsel testified that he made a strategic decision not to call these witnesses at the second trial because there was no reason to call them based on the wife's testimony for the State.

Trial Counsel testified that he filed his motion to be relieved after Applicant was able to make a high bond and had \$100,000 in cash on him when he was detained, so he believed Applicant was not indigent and could afford to retain an attorney rather than having one appointed. He stated Applicant filed a grievance on him during his representation, and they had a contentious relationship. However, Trial Counsel testified neither the motion nor the grievance affected his representation, and he still represented Applicant to the best of his ability.

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged 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. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that 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 (1985). 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.

V. 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 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).

INEFFECTIVE ASSISTANCE OF COUNSEL

Failure to object to evidence presented at trial

Applicant has failed to meet his burden of proving any deficiency or prejudice for failing to object to any evidence presented at trial. Trial Counsel credibly testified there was no legal basis for objecting to the drug evidence or the probable cause for the arrest warrant. There was no issue with a confidential informant here and no search warrant, and the drugs were properly obtained as they were seized in a search of the wife's home and purse after she gave law enforcement verbal and written consent. Applicant has failed to point to any specific evidence that Trial Counsel could have successfully excluded by making a valid objection. This Court

finds there is no deficiency or prejudice on this ground, and this allegation is denied and dismissed with prejudice.

Failure to present favorable witnesses at trial

This Court finds Trial Counsel was not ineffective for failing to present his witnesses from the first trial, which ended in a mistrial, at the second trial. Trial Counsel was clearly prepared to use these witnesses again at the second trial, however, he articulated a valid strategic reason for choosing not to call these witnesses based on the new testimony of the State's witnesses at trial.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Because Trial Counsel articulated a valid trial strategy for choosing not to call these witnesses, he cannot be deficient.

Furthermore, this Court finds there is no resulting prejudice from the failure to call these witnesses because all their testimony would have been cumulative to the evidence already presented at trial by Applicant's wife, the State's witness, so none of their testimony would have changed the outcome of the trial. See Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) (holding there was no prejudice from counsel's failure to call a witness at trial where the witness's testimony "simply would have been cumulative to evidence already introduced through other witnesses.")

This Court also agrees with Trial Counsel's assessment that it was not the absence of these witnesses' testimony which resulted in Applicant's conviction, but rather Applicant's own testimony at trial, which opened the door for the State to question him on his other pending drug charges. Trial Counsel credibly testified that he begged Applicant not to testify at trial based on how the trial was going, and this conversation is reflected in the trial transcript. Tr. 166, line 7 – 167, line 3. However, the resulting testimony from Applicant's decision to testify ultimately prejudiced his case. Accordingly, based on the evidence presented at trial and Applicant's testimony from his knowing and voluntary decision to exercise his constitutional right to testify at trial, this Court finds Applicant was not prejudiced from the failure to call these three witnesses. Accordingly, this allegation is denied and dismissed with prejudice.

PROSECUTORIAL MISCONDUCT

Applicant alleged prosecutorial misconduct in his application for PCR. The applicant has the burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). However, Applicant here has not set forth any credible evidence of prosecutorial misconduct and has therefore failed to meet his burden of proof. Accordingly, this allegation is denied and dismissed with prejudice.

JUDICIAL MISCONDUCT

Applicant further alleges "judicial misconduct" by the trial court for improper remarks during sentencing. However, this allegation is improper for post-conviction relief, as it is a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, this allegation is denied and dismissed with prejudice.

VI. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. 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), SCRCR, 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:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 18th day of October, 2018.

Kristi Curtis

KRISTI CURTIS
Presiding Judge
Third Judicial Circuit

Sumter, South Carolina

THE BOOZER LAW FIRM, LLC

1419 Pendleton Street
Columbia, SC 29201



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