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July 14, 2019

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

RECEIVED

JUL 18 2019

S.C. SUPREME COURT

Re: Phillip Monroe 354301, 2015-CP-27-0354

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, in the above Jasper 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:

Sara Lee Gunton, Esq

Phillip Monroe 354301

Jasper County Circuit Court Clerk

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUL 18 2019

S.C. SUPREME COURT

APPEAL FROM JASPER COUNTY
Court of Common Pleas
Honorable Thomas A Russo, Circuit Judge

Case No.: 2015-CP-27-0354

Phillip Monroe 354301.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Phillip Monroe appeals the Honorable Thomas A Russo's April 26, 2019 Order of Dismissal. Undersigned counsel received notice of entry of the order on July 8, 2019. A copy of the order on appeal is attached hereto.



James K Falk
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PO Box 1058
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July 14, 2019

Sara Lee Gunton, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

Clerk of Court- Jasper CP
PO Box 248
Ridgeland, SC 29936

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JUL 18 2019

APPEAL FROM JASPER COUNTY

S.C. SUPREME COURT

Court of Common Pleas

Honorable Thomas A Russo, Circuit Judge

Case No.: 2015-CP-27-0354

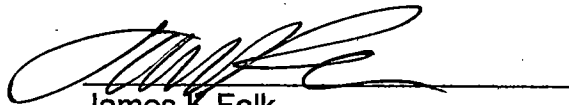
Phillip Monroe 354301.....PETITIONER

V.

State of South Carolina.....RESPONDENT

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, Sara Lee Gunton Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Jasper County Clerk of Court. I further certify that all parties required by Rule to be served have been served this July 14, 2019.



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indicted for one (1) count of Drugs/Trafficking Cocaine, More than 10 grams but Less than 28 grams (2012-GS-27-190). Applicant was also found guilty of one (1) count of the lesser included offense of Possession of Other Controlled Substances in Schedule I to V, First Offense (2012-GS-27-189). The Honorable Perry M. Buckner sentenced Applicant to confinement for twenty-seven (27) years for the count of Drugs/Trafficking Cocaine, More than 10 Grams but Less than 28 grams, and six (6) months for the count of Possession of Other Controlled Substances in Schedule I to V, First Offense. 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. Monroe, Op. No. 2015-UP-044 (filed on January 28, 2015). The Remittitur was issued on March 12, 2015.

II. ALLEGATIONS

Applicant alleged the following grounds in his amended application:

I. Ineffective Assistance of Counsel

1. Trial counsel did not consult with Applicant before counsel adopted a strategy to advise the jury during closing argument that the guilty of trafficking, but he is guilty of conspiracy to manufacture crack cocaine.
2. Trial counsel's closing argument exposed the jury to information regarding Defendant's prior bad acts which otherwise would not have been admissible as Lyles evidence.
3. Trial counsel failed to object to "hands of one, hands of all" jury charge.
4. Trial counsel should have objected to the use of Respondent's Georgia conviction for enhancement purposes under the trafficking statute.
5. Trial counsel failed to relay a plea offer or accept the plea offer on Applicant's behalf.

Applicant presented no evidence regarding the third allegation and it is, therefore, dismissed.

IV. SUMMARY OF TESTIMONY AT PCR HEARING

Applicant testified Counsel never saw him until the Friday before the trial. He also testified he never saw any discovery. Further, he testified he wanted a deal for eight years, but told Counsel if he couldn't get him down to eight that he would accept a sentence of ten years. He admitted that he gave a video-recorded statement to law enforcement that he was planning on cooking the cocaine into crack cocaine.

Counsel testified he met with Applicant at least three or four times and that he met with Applicant on at least two or three occasions. Moreover, Counsel testified that his goal was to get a mistrial or a not guilty on trafficking in the hopes that the State would re-consider the offer of ten years. To achieve this, Counsel testified his strategy was to say that Applicant was guilty of conspiracy, not guilty of trafficking. Counsel testified there was an offer of ten years, and Applicant rejected it on the record in a Jasper County courtroom a month or so before the trial took place. Furthermore, Counsel testified he went over with the Applicant the statements that he had made.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that Applicant has failed to satisfy his burden to prove that Counsel was deficient or that he was prejudiced by Counsel's alleged deficiencies. 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, 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 v. Washington, 466 U.S. 668 (1984). The proper measure of performance is whether Counsel provided representation within the range of competence required in criminal cases. Id.

This Court finds Applicant's testimony lacked credibility and Counsel's testimony was credible. This Court finds that Applicant has failed to satisfy his burden to prove that Counsel's actions were deficient. Applicant also failed to prove he was prejudiced by Counsel's alleged deficiencies. This Court finds Counsel properly prepared for Applicant's trial. This Court finds Counsel elucidated valid trial strategies in defending Applicant and preparing for trial given the difficult facts against which Counsel had to defend. This Court finds Counsel rendered adequate assistance and exercised professional judgment in his decisions at trial. Further, this Court finds the evidence against Applicant was overwhelming. This Court dismisses Applicant's application for the reasons set out below:

Ineffective Assistance of Counsel

In evaluating allegations of ineffective assistance of counsel, the court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. at 669. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 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. 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 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. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland,

466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 1992.

1. Trial counsel did not consult with Applicant before Counsel adopted a strategy to advise the jury during closing argument that Applicant was not guilty of trafficking, but he was guilty of conspiracy to manufacture crack cocaine.

The strong weight of evidence to the Applicant's guilt, namely a video confession, required a creative strategy by Counsel. Therefore, Counsel's argument that Applicant was not guilty of the charged crime, but rather a different crime, was not deficient. Applicant was also unable to provide an argument that would have been more suitable, given the facts of the case. Further, this Court finds there was overwhelming evidence of guilt, such that any deficiency of Counsel did not prejudice Applicant.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient or that Applicant was prejudiced by Counsel's closing argument. Accordingly, this Court denies and dismisses this allegation.

2. Trial counsel's closing argument exposed the jury to information regarding defendant's prior bad acts which otherwise would not have been admissible as Lyles evidence.

Counsel's strategy of admitting to some guilt, but not to the indicted crime, was not deficient. Therefore, Counsel's inclusion of prior bad acts was not deficient, it was a matter of trial strategy. Further, this Court finds there was overwhelming evidence of guilt, such that any deficiency of Counsel did not prejudice Applicant.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient or that he was prejudiced by Counsel's alleged deficiency. Accordingly, this Court denies and dismisses this allegation.

3. Trial counsel failed to object to "hands of one, hands of all" jury charge.

This Court finds that there was no testimony presented as to trial counsel's failure to object to the hand of one, hand of all jury charge. Applicant has failed to prove deficiency on the part of trial counsel and any resulting prejudice suffered. Accordingly, this Court denies and dismisses this allegation.

4. Trial counsel should have objected to the use of Respondent's Georgia conviction for enhancement purposes under the trafficking statute.

The Georgia conviction was properly used to enhance Applicant's drug sentence. Therefore, Counsel was not deficient and Applicant was not prejudiced.

Accordingly, this Court finds Applicant failed to prove Counsel should have objected or that Applicant was prejudiced by Counsel's failure to object. Accordingly, this Court denies and dismisses this allegation.

5. Trial counsel failed to relay a plea offer or accept the plea offer on Applicant's behalf.

This Court finds Counsel's testimony persuasive and Applicant's testimony lacking in credibility. Counsel testified he conveyed a 10 year offer to Applicant, which Applicant was adamant he would not take. Therefore, Counsel was not deficient and Applicant was not prejudiced.

Accordingly, this Court finds Applicant failed to prove Counsel failed to convey or accept a plea offer or that Applicant was prejudiced. Accordingly, this Court denies and dismisses this allegation.

VI. CONCLUSION

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

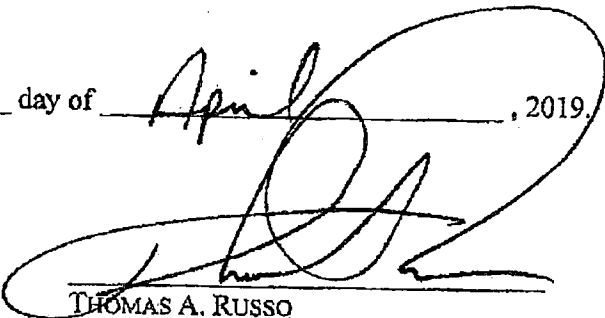
constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty 30 days from 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 71.1g, SCRPC, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are 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 must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 26th day of April, 2019.


THOMAS A. RUSSO
Presiding Judge
14th Judicial Circuit

Abraham, South Carolina

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Clerk of Court

Supreme Court of South Carolina

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