

RECEIVED

SEP 09 2019

S.C. SUPREME COURT

September 06, 2019

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

Re: Robert Jackson vs. State of South Carolina
C/A No: 2018-CP-21-00962

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Jackson in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,

Jonathan D. Waller

Cc: Brianna L. Schill, South Carolina Office of Attorney General

Enclosures

Waller Law Group
1116 Blanding Street, Suite 2B
Columbia, SC 29201

803-520-7278
www.wallerlawgroup.com
jonathan@wallergroupsc.com

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM FLORENCE COUNTY
William H. Seals, Jr., Circuit Court Judge

SEP 09 2019

S.C. SUPREME COURT

2018-CP-21-00962

Robert Jackson, # 138725,

Appellant,

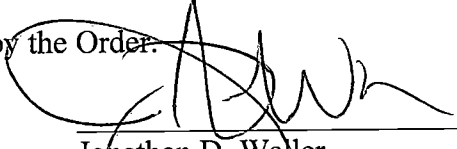
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Robert Jackson, # 138725, appeals the Order of Dismissal and Grant of Appeal Pursuant to White v. State denying his Application for Post-Conviction Relief filed Sep 29, 2018, issued by the Honorable William H. Seals, Jr., Presiding Judge, Twelfth Judicial Circuit. Mr. Jackson appeals both the denial of Post Conviction Relief as well as his original conviction as granted by the Order.


Jonathan D. Waller

Waller Law Group
SC Bar No.: 76290
1116 Blanding Street
Suite 2B
Columbia, SC 29201
803-520-7278 (phone)
jonathan@wallergroupsc.com
ATTORNEY FOR PETITIONER

September 06, 2019

Other Counsel of Record:
Lindsey A. McCallister, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

SEP 09 2019

APPEAL FROM FLORENCE COUNTY
William H. Seals, Jr., Circuit Court Judge

S.C. SUPREME COURT

2018-CP-21-00962

Robert Jackson, # 138725,

Appellant,

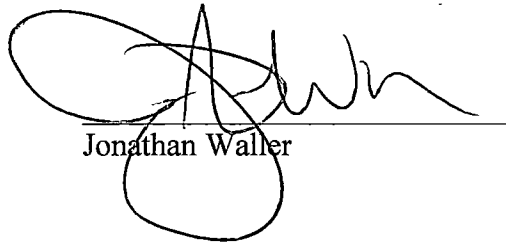
v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Brianna L. Schill, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to her office located at P.O. Box 11549, Columbia, SC 29211.



Jonathan Waller

September 06, 2019

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
IN THE COURT OF COMMON PLEAS

FILED

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2018CP2100962

Robert Jackson

2019 SEP -4 PM 12:13

South Carolina State Of

PLAINTIFF(S)

DORIS POULOS O'HARA

DEFENDANT(S)

CCCP & GS

FLORENCE COUNTY, SC

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 43(k), SCRPC (Settled);
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 - Affirmed;
 - Reversed;
 - Remanded;
 - Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|--|--|--|
| | | |
| | | |
| | | |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

9/4/2019

Date

For Clerk of Court Office Use Only

This judgment was entered on **September 4, 2019**, and a copy mailed first class or placed in the appropriate attorney's box on **September 4, 2019**, to attorneys of record or to parties (when appearing pro se) as follows:

CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

Doris Poulos O'Hara

CERTIFIED: A TRUE COPY

Jonathan D Waller 1116 Blanding Street Suite 2B
Columbia, SC 29201

Samuel Leonard Key Rembert C. Dennis Building 1000
Assembly Street Columbia, SC 29201
Hand Delivered 09/04/2019

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P. O'Hara

Court Reporter

Doris Poulos O'Hara - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

Robert Jackson, #138725

Case No.: 2018-CP-21-962

Applicant,

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

v.

State of South Carolina,

Respondent.

2019 SEP -4 AM 11: 23
FLORENCE COUNTY, S.C.
CLERK OF COURT

FILED

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Robert Jackson (Applicant) on January 31, 2018. Respondent made its Return on October 24, 2018. An evidentiary hearing into the matter was convened on June 28, 2019, at the Florence County Courthouse before the undersigned. Jonathan D. Waller, Esquire, represented Applicant. Assistant Attorney General Brianna L. Schill of the South Carolina Attorney General's Office represented Respondent.

At the hearing, Applicant testified on his own behalf. B. Scott Suggs, Esquire, and John R. Ethridge, Jr., Esquire, were also called to testify. This Court had before it a copy of the records of the Florence County Clerk of Court, records from the South Carolina Department of Corrections, the PCR application, Respondent's Return, and the plea transcript. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application.

PROCEDURAL 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).

CERTIFIED: A TRUE COPY
Paula Offner
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

to orders of commitment of the Florence County Clerk of Court. In August 2017, the Florence County Grand Jury indicted Applicant for trafficking in heroin and possession of controlled substance-second offense (2017-GS-21-1033). B. Scott Suggs and John R. Ethridge, Esquires, represented Applicant. Assistant Solicitor Ryan White, Esquire prosecuted the case. On September 15, 2017, Applicant proceeded to trial before the Honorable Thomas A. Russo. The jury found Applicant guilty as indicted. Judge Russo sentenced Applicant to imprisonment for concurrent terms of twenty-five years for trafficking in heroin and one year for possession of a controlled substance. Applicant did not appeal his conviction or sentence.

ALLEGATIONS

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

1. "Ineffective Assistance of Counsel"
 - a. "Not a lawyer requesting a public defender"
2. "New found evidence: my lawyer didn't allow my witness"

On June 19, 2019, Applicant submitted an Amended PCR application, asserting the following allegations:

1. Counsel was ineffective for failing to properly investigate the facts and circumstances surrounding the allegations against Applicant;
2. Counsel was ineffective for failing to adequately prepare for trial;
3. Counsel was ineffective for failing to move to sequester witnesses;
4. Counsel was ineffective for failing to object to the Solicitor's impermissible comment on Applicant's right to remain silent during the closing argument of the State; and
5. Counsel was ineffective for failing to file a notice of appeal on behalf of Applicant, thus denying Applicant appellate review.

At the evidentiary hearing, Applicant proceeded solely with the allegations set forth in his amended application. This Court thus finds the allegations pleaded in Applicant's original application are waived and abandoned, and the Court denies and dismisses them with prejudice.

SUMMARY OF TESTIMONY

Applicant's Testimony

Applicant testified he hired the Gardner Law Firm to represent him on this case, but he was ultimately represented by both Suggs and Ethridge. Applicant testified he met with Suggs and/or Ethridge a total of approximately ten times. Applicant testified neither Suggs nor Ethridge discussed trial strategy or possible defenses with him. Applicant testified Ethridge instructed him to speak to Suggs regarding taking his case to trial. Applicant testified he was not aware that Suggs would go to trial if Applicant had wanted to go to trial. Applicant testified he had did not have enough time to talk with Suggs regarding his trial. Applicant testified he and Suggs reviewed trial procedure two days before his trial.

Applicant testified he recalled being arrested on heroin-related charges. Applicant further testified he had "two ten dollar balls" in his pocket, and that there was additional heroin found in his car. Applicant testified he was charged with trafficking all of the heroin found on his person and in his car. Applicant testified the heroin found in his car belonged to his first cousin, Herbert McDaniel. Applicant testified McDaniel died in either 2017 or 2018.

Applicant gave conflicting testimony regarding McDaniel's presence at trial. Applicant testified he never told Suggs or Ethridge that the drugs found in his car belonged to McDaniel. Applicant testified he was not sure why McDaniel was on Applicant's potential witness list because he did not tell Suggs he believed testimony from McDaniel would help his case, nor did he tell Suggs he wanted McDaniel to testify prior to trial. Applicant testified he told Suggs about McDaniel on the day of his trial. Applicant testified he had not mentioned McDaniel to either Suggs or Ethridge prior to trial. Applicant testified McDaniel was present for the first day of his trial, but Suggs and McDaniel did not talk at that time. Applicant further testified McDaniel could

not attend Applicant's second day of trial because he had a doctor appointment. However, Applicant testified he was unsure if McDaniel was on his witness list, but he wanted McDaniel to testify. Applicant testified he testified on his own behalf at trial, but he did not provide McDaniel's name to the Court or the jury. Applicant testified he did not ask Suggs to talk to any witnesses.

Applicant testified he did not understand why he was charged with trafficking all of the heroin, including the heroin that was found in his car and not on his person. Applicant testified he thought he was charged only for the drugs found on his person. Applicant testified he never denied possessing the drugs found on his person.

Applicant testified he believed a confidential informant ultimately led to his arrest. Applicant testified he was not sure who this confidential informant was, but he believed it was a friend of his. Applicant testified this confidential informant did not testify at his trial. Applicant testified he did not talk with Suggs about this confidential informant.

Applicant testified he saw a part of the video obtained by law enforcement. Applicant testified he first saw the video in the courtroom at trial. Applicant testified he did not see any part of the video prior to his trial. Applicant testified he did not discuss the SLED drug analysis with Suggs.

Johnny Ethridge's Testimony

Ethridge testified he previously represented Applicant on other charges unrelated to this PCR application. Ethridge testified he was involved in Applicant's case from the beginning. Ethridge testified his involvement primarily concerned the pleadings and early negotiations with the Solicitor's Office. Ethridge testified he received discovery and reviewed the discovery with Applicant. Ethridge also testified it his normal practice to discuss defenses with his clients, although he could not specifically recall what he said to Applicant in that regard. Ethridge testified

Applicant did not provide him with any helpful information including the names of a witnesses Applicant wanted Ethridge to investigate. Ethridge stated he had not viewed any video evidence, but he also indicated Suggs had reviewed video evidence. Ethridge stated he began preliminary negotiations with the Assistant Solicitor, but the preliminary negotiations halted when Applicant was arrested for additional charges.

Ethridge testified Suggs was involved from the beginning of Applicant's case. Ethridge testified although Suggs did not work directly for Ethridge's law firm, The Gardner Law Firm, Suggs was involved in Applicant's case from the beginning.

Scott Suggs's Testimony

Suggs testified he was not present at Applicant's bond hearings, but was involved in Applicant's case well in advance of his trial. Suggs testified he discussed Applicant's charges with him in detail, including possible defenses. Suggs testified his defense strategy was to convince a jury Applicant was only guilty of a lesser-included possession charge based on the heroin found on Applicant's person. Suggs testified Applicant did not deny possessing the heroin found on his person, but he denied being in constructive possession of the heroin found in the center console and floorboard of Applicant's car. Suggs testified he intended to use this information to ask the trial judge for a jury charge of simple possession. Suggs testified he attempted to introduce photographic evidence depicting Applicant's physical ailments to support Applicant's argument he was merely in simple possession and utilized narcotics to help with physical pain.

Suggs testified Applicant testified at his trial that the drugs found in the center console and beneath the floorboard belonged to another individual. Suggs testified Applicant did not provide a name or any other identifying information to the jury. Suggs testified he could not recall anyone

by the name of Herbert McDaniel on Applicant's trial witness list. Suggs did not recall whether he subpoenaed an individual by the name of Herbert McDaniel. Suggs could not recall any possible significance to Herbert McDaniel other than the possibility Applicant mentioned McDaniel as possible witness, generally.

Suggs recalled the existence of a video depicting law enforcement approaching, questioning, and arresting Applicant for the incident at issue in this PCR action. Suggs recalled reviewing the video prior to Applicant's trial. Suggs testified he probably reviewed the video with Applicant, but he was not absolutely sure.

Suggs testified he did not see any basis to object to anything argued by the State during its closing. As to the comment made by the state in its closing argument: "Well, this slippery drug dealer scenario is -today is the first time I've heard of it," Suggs testified he did not believe it was objectionable. Suggs further testified the statement could have been possibly objectionable under a different set of facts, but he did not believe it was under the facts in Applicant's case. Suggs testified it is his business practice not to object to statements made in closing arguments, unless the statement made is prejudicial or mentions evidence not presented during trial.

Suggs testified Applicant briefly spoke to law enforcement prior to being given Miranda warnings. Suggs testified he made a motion to suppress any statement that was given after the second officer did not re-inform Applicant of his Miranda rights, and this motion was successful.

Suggs testified he did not file a notice of appeal in Applicant's case. Suggs testified he informed Applicant at the outset of his representation that he did not handle appeals. Suggs testified he told Applicant at the outset of his representation Applicant should be "proactive" and contact an appellate lawyer in advance.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record and heard the testimony at the PCR hearing. This Court has observed the witnesses presented at the evidentiary hearing, judged their credibility, and weighed their testimony accordingly in its discussion below. Set forth below are findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code.

Applicant alleges he received ineffective assistance of counsel. 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, Applicant 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." 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 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 plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove 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, 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.” Id. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove counsel’s representation was below the standard of reasonableness and, but for counsel’s unprofessional errors, there is a reasonable probability he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. 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. Strickland, 466 U.S. 668.

For the reasons stated below, the Court denies relief under the Uniform Post-Conviction Relief Procedure Act, but grants Applicant belated appellate review pursuant to White v. State. S.C. Code Ann. §§ 17-27-10 to -160; 263 S.C. 110, 108 S.E.2d 35 (1974).

Issue #1: Failure to Investigate

Applicant alleges Suggs and Ethridge were ineffective because they did not properly investigate Applicant’s case. This Court disagrees and finds they provided effective assistance in this case.

“[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014)). Failure to conduct an independent investigation does not constitute ineffective assistance

of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

This Court finds credible Suggs's testimony Applicant did not provide information regarding the individual who was allegedly responsible for the drugs found in the center console or floorboard. Further, this Court finds credible Suggs's testimony he viewed the video depicting law enforcement's questioning and arrest of Applicant. The credible testimony shows Suggs reviewed discovery with Applicant and reviewed Applicant's case file. Therefore, this Court finds Suggs was not deficient.

This Court further finds credible Ethridge's testimony his representation primarily concerned the pleadings and early negotiations with the Solicitor's Office. The credible testimony shows Ethridge reviewed the discovery and discussed it with Applicant. This Court also finds credible Ethridge's testimony Applicant did not provide him any contact information for any potential witnesses. Accordingly, this Court finds Ethridge was not deficient. This Court further finds Applicant failed to meet his burden of proof as to prejudice requiring him to show this Court what further information Ethridge and Suggs would have uncovered through additional investigation. Accordingly, this allegation is denied and dismissed with prejudice.

Issue #2: Failure to Adequately Prepare for Trial

Applicant alleges Suggs was ineffective for failing to adequately prepare for trial. This Court disagrees. To establish counsel failed to adequately prepare for trial, the applicant must

present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Moorehead, 329 S.C. at 334, 496 S.E.2d at 417 (holding trial counsel's failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds credible Suggs's testimony Applicant did not provide a name or any contact information for the individual allegedly responsible for the drugs found in the center console and floorboard of Applicant's car. This finding is further supported by the fact Applicant did not name the individual during his own testimony at trial. Additionally, this Court finds credible Suggs's testimony he viewed the video prior to Applicant's trial. Furthermore, this Court finds credible Suggs's testimony he made a motion to suppress certain statements made by Applicant prior to his trial. This Court finds credible Suggs's testimony Applicant never denied possessing the drugs on his person, and therefore, Suggs's defense consisted of attempting to obtain a jury charge for simple possession, which he was successful in obtaining. This Court finds credible Suggs's testimony he attempted to introduce photographic evidence depicting Applicant's physical ailments to support Applicant's argument he was merely in simple possession and utilized

narcotics to help with physical pain. Because this Court finds Applicant has failed to meet his burden as to either deficiency or prejudice, this allegation is denied and dismissed with prejudice.

Issue #3: Failure to Sequester Witnesses

In his amended application, Applicant alleged Suggs was ineffective for failing to sequester witnesses. At the conclusion of the evidentiary hearing, Applicant conceded no evidence was presented to support this allegation, and consented to the dismissal of this claim. Accordingly, this allegation is dismissed with prejudice.

Issue #4: Failure to Object to Impermissible Comment in State's Closing Argument

In his amended application, Applicant asserts Suggs was ineffective for failing to object to an "impermissible comment" made in the State's closing argument. More specifically, Applicant asserts Suggs was ineffective for failing to object to the following statement: "Well, this slippery drug dealer scenario is – today is the first time I have heard of it." (Trial Tr. 326). This Court disagrees.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Wiggins v. Smith, 539 U.S. 510, 526-527 (2003). There is a "strong presumption" 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).

This Court finds Suggs's testimony credible that he did not believe this comment was objectionable, particularly under the facts of Applicant's case. The State's closing argument was not a comment regarding Applicant's right to remain silent because Applicant testified at his own trial. This Court finds credible Suggs's testimony the State's closing argument would not have had an effect on the outcome of Applicant's case. Furthermore, this Court finds Suggs's testimony

credible that it is his usual practice and strategy not to object to statements made in closing arguments, unless the statement made was prejudicial or unless the statement mentioned evidence not presented during trial. Accordingly, this Court finds that Suggs was not deficient for failing to object to the comment made during the State's closing argument.

Furthermore, this Court finds Applicant was not prejudiced by Suggs's failure to object to the comment made during the State's closing arguments. 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." Strickland, 466 U.S. at 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. See Harrington, 562 U.S. 86. This Court finds Applicant has failed to meet his burden proving he was prejudiced by Suggs's failure to object to the statement made during the State's closing argument. Applicant provided no evidence to support his argument the statement damaged Applicant's case, and it was one comment in a lengthy closing argument. See State v. Tucker, 324 S.C. 155 (1996) (Affirming conviction, in part, because the statement made in Solicitor's closing argument was "one isolated event in the entire argument."). Accordingly, because Suggs was not deficient, nor was Applicant prejudiced, this allegation is denied.

Issue #5: Failure to File a Notice of Appeal

Applicant asserts Suggs was ineffective for failing to file a direct appeal on his behalf, and Applicant asserts he wanted to appeal his convictions and sentence. "Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (internal citations omitted). "In the absence of an

intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967).” Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (internal citation omitted). “To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” Simuel, 390 S.C. at 271, 701 S.E.2d at 740 (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (internal citation omitted)).

In the present case, there is no evidence Applicant made a knowing and intelligent decision not to pursue a direct appeal. Applicant credibly testified he intended to pursue an appeal. Although Suggs testified he informed Applicant at the outset of his representation that he did not pursue appeals on behalf of his clients, Suggs should have filed a notice of appeal on behalf of Applicant to protect Applicant’s appellate rights. Therefore, since Applicant did not knowingly and intelligently waive his right to appeal, he is entitled to petition the South Carolina Supreme Court for belated appellate review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief pursuant to the Uniform Post Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10 to -160. Neither Suggs nor Ethridge were deficient in any manner regarding their performance before or during trial, nor was Applicant prejudiced by their representation. However, this Court finds Applicant did not knowingly and intelligently waive his right to appeal and, therefore, he is entitled to petition the South Carolina Supreme Court for belated appellate review of direct appeal issues pursuant to


White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). All remaining allegations are denied and dismissed with prejudice.

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 (providing the appropriate procedure to perfect an appeal). 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. Further, 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 Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

IT IS THEREFORE ORDERED:

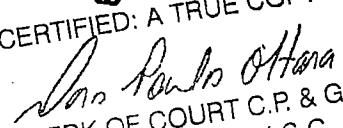
1. The Application for Post-Conviction Relief is denied and dismissed with prejudice;
2. That the Applicant is granted a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). Within thirty days of service of this Order, counsel for Applicant must file a Notice of Appeal to secure the appropriate review of Applicant's convictions. Counsel and the Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) and South Carolina Appellate Court Rule 277(g) for the appropriate procedure for securing belated appellate review.
3. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.


WILLIAM H. SEALS, JR.
Presiding Circuit Court Judge
Twelfth Judicial Circuit

August 29, 2019

FILED
2019 SEP - 4 AM 11: 23
FLORENCE COUNTY, SC

CERTIFIED: A TRUE COPY

CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.



ALAN WILSON
ATTORNEY GENERAL

August 26, 2019

2019 SEP -4 AM 11:23
FILED
CLERK OF COURT
FLORENCE COUNTY, S.C.

FILED

The Honorable William H. Seals, Jr.
Presiding Judge
103 North Main Street
Marion, South Carolina 29571

Re: Robert Jackson, #138725 v. State of South Carolina
2018-CP-21-962

Dear Judge Seals:

Enclosed please find an original proposed **Order of Dismissal** in the above-captioned case. If this Order meets your approval, please sign and return to me in the enclosed envelope, and I will then forward it to the Florence County Clerk of Court to be filed and served.

Sincerely,

Brianna L. Schill
Assistant Attorney General

BLS/kk
Enclosure(s)

cc: Jonathan D. Waller, Esquire

CERTIFIED: A TRUE COPY
Donna Paula Ottana
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.



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Clerk of Court
Supreme Court of South Carolina
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