THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Jun 21 2023
S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. D. Morgan, Jr., Circuit Court Judge

2019-CP-23-3629

Erick Hewins, ... Appellant,

v.

The State, ... Respondent.

NOTICE OF APPEAL

Erick Hewins appeals the Honorable G. D. Morgan, Jr.'s Order of Dismissal received June 15, 2023.

This 21 day of June, 2023.

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENHTH JUDICIAL CIRCUIT
Erick Hewins, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2019-CP-23-03629 **ORDER OF DISMISSAL**

This matter comes before this Court by way of a pro se application for post-conviction relief filed by Erick Hewins ("Applicant") on June 25, 2019. The State's ("Respondent") return to the application was served on Applicant on November 21, 2019. An evidentiary hearing in this matter was held before the undersigned at the Greenville County Courthouse. Applicant was present and was represented by Susannah C. Ross. Taylor Zane Smith of the South Carolina Attorney General's Office represented Respondent. Following a thorough review of the record in its entirety and the evidence presented at the evidentiary hearing, this Court finds that Applicant has failed to prove that he is entitled to post-conviction relief and denies the application with prejudice.

PROCEDURAL HISTORY

Applicant is not currently imprisoned in the South Carolina Department of Corrections ("SCDC"). During its July of 2011 term, the Greenville County Grand Jury indicted Applicant for trafficking in cocaine base (crack cocaine) (2010-GS-23-008295), possession of a Schedule IV controlled substance (clonazepam) (2010-GS-23-008296). On January 14-17, 2013, Applicant proceeded to a jury trial with the Honorable G. Edward Welmaker ("trial court") presiding. Hunter Chase Harbin ("trial counsel") represented Applicant at that trial, and Joyce Krolak Monts ("the

solicitor"), then of the Thirteenth Circuit Solicitor's Office, prosecuted him. At the conclusion of trial, the jury found Applicant guilty as indicted. The trial court sentenced Applicant to imprisonment for one year for possession and for a consecutive term of twenty-five years for trafficking.

Trial counsel filed a timely notice of appeal. Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent Defense and Jessica H. Lerer[1] ("appellate counsel") represented Applicant on appeal initially. Appellate counsel argued that the trial court erred: (1) in denying the defense's motion to suppress drugs seized from Applicant by a law enforcement officer; (2) in finding that the officer had reasonable suspicion to conduct a frisk of Applicant pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968); (3) in denying the defense's motion to suppress evidence seized by the officer from Applicant during a second search of Applicant; and (4) in admitting evidence over the defense's objection to the chain of custody. The South Carolina Court of Appeals affirmed in an unpublished opinion, finding that: (1) there was evidence to support the trial court's finding that the officer had reasonable suspicion to justify his stop of Applicant; (2) there was evidence to support the trial court's finding that the officer had a reasonable suspicion to believe that Applicant was armed and dangerous, justifying his pat-down of Applicant; (3) there was evidence to support the officer's first reach into Applicant's pocket; that the issue of whether the officer's second reach into Applicant's pocket was justified by Applicant's consent was not preserved for direct appellate review; and (4) that the trial court did not abuse its discretion in overruling Applicant's chain-of-custody objection to the admission of the drug evidence. *State v. Hewins*, Op. No. 2014-UP-478 (S.C. Ct. App. filed December 23, 2014) (per curiam). In an order issued on February 24, 2015, the Court of Appeals denied Applicant's petition for rehearing.

[1] Lerer was appointed as lead counsel as part of the Appellate Practice Project.

The South Carolina Supreme Court, in an order issued on March 24, 2015, among other things, denied Petitioner's motion to appoint counsel, which left Applicant proceeding as a pro se appellant. Applicant also filed a motion to, among other things, proceed as a pro se appellant; in light of the Supreme Court's previous order denying Applicant's to appoint counsel, the Court took no action on that second motion. In an order issued on November 5, 2015, the Supreme Court granted Applicant's petition for a writ of certiorari in part and denied it in part. Applicant then argued that the trial court erred: (1) by not suppressing evidence seized from Applicant by the officer; (2) in finding that the officer had a reasonable suspicion justifying a *Terry* frisk; (3) in not suppressing evidence seized by the officer during a second search of Applicant; and (4) in admitting evidence over the defense's chain-of-custody objection. On March 23, 2016, the Supreme Court dismissed the writ of certiorari as improvidently granted. The remittitur was issued on that same date.

On April 26, 2016, Applicant filed a pro se application for post-conviction relief, raising multiple claims, which this Court interprets as follows: (1) trial counsel was constitutionally ineffective for not having the trial court correctly apply the law regarding consent; (2) trial counsel was constitutionally ineffective for not producing evidence of a motel parking ordinance; (3) trial counsel was constitutionally ineffective for not requesting a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978); (4) trial counsel was constitutionally ineffective for not communicating to Applicant a plea offer from the solicitor; (5) trial counsel was constitutionally ineffective for not requesting a hearing pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964); (6) trial counsel was constitutionally ineffective for not requesting a jury instruction on a lesser-included offense; (7) trial counsel was constitutionally ineffective for raising a consent argument to the officer's two reaches into Applicant's pocket; (8) trial counsel was constitutionally ineffective for

not calling witnesses at trial to impeach the officer's credibility; (9) trial counsel was constitutionally ineffective for not objecting to the trial court's jury instructions given pursuant to *Allen v. United States*, 164 U.S. 492 (1896); (10) trial counsel was constitutionally ineffective for not objecting to an improper comment from the solicitor; (11) trial counsel was constitutionally ineffective for not objecting to the presence of an alternate juror in the jury room during the jury's deliberations; and (12) appellate counsel was constitutionally ineffective for not arguing the merits versus the preservation issues. On October 25, 2016, Applicant appeared at the Greenville County Courthouse before the Honorable John C. Hayes, III ("PCR court"), for an evidentiary hearing on the application. Applicant was represented by Brian P. Johnson, and Patrick L. Schmeckpeper of the South Carolina Attorney General's Office represented Respondent. On October 27, 2016, the PCR court issued an order granting the application in part and denying in part, finding that: (1) trial counsel was constitutionally ineffective for not preserving for direct appellate review the issue of the officer's second reach into Applicant's pocket because attorneys are required to preserve issues for appellate review and the lack of preservation itself affected the adversarial process to Applicant's detriment; (2) trial counsel's performance with respect to the *Allen* charges was not deficient; and (3) there was no merit to Applicant's argument about a *Jackson v. Denno* hearing because there was no such issue.

Respondent filed a timely notice of appeal. Respondent argued that the PCR court erred in granting the application by failing to apply the correct standard, which required it to consider whether Applicant had proved that he would have been successful on appeal had the search issue been preserved for appellate review, and because Applicant had failed to satisfy that standard. On May 3, 2018, the Supreme Court denied Respondent's petition. The remittitur was issued on May 21, 2018.

On August 21, 2018, Applicant appeared before the Honorable Walton J. McLeod, IV ("plea court"), and pleaded guilty to possession with intent to distribute cocaine base (2010-GS-23-08295), a lesser-included offense of trafficking, and possession of a Schedule IV controlled substance (clonazepam) (2010-GS-23-08296). Applicant was represented at that hearing by William Eugene Grove ("plea counsel"), and the solicitor again prosecuted him. The plea court sentenced Applicant to imprisonment for six months for possession of a controlled substance and for five years for possession with intent to distribute, with both sentences running concurrently, and with credit for time served. Applicant did not appeal those convictions or sentences.

CURRENT PROCEEDING

On June 25, 2019, Applicant filed the present pro se application for post-conviction relief, and raised multiple claims, which this Court interprets as follows: (1) plea counsel failed to conduct an adequate pre-trial investigation, which would have shown that the officer committed perjury; and (2) plea counsel was constitutionally ineffective for not moving to dismiss rather than reaching a plea deal. Applicant prayed in the application that the convictions would be dismissed and that the sentences would be vacated. On March 6, 2020, Applicant, through counsel, filed an amended application, that incorporated some or all of Applicant's claims previously raised and also raised the following claims: (1) plea counsel was constitutionally ineffective for advising Applicant to plead guilty when an adequate investigation would have shown evidence that the law enforcement officer lied and that the officer's search was unconstitutional; and (2) that the illegal search violated

Applicant's due process rights.[2, 3]

On May 25, 2022, Applicant appeared before this Court at the Greenville County Courthouse for an evidentiary hearing on this current application. Applicant was represented at the hearing by Susannah C. Ross, and Taylor Zane Smith of the South Carolina Attorney General's Office represented Respondent.[4] At the start of that hearing, Applicant affirmed that he would proceed only upon the claims presented in the amended application filed through counsel. This Court finds that all other claims are waived and abandoned and will only consider the claims presented in the amended application.[5]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Before this Court are: the records of the Greenville County Clerk of Court for Applicant's convictions and sentences; Applicant's records from SCDC; the transcript from Applicant's trial; the records from Applicant's direct appeal, including the notice of appeal, the record on appeal, the parties' final briefs

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[2] On July 23, 2019, Applicant filed a pro se amended application, but he did so the day after counsel had been appointed to represent him. Because Applicant was represented by counsel at that time, this Court will not consider his pro se amendment. "Since there is no right to 'hybrid representation' that is partially pro se and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed pro se by a person represented by counsel are not to be accepted unless submitted by counsel." *Miller v. State*, 388 S.C. 347, 347, 697 S.E.2d 527, 527 (2010).

[3] On January 27, 2022, Applicant, through counsel, filed another amended application that was identical to the amendment that counsel had already filed. Because the two amendments were identical, this Court will disregard the second.

[4] Applicant had already completed his sentences by the time of the hearing.

[5] Respondent moved to dismiss the application as a matter of law at the start of the hearing, arguing that the record was clear that Applicant was aware that the Court of Appeals found that the issue of the officer's second reach into his pocket had been unpreserved for appellate review, that Applicant could have raised the issue again if he had proceeded to trial instead of pleading guilty, and that Applicant nevertheless decided to waive his right to challenge the prosecution's case by entering guilty pleas in accordance with the plea agreement. This Court denied that motion and allowed Applicant to put up his evidence, although the ruling admittedly was a close call.

(including appellant's reply brief), appellate counsel's July 16, 2014, supplemental citations letter, the Court of Appeals' opinion, the petition for rehearing, the Court of Appeals' order denying the petition for rehearing, Applicant's pro se filings and letters and motions, Applicant's pro se petition for a writ of certiorari to the Court of Appeals, Respondent's return to the petition for a writ of certiorari to the Court of Appeals, the Supreme Court order denying Applicant's motions, the Supreme Court order granting Applicant's petition for a writ of certiorari in part and denying it in part, the parties' final briefs filed in the Supreme Court, the order dismissing the writ of certiorari as improvidently granted, and the remittitur; the transcript from Applicant's guilty plea hearing; and all filings in this matter. Set forth below are the relevant findings of facts and conclusions of law with regards to the claims that Applicant advanced at the evidentiary hearing, as required by S.C. Code Ann. §17-27-80 (1985).

Applicant's claim that plea counsel was constitutionally ineffective for advising Applicant to plead guilty when an adequate investigation would have shown evidence that the law enforcement officer lied, and that the officer's search was unconstitutional.

Applicant testified before this Court that everyone speculated and lied at his trial. He testified that, if plea counsel had done an adequate pre-trial investigation rather than negotiating a plea agreement, he would have discovered that the law enforcement officers were lying, and that the case against him should have been dismissed. He testified that plea counsel should have pursued a trial strategy based on the Fourth Amendment. He testified that a computer assisted dispatch ("CAD") report, the first page of which was admitted into evidence before this Court as Applicant's exhibit one, proves true his testimony. He testified that he had seen the CAD report before pleading guilty and that trial counsel had used at least part of the report at trial. He then testified that he "didn't know nothing was out there until . . . [he came] back" and pleaded guilty,

but he also agreed that he knew that the report "was out there." PCR Tran. 15-16.[6] He testified that he knows his driver's license number and that the CAD report contains his driver's license number, but then testified that he does not "know if that's [his] driver's license number. Because won't nobody tell me." PCR Tran. 16. He testified that a law enforcement officer testified at trial that he detained Applicant because he did not know Applicant's identity, and Applicant questioned that testimony from the officer because the CAD report contained Applicant's driver's license number, which he thought was an indication that the officer's testimony had been false. He testified that, had plea counsel conducted an adequate investigation, he could have argued at trial that the officer lied about his reason for detaining Applicant and that he really was on a "fishing expedition." PCR Tran. 17. He felt that the officer's actions violated his constitutional rights. He testified that he pleaded guilty because plea counsel failed to conduct that investigation and erroneously advised him to plead guilty. He testified that he would have proceeded to trial had he known of the issue beforehand, which made the case, in his mind, "a clear-cut case." PCR Tran. 18. He testified that he did not think that plea counsel should have even negotiated a plea agreement.

On cross-examination, Applicant agreed that he told plea counsel that he wanted him to investigate the issue of the CAD report and testified that he did so himself as soon as he was released from SCDC after he was awarded a new trial. He agreed that that discussion took place as soon as plea counsel began representing him. He testified that the only thing that plea counsel told him was to plead guilty because plea counsel did not trust the "system." PCR Tran. 19. He denied that, at the time of his guilty plea hearing, he had been satisfied with plea counsel's representation of him and explained that his affirmation to the plea court that he was satisfied was

[6] Citations styled this way are references to the transcript of the May 25, 2022, hearing before this Court.

a lie. He testified that his affirmation to the plea court that plea counsel had answered all of his questions had been true. He testified that he pleaded guilty because he saw that plea counsel would not "put up no fight," which he also believes is true of all of the lawyers who have represented him. PCR Tran. 19-20. He agreed that he pleaded guilty because he was "[j]ust ready to get it over with." PCR Tran. 20. He explained that he affirmed to the plea court that he wanted to waive his constitutional rights and plead guilty because he knew that plea counsel would not "fight." PCR Tran 20-21. He testified that he falsely affirmed his guilt to the plea court because plea counsel told him to do so, as plea counsel did not "have faith in the system." PCR Tran. 21.

Applicant was questioned about a letter that he mailed to the South Carolina Court of Appeals while his direct appeal was pending. That letter was admitted into evidence before this Court as Respondent's exhibit one. He agreed that the first and third pages of the CAD report accompanied his letter, and that he requested in the letter that the Court of Appeals consider the report. He also agreed that he had underlined on the report, which accompanied his letter, the number he had just previously claimed was his driver's license number.

Plea counsel testified at the hearing before this Court. He testified that he was appointed to represent Applicant shortly after Applicant's case was remanded for re-trial after he was awarded post-conviction relief. He testified that he discussed Applicant's case with trial counsel, Susan B. Hackett, who is an appellate lawyer at the Commission on Indigent Defense who represents those convicted of crimes when they are appealing their convictions, and with Lawrence W. Crane, a lawyer who had represented Applicant in the case before trial counsel did so. He testified that he agreed with Applicant's allegation that there was a viable Fourth Amendment issue in Applicant's case and said that he discussed that issue with trial counsel. He testified that he and Applicant decided, over the course of the six to ten weeks during which he represented Applicant, that

Applicant would abandon that issue in exchange for a plea agreement. He could not recall if he had read all of the transcript from Applicant's trial, but he agreed that he was aware of the legal issues from the trial. He described Applicant as someone who is intelligent and understands the law and testified that he and Applicant discussed the Fourth Amendment issue and how it would play out if they pursued the issue at a second trial. He did not think that he reviewed the CAD report, but he was aware of the allegation that the law enforcement officers who testified at trial gave conflicting accounts of their interaction with Applicant; he did not remember specifically discussing with Applicant the driver's license number, but he thought that it was possible that they discussed that topic. He did not see a copy of the CAD report in his file, but he agreed that it was possible that he had not yet received all of the discovery from the solicitor by the time of Applicant's guilty plea hearing. He did not recall reviewing the CAD report with Applicant. He testified that he did not have any note indicating that Applicant specifically asked him to investigate the report.

Plea counsel testified that he and Applicant considered how the alleged inconsistencies in the officers' accounts "changed the value" of what Applicant's case "was worth," and that they decided that Applicant received a good value by entering guilty pleas in exchanged for sentences that were essentially "time served negotiated." PCR Tran. 30. He testified that he thought that a conviction for possession with intent to distribute with a sentence of time served was an appropriate resolution in exchange for the issue that Applicant was waiving by pleading guilty considering the risk to which Applicant would have been exposed had he proceeded to trial and been unsuccessful. He agreed that his explanation would have been like saying that Applicant was trading a potential Fourth Amendment issue for a five-year, time-served sentence, and avoiding the possibility that Applicant would again receive a twenty-five-year mandatory sentence. He

testified that Applicant gave him no reason to believe that he did not understand the trade off associated with the plea agreement, and that Applicant indicated to him that, if the solicitor would not meet the terms that were ultimately agreed upon, that Applicant would be willing to go to trial again. He agreed that Applicant wanted a second trial when he was first appointed to represent him but testified that Applicant changed his mind during the representation. He testified that Applicant did not ask him to do anything with respect to the Fourth Amendment issue that he failed to do, and that, if anything was left undone, it was left undone because Applicant accepted the plea agreement and abandoned the idea of a trial. He made it clear to Applicant that he would try the case if Applicant did not plead guilty. As he explained it, his investigation ended when Applicant accepted the plea offer.

All defendants have a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). A post-conviction relief applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that his lawyer was constitutionally ineffective, he must prove that the conduct of his lawyer "so undermined the proper functioning of the adversarial process that [that conduct] cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the post-conviction relief court applies the two-pronged test outlined in *Strickland*. First, the applicant must prove that the performance of his lawyer was deficient. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting *Strickland*). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). In order for a post-conviction relief applicant to successfully prove that his defense attorney's

performance was deficient, the applicant must prove "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quotation omitted). "The proper measure of counsel's performance remains whether he has provided representation within the range of competence required of attorneys in criminal cases." *Id.* (citations omitted). The "preeminent authority for all" courts when they are considering an applicant's claim of constitutional ineffectiveness requires that the courts be highly deferential to a defense lawyer's performance because:

> [I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable . . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 444-45, 334 S.E.2d at 815-16 (quoting *Strickland*). An applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. "The burden of rebutting this presumption rests squarely on the defendant, and it should go without saying that the absence of evidence cannot overcome it. In fact, even if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen." *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (quotation omitted).

Second, the deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for [the lawyer'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. "Representation is an art, and an act or omission that is unprofessional in one case may be sound

of even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (quotation omitted). With respect to a guilty plea counsel, an 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*, 474 U.S. at 59. A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing: (1) that counsel was deficient and (2) that there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. *Roscoe v. State*, 345 S.C. 16, 546 S.E.2d 417 (2001). The "prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial." *Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009).

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. A court need not first determine whether a lawyer'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. *Strickland*, 466 U.S. at 697. Moreover, *Strickland* does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, *Strickland* requires the post-conviction relief applicant to prove that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified

acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney. *Id.* at 690.

"A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." *Dalton v. State*, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). "Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea." *Garren v. State*, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); *see Jamison v. State*, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of cases" and instructing that caution must be exercised so as not to "undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea"). The South Carolina Supreme Court has instructed that:

> The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.

State v. Inman, 395 S.C. 539, 556, 720 S.E.2d 31, 40 (2011) (internal quotations and citations omitted). "[A] guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." *Jamison*, at 468, 765 S.E.2d at 129 (citations omitted).

In evaluating Applicant's arguments, this Court must consider the first prong of *Strickland*. A defense attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any

aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). A defense attorney's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. *Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Applicant has failed to prove that there was any deficiency in plea counsel's advice to Applicant. Plea counsel conducted a reasonable investigation into the potential Fourth Amendment issue when representing Applicant. He consulted with trial counsel, an appellate lawyer about the issue, and a criminal defense lawyer who has previously represented Applicant. He read at least some of the transcript from Applicant's trial, at which the issue had been addressed through argument from the parties and testimony from the relevant witnesses; since the potential Fourth Amendment issue was Applicant's primary concern and basis for the grant of post-conviction relief to Applicant, it is likely that the portion that plea counsel read would have included material relevant to the issue. He discussed the issue with Applicant extensively and explained to Applicant his two choices—proceed to trial or enter into a plea agreement that took the potential issue into account—and the possible consequences associated with each choice. He did everything with respect to the potential Fourth Amendment issue that Applicant asked him to do, except that he would have stopped investigating the issue once Applicant decided to abandon it by pleading guilty. He and Applicant decided that Applicant would abandon the potential issue in exchange for a plea agreement. This Court finds that all plea counsel's testimony about his investigation into the potential Fourth Amendment issue and his discussions with Applicant about the potential issue was credible. Under these circumstances, plea counsel's investigation was reasonable and his decision to stop investigating when Applicant decided to plead guilty was reasonable.

Applicant's testimony leads this Court to conclude that Applicant knew of the potential Fourth Amendment issue at least as early as his trial in January of 2013 because Applicant questioned the veracity of an officer's testimony as that officer testified at trial. Respondent's exhibit one, and Applicant's admission that he sent that letter to the Court of Appeals with the CAD report attached, and with his driver's license number underlined, proves that Applicant knew of the potential Fourth Amendment issue while his direct appeal was ongoing. Applicant knew of the potential Fourth Amendment issue when he was released from prison after Judge Hayes granted his previous application for post-conviction relief because Applicant testified that he began to investigate the issue of the CAD report himself as soon as he was released. He testified that he told plea counsel at the very beginning of the representation that he wanted plea counsel to investigate the CAD report issue. Applicant gave conflicting testimony, though, when he testified that he did not know that "nothing was out there" until he pleaded guilty; Applicant's testimony that he did not know of the CAD report until after he pleaded guilty is not credible. Applicant's testimony that he did not know if his driver's license number, which is on the CAD report, was actually his driver's license number is not credible and conflicts with his own testimony. Applicant has failed to specify what further investigation into the CAD report plea counsel should have done.

This Court turns now to the second prong of *Strickland*. A defense attorney's "[f]ailure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing *Kibler v. State*, 267 S.C. 250, 227 S.E.2d 199 (1976)). An applicant alleging that his attorney failed to prepare for the case must show how additional preparation would have resulted in a different outcome. *Skeen v. State*, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997). As already discussed, this Court finds that Applicant has failed to prove

that there was any deficiency in plea counsel's performance with respect to his advice to Applicant about the advisability of Applicant's entering into the plea agreement. However, even if plea counsel's performance had been deficient in some way, Applicant has failed to establish that further investigation would have yielded a different outcome if Applicant had gone to trial. Applicant did not establish that any issue with the CAD report and his driver's license number would have proven that the officers lied at trial, or that any evidence against him would have to be suppressed, or that the case against him would have had to be dismissed.

At any rate, Applicant has failed to prove that there is a reasonable likelihood that he would have proceeded to trial instead of pleading guilty had plea counsel done some additional investigation. This Court finds that Applicant's testimony that he would have gone to trial had plea counsel done more investigation is not credible because it is contradicted by plea counsel's credible testimony about his investigation and discussions with Applicant and by Applicant's affirmations at the guilty plea hearing that he was satisfied with plea counsel's representation of him and that plea counsel had done everything that Applicant wanted him to do, and because Applicant agreed before this Court that he pleaded guilty because he was ready to "get it over with." Applicant's attempts to disavow those affirmations now are self-serving and not credible. Applicant's testimony that he would have gone to trial instead of pleading guilty if he had known of the issue before he pleaded guilty is not credible because Applicant admitted in his testimony that he knew of the issue before pleading guilty and because the record independently proves that Applicant knew of the issue before pleading guilty. The evidence before this Court demonstrates that Applicant had full awareness of the potential Fourth Amendment issue in his case, including any aspect of the issue related to the CAD report, and that he chose to waive his right to make that Fourth Amendment challenge again at a second trial in exchange for a favorable plea agreement,

which plea counsel had explained to him would be an agreement accounting for the fact that the potential issue existed in the prosecution's case, should Applicant have decided to go to trial again. Applicant pleaded guilty to get the benefit of the bargain with a full understanding of the consequences of pleading guilty, and his testimony to the contrary is not credible.

This claim is denied and dismissed with prejudice.

Applicant's claim that the unconstitutional search violated his due process rights.

Applicant's claim that the search was unconstitutional is not properly before this Court. Post-conviction relief is not a substitute for any remedy incident to the direct review of a defendant's sentence or conviction. S.C. Code Ann. § 17-27-20(B). "Error in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in PCR proceedings." *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975); *Cummings v. State*, 274 S.C. 26, 27-28, 260 S.E.2d 187, 188 (1979). Additionally, our Supreme Court recently instructed that a post-conviction relief applicant's standalone constitutional claim was properly before it because that issue was not preserved at trial for direct appellate review by that applicant's criminal defense lawyer. *Fortune v. State*, 428 S.C. 545, 558, 837 S.E.2d 37, 44 (2018). "[A] guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." *Jamison*, at 468, 765 S.E.2d at 129. By pleading guilty, Applicant waived his right to challenge the constitutionality of the officers' actions. If Applicant wanted to make such a challenge, he could have proceeded to trial. Applicant specifically affirmed to Judge McLeod at his guilty plea hearing that he understood that, by pleading guilty, he would be waiving his right to confront the prosecution's evidence and the right to present a defense. As a matter of law, this Claim is dismissed because Applicant has waived his right to make this particular constitutional challenge and because this claim is not properly before this Court as Applicant pleaded guilty.

Nevertheless, Applicant's claim fails on the merits, too. The South Carolina Supreme Court has instructed that:

> The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.

Inman, at 556, 720 S.E.2d at 40. The United States Supreme Court has already identified the rights that a defendant needs to waive for his decision to plead guilty to be one that is voluntary, knowing, and intelligent: (1) the right against compulsory self-incrimination, (2) the right to a jury trial, and (3) the right to confront one's accusers. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Additionally, a defendant must be aware of the nature and crucial elements of the offense for which he is being accused, the maximum and minimum possible penalties, and the nature of any constitutional rights being waived by the entry of a guilty plea. *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). It is not required that a court direct a defendant's attention to "each and every constitutional right and obtain a separate waiver for each . . . . [A]n enumeration of specific rights waived is not required where the record otherwise reveals affirmative awareness of the consequences of a guilty plea." *State v. Lambert*, 266 S.C. 574, 578-79, 225 S.E.2d 340, 342 (1976) (internal citation omitted). Applicant has failed to prove that he was unaware of these rights; not only that, but he specifically waived them on the record at his guilty plea hearing. To the extent that Applicant is arguing that his guilty pleas were not entered knowingly and voluntarily because he did not know of the potential Fourth Amendment issue, this Court finds that that argument is not credible. To the extent that Applicant is challenging the knowing and voluntary nature of his pleas based upon his alleged belief that plea counsel had not done an inadequate investigation, this Court finds that that argument is not credible. This Court incorporates again all previous findings

in this order above. Applicant, in full understanding of the alternative courses of action open to him, made a knowing, voluntary, and intelligent choice to plead guilty. This claim is denied and dismissed with prejudice.

CONCLUSION

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

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice.

AND IT IS SO ORDERED this 5th day of May, 2023.

G. D. Morgan, Jr.
Presiding Judge

Greenville, South Carolina