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August 8, 2019

RECEIVED

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

AUG 12 2019

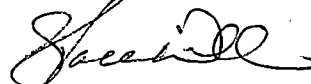
S.C. SUPREME COURT

Dear Mr. Shearouse,

I represent Taiwan Jevon Hardy who is appealing from the circuit court's denial of relief in a post conviction relief case. I am enclosing herewith a notice of appeal along with certificates of service. By copy of this letter I am informing SCCID of the appeal. I have forwarded the SCCID affidavit and instructions to Mr. Hardy so that he may engage SCCID in the case. As I believe that Mr. Hardy will qualify for SCCID services I will take no further action unless instructed by the Court or SCCID.

If I need to do anything further to protect Mr. Hardy's right to apply for review please let me know.

Sincerely,



J. Falkner Wilkes

c:

Amy W. Cox
Clerk of Court
PO Box 3483
Spartanburg, SC 29304-3483

Robert M. Dudek
SCCID/ Appellate Defense
P.O.B. 11589
Columbia, SC 29211-1589

Taiwan Jevon Hardy, 321387
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. SUPREME COURT

Court of Common Pleas, Spartanburg County
The Honorable Thomas A. Russo, Circuit Court Judge

Circuit Court Case No. 2017-CP-42-02217
Appellate Case No. _____

Taiwan J. Hardy, Appellant,

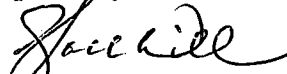
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL
(PCR CASE)

Appellant hereby appeals the judgment of the Court of Common Pleas dismissing his action for post conviction relief by way of the attached ORDER OF DISMISSAL, signed by the Honorable Thomas A. Russo, entered of record on July 12, 2019. A copy of said order is enclosed herewith and made a part hereof.

Respectfully submitted,



J. Parkner Wilkes (SC Bar #12893)
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(864) 282-1292
Counsel for Appellant

Other Counsel of Record:

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Counsel for Respondent

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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AUG 12 2019

Court of Common Pleas, Spartanburg County
The Honorable Thomas A. Russo, Circuit Court Judge

S.C. SUPREME COURT

Circuit Court Case No. 2017-CP-42-02217
Appellate Case No. _____

Taiwan J. Hardy, Appellant,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I certify that on August 8, 2019, I served Appellant's notice of appeal and attached orders on the Respondent, and others if indicated, by placing a copy in the U.S. Mail, first class, postage prepaid, addressed as follows, and by electronic means if indicated:

Johnny E. James, Asst. Atty. Gen.
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Counsel for Respondent
via facsimile also to: (803) 253-6283

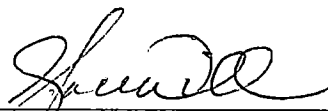
Also to:

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Hon. Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211
via facsimile also to: (803) 734-1499

Respectfully submitted,



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Counsel for Appellant

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG)

Taiwan J. Hardy,) Case No.: 2017-CP-42-02217
S.C.D.C. No. 321387,)

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of an application for post-conviction relief filed by Taiwan J. Hardy ("Applicant") on June 26, 2017. Respondent made its return on about December 29, 2017. The Court convened an evidentiary hearing into the matter on Thursday, March 7, 2019, at the Spartanburg County Judicial Center in Spartanburg, South Carolina. Applicant was present at the hearing and represented by J. Falkner Wilkes, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

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Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, William S. Bean, IV, Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, the pleadings, and Applicant's memorandum submitted to the court at the time of the evidentiary hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the December 2014 term of the Spartanburg County Grand Jury for distribution of cocaine, third or subsequent offense (2017-CP-42-02217). William S. Bean, IV, Esq. represented Applicant. Hunter C. Blouin and J. Edward Hunter, Esqs., of the Seventh Circuit Solicitor's Office, prosecuted the case. On July 22, 2015, Applicant proceeded to trial before the Honorable Roger L. Couch and a jury. The jury found Applicant guilty as indicted on July 23, 2015. Pursuant to S.C. Code Ann. § 17-25-45, Judge Couch sentenced Applicant to imprisonment for a term of life without parole.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Wanda H. Carter, Esq. filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967), which offered the following issue:

The trial judge erred in coercing appellant in effect to withdraw defense exhibit #1, which was a prior controlled drug purchase agreement signed by the confidential informant used in this case, in order to secure the last closing argument to the jury because this exhibit was corroborative evidence that established the unreliableness of this informant deemed critical to appellant's defense.

The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Hardy, Op. No. 2016-UP-460 (S.C. Ct. App. 2016). The Remittitur was issued on December 2, 2016.

Present Application

At the evidentiary hearing, Applicant proceeded on three allegations:

1. Ineffective assistance of counsel for:
 - a. Failure to properly advise client in relation to the plea offer.

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- b. Failure to object and require a 404(b) analysis on the record to preserve the issue for appeal as to highly prejudicial prior bad act / evidence of bad character / propensity testimony.
- c. Failure to represent an effective defense by withdrawal of key evidence essential to the issue of credibility and impeachment of the confidential informant.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, she must prove “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.” Butler, 286 S.C. at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

“Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting

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for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

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, 386 S.E.2d at 625 (citing Strickland, 466 U.S. 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 (citing Strickland, 466 U.S. at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

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1. Misadvice as to Plea Offer

The Court finds no merit in Applicant's claim that Counsel was ineffective in adequately advising him regarding two plea offers by the State.

At the evidentiary hearing, Applicant testified that Counsel brought him an offer from the State where Applicant would plead guilty to distribution of crack in exchange for a sentence of 18 years, to run concurrent with his probation violation. Applicant recalled that at the time, he hadn't seen his discovery at the time, had not yet much talked about the case with Counsel, and was not yet aware the State was pursuing life without parole. Applicant declined the offer, explaining "why take a plea if I ain't seen discovery?" When Applicant finally saw Counsel again sometime later, he was able to review discovery with Counsel and return to the State's 18 year offer. Applicant noted that while he was able to review stills from the video of the drug buy, he was not permitted to see the video at that time; otherwise he fully reviewed his discovery with Counsel. Applicant recalled that Counsel advised him to take the plea offer, but Applicant was not aware if as part of the plea he would be pleading to a violent or non-violent classification. Applicant testified he wanted to plead guilty in exchange for 15 years, but the counter-offer was denied. Applicant recalled when he finally saw the video, he did not see transaction for which he was charged take place, and asserted that Counsel did not see it either, but Applicant admitted it was him in the video. Applicant recalled Counsel told him he would "die in prison" if he did not take the offer. Nonetheless, Applicant asserted that if he had been told he would be convicted, he would have pled guilty, and that he thought there was perhaps a "fifty-fifty" chance at trial.

Counsel testified he and Applicant met and discussed the case on multiple occasions, and confirmed they reviewed the discovery in the case. Counsel noted that he received the 18-year-

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offer *after* receiving the State's LWOP notice. Counsel and Applicant discussed the possibility of a 15-year deal, but Applicant was not willing to take it. Counsel recalled Applicant desired a 10-year sentence, and was maybe willing to accept a 12-year sentence, but that he was never willing to entertain the offers the State actually made. Counsel testified he told Applicant that he believed Applicant would be convicted by a jury if he proceeded to trial and that he should accept the State's offer and plead guilty. Counsel asserted he communicated that belief and advice on more than one occasion, and always told Applicant either would "probably" or "definitely" be convicted. Counsel recalled the first time he showed Applicant a still from the confidential informant's video; Applicant said he didn't know if it was him in the still, to which Counsel replied that it looked like Applicant and that a jury would conclude the same. Counsel could not recall precisely when he received the LWOP notice, but testified he notified Applicant immediately.

The Court finds Applicant has failed to meet his burden as to either prong of Strickland. Applicant cannot reasonably contend that his Counsel did not adequately appraise him of the likelihood of his conviction and LWOP sentence when, as Applicant admitted, Counsel told him that he would die in prison if he did not accept the State's offer. Counsel could not have put the matter before Applicant more clearly, bluntly, or simply. The Court finds credible Counsel's testimony that Applicant was unwilling to accept the State's plea offers despite his unequivocal advice. Though Applicant and Counsel largely corroborated one another, to the extent their testimony conflicted, the Court finds Counsel credible and Applicant concordantly not credible. The Court finds Counsel gave no advice upon which Applicant could have reasonably concluded he had a "fifty-fifty" chance of acquittal in a jury trial. The Court finds Applicant was only interested in deals for terms of incarceration the State did not offer. Accordingly, Applicant has

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failed to prove either prong of Strickland, and his demand for relief by way of this allegation is **DENIED**.

2. Failure to Object

The Court finds no ineffectiveness in Counsel's decision not to object to the confidential informant's remark indicating Applicant's own prior drug use. At trial, the confidential informant Brandy Cannon testified that she had known Applicant for ten or eleven years, and that the two "used to do drugs together." (R. 59-60; R. 61, ll. 14-17). Counsel affirmatively declined to object. (R. 61, ll. 3-5).

At the evidentiary hearing, Counsel testified he did not object because he deemed it beneficial to Applicant to elicit the informant's own drug use, and that the testimony was bad for the CP's credibility.

The Court finds no ineffectiveness on the part of Counsel. Counsel articulated his value judgment at the evidentiary hearing, valuing the damage to the confidential informant's credibility over the potential damage to his client. This Court will not second-guess that judgment. Additionally, even if it were to find some basis to find Counsel's decision constitutionally deficient, there is no reasonable probability that the absence of such a fleeting remark by Cannon would have changed the outcome of the trial—as emphasized by Applicant in his memorandum to this Court, the evidence against Applicant was overwhelming, there was no viable defense, and the probability for conviction was all but a certainty. For these reasons, Applicant's request for relief by way of this allegation is **DENIED**.

3. Withdrawal of Key Evidence

The Court finds no ineffectiveness in Counsel's decision to withdraw the lone defense exhibit introduced at trial. At trial, Counsel attacked Brandy Cannon's credibility by confronting

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her with the contents of her "CI information sheet." (R. 77, ll. 13-22). Counsel pointed out Cannon's signature on the information sheet and that she was subject to pending criminal charges for distribution of Lortab, distribution of OxyContin, and obtaining goods under false pretenses. (R. 78, ll. 1-22). Counsel thereafter introduced the information sheet into evidence as Defendant's Exhibit #1. (R. 79, ll. 4-11). Counsel proceeded to grill Cannon on her efforts to work off drug charges, which Cannon contested, and the number of drug buys in which Cannon had been involved since beginning her cooperation with the State in 2000. (R. 79-81). Cannon admitted she was paid cash for her services. (R. 81-82).

At the end of the State's case-in-chief, Counsel asserted to the trial court his "understanding that if [he] introduce[d] evidence on cross examination of a State's witness, that doesn't constitute the admission of evidence on [his] part." (R. 142, ll. 11-24). The trial court, understandably, replied with surprise and confusion. (R. 143, ll. 1-8). After reviewing State v. Battle, 304 S.C. 191, 403 S.E.2d 331 (Cl. App. 1991) and State v. Mouzon, 326 S.C. 199, 485 S.E.2d 918 (1997), the trial court inquired if Counsel had any authority to support his position; Counsel admitted he did not, and that he had successfully introduced evidence and retained "last argument" in the past. (R. 143-45). Counsel thereafter moved to withdraw the CI information sheet from evidence; after a brief recess, Counsel and the State reached an agreement that the lone defense exhibit would be withdrawn and that Counsel would retain last argument. (R. 145-48). The trial court asked Applicant if he understood agreed with Counsel's strategic decision, and Applicant confirmed he did. (R. 148, ll. 11-23).

At the evidentiary hearing, Counsel testified he introduced Cannon's pending charge sheet, published it, and was later able to withdraw it in order to save last argument. Counsel opined that reclaiming last argument was helpful to Applicant. Counsel acknowledged he could

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have requested a curative instruction to explain to the jury what happened to the exhibit, but on cross-examination also acknowledged a curative instruction could have been harmful to Applicant—the trial court could have told the jury to disregard the beneficial evidence they'd already seen.

The Court finds Applicant has failed to meet his burden of proving either prong of Strickland. Counsel arguably erred in his belief that he could introduce evidence and retain last argument, though he appears to have held the belief due to prior success in doing just that. But see, generally State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018) (exploring the historical ordering of closing arguments in South Carolina courts). But ultimately Counsel cured any potential deficiency in losing last argument by withdrawing the CI information sheet. Applicant's contention that Counsel's saving play is itself deficient performance fails, as Counsel articulated a valid strategic reason or doing so—he valued last argument over keeping the exhibit in evidence. Applicant also cannot meet his burden of showing a reasonable probability the outcome at trial would have been different had he not withdrawn the exhibit. First, the substantive effect and purpose of the exhibit—impeachment of the confidential informant—was already achieved and the contents of the exhibit had already been published to the jury. Second, keeping the exhibit in evidence would have cost Counsel the valuable opportunity to argue last. The Court is further not compelled by Applicant's contention that Counsel should have sought a curative instruction, as any such instruction would have been to prohibit the jury from considering the evidence which was beneficial to Applicant, which would have hardly improved his chances. Finally, as noted in the prior sections and emphasized by Applicant in support of his first allegation, the evidence against Applicant was simple and

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complete, such that there is no realistic possibility of a different outcome. For all of these reasons, the demand for relief by way of this allegation is DENIED.

III. 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.

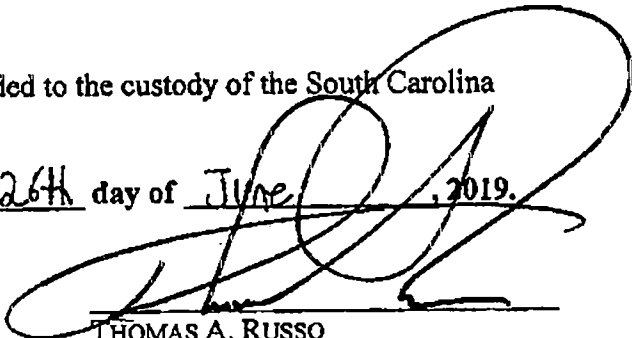
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

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



THOMAS A. RUSSO
Presiding Judge
Seventh Judicial Circuit

Florence, South Carolina



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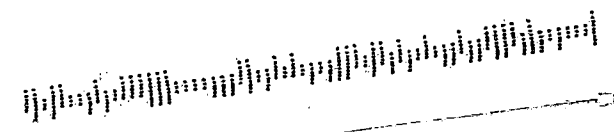
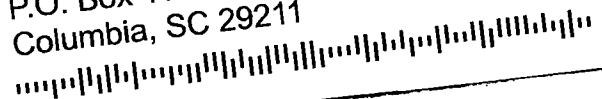


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