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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Post Conviction Relief

Walton J. McLeod, IV, Circuit Court Judge

Lower Court Case No.: 2020-CP-10-04498

Kevin L. Middleton #363735,..... Petitioner,

vs.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

The Petitioner, Kevin L. Middleton #363735, appeals the Order of Dismissal signed by the Honorable Walton J. McLeod, IV on January 24, 2025 and filed on January 29, 2025. Applicant received a copy of this Order of Dismissal on February 18, 2025.

Respectfully submitted.

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February __, 2025

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Kevin L. Middleton, SCDC #363735, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2020-CP-10-04498 **ORDER OF DISMISSAL**

This matter is before the Court pursuant to an application for post-conviction relief ("PCR") filed by Kevin Middleton ("Applicant") on October 13, 2020. On March 12, 2024, an evidentiary hearing convened before the Honorable Walton J. McLeod, IV. Applicant was present and represented by Tommy A. Thomas, Esquire. Assistant Attorney General Bryan T. Hall represented Respondent. At the hearing, Applicant testified on his own behalf and called as a witness Timothy Elliot. Respondent called as a witness Jackson S. Whipper, Esquire. Following a thorough review of the trial transcript and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections ("SCDC") serving a sixteen (16) year sentence. In its August 2013 term, the Charleston County Grand Jury indicted Applicant for trafficking cocaine base (2013-GS-10-4659); possession with intent to distribute ("PWID") heroin (2013-GS-10-4660), and possession with intent to distribute cocaine (2013-GS-10-4461). These charges arose from an incident in which law enforcement went to execute an arrest warrant on Applicant, who was staying overnight at a trailer. Upon arriving, a male opened the door, and officers observed Applicant in plain view, sitting on a couch, leaning

over a coffee table, and cutting an off-white rock-like substance with a razor blade and a digital scale in his lap. (R. 60; Tr. 85). After arresting Applicant, officers obtained a search warrant for the trailer, citing plain view of narcotics as probable cause. Upon executing the search warrant, officers found narcotics in the trailer.

On April 13-15, 2015, Applicant proceeded to a jury trial before the Honorable W. Jeffery Young. Jackson S. Whipper, Esquire, ("Counsel") represented Applicant. Assistant Solicitors Edward Corvey, David Osbourne, and Greg Voigt prosecuted the case. Applicant was convicted of trafficking cocaine base twenty (28) to one hundred (100) grams, PWID heroin, and the lesser included offense of possession of cocaine. Judge Young sentenced Applicant to sixteen (16) years for trafficking cocaine base; ten (10) years for PWID heroin; and three (3) years for possession of cocaine.

On April 5, 2017, a notice of appeal was filed on Applicant's behalf. On appeal, Applicant was represented by Appellate Defender Taylor Gilliam, who filed a brief raising the following issues:

> I. Whether the trial judge erred in denying Appellant's motion to suppress evidence found as the result of a warrantless search and seizure of Appellant, where Appellant was in the home of a third party and law enforcement had an arrest warrant for Appellant but did not have a search warrant at the time of entry into the home?
>
> II. Whether the trial judge erred in allowing law enforcement officers to testify about the existence of arrest warrants involving Appellant, where the prejudicial effect significantly outweighed any probative value, where officers repeatedly referred to Appellant as a target and a fugitive, and where the trial judge failed to perform a balancing test?

Following briefing and without oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction, determining (1) the issue of the warrantless search was unpreserved; and (2) the trial court did not abuse its discretion by admitting the testimony because

the evidence was admissible as *res gestae* evidence (evidence of other crimes that supply context to or helps explain the crime charged). *State v. Middleton*, Op. No. 20-UP-043 (S.C. Ct. App. filed Feb. 12, 2020).

CURRENT APPLICATION

Applicant timely commenced this PCR action on October 13, 2020, alleging he is being held in custody unlawfully for the following reasons:

Ineffective Assistance of Counsel

a. Failure to object to the prosecutor's use of the terms "fugitive" or "target" which clearly prejudiced his case.
b. Failure to object to the admission of evidence from a prior crime.
c. Failure to object to law enforcement testimony about the existence of a prior arrest warrant.

On April 30, 2021, Respondent filed a return and motion for a more definite statement on Applicant's claims. On October 10, 2023, Applicant amended his application to add the following allegations:

Ineffective Assistance of Counsel

d. Failure to properly advise regarding Applicant taking the stand to testify on his own behalf.
e. Failure to adequately explain money that was seized at the scene. Evidence could have been presented to show that Applicant was working and had a source of income and these funds were not drug related.
f. Failure to hire a private investigator.
g. Failure to show that pictures entered into evidence of the drugs were misleading. They were taken in a fashion to show that the drugs were located closer to Applicant than they were to strengthen the contention that the drugs belonged to Applicant.
h. Failure to call as a witness George Allen Wilson, Jr., who was prepared to testify that the drugs in question did not belong to Applicant. Defense Counsel chose not to put Alan Wilson on the stand despite the fact that he was available and in the courtroom.

On October 16, 2023, Applicant amended his application to add the following allegations:

Ineffective Assistance of Counsel

i. Failure to object to admission of evidence secured by a faulty search warrant, which contained an address which was not associated with the property in question.

On October 30, 2023, Respondent filed an amended return and a partial motion to dismiss Applicant's claim of ineffective assistance of counsel for failing to object to the trial court's admission of drugs seized pursuant to a search warrant. Before this Court are the Charleston County Clerk of Court records of the subject conviction; Applicant's records from SCDC; the appellate records; the trial transcript; and the records of the current PCR action.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant's Testimony

At the evidentiary hearing, Applicant averred Counsel was ineffective in representing him. Applicant testified that he hired Counsel to get him a bond reduction, but Applicant did not get a bond. Applicant testified that he met with Counsel five (5) to six (6) times and spoke about how Counsel would defend him. Applicant testified that Counsel did not have a theory of defense and did not know how Counsel would defend him. Applicant testified that Counsel offered fifteen (14) years for a plea, which the solicitor's office did not approve. Applicant testified that he did not want to plead guilty without knowing if the plea was to a violent or non-violent offense or what the charge carried. Applicant testified that Ben Lewis was his previous counsel, and Lewis received an offer of seven (7) years, but the plea offer was increased to fifteen (15) years after Counsel was hired. Applicant testified that he did not understand why the plea offer increased because he thought he paid Counsel to make it go down. Applicant testified that he went to trial because the plea offer went up in years.

Applicant testified that he had discovery before Counsel became his attorney, and Counsel did not discuss discovery with him. Applicant testified that he wanted to testify at trial, but Counsel

said it was not a good idea because Applicant had a breach of trust conviction. Applicant testified that he believes it was the wrong decision for him not to testify, and he believes it would have made a difference. Applicant testified that his co-defendants, who were arrested with him, were all charged, pled guilty, and went home.

Applicant testified that he discussed pictures of the drugs with Counsel, and the pictures showed the drugs grouped together but the drugs were in different places. Applicant testified that law enforcement said he had a "cookie" and kept cutting it, and Applicant wanted to tell that it's not true. Regarding the four hundred dollars ($400) found when he was arrested, Applicant testified that his father, Timothy Elliot, would have testified that he gave the money to Applicant, and Counsel should have called Elliot to testify. Applicant testified that Counsel should have called George Allen Wilson, the trailer's owner, to testify that the drugs belonged to Wilson. Applicant testified that Counsel did not object to many arguments, and the search warrant (entered as Applicant's Ex. 1) contained the wrong address. Applicant testified that Counsel should have made better arguments regarding the search warrant. Applicant testified that Counsel should have objected to law enforcement calling him a "target."

Timothy Elliot's Testimony

Timothy Elliot ("Elliot"), Applicant's father, testified that Applicant worked with him, and Elliot testified paid Applicant in cash for work done. Elliot testified that he told Applicant that he would not go to court for him if the drugs belonged to Applicant. Elliot testified that he was present at trial and available to testify.

Counsel's Testimony

Jackson S. Whipper ("Counsel") testified that he was been practicing law since 1985. Counsel testified that he discussed defenses with Applicant and always had a good conversation

with Applicant regarding what to do. Counsel testified that the defense's position was that the drugs were not Applicant's, and the State's position was to sell the story that the drugs belonged to Applicant. Counsel testified that he did a lot of investigating, which included going to the trailer, taking pictures of the trailer, and spending a lot of time in the area reading people. Counsel testified that he was the private investigator. Counsel testified that he saw pictures of the drugs but did not see an issue with the way things were grouped together.

Counsel testified that he advised Applicant of his constitutional rights and was familiar with the criminal process. When Counsel took the case, Applicant had ten (10) charges. Counsel testified that he and his sister, Cheryl Whipper, who was assisting in Applicant's defense, discussed with Applicant the risk of testifying at trial. Ultimately, Applicant elected not to testify.

Counsel testified that he moved to exclude evidence of other charges and argued that such testimony should be suppressed. Counsel testified that the court ruled in his favor and limited testimony regarding Applicant's other charges, and Counsel does not recall any witnesses testifying about the charges. Counsel testified that he made a pre-trial motion to suppress the search warrant of the property, raising the issue of Applicant being a third party at another person's home but the judge ruled the arrest was proper. Counsel testified that he raised the issue of the search warrant's date at trial, and the judge overruled him and allowed the warrant.

Regarding Timothy Elliot, Counsel testified that he spoke to Elliot who told Counsel that he would not testify at trial because testifying that Applicant got the money from him would not have been the truth. Counsel testified that Elliot made the decision not to testify, and Counsel does not believe the testimony would have made a difference because the money issue was immaterial. Regarding George Allen Wilson, Counsel testified that he spoke to Wilson and was not clear what Wilson would say but thought Wilson's testimony would cause more harm than good. Regarding

the State's closing argument, Counsel testified that he did not believe it was consequential.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court observed the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony. Also, this Court has had the opportunity to review the trial transcript in its entirety and has heard the testimony at the PCR hearing. After a careful review based on the *Strickland* standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove "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. at 441, 334 S.E.2d at 813. "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland*, 466 U.S. at 687–88; *Cherry*,

300 S.C. at 117–18, 386 S.E.2d at 625. Applicant must prove prejudice by showing "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.

Failing to Object

Failing to object does not automatically constitute ineffective assistance of counsel; an applicant must prove both deficiency and prejudice to establish an ineffective assistance of counsel claim for failing to object. *Millidge v. State*, 422 S.C. 366, 374, 811 S.E.2d 769, 800-01 (2018). The proper inquiry for determining prejudice for failing to object is whether there is evidence to support the trial court's ruling such that "an appellate court would necessarily have affirmed the trial court's ruling." *Id.*, 422 S.C. at 380, 811 S.E.2d at 804.

Failure to Object to Law Enforcement and the Prosecutor's Use of "Fugitive" or "Target"

This Court finds Applicant failed to prove Counsel was ineffective for failing to object to the solicitor or law enforcement's use of "fugitive" or "target." A solicitor's comments do not require reversal if they are not prejudicial to the defendant; the inquiry for prejudice is whether the solicitor's comments so infected the trial with unfairness as to result in a denial of the defendant's right to a fair trial. *Fortune v. State*, 428 S.C. 554, 549-50; 837 S.E.2d 37, 39-40 (2019). The solicitor's closing argument must be confined to the evidence in the record and the reasonable inferences that may be drawn from the evidence. *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010).

This Court finds Applicant failed to prove Counsel's performance was deficient for failing to object to law enforcement's testimony and the solicitor's use of "fugitive" or "target." At trial, Officer Robert Kruger testified that he was a part of the North Charleston Police Department's ILP unit, which he characterized as "like a fugitive unit violent offender fugitive squad." (R. 108; Tr.

133). Kruger testified that the ILP unit is a "fugitive unit" that tracks down fugitives. (R. 109; Tr. 133). Kruger testified that he and other officers received information regarding Applicant's location and were going to the location to serve a warrant on Applicant. (R. 111-12; Tr. 136-37). Kruger testified and described the location where intel was received regarding Applicant's location as the "target" location. (R. 114; Tr. 139). Kruger identified Applicant as the "target." (R. 115; Tr. 140). Officer Kristopher Gorman, also a part of ILP team, testified that the team was a "fugitive task force" that gets assigned to "subjects that are high risk or violent due to the nature of the warrant." (R. 55; Tr. 80). In closing, the solicitor stated the following:

> You heard first from Officer Gorman, the ILP team, team which is a *fugitive* task force. They're a task force made up of mostly SWAT member, and they go and look for individuals who are hiding from the law so they can serve arrest warrants on those individuals. They go in the communities in which the certain *subjects* are known to live or to spend time in, and they crowd source.
>
> ...
>
> The owner of the home, George Wilson, opens, and then Officer Gorman who, per their procedure, is huddled against the door, sees Mr. Middleton, their *subject*.

(R. 260-61; Tr. 285-86) (emphasis added).

This Court finds Applicant failed to prove the law enforcement or the solicitor's use of the words "fugitive" and "subject" were prejudicial as the words were merely used to describe the ILP team and Applicant as the subject of their search to execute an arrest warrant. This Court finds Applicant failed to prove he was prejudiced by Counsel's failure to object as Applicant cannot prove the comments so infected the trial with unfairness as to result in a denial of due process. Additionally, Applicant failed to prove there's a reasonable probability that the result of trial would have been different if Counsel had objected. Thus, Applicant failed to meet his burden.

Failure to Object to the Admission of Evidence from a Prior Crime and the Existence of a Prior Arrest Warrant

This Court finds Applicant failed to prove Counsel was ineffective for failing to object to admission of evidence from a prior crime. Pre-trial, Counsel moved for the court to exclude evidence of why the officers were at the location looking for Applicant. (R. 7-15; Tr. 32-40). After hearing arguments, the court ruled that the officers would be allowed to say that they were there to serve a warrant on Applicant, but the court excluded testimony regarding the crimes the warrants were for. (R. 15; Tr. 40).

This Court finds Applicant failed to prove Counsel's performance was deficient. This Court finds ***credible*** Counsel's testimony that he does not recall any of the witnesses mentioning what crimes the warrants were for. Upon review of the trial transcript, this Court finds Applicant failed to prove there was any mention of the prior crimes by the witnesses. This Court also finds Applicant failed to prove he was prejudiced by Counsel failing to renew his objection to testimony regarding arrest warrants because this Court finds testimony regarding the arrest warrants were a part of the *res gestae* of the case such that the appellate courts would have affirmed the trial court's ruling if Counsel had objected. *State v. Preslar*, 364 S.C. 466, 473-74, 613 S.E.2d 381, 385 (Ct. App. 2005) ("the res gestae theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred"). Thus, this Court finds Applicant failed to meet his burden.

Failure to Properly Advise Regarding Applicant Taking the Stand to Testify

This Court finds Applicant failed to prove Counsel was ineffective for failing to properly advise him on taking the stand to testify on his own behalf. This Court finds ***credible*** Counsel's testimony that he explained to Applicant the risks of testifying, and Applicant made the decision not to testify. This Court also finds ***credible*** Counsel's testimony that Applicant knew his

constitutional rights and was familiar with the criminal process. This Court finds Applicant failed to prove Counsel's advice was deficient. Further, this Court finds the trial court explained to Applicant his right to testify. (R. 233-35; Tr. 258-60). Applicant indicated that he understood what was explained and decided not to testify. (R. 235-36; 260-61). Additionally, this Court finds Applicant failed to prove prejudiced by failing to prove a reasonable probability that the result of trial would have been different if he had testified since officers observed Applicant in plain view possessing the drugs. Thus, Applicant failed to meet his burden.

Failure to Adequately Explain Money Seized at the Scene and Present Evidence to Show that the Funds Seized were not Drug Related

Failure to Call Timothy Elliot as a Witness

This Court finds Applicant failed to prove Counsel was ineffective for failing to adequately explain money seized at the scene and present evidence through the testimony of Timothy Elliot to show that the money was not drug related. To prevail on a claim that counsel failed to interview or call witnesses, an applicant must prove counsel's inaction resulted in prejudice by producing witnesses at the PCR hearing to show a reasonable probability the result of the trial would have been different based on the witness's testimony. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

At trial, the State presented evidence that four hundred ($400) dollars was found in Applicant's pocket upon arrest, and the State argued the money was drug related. (R. 225, Tr. 250; R. 246, Tr. 271; R. 270, Tr. 295). At the PCR hearing, Elliot testified that his trial testimony would have been that the money was given to Applicant by Elliot for work done. This Court finds ***credible*** Counsel's testimony that he spoke to Elliot who told Counsel that he would not testify at trial because testifying that Applicant got the money from him would not have been the truth. This Court finds ***credible*** Counsel's testimony that Counsel does not believe the testimony would have

made a difference because the money issue was immaterial. Further, this Court finds Applicant failed to prove prejudice because Applicant failed to prove a reasonable probability that Elliot's testimony, if true, would have resulted in a different outcome at trial since Applicant was observed in plain view possessing the drugs. Thus, Applicant failed to meet his burden.

Failure to Hire a Private Investigator

This Court finds Applicant failed to prove Counsel was ineffective for failing to hire a private investigator. "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "The scope of a reasonable investigation depends on a number of issues, but at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007). Counsel's duty to investigate is limited to reasonable investigations or a reasonable decision that makes particular investigations unnecessary. *Ard*, 372 S.C. at 331, 642 S.E.2d at 597; *Strickland*, 466 U.S. at 691.

In applying the *Strickland* standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation should be evaluated for reasonableness under all the circumstances with heavy deference to counsel's judgment. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014). To prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop if counsel had more fully prepared. *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when

the allegation is supported only by mere speculation as to the result. *Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998).

This Court finds Applicant failed to prove Counsel's performance was deficient. This Court finds ***credible*** Counsel's testimony that he investigated Applicant's case by going to the trailer, taking pictures of the trailer, and spending a lot of time in the area reading people. Also, Counsel's decision not to hire a private investigator was reasonable under the circumstances, and accordingly, this Court gives deference to Counsel's judgment in deciding not to hire a private investigator. Additionally, this Court finds Applicant failed to prove prejudice by failing to present evidence of discoverable matters that Counsel could have discovered that would have resulted in a different outcome at trial. Thus, Applicant failed to meet his burden.

Failure to Show that Pictures Entered into Evidence of the Drugs were Misleading

This Court finds Applicant failed to prove Counsel was ineffective for failing to show that pictures entered into evidence of the drugs were misleading. This Court finds ***credible*** Counsel's testimony that he reviewed the discovery and pictures and did not see an issue with how the items were grouped together. Further, this Court finds Applicant failed to prove prejudice by failing to prove a reasonable probability the result of trial would have been different if the pictures had been excluded. Thus, Applicant failed to meet his burden.

Failure to Call as a Witness George Allen Wilson, Jr.

This Court finds Applicant failed to prove Counsel was ineffective for failing to call as a witness George Allen Wilson, Jr., who would have testified that the drugs belonged to him. This Court finds credible Counsel's testimony that he did not call Wilson to testify because he believed it would do more harm than good. This Court finds Counsel articulated a reasonable strategic decision for not calling Wilson. Further, this Court finds Applicant failed to prove prejudice by

failing to call Wilson as a witness in the PCR hearing to show a reasonable probability the result of trial would have been different based on Wilson's testimony. *Glover*, 318 S.C. at 499, 458 S.E.2d at 540 ("applicant's mere speculation to what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice"). Thus, Applicant failed to meet his burden.

Failure to Object to the Admission of Evidence Secured by a Faulty Search Warrant

This Court finds Applicant failed to object to the admission of evidence seized from the search warrant in question (Applicant's Ex. 1). This Court has reviewed the search warrant and finds Applicant failed to prove Counsel was deficient for failing to object to the warrant or the evidence seized pursuant to the warrant. This Court finds Applicant failed to prove he was prejudiced because Applicant failed to prove there's a reasonable probability that the drugs seized would have been suppressed if Counsel had objected.

In a pre-trial hearing, Counsel moved to suppress the evidence seized from the warrant, arguing a violation of the Fourth Amendment. (R. 18, Tr. 43; R. 29-30, Tr. 54-55). The court denied the Applicant's motion, finding Applicant did not have standing to challenge the search because he was merely a visitor in the home. (R. 19, Tr. 44). The court also found the officers did not violate the Fourth Amendment because they were lawfully at the property to execute an arrest warrant on Applicant, and probable cause was obtained when they observed Applicant in the home and saw the drugs in plain view. (Tr. R. 32-33; Tr. 57-58).

As an initial matter, this Court finds the search warrant complied with the requirements of the Fourth Amendment and state law under Section 17-13-140 and thus, was valid. The Fourth Amendment protects against unreasonable searches and seizures by the government and provides that no warrants shall be issued upon probable cause, supported by oath

or affirmation, and particularly describing the place to be searched or the things to be seized. U.S. Const. amend IV. The search warrant in question was (1) signed by a magistrate having jurisdiction in the area where the trailer was located; (2) an affidavit was sworn before the magistrate establishing the grounds for the warrant; (3) probable cause was established as officers observed an off white rock substance and green plant material in plain view; (4) the warrant identified the property to be searched as "4333 Leslie Street, Lot B" particularly describing the property as a "single wide trailer...[t]he letter B is clearly visible on... the trailer." *See* S.C. Code Ann. § 17-13-140 (2014) (providing statutory requirements for a valid search warrant). Thus, Applicant failed to meet his burden of proving Counsel was deficient in challenging the search warrant since the warrant was valid.

This Court finds the record supports a finding that the erroneous address mentioned once in the search warrant is merely a typographical error, which does not affect the warrant's validity. During deliberations, the jury submitted a question to the court asking the following question:

> What is the difference between page 108 and 109 because they have two different addresses with the same date, April 20th, 2013, signed by the same judge[?]

(R. 291:9-14; Tr. 316:9-14). Counsel argued the warrant was for another address and not the address searched. (R. 291:20-22; Tr. 316:20-22). The solicitor responded that the error was likely a clerical error due to a template being used [to write] the search warrant, and the incorrect address is certainly an unrelated address. (R. 292; Tr. 317). The court responded to the jury by telling them to carefully examine the documents. (R. 292; Tr. 317).

Although on a separate page, the warrant erroneously refers to the place to be searched as "7840 Park Gate Drive." The Leslie Street property ("correct address") is mentioned in the warrant

eight (8) times compared to the once mention of the Park Gate address ("incorrect address"). The numerous mentions of the correct address in comparison to the incorrect address, and the warrant's description of the correct address with specificity supports a finding that the incorrect address is merely a typographical error, which does not invalidate the warrant. *See State v. Herring*, 387 S.C. 201, 213, 692 S.E.2d 490, 496 (2009 (a typographical error does not affect the validity of a search warrant). Thus, this Court finds the record supports a finding that the incorrect address was a typographical error that does not affect the validity of the search warrant.

This Court finds Applicant failed to prove he was prejudiced by Counsel's failure to object because Applicant failed to prove there's a reasonable probability the trial court would have changed its ruling on the warrant's validity and the admissibility of the drugs if Counsel had objected. At trial, during the jury's deliberations, Counsel objected to and raised concerns to the trial court about the date on the warrant. (R. 293-94; Tr. 318-19). The following is an excerpt of the exchange.

> Court: Again, we talked about it, and there was no objection in chambers, but I think that was probably the wrong instruction. It's not a fact for them to consider. It's a ruling on the law that I made, and therefore, I think I cured what was a mistake by sending the note back there, but your objection is noted.
>
> Counsel: All right. I think the positions that I took relative to – there are some questions about the accuracy of the warrant relative to the –
>
> The Court: But I have already ruled that it was admissible, and quite frankly, the drugs came in. Exhibit No. 10 came in without objection.
>
> Counsel: Well, it came in mistakenly without objection...and I think the date issue is a fact issue...
>
> Court: All right. Your objection is duly noted, and I'm not changing my ruling...

(R. 294-95; Tr. 319-20).

The trial judge stated that he had already ruled that the search warrant was valid, and he was not changing its ruling. Despite Counsel's comment that he should have objected to the admission of the drugs, this Court finds Applicant failed to prove prejudice because Applicant failed to prove there's a reasonable probability that the trial court would have changed its ruling that the warrant was valid, and the drugs seized were admissible.

This Court finds Applicant failed to prove he was prejudiced by Counsel's failure to object to the admission of the drugs because even if the warrant was defective, it is reasonably likely that the drugs seized would have been admitted under good faith reliance exception such that an appellate court would have affirmed the trial court's ruling. The exclusionary rule provides that evidence obtained in violation of the Fourth Amendment may be excluded. *Mapp v. Ohio*, 367 U.S. 643 (1961). Evidence that would otherwise be excluded under the exclusionary rule, can be admitted under the "good faith exception." *United States v. Leon*, 468 U.S. 897 (1984). This exception applies where police officers acted in an objectively reasonable belief that their conduct did not violate the Fourth Amendment. *Id.* (stating the purpose of the exclusionary rule is to deter willful and unlawful police conduct). Under South Carolina law, the "good faith" exception also applies to the statutory requirements of § 17-13-140 where the state demonstrates the officers make a good faith attempt to comply with the statute's procedures. *State v. Covert*, 368 S.C. 188, 628 S.E.2d 482 (2006).

Despite Counsel's comments at trial that he should have objected, this Court finds Applicant failed to prove prejudice because even if Counsel had objected, it is reasonably likely that the drugs would have been admitted under the good faith reliance exception. This Court finds the record supports a finding that law enforcement officers complied with relevant constitutional and statutory requirements and acted on an objectively reasonable belief that they were executing

a valid search warrant. Thus, this Court finds Applicant failed to prove he was prejudiced by Counsel's failure to object because there is sufficient evidence to support the trial court's ruling that the drugs seized were admissible such than an appellate court would have affirmed. *See Millidge*, 422 S.C. at 380, 811 S.E.2d at 804 (stating the proper inquiry for determining prejudice for failing to object is whether there is evidence to support the trial court's ruling such that "an appellate court would necessarily have affirmed the trial court's ruling"). Accordingly, this Court finds Applicant failed to meet his burden.

CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty (30) days of receipt by counsel of written notice of entry of judgment. *See* Rule 203, SCACR. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal. Therefore, this application for PCR is **DENIED** and dismissed with prejudice. Applicant must be remanded to and remain in the custody of the State.

IT IS SO ORDERED.

WALTON J. MCLEOD, IV
Presiding Judge
Ninth Judicial Circuit

Lexington, South Carolina
1/24/2025