

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Sep 06 2023

S.C. SUPREME COURT

APPEAL FROM YORK COUNTY  
Court of Common Pleas  
Heath P. Taylor, Circuit Court Judge

Case No 2019-CP-46-3761

Reginald Raynard White, Jr. SCDC No. 353172,..... Appellant,

vs.

State of South Carolina..... Respondent.

NOTICE OF INTENT TO APPEAL

Reginald Raynard White, Jr. appeals the Order of the Honorable Heath P. Taylor dated August 31, 2023. Appellate received a copy of this decision on September 1, 2023. The Order of Judge Taylor grants Mr. White permission to appeal the Order of the Honorable Thomas A. Russo.

Sept. 6<sup>th</sup>, 2023



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Attorney for Respondent

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF YORK )  
 Reginald Raynard White, Jr. )  
 SCDC № 353172, )  
 )  
 Applicant, )  
 )  
 -vs- )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS

2019-CP-46-3761

ORDER

This matter came before for hearing on August 14, 2023. On May 17, 2017, Reginald Raynard White filed his initial Post Conviction Relief application. He was represented in that case by William G. Yarborough. A hearing was held on the application on January 30, 2019 before Judge Thomas A. Russo. By order dated June 20, 2019, the Post Conviction Relief application was dismissed. No appeal was filed from the dismissal.

On November 11, 2019, Mr. White, pro se, filed a second Post Conviction Relief Application. This application made numerous allegations that related to the trial. After filing the initial application, Mr. White retained the services of C. Rauch Wise who filed an amended application. The amended application sought to have the right to appeal and the right to file a Rule 59(e) SCRPC motion as it relates to order denying the original application. This hearing is upon this amended application.

Present at the hearing was William G. Yarbrough. He advised the court that at about the time the order was issued Mr. White and he were having communications problems. He stated he intended to file a Rule 59(e) SCRPC motion and subsequently a Notice of Appeal. He was led to believe that Mr. White had filed a pro se Rule 59(e) SCRPC motion so he did not file such a motion. Nor did he file a Notice of Appeal.

The State at the hearing conceded that under the facts of this case, Mr. White is entitled to a belated appeal. The State does not believe that Mr. White is entitled to file a belated Rule 59(e) SCRCP motion. The attorney for Mr. White argues that a Rule 59(e) SCRCP motion may be needed to preserve for appellate review any issues not ruled upon in the order.

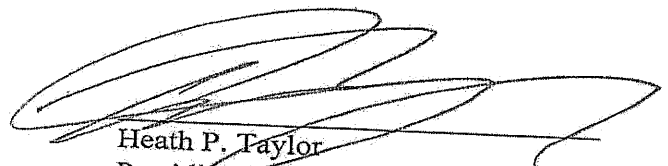
The parties finally agreed that the state would not object on appeal to an issue being unpreserved if the issue was fairly presented at the hearing but not ruled upon in the order. If the issues were not raised at the hearing, even if raised in the application, then the issue would not be preserved. The attorney for Mr. White accepted this compromise.

Therefore, it is hereby ordered that:

1. Reginald Raynard White shall have 30 days from the filing of this Order to appeal the dismissal of his original Post Conviction Application.
2. The State will agree that an issue is preserved if the issue was not ruled upon in the final order, but was otherwise presented to the Post Conviction Relief hearing judge.

IT IS SO ORDERED

August 31, 2023

  
Heath P. Taylor  
Presiding Judge  
York County

STATE OF SOUTH CAROLINA )  
 COUNTY OF YORK )  
 )  
 Reginald R. White, Jr., #353172, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
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IN THE COURT OF COMMON PLEAS  
 FOR THE SIXTEENTH JUDICIAL CIRCUIT

2017-CP-46-1435

**ORDER OF DISMISSAL**

2019 JUN 28 AM 8:20  
 DAVID HAMILTON  
 C.C.P. & G.S.  
 YORK COUNTY, SC

FILED-RECEIVED

This matter comes before the Court by way of an application for post-conviction relief filed on May 17, 2017, by Reginald White (Applicant). The State (Respondent) filed a return and partial motion to dismiss on October 26, 2017, requesting an evidentiary hearing. Applicant, through counsel, filed an amended application on January 23, 2019. An evidentiary hearing into the matter was convened on January 30, 2019, at the Moss Justice Center. Applicant was present at the hearing and represented by William Yarborough, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General’s Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf. The Honorable Judge William A. McKinnon (Counsel) also testified. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application.

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. In May 2014, the York County Grand Jury indicted Applicant for trafficking in cocaine (2014-GS-46-1499) and possession with intent to distribute crack cocaine (2014-GS-46-1500). Counsel represented Applicant. Assistant Solicitors Matthew W. Shelton and Christopher Epting of the Sixteenth Circuit Solicitor’s Office prosecuted the case. On January 12, 2015, Applicant proceeded to trial before the Honorable Roger

L. Couch. The jury found Applicant guilty as indicted and Judge Couch sentenced Applicant to life without the possibility of parole for each charge.

Applicant filed a timely notice of appeal. Appellant Defender Robert M. Pachak, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on October 26, 2016. State v. White, Op. No. 2016-UP-441 (S.C. Ct. App. filed October 26, 2016). The remittitur was returned to the circuit court on December 7, 2016.

## **II. SUMMARY OF FACTS**

Detective Carson Neely (Neely) with the York County Sheriff's Office received information from a complainant regarding illegal drug usage and packaging at a residence on Silver Creek Drive.<sup>1</sup> (Trial Tr. 72, 74.) Neely did not know the numeric address of the residence, but was able to show the complainant a Google map of the area and she pinpointed the exact home where the illegal activity was occurring. (Trial Tr. 72.) On February 26, 2014, Neely applied for a search warrant of the Silver Creek Drive residence. (Trial Tr. 70.) Neely explained a sexual assault occurred at the same residence just two days earlier on February 24, 2014, and that was also part of the probable cause to seek a search warrant for that residence. (Trial Tr. 73-74.) The search warrant provided precise directions to the residence and a detailed description of the residence to be searched. (Trial Tr. 74.) Neely also included a map of the target residence to show the magistrate judge issuing the warrant what residence he intended to search. (Trial Tr. 74-75.) Neely also did surveillance on the residence prior to applying for his search warrant to verify the

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<sup>1</sup>During the pre-trial suppression hearing, Counsel challenged the search warrant based on a facial defect because the numeric address listed on the search warrant was not the actual numeric address of the property law enforcement searched. The State presented evidence and testimony showing law enforcement provided detailed directions to the residence, a description of the residence, a map, and an aerial photograph of the residence to the magistrate identifying the residence they intended to search. Ultimately, the trial court believed the error to be a scrivener's error and denied Counsel's motion. (Trial Tr. 68-84.)

information provided by the complainant. (Trial Tr. 76.) Ultimately, the search warrant was issued for the Silver Creek Drive residence. (Trial Tr. 77.)

During the search of the residence, law enforcement located Oxycodone pills, three or four burnt marijuana cigarettes in the living room, a glass jar containing one bag of suspected crack cocaine, three bags of suspected cocaine in the back bedroom floor vent, a digital scale, and a pill grinder. (Trial Tr. 178-179.) Officers also located a pill bottle with Applicant's name on it in the bedroom nightstand, men's clothing, and bank statements bearing Applicant's name dated February 3, 2014. (Trial Tr. 215, 420, 422.) Officers located and interviewed Applicant after the search and Applicant admitted to living at the Silver Creek Drive residence with Jessica Collins (Collins) and stated they have a child in common. (Trial Tr. 196.) Applicant told officers they would find Oxycodone pills, cocaine, crack, "and pills" in the residence. (Trial Tr. 196.) Applicant told officers he "distributed crack cocaine to two other people" on February 24, 2014. (Trial Tr. 256, 427.)

### **III. ALLEGATIONS RAISED**

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

1. Counsel was ineffective pursuant to Strickland v. Washington for failing to contemporaneously object and preserve for appeal the improper admission of prior bad act/ propensity evidence of Applicant's purported drug dealing. The prior bad act evidence only served as improper propensity evidence and was unduly prejudicial.
2. Counsel was ineffective for eliciting testimony about the prior bad acts on cross-examination, further disqualifying the issue for exclusion by the trial judge and for appellate review. Additionally, had this evidence been properly excluded, the trial judge would have been precluded from considering it when deciding on the motion for directed verdict.
3. Counsel was ineffective for failing to raise the issue in the motion to suppress or at the suppression hearing that the search warrant affidavit failed to provide a substantial basis for the magistrate to have found probable cause due to:
  - a. The entire basis for the affidavit was hearsay from a person who did not

- testify at the suppression hearing and whose credibility and reliability was not verified or provided for;
- b. The absence of a link or nexus between Applicant and the residence or drug distribution at the residence;
  - c. The absence of a basis for the belief that evidence of crack cocaine would be found there.
4. Counsel was ineffective for stipulating to the partial basis of Investigator Walter Beck's knowledge of "controlled buys," "marked money," and the street value of drugs when Counsel stated the case had nothing to do with either controlled buys or marked money and had previously objected to both the qualification of Investigator Beck as an expert and testimony on such matters during a pre-trial hearing.
  5. Counsel was ineffective for failing to request that the foundation of Investigator Beck's knowledge on these matters be heard in-camera.
  6. Counsel was ineffective for failing to contemporaneously and properly object/move to exclude /strike Investigator Beck's testimony on the common methods and manner of selling, buying, and using narcotics; controlled buys; drug price and weight; and other related topics. Investigator Beck was never qualified as an expert, and his testimony constituted as improper lay witness testimony, which consisted of opinion, and commentary on an ultimate issue at trial. Further, the testimony as purely anecdotal, irrelevant, and unduly prejudicial.
  7. Counsel was ineffective for eliciting additional testimony on cross-examination from Investigator Beck on these subjects as well as on matters of law relating to constructive possession. Not only did eliciting such testimony theoretically further open the door, but the testimony was also unduly prejudicial and consisted of opinion and commentary on the ultimate issue at trial.
  8. Counsel was ineffective for eliciting testimony and/or failing to object/move to strike Investigator Beck's testimony that "Other people had told us that he was living there" because the testimony was inadmissible hearsay and violated Applicant's right to confrontation and cross-examination of these purported other individuals.
  9. Counsel was ineffective for failing to clarify or correct during argument on the directed verdict motion as to certain items and events the State argued sufficiently proved Applicant had dominion and control over the premises where the drugs were found or the right to exercise dominion or control thereof. In denying the motion for directed verdict, the trial judge cited a neighbor's testimony that Applicant frequently stayed at the residence. The trial judge also cited "recently dated" prescription bottles with Applicant's name as support for the dominion and control element. Counsel failed to bring to the trial judge's attention that:
    - a. The neighbor's testimony was not anywhere as near specific as to frequency, rather she testified she only believed he visited or may have lived there because she simply saw a "silver car" parked out front, which was not identified by any witness as belonging to Applicant;

- b. The neighbor was unsure as to when she had seen Applicant there or the silver car, only that she had seen either at some point in “2014;”
  - c. There was no testimony as to the date on any prescription bottle with Applicant’s name.
10. Counsel was ineffective for failing to object to the trial court’s instructions that the jury was to render a “just and true” verdict and that the jury’s duty was to determine “the trust of the evidence” and well as the “trust of [witnesses] statements.”
  11. Counsel was ineffective for failing to object to the Solicitor’s urging during closing argument for the jury to render a verdict that “speaks the truth.”
  12. Counsel was ineffective for failing to request an instruction that the jury was free to “accept or reject” any evidentiary inference.
  13. Counsel was ineffective for failing to make a sufficient and supported objection to the separate counting of prior “strike” convictions.

On January 30, 2019, an evidentiary hearing was convened. Applicant informed this Court he would be proceeding on the allegations in his amended application.

#### IV. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel’s performance was deficient. Id.

Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." *Id.* (citing *Strickland*, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18, 300 S.C. 115.

## **V. FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's appellate records, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

### **Ineffective Assistance of Counsel**

This Court finds Applicant has failed to meet his burden of proving he is entitled to post-conviction relief on any of the allegations of ineffective assistance of counsel. Applicant has failed to prove both deficiency and any prejudice therefrom.

*Ineffective Assistance of Counsel for failing to contemporaneously object and preserve for appeal the improper admission of prior bad act/propensity evidence of Applicant's purported drug dealing. The prior bad act evidence only served as improper propensity evidence and was unduly prejudicial.*

Applicant alleges Counsel was constitutionally deficient for failing to object to Applicant's "prior bad acts" being brought up during trial and, therefore, failing to preserve this issue for appeal. Applicant testified Counsel made a good argument on his behalf when he attempted to keep this information from being used at trial, but ultimately, the trial court allowed the

information to come in. Applicant testified Counsel did not renew his objection during the trial when the information was introduced. Applicant testified he believes Counsel should have objected during the trial and because he did not, it affected his ability to raise that issue on appeal. Applicant testified the decision from the South Carolina Court of Appeals shows Counsel's failure to object affected his ability to raise the issue on appeal. Applicant also testified Counsel's lack of objection to this issue affected his ability to win the directed verdict motion.

Counsel testified this case was a constructive possession case. Counsel testified the State wanted to use Applicant's admission that he had distributed drugs two days prior to the search of his residence as circumstantial evidence to prove Applicant had constructive possession of the drugs found during the search warrant. Counsel testified he attempted to suppress Applicant's statement to law enforcement so Applicant's admission to distributing drugs on February 24, 2014, could not be used against Applicant at trial. Counsel testified he argued to the trial judge that the evidence was prejudicial. Counsel testified the trial judge was right to have admitted the evidence against Applicant. Counsel testified the probative value of Applicant's admission to distributing drugs at the residence was very strong and Judge Couch was correct to allow it in at trial.

According to the record, law enforcement executed a search warrant at the Silver Creek Drive residence on February 26, 2014. (Trial Tr. 223.) Applicant was found and interviewed by law enforcement in the early morning hours of February 27, 2014. (Trial Tr. 253.) During that interview, Applicant told Neely that, on February 24, 2014, he gave two people crack [at the Silver Creek Drive residence] and they smoked it. (Trial Tr. 117.) Although Counsel argued the State could prove intent solely on the weight of the drugs recovered from the residence, the trial court found that was a rebuttable presumption and allowed the State to use Applicant's statement regarding the previous distribution at trial. (Trial Tr. 134-135.)

Applicant has also alleged he was prejudice by Counsel's failure to object to the introduction of this evidence against him because Counsel's lack of objection did not preserve the issue for appeal. In McHam, the South Carolina Supreme Court states, ". . . to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability." Id., 404 S.C. at 475-476, 746 S.E2d at 47. As Counsel testified, the evidence was properly admitted by the trial judge against Applicant, and therefore, even if he had contemporaneously objected to the admission of the evidence during trial, it would not have been a meritorious claim to raise on appeal. Additionally, even if the issue had been raised on appeal, Applicant has failed to establish this claim would have a reasonable probability of resulting in a reversal on appeal.

This Court finds Counsel's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. This Court finds that Neely's testimony regarding Applicant's statement was admissible. This Court also finds Neely's testimony was properly admitted because it had high probative value in regards to the element of intent, which is a required element in order to prove possession with intent to distribute crack cocaine, third offense. Therefore, the prejudicial effect of the prior bad act evidence did not outweigh its probative value.

This Court finds Applicant has also failed to establish any resulting prejudice from Counsel's alleged deficiency as this Court finds the prior bad act evidence was properly admitted and, therefore, Counsel's failure to contemporaneously object during the trial is harmless error. Additionally, Applicant has also failed to show the underlying claim he believes Counsel should have preserved was meritorious and would have a reasonable probability to be successful on appeal. Based on the forgoing, Applicant has failed to meet his burden set forth in Strickland and this allegation must be denied and dismissed with prejudice.

*Counsel was ineffective for eliciting testimony about the prior bad acts on cross-examination, further disqualifying the issue for exclusion by the trial judge and for appellate review. Additionally, had this evidence been properly excluded, the trial judge would have been precluded from considering it when deciding on the motion for directed verdict.*

Applicant alleges Counsel addressed his prior bad acts during cross-examination, which allowed the trial court to consider that evidence during the directed verdict motion. Additionally, Applicant alleges Counsel's decision to address his prior bad acts on cross-examination further precluded the issues from being addressed on appeal.

As noted in the previous section, this Court finds the prior bad act evidence was properly admitted against Applicant during the trial. Therefore, this Court finds this allegation wholly without merit as the trial judge properly allowed the prior bad acts to be admitted despite Counsel's pretrial motion to exclude this evidence. As such, Counsel was proper to cross-examine witnesses on the prior bad acts during the trial. This Court also finds the trial judge properly considered this evidence during the directed verdict motion as it was proper evidence before the court.

As noted in the previous section, this Court finds Counsel's testimony with respect to the admission of the prior bad acts very credible, whereas Applicant's testimony is not credible. This Court finds Applicant has failed to establish how Counsel was deficient or any resulting prejudice from Counsel's alleged deficiency as the prior bad act evidence was properly admitted during the trial. Based on the standard set forth in Strickland, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

*Counsel was ineffective for failing to raise several issues during the motion to suppress the search warrant.*

Applicant alleges Counsel should have argued during the motion to suppress the search warrant that the underlying affidavit for the search warrant was entirely based on hearsay by a person whose credibility and reliability was not verified. Applicant also alleges Counsel should

have argued there was no link between Applicant and the residence or drug distribution within the residence. Applicant also believes Counsel should have argued law enforcement did not have a reason to believe crack cocaine would be found at the residence. Applicant testified he wanted Counsel to challenge the affidavit of the search warrant.

Counsel testified he did not see any other basis to challenge the search warrant other than the grounds he raised during the suppression hearing. Counsel testified the search warrant was valid. Counsel testified Collins admitted Applicant lived with her when she was questioned by officers.

In State v. Driggers, the South Carolina Court of Appeals held, “. . . the task of a magistrate when determining whether to issue a warrant is simply to make a practical, common sense decision as to whether, under the totality of the circumstances set forth in the affidavit, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that evidence of a crime will be found in a particular place.” State v. Driggers, 322 S.C. 506, 510, 473 S.E.2d 57, 59 (1996).

The record shows the State was able to present evidence during the suppression hearing that law enforcement believed the complainant to be credible and reliable. (Trial Tr. 76.) Officers also conducted surveillance of the target residence to verify the information provided by the complainant. (Trial Tr. 76-77.) Further, during cross-examination of Collins by the State during the suppression hearing, Collins admitted the residence on law enforcement’s map was the residence she shared with Applicant. (Trial Tr. 81.) Law enforcement also made it clear there was another incident that occurred at the targeted residence that, although not relevant to the drug charges against Applicant, added to the probable cause affidavit used to obtain the search warrant. (Trial Tr. 72.)

This Court finds Counsel's testimony with regard to this allegation very credible, whereas Applicant's testimony is not credible. This Court finds this allegation is without merit as Applicant has failed to establish any deficiency on behalf of Counsel as Counsel raised the only meritorious arguments he could during the suppression hearing. Additionally, Applicant has failed to establish any resulting prejudice from any alleged deficiency. As such, Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

*Counsel was constitutionally ineffective for the way he handled the testimony of Investigator Beck during the trial.<sup>2</sup>*

Applicant alleges Counsel was deficient for stipulating to Investigator Beck's (Beck) knowledge of controlled buys, marked money, and the street value of drugs. Applicant alleges Counsel had previously objected to Beck's testimony on this matter during a pretrial hearing. Applicant alleges Counsel was ineffective for failing to request an in-camera hearing to establish the foundation of Beck's knowledge. Applicant alleges Counsel was deficient for failing to object to Beck's testimony regarding the common methods of selling, buying, and using narcotics; as well as, controlled buys, and other related topics. Applicant alleges Beck's testimony was inappropriate opinion testimony from a lay witness and was unduly prejudicial. Applicant also alleges Counsel was deficient for cross-examining Beck on constructive possession, which led to prejudicial opinion testimony and commentary. Finally, Applicant alleges Counsel was deficient for failing to object or strike the testimony of Beck that, "other people had told us that he was living there" as that testimony was inadmissible hearsay and violated Applicant's right to confrontation.

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<sup>2</sup> This section addresses allegations 4 – 8 of Applicant's amended application.

Counsel testified he objected to Beck's testimony regarding controlled buys and marked money during the trial because the testimony was not relevant to Applicant's case. (Trial Tr. 229.) Counsel testified he did stipulate to Beck's knowledge of marked money, street value of drugs, and controlled buys because those issues were not relevant to Applicant's case. During cross-examination, Counsel questioned Beck on whether controlled buys and marked bills had anything to do with Applicant's case, and Beck testified they did not. (Trial Tr. 237.) Also during cross-examination, Counsel was questioning Beck on what evidence showed Applicant lived at the residence where the drugs were found. (Trial Tr. 240.) Beck responded to Counsel's question in part by stating, "Other people had told us that he was living there." (Trial Tr. 240.) In response, Counsel directed Beck to focus on the actual evidence in the case. (Trial Tr. 240.) The State attempted to use Beck's statement to go further into who told Beck Applicant was living at the residence, however, Counsel successfully argued against the State being able to elicit any further testimony from Beck on that issue. (Trial Tr. 246-247.) Counsel also testified that a single sentence from Beck that "other people" indicated Applicant lived at the residence did not make a difference in Applicant's case.

According to the record, Counsel "strenuously" objected to any expert testimony by Beck during pretrial motions. (Trial Tr. 52.) Counsel told the trial court that "purported expert testimony from a law enforcement officer as far as the cocaine trade . . . [is] inappropriate expert testimony[.]" (Trial Tr. 52.) The State conceded they would not offer him as an expert, but would rely on his training and experience. (Trial Tr. 53.) The trial court indicated the State would be wise not to introduce Beck as an expert, but also indicated there was nothing wrong with the jury knowing that he is competent and knows what he is doing. (Trial Tr. 53-54.) The trial court also indicated Beck could testify as to his experience in handling drug buys, the market value of drugs for sales he has participated in, and what he has observed. (Trial Tr. 54-55.)

This Court finds Counsel's testimony with regard to this allegation very credible, whereas Applicant's testimony is not credible. This Court finds this allegation is without merit as Applicant has failed to establish any deficiency on behalf of Counsel. This Court finds Beck did not provide improper testimony during the trial and Counsel's stipulation to Beck's knowledge and experience in the drug trade was inconsequential to Applicant's case. Counsel also conducted proper cross-examination of Beck regarding constructive possession.

Applicant has also failed to show this Court any resulting prejudice from Counsel's alleged deficiencies in handling Beck's testimony at trial. Applicant has failed to show this Court how the outcome of his trial would have been different had Counsel not stipulated to Beck's knowledge of the drug trade, or if Counsel had requested an in-camera hearing of Beck's qualifications prior to his testimony. As such, Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

*Counsel was constitutionally ineffective for failing to clarify or correct the State's argument during the directed verdict motion regarding Applicant's dominion and control over the premises where the drugs were found.*

Applicant alleges Counsel was deficient for failing to correct the trial judge's summary of the neighbor's testimony in his finding that Applicant lived at the Silver Creek Drive residence. Applicant also alleges Counsel was deficient for failing to correct the trial judge's statement that the "recently dated" pill bottle showed Applicant had dominion and control over the residence. Applicant alleges he was prejudiced by Counsel's failure to correct the trial judge's statements regarding the neighbor's testimony and the pill bottle during the denial of Applicant's directed verdict motion.

Counsel testified the judge did not know the date on the pill bottle. According to the record before this Court, the judge specifically stated, "Evidence inside of that location would indicate

that he was present and living there as well, such as the pill bottle that was found on the nightstand or dresser in the bedroom which the drugs were found that had his name on it, as well as the bank records that were found in the home that had his name on [them], which were fairly recent of the date, indicating that they had recently been placed there.” (Trial Tr. 353-354.) The trial judge never referred to the pill bottle being “recently dated” or even implying a date at all regarding the pill bottle.

Kimberly Kinley (Kinley), the neighbor, testified for the State and stated she was acquaintances with Applicant and Collins and testified Applicant and Collins lived at the Silver Creek Drive residence in 2014. (Trial Tr. 263.) Kinley testified she saw Applicant come and go and knew he had a silver car, although should could not identify the make and model of the vehicle. (Trial Tr. 263.) The trial court summarized the neighbor’s testimony during his denial of the directed verdict motion by stating, “There was evidence from a neighbor . . . that [Applicant] lived there quite often. He would come and go and stay there. While he was not there all the time, he was there frequently, and stayed there for periods of time at that address.” (Trial Tr. 353.) This summary is an accurate summation of the neighbor’s testimony as the neighbor did indicate Applicant and Collins lived there and observed Applicant come and go from the residence. Further, her belief was not solely based on the silver car she believed to be Applicant’s.

This Court finds Counsel’s testimony with regard to this allegation very credible. This Court finds this allegation is without merit as Applicant has failed to establish any deficiency on behalf of Counsel as Counsel did not need to clarify the trial court’s findings because the trial court properly summarized the pill bottle evidence and the neighbor’s testimony during the denial of the directed verdict motion. Additionally, Applicant has failed to establish any resulting prejudice from any alleged deficiency as the record shows the pill bottle and the neighbor’s testimony was not the only evidence the State presented linking Applicant to the Silver Creek Drive residence.

Importantly, Applicant provided a statement to law enforcement stating he lived at the residence. Additionally, the State presented recently dated bank statements bearing Applicant's name and men's clothing found in the residence to show Applicant lived at the Silver Creek Drive residence. As such, Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

*Counsel was ineffective for failing to object to the trial court's instructions that the jury was to render a "just and true" verdict and that the jury's duty was to determine "the trust of the evidence" and well as the "trust of [witnesses] statements.*

Applicant alleges Counsel was deficient for failing to object to the trial judge's jury instruction that the jury was to render a "just and true" verdict. Applicant further alleges Counsel should have objected to the trial judge's instruction that it was the jury's duty to determine "the trust of the evidence" as well as the "trust of [witnesses] statements." Applicant testified he believes Counsel was ineffective because he did not object to the judge when the judge shifted the burden of proof.

Counsel testified at the time of the trial the trial court's jury instructions came out of the bench book. Counsel testified the trial judge properly instructed the jury on circumstantial and direct evidence, the State's burden of proof, and inferences.

Upon review of the record, this Court finds the trial court did not provide any jury instructions that improperly shifted the burden from the State. The trial court provided clear instructions regarding the State's burden of proof and properly instructed the jury that the verdict be based upon the evidence presented during the trial. The trial court never instructed the jury to "seek the truth."

This Court finds Counsel's testimony with regard to this allegation very credible. This Court finds Applicant has failed to show how Counsel was deficient for failing to object to the trial court's jury instructions because the jury instructions properly advised the jury on the State's

burden of proof, direct evidence, and circumstantial evidence. Additionally, Applicant has failed to establish any resulting prejudice from any alleged deficiency as the jury reached its verdict after being properly instructed by the trial court. As such, Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

*Counsel was ineffective for failing to object to the Solicitor's urging during closing argument for the jury to render a verdict that "speaks the truth."*

Applicant alleges Counsel was deficient for failing to object to the State's closing where the solicitor told the jury to render a verdict that "speaks the truth."

Counsel testified he does not recall the solicitor making that statement in his closing. Counsel testified he does not recall any objectionable statements made by the State during closing. Counsel testified he typically does not make an objection during closing unless the statement is egregious.

The State's closing argument should be reviewed in context of the entire record. State v. Rudd, 355 S.C. 543, 586 S.E.2d 153 (2003). Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the petitioner has the burden of proving he did not receive a fair trial because of the alleged improper argument. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Id. (citing DeChristoforo, 416 U.S. at 643).

This Court finds Counsel's testimony with regard to this allegation very credible. This Court finds this allegation is without merit. This Court has reviewed the State's closing argument in context of the entire record and finds the isolated statement Applicant is challenging does not "so infect the trial with unfairness as to make the resulting conviction a denial of due process."

Additionally, the trial court properly instructed the jury prior to their deliberations on their duties and the State's burden of proof. This Court finds Applicant has failed to show how Counsel was deficient for failing to object to the solicitor's closing argument or any resulting prejudice therefrom. As such, Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

*Counsel was ineffective for failing to request an instruction that the jury was free to "accept or reject" any evidentiary inference.*

Applicant alleges Counsel was deficient for failing to request a jury instruction that tells the jury they are free to "accept or reject" any evidentiary inference. Counsel testified the jury was properly instructed on inferences by the trial court.

During the jury charge the trial court states the following:

The defendant's knowledge and possession may be inferred when a substance is found on the property that's under a defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you, along with other evidence in the case. You give it the weight you think it should have.

Again, mere presence at a scene where drugs are found is not enough to prove possession. The defendant's knowledge and possession may be inferred when the substance is found on property under the defendant's control. However, again, that inference is simply an evidentiary fact to be considered by you, along with all the other evidence in the case, and you give it the weight you think it should have.

(Trial Tr. 451, 452.)

This Court finds Counsel's testimony with regard to this allegation very credible and finds this allegation is without merit. This Court has reviewed the trial court's jury instructions and finds the jury was properly instructed regarding the weight they could give to evidentiary inferences. This Court finds Applicant has failed to show how Counsel was deficient for failing to request a jury instruction that the jury was free to "accept or reject" any evidentiary inference

as the jury was properly instructed by the trial court. Applicant has also failed to establish any resulting prejudice from the alleged deficiency. As such, Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

*Counsel was ineffective for failing to make a sufficient and supported objection to the separate counting of prior "strike" convictions.*

Applicant alleges Counsel failed to properly articulate and support his objection to the State use of Applicant's prior "strike" convictions to qualify him for a life without the possibility of parole sentence. Applicant testified he did not feel he had three strikes. Applicant testified he did research on his strikes and does not believe Counsel made a good argument on his life sentence.

Counsel testified Applicant had two prior strikes for separate incidents, but that Applicant was arrested for his two prior strikes on the same day. Counsel testified he wrote lengthy letters and talked to Applicant about the fact that he was facing a life sentence. Counsel testified he strongly urged Applicant to take the State's plea offer. Counsel testified Applicant rejected the plea offer on the record.<sup>3</sup>

According to the record, Counsel did object to Applicant's prior offenses being counted as two separate and distinct strikes since he was arrested for them on the same date. However, the trial court properly found Applicant's prior convictions did qualify as strikes under the law. (Trial Tr. 470.) Counsel further argued imposing a life sentence on Applicant would be cruel and unusual punishment. (Trial Tr. 470.)

In State v. Woody, the South Carolina Supreme Court reversed the petitioner's three strike conviction because two of the strikes stemmed from a singular incident. The petitioner was charged with two counts of armed robbery after robbing a Fast Fare convenient store. One of

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<sup>3</sup> On December 17, 2014, Applicant rejected the plea offer on the record before Judge Alford. (Trial Tr. 466.)

petitioner's charges was for robbing the store's clerk and the second charge was for robbing the store itself. The South Carolina Supreme Court held the petitioner's two robbery convictions could not be counted as two separate strikes under S.C. Code Ann. §17-25-50 since they stemmed from a singular incident. Section 17-25-50 states, "In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses." S.C. Code Ann. §17-25-50. Here, although Applicant was arrested for his prior convictions on the same date, the incidents occurred during separate incidents on different dates, which allows them to count as two separate strikes.

This Court finds Counsel's testimony credible, whereas Applicant's testimony is not credible. This Court finds Applicant's allegation is without merit as Counsel properly advised him that he could face a life sentence, urged him to accept the State's plea offer, and objected to the State's use of Applicant's prior convictions as separate strikes. However, the trial court properly counted Applicant's prior convictions as two separate strikes and imposed a proper sentence on Applicant. Applicant has failed to establish any deficiency on behalf of Counsel or show this Court what Counsel should have or could have done that would have made a difference in Applicant's case. Additionally, Applicant has failed to establish any resulting prejudice from any alleged deficiency. As such, Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

**CONCLUSION**

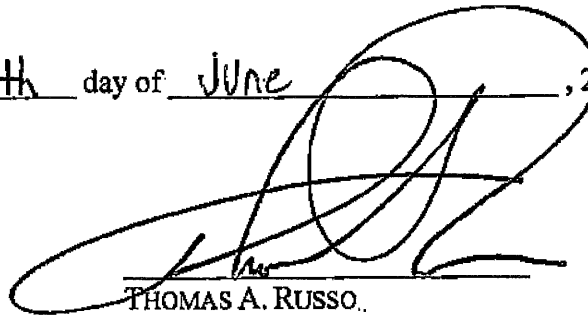
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from post-conviction relief counsel's 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), SCRCR, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is 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 will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 20th day of June, 2019.



THOMAS A. RUSSO,  
Presiding Judge  
Sixteenth Judicial Circuit

Flame, South Carolina