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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS
George M. McFaddin, Jr., Circuit Court Judge

Circuit Court Case No. 2019-CP-32-02208

Ronald Michaux, Jr., #369511, Appellant,
v.
State of South Carolina, Respondent.

NOTICE OF APPEAL

Ronald Michaux appeals the attached Order of Dismissal signed by the Hon. R. Scott Sprouse on May 16, 2024, and entered of record on May 28, 2024, a copy of which is incorporated herein by attachment and reference.

s/J. Falkner Wilkes
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Trial Counsel for Appellant

June 10, 2024.

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON 2024 MAY 28 AM 11:25) FOR THE ELEVENTH JUDICIAL CIRCUIT

Ronald Michaux, Jr., SCDC #36951) LISA M. COMER
CLERK OF COURT
LEXINGTON SC Case No. 2019-CP-32-02208

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

This matter comes before this Court by way of Applicant Ronald Michaux, Jr.'s Application for Post-Conviction Relief and Amendment to Application for Post-Conviction Relief filed June 4, 2019 and November 14, 2019, respectively, challenging his conviction for trafficking in cocaine 100 grams or more, but less than 200 grams. An evidentiary hearing on this action was convened April 12, 2022 before this Court. Applicant appeared with his counsel, J. Faulkner Wilkes. Respondent State of South Carolina was represented by Taylor Smith of the South Carolina Attorney General's Office. At the hearing, this Court heard testimony from Applicant; Applicant's trial counsel, David Mauldin ("Counsel"); Applicant's Counsel for his direct appeal, Taylor D. Gilliam ("Appellate Counsel"); and Bradley Pogue, one of the Assistant Solicitors who prosecuted Applicant's case ("the Solicitor"). Following a review of the record and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice. Specific findings of fact and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 are set forth below.



I. FACTUAL & PROCEDURAL HISTORY

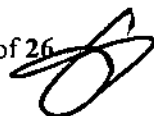
Applicant is presently confined in the South Carolina Department of Corrections. Applicant was arrested on March 20, 2014, for drugs recovered during a traffic stop and subsequent search of Applicant's vehicle. During its July 2015 term, the Lexington County Grand Jury indicted Applicant for trafficking in cocaine, one hundred to two hundred grams—first offense (2014-GS-32-0206). Applicant was offered plea opportunities, which he rejected. On May 17, 2016, Applicant proceeded to a jury trial before the Honorable R. Knox McMahon. David Mauldin, Esquire represented Applicant. Assistant Solicitors Lester Bell, Jr. and Bradley Pogue prosecuted the case.

A. Summary of Evidence Adduced at Trial

In 2014, Lance Corporal Michael Harrison with the South Carolina Highway Patrol operated as part of the Patrol's H-team doing interdiction work. (R. 6-7).¹ On March 20, 2014, he was stationed on I-20 in Lexington County. (R. 7). He observed a white sedan travelling in front of a tractor-trailer. (R. 7-8). When the driver of the white sedan observed Trooper Harrison on the side of the road, he abruptly slowed in a dangerous and noticeable action requiring the tractor-trailer to swerve into the other lane to avoid hitting the sedan. (R. 8, 83-84). Trooper Harrison indicated he saw the driver "essentially jam on his brakes," which was not a normal course of action for a driver based on the Trooper's 16 years of experience. (R. 84-85).

As a result of seeing the driver abruptly brake, Trooper Harrison pulled out and followed the driver. As he pulled into the interstate, Trooper Harrison noticed the vehicle unable to maintain the center of his lane driving to the left side of the lane and then to the right side of the lane. (R.

¹ Cites to the Record on Appeal are noted "R."; cites to the transcript of the post-conviction relief hearing are noted "PCR".



84–85). Trooper Harrison indicated he was “weaving” within his lane. (R. 8, 85). Trooper Harrison decided to activate his blue lights and pull the driver over because he was concerned about his condition. (R. 8, 85–86).

Trooper Harrison approached the vehicle after he pulled it over and noticed it was a newer vehicle with an out-of-state license plate. (R. 9, 87). Trooper Harrison approached on the passenger side and noticed the driver was the only occupant. He also noticed the vehicle had a bar code sticker on the window indicating the car was likely a rental car. (R. 87). He asked the driver for his license and registration, while at the same time noticing two cans of air fresheners inside the vehicle. (R. 9, 87–88). Trooper Harrison noticed some cigar shavings from the inside of a cigar and immediately smelled the overwhelming smell of marijuana, even over the smell of the air fresheners. (R. 10, 89). He radioed for backup who ultimately arrived at scene. (R. 90). The driver did not provide a license, and instead provided a North Carolina Identification Card with the name Ronald Douglas Michaux. (R. 10–11, 88–89). Applicant provided the rental agreement for the vehicle, and the name on the agreement did not match Applicant. (R. 90). The renter of the vehicle was not present. (R. 14, 90).

Trooper Harrison had Applicant exit the vehicle and move beside the Trooper’s vehicle to talk. Trooper Harrison asked Applicant where he was coming from and he received a generic response about Applicant coming from his cousins. When Trooper Harrison asked where the cousin lived, Applicant “turned back from the direction he was coming from and basically pointed back down the interstate and said [I’m coming] from that way” instead of giving a specific answer. (R. 12–13, 93–94). Trooper Harrison also asked Applicant about his license and Applicant told him it was suspended in North Carolina.² (R. 13).

² Trooper Harrison ultimately learned Applicant’s driver’s license was revoked in North Carolina, so he was illegally driving without a license. (R. 20–21).



Trooper Harrison gave Applicant a warning for his driving and explained he would be searching the vehicle based on the smell of marijuana. (R. 17). As Trooper Harrison returned to the vehicle to perform the search, Applicant stated “there’s no marijuana in the vehicle.” (R. 17-18). Trooper Harrison located some additional tobacco shavings and cigar packages, which he explained people hollow out and use to smoke marijuana. (R. 18). Additionally, Trooper Harrison found a black plastic bag with a knot tied in it which contained a powdered substance. (R. 18–19). He explained the bag likely contained cocaine or heroin. (R. 19). The substance in the bag field tested positive for cocaine. (R. 100).

B. Verdict & Sentencing

The defense rested on the afternoon of May 18, 2016. (R. 192). However, despite Judge McMahon’s warning that the trial would proceed in his absence if he did not appear in court the following day, Applicant failed to appear. (R. 196–198). Judge McMahon issued a bench warrant, and the trial continued in Applicant’s absence. (R. 199). The jury found Applicant guilty as indicted that same day. (R. 228). At that time, Judge McMahon sealed Applicant’s sentence to be imposed once he was located and taken into custody. (R. 232–233).

On Thursday, August 25, 2016, Applicant appeared before the Honorable William P. Keesley for sentencing. (R. 235). Upon unsealing the sentence, Judge Keesley imposed a sentence of twenty-five (25) years’ imprisonment. (R. 239).

C. Direct Appeal

On August 31, 2016, Counsel filed a timely notice of appeal. Appellate Defender Taylor Gilliam perfected Applicant’s appeal by briefing the following issues for the Court of Appeals:

- I. Whether the trial judge erred in denying Appellant’s motion to suppress evidence found as the result of an unconstitutional traffic stop that was initiated without probable cause where law enforcement could have issued a warning ticket and concluded



the stop but instead continued to investigate without reasonable suspicion in violation of the Fourth Amendment of the United States Constitution and the South Carolina Constitution?

- II. Whether the trial judge erred in allowing officer qualified as an expert witness in narcotics trafficking to testify about the value of cocaine when the testimony did not assist the jury in understanding the evidence or determining a fact in issue, when the testimony was unnecessary and cumulative, and when the testimony's probative value was substantially outweighed by the danger of unfair prejudice?

On December 5, 2018, the Court of Appeals affirmed Applicant's conviction in an unpublished opinion. *State v. Michaux*, Op. No. 2018-UP-440 (S.C. Ct. App. filed Dec. 5, 2018). When no petition for rehearing was filed with the Court of Appeals, the remittitur was issued on December 27, 2018.

On February 15, 2019, Applicant filed a *pro se* "notice of appeal," seeking the Supreme Court's review of the decision of the Court of Appeals. On March 13, 2019, the Supreme Court issued an order dismissing the *pro se* filing because no petition for rehearing had been filed or ruled upon by the Court of Appeals. *State v. Michaux* (S.C. Sup. Ct. filed March 13, 2019). The Supreme Court remitted the case back to the circuit court on April 1, 2019.

D. PCR Filings and Proceedings

Applicant commenced this PCR action on June 4, 2019 by filing an Application for Post-Conviction Relief in the Lexington County Court of Common Pleas. In that Application, Applicant alleged he is being held in custody unlawfully based on the following reasons:

1. Ineffective assistance of trial counsel
 - a. "[F]ailing to argue that the affidavit underlying the arrest warrant was insufficient to support a finding of probable cause in contravention of the Fourth and Fourteenth Amendment, State constitution, and statute."



- a. “[F]ailing to object that State unlawfully impaneled its grand jury outside the jurisdiction of the Court of General Sessions.”
- b. “[F]ailing to request a *Batson*³ hearing after the State exercised all preemptory challenges to strike all but one black juror.”

On November 14, 2019, Applicant, with assistance of PCR counsel, filed an Amended Application for Post-Conviction Relief raising the following issues:

1. Ineffective assistance of trial counsel
 - a. Trial counsel failed to properly investigate the case and prepare an adequate defense based on the evidence in the case;
 - b. Trial counsel failed to request a continuance in order to allow counsel to properly investigate the case and prepare an adequate defense;
 - c. Trial counsel failed to properly move for the suppression of testimony and evidence;
 - d. Trial counsel failed to make necessary objections during the trial or otherwise properly raise and/or preserve issues for appeal;
 - e. Trial counsel failed to effectively cross-examine the State’s witnesses during the trial;
 - f. Trial counsel failed to introduce relevant evidence in the defense case in chief, or proffer evidence when necessary;
 - g. Trial counsel failed to state and/or argue relevant facts and law to the jury in his statements and arguments to the jury;
 - h. Trial counsel failed to properly explain, convey, and advise client on the issues in the case, plea offers, and potential for various outcomes sufficiently for the Applicant to make informed decisions as to whether to enter a plea or proceed to trial, or to testify at trial; and
 - i. Trial counsel failed to properly convey, review and advise as to the charges, potential sentences and the evidence.

³ *Batson v. Kentucky*, 476 U.S. 79 (1986), holding modified by *Powers v. Ohio*, 499 U.S. 400 (1991).



2. Ineffective assistance of appellate counsel
 - a. Appellate counsel failed to properly raise and argue viable issues on appeal.
3. Failure of the State to adequately comply with the rules of discovery
 - a. The State failed to provide discovery materials that were in its possession or which were known or should have been known to the State or its agents.

Applicant requested relief as follows: “reversal of the conviction and a new trial.” (Amendment to Application for Post Conviction Relief, 11/14/2019.)

Respondent State of South Carolina filed a return January 7, 2020, seeking summary dismissal of Applicant’s claims regarding an alleged *Batson* violation; the sufficiency of probable cause in the arrest warrant; and the alleged unlawful empanelment of the Grand Jury, for failure to state a cognizable claim under the Uniform Post-Conviction Relief Act (the Act). On the remaining claims, Respondent’s return requested an evidentiary hearing to fully resolve the issues.

An evidentiary hearing was held April 12, 2022 before this court. At the outset of the hearing, the following issues were presented as being before the Court:

1. Trial counsel was ineffective for giving poor advice regarding plea negotiations and the State’s plea offers.
2. Trial counsel was ineffective for giving poor advice about the success of the trial.
3. Trial counsel was ineffective for not raising a *Batson* issue.
4. Trial counsel was ineffective for not informing Mr. Michaux that he would be taken into custody and the trial would begin the first day.
5. Trial counsel was ineffective for not arguing that the arrest warrant affidavit was insufficient to support a finding of probable cause.
6. Trial counsel was ineffective for not arguing that the grand jury was impaneled outside of a General Sessions term.
7. Trial counsel was ineffective for not rejecting testimony from the



State's expert witness that a drug dealer would not leave drugs behind in a rental car.

8. Appellate counsel was ineffective for not arguing that the trial court erred in admitting Mr. Michaux's roadside statement to the officers.

PCR Tr.p. 5-6.

Materials before this Court and incorporated by reference are the Lexington County Clerk of Court records regarding the subject conviction; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal; the transcripts of Applicant's May 17-19, 2016 trial and August 25, 2016 sentencing; and the records of the current PCR action.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Standard of Review

The grounds for relief on which Applicant proceeded at the evidentiary hearing pertain to alleged ineffective assistance of counsel. The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). It is common that PCR allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient


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to warrant granting relief. Rule 71.1(e), SCRPC; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); *State v. Pendergrass*, 270 S.C. 1, 4, 239 S.E.2d 750, 751 (1977). The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. *Id.* at 668; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S. Ct. 1473, 1482, 176 L. Ed. 2d 284 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 117–18, 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.

Strickland "does not guarantee perfect representation[—] only a 'reasonably competent attorney.'" *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (quoting *Strickland*, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington*, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an



adverse sentence, and it 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." *Strickland*, 466 U.S. at 689; *see also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Thus, a fair assessment of attorney performance requires 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. *Id.* Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

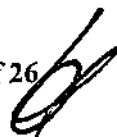
A reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." *Strickland*, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; *see also Harrington*, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel's



representation is a most deferential one. *Harrington*, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," *not* whether it deviated from best practices or most common custom. *Id.* (quoting *Strickland*, 466 U.S. at 690) (emphasis added).

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance 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." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to *deprive the defendant of a fair trial.*" *Id.* at 687 (emphasis added). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 668. In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).



The performance and prejudice standards, however, “do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Strickland* at 696. Moreover, “there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.” *Id.* at 697. The court “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

B. Allegations before the Court

As stated above, at the evidentiary hearing, Applicant proceeded on the following claims, which are individually addressed below:

Trial counsel was ineffective for:

1. giving poor advice regarding plea negotiations and the state’s plea offers;
2. giving poor advice about the chance of success at trial;
3. not raising a *Batson* motion;
4. not informing Applicant that he would be taken into custody and the trial would begin on the first day;
5. not arguing that the arrest warrant affidavit was insufficient to support a finding of probable cause;
6. not arguing that the grand jury was impaneled outside of a General Sessions term; and
7. not rejecting testimony from the State’s expert witness that a drug dealer would not leave drugs behind in a rental car; and
8. Appellate counsel was ineffective for not arguing that the trial court erred in admitting Applicant’s roadside statements to the officers.

PCR, p. 5, l. 12 – p. 6, l. 14.

C. Findings as to Claims Raised

Claim 1: Counsel was ineffective for giving poor advice regarding plea negotiations and the State’s plea offers.

Applicant first alleges trial counsel was ineffective for giving poor advice regarding plea

negotiations and the State's plea offers. This Court finds that the Applicant has failed in his burden of proof to show that counsel was deficient or that he was prejudiced under *Strickland*. A review of the trial transcript, supplemented by Counsel's credible testimony at the evidentiary hearing, establishes the case was not a complex one and that Counsel understood the case well. (PCR, p. 39) ("[I]t's not a complex case factually. You know, a vehicle stop. There's a search. They find drugs in the car. That's about all the evidence there is.") It was based on Counsel's understanding of the case, the main issues in the case, and his understanding that the offense Applicant was accused of required the Court impose a mandatory 25-year sentence upon a finding of guilt, that led Counsel to recommend Applicant plead guilty and limit his exposure, rather than risk being convicted. (PCR, p. 26, l. 24- p. 29, l.6; *see also Id.* at p. 49, l. 4-13).

Applicant was offered two pleas throughout the case's history. (R. 237, l. 16-24). The first was the chance to plead guilty to possession with intent to distribute cocaine ("PWID") first, with no recommendation by the State, and face a sentence of zero to fifteen years. (*Id.*; *see also* PCR, p. 32, l. 12-17). This offer was initially extended to Counsel by the Solicitor in July 2014. (PCR, p. 24, l. 8-12). Following Counsel's initial meeting with Applicant on June 6, 2014, Applicant's bond had been lowered and he had been released from jail and traveled back to his home state of North Carolina. (PCR, p. 24). As a result, Counsel relayed the first offer to Applicant via telephone on August 12, 2014. *Id.* Applicant then had a court appearance on August 22, 2014 and said he was not going to take the offer. *Id.*

Following Applicant's first rejection of the offer, the Solicitor had originally indicated the offer was void but then it (the original offer) was extended or re-extended. *Id.* The plea offer remained open as of September 4, 2015 and Applicant was aware it was still available, as evidenced by his telling Counsel on that date that he "needed more time to think about it." (PCR,



p. 25). In January 2016, Applicant remained aware of the offer, again not declining it but, instead, telling Counsel he still needed time to think about the plea offer. *Id.* Applicant was given a February 9, 2016 date to decide or the offer would be considered dead. *Id.* At that time, Applicant requested Counsel see if a specific sentence could be negotiated, at which time the Solicitor both said he was not going to negotiate a specific sentence and that he was going to ask the judge for jail time. *Id.* When Counsel let Applicant know that, on February 9th, 2016, Applicant told Counsel he wanted a trial. (PCR, pp. 25-26).

More communications between Applicant and Counsel continued and, ultimately, following Applicant's refusal of the first offer because "he said he wasn't going to plea to that, zero to fifteen," on the morning of the day Applicant's trial was to be called there was no longer any offer on the table. *Id.* Thereafter, the trial court suggested another offer be made, and the Solicitor agreed, though it was not the standard practice of his office. (PCR, p. 67, l. 10- p. 68, l. 25). Thereafter, the offer of trafficking with a penalty of seven to twenty-five years was made. (PCR, p. 11). Applicant testified at the PCR hearing that he rejected this offer as well. (PCR, p. 11). Based on the testimony of the Applicant and Counsel, I find the offers the Solicitor made were communicated with Applicant.

Counsel also credibly testified he recommended Applicant accept the offers. Taking them in order, Counsel first recommended that Applicant take the first offer. (PCR, p. 53, l. 14-17; PCR, pp. 27-29; PCR, p. 49, l. 4-13.) Counsel testified he felt this was good advice because "I never tell people that they've got a winner or a solid loser because it goes either way, but I mean, he's the only person in the car. I've told him that you're the only one in the car. The drugs are in the car. It's leaning towards you." (PCR, p. 27, l. 21-25). Counsel indicated that Applicant emphatically rejected the offer, "[Applicant] was very definite in his decision." (PCR, p. 53, l. 18-23). Applicant

did not like the possible prison time he was facing and was “emphatic that [Counsel] needed to get the drugs suppressed... .” (PCR, p. 28; PCR, p. 27, l. 3-6) (“[Applicant’s] position was that it was an illegal search and if I was going to do my job, I’d get those drugs suppressed and that’s all I needed to know about the case is to get the drugs suppressed.”)

This Court also finds credible counsel’s testimony on why he recommended Applicant take the plea offer. Counsel specifically told Applicant there was no guarantee that the drugs would be suppressed given the facts of the case, which included that Applicant was the only person in the car with the drugs when they were found. (PCR, p. 55, l. 1-7). Counsel both let Applicant know there was a chance the drugs would not be suppressed and further told him (regarding the first offer) “even if the judge does the worst on this, it would be better than the best outcome at trial. Fifteen at nonviolent would be better than 25 [years] at 85 percent.” (PCR. p. 28, l. 4-13; *see also* PCR, p. 29, l. 2-8) (“[M]y opinion was that offer of PWID first was a good way to hedge his bets.”). Counsel, who had over a dozen years criminal defense trial experience and whose testimony demonstrates his understanding of the issues involved, recommended to Applicant that the offer be accepted. (PCR, p. 23, l. 4-23; *see also, generally*, PCR, pp. 22-57). After making the recommendation, Counsel left it up to Applicant to accept or reject the plea and Applicant rejected it. *Id.* (“[I]t’s their decision as far as whether to plea or go to trial.”)

A second plea offer was made during pre-trial motions just prior to the start of trial. This offer was for a plea to trafficking with a potential sentence of seven to twenty-five years. (PCR, p. 31, l. 21- p. 32, l. 4; *see also* R. 233, l. 10-16). Applicant was notified of the offer and, against Counsel’s recommendation, he rejected this offer as well. (*Id.*; *see also* PCR, p. 49, l. 4-6).

Applicant has not established Counsel failed to convey either plea offer to him and also has not established Counsel’s conduct regarding the offers was “unreasonable” as required by

Strickland. Strickland, 466 U.S. at 689.

This Court further finds as to the second prong of *Strickland* that he similarly failed in his burden of proof. The Applicant claims that prejudice was shown by his testimony that had counsel advised him about the likelihood of acquittal was “slim to none” and explained the impact of an *Alford* plea that he probably would have thought about a guilty plea more depending on the specifics of the offer than going to trial and getting 25 years. PCR Tr.p. 11-12. However, this Court did not find Applicant’s testimony credible in light of the record before it and the conditions that he placed upon it during the PCR hearing, as well as the fact that no *Alford* plea was ever offered. This is supported by counsel’s testimony that he did not discuss an *Alford* type plea with the Applicant. Tr.p. 40. The Applicant was adamant at the outset of the trial he was not going to plead guilty when he claimed he did not have the drugs. Trial Tr.p. 87-88. The Court further find that he had failed to prove that the State either offered or was willing to agree to an *Alford* plea during its negotiations. See Trial Tr.p. 263; PCR Tr.p. 67-68. Further, Applicant has failed to show 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. In fact, in hindsight, the record establishes Applicant would have received less time if he had taken Counsel’s advice regarding the initial offer and, worst case, no additional time if the second offer was accepted. Because Applicant has not met the burden of either *Strickland* prong, this claim is denied and dismissed with prejudice.

Claim 2: Counsel was ineffective for giving poor advice about the chance of success at trial.

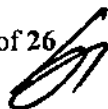
Applicant next alleges trial counsel was ineffective for giving poor advice about Applicant’s chances of success at trial. A primary ground for the charge against Applicant was cocaine found in the car he was driving and was the sole occupant of at the time of the stop. (R.

100-101). Applicant had prior convictions for possession of cocaine with intent to distribute, and didn't want to go back to prison."⁴ (R. 232, R. 54). Applicant was very emphatic that the drugs in car were to be suppressed. (PCR, p. 44). Counsel testified he told Applicant that there was a chance that they would be, but there also was a chance they would not be suppressed. (PCR, p. 44; *see also* PCR, p. 44, l. 14-15) ("I [Counsel] told him that it might not be, and his response was that I needed to do my job.").

The testimony at the hearing was clear that (1) Applicant was told Counsel was making a motion to suppress and that "[a] judge could rule for or against [Applicant] and that (2) "[Counsel] recommended he take the PWID. I [also] recommended that he take the other [offer], but I said if you want to go to trial, I'm happy to do that too." (PCR, pp. 48-49). Applicant did not reveal any defense to Counsel nor suggest a defense that Counsel should put forth beyond arguing for suppression. (PCR, pp. 30-31). Counsel testified that because he could not guarantee the drugs in the car would be suppressed and the facts for suppression, in terms of Applicant being the only person in the car were not good, Counsel recommended Applicant take the pleas offered, especially the first one, limiting Applicant's exposure to 15 years. Applicant responded he was tired of going to prison and rejected the offer. (PCR, p. 53, l.14- p. 55, l.7).

Applicant has not established Counsel's conduct, in terms of giving advice regarding Applicant's chance of success at trial, was "unreasonable" as required by *Strickland*. *Strickland*, 466 U.S. at 689. As found earlier in the initial allegation, this Court finds that the Applicant failed to prove with credible evidence 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.

⁴ Applicant's prior criminal history included at least three prior convictions for possession with intent to distribute cocaine (2007, 2009, and 2014), as well as other charges, and reflected four periods of incarceration. (R. 232). The offense he was charged with in the present case was a technical third offense. However, as to weight, the charge was a twenty-five year charge, even as a first offense. *Id.*



at 117-18, 386 S.E.2d at 625. Because Applicant has not met either burden required of him pursuant to *Strickland*, this claim is denied and dismissed with prejudice.

Claim 3: Counsel was ineffective for not raising a *Batson* motion

Applicant next alleges trial counsel was ineffective for not raising a *Batson* motion after the State struck a black female during jury selection. On this point Counsel David Mauldin, who was an experienced defense attorney with over a dozen years trial practice, testified that he was familiar with *Batson* and summarized his understanding of the case. (PCR, p. 35). His recollection of Applicant's case was that one black female juror had been struck by the State, but that the State had sat at least one or two other black people on the jury. (PCR, p. 35). He testified that he saw no reason to raise a *Batson* issue and, further, that if he had seen something that raised his suspicion that the Solicitor was taking race into consideration in jury selection, he would have raised the issue. (PCR, p. 36).

Assistant Solicitor Bradley Pogue testified on the matter as well, testifying he understood the premise of *Batson* ("preemptory strikes can only be used for, you know, non-racial or non-sexual reasons") and that "in this case, it was non-race." (PCR, p. 69). He further testified "we don't ever strike a juror for any race-based reason." (PCR, p. 69). Of the three black females that were presented, the State struck just one, and it was because she had a criminal charge on her record—that was the basis for the strike. (PCR, pp. 70-75). The Solicitor testified that such a strike would be keeping with standard office practice. (PCR, p. 74). This Court finds the testimony of the prosecutor that the strike was based upon the existence of the criminal charge on her record which the State reasonably felt could harbor resentment against the State. See PCR Tr.p. 71-75.

To prevail in a *Batson* hearing, the burden is "on the defendant who alleges discriminatory selection of the venire to prove the existence of purposeful discrimination." 476 U.S. at 93 (internal



citations and quotation marks omitted). Applicant has not met this burden by presenting testimony, as required to prevail on the claim. Accordingly, Applicant has not shown that counsel was ineffective in failing to raise the claim at trial. Further, Applicant has failed to show prejudice resulted from the failure of this one juror to be seated when the State put forth all of the remaining black female jurors who were selected as possible jurors. For these reasons, Applicant's claim is denied and dismissed with prejudice.

Claim 4: Counsel was ineffective for not informing Applicant the trial would begin the first day and he would be taken into custody at the trial's start.

Applicant next alleges trial counsel was ineffective for not informing Applicant that he would be taken into custody and the trial would begin on the first day. On this point, when asked at the hearing if his attorney told him when to be in court for trial, Applicant agreed Counsel had told him when to show up. (PCR, p. 17). Further, Applicant showed up for the first day of trial. Upon showing up, Applicant was informed that it is standard practice for Defendants to be taken into custody for the period of the trial. (R. 48, l. 2-3). At this Applicant stringently objected, claiming he had not been advised of this in advance. (R. 48, l. 9-12). Whether or not to take a Defendant into custody for the period of his trial is a trial court matter. In this case, the trial court ultimately chose to not require Applicant to continue to be held in custody throughout his trial and, after the second day, Applicant was told he would not be held in custody but, that if he failed to return for the third or any subsequent day, he would be tried in his absence. (R. 195-198).

Though the majority of claims allowed pursuant to the Act fall under ineffective assistance of counsel, not all claims do. *See Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (noting that allegations of trial court error are not cognizable on PCR); *Stepney v. State*, 278 S.C. 47, 292 S.E.2d 41 (1982) (explaining that issues that could have been raised on direct appeal

cannot be considered on PCR application absent claims of ineffective assistance of appellate counsel); *State v. Gentry*, 363 S.C. 93, 101, 610 S.E.2d 494 499 (2005) (“Circuit courts obviously have subject matter jurisdiction to try criminal matters.”).

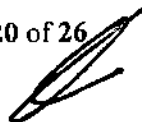
Applicant’s claim here, that he was not told he would be taken into custody, is not a cognizable claim under the Act. See S.C. Code Ann. § 17-27-20 (grounds for actions pursuant to the Act). For this reason alone, this claim fails. Going further, Applicant has not shown Counsel’s conduct in failing to notify him (if this was the case, which has not been established) was not within the wide range of reasonable professional actions or that prejudice of any type, and especially prejudice “sufficient to undermine confidence in the outcome” resulted from any such failure to notify him in advance that his bond condition may change. Accordingly, this allegation is denied and dismissed with prejudice.

Claim 5: Counsel was ineffective for not arguing the arrest warrant lacked probable cause.

Applicant next alleges trial counsel was ineffective for failing to argue that the affidavit underlying the arrest warrant was insufficient to support a finding of probable cause.⁵ Counsel testified at the hearing that he had seen the arrest warrant affidavit and that he did not see any benefit in arguing the affidavit lacked probable cause. (PCR, pp. 54-55). In this case, the warrant was obtained after the Applicant was in jail, the Applicant having been arrested on the side of the

⁵ In the March 20, 2014 affidavit, the following basis was set out for Trafficking in Cocaine 100 g. or more, but less than 100 g.:

On 3/20/2014 at 1240 hours while in Lexington County, I made a lawful traffic stop on a 2014 Volkswagen Jetta for improper lane use. I identified the driver as Arnold D. Michaux by his North Carolina ID card. I smelled of marijuana coming from the vehicle. I had Mr. Michaux exit the vehicle. A search of the vehicle was conducted and a black bag was found in the rear floorboard that contained 5 oz of a white powder substance. Mr. Michaux was placed under arrest...



road after, among other things, the officer smelled marijuana in the car, determined Applicant was driving without a valid license, and found a small black bag that field tested for cocaine in the car. (PCR, p. 35, 1.2-13; R. 88-90; R. 100-101). Counsel's point was the evidence used against Applicant at trial had already been obtained by the time of Applicant's arrest and it was sufficient for conviction (implying the evidence was sufficient for arrest). (PCR, p. 35). Counsel made the additional point, "arrest warrants are kind of subsumed by the indictments as far as the charging document." (PCR, p. 34).

In the present case, Counsel chose to challenge the officer's probable cause regarding the stop and search, instead of the probable cause articulated in the arrest warrant after the search had already been conducted. In this case, Counsel's conduct was within the acceptable range of professional assistance. *Butler*, 286 S.C at 445, 334 S.E.2d at 816. Further, Applicant has not shown prejudice resulting from Counsel's failure to argue the affidavit. In light of the indictment returned by the grand jury in this case, and the jury verdict, it is not surprising Applicant has been unable to show prejudice, particularly prejudice "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 690. For these reasons, this ground is denied and dismissed with prejudice.

Claim 6: Counsel was ineffective for not arguing that the grand jury was impaneled outside of a General Sessions term.

Applicant next raised that Counsel was ineffective for not arguing that the grand jury was impaneled outside of a General Sessions term. Applicant chose to abandon this claim at the evidentiary hearing. (PCR, pp. 21-22) (PCR counsel testified "[w]e've reviewed the evidence on the issue involving the grand jury, being indicted outside the term of the grand jury. The attorney general has presented the documentation showing that it was, in fact, in a legitimate term for the grand jury and, therefore, that is a non-issue.") Because this claim has been abandoned and, further,



there has been no meeting of either prong of *Strickland*, this claim is denied and dismissed with prejudice.

Claim 7: Counsel was ineffective for not rejecting testimony from the State's expert witness that a drug dealer would not leave drugs behind in a rental car.

Applicant next alleges trial counsel was ineffective for not rejecting testimony from the State's expert witness that a drug dealer would not leave drugs behind in a rental car. The specific testimony that it is alleged Counsel should have objected to occurred when the Solicitor asked Corporal Rogers, a full-time member the South Carolina Highway Patrol interdiction team, and someone who had been qualified as an expert in the field of drug trafficking if, based on his background and experience, a drug trafficker would leave \$10,000 worth of cocaine behind in a rental car and Corporal Rogers responded "no, that would not happen." (R.165, 172-173, 177-178).

On this point Counsel testified, first, that while he did have some objections regarding Corporal Rogers' testimony, there was nothing in Corporal Rogers background that would lead him to believe Rogers was not qualified to give expert testimony regarding drug trafficking. (PCR, p. 37, l. 4-19). Second, Counsel testified he did not object to Rogers saying that in his experience a drug trafficker would not leave \$10,000 worth of cocaine behind in a rental car because he did not find the statement objectionable. (PCR, p. 38). "I thought he was giving his opinion." *Id.* Counsel added "I thought it was kind of patently ridiculous to say that people don't accidentally leave stuff somewhere. I think I argued it in my closing maybe, that I talked about how people lose [things] all the time." *Id.*

Counsel articulated two reasons at the hearing for not objecting to the Corporal's testimony, both of which I find to be the result of reasonable professional judgment. Further, there

is a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. Applicant, who has the burden of proof, must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. Here the Applicant has not done so. Further, Applicant has not established prejudice, in terms of establishing that, but for Counsel’s failure to object, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Here, where the jury saw the cocaine that was found in the backseat, and heard testimony regarding Applicant being the sole occupant of the car at the time of stop, as well as other factors, Applicant has not established that there is a reasonable probability that, if the statement had been objected to, the outcome of the trial would have been different. The probability of a different outcome minus the statement is not sufficient “to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Since applicant has met neither of the required *Strickland* prongs to prevail, this claim is denied and dismissed with prejudice.

Claim 8: Appellate Counsel was ineffective for not arguing that the trial court erred in admitting Applicant’s roadside statements to the officers.

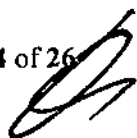
Applicant next alleges Appellate Counsel Taylor Gilliam was ineffective for not arguing that the trial court erred in admitting Applicant’s roadside statements to the officers. At the hearing Appellate Counsel Gilliam testified regarding the issues he raised on appeal in the present case, as well as how he decided what issues to raise. (PCR, p. 58). He testified that he reviews the transcripts in their entirety, takes notes, marks them up, tabs them and preforms legal research to determine whether motions or objections that were made by trial or PCR counsel resulted in what he believed to be an incorrect decision by the judge of the lower court. *Id.* In the present case he filed a two-issue merits brief on behalf of Applicant, which included a motion to suppress the

traffic stop, which “struck [Appellate Counsel] as a fishing expedition.”⁶ *Id.*

Appellate Counsel went into detail regarding the suppression issues and demonstrated his knowledge in this area of the law. (PCR, pp. 58-61). When asked if he saw anything that made him think he should raise an argument that the judge erred in admitting Applicant’s roadside statement to law enforcement, he responded he did not. (PCR, p. 59, l. 19-24) (“I did not conclude that that was a meritorious issue worthy of inclusion in the brief.”) If he had thought it was a worthy argument, he would have raised it. (PCR p. 59, l. 25- p. 60, l. 2). Appellate Counsel is experienced in raising *Miranda* violations; articulated how such violations tend to revolve around reasonableness, voluntariness, and custody; and testified that just the week before he had had a conviction overturned based on custodial interrogation and a *Miranda* violation. (PCR, pp. 58-61). The statement made by Applicant to law enforcement – that “there was no marijuana in the car”— was neither a custodial interrogation nor a confession, and something Appellate Counsel did not find objectionable as a matter of law. (PCR, p. 61; R. 40). Appellate Counsel agreed with the Circuit Court’s finding that the statement was a spontaneous statement. *Id.*

Applicant has failed to meet his burden of showing Appellate Counsel was ineffective for failing to argue the trial court erred in admitting Applicant’s roadside statements to officers. An Applicant making a claim of ineffective assistance must overcome a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. Applicant has not done this on this claim. Further, to prevail Applicant must also show 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.

⁶ The Court of Appeals issued merits findings on both of the issues in an unpublished opinion filed December 18th, 2018. The issues are not before this Court.



at 117-18, 386 S.E.2d at 625. Applicant has not met his burden on this prong either.

Accordingly, this claim is denied and dismissed with prejudice.

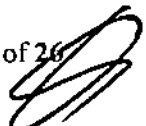
CONCLUSION

After careful consideration of Applicant's Amended Application for Post-Conviction Relief, the Record of the case, the arguments of PCR Attorney Wilkes and Assistant Attorney General Smith, and the testimony of witnesses, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. To satisfy the two prongs of *Strickland*, the Applicant must show that counsel was deficient and also show the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The Applicant has not met this burden on any of the allegations made. Therefore, the Court denies Applicant's requested relief in this matter.

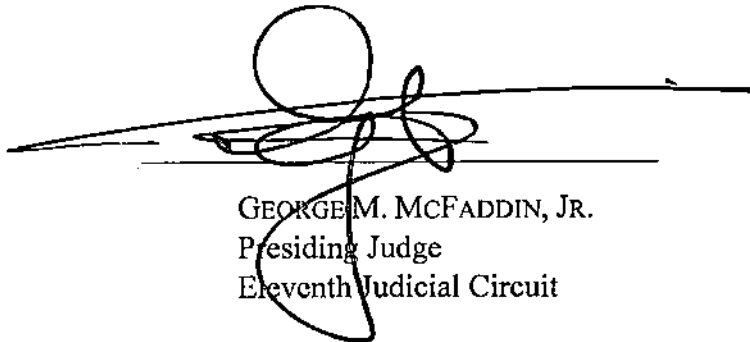
This Court notes if Applicant desires to appeal this Order, he must file and serve a notice of appeal within thirty days from the receipt of this Order through his counsel of record. See Rule 203 and 243, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State.



AND IT IS SO ORDERED this 16th day of May, 2024.



GEORGE M. MCFADDIN, JR.
Presiding Judge
Eleventh Judicial Circuit

Sumter, South Carolina