THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

H. Steven DeBerry, IV, Circuit Court Judge

Case No. 2019-CP-26-06870

Jawan White, Appellant,

Vs.

State of South Carolina, Respondent,

NOTICE OF APPEAL

Jawan White, Appellant, appeals trial court's Order of Dismissal, dated October 10, 2022, dismissing his application for PCR relief, and the Court's Order, dated November 14, 2022, denying his motion for reconsideration under Rule 59(e).

November 22, 2022

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)

Jawan White #337138,

Applicant,

vs.

State of South Carolina

Respondent.

ORDER
Case No.: 2019-CP-26-06870

The Applicant, Jawan White, requests the Court to reconsider the Order dated October 10, 2022, and filed in the Horry County Clerk of Court's office.

Having duly considered the motion of the Applicant, this Court has determined that it's original ruling of October 10, 2022, is fully supported by the law and the evidence and is hereby ratified and reconfirmed. The motion is therefore DENIED.

AND IT IS SO ORDERED.

Dated: 11/14/2022

H. Steven DeBerry, IV
Judge, Twelfth Judicial Circuit

FILED
HORRY COUNTY
2022 NOV 18 P 2:07
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Jawan White, #337138, Applicant,	)	Case No.: 2019-CP-26-06870
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter comes before this Court by way of Applicant's post-conviction relief application filed October 25, 2019. Respondent made its return on May 4, 2020, requesting an evidentiary hearing be convened. An evidentiary hearing was held on June 1, 2022, at the Horry County Courthouse. Thurmond Brooker, Esquire, represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Prosecutor Martin Spratlin also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. During its April 2012 term, the Horry County Grand Jury indicted Applicant for trafficking in heroin, more than twenty-eight grams (2012-GS-26-01319). Applicant was represented by John Hilliard, Esquire. Assistant Solicitor Martin Spratlin of the Fifteenth Circuit Solicitor's Office prosecuted the case. On June 13-14, 2013, Applicant proceeded to a jury trial before the Honorable Larry B. Hyman, circuit

court judge. He was found guilty of the crime charged. Judge Hyman sentenced Applicant to twenty-five years' imprisonment.

A notice of appeal was filed on February 16, 2017. In his appeal, Applicant argued that the trial court abused its discretion in denying his motion for a new trial because the trial court improperly charged the jury that guilt could be found on either the legal theory of conspiracy to purchase heroin or attempt to purchase heroin and that he was denied the right to confront accusers under the Confrontation Clause of the Sixth Amendment. The South Carolina Court of Appeals affirmed the trial court's holding, pursuant to Rule 220(b), SCACR. The remittitur was issued July 31, 2019.

Summary of Relevant Facts

In August 2011, the Horry and Georgetown County joint Drug Enforcement Unit began targeting Applicant in an investigation. (Tr. 109). At trial, Randy Miller, a Myrtle Beach Police Department Officer, testified that he received relevant information that prompted the investigation. (Tr. 109). Miller met with and ultimately employed a confidential informant, Adrian Chavez, to meet with Applicant to arrange a heroin drug buy. (Tr. 109-10). A second informant, employed by a different government agency, also attended this meeting. (Tr. 110).

At trial, Chavez testified that at this initial meeting, Applicant expressed that he wanted to buy four ounces of heroin from Chavez for $10,000. (Tr. 81-82). Applicant and Chavez agreed that Applicant would call Chavez when he was ready to complete the transaction. (Tr. 83). The conversation was recorded by Chavez on a device provided by Miller. (Tr. 111). Miller observed the meeting from a distance and later watched the recording taken by Chavez. (Tr. 83, 112).

Three days later, Applicant called Chavez to complete the purchase. (Tr. 83-84). On August 20, 2011, Miller provided Chavez with approximately four ounces of imitation heroin

and followed Chavez to the Coastal Grand Mall. (Tr. 117). Applicant arrived and got into Chavez's car. (Tr. 119). Applicant gave Chavez $10,000 and Chavez gave Applicant the imitation heroin. (Tr. 90). Miller and other officers watched the transaction from a distance. (Tr. 119). Upon seeing the exchange, the officers approached the car and arrested Applicant. (Tr. 119). When the police approached Applicant, the imitation heroin was tucked in Applicant's waistband. (Tr. 119). $10,000 was recovered from the front driver's side of the vehicle. (Tr. 120). After being advised of his *Miranda* rights, Applicant told officers he came to the mall to purchase four ounces of heroin for $10,000. (Tr. 127). Chavez recorded the transaction. (Tr. 88).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. "Trial counsel as ineffective for failing to object to the court's erroneous charge to the jury on conspiracy."
2. "The trial judge erroneous[ly] charge[d] the jury on conspiracy."
3. "Trial counsel was ineffective for failing to object to testimony presented at trial in violation of the hearsay rule and the confrontation clause of the United States."

At the PCR hearing, Applicant proceeded forward on the above allegations. Any other potential allegations are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Prosecutor Testimony

Prosecutor testified that the case revolved around a reverse heroin buy involving first a federal confidential informant, and then a state informant. He stated this was recorded on audio and video. Concerning jury instructions, Prosecutor testified that he read the applicable statute, but that the only attribute that fit was attempt. He stated he did not think he argued this case

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could constitute a conspiracy but deferred to the record concerning whether he requested a conspiracy charge. He stated that the State requested two charges: one taken directly out of the applicable statute and the other out of an applicable case law involving imitation heroin.[1] Prosecutor testified that, in closing, he did not argue conspiracy, just attempt.

Prosecutor testified that the federal informant was not available to testify. Prosecutor testified that statements by this informant were admissible because they were non-testimonial and that they did not constitute hearsay. He stated that the statements were relevant combat the entrapment defense. Specifically, they were concerning how a certain weight was set by someone other than Applicant, which went to the entrapment defense. Prosecutor stated that the entrapment defense was only a partial defense because he was predisposed to commit the crime. He stated that if the entrapment defense was successful, Applicant would have been found not guilty.

Applicant Testimony

Applicant stated that Counsel represented him for about two to three months. He stated that he did not go over discovery, trial strategy, a defense of entrapment, any constitutional rights waivers, or the Confrontation Clause. He stated he did not appear for trial or present to talk to Counsel at trial. He stated that he did not discuss a potential conspiracy with Counsel. He stated he did not remember having any conversations with Counsel.

On cross-examination, Applicant stated that he spoke with Counsel prior to trial. He stated that this conversation was focused on him retaining Counsel and Counsel telling him to come back for another hearing to prepare a strategy. He stated no further contact with Counsel was made. He stated he did not intentionally stop contacting Counsel, but that it just happened.

[1] The applicable case cited is *State v. McCluney*, 361 S.C. 607 (2004).

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He stated he did not know why he did not appear at trial. He stated that part of the reason was because he did not talk to counsel. He stated he did not know if Counsel tried to contact him prior to trial. He stated they never talked to Counsel about the confidential informants. He stated that he knew there were two confidential informants involved. He stated that the federal confidential informant was deported.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, direct appeal records, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "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, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington.*

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Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland,* 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

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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. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Failure to Object to Jury Charge

Applicant contends that Counsel was ineffective for failure to object to jury instructions regarding conspiracy and that the Court issued an erroneous instruction regarding conspiracy. Whether failure to object constitutes deficient performance generally hinges on whether a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel"). In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in a way that violates the Constitution. *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 740 (2009).

The relevant section of jury charge reads:

> The State must prove, beyond a reasonable doubt, that the Defendant knowingly sold, manufactured, cultivated, delivered, purchased, brought into this State, provided financial assistance or otherwise aided, abetted, attempted or conspired to sell, manufacture, cultivate, deliver, purchase, or bring into this State, and was knowingly in actual or constructive possession, knowingly attempted to become in actual or constructive possession of heroin.
>
> In order to find the Defendant guilty, the State must also prove, beyond a

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> reasonable doubt, that the amount of the heroin, or any mixture containing heroin, was twenty-eight grams or more. Under trafficking in heroin, twenty-eight grams or more, the presence of only imitation heroin at the transaction is irrelevant if the State proves, beyond a reasonable doubt, that the defendant conspired or attempted to purchase more than twenty-eight grams of real heroin.

(Tr. 163).

This Court finds that Counsel was not ineffective on this ground. The instructions given at trial consisted of the applicable statute being recited almost verbatim,[2] followed by the Court charged based upon a relevant case almost verbatim.[3]

United States Supreme Court and South Carolina law makes clear that a court may define an offense to a jury by charging the full language of the statute, even when not every term is applicable in the given case. *See City of Columbia v. Moser*, 280 S.C. 134, 311 S.E.2d 920 (1983) (finding that the court committed no error in charging the entire statute even when there was only an indication of lewdness, not assignation or prostitution, because the language complained was not offensive or confusing enough to mislead the jury, resulting in prejudice to the defendant). *See also Schad v. Arizona*, 501 U.S. 624, 636 (1991) ("Because statutes frequently enumerate alternatives that clearly are mere means of satisfying a single element of an offense, adoption of the dissent's approach of requiring a specific verdict as to every alternative would produce absurd results."); *Crain v. United States*, 162 U.S. 625, 636 (1896) (approving "a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute."). This Court finds nothing offensive about the instruction

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[2] The statute prohibits the selling, manufacturing, cultivation, delivery, purchasing or bringing into the state of heroin, or aiding, abetting, attempting or conspiring to do the same. S.C. Code Ann. 44-53-370(e).

[3] "The presence of only imitation cocaine at the transaction is irrelevant to Respondent's intent and thus irrelevant to the State's conspiracy and attempt arguments." *State v. McCluney*, 361 S.C. 607, 609-10, 606 S.E.2d 485, 486 (2004).

and finds Counsel was not deficient for failing to object to an otherwise valid instruction.

Additionally, this Court finds Applicant suffered no prejudice because the State's theory of the case was clearly that Applicant attempted to purchase heroin. The prosecutor repeatedly argued that Applicant attempted to purchase heroin both in opening and closing arguments. (Tr. 65, 67, 141, 143-44, 147-48, 150). Further, this theory was unambiguously presented through witnesses' testimonies in the State's case-in-chief. Accordingly, this Court finds that even if the instructions were in some way improper, they did not cause the jury to reach an improper conclusion. Accordingly, relief is denied on this ground.

Failure to Object to Testimony – Confrontation Clause/Hearsay

Applicant clams Counsel was ineffective for failing to object to testimony constituting hearsay in violation of the Confrontation Clause. This was elicited through introduction of a video as well as during cross-examination of State witnesses Chavez and Miller.

This Court finds that none of the testimony elicited did not constitute hearsay. The video was elicited to demonstrate Applicant's conduct; not for the truth of the matter asserted. Testimony elicited in cross-examination was elicited *by defense counsel* to show that the government chose the amount of heroin to be purchased to establish a partial entrapment defense. The admission of non-hearsay does not implicate a defendant's confrontation rights. *Crawford v. Washington*, 541 U.S. 36, 51 n. 9 (2004) ("The Clause ... does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."); *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir.1985) (holding that an agent's testimony concerning information received from another agent "was offered not for its truth but only to explain why the officers and agents made the preparations that they did in anticipation of the appellant's arrest. As such it was not inadmissible hearsay."). Counsel was not unreasonable

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because the video and testimonies in question were not objectionable. This is particularly true because the bulk of the testimony in question was elicited by Counsel to establish their chosen defense. Counsel is not deficient for failing to object to his own questions strategically utilized to establish a defense at trial.

Additionally, no prejudice is found. The evidence of guilt in this case was overwhelming, specifically because the exchange was documented on audio and video. *State v. McDonald*, 412 S.C. 133, 142, 771 S.E.2d 840, 844 (2015), *quoting Schneble v. Florida*, 405 U.S. 427, 430 (1972) (finding that a Confrontation Clause violation does not require reversal where the properly admitted evidence of guilt is so overwhelming it is clear beyond a reasonable doubt that the improper use of the admission was harmless error). Thus, this Court finds Counsel was not deficient and that Applicant has not met his burden of proof in finding prejudice resulted from any alleged deficiency. Accordingly, relief is denied on this ground.

[findings of fact and conclusions of law on following page]

Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 10 day of October, 2022.

H. STEVEN DEBERRY, IV
Presiding Judge
Fifteenth Judicial Circuit

10/10/2022, South Carolina.