

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2020-CP-04-00904

Mary Patrick #340156 Petitioner,

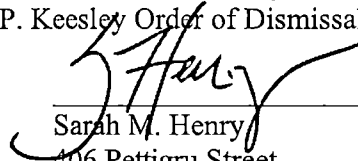
v.

State of South Carolina..... Respondent.

NOTICE OF APPEAL

Mary Patrick appeals the Honorable William P. Keesley Order of Dismissal dismissing Appellant's application for post conviction relief. On August 10, 2022 this order was filed with the clerk of court, and Appellant received written notice of entry of this order on August 16, 2022. A copy of the Honorable William P. Keesley Order of Dismissal is attached.

September 1, 2022



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Attorney for Petitioner

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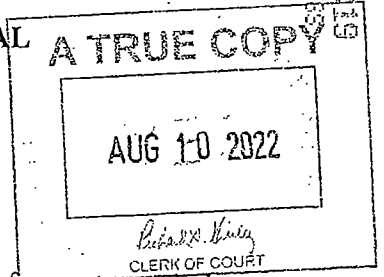
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
 COUNTY OF ANDERSON)
)
 Mary N. Patrick, #340156,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE TENTH JUDICIAL CIRCUIT

Case No. 2020-CP-04-00904

ORDER OF DISMISSAL A TRUE COPY



This matter comes before this Court by way of a *pro se* application for post-conviction relief filed by Mary N. Patrick (“Applicant”) on April 2, 2020. The State’s (“Respondent”) return to the application, which was served on August 24, 2020, included a motion for a more definite statement and a motion to dismiss some of Applicant’s claims. An evidentiary hearing in this matter was held before the undersigned via the WebEx virtual platform on March 1, 2022. Everyone who participated did so remotely. Applicant was present and was represented by Sarah M. Henry. Taylor Zane Smith of the South Carolina Attorney General’s Office represented Respondent. Following a thorough review of the record in its entirety and the evidence presented at the hearing, this Court finds that Applicant has failed to prove that she is entitled to post-conviction relief, and denies the application with prejudice.

PROCEDURAL HISTORY

Applicant is presently imprisoned in the South Carolina Department of Corrections. During its October of 2017 term, the Anderson County Grand Jury indicted her for trafficking in methamphetamine, 200 to 400 grams (2017-GS-04-2576). On April 16, 2018, Applicant proceeded to a jury trial with the Honorable R. Lawton McIntosh (“the trial court”) presiding. William G. Yarborough, III (“trial counsel”), represented Applicant at trial. At the conclusion of trial, the jury

found Applicant guilty as indicted. The trial court sentenced Applicant to imprisonment for twenty-five years and ordered her to pay a \$100,000 fine.

Trial counsel filed a timely notice of appeal. Deputy Chief Appellate Defender Wanda H. Carter (“appellate counsel”) of the South Carolina Commission on Indigent Defense represented Applicant on appeal. Appellate counsel filed a petition to be relieved as counsel and a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), arguing that the trial court erred in denying trial counsel’s motion for a directed verdict. The South Carolina Court of Appeals subsequently dismissed the appeal and relieved appellate counsel. *State v. Patrick*, Op. No. 2020-UP-069 (Ct. App. filed March 11, 2020) (per curiam). The remittitur was issued on May 5, 2020.

CURRENT PROCEEDING

In her *pro se* application for post-conviction relief, filed on April 2, 2020, Applicant raised multiple claims, which this Court interprets as follows: (1) trial counsel was constitutionally ineffective for not representing Applicant adequately due to his lack of research; (2) trial counsel was constitutionally ineffective for not objecting to hearsay; (3) trial counsel was constitutionally ineffective for not making “proper” motions before and after trial that would have resulted in a dismissal of the charges; (4) trial counsel was constitutionally ineffective for allowing a “prejudicial” jury to decide Applicant’s guilt; (5) trial counsel was constitutionally ineffective for not discrediting the testimony of law enforcement officers who, allegedly illegally, obtained no evidence; (6) the trial court erred in denying trial counsel’s motion for a directed verdict; (7) the trial court erred by not ensuring that the jury was impartial; and (8) the trial court erred by not dismissing the charge based upon the alleged illegality of the search and seizure.

At the start of the March 1, 2022, hearing before this Court, Respondent noted for the record that Applicant, through counsel, had served Respondent with an amended application on

the week prior to the hearing, which included the following claims: (1) trial counsel was constitutionally ineffective for not introducing legitimate evidence of third-party guilt; (2) trial counsel was constitutionally ineffective for not calling as a witness either Derek Green or Gary Patrick; (3) trial counsel was constitutionally ineffective for not adequately objecting to hearsay; and (4) trial counsel was constitutionally ineffective for not adequately preparing Applicant to testify and for failing to elicit certain testimony. Applicant withdrew the third claim raised in the amended application, and stated her intention to move forward only on the first, second, and fourth claims, as Respondent had laid them out. This Court finds that Applicant has abandoned and waived all claims other than these three, and will address only these in this order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Before this Court are: the records of the Anderson County Clerk of Court for Applicant's conviction and sentence; Applicant's records from the Department of Corrections; Applicant direct appeal records, including the notice of appeal, appellate counsel's *Anders* brief, the record on appeal, the Court of Appeals' letter to Applicant informing her that she could file a *pro se Anders* brief, the Court of Appeals' dispositive opinion, and the remittitur; and all filings in this matter. Set forth below are the relevant findings of facts and conclusions of law with regards to the claims that Applicant advanced at the evidentiary hearing, as required by S.C. Code Ann. §17-27-80 (1985).

Applicant's claim that trial counsel was constitutionally ineffective for not introducing legitimate evidence of third-party guilt.

Applicant raises a claim that trial counsel was constitutionally ineffective for not introducing evidence of third-party guilt. Applicant argues that trial counsel knew that Applicant's defense at trial would be that of third-party guilt, but that trial counsel did not introduce any evidence corroborating the fact that there had been third parties living in Applicant's home at the

time of the law enforcement officers' search of it, did not name anyone during the trial as a third party, and did not conduct any additional investigation into the people living in Applicant's home. Applicant argues that it was impossible to prove the defense due to trial counsel's failures.

In his opening statement at Applicant's trial, trial counsel said that the officers arrested Applicant because she was the only person at the home when the officers conducted their search, and questioned the reason that the officers charged only Applicant. Trial Tran. 104. During the prosecution's case-in-chief, trial counsel questioned one of the officers about whether he knew if anyone other than Applicant lived in the home. Trial Tran. 114. The officer answered that no one else had been present when the officers conducted the search because he knew that the officers would have stopped anyone who had tried to leave. Trial Tran. 115. Trial counsel also asked that officer about the number of bedrooms in Applicant's home. Trial Tran. 115. Trial counsel asked a second officer whether he had seen evidence that anyone else was living in the home with Applicant. Trial Tran. 124. A third officer testified that, based upon his surveillance of the home, he had determined that no women other than Applicant lived there. Trial Tran. 131. Trial counsel asked that officer whether he knew if anyone else lived in Applicant's home, and the officer testified that he had not seen any men's clothing in the home. Trial Tran. 131, 138. Trial counsel asked a fourth officer whether he had seen any men's clothing in the home, and used photographs of the interior of the home to do so. Trial Tran. 151. Trial counsel asked that officer whether officers had tested a crack pipe found in the home for fingerprints or DNA, and whether he had seen a guitar in the home. Trial Tran. 153. Trial counsel asked a fifth officer whether he had seen men's clothing and a guitar in the home. Trial Tran. 173. Trial counsel elicited testimony from the prosecution's forensic chemist that the officers could have, but did not, test the drugs' containers for fingerprints and DNA. Trial Tran. 192-93.

Trial counsel elicited testimony from Applicant that her husband Gary Patrick (“Patrick”) had been living with her in the house, that she had falsely claimed possession of the methamphetamine (“meth”) because she had been trying to protect Patrick, who had been ill, and that the closet in which the bulk of the meth had been found was not hers. Trial Tran. 209, 211, 213, 228, 231. Applicant testified that someone named Derrick Green (“Green”) had been staying at the house off and on, and that Green had left her house shortly before the officers’ search began. Trial Tran. 212. The trial court overruled the solicitor’s objection to trial counsel’s questions that raised a third-party guilt inference. Trial Tran. 215. Applicant testified that she had heard that Green was a drug dealer. Trial Tran. 227-28. In his closing argument, trial counsel argued that the photographs from the interior of the home showed that there had been men’s clothing in there. Trial Tran. 267, 271. Trial counsel argued that the officers had done an incomplete investigation by not testing the meth’s wrappings for fingerprints and DNA. Trial Tran. 268. Trial counsel argued that people other than Applicant had been in and out of her house. Trial Tran. 271.

Applicant testified before this Court about the officers’ search of her home. She testified that she had been in the bathroom when the officers arrived, and that they found meth in her home. She testified that no one else was in the house at the time, although she said that Patrick and Green had been living there, too. She testified that the officers found the meth in multiple locations throughout the home. She testified that the officers found meth in the closet of Green’s bedroom—which was how she described the room in her house—and found some in a pair of shorts that were located on the floor in her bathroom. She testified that the meth found in her “part” of the home weighed eighteen grams, while there were over 200 grams in Green’s room. She testified that the officers found drug paraphernalia in her bathroom and scales in the kitchen. She testified that she told the officers at the scene that the meth was hers because she had been naked at the time, and

the officers told her that they would not let her get dressed until she told them to whom the meth belonged. She testified that the officers' testimony that she had been wearing a shirt and underwear during the interview had not been true, and she said that the officers had given her a towel or blanket to use to cover herself up. She testified that she had been naked at the scene for an hour during the questioning, and that none of the officers present had been female.

Applicant testified that she told trial counsel that the meth had not been hers. She testified that Green had claimed ownership of the meth in front of trial counsel, but that Green had not shown up for trial. She testified that she had told trial counsel that Patrick had also been involved with the meth. She denied that the meth found in her shorts had been hers. In explaining the meth's presence in her pocket, she testified that she had picked the meth up off of a table and put it in her pocket before taking a shower. She testified that Patrick had talked to trial counsel once, but she could not remember what the two discussed. She testified that Green asked trial counsel what would happen if Green claimed ownership of the meth at Applicant's trial, and that trial counsel told Green that he needed to have a good lawyer when he gave his testimony. She testified that trial counsel had known that Patrick and Green had had the meth, and that Applicant had not had it. She testified that trial counsel did not issue a subpoena for either Patrick or Green. She testified that Patrick had been in the hospital on the first day of her trial; she said that someone asked about his presence, but did not ask again after the first day. She testified that Patrick had been present on the final two days of trial, but that trial counsel had still not called him as a witness. She believed that Patrick would have truthfully admitted at trial that the meth was his, if he had been called as a witness. She testified that Patrick has since died and that she does not know Green's whereabouts. She thinks her trial would have ended different had Green testified truthfully. She testified that

trial counsel did not ask her while she was testifying at trial if the meth had belonged to Patrick or Green.

Trial counsel testified before this Court that Applicant's only defense had been third-party guilt. He testified that it was tough to defend Applicant because she had been the only person at the scene when the officers conducted their search, the officers found drugs in Applicant's clothing, and the officers had been tracking Applicant for some time beforehand. He testified that Applicant told the officers that the meth had been hers. He testified that he and Applicant discussed the fact that she had possessed the meth, that she brought two people to meet him whom she said would take responsibility for the drugs, and that neither of the people would take responsibility. He testified that he heard lots of different stories about the meth. He testified that Applicant would bring people to him whom she claimed knew stuff about the case, but that the people had never said the things that Applicant hoped they would. He testified that he did not think that there would be anybody who would go to trial and take responsibility for the meth because the case involved "a lot of time and a lot of drugs."

Trial counsel testified that he questioned the officers at trial about the presence of men's clothing in the home, which he felt was in pursuit of a third-party guilt defense. He testified that his questions about whether the officers tested for deoxyribonucleic acid ("DNA"), he had been grasping at straws to help her defense. He testified that Applicant denied at trial that she had had any knowledge about the meth and claimed that it had been Patrick's. He testified that he was not sure what "happened" with Patrick, but he knew that Patrick would not have taken responsibility for the meth, even though trial counsel told both Applicant and Patrick that Applicant was in a bad spot. He testified that Green had never told trial counsel that the meth was his, although he told trial counsel that he had bought meth from Applicant's house in the past. He testified that he

questioned Applicant at trial about the layout of the house, and that the meth was found in a closet that was not hers. He testified that he chose not to call Green as a witness because he thought that his testimony would have harmed Applicant's defense and would not have helped. He testified that he would have called Green as a witness if he had thought it would help, but that Green had not been cooperative as trial approached. He testified that he was aware that Green had lived in the house. He testified that Patrick's and Green's stories changed frequently, so he had been unsure what they would say on the witness stand. He testified that he remembered that Applicant blamed Patrick for the drugs.

All defendants have a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). A post-conviction relief applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that his lawyer was constitutionally ineffective, he must prove that the conduct of his lawyer "so undermined the proper functioning of the adversarial process that [that conduct] cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the post-conviction relief court applies the two-pronged test outlined in *Strickland*. First, the applicant must prove that the performance of his lawyer was deficient. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting *Strickland*). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). In order for a post-conviction relief applicant to successfully prove that his defense attorney's performance was deficient, the applicant must prove "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Butler v. State*,

286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quotation omitted). “The proper measure of counsel’s performance remains whether he has provided representation within the range of competence required of attorneys in criminal cases.” *Id.* (citations omitted). The “preeminent authority for all” courts when they are considering an applicant’s claim of constitutional ineffectiveness requires that the courts be highly deferential to a defense lawyer’s performance because:

[I]t 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 A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight; to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.

Id. at 444-45, 334 S.E.2d at 815-16 (quoting *Strickland*). An applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. “The burden of rebutting this presumption rests squarely on the defendant, and it should go without saying that the absence of evidence cannot overcome it. In fact, even if there is reason to think that counsel’s conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen.” *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (quotation omitted).

Second, the deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for [the lawyer’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. “Representation is an art, and an act or omission that is unprofessional in one case may be sound of even brilliant in another. Even if a defendant shows that particular errors of counsel were

unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.” *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (quotation omitted).

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 a lawyer’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. at 697. Moreover, *Strickland* does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, *Strickland* requires the post-conviction relief applicant to prove that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 697. Therefore, the function of the post-conviction relief court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney. *Id.* at 690.

This Court finds that Applicant has failed to prove that there was any deficiency in trial counsel’s performance with respect to his handling of the third-party guilt defense. “The admissibility of evidence of third-party guilt is governed by *State v. Gregory*, 198 S.C. 98, 16 S.E.532 (1941).” *State v. Cope*, 405 S.C. 317, 341, 748 S.E.2d 194, 206 (2013). “[T]he evidence offered by an accused as to the commission of a crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.” *Gregory*, 198 S.C. 98, 16 S.E.2d at 534 (quotation omitted). But before

such testimony can be received, there must be proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.” *Id.* 198 S.C. 98, 16 S.E.2d at 535 (quotation omitted). “[E]vidence of third-party guilt is appropriately managed by evidentiary rules such as Rule 403, SCRE.” *State v. Brooks*, 428 S.C. 618, 635, 837 S.E.2d 236, 245 (Ct. App. 2019) (citing *Holmes v. South Carolina*, 547 U.S. 319, 327 (2006)).

Trial counsel did everything that he reasonably could have done to present the defense, to the extent possible, through the evidence and argument. Trial counsel’s closing argument was essentially that Applicant was not guilty just because meth had been found in her home, pointed out that there was evidence that others had been in Applicant’s home, and offered explanations for the officers’ failure to find the true identity of the person to whom the meth belonged. Furthermore, Applicant has failed to prove that trial counsel could have done more at trial to establish the defense of third-party guilt. In her testimony before this Court, Applicant did something that she did not do at trial: she explicitly stated that the meth belonged to Patrick and Green. Other than this, she offered no evidence that could arguably be used to support a defense of third-party guilt; however, Applicant did not offer in “proof of connection with [her testimony], such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.” *Id.* 198 S.C. 98, 16 S.E.2d at 535. Even had Applicant testified at her trial in the same way that she did before this Court, she would not have been entitled to a jury charge on third-party guilt.

This Court turns now to the prejudice prong of *Strickland*. The officers who testified in the pre-trial hearing pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964), testified that they let Applicant get dressed before they questioned her, or that she had been wearing clothing during the questioning. Trial Tran. 66, 72, 80. The officers also testified about the changes in Applicant's statements throughout the questioning, which included the following: a denial that there were any drugs in the home because she had already gotten rid of them, a statement that the drugs found in Applicant's pocket were the only drugs in the house and that they belonged to someone named Nathan Blake Kelly, a statement that Applicant helped Kelly break up the methamphetamine into individual baggies in her house for sale, a statement that she had gotten drugs from someone named Gene Finley, a statement that Applicant insinuated that the meth found in her pocket was hers, and a statement that the drugs found in the closet had been delivered to her by Kelly for distribution from her home. Trial Tran. 69-71, 74-76, 83-84. In finding that Applicant's statements were given voluntarily, the trial court found that the officers remedied Applicant's initial lack of clothing "as best they could under the circumstances fairly timely." Trial Tran. 87-88.

During the prosecution's case-in-chief at trial, the jury heard from the officers about the changes in Applicant's statements throughout the course of the questioning. Trial Tran. 112-14, 122-23. The jury also heard from Applicant, who testified: that she did not know that there had been drugs in the house, that she had falsely told the officers that the drugs were hers to keep Patrick from getting arrested and because she was scared, that the drugs may have belonged to one or more people whom Applicant had "seen [] that night and [] told them to take them out of [the] house," and that she did not know anything about the drugs. Trial Tran. 210-11. On cross-examination, Applicant admitted that the shorts in which some meth was found had been located near her when the officers arrived, denied that she had known that there was meth in the pocket of

the shorts, which she had just taken off, denied that the shorts looked like they were hers, denied that she had known that there was a drug pipe laying on the vanity of the bathroom in which she was located when the officers arrived, said that she did not remember what she told the officers, said that she told the officers whatever they wanted to hear, denied that she knew the drug dealers whom she had named to the officers, said that she claimed the drugs only to keep Patrick out of trouble, denied that the drugs had been hers, and said that she told the officers that Kelly delivered to her about the same amount of meth at a time that the officers found in her house because she had been merely agreeing with the officers. Trial Tran. 223-30.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different but for the alleged deficiency in trial counsel's performance. After considering all of the evidence at trial, the jury obviously found that Applicant's testimony was not credible, and that the officers' testimony was credible. It is easy to see the reason for that, as Applicant's trial testimony ranged widely, in contradictory directions, and provided no credible explanation for the presence of the drugs found in her home and pants pocket and the presence of drug paraphernalia in the home; by way of contrast, the testimony from the officers was consistent in relaying Applicant's statements to them. Applicant's lack of credibility did not end with her trial, as this Court finds that her testimony before this Court was not credible, either. Applicant repeated her testimony that the officers questioned her while she was in a state of undress, but the trial court found that the officers remedied that situation before questioning her, and this Court will not contradict that finding here; at any rate, this Court finds that Applicant's testimony that she was naked during the questioning is not credible. Applicant testified before this Court that none of the meth was hers, but she then contradicted herself by saying that she had put into her pocket the baggie of meth that the officers found there during the

search. Applicant's testimony on that point contradicted her trial testimony, wherein she denied having any knowledge of the drugs and tried to deny that the shorts were even hers. In a contradictory fashion, she blamed both Green and Patrick for the presence of the meth in her house. And Applicant still has not given a credible and satisfactory explanation for the presence of drug paraphernalia in her home in places where she reasonably should have seen them. Overall, Applicant's testimony before this Court about the meth was not credible. Additionally, trial counsel's testimony suggested that Applicant's statements to him about the meth were not always consistent. Applicant has failed to convince this Court that, even if she had presented the testimony at trial that she gave before this Court, there is a reasonable likelihood that the jury's verdict would have been any different.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for not introducing legitimate evidence of third-party guilt because she has failed to prove that there was any deficiency in trial counsel's performance with respect to the issue and because she has failed to prove that there was any resulting prejudice. This claim is denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for not calling as a witness either Derek Green or Gary Patrick.

This Court finds that Applicant has failed to prove that there was any deficiency in trial counsel's performance with respect to his decision not to call Green and Patrick as witnesses at trial. Trial counsel testified before this Court that neither Patrick nor Green had ever claimed responsibility for the drugs, although he understood that Applicant wanted one or both of them to do so. He testified that their stories to him changed over time. He testified that Green became less cooperative with him as the trial approached. He testified that he decided ultimately that neither witness would help Applicant's defense at trial. Additionally, there is evidence that Patrick was in the hospital for at least part of Applicant's trial. Under those circumstances, Applicant's decision to proceed without calling Green or Patrick as a witness was reasonable under prevailing professional norms. *See Edwards v. State*, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011) ("A witness's credibility and demeanor is crucial to an attorney's trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision not to call a witness with serious credibility questions"). Applicant's testimony that Green and Patrick told plea counsel that the meth had been theirs is not credible, but trial counsel's testimony that they did not tell him that is credible.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different had Green or Patrick testified. An "applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' [sic] failure to testify at trial." *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998); *see also Dempsey v. State*, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2015) (holding that the PCR court's finding that Dempsey was prejudiced by trial counsel's failure to call an expert at trial to

rebut the State's expert was merely speculative when Dempsey failed to have an expert testify at his PCR hearing), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). An applicant's "mere speculation" as to what a witness's testimony at trial would have been "cannot, by itself, satisfy the applicant's burden of showing prejudice." *Glover v. State*, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995). Applicant did not produce anything from either Green or Patrick for this Court's consideration, but merely speculated that they would claim responsibility for the meth, absolving her. Applicant has therefore failed to meet her burden with respect to the prejudice prong of *Strickland*.

Applicant has failed to prove that trial counsel was constitutionally ineffective for not calling as a witness either Green or Patrick because she has failed to prove that there was any deficiency in trial counsel's performance and because she has failed to prove that there was any resulting prejudice. This claim is denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for not adequately preparing Applicant to testify and for failing to elicit certain testimony.

Applicant raises a claim that trial counsel was constitutionally ineffective for not adequately preparing her to testify at trial and for failing to elicit certain testimony. Applicant did not present any argument in support of this claim before this Court. The only testimony from Applicant that could be used to support the claim was that trial counsel did not ask her while questioning her at trial if Patrick or Green owned the meth. Trial counsel testified before this Court that he talked with Applicant in advance about what she could expect if she were to testify at trial. He testified that he prepared Applicant for her testimony as best as he could, and that he spent a lot of time preparing with her.

This Court finds that Applicant has failed to prove that there was any deficiency in trial counsel's performance with respect to his preparation of Applicant for her testimony and his

questioning of her at trial. At trial, trial counsel asked Applicant if she “[knew] who those drugs might belong to?” Trial Tran. 210-11. Applicant answered as follows, “I know they could belong to – I seen them that night and I told them to take them out of my house. And he left to take them out, but he came back to stay the night.” Trial Tran. 211. Applicant did not specifically identify the person or people to whom she was referring, but that was her chance to do so. Applicant has not proven that there was any reason for trial counsel to question her further about that person’s identity. The only evidence before this Court about trial counsel’s pre-trial preparation with Applicant regarding her testimony was trial counsel’s testimony that he worked with Applicant to prepare her. Applicant has not proven that there was anything additional that trial counsel should have done that he did not do.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different but for the alleged deficiency in trial counsel’s performance. As already noted in this order, trial counsel elicited testimony from the prosecution’s witnesses and from Applicant that could have caused the jury to believe that someone other than Applicant was living in her home, Applicant testified that the meth was not hers and that others had been in her home who could have left the meth there, and trial counsel argued that Applicant’s mere proximity to the meth did not make it hers. Applicant’s explicit testimony now that the meth was Patrick’s or Green’s has not made her defense more convincing than it was at trial, and she has not proven that there it is likely that she would have been found not guilty had trial counsel pulled one or both of those names out of her at trial. Neither has Applicant proven to this Court that it is more likely that she would have been found not guilty had trial counsel spent even more time preparing her for her trial testimony.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for not adequately preparing her to testify at trial and for failing to elicit certain testimony because Applicant has not proven that there was any deficiency in trial counsel's performance and because she has failed to prove that there was any resulting prejudice. This claim is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds that Applicant has not proven any constitutional violations or deprivations that would require this Court to grant her application for post-conviction relief. Therefore, this application is denied and dismissed with prejudice.

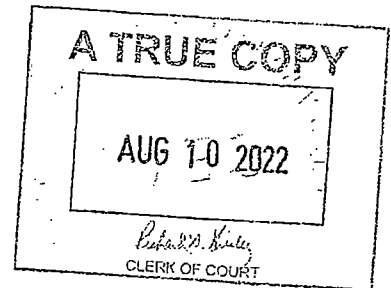
IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 29th day of July, 2022.

William P. Keesley
William P. Keesley
Presiding Judge

Edgefield, South Carolina



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