

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2009-CP-41-0088

Frank Tolen Jr., No. 246966 ,Appellant,

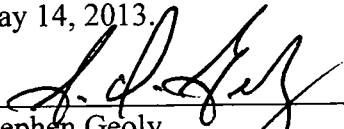
vs.

State of South Carolina,Respondent.

NOTICE OF APPEAL

Frank Tolen Jr. appeals the order of the Honorable R. Lawton McIntosh, dated March 25, 2013. Appellant moved for reconsideration pursuant to Rule 59, SCRCP, which was denied by order of the Court on April 18, 2013. Appellant received notice of entry of the order denying reconsideration on May 14, 2013.

May 30, 2013



Stephen Geoly
1225 South Main Street
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Attorney for Appellant

Other Counsel of Record:

Ashleigh R. Wilson
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Columbia, SC 29211

Attorney for the State

RECEIVED

JUN 03 2013

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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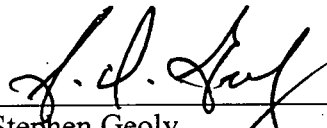
vs.

State of South Carolina,Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 30, 2013, he served the attorney for the Respondent with a copy of the Notice of Appeal, with a copy of the Honorable R. Lawton McIntosh's Order of Dismissal, dated March 25, 2013, and order Denying Motion for Reconsideration, dated April 18, 2013, by depositing the same with U.S. Postal Service, first class mail, and directed to the Respondent at PO Box 11549, Columbia, SC 29211.

May 30, 2013



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Attorney for Appellant

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May 30, 2013

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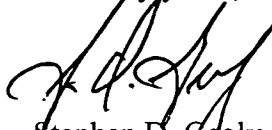
RE: FRANK TOLEN v. STATE OF SOUTH CAROLINA
2009-CP-41-0088

Dear Ms. Wilson,

Please find enclosed with this letter one copy of the Notice of Appeal, Certificate of Service, orders from the court below, and a letter sent by my office to the South Carolina Court of Appeals in the above reference matter.

If you have any questions or concerns, please do not hesitate to contact me at your convenience.

Sincerely yours,



Stephen D. Geoly
Attorney at Law

RECEIVED

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SC Court of Appeals

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FORM 4

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

JUDGMENT IN A CIVIL CASE

FILED

CASE NO. 2009 CP-41-00088

Frank Tolen, Jr., #246966

State of South Carolina

2013 APR 23 PM 4:05

PLAINTIFF(S)

CLERK OF COURT DEFENDANT(S)

SALUDA CO. S.C.

Submitted by:

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: **Defendant's Motion to Alter or Amend Judgment is denied without the necessity of a hearing.**

ORDER INFORMATION

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

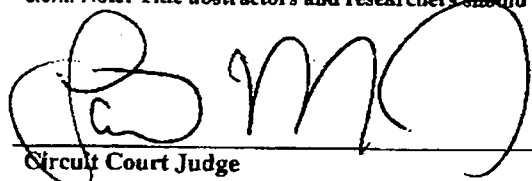
INFORMATION FOR THE JUDGMENT INDEX

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

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

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

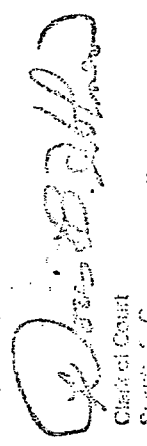
The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time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


Circuit Court Judge

2155
Judge Code

4-18-13
Date

ATTACH TRUE COPY


Clerk of Court

FILED

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF SALUDA 2013 APR -1 AM 11:24)

2009-CP-41-0088

CLERK OF COURT)
SALUDA CO. S.C.)

Frank Tolen, Jr., #246966,)

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of an application for post-conviction relief (PCR) dated June 30, 2009. The Respondent made its return on January 16, 2012. An evidentiary hearing on the matter was convened on January 30, 2013 at the Lexington County Courthouse. The Applicant was present at the hearing and represented by Stephen Geoly, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Present and testifying at the hearing were Andrew Thompson, Esquire, Kathrine Hudgins, Esquire, and the Applicant. The Court had before it the second trial transcript, the Saluda County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's return, the exhibits submitted by the Applicant at the hearing, and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Saluda County Clerk of Court. The Applicant was indicted at the January 1998 term of the Saluda County Grand Jury for armed robbery (1998-GS-

41-0165) and possession of a firearm by a person previously convicted of a crime of violence (1998-GS-41-0166). He was represented by Vannie Williams, Esquire.

The Applicant proceeded to trial and was found guilty. On January 27, 1998, the Applicant was sentenced by the Honorable James Johnson, Jr. to confinement for a period of life without parole for the armed robbery and five years for possession of a firearm by a person previously convicted of a crime of violence.

The Applicant filed his first application for post-conviction relief (1998-CP-41-0064) which resulted in the granting of a belated direct appeal. The Applicant filed a Notice of Appeal and a brief pursuant to Anders.¹ The Court of Appeals denied the Petition for Writ of Certiorari and the Remittitur was sent April 9, 2002.

The Applicant filed a second application for post-conviction relief (2002-CP-41-0085) which was granted based on the State's failure to comply with the life without parole notice requirements prior to trial. The State appealed the granting of the Applicant's post-conviction relief application. The Court of Appeals affirmed the lower court's decision and remanded the case to the lower court for a new trial.

The Applicant proceeded to trial for the second time. The Applicant was represented by Andrew Thompson, Esquire. On November 9, 2006, the Applicant was found guilty as indicted. The Honorable William P. Keesley sentenced the Applicant to confinement for a period of life without parole for the armed robbery and five years for possession of a firearm by a person previously convicted of a crime of violence.

The Applicant filed a timely Notice of Appeal. Kathrine Hudgins, Esquire, of the South Carolina Office of the Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences.

¹ Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

ALLEGATIONS

In his application, the Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. Deprived of due process of law.
 - b. Failure to object and move for mistrial.
 - c. Failure to object to the State retrying the Applicant when the South Carolina Supreme Court ruled on the sentencing issue of the State's failure to give proper notice of intent to seek life imprisonment without parole.
2. Ineffective assistance of appellate counsel.
 - a. Failure to review Applicant's case and raise all issues that could have been reviewable in the Court of Appeals.

Prior to the hearing, Applicant amended his application to proceed on the following allegations:

1. Ineffective assistance of counsel.
 - a. Failure to review the transcript of the previous trial and discuss it with the Applicant.
 - b. Failure to make a Batson motion.
 - c. Failure to object to the court's comments to the jury about the trial being that of a person who had previously been convicted of a violent crime.
 - d. Failure to object to the introduction of a previous conviction despite stipulating to the said conviction.
 - e. Failure to cross-examine the co-defendant regarding what type of deal he was offered to testify against the Applicant and the amount of time he was facing.
 - f. Failure to attack the credibility of the witness' identification of the Applicant.
 - g. Failure to cross-examine witnesses regarding how the Applicant became a suspect or what probable cause they had to arrest the Applicant.
 - h. Failure to question the victim and law enforcement regarding a photo that indicated the victim identified the Applicant prior to court.
 - i. Failure to object to hearsay testimony of Officer Bobby Jones.
 - j. Failure to object to the Applicant being retried on the indictments.
2. Ineffective assistance of appellate counsel.
 - a. Failure to raise issues that had merit in the Applicant's appeal.

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. 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 conclusions of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

Summary of the Testimony

Kathrine Hudgins, Esquire, represented the Applicant on appeal of his convictions after the retrial. Appellate counsel testified she has been practicing law for the past 20 years. Counsel testified that she is currently an appellate defender and that the majority of her practice has been in criminal law. Counsel also testified she keeps abreast of current issues in criminal law by reading opinions and advance sheets and by receiving updates on the law from her office. Counsel testified that when a new appeal is received in her office she reviews the transcript, takes notes of the transcript, makes a list of the most important issues, reviews the transcript a second time, and researches the relevant issues.

Appellate counsel testified she raised two issues in the Applicant's appeal and that her appellate strategy was to choose the strongest issues for appeal. Counsel testified that if she briefed an issue that was not preserved for review during trial it was because she did not feel she had any other issues to appeal or that the issue was the strongest. Counsel testified the appeal resulted in the Applicant's convictions being affirmed. She testified that when presented out of context, she cannot say that other issues not presented on appeal were meritorious. Counsel testified more specifically that she did not recall reviewing the issue of how the Applicant was established as a suspect during her preparation for the appeal. Counsel testified she cannot say the issue was meritorious and the issues briefed were the ones she felt were the strongest.

Andrew Thompson, Esquire, represented the Applicant during his second trial. Counsel testified he has been practicing law since 2004 and was appointed to represent the Applicant. Counsel testified the Applicant's case was his first criminal trial. He testified he met with the Applicant at least once at the jail and corresponded with the Applicant via mail. Counsel testified he filed Brady² and Rule 5 motions on the Applicant behalf, reviewed discovery material with the Applicant, discussed with the Applicant the elements of the charges and what the State was required to prove, and discussed the Applicant's version of the facts. Counsel also testified that he discussed possible defenses with the Applicant.

Trial counsel testified that to prepare for trial he researched the proper motions and objections to make during a criminal trial and discussed with other experienced attorney's the criminal trial process. Counsel also testified he reviewed the transcript from the Applicant's first trial. He testified he developed his trial strategy from the State's evidence in the previous trial transcript. Counsel also testified that when he visited the Applicant at the jail he reviewed with the Applicant a copy of the previous trial transcript. Counsel testified that when he was appointed he did not think about whether the remedy given to the Applicant after the granting of his previous post-conviction relief application was improper.

Trial counsel characterized the State's evidence against the Applicant as follows: a gun tied to the incident and the Applicant by the co-defendant, testimony from the co-defendant that he was with the Applicant during the robbery, testimony from the arresting officer as to how he came upon the Applicant as a suspect, the victim's testimony and in-court identification of the Applicant, testimony of the residents who resided in the traffic circle near the scene of the robbery, and the testimony of the Applicant's family about events after the robbery.

² Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963).

Counsel testified that the Applicant gave him the name of a potential alibi witnesses to investigate. Counsel testified that the Applicant claimed to be having sex at the time of the incident. Counsel testified that he tried to get in contact with the witness, but decided not to pursue an alibi defense because the witness would not testify at trial. Counsel testified the Applicant did not provide any additional evidence for his to investigate.

Trial counsel testified his investigation included reviewing all the State's evidence and discussing the case with the State and the Applicant. Counsel testified he spent 20 to 25 hours preparing for trial and he was as prepared as he could be. He also testified his best strategy for trial was to discredit the eyewitness' testimony and challenge the chain of custody for the gun. Counsel testified he tried to challenge how the Applicant was developed as a suspect at trial and all of the State's evidence.

Counsel testified he did not make a Batson motion at trial. Counsel testified that the purpose of a Batson motion was to challenge the racial composite of a jury. Counsel testified he discussed juror selections with the Applicant and he did not feel a Batson motion was necessary because the jury include both Black and White jurors.

Counsel testified that at trial, a photo of the Applicant was submitted to the jury with a redaction. Counsel testified he believed the photo was a part of the discovery he received. Counsel testified he did not know where the writing on the photo came from and that he did not investigate the origin of the writing or hire a handwriting expert. Counsel testified that the victim testified he did not identify the Applicant in a photo line-up prior to trial. Counsel also testified he thought the photo was simply a photo of his client and did not draw the conclusion that the photo was identification by the victim. Counsel testified the notes on the photo could have been

from a previous incident. Counsel testified that with the photo of the Applicant he was able to elicit testimony from the victim that the person in the photo was not the person who robbed him.

Trial counsel also testified he reviewed the Applicant's arrest warrant, but he could not recall what evidence the State submitted to establish probable cause to arrest the Applicant. Counsel recalled Officer Whisenant being questioned during the Neil v. Biggers³ hearing about how the Applicant was developed as a suspect. Counsel testified he objected to the introduction of testimony about the Officer receiving a tip from Frontis Smith on the basis of hearsay and lack of foundation.

Counsel testified he recalled the reading the Applicant's indictment to the jury. Counsel testified the Applicant was convicted of possession of a firearm by a person previously convicted of a violent crime and he did not think it was problematic for the court to state to the jury what the Applicant was charged with. Counsel also testified he stipulated to the fact that the Applicant had previously been convicted of a violent crime to avoid the State being able to present evidence as to the specific prior conviction.

Counsel testified that at trial he questioned the co-defendant regarding the time he was facing and elicited testimony on what charge he pled guilty to. He also testified he was able to elicit the co-defendant's bias during trial and tried to go into his prior convictions. Counsel also testified he questioned the victim about the photo of the Applicant and about the basis for her identification of the Applicant. Counsel testified he brought out all issues regarding the victim's identification of the Applicant and objected throughout the trial.

Lastly, the Applicant was present and testified he met with trial counsel once prior to trial. He testified he wrote trial counsel with issues for trial. He testified trial counsel should have pointed out to the jury that the writing on the photo said the victim identified the defendant. The

³ 409 U.S. 188, 93 S.Ct. 375 (1972).

Applicant testified that trial counsel was not adequately prepared, did not respond to his letters requesting information, and did not review the transcript of his previous trial. The Applicant testified that had trial counsel investigated his case, he would have discovered that the probable cause against him was illegal. The Applicant also testified he did not discuss with trial counsel a Batson motion or the judge's comments to the jury. The Applicant testified that counsel told him that if he did not take the stand, the State could not use his prior convictions against him.

The Applicant recalled having a Neil v. Biggers hearing prior to trial and trial counsel cross-examining the victim on whether his identification resulted from the Applicant's prior trial. The Applicant also testified that he assisted trial counsel during jury selection. The Applicant testified the jury did not hear the specifics of his prior convictions at trial.

The Applicant testified he is not guilty of armed robbery and the victim's testimony that the man in the photo was not the guy who committed the robbery exonerates him. The Applicant testified trial counsel did not call witnesses, allowed redacted photo to be put into evidence, and gave up last argument. The Applicant testified that before his retrial he simply wanted to be resentenced, but now he wants a new trial because the victim testified that the person in the photo did not commit the robbery.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For the Applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective

performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

This Court finds the Applicant’s testimony is not credible, while also finding trial and appellate counsel’s testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation. This Court finds trial counsel filed Brady and Rule 5 motions on the Applicant’s behalf and reviewed the received discovery with the Applicant. This Court finds trial counsel discussed with the Applicant the elements of the charges against him and what the State was required to prove. This Court finds trial counsel discussed the Applicant’s version of the facts and possible defenses with the Applicant.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have reviewed the transcript of the Applicant’s previous trial and discussed it with the Applicant prior to trial. This Court finds trial counsel gave credible testimony that he reviewed the Applicant’s first trial transcript and used the transcript to develop his trial strategy. Counsel also gave credible testimony that he reviewed the first trial transcript with the Applicant during a jail visit. This Court finds the Applicant has failed to carry his burden of proving that counsel’s performance was deficient and that he was prejudiced as a result of counsel’s performance.

This Court finds that the Applicant failed to meet his burden of proving trial counsel should have made a Batson motion prior to the start of trial. In Batson, the Supreme Court held the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prevents the prosecution from striking potential jurors on the basis of race. 476 U.S. at 89, 106 S.Ct. 1712. In Georgia v. McCollum, the Supreme Court expanded Batson, holding "the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges." 505 U.S. 42, 59, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992). Thus, during jury selection, either the defendant or the State may oppose the peremptory challenge of a juror who is a member of a cognizable racial group. Once a peremptory challenge is opposed, the trial court must, upon request, conduct a Batson hearing and adhere to the procedures set forth in Purkett v. Elem, 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), and adopted by our supreme court in State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996).

The Court finds trial counsel was not ineffective for failing to make a Batson motion at trial. Trial counsel gave credible testimony that he understood the purpose of a Batson motion at trial and he was satisfied with the racial composition of the jury. This Court finds the jury selected during the Applicant's trial, including the alternates, was racially diverse and comprised of two black males, three black females, one Hispanic male, three white males, and five white females. This Court finds the racial composite of the jury was not objectionable. This Court finds the Applicant has failed to carry his burden of proving that counsel's performance was deficient and that he was prejudiced as a result of counsel's performance.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to references by the solicitor that the Applicant was indicted for possession of a

pistol by a person convicted of a crime of violence. This Court also finds the Applicant failed to meet his burden of proving trial counsel should have objected to the introduction of a previous conviction despite the Applicant's stipulation to prior convictions.

Before jury *voir dire*, the solicitor read to the potential jurors that the Applicant had been indicted for "possession of a pistol by a person convicted of a crime of violence." (Transcript 3:5-6). Shortly before the resting of the State's case, the Court informed the jury of a stipulation between the parties as to the Applicant's prior conviction for a violence crime. The Court told the jury:

"it's not disputed the parties here have entered into a stipulation that for the purpose of prosecution under the alleged gun law violation which is section 16-23-30- I'm gonna explain all that to you later, that Frank Tolen, Jr., has a prior conviction in the South Carolina Court system for a crime of violence. So it's agreed that for the purpose of evaluating the gun law charge, you take it as a given that Mr. Tolen has a prior conviction in the South Carolina Courts for – a South Carolina crime of violence." (Transcript 237:9-15).

The stipulation was followed by two limiting instructions on the use of the stipulation by the jury. (Transcript 237:21-238:1 and 270:7-24).

Evidence which is logically relevant to a material element of the offense charged should not be excluded merely because it may also show guilt of another crime. When evidence of other crimes is admitted for a specific purpose, the trial judge should instruct the jury to limit its consideration of this evidence to the particular purpose for which it is offered. State v. Hamilton, 327 S.C. 440, 447, 486 S.E.2d 512, 515-16 (Ct. App. 1997) (citing State v. Johnson, 306 S.C. 119, 126, 410 S.E.2d 547, 552 (1991), *cert. denied*, 503 U.S. 993, 112 S.Ct. 1691, 118 L.Ed.2d 404 (1992); State v. Steadman, 216 S.C. 579, 600, 59 S.E.2d 168, 178, *cert. denied*, 340 U.S. 850, 71 S.Ct. 78, 95 L.Ed. 623 (1950)).

This Court finds the statements to the jury were proper and the limiting instructions given were sufficient. The record reflects the Applicant was indicted for possession of a firearm by a person convicted of a prior violent crime. Conviction of a prior violent crime is an element to the charge that must be proven by the State. Stipulating to the Applicant's prior conviction for a prior violent crime erred to the Applicant's benefit as it prevented the State from attempting to inform the jury that the Applicant had previously been convicted of armed robbery. This Court finds the Applicant has failed to carry his burden of proving that counsel's performance was deficient and that he was prejudiced as a result of counsel's performance.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have cross-examined the Applicant's co-defendant regarding what deal he was offered to testify against the Applicant and the amount of time he was facing. The purpose of cross-examination at trial is "to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness." State v. Gillian, 360 S.C. 433, 451, 602 S.E.2d 62, 71 (Ct. App. 2004) aff'd as modified, 373 S.C. 601, 646 S.E.2d 872 (2007) (citing Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

This Court finds trial counsel adequately impeached the credibility of the Applicant's co-defendant Wade Brannon. On direct examination, the State elicited testimony that Brannon was originally charged with armed robbery and was allowed to plead guilty to strong armed robbery (Transcript 180:22-181:2). The State also elicited testimony about the sentence that Brannon received after pleading guilty. On cross-examination, trial counsel was precluded from impeaching the victim on several prior convictions. However, trial counsel was able to elicit testimony from Brannon on a pending criminal domestic violence- second offense charge

(Transcript 187: 2-4) and his long term drug use (Transcript 187:5-22). Trial counsel also elicited testimony from Brannon that he had used crack the night of the incident and highlighted Brannon's inability to recall several aspects of the event due to drug use. (Transcript 192: 3-10). This Court finds the jury was apprised of the benefit that Brannon received for testifying against the applicant and the amount of time he received for his testimony. This Court finds the Applicant has failed to carry his burden of proving that counsel's performance was deficient and that he was prejudiced as a result of counsel's performance.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have attacked the credibility of the victim's identification of the Applicant. This Court finds and the record reflects trial counsel sufficiently challenged the victim's identification of the Applicant. Prior to trial a Neil v. Biggers hearing was held and the Court concluded the victim's previous in-court identification of the Applicant was admissible. (Transcript 102). Trial counsel also cross-examined the victim about the basis of his in-court identification of the Applicant as the assailant. (Transcript 141:17-25). This Court finds the Applicant has failed to carry his burden of proving that counsel's performance was deficient and that he was prejudiced as a result of counsel's performance.

This Court finds that the Applicant failed to meet his burden of proving trial counsel should have cross-examined witnesses on how the Applicant became a suspect and what probable cause they had to arrest the Applicant. This Court finds that trial counsel inquired into how the Applicant became a suspect and objected to testimony elicited by the State on the substance of a tip from a deceased witness implicating the Applicant. During the cross-examination of Officer Bobby Jones, when asked what information he had indicating the Applicant as a suspect, the Officer responded "the information I received was from the owner of

the stop and shop concerning the armed robbery.” (Transcript 232:15-16). This Court also finds the probable cause submitted by the State was sufficient enough to result in indictment by the Saluda County Grand Jury. This Court finds the Applicant has failed to carry his burden of proving that counsel’s performance was deficient and that he was prejudiced as a result of counsel’s performance.

This Court finds that the Applicant failed to meet his burden of proving trial counsel should have questioned the victim and law enforcement officers about a troubling photo that indicated the “victim was able to pick suspect out of a line up”. (Applicant’s Exhibit 1). This Court also finds that the Applicant failed to meet his burden of proving trial counsel should have objected to the redaction of this photo.

This Court finds and the record reflects that the victim and law enforcement were both questioned about the photo which indicated the “victim was able to pick suspect of line up”. During cross-examination of the victim, trial counsel elicited the following testimony about the photo: (Transcript 87:25-88:19)

Q: I’m gonna show you a picture of—a piece of paper that you have in front of you has a picture of an individual. You stated to Mr. Maye that you never picked out the defendant here in any photo lineup. Is that correct?

A: That’s correct.

Q: Okay, did you put that writing down on the top of that piece of paper?

A: No, I did not.

Q: Okay. Can you read what the writing says?

A: Yes, I can.

Q: Would you read it into the court please.

A: Victim was able to pick this suspect out of a lineup.

Q: Okay.

A: This never happened.

Q: Okay.

A: I never seen this picture before.

Q: Okay.

A: Until now.

Q: Okay. So you never picked out the victim (sic) from a lineup?

A: Never.

During cross-examination of Officer Mark Whisenant, trial counsel elected testimony from the officer that he never showed the victim a photo of the Applicant and that the victim was never able to identify anyone shortly after the robbery. This Court finds that counsel's performance was not deficient and that the Applicant was not prejudiced by trial counsel's questioning.

This Court also finds that counsel's unsuccessful attempt at entering the photo without the redaction did not result in deficient performance. Prior to trial counsel entering the photo into evidence, the State objected to the relevance of the photo. (Transcript 245:8-12). The Court stated that the photo was admissible, but the writing on the photo was problematic. (Transcript 245:14-16). Trial counsel attempted to enter the photo into evidence with all the writing, however, the Court ruled that the writing on the photo be redacted to hide all writing other than "victim was able to pick the suspect out of the line up" which was testified to by the victim during trial. This Court finds further that no prejudice resulted from the redaction of the writing on the photo because the main substance of the writing- identification of the Applicant by the victim- was not redacted and elicited from the victim on cross-examination. This Court finds the Applicant has failed to carry his burden of proving that counsel's performance was deficient and that he was prejudiced as a result of counsel's performance.

This Court finds the Applicant failed to meet his burden of proving counsel failed to object to hearsay testimony from Officer Bobby Jones. This Court finds and the record reflects that trial counsel objected to hearsay testimony from Officer Jones about the information that the officer received from Ben Tolen on hearsay grounds. (Transcript 225:10-21). This Court finds the Applicant has failed to carry his burden of proving that counsel's performance was deficient and that he was prejudiced as a result of counsel's performance.

This Court finds the Applicant failed to meet his burden of proving counsel failed to object to the Applicant being retried after the Applicant's prior post-conviction relief was granted. This Court finds that all parties properly complied with the orders from the appellate courts remanding to the lower court for a new trial. There was no ambiguity in the language of the order granting post-conviction relief from Judge Goode. The order stated the "Applicant's convictions of armed robbery and possession of a pistol by a person convicted of a violent crime should be reversed and the applicant's sentences vacated and this matter remanded for Applicant to have a new trial." The Supreme Court on appeal of the post-conviction relief decision held the "matter is to be remanded for a new trial". Further, the issue of whether the court lacked subject matter jurisdiction to try the Applicant a second time when the error went solely to sentencing and had no effect on the conviction was presented by the Applicant to the Court of Appeals on appeal of his second trial. The Court of Appeals affirmed the convictions and sentences that resulted from the Applicant's retrial. This Court finds the Applicant has failed to carry his burden of proving counsel's performance was deficient and that he was prejudiced as a result of counsel's performance.

Ineffective Assistance of Appellate Counsel

The Applicant alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). 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 v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). "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 at 754, 103 S.Ct. at 3308.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show 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).

This Court finds appellate counsel was not ineffective for failing to raise other meritorious issues on appeal. The United States Supreme Court has stated that "appellate counsel is *not* required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983) (emphasis supplied)). The Supreme Court opined further that "for judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every "colorable" claim suggested by a client would disserve the very goal of vigorous and effective advocacy". Jones v. Barnes, 463 U.S. 745, 754, 103 S. Ct. 3308, 3314 (1983).

This Court also finds appellate counsel thoroughly reviewed the trial transcript and researched the relevant issues before briefing the issues presented on appeal. Counsel gave credible testimony that she keeps abreast of updates and changes in criminal law and presented to the appellate court the Applicant's strongest issues on appeal. This Court finds the Applicant has not proven that appellate counsel's performance was deficient. This Court also finds the

Applicant has not proven that had counsel briefed other issues on appeal there was a reasonable probability that the Applicant would have prevailed on appeal.

Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test- that trial counsel and appellate counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial and appellate counsel committed either errors or omissions in their representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland- that he was prejudiced by trial and appellate counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial, sentencing, or appellate proceedings. Trial and appellate counsel were not deficient and the Applicant was not prejudiced by their representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he chooses to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 25 day of March, 20 13

s/ R. Lawton McIntosh

R. Lawton McIntosh
Presiding Judge
11th Judicial Circuit

Anderson, South Carolina.