

STATE OF SOUTH CAROLINA)
 COUNTY OF ABBEVILLE)
 Rickey Santione Henley, #290970,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE EIGHTH JUDICIAL CIRCUIT

Case No.: 2021-CP-01-085

ORDER OF DISMISSAL

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This matter is before the Court by way of an application for post-conviction relief filed by Applicant Rickey Santione Henley on March 23, 2021, and amended on November 2, 2021. An evidentiary hearing was scheduled to be held on August 2, 2022, at the Newberry County Courthouse. Prior to the hearing, however, counsel for the parties agreed that Applicant’s ineffective assistance of appellate counsel claim—the only cognizable claim raised in his amended application—presented a purely legal issue that could be resolved as a matter of law. Accordingly, the Court permitted the parties to brief the issue rather than proceed with the evidentiary hearing. After reviewing the parties’ briefs and all the other records before the Court, the Court finds Applicant’s claim of ineffective assistance of appellate counsel fails as a matter of law and, therefore, the post-conviction relief application should be denied and dismissed with prejudice.

I. Procedural History

Applicant is confined in the South Carolina Department of Corrections (SCDC). Applicant was indicted at the July 2012 term of the Abbeville County Grand Jury for first-degree burglary (2012-GS-01-00348) and larceny, \$2,000 or less (2012-GS-01-00349). Applicant was represented by Assistant Public Defenders Patricia A. Bolen and Yasha Patel of the Eighth Circuit Public Defender’s Office. Assistant Solicitor Demetri Andrews of the Eighth Circuit Solicitor’s Office prosecuted the case.

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On April 8, 2015, Applicant proceeded to a jury trial before the Honorable R. Lawton McIntosh, circuit court judge. At the conclusion of trial, the jury acquitted Applicant of larceny; however, the jury remained hung as to the charge of first-degree burglary. Judge McIntosh declared a mistrial as to the burglary charge.

On April 4, 2016, the State retried Applicant for first-degree burglary before the Honorable Eugene C. Griffith, Jr., circuit court judge, and a jury. At the conclusion of trial, the jury convicted Applicant. Judge Griffith sentenced Applicant to imprisonment for a term of twenty-four years.

Applicant timely filed a notice of appeal and was represented on appeal by Appellate Defender Laura R. Baer of the Office of Appellate Defense, who raised the following issues:

1. Did the trial court err in denying Appellant's motion to quash the indictment based on Double Jeopardy where the trial court failed to apply the proper test under *Yeager* and where Appellant's prior acquittal of larceny necessarily decided that Appellant was not the person who stole the homeowner's laptop, the sole item missing after the burglary, precluding the State from relitigating Appellant's identity as the intruder or intent to steal?
2. Did the trial court err in denying the defense's motion to admit evidence of Appellant's acquittal on the prior larceny charge where the State's theory of the case continued to be that the burglar's intention was to steal?
3. Did the trial court err in limiting the admission of Jolene Gray's testimony from the prior trial where Gray was unavailable to the defense and her testimony provided evidence that the police had an opportunity to obtain a cigarette smoked by Appellant from outside his home?
4. Did the trial court err in denying the defense's motion to exclude evidence regarding DNA testing conducted on the cigarette butt purportedly found at the scene where the State's negligence in the destruction of the evidence constituted bad faith and where the State could not present a complete chain of custody for the cigarette butt such that the cigarette butt was not available for comparison to the crime scene photograph at trial?

After briefing and oral arguments, the Court of Appeals affirmed Applicant's conviction, holding that Applicant's acquittal for larceny did not preclude the State from retrying Applicant

for first degree burglary, evidence of Applicant's larceny acquittal was irrelevant, and the trial court's error in allowing the State to read portions of testimony from Applicant's former girlfriend constituted harmless error. *State v. Henley*, 428 S.C. 649, 837 S.E.2d 639 (Ct. App. 2019).

On March 16, 2020, Applicant, through appellate counsel Susan B. Hackett of the Office of Appellate Defense, filed a petition for a writ of certiorari with the South Carolina Supreme Court, presenting the same issues raised to the South Carolina Court of Appeals. On October 19, 2020, the Supreme Court denied Applicant's petition for a writ of certiorari through a written order. The remittitur was issued on October 19, 2020.

II. Facts Giving Rise to the Conviction

On February 15, 2012, Rick Culbreth drove through his neighborhood and noticed a grey car backed into the carport of his neighbors' house and a black male running from the front door to the side door. (Tr. p. 124, l. 20–p. 127, l. 4). Recognizing the situation was abnormal, Culbreth turned around and went back to the house. (Tr. p. 126, l. 18–p. 127, l. 4). When Culbreth returned, he observed the man standing in the open doorway of the house. (Tr. p. 127, ll. 5–14). Culbreth noticed that the rear passenger side door of the stranger's car was open. (Tr. p. 127, ll. 15–20). After seeing Culbreth, the man got into his vehicle and pulled out of the driveway. (Tr. p. 128, ll. 7–17). While leaving, the intruder stopped in front of Culbreth's vehicle and asked if Culbreth needed any help with lawn care, and Culbreth replied that he did not. (Tr. p. 128, ll. 7–17). As the intruder left, Culbreth looked into his rearview mirror and was able to get a partial license plate number from the vehicle. (Tr. p. 129, ll. 17–24). After the intruder left, Culbreth called 911 and provided the police with a description of the car as well as the partial license plate number "HSN 454." (Tr. p. 129, ll. 19–24; p. 132, l. 6–p. 133, l. 9). At trial, Amanda Moss, the owner of the

house at the time of the incident, testified that the doorframe of the side carport door had been damaged and part of it had been broken off. (Tr. p. 149, l. 18–p. 150, l. 18).

Deputy Patrick Thompson, of the Abbeville County Sheriff's Office, received a radio call about a possible burglary and proceeded to the home. (Tr. p. 157, l. 22–p. 158, l. 4). While processing the scene, Deputy Thompson noticed footwear impressions on the carpet inside the house, along with a cigarette butt which Deputy Thompson recovered and placed into evidence. (Tr. p. 159, ll. 1–25; p. 162, l. 16–p. 163, l. 23). After speaking with Culbreth, Deputy Thompson searched for the suspect vehicle in a SLED database based on the tag description provided by Culbreth. (Tr. p. 159, l. 23–p. 160, l. 25). The search returned a car matching the description provided by Culbreth, with a license plate number "HSN 544." (Tr. p. 160, ll. 1–20). Based on this information, Deputy Thompson went to Applicant's address in Anderson County on February 22, 2012, and noticed a car matching the description with the license plate number "HSN 544." (Tr. p. 162, ll. 2–15; p. 165, l. 7–p. 167, l. 10). Applicant was at the residence and spoke with law enforcement. (Tr. p. 167, ll. 11–20). Applicant admitted that he had been in Abbeville recently and that he spoke with someone in a truck. (Tr. p. 168, l. 18–p. 169, l. 9). Applicant further admitted he smoked Newport cigarettes; the cigarette found at the victims' home was a Newport. (Tr. p. 169, l. 20–p. 171, l. 4). Deputy Thompson also noticed Applicant was wearing work boots; he asked to see the soles of the boots and observed that they resembled the impressions left on the victim's carpet. (Tr. p. 170, ll. 8–19). Applicant was subsequently arrested. (Tr. p. 171, ll. 11–14). DNA recovered from the Newport cigarette found at the scene matched Applicant's DNA profile. (Tr. p. 218, ll. 11–20).

III. Current Application

Applicant timely filed his initial PCR application on March 23, 2021, asserting he is being held in custody unlawfully for the following reason:

1. “Henley argues the Court erred by denying his motion to quash the burglary indictment on double jeopardy grounds. Because it failed the proper test.”
 - a. “Prior to the state [*sic*] of his second trial [*sic*], Henley move to quash the burglary indictment arguing any retrial [*sic*] would violate both the federal and state double jeopardy clauses.”

Applicant requested relief in the form of “a new trial, or reduced sentence, or free to go home. Because in this trial I was treated unfair.”

On August 3, 2021, Respondent filed its return and motion to dismiss Applicant’s application for post-conviction relief, arguing that Applicant failed to state a cognizable claim for post-conviction relief and that Applicant’s allegation was barred by the doctrine of *res judicata*.

A conditional order of dismissal was concurrently submitted for the Court’s consideration, which the Court signed on August 30, 2021, and filed with the Abbeville County Clerk of Court. Applicant’s counsel did not respond to the conditional order of dismissal, and instead requested an opportunity to file an amended application for post-conviction relief containing a cognizable claim for relief. Instead of signing a final order of dismissal in this matter, the Court allowed Applicant’s counsel an opportunity to file an amended application for post-conviction relief.

On November 2, 2021, Applicant, through his counsel, filed an amended application for post-conviction relief. Applicant asserts he is being held in custody unlawfully, alleging:

1. “Ineffective Assistance of Appellate Counsel of Susan Barber Hackett,¹ Esq.:

¹ The author of Applicant’s appellate brief was Laura Baer, not Susan Hackett. Because Applicant’s allegation of ineffective assistance relates only to which issues were raised on

- a. Appellant counsel failed to raise the issue in brief of the propriety of the trial judge's denial of the Petitioner's Motion for Directed Verdict following the presentation of the state's case-in-chief. The trial court erred in denying the Petitioner's Motion for Directed Verdict, and appellant counsel should have raised this as an appellate issue for review by the South Carolina appellate courts.
- 2. "Applicant requests that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in this Application. See *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

The Court permitted the parties to submit briefs on the issue in lieu of holding an evidentiary hearing.

IV. Findings of Fact and Conclusions of Law

Before the Court are Applicant's records from the South Carolina Department of Corrections, the records of the Abbeville County Clerk of Court regarding the subject conviction, the transcript of Applicant's trial, Applicant's appellate records, the records of this post-conviction relief action, and the briefs submitted by the parties. After reviewing all records, arguments, and evidence before this Court, the Court finds and concludes that Applicant is not entitled to post-conviction relief.

Applicant alleges ineffective assistance of appellate counsel due to appellate counsel's failure to raise the issue of the trial judge denying Applicant's motion for a directed verdict. The Court finds this allegation is without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985); Rule 71.1(e), SCRPC. Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so

appeal, counsel for the parties have agreed that Ms. Baer, rather than Ms. Hackett, is the attorney whose effectiveness Applicant is contesting.

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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.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel’s performance was deficient. *Strickland*, 466 U.S. at 687; *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. “When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690).

Second, counsel’s deficient performance must have prejudiced 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 (quoting *Strickland*, 466 U.S. at 694).

Beyond the right to effective assistance of counsel at trial, a criminal defendant is constitutionally entitled to effective assistance of appellate counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 404–05 (1985) (finding that to be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair); *accord. Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). The analysis of counsel’s performance under *Strickland* remains unchanged—the applicant must demonstrate (1) that his “counsel’s representation fell

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below an objective standard of reasonableness” in light of the prevailing professional norms, *Strickland*, 466 U.S. at 688, and (2) that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694; *cf. Smith v. Robbins*, 528 U.S. 259, 285 (2000) (holding that a habeas applicant must demonstrate that “counsel was objectively unreasonable” in failing to file a merits brief addressing a non-frivolous issue, and that there is “a reasonable probability that, but for his counsel’s unreasonable failure . . . , he would have prevailed on his appeal”).

In applying *Strickland* to claims of ineffective assistance of appellate counsel, reviewing courts must accord appellate counsel the “presumption that he decided which issues were most likely to afford relief on appeal. A decision with respect to appeal is entitled to the same presumption that protects sound trial strategy.” *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir. 1993).

Although appellate counsel is required to provide effective assistance of counsel, “appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record.” *Thrift*, 302 S.C. at 539, 397 S.E.2d at 526 (citing *Jones v. Barnes*, 463 U.S. 745 (1983)). Indeed, “[w]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.” *Smith v. Murray*, 477 U.S. 527, 536 (1986). “For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .” *Jones*, 463 U.S. at 754.

“Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Robbins*, 528 U.S. at 288 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). To prove prejudice, the applicant must show

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that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Here, Applicant alleges appellate counsel was ineffective for failing to raise the issue of the trial court's denying Applicant's motion for a directed verdict. On direct appeal, Applicant's appellate counsel briefed four issues which were submitted to the South Carolina Court of Appeals. Though Applicant's appellate counsel did not brief the directed verdict issue, she thoroughly addressed multiple issues which she felt warranted appellate review. Applicant does not explain how the directed verdict issue was "clearly stronger" than any of the issues actually raised by appellate counsel; therefore, he has failed to overcome the presumption of effective assistance. *Robbins*, 528 U.S. at 288. Moreover, because appellate counsel may exercise reasonable professional judgment in determining which issues to raise, counsel had no duty to raise the directed verdict issue in particular, even if there were some merit to that issue on appeal. See *Thrift*, 302 S.C. at 539, 397 S.E.2d at 526. Accordingly, Applicant has failed to prove that counsel was deficient.

Nevertheless, even if appellate counsel's performance was deficient, Applicant cannot prove prejudice because there is no reasonable probability that he would have prevailed on his directed verdict argument on appeal. See *Anderson*, 354 S.C. at 434, 581 S.E.2d at 835 (holding prejudice requires showing a reasonable probability of prevailing on appeal). On appeal from the denial of a directed verdict, the appellate court views the evidence in the light most favorable to the State; if there is any evidence from which the defendant's guilt can be fairly and logically deduced, the jury verdict will not be disturbed. See *State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). Therefore, even if appellate counsel had raised the directed verdict issue to the court of appeals, Applicant could only have prevailed if there was *no* evidence from which his

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guilt could have been deduced, when viewed in the light most favorable to the State.

The State introduced considerable evidence of Applicant's guilt as to every element of first-degree burglary. *See* S.C. Code Ann. § 16-11-311(A) ("A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . with a prior record of two or more convictions for burglary . . ."). Mr. Culbreth testified he saw Applicant standing in the open door between the house and the carport, Amanda Moss testified her carport door had been broken in, and Deputy Thompson found footprints on the carpet inside the house that matched the work boots worn by Applicant. These facts—viewed in the light most favorable to the State—showed that Applicant had broken into the Mosses' home without their consent. In addition to the fact of the break-in, the fact that Applicant had backed his car into the carport and left the rear passenger-side door open (not the front driver-side door, which one would expect if Applicant had merely gotten out of his car to use the bathroom as he claimed) supports the State's theory that Applicant intended to commit a crime in the dwelling—specifically, "to go in there and clean them out." (Tr. p. 278, ll. 16–19). In addition, the State introduced considerable evidence identifying Applicant as the intruder: Mr. Culbreth's visual identification of Applicant standing in the open doorway to the house; his identification of Applicant's car from the make, model, and license plate number; the DNA evidence linking Applicant to the cigarette found at the scene of the break-in; and the footprints inside the house matching the soles of Applicant's work boots. All of this evidence, viewed in the light most favorable to the State, establishes that Applicant broke into the Mosses' home with the intent to steal their belongings.

Applicant now claims that, because there was no testimony that anything had been stolen from the house, the State failed to present any evidence that a crime was committed during the

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break-in. Burglary, however, only requires the State to prove *intent* to commit a crime, which could be “fairly and logically deduced” both from the suspicious parking of Applicant’s car with the rear passenger door open and from the break-in itself. In its closing argument, the State presented its theory that Applicant’s intent to steal was foiled by the sudden appearance of Mr. Culbreth, which is sufficient to explain the lack of evidence that anything had actually been stolen. (Tr. p. 278, ll. 16–23). The mere fact that nothing was stolen from the home is irrelevant to whether the State presented *some* evidence of Applicant’s intent to steal.

Applicant argues that State’s evidence was merely circumstantial, rather than direct, and was described by the trial court as “thin.” (Tr. p. 231, ll. 13–14). However, circumstantial evidence is sufficient to deny a directed verdict motion, and “[the] court is concerned with the existence of evidence rather than its weight in ruling on a motion for a directed verdict.” *State v. Spann*, 279 S.C. 399, 402, 308 S.E.2d 518, 520 (1983) (holding circumstantial evidence, such as smudged palmprints, chipped paint, and blood of the defendant’s blood type found on a windowsill, was sufficient to sustain a burglary conviction).

For all these reasons, it is not likely that any appellate court would have disturbed the trial court’s refusal to direct a verdict, even if appellate counsel had raised the issue on appeal. Therefore, Applicant has failed to prove either prejudice or deficiency regarding appellate counsel’s omission to raise the directed verdict issue; under *Strickland*, therefore, Applicant’s claim of ineffective assistance of counsel fails as a matter of law. *See Robbins*, 528 U.S. at 285. As Applicant’s amended application for post-conviction relief does not raise any other cognizable claims, the Court finds that Applicant’s application must be denied and dismissed with prejudice.

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III. CONCLUSION

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

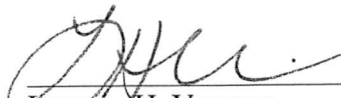
This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991),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

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 24 day of Oct, 2022.

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LETITIA H. VERDIN
Presiding Judge
Eighth Judicial Circuit

Greenville, South Carolina

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