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May 15, 2019

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Donald Peters 316642 v State, 2015-CP-07-2251

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service in the above Beaufort County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc:
Benjamin Limbaugh, Esq
Donlad Peters 316642
Charleston County Circuit Court Clerk

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MAY 20 2019
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Honorable Jennifer McCoy, Circuit Judge

Case No.: 2015-CP-07-2251

Donald Peters 316642.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Donald Peters appeals the Honorable Jennifer McCoy's April 24, 2019 Order of Dismissal. Undersigned counsel received notice of entry of the order on May 2, 2019. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

May 15, 2019

Benjamin Limbaugh, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

Clerk of Court- Beaufort CP
PO Box 1128
Beaufort, SC 29901

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CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Benjamin Limbaugh Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Beaufort County Clerk of Court. I further certify that all parties required by Rule to be served have been served this May 15, 2019.

James K Falk
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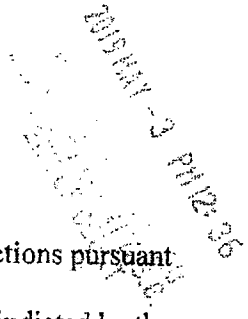
STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT C/A No: 2015-CP-07-2251
Donald Eugene Peters, #316642, Applicant, v. State of South Carolina, Respondent.	)	**ORDER OF DISMISSAL**



The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Beaufort County Clerk of Court's orders of commitment. The Applicant was indicted by the July 2011 term of the Beaufort County Grand Jury for one (1) count of Burglary, First degree, one (1) count of Armed Robbery, and one (1) count of Assault and Battery, First Degree (2011-GS-07-1456, -1457, -1458). Ehrick K. Haight, Esquire, represented him on all charges. On February 26, 2013, the Applicant proceeded to a jury trial, pursuant to which he was found guilty as indicted on all charges. The Honorable Thomas W. Cooper, Jr. sentenced the Applicant to confinement for twenty-three (23) years for the count of Burglary, First Degree, twenty-three (23) years for the count of Armed Robbery, and ten (10) years for the count of Assault and Battery, First Degree. The sentences run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to Anders v California 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Peters, Op. No. 2015-UP-247 (filed on May 13, 2015). The Remittitur was issued on June 5, 2015.

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II.

In his application for post-conviction relief, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Trial Counsel"
    a. "Failure to prepare and present a defense to Applicant's charges where benefit of retaining the right to the last argument was significantly outweighed by the need to explain circumstances and evidence that were readily explainable and which, left unrefuted, were highly prejudicial to the defense"
        i. "Failure to adequately cross examine all the State's witness (sic), and failed to adduce evidence that could have refuted the State's case"
    b. "Failure to make a pretrial motion to suppress any and all evidence obtained from Kurtis Edwards (sic) residence where defense counsel was aware that none of the evidence linked Applicant to the crime"
    c. "Failure to research and present an argument pertaining to a defense of third party guilt where, on the demonstrable facts of this case such a defense was a viable option"
    d. "Failure to lodge objections to evidence and testimony concerning text messages between Lauren Baughman and Kurtis Edwards where the content of said messages was more prejudicial than probative and should have been suppressed cannot be defended as part of any strategy but are signs that he neglected his duty as an advocate."
    e. "Defense counsel's failure to lodge objections to evidence and testimony concerning the burglary of Ron's barber shop where the content of testimony was more prejudicial than probative and should have been suppressed cannot be defended as part of any strategy but are signs that he neglected his duty as an advocate."
    f. "Failure to lodge objections to evidence and testimony concerning Whitmore Plumbing where the content of testimony was more prejudicial than probative and should have been suppressed cannot be defended as part of any strategy but are signs that he neglected his duty as an advocate."
    g. "Deficient performance during the sentencing phase as he strongly argued that the Applicant's long problem with substance abuse is what's gotten him into trouble, and implied Applicant can do well when staying away from illicit substances when the record shows the crime was committed due to Lauren Baughman's long problem with substances abuse"
2. "Appellate counsel's failure to argue Direct Verdict on Appeal"
    a. "There wasn't a scintilla of evidence in support of the argument"

At the evidentiary hearing, Counsel amended the application to the sole allegation that trial counsel did not properly object to the introduction of the audio text message exhibit

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presented by the State at trial.

III. Summary of Testimony Presented

Trial Counsel

Counsel Haight testified that he was appointed to this case. Counsel testified as to the facts surrounding the charges, to wit: applicant and two co-defendants broke into a house, beat the victim, and stole a sum of money from the home. Counsel testified that text messages between the defendants was a crucial part of the State's case against Applicant. Counsel testified that after the Solicitor's office got the text messages from Verizon, they were put in a PowerPoint and provided to him prior to trial. Counsel testified, however, that the Solicitor's office also had voice actors read the text messages onto a recording and that he did not hear the audio of this recording before the trial. Counsel testified that the Solicitor assured him the text messages were read in a non-emotional tone. Counsel testified that he objected to the text message presentation coming in as being hearsay and believes he objected to the text messages being presented in the audio format. Counsel testified that he objected to the presentation, but that the exhibit was ultimately played for the jury. Counsel testified that the co-defendants who originally authored the text messages testified in this case and explained the various acronyms that they used in the text messages. Counsel testified that he believes that he properly preserved his objection to the introduction of the audio exhibit during trial. Counsel testified that he doesn't believe the audio made that big of an impression, since he does not really recall it. Counsel testified that the court published the exhibit subject to the objection. Counsel testified that he originally thought the text messages were going to be crucial to the case against Applicant, but they became less important when both of the co-defendants ultimately testified against him. Counsel testified that Applicant also gave a statement to police, after being read his Miranda

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rights. Counsel testified that Applicant told police that he did not go in the house, but that he was the lookout. Counsel testified that he worked hard on this case and that the only offer ever extended by the Solicitor's Office was for twenty years. Counsel testified that the audio exhibit was never played for the court *in camera*. Counsel testified that he did not ask for the exhibit to be played for the court *in camera*. Counsel testified that he believes the PowerPoint of the text messages would have been sufficient, but did not consider that at the time.

Appellate Counsel

Counsel testified that she put a footnote in her Brief that trial counsel's failure to object to the State's interpretation of the text messages through the summary and audio may be an issue to be explored in post-conviction relief. Counsel testified that she did not believe the objection to the introduction of the audio exhibit was properly preserved. Counsel testified that the reason for the footnote was that there wasn't a detailed objection specifically as to the manner in which the text messages were published to the jury. Counsel went on to testify that she was *unclear* as to whether the renewed objection was based on the hearsay objection or the manner in which it was published to the jury. Counsel testified that the Court of Appeals and the Supreme Court would like for trial objections to be as specific as possible in fairness to the trial judge making the ruling. Counsel testified that if she thought the objection was properly preserved she would have raised it on appeal.

IV. Findings of Facts and Conclusions of Law

This court has thoroughly reviewed the record in its entirety. Additionally, this court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented, which allowed the court to scrutinize the credibility presented. Furthermore, this court reviewed the PowerPoint presentation of the text messages read at trial and listened to the audio exhibit of

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the text message exchange. 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).

Applicant has alleged numerous instances of ineffective assistance of counsel against trial counsel, Ehrick Haight. Each allegation is addressed fully below.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her 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 [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland does not guarantee perfect representation, only a "'reasonably competent attorney.'" 466 U. S. at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. See generally Id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness

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under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286, 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins, 539 U.S. at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial, even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 688; Harrington v. Richter, 562 U.S. 86 (2011)

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at

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694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687; Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693,

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697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

Based on this standard set forth above, this court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations. Applicant's allegation is addressed fully below:

Failure to properly object to introduction of audio exhibit

This court finds that Applicant has failed to show prejudice sufficient to grant the Post-Conviction Relief Application on this ground. Applicant contends that trial counsel was deficient for failing to properly preserve his objection to the introduction of the audio exhibit and appellate counsel was deficient for failing to brief the issue. This court finds that, even if trial counsel did not preserve the objection with enough specificity to be preserved for appellate review, Applicant was not ultimately prejudiced as a result. Trial counsel testified that he objected to the manner in which the exhibit was to be published to the jury, however, the objection was not made with requisite specificity. PCR counsel argues that it is unclear on what basis the trial court allowed the evidence to come in. This court, however, finds that argument is without merit. An objection to the evidence was made, and the court considered that objection when ultimately allowing the evidence in.

As to Petitioner's claim against appellate counsel, Ms. Hudgins stated she was unclear as to what grounds trial counsel's objection was made, therefore, she was unable to brief the issue on appeal. Appellate counsel was not deficient for failing to brief the issue, since this court finds that the issue was not properly preserved by trial counsel. Furthermore, this court finds that even if trial counsel did not properly preserve the issue by specifying upon which grounds he objected to the presentation of the evidence, Applicant was not prejudiced by the introduction of the

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evidence as there was overwhelming evidence for the jury to return a guilty verdict. Trial counsel testified that he did not believe the text messages to be crucial to the trial due to the testimony of the co-defendants. Moreover, the co-defendants placed Applicant at the scene and testified in great detail about his involvement in the crime. Trial counsel also testified that the text messages were introduced on their own as well as in a PowerPoint presentation. This court was able to review the audio recordings in question and finds that the tone in which they were read was not improperly prejudicial to Applicant. The failure to properly preserve the issue with more specificity would not have changed the outcome of the trial, as the jury heard other substantial evidence of guilt as to the Applicant. Therefore, this court dismisses this allegation.

V. CONCLUSION

Based on the foregoing, this court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Trial counsel was not deficient, nor was Applicant prejudiced by trial counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

The court notes Applicant must file and serve a notice of appeal within thirty 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), SCRCP, 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:

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1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 24th day of April, 2019.

JMcCoy

JENNIFER MCCOY
Presiding Judge
Fourteenth Judicial Circuit

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WED 15 MAY 2019 AM

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