STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein, Circuit Court Judge

Case No. 2011-CP-43-754

Jason J. Forde, #340328, ...Petitioner,

v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Applicant, Jason J. Forde, appeals the final order of dismissal of the Honorable Diane S. Goodstein, filed March 13, 2023.

3/30/, 2023

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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	FOR THE THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	
Jason Forde, S.C.D.C. No. 340328,	Case No.: 2011-CP-43-00754
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 filed by Jason Forde ("Applicant") on April 15, 2011, and amended on November 4, 2013; November 5, 2021; and November 15, 2021. The Court convened a virtual evidentiary hearing into the matter on November 19, 2021. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Assistant Attorney General Michael J. Neubauer represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Timothy W. Murphy, Esquire, who represented Applicant at his trial and plea proceedings, also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial and plea transcripts, the records of the Sumter County Clerk of Court regarding the subject convictions, and the pleadings. 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, therefore, denies and dismisses this application with prejudice. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections. In a series

of similar crimes occurring during May 2008, several businesses in Sumter County were robbed at gunpoint by a black male suspect described as tall, skinny, and speaking with a Jamaican accent. Two clerks were able to pick Applicant out of a lineup, and another was able to narrow a six-person lineup to Applicant and one other individual. (Plea Tr. pp. 30–33). After Applicant was arrested, he gave a statement in which he confessed to robbing one of the businesses, a Food Lion. (Trial Tr. pp. 214–15).

Applicant was indicted at the February 2009 term of the Sumter County Grand Jury for seven counts of armed robbery (2009-GS-43-218, -242, -243, -244, -245, -246, and -248). He was represented by then-Assistant Public Defender Timothy W. Murphy (Counsel). On April 12–15, 2010, Applicant proceeded to a jury trial before the Honorable George C. James. On April 15, 2010, Applicant changed his plea to guilty. Judge James sentenced Applicant to twenty-two years imprisonment on each charge, all to run concurrently. Applicant did not appeal his convictions or sentences.

Present Application

In his original post-conviction relief application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel for failing to make a speedy trial motion for almost one year and then failing to make a motion to dismiss for failure to prosecute for another year after making the speedy trial motion;
2. Ineffective Assistance of Counsel for failing to object to the introduction of a new set of fingerprints taken over Applicant's refusal where the prosecution lied as to the reason for taking a new set of prints;
3. Ineffective Assistance of Counsel for advising Applicant to plea rather than requesting a mistrial after his motion to dismiss the charges was erroneously denied;
4. Ineffective Assistance of Counsel for failure to move to suppress the testimony of a witness who was not made known to the defense until the first day of trial or to object to inconsistencies between that witness's testimony and the incident report;
5. Ineffective Assistance of Counsel for failing to notice that the prosecution's admission of Applicant's statement was inadmissible hearsay because prior

statements may only be used for impeachment and Applicant did not take the stand;
6. Ineffective Assistance of Counsel for failing to object to the introduction of fingerprint evidence taken from a soda bottle when the bottle itself was never presented;
7. Ineffective Assistance of Counsel for failing to object to the admissibility of clothing where the prosecutor never established a connection between the clothing and the crime;
8. Ineffective Assistance of Counsel relating to the legality of Applicant's arrest and search.

As his requested relief, Applicant seeks to have his conviction and sentence vacated and remanded for a new trial.

On November 4, 2013, through counsel, Applicant filed an amended post-conviction relief application raising the following claims:

1. Ineffective Assistance of Counsel pursuant to Hill vs. Lockhart.
2. Abuse of Discretion.
3. Belated Direct Appeal pursuant to White vs. State.
4. Judicial Errors.
5. Constitutional Violations.
6. Prosecutorial Misconduct.
7. Invalid Affidavit.

On November 5, 2021, through counsel, Applicant filed a second amended post-conviction relief application clarifying his allegation that he was entitled to belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), based on ineffective assistance of Counsel.

On November 15, 2021, through counsel, Applicant filed a third amended post-conviction relief application consisting of thirteen letters from Counsel to Applicant concerning Counsel's decisions during the course of his representation of Applicant. [1]

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

[1] At the outset of the evidentiary hearing, Applicant's counsel clarified that the issues raised in the amended applications were "really all the same issues" as those raised in the initial application. (PCR Tr. p.8, lines 9–15). Therefore, the Court will address Applicant's claims as they are set forth in the original application, as well as the White v. State claim that was raised for the first time in Applicant's amended application.

This Court has reviewed the testimony presented at the evidentiary hearing, the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented:

Ineffective Assistance of Counsel, Generally

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), SCRCP. Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 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. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). "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).

The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109–10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough, 540 U.S. at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable.").

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). "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" Harrington, 562 U.S. at 111–12 (quoting Strickland, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." Id. at 112.

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.

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial

admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73–74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Statements made during a guilty plea should be considered conclusive, unless an applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. Dalton v. State, 376 S.C. 130, 137–38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975)).

Speedy Trial Motion

Applicant alleges Counsel was ineffective for failing to promptly file a motion for a speedy trial and for failing to move to dismiss the charges when more than a year elapsed after the filing of the speedy trial motion. The Court finds this allegation to be without merit.

Applicant testified he was arrested in May of 2008. He wrote a letter to Counsel in September of 2008 requesting Counsel make a motion for a speedy trial. (PCR Tr. p.11, line 23–p.12, line 8). Counsel replied by letter dated September 18, 2008, that he did not intend to move for a speedy trial at that time because he did not believe the State was "slow rolling" Applicant's case and nothing the State had done thus far had prejudiced Applicant's defense. (September 18, 2008, letter; PCR Tr. p.11, lines 6–22). Counsel also informed Applicant that the State had offered a 15-year negotiated plea, which Counsel viewed as a good offer, and that filing a speedy trial motion would alert the State that Applicant was not interested in the plea. (March 20, 2009, letter). At the evidentiary hearing, Counsel articulated multiple reasons for not filing a speedy trial motion when Applicant first requested it: at the time, Applicant was not willing to commit to a trial as

opposed to a guilty plea; Counsel wanted to preserve the option of accepting the plea offer; and Counsel believed it would be prejudicial to the defense to rush the case to trial because he needed more time to prepare. (PCR Tr. p.96, line 23–p.97, line 20). In March of 2009, Counsel believed he was prepared for trial and filed a speedy trial motion to "put some pressure on the Solicitor's office." (March 30, 2009, letter; PCR Tr. p.96, lines 3–22).

The Court finds Applicant has failed to prove Counsel's conduct fell below an objective standard of reasonableness as to this allegation. Applicant was tried in April of 2010, less than two years after his arrest in May of 2008. Counsel articulated multiple valid strategic reasons for waiting as long as he did to file the speedy trial motion: the State's delay in bringing the case to trial was not initially unreasonable; the delay arguably benefited the defense by allowing more time to prepare for trial; and Counsel wanted to preserve what he saw as a favorable plea offer until Applicant insisted on going to trial. Finally, Applicant has not shown how he was prejudiced by the delay. Because Applicant has failed to prove either deficiency or prejudice arising from Counsel's conduct, the Court finds this allegation is meritless and must be denied and dismissed with prejudice.

Failure to Object to Second Set of Fingerprints

Applicant alleges Counsel was ineffective for failing to object to the introduction of a second set of fingerprints collected from Applicant approximately one month before trial, claiming the prosecution lied about the reason they were seeking Applicant's fingerprints. The Court finds this allegation to be without merit.

At Applicant's trial, the State's fingerprint expert, Marie Hodge, testified she examined a fingerprint obtained from the scene of the Food Lion robbery and compared it against a set of fingerprints obtained from Applicant on May 28th, 2008. (Trial Tr. p. 186, line 25–p.189, line 10).

She identified the fingerprint found at the crime scene as belonging to Applicant. (Trial Tr. p. 191, lines 15–17). Approximately one month prior to Applicant's trial, she obtained a second set of fingerprints from Applicant and confirmed that they matched the first set. (Trial Tr. p.191, line 18–p. 192, line 8).

Applicant claims the original set of fingerprints were "invalid" because they were not signed by the reviewing officer. At the PCR hearing, Applicant testified he was told the reason for collecting the second set of fingerprints was because the State had "messed up" the chain of custody regarding the first set. (PCR Tr. p.19, lines 2–22). He claimed this was inconsistent with the testimony at trial that the second set of fingerprints was taken to make sure it matched the original set. (PCR Tr. p.20, lines 3–7; p.21, lines 16–25).

Applicant argues Counsel should have objected to the introduction of the second set of fingerprints because of this "perjury." The Court finds Applicant has not shown that any perjury occurred. The comparison between the first and second sets of fingerprints to confirm that they matched is perfectly consistent with an attempt to cure a chain-of-custody problem with the first set. Furthermore, the trial transcript reveals Counsel did object to the introduction of Applicant's fingerprint cards, and that objection was overruled. (Trial Tr. p.192, lines 9–17). Accordingly, the Court finds Applicant has failed to prove either deficiency or prejudice as to this issue.

Applicant also complains that Counsel advised him to give the second set of fingerprints because, if he refused, the trial judge would order him to give the fingerprints anyway. (PCR Tr. p.22, lines 14–17). Applicant argues Counsel's advice "basically fed [him] essentially to the wolves" because the second set of fingerprints strengthened the State's case against him. (PCR Tr. p.26, line 14–p.27, line 7). However, Applicant also testified that he *did* refuse to give the second set of fingerprints and that the trial judge *did* order him to give fingerprints over his refusal.

(PCR Tr. p.22, lines 17–22).

Far from showing ineffectiveness, Applicant's testimony proves that Counsel's advice about what would happen if he refused to give the fingerprints was accurate, and therefore not deficient. In addition, Applicant could not have been prejudiced by advice that he admittedly ignored. The Court, therefore, finds that this allegation is meritless and must be denied and dismissed with prejudice.

Failure to Request a Mistrial

Applicant alleges Counsel was ineffective for advising Applicant to plead guilty rather than requesting a mistrial after Applicant's motion to dismiss the charges was denied. The Court finds this allegation to be without merit.

At one point during the trial, police officers who were in the courtroom caught a glimpse of an exposed notepad on Counsel's desk and approached the solicitor about recalling witnesses to address the issues Counsel had written about. (Trial Tr. pp.242–44). When he learned the officers had read from Counsel's notes, the solicitor informed both Counsel and the trial court of what had happened. (Trial Tr. pp.242–44). The State informed the court that it had no intention of recalling any witnesses in response to the officers' request. (Trial Tr. p.258, lines 6–25). Counsel moved to dismiss the charges against Applicant on the ground that the officers' attempt to influence the trial based on reading his notes constituted prosecutorial misconduct and raised an irrebuttable presumption of prejudice. (April 14th, 2010, Motions Hearing Tr. p.3, line 14–p.6, line 24). Counsel argued a mistrial would not be an appropriate remedy because "the cat is out of the bag" and the State would be able to correct the imperfections in its case in a subsequent trial. (April 14th, 2010, Motions Hearing Tr. p.6, line 25–p.7, line 7).

The court agreed that the officers' actions were improper, but it held that dismissal of the

charges was not a proper remedy. (April 14th, 2010, Motions Hearing Tr. p.22, line 7–p.25, line 12). The court noted it would likely grant a mistrial if Counsel requested one, but Counsel was "perhaps correct in not asking for one." (April 14th, 2010, Motions Hearing Tr. p.23, line 19–p.24, line 13).

At the PCR hearing, Counsel testified he did not want to move for a mistrial, but he wanted to seek dismissal of the charges because, "unlike the [issues] we've lost, this one actually has some merit to it." (PCR Tr. p.99, line 23–p.100, line 4). He also testified that, after the hearing on his motion for dismissal, the solicitor approached him and told him the State's concurrent plea offer was still on the table. (PCR Tr. p.100, lines 5–8). Counsel conveyed that offer to Applicant and told him, "Look, if you are going to plead, now's the time because I can tell Judge James was livid and he . . . wanted to send a message to those officers." (PCR Tr. p.100, lines 8–16).

The Court finds Applicant has failed to show that Counsel was deficient for not requesting a mistrial. Counsel possessed a valid strategic reason for not proceeding with a mistrial: he believed a new trial would not benefit Applicant because it would give the State the opportunity to correct any imperfections with its case. At the same time, he believed the judge would likely impose a relatively lenient sentence if Applicant entered a guilty plea because the judge was "livid" at the officers' misconduct. Having tried, and failed, to obtain a dismissal of the charges, Counsel expressed to Applicant his belief that "now is the time" to accept the State's plea offer if that's what Applicant wanted to do. Applicant then made the decision to plead guilty. The Court finds Counsel conducted himself with reasonable professional judgment as to this issue. Accordingly, the Court finds this allegation is meritless and must be denied and dismissed with prejudice.

Failure to Suppress Testimony for Lack of Notice

Applicant alleges Counsel was ineffective for failing to move to suppress the testimony of

David Holzbach, one of the State's witnesses. Applicant claims the defense never received notice that the State intended to call Mr. Holzbach. Applicant also claims Counsel failed to effectively cross-examine Mr. Holzbach regarding alleged inconsistencies between his testimony and that of Officer Curtis Hodge. The Court finds this allegation to be without merit.

Mr. Holzbach testified at the pre-trial suppression hearing. He testified that, on May 28, 2008, he was driving a vehicle in Sumter County when he observed a slate blue Cadillac moving at a high rate of speed and disregarding stop signs. (Trial Tr. p.41, line 19–p.43, line 5). Shortly afterward, he observed police cars at "what appeared to be a crime scene" at the nearby Dollar General. (Trial Tr. p.42, line 20–p.43, line 10). Suspecting that the Cadillac was fleeing the crime scene, Mr. Holzbach called 911 and gave the dispatcher a description of the car and its occupants. (Trial Tr. p.42, line 23–p.43, line 18).

Officer Hodge testified that he was responding to a report of an armed robbery at the Dollar General that day when a call came in from dispatch that a powder blue, older model vehicle was seen leaving the area. (Trial Tr. p. 47, lines 3–15). Officer Hodge then spoke with Mr. Holzbach, who told him he had almost been hit by a powder blue vehicle speeding away from the crime scene and running stop signs. (Trial Tr. p.47, line 16–p.48, line 4). Officer Hodge testified that, later that day, he learned that a vehicle matching Mr. Holzbach's description had been spotted, and he joined an investigatory stop of the vehicle that ultimately resulted in Applicant's arrest. (Trial Tr. p.48, line 7–p.49, line 14).

Applicant now argues that Counsel should have objected to Mr. Holzbach's testimony because the defense was not given notice that the State intended to call him as a witness. At the PCR hearing, Counsel denied that he was surprised by any of the witnesses called by the State, and he saw no grounds to move for the suppression of testimony based on lack of notice. (PCR

Tr. p.90, line 25–p.91, line 17). The Court finds Applicant has failed to show that the defense was indeed prejudiced by not receiving notice of Mr. Holzbach or any other witness. Therefore, Applicant has not met his burden of proving that Counsel was deficient for not moving to suppress the testimony.

Applicant also argues Counsel should have challenged Mr. Holzbach's testimony on the ground that Mr. Holzbach did not witness the actual commission of the robbery. The Court finds that Mr. Holzbach's testimony was relevant circumstantial evidence that the occupants of the blue Cadillac were involved in the robbery of the Dollar General due to the vehicle's suspicious haste in driving away from the crime scene. The fact that Mr. Holzbach did not personally observe the commission of the robbery is not a ground for the suppression of his testimony. Therefore, Counsel was not deficient for failing to move for suppression on that basis.

Finally, Applicant claims that Mr. Holzbach's testimony was inconsistent with Officer Hodge's testimony, because Mr. Holzbach testified he told police the suspicious vehicle was a Cadillac while Officer Hodge stated Mr. Holzbach did not identify the make of the vehicle. (Trial Tr. p.45, lines 6–12; p.44, line 22–p.45, line 2). Applicant complains that Counsel was ineffective for failing to challenge that inconsistency. The transcript, however, reveals that Counsel *did* expose the inconsistency during his cross-examination of both witnesses. He then argued to the trial court that this inconsistency rendered the investigatory stop illegal. (Trial Tr. p.81, lines 7–18). While Counsel's attempt to suppress the evidence on this ground was ultimately unsuccessful, the Court finds he clearly *did* raise the issue and, therefore, was not deficient. Accordingly, the Court finds that this allegation is meritless and must be denied and dismissed with prejudice.

Failure to Object to Applicant's Confession

Applicant alleges Counsel was ineffective for not objecting to the introduction of

Applicant's confession as inadmissible hearsay. Applicant argues that, because he never testified at the trial, his confession could not have been admitted as a prior inconsistent statement. The Court finds this allegation to be without merit.

After his arrest, Applicant gave a confession about his involvement in the Food Lion robbery to Detective Irene Culick. Counsel challenged the voluntariness of Applicant's confession at a pre-trial Jackson v. Denno[2] hearing. (Trial Tr. pp.124–28). He renewed his objection during trial when the State began questioning Detective Culick about the confession. (Trial Tr. p.208, lines 21–22; p.210, lines 16–18). Counsel also objected multiple times to Detective Culick's reading from a document containing her notes of the confession; the trial court overruled Counsel's objections. (Trial Tr. p.212, line 10–p.213, line 8; p.214, lines 14–24).

The Court finds Applicant's confession was admissible as a statement of a party opponent, which is not hearsay. See Rule 801(d)(2)(A), SCRE. Therefore, Counsel correctly decided not to object on that basis. To Counsels' credit, he attempted to exclude the statement on other grounds, but the trial court ruled against him. Accordingly, the Court finds Counsel was not deficient as to this issue, and this allegation must be denied and dismissed with prejudice.

Failure to Object to Soda Bottle Fingerprint

Applicant alleges Counsel was ineffective for not objecting to the introduction of a fingerprint taken from a soda bottle when the bottle itself was not presented. The Court finds this allegation to be without merit. Applicant has not pointed to any law requiring an object to be introduced into evidence before the State may introduce a fingerprint taken from the object. As Counsel stated during the evidentiary hearing, "You don't introduce a car when you have fingerprints on the car." (PCR Tr. p.94, lines 2–3). Applicant argues that Counsel should have

[2] 378 U.S. 368 (1964).

introduced the bottle because the prosecution could have fabricated the fingerprint evidence; however, Counsel testified that he knew that the fingerprint on the soda bottle belonged to Applicant because "he admitted to me it was him." (PCR Tr. p.93, lines 8–9). Therefore, the Court finds Applicant has not met his burden of proving either deficiency or prejudice as to this allegation. Accordingly, the Court finds this claim must be denied and dismissed with prejudice.

Failure to Object to Clothing

Applicant alleges Counsel was ineffective for failing to object to the admissibility of clothing on the ground the prosecutor never established a connection between the clothing and the crime. The Court finds this allegation to be without merit.

At trial, Officer Tassone testified he located a black t-shirt, a grey sweatshirt, and a pair of blue sweatpants with a bundle of cash in the pocket on the side of road while patrolling near the intersection of Highways 378/76 and 261. (Trial Tr. p.172, lines 2–17). Detective Culick testified Applicant told her that, after robbing the Food Lion, he had thrown his clothes—a grey hoodie and blue sweatpants—out the window near a stoplight on Highway 261. (Trial Tr. p.215, lines 14–16).

The Court finds the State did, in fact, establish a connection between the clothing found on the side of the highway and the robbery of the Food Lion. Specifically, the discovery of the clothing at that location corroborated the portion of Applicant's confession in which he stated he had thrown a grey hoodie and blue sweatpants out of the window at Highway 261. Applicant has failed to explain why the clothing was inadmissible in light of this connection. Accordingly, the Court finds Applicant has not met his burden of proving Counsel was ineffective for failing to object to the introduction of the clothing, and this allegation must be denied and dismissed with prejudice.

Legality of Arrest and Search

Applicant alleges Counsel was ineffective regarding the legality of Applicant's arrest and search. The Court finds this allegation to be without merit. The transcript of the pre-trial suppression hearing reveal that Counsel vigorously challenged the legality of Applicant's arrest and search, arguing that officers lacked both reasonable suspicion to justify an investigatory stop of Applicant's vehicle and probable cause to place Applicant under arrest. (Trial Tr. pp.23–75; pp.79–81). Applicant has not explained how any of Counsels' conduct regarding that issue fell below an objective standard of reasonableness. Although Applicant may disagree with the trial court's ruling as to the legality of the arrest, allegations of trial court error are not cognizable on post-conviction relief. See S.C. Code Ann. § 17-27-20(B) (stating PCR "is not a substitute for . . . direct review of the sentence or conviction"); Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (holding a PCR application cannot assert any issues that could have been raised at trial or on appeal).

White v. State Claim

Applicant alleges he is entitled to belated review of his direct appeal issues because Counsel was ineffective in failing to file an appeal from Applicant's guilty plea. The Court finds this allegation to be without merit.

Defense counsel should make certain that a criminal defendant is fully aware of his appeal rights and, in the absence of an intelligent waiver of those rights by the defendannt, pursue an appeal. White, 263 S.C. at 118, 208 S.E.2d at 39. Counsel's constitutionally imposed duty to consult with a defendant about an appeal arises *only* when there is reason to think (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 471 (2000).

These elements are much harder to establish when a conviction follows a guilty plea, because a plea both reduces the scope of appealable issues and indicates that the defendant sought an end to judicial proceedings. Id. In addition, to prove prejudice, an applicant must demonstrate a reasonable probability that he would have timely appealed but for counsel's deficiency. Id. Evidence that there were nonfrivolous grounds for appeal or that the defendant promptly expressed a desire to appeal is highly relevant to this determination. Id. at 472.

Even where the post-conviction relief court finds an applicant was denied the right to a direct appeal due to the ineffective assistance of counsel, the court may not grant post-conviction relief on that basis. Davis v. State, 288 S.C. 290, 291 n.1, 342 S.E.2d 60, 60 n.1 (1986). Instead, the proper remedy is for the applicant to petition for belated review of direct appeal issues pursuant to the procedure set forth in Davis. Id.

At the evidentiary hearing, Counsel testified that he discussed the appeal process with Applicant and explained what his appellate rights were. (PCR Tr. P.103, lines 21–25). He explained that entering a guilty plea would preclude Applicant from appealing the denial of his pre-trial motions. (PCR Tr. p.104, lines 1–3). Counsel testified he had no doubt that Applicant understood all of his discussions about the right to appeal. (PCR Tr. p.106, lines 9–13). Counsel also testified he advised Applicant that the 22-year sentence was a "pretty good" result given Applicant's numerous armed robbery charges, that an appeal would not have much merit, and that Counsel did not recommend appealing. (PCR Tr. p.129, lines 7–15). Counsel testified that Applicant seemed to understand Counsel's recommendation and never asked him to file an appeal. (PCR Tr. p.129, lines 15–24). Counsel said he would have filed one if Applicant had asked him to. (PCR Tr. p.106, lines 14–25).

The Court finds Applicant has failed to prove Counsel was ineffective as to this issue.

Counsel's testimony shows that he fulfilled his duty to advise his client of the right to appeal and that Applicant did not ask Counsel to file an appeal. Therefore, the Court finds Applicant is not entitled to belated review of any direct appeal issues, and this allegation must be denied and dismissed with prejudice.

Other Allegations

The other allegations raised in the 2013 Amended PCR Application and not specifically mentioned above are:

1. Ineffective Assistance of Counsel pursuant to Hill vs. Lockhart.
2. Abuse of Discretion.
3. Judicial Errors.
4. Constitutional Violations.
5. Prosecutorial Misconduct.
6. Invalid Affidavit.

No allegations were raised nor was testimony taken at the hearing regarding Abuse of Discretion, Judicial Errors, Constitutional Violations, Prosecutorial Misconduct, and Invalid Affidavit. These are not issues for post-conviction relief. Rather, these allegations concern direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993).

The ineffective assistance of counsel claim citing Hill v. Lockhart has been addressed above under the general allegations of ineffective assistance counsel listed, *supra*.

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 the 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), Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on Applicant's behalf. Applicant'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. That Applicant be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 2nd **day of** March **, 2023.**

DIANE S. GOODSTEIN
Presiding Circuit Court Judge

St. George, South Carolina

MAHAN LAW, LLC
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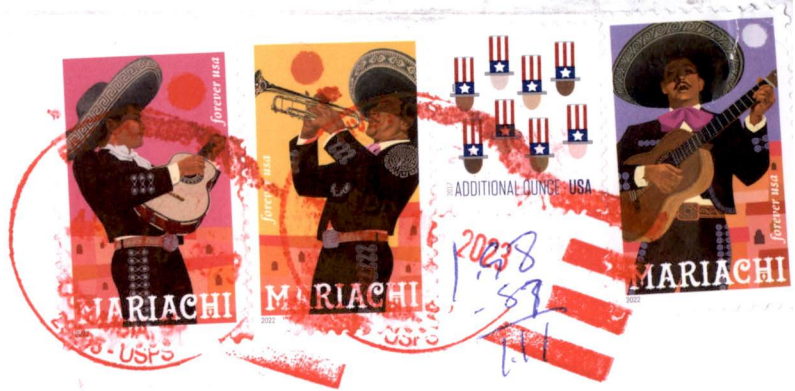

The Honorable Patricia A. Howard
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211