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October 16, 2019

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

Re: Gerald Cornell Green 187172 v State, 2017-CP-10-2804

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, in the above Charleston 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
Gerald Cornell Green 187172
Charleston County Circuit Court Clerk

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

THE STATE OF SOUTH CAROLINA

In The Supreme Court

RECEIVED

OCT 18 2019

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable Michael G. Nettles, Circuit Judge

Case No.: 2017-CP-10-2804

Gerald Cornell Green 187172.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Gerald Cornell Green 197172 appeals the Honorable Michael G Nettles' September 27, 2019 Order of Dismissal. Undersigned counsel received notice of entry of the order on October 15, 2019. A copy of the order on appeal is attached hereto.

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

October 16, 2019

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

Clerk of Court- Charleston CP
100 Broad Street
Charleston, SC 29401

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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 Charleston County Clerk of Court. I further certify that all parties required by Rule to be served have been served this October 16, 2019.

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

Cc
AG
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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Gerald Cornell Green, #187172, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2017-CP-10-2804 **ORDER OF DISMISSAL**

This matter is before the Court by way of an application for post-conviction relief ('PCR") filed on June 1, 2017 by Gerald Cornell Green ("Applicant"). An evidentiary hearing was convened on July 24, 2019 in Charleston County at the Charleston County Courthouse. Applicant was present and represented by James Falk, Esquire. Benjamin Limbaugh, Esquire of the South Carolina Attorney General's Office, represented the State.

Before the Court were the records of the Charleston County Clerk of court regarding the subject conviction, applicant's records from the South Carolina Department of Corrections, and the application.

I. PROCEDURAL HISTORY

Gerald Cornell Green (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its July 2015 term, the Charleston County Grand Jury indicted Applicant for possession of crack cocaine, third offense, (2015-GS-10-3239). During its August 2015 term, the Charleston County Grand Jury indicted Applicant for two counts of possession of heroin, third offense (2015-GS-10-3903, -3937), possession of crack cocaine, third offense (2015-GS-10-3902), and possession of cocaine, third offense (2015-GS-10-3901). During its October 2015 term, the Charleston County

Grand Jury indicted Applicant for possession of heroin, third offense (2015-GS-10-5545). The Charleston County Grand Jury subsequently indicted Applicant for trafficking in heroin (more than 4 grams but less than 14 grams) (2016-GS-3947). Martha K. Runey, Esquire, represented Applicant on all charges. Assistant Solicitor Truc Thi Thanh Tran, Esquire, prosecuted the case.

On July 20, 2016, Applicant appeared in the Charleston County Court of General Sessions before the Honorable R. Markley Dennis, Jr., circuit court judge, and pled guilty as indicted. Judge Dennis sentenced Applicant to twenty-five years imprisonment suspended upon the service of twelve years imprisonment for trafficking in heroin (more than 4 grams but less than 14 grams) and to concurrent terms of five years each for all remaining charges with credit for time served. Applicant did not appeal his pleas or sentences.

II. RELEVANT FACTS

On October 6, 2014, officers executed a lawful traffic stop on Applicant at the intersection of Mount Pleasant Street and Rutledge Avenue in Charleston. Plea Tr. 8:7-15. Officers found in plain view a plastic bag containing .58 grams of heroin. Id., 8:17-19. On February 10, 2015, officers conducted a lawful traffic stop on Applicant at Cannon Street and Rutledge Avenue and saw in plain view a clear plastic tube that was burnt on both ends. Id., 8:22-9:3. Applicant admitted the tube was his and he used it to smoke crack cocaine, and officers found on Applicant a bag containing heroin. Id., 9:5-10.

On February 27, 2015, officers observed Applicant sitting in his car behind a Best Western Hotel on Savannah Highway, and obtained consent to search his vehicle. Id., 9:11-16. Officers found two off-white rock-like substances that tested positive for crack cocaine and a razor blade with white powdery residue. Id., 9:16-19.

On March 28, 2015, officers responded to a concerned citizen call regarding a driver passed out in his car at the Kangaroo gas station on Folly Road. Id., 9:20-10-1. Officers arrived and found Applicant passed out in the driver's seat and observed in plain view a bag containing a white powdery substance. Id., 10:2-7. The powder tested positive for .95 grams of cocaine, and officers found within the bag a smaller bag containing .69 grams of crack cocaine and another bag containing .97 grams of heroin. Id., 10:8-14.

On November 16, 2015, agents with the City of Charleston drug enforcement task force received a tip that Applicant would be conducting a drug transaction in the area of Bogart and Norman Streets. Id. 10:15-23.Officers observed Applicant conducting a hand-to-hand transaction with an unknown subject, then walk away while putting something in his pocket. Id., 10-11. Officer conducted a pat down of Applicant and recovered 6.93 grams of heroin, Applicant admitting to making the purchase. Id., 10-11.

Upon hearing the above facts read to the Court at his plea hearing on July 20, 2016, Applicant admitted them as true. Id., 12:3-6.

III. ALLEGATIONS

In his initial application for post-conviction relief, Applicant alleged ineffective assistance of counsel. Specifically, Applicant alleged his "sentencing sheets stated he was pleading guilty without negotiation or recommendation, but the solicitor made a recommendation during the sentencing phase of his plea hearing. His counsel did not object to the recommendation and Applicant alleges counsel was ineffective for failing to object." At the evidentiary hearing, Applicant amended to include an allegation that counsel was ineffective for failing to investigate a potential warrantless wiretap on his cellphone.

IV. APPLICABLE LAW

In a post-conviction relief action, an 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 v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 4666 U.S. 668. First, the 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 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 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. (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.

V. FINDINGS OF FACT 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. 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).

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, an 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 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 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. (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 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, 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. Each allegation is addressed fully below:

Ineffective Assistance of Counsel

Applicant alleges that counsel was ineffective for failing to challenge a warrant for a wiretap he believes was placed on his phone.

Applicant testified at the evidentiary hearing that his plea was involuntarily given because there was a possible wire-tap on his phone and he did not know that at the time of the plea. Applicant testified that he received his discovery, but that there were only four pages. Applicant testified that police stopped him on the street because he matched the description of someone who just robbed someone of their gold chain. Applicant testified that he was searched and detained temporarily, there were no drugs in his pocket. Applicant testified that he read in his discovery that his phone was being tapped. Applicant testified that he did not know if a warrant was obtained to tap his phone, but he was aware of the potential issue before taking his plea. Applicant testified that documents received from the DEA were highly redacted, but there was no information about a warrant for his phone to be tapped. Applicant further testified that if there was a warrant he should have had it and him not having it means he believes they did not. Counsel testified that she was not provided with a warrant for the wire taps. Counsel testified

that she reviewed the discovery with Applicant and informed him that they could move to suppress the phone calls if they proceeded to trial. Counsel testified that it was Applicant's decision to plead guilty and that he did not wish to proceed with trial.

This Court finds that counsel advised him of his right to trial and that he waived that right by deciding to take a guilty plea. The plea court specifically reviewed all of the indictments with Applicant, asked if he wished to plead guilty, and he did in fact plead guilty. Applicant has the burden to show that there was a warrantless arrest and has failed to do so in this case. Applicant has presented nothing of evidentiary value in support of his allegation. This Court finds that counsel properly advised Applicant that he could pursue suppression of the evidence if he went to trial, but Applicant decided to pursue the plea. Therefore, this Court finds that Applicant has failed to show counsel was ineffective or how he was prejudiced by any alleged deficiency. This allegation is therefore dismissed with prejudice.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by 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,

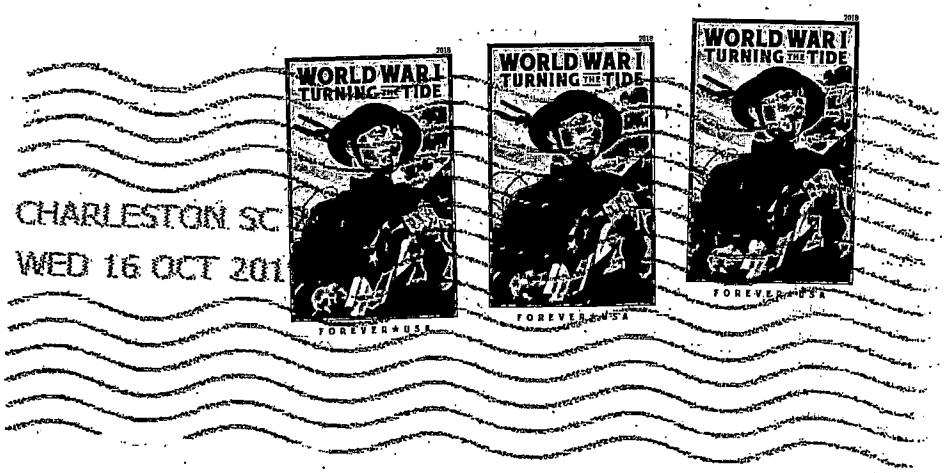
PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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 27 day of Sept, 2019.

MICHAEL G. NETTLES
Presiding Judge
Ninth Judicial Circuit



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