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S.C. SUPREME COURT

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4003169

Johnny Walker Gaskins

PLAINTIFF(S)

State of South Carolina

DEFENDANT(S)

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.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other ______

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other ______

☐ **STAYED DUE TO BANKRUPTCY**

☐ **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:

2017 OCT 10 PM 2:00

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
		$
		$
		$

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 ______________ **Judge Code** ______ **Date** ______

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of ________, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 10 day of Oct, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

Aimee Jendrzejewski Zmroczek

Jessica Elizabeth Kinard

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter ______________

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No.: 2015-CP-40-03169

Johnny Walker Gaskins, 313590,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

2017 OCT 10 PM 12:03

This court convened an evidentiary hearing into this matter on July 18, 2017, at the Richland County Courthouse. Applicant was present at the hearing and represented by Aimee J. Zmroczek, Esquire. Jessica E. Kinard, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Applicant's attorneys, Joseph M. McCulloch, Esquire ("trial counsel") and Tara Dawn Shurling, Esquire ("appellate counsel"), were present and testified. Applicant was also present but did not testify, as is his right. This court had before it a copy of the trial transcript, the records of the Richland County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the appellate record, and the pleadings in this matter. This court finds as follows:

I. PROCEDURAL HISTORY

Applicant was indicted at the July 2008 term of the Richland County Grand Jury for two (2) counts of murder (2008-GS-40-1626, -3448), three (3) counts of assault and battery with intent to kill (2008-GS-40-1629, -1631, -1632), and one (1) count of use of a firearm during the commission of a violent crime (2008-GS-40-1627). Joseph M. McCulloch, Jr., Esquire, and Kathy R. Schillaci, Esquire, represented Applicant.

On April 13, 2015, Applicant proceeded to trial before The Honorable L. Casey Manning. Applicant was found guilty of all charges as indicted. Judge Manning sentenced Applicant to incarceration for life for both counts of murder, which are set to run concurrently. Applicant was sentenced to consecutive twenty (20) year sentences for each count of assault and battery with intent to kill. Applicant was also sentenced to a consecutive sentence of five (5) years for use of a firearm during the commission of a violent crime.

Applicant filed a timely notice of appeal. An appeal was perfected by Tara Shurling, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Gaskins, Op. No. 2013-UP-304 (S.C. Ct. App. filed July 3, 2013). Applicant filed a writ of certiorari to the South Carolina Supreme Court, in which the court subsequently denied certiorari. State v. Gaskins, Appellate Case No. 2013-001904 (S.C. filed August 6, 2014). The Remittitur was returned on August 15, 2014.

II. ALLEGATIONS

In his Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel"
   a. "Failure to properly prepare Applicant prior to trial"
   b. "Failure to call witnesses and utilize evidence"
2. "Ineffective assistance of appellate counsel"
   a. "Failure to raise all meritorious issues on appeal"

The morning of the hearing, Applicant emailed Respondent and this court a handwritten document listing amended allegations, which were the following:

Trial Attorney

Fail to properly prepare/call witness/utilize evidence

Fail to preserve obvious issues for appeal

A. Did not move to suppress search of vehicle
   a. Illegally obtained
B. Did not move to suppress video
   a. Issues with completeness

b. Editing
C. Did not move to suppress phone
a. Never reviewed calls
b. Never examined
D. Did not object to Judge's behavior/chilling effect on defendant
E. Did not object to Judge going into jury room
F. Did not object to premature deliberations
G. Did not argue jury charges/Belcher
a. Fail to request charges
H. Did not object to bolstering
I. Never received/reviewed 911 calls

Appellate Attorney
A. Did not argue Biggers
B. Did not argue search warrants
a. Validity of tipster
b. Hearsay
C. Did not argue closing argument preservations
D. Did not argue Brady/Rule 5 violations

Respondent objected to the submission of these amendments pursuant to SCRCP Rule 15(a), and moved for a continuance in order to prepare to defend these allegations. This motion was denied, though this court cautioned Applicant about the presentation of late amendments in the future. In evaluating these allegations, it is the court's position that Applicant's original allegations were folded into and described in more detail by the amendments, which will be discussed further below.

III. STATEMENT OF FACTS

On February 5, 2007, Johnnie Gaskins was removed from the Super Bowl party at the Club 360 for unruly behavior. According to bar manager Erin Hellman, Gaskins had demanded service: "give me a f—ing Hennessy" (cognac). When she offered him a menu, he retorted again "give me a f—ing Hennessy bitch," and threw money at her. Gaskins then approached aggressively toward her behind the bar. At that point, security for the club came and took him out the front door of the club. Hellman described Gaskins as being very sweaty and unsteady on

his feet, and having a difficult time keeping his head up. She identified Gaskins in court (and in a photographic line-up) as the unruly person. Around 20 minutes later, she heard shots being fired.

Prior to the shooting, Shannavia Williams arrived at the Club 360 around midnight. After staying for a while, she decided to leave to go to another club with her friends. Before leaving, she sat her drink down, but spilled it. She left her friend, Deirdre Houston, there and went to get something to clean the spill. Two other friends, Shanna Williams and Shanelle Whack, were in the back of the bar.

Quinton Harris and Lamont Davis had taken Gaskins outside with security and handcuffed him. Gaskins stated that the security thought they were gangsta, but "I'll show them gangsta." Sydney Williams, a friend of Gaskins, approached them and talked them out of calling the police concerning Gaskins. The handcuffs were removed and he was allowed to return to his car.

Gaskins was still angry as he walked back toward the car he came in - a Chevy Impala. Another security guard, Epsil Palmer, remained concerned about Gaskins because he was still acting rowdy at the car. Palmer went and talked to Gaskins and asked him to leave. Subsequently, he was seen getting in the car by himself.

Harris and Davis returned inside the club to remove another patron, Christopher Lyles. As they were doing that, Gaskins returned to his car.

Next, Harris and Davis took Christopher Lyles, another rowdy patron, outside. At that time, Gaskins had gotten in his Impala and driven to the front of Club 360 where he proceeded to open fire. Harris, while tussling with Lyles, looked up and saw Gaskins, whom he had removed from the club, firing from the Impala. Independent witnesses identified Gaskins as either shooting from the car or walking to the car immediately before the shooting. Victim Lamont

Davis identified Gaskins as the individual he saw shooting from the car, victim Quinton Harris identified Gaskins as the person he saw in the car with the gun, Sydney Williams identified Gaskins as getting in the car that stopped in front of club when shooting started, and Epsil Palmer identified Gaskins as person who entered vehicle from which he saw flashes emanating, although it was too far at the time to see the actual shooter.

Security guard John Adams was hit and subsequently died. Inside the bar, Deirdre Houston was shot while she was waiting for Shannavia Williams to return and clean the spilled drink. Shannavia Williams was returning to clean up the spill and was shot in the head, resulting in her death. Security guard Lamont Davis was also shot. Quintin Harris was also shot on his knuckle, but avoided other bullets in his direction. At that point, the Chevy Impala left the scene. Calls were made to 911. The acquaintance of Gaskins, Sydney Williams, was handcuffed by security because they believed he knew something about the shooter.

The owner of the club, Lindburgh Porterfield, recovered a cell phone in the parking lot. This phone was later turned over to the Sheriff's Department. The Chevy Impala was ultimately found. Inside the vehicle, the police located documents with Gaskins' name, as well as gunshot residue and trace evidence linking Gaskins' DNA to the vehicle. In addition, a shell casing was found inside the vehicle. Forensic testing of the shell casing in the Impala linked it to 40 caliber shell casings found in the club's parking lot as being fired from the same weapon.

IV. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Applicable Law

This Court finds that Applicant has failed to satisfy his burden to prove that Counsel was deficient or that he was prejudiced by Counsel's alleged deficiencies. Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813,

814 (1985). 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 (1984). The proper measure of performance is whether Counsels provided representation within the range of competence required in criminal cases. Id.

In evaluating allegations of ineffective assistance of counsel, the court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). 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. Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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.

This court finds both attorneys' testimony was credible, and does not factor into its ultimate decision the fact that Applicant chose not to testify. Regardless, this court finds that Applicant has failed to satisfy his burden to prove that either counsel was deficient. Applicant also failed to prove he was prejudiced by the alleged deficiency. For the reasons below,

Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is, therefore, denied and dismissed:

<u>Analysis</u>

At the evidentiary hearing, trial counsel testified to his recollection of the evidence the prosecution had against Applicant, and characterized it as overwhelming. He described it as a "hope for the best" defense, describing that as trying to defeat the State's burden of proof by poking holes in their presentation. The evidence against Applicant was that many witnesses identified him, shell casings were found in his car, as well as near where the car stopped and fired. His cell phone was found inside of the club, and potential testimony from a woman with whom he was romantically involved that he confessed to her was presented to the defense several days before trial. Trial counsel testified that they went through the list of usual defenses, including alibis and mental incompetence, but none refuted the evidence. Additionally, many witnesses to the incident would not meet with the defense team, including Sydney Williams. Ultimately, trial counsel's summary was that there was no real defense and Applicant knew that.

Trial counsel testified in further detail about individual pieces of evidence, many of which were listed as specific allegations. For example, Applicant alleged a general failure to prepare, call witnesses, or utilize evidence, which all go hand in hand with other allegations such as failure to suppress different items. Trial counsel was questioned about the vehicle in question at the crime scene, including why he did not move to suppress the search of the vehicle as being illegally obtained. The record reflects that trial counsel did move to challenge the validity of the search warrants of Applicant's residence and vehicle, but was not successful. PCR counsel questioned trial counsel specifically about whether the warrant was illegally obtained, and whether an anonymous tip could have influenced the issuance of the warrant. Trial counsel

argued that he would always be concerned if a warrant was based on an anonymous tip, but it was apparent that the information was verified and corroborated by law enforcement, as was evidenced in the trial court's ruling.[1] Id. South Carolina law holds that even an attorney who may have performed deficiently in failing to object to a defective warrant may not be found ineffective if the Applicant fails to show prejudice. Gantt v. State, 354 S.C. 183, 520 S.E.2d 133 (2003). That is not the case at hand, as trial counsel took the steps he deemed necessary to challenge the warrants and ensure that no adverse evidence or rulings were entered against Applicant. This certainly does not rise to the level of deficient performance or prejudice as considered by Strickland, supra. The evidence submitted regarding this allegation does not meet the required burden and the allegation is dismissed with prejudice.

Regarding the video of the incident from nearby security cameras, trial counsel testified that he did not move to suppress it, as alleged. He could not recall when he received the video, but did remember that he showed it to Applicant. He remembered it being an exterior security camera from the business next door. He testified that it showed people leaving the club, two people going to a vehicle, one getting in the back of the vehicle, the car pulling around to the front of the club, and what the State characterized as gunfire coming from the car. Trial counsel further testified that he had no reason to believe that the video was altered in any way and, because it corroborated the accounts of the witnesses, he believed it was an accurate presentation. Therefore, he did not hire an expert to explore the video further. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State,

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[1] During argument, the trial court opined that, "I think [Applicant's] name wasn't just casually mentioned. They put him in the car, they put the gun in his hand, the bullets came out of the gun that was in his hand." Tr. p. 65;25 - 66;3.

309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). The evidence submitted regarding this allegation does not meet the required burden and the allegation is dismissed with prejudice.

Specific testimony was elicited regarding the aforementioned phone call of a confession made to Ms. Sykes, a former romantic interest of Applicant. Trial counsel testified that he did not look too deeply into the phone call or other issues regarding Applicant's phone because he was aware that the phone was collected at the crime scene. He did not believe that the phone was an issue, because its location at the scene was bad enough; therefore, he gave the phone no further examination or weight. When the issue of the phone came up at trial, specifically when the club's owner, Lindbergh Porterfield, began to testify regarding calls he answered on the phone after he found it, trial counsel made all appropriate objections, including a motion for a mistrial and curative instruction. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). The evidence submitted regarding this allegation does not meet the required burden and the allegation is dismissed with prejudice.

Applicant made further allegations regarding trial counsel failing to receive and/or review 911 calls regarding the incident. The only evidence presented at the evidentiary hearing

regarding 911 calls was the fact that an anonymous tip regarding the location of the vehicle was submitted via 911. Trial counsel testified that he had no way to know more information about the 911 tip, and did not see that it was relevant, given that his suppression motion was denied. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). The evidence submitted regarding this allegation does not meet the required burden and the allegation is dismissed with prejudice.

When considering the fact that the trial judge went into the jury room, trial counsel testified that it is not very unusual and had happened to him during prior trials. He testified that he did not object because he saw no aggravation to the jury, so any objection would not serve a purpose. He further testified that he would have objected if it had been prejudicial, but the conduct seemed inoffensive. Overall, the allegations relating to trial counsel's failure to object to the trial judge's behavior do not meet the burden required to prove ineffective assistance of counsel. Rather, they show sound judgment and well-reasoned strategy Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State,

308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). Therefore, the allegation is dismissed with prejudice.

There were further allegations regarding jury conduct, specifically, that the jury sent a note to the trial court before the trial had ended regarding details of testimony. When questioned about this at the evidentiary hearing, trial counsel testified that he had concerns to the extent that the jury is told not to discuss the case before they retire to deliberate. He elaborated, though, that he has been in trials where jurors raised their hands and asked questions. He further testified that he believed the trial judge handled the situation appropriately by asking the jurors to keep listening to the entire presentation and the charges before asking any questions. There was no evidence presented showing that trial counsel's conduct was deficient or prejudicial, and therefore the standards of Strickland, supra, cannot be satisfied. The evidence submitted regarding this allegation does not meet the required burden and the allegation is dismissed with prejudice.

Also regarding the jury, Applicant alleged that trial counsel was ineffective by not requesting any specific jury charges and failing to ask for a Belcher[2] charge, specifically. The record reflects that trial counsel did make an argument to the trial court about the language regarding intent as reflected by Belcher, even though the case had only recently been decided. Trial counsel testified that he did not recall specific jury instructions, though he usually submitted written ones. When asked why he did not submit an instruction on multiple charges, he stated that he does not always submit that specific instruction because it is a standard instruction. When asked about submitting an instruction on intent, he testified that he could not recall a reason he did not request one. Lastly, when asked why he did not request a charge

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[2] State v. Belcher, 385 S.C. 597685 S.E.2d 802 (2009).

regarding spoliation, he testified that judges rarely charge on the facts and he did not believe this was necessary. This court agrees with trial counsel's assessment of the jury instructions as they were presented at trial. Further, it finds that any perceived failure to request an instruction regarding intent was remedied by the discussion on the record about Belcher. There was no evidence presented showing that any of trial counsel's conduct was deficient or prejudicial, and therefore the standards of Strickland, supra, cannot be satisfied. The evidence submitted regarding this allegation does not meet the required burden and the allegation is dismissed with prejudice.

Applicant's last issue regarding conduct with the jury was that trial counsel did not object to bolstering during the State's closing argument. However, the record reflects that trial counsel objected three times during the State's closing. These were made contemporaneously with the testimony and explained to the court at the bench, then put on the record after all closings were completed. These objections, as trial counsel described at the evidentiary hearing, dealt with repetition, inflaming the jury's passions, mischaracterized testimony, and reference to a "gangsta style" shooting. This court finds that trial counsel's performance was not deficient or prejudicial, and therefore the standards of Strickland, supra, cannot be satisfied. The evidence submitted regarding this allegation does not meet the required burden and the allegation is dismissed with prejudice.

The last allegation regarding trial counsel was that of failure to preserve issues for appeal. This court finds that no evidence has been presented, independent of the aforementioned allegations and their analysis, which would constitute a failure to preserve an issue for appeal. Therefore, this court finds that trial counsel's performance was not deficient or prejudicial, and therefore the standards of Strickland, supra, cannot be satisfied. The evidence submitted

strong one, as many witnesses knew Applicant in advance of the shooting and/or had seen him up close during the incident. She further felt that this would go to weight rather than admissibility of identification evidence. Furthermore, appellate counsel testified that she felt the solicitor was careful to get the witness to testify how they were able to identify Applicant, for example that he was harassing the bartender. Appellate counsel testified that she felt that, overall, briefing this issue would muddy the waters for good issue. As considered above, "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. Appellate counsel exercised her discretion in the decision not to brief this issue, and is not ineffective for that. This court finds these arguments persuasive and does not find that appellate counsel's conduct was deficient or prejudicial. Therefore, Applicant has failed to meet the burden required by Strickland, supra and Southerland, supra, and the allegation is dismissed with prejudice.

When questioned about the potential appellate issues surrounding objections during the state's closing argument, appellate counsel testified that she believed the fact that the objections were not contemporaneously ruled upon was problematic. She also believed that trial counsel was required to object and move for a mistrial, rather than simply object and explain it after arguments were completed. Regarding potential discovery violations, appellate counsel testified that she addressed this in her second issue on appeal. These alleged violations stemmed from the testimony of the club's owner, Lindbergh Porterfield, testifying to two surprise pieces of evidence that were both potential hearsay problems – a dying declaration by the victim and a confession by Applicant. These both drew objections from trial counsel; however, Applicant alleged in this PCR that they were potentially Rule 5, SCRCrimP and Brady[4] violations because

[4] 373 U.S. 83 (1963).

regarding this allegation does not meet the required burden and the allegation is dismissed with prejudice.

V. Ineffective Assistance of Appellate Counsel

Applicable Law

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. This is the same standard as stated for trial counsel in Strickland, supra. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

"Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is 'difficult to demonstrate that counsel was incompetent.'" United States v. Mason, No. 3:06–607–CMC, 2012 WL 5845807 at *1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While 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 (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, 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not deficient performance. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

"To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal." United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct. at 764).

This court finds both attorneys' testimony was credible, and does not factor into its ultimate decision the fact that Applicant chose not to testify. Regardless, this court finds that Applicant has failed to satisfy his burden to prove that either counsel was deficient. Applicant also failed to prove he was prejudiced by the alleged deficiency. For the reasons below, Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is, therefore, denied and dismissed:

Analysis

Appellate counsel testified that she was retained to represent Applicant in his direct appeal. She stated that she prepared the case by reading the entire transcript and identifying the issues that were preserved and most meritorious for appeal. Appellate counsel was asked if there were any unpreserved issues, and she responded that there may have been some that she did not argue. She testified that she was most concerned with what she identified as Issue 3 in the appellate case regarding the trial judge's response to one of trial counsel's objections, as she thought it could be successful even without an underlying objection from trial counsel.

Most of appellate counsel's testimony centered on potential challenges to the search warrants. Substantially, it was because appellate counsel did not believe that those grounds were meritorious. Specifically, she testified that there was consent from a resident to search the house, where they found clothing in plain view. The search continued until law enforcement saw that an attic door was open and asked if anyone was up there, and consent was revoked by the owner of the house. Regarding the car, Sydney Williams gave a statement immediately after the incident that said Applicant drove a blue Impala. This statement was bolstered by the video that law enforcement received. Furthermore, appellate counsel testified that there were many sustaining grounds to allow the warrant, including that Applicant had no expectation of privacy for the vehicle, as it was not his, and he later returned it to her home. This court finds these arguments persuasive and does not find that appellate counsel's conduct was deficient or prejudicial. Therefore, Applicant has failed to meet the burden required by Strickland, supra and Southerland, supra, and the allegation is dismissed with prejudice.

Testimony was also elicited regarding identification testimony and the Neil v. Biggers[3] hearing. Appellate counsel testified that she did not think the issue of proper identification was a

[3] 409 U.S. 188 (1972).

they were inconsistent with the witness's prior statements. Appellate counsel stated that she pursued the hearsay aspect of this witness's testimony, as she believed that the reviewing court would find that Applicant and his counsel had sufficient time to review the written statements that were turned over in advance of cross-examination, as well as due to trial counsel's solid objection and record preservation. She further testified that if there had been a written statement from Mr. Porterfield that had not been turned over in discovery, it would have been a much stronger issue for appeal. As considered above, "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. Appellate counsel exercised her discretion in the decision not to brief this issue, and is not ineffective for that. This court finds these arguments persuasive and does not find that appellate counsel's conduct was deficient or prejudicial. Therefore, Applicant has failed to meet the burden required by Strickland, supra and Southerland, supra, and the allegation is dismissed with prejudice.

V. CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant, Johnny Walker Gaskins, 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.

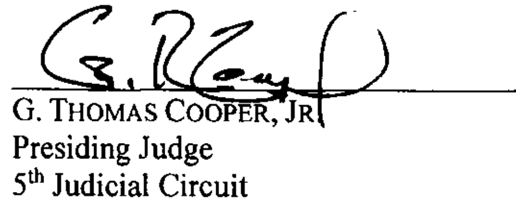
This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate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

review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant is remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 6 day of October, 2017.



G. THOMAS COOPER, JR.
Presiding Judge
5th Judicial Circuit

Camden, South Carolina