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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Walton J. McLeod, IV, Circuit Court Judge

KEVIN L. MIDDLETON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000349

APPENDIX

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1 the fac that he had been dealing all night while he was
2 there and that kind of thing. And so yeah, we knew that was
3 the conclusion they wanted to draw. I don't think it was
4 presented like that initially, it was just one of the
5 factors.

6 Q. Mr. Whipper, I want to ask you about Timothy Elliot,
7 Mr. Middleton's father. Did you speak with Mr. Elliot
8 before trial or did you speak with him at some point?

9 A. Yeah I spoke with him, Mr. Timothy Elliot. I spoke
10 with him about testifying.

11 Q. Okay, and can you tell us about that conversation?
12 What did he tell you when you asked him would he come
13 testify?

14 A. He decided he didn't want to testify on this issue. I
15 asked him about it and told him if he wanted and he said he
16 didn't want to do it. He couldn't do it.

17 Q. And did he say why he couldn't do it?

18 A. He indicated that if he did he wouldn't be telling
19 the truth.

20 Q. Okay. So Mr. Elliot made the decision not to testify?

21 A. He made the decision not to testify.

22 Q. Okay.

23 A. You know I sat him in the hallway and I sat right
24 down beside him ...

25 Q. Beg the Court's indulgence.

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1 A. ... Gave him the opportunity to testify and he didn't
2 want to.

3 Q. And that was at trial?

4 A. At trial.

5 Q. Beg the Court's indulgence. Mr. Whipper regarding
6 George Alan Wilson. Do you know who George Alan Wilson is?

7 A. I do. I did a talk with George.

8 Q. Okay. Can you tell us who he is?

9 A. He was somehow he was related. He was a friend
10 socially of Kevins. It's my understanding, it wasn't clear
11 to me that exactly what all he was going to testify to but
12 I knew he was a witness in some way. And this is something
13 I think I kind of did. I mentioned to the family I was
14 going to do it but I wasn't comfortable with Mr. Wilson as
15 a matter of fact a co-defendant that he was. You know, I
16 thought that for Mr. Middleton's position that we needed to
17 put the burden on the state to prove their case.

18 Q. Okay. And you stated that you didn't think Mr. Wilson
19 would have been a good witness. Why didn't you call him
20 testify?

21 A. I thought there would be more harm done than good.

22 Q. And why would there be more harm done than good?

23 A. Well he was one of the defendants. He had regular
24 drug offenses. He, you know, he was familiar with, you
25 know, some of the goings on, and I couldn't risk --- I

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1 SETH WHIPPER - CROSS EXAMINATION BY MR. THOMAS

2 thought it would be bad for cross examination.

3 Q. Okay. And do you think that actually --- Do you
4 think that by calling Mr. Wilson that could have
5 potentially hurt mister --- Let me rephrase. I withdraw
6 that question. How do you think calling Mr. Wilson could
7 have impacted Mr. Middleton's case?

8 A. I didn't hide that I wasn't going to call him. I told
9 them I wasn't going to call him.

10 MR. HALL: No further questions, Your Honor.

11 THE COURT: All right. Cross examination.

12 MR. THOMAS: Thank you, Your Honor.

13 THE COURT: Madam Court Reporter, you doing all
14 right?

15 MADAM COURT REPORTER: I'm fine.

16 **Mr. Seth Whipper - Cross Examination by Mr. TOMMY THOMAS**

17 MR. THOMAS: Your Honor, may I approach?

18 THE COURT: Yes, sir. Move freely as you see fit.

19 MR. THOMAS: Thank you, Your Honor.

20 Q. Mr. Whipper, let's since it's fresh on my mind, let's
21 talk about the search warrant.

22 A. Yes sir.

23 Q. It's been marked as applicant's one for
24 identification. This is the search warrant we
25 were talking about at trial?

1 A. That's right.

2 Q. Your Honor, we move to introduce this as Applicant's
3 Two.

4 THE COURT: For purposes of this hearing, so be
5 it.

6 Q. Yes.

7 MR. HALL: I'm sorry, hold on.

8 MADAM COURT REPORTER: It's already one but you
9 want to put it as two?

10 MR. THOMAS: It was marked for identification one.

11 THE COURT: What was it?

12 MR. THOMAS: And I just want to introduce it into
13 evidence.

14 THE COURT: Just for the record, what was it?

15 MADAM COURT REPORTER: It'll be one.

16 THE COURT: No. What is the actual document? Like
17 what is it?

18 MADAM COURT REPORTER: The search warrant.

19 MR. HALL: It's the search warrant, Judge.

20 MADAM COURT REPORTER: I just marked that off ID
21 off and it's in as number one.

22 THE COURT: Okay. Any objection to the search
23 warrant?

24 MR. HALL: No objection.

25 THE COURT: Okay so admitted.

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1 (Applicant's Number One was admitted - Search Warrant)

2 Q. Now, Mr. Whipper, you did make an objection pre trial
3 in regards to the drugs being seized. And I think that the
4 argument, if I'm correct, the argument was that the search
5 warrant was invalid because they were searching for my
6 client, because they had an arrest warrant for him, and
7 that he was not the owner of the house. Is that what you
8 were arguing?

9 A. Yes essentially that they couldn't search and they
10 couldn't use the contraband.

11 Q. Right, because they came there with a warrant for his
12 arrest, my client's arrest, and actually this was not his
13 domicile nor was he the owner of the home.

14 A. That's right. That's right. Essentially that's what
15 it is. I forgot the name of the cases now but there's a
16 whole list of cases.

17 Q. But this is a whole different issue than the one that
18 arises later when we get the question from the juror?

19 A. Yeah, yeah.

20 Q. And because they ask, what is the difference between
21 two different pages on the search warrant? Was that
22 correct? Do you remember that?

23 A. No, I don't remember that.

24 MR. THOMAS: Your Honor, if I could beg the
25 Court's indulgence just for a second. This is going to be

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1 so confusing. Okay. Okay. May I approach Your Honor?

2 THE COURT: Yes, sir.

3 Q. Okay, Mr. Whipper if you would look at page 315 that
4 this is of the transcript.

5 A. Yes sir.

6 Q. And look from lines nine through 14, please sir.

7 A. Let me say did you say page 315 or 316?

8 Q. It's right here.

9 A. That's page 316.

10 Q. 316 okay.

11 A. Yeah I kind of remember going through this that I
12 objected on that basis.

13 Q. Well, I don't think you did object to it.

14 A. Hold on a second, Your Honor, I thought I did.
15 Because he, he said ...

16 THE COURT: Mr. Thomas, again, which page are you
17 on?

18 MR. THOMAS: Sir?

19 THE COURT: What page are you on?

20 MR. THOMAS: Sorry, it's ...

21 MR. WHIPPER: 316.

22 MR. THOMAS: 316 Your Honor, of the trial
23 transcript.

24 THE COURT: The record of appeal?

25 MR. THOMAS: Well, I have the trial transcript.

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1 THE COURT: Okay. 326?

2 MR. THOMAS: 316. 3-1-6.

3 THE COURT: Okay.

4 A. I recall there was a time where I said well, I'm
5 going to objective to that. This may have been now this
6 seems to be post trial argument about treatment of
7 duration.

8 Q. It's a question from the jury. And the question from
9 the jury is on page 316 and they said that they have a
10 question about two pages in the search warrant. And if you
11 may, I apologize for reaching over. The question is, is
12 there a difference between pages 108 and 109? And if we
13 look at 109 and 108 of applicants one, then what they're
14 looking at is an address of Leslie Street Lot B and [REDACTED]
15 Park Gate Drive. You remember that?

16 A. I don't remember exactly that. I seem to recall there
17 was up in the trial section of it unless it's ...

18 Q. Yeah, sir. And I think. And I'm I wasn't there, so I
19 apologize. I think that was your argument about them using
20 the arrest warrant to search the house when it wasn't his
21 home, nor did he own the home.

22 A. Yeah I think so but that's inside during the trial
23 process.

24 Q. Yes, I think it pops up during the trial several
25 times.

1 A. It seems like I objected then. I said well I object
2 to that on that basis and I was overruled.

3 Q. So let me, let me show you one thing, and I'll ask
4 you about this, and then we can move on.

5 MR. THOMAS: Your Honor, we're on page 319, of the
6 transcript, and we're looking at lines 9 through 13, and
7 then also lines, I guess, 18 through 25. It's highlighted
8 on mine if you want to just look.

9 THE COURT: What page is that?

10 MR. THOMAS: Your Honor, it's 319.

11 THE COURT: I'm here.

12 Q. Okay, and it starts at line nine, and basically goes
13 well line eight, and basically goes through that. I want
14 you to look at this right here Mr. Whipper.

15 A. That's close to the argument that I made I think
16 back in the trial time.

17 Q. But I think that you say that because the Court
18 brings it up says, Well, no objection was made in chambers.

19 A. No it says. No objection was made as to the
20 instructions.

21 Q. To the instructions.

22 A. Not to the admission.

23 Q. And then I think that you said that, well, maybe you
24 should. I don't know the exact words, but it's there in the
25 transcript. I should have objected. I didn't.

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1 A. Yeah, you know, I tried to correct that a couple of
2 times and he wouldn't take it. It was because I told him
3 before the trial started that I had some concerns about the
4 evidence. The chain of custody and other things. And some
5 other things. And so we got to trial and immediately then
6 I raised it and then he said to me well I got it in and
7 raised them and if you raised those particular arguments I
8 was going to overrule you anyways. So that's what he said
9 to me.

10 Q. Yes sir.

11 A. So well it came in a statement without objection but
12 by the same token the idea of is this in fact, in fact is
13 unauthorized, ...that would be on page 319. That would be
14 my objection. My objection to ignore these things. So Judge
15 Young is fixed on doing what he wants to do.

16 Q. Right. Right. Well, what's the fact that there were
17 two different addresses on the search warrant. Was that a
18 problem?

19 A. You know, you know, it's probably would be a problem
20 if he didn't have to deal with all of this stuff about ---
21 I mean, I made my objections for the record, for people to
22 review so they're in the record.

23 Q. And the thing is that the I think, does it become a
24 bigger problem when the jury has questions about it? So
25 obviously we know now that they're looking at it.

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1 A. So when the judge did what he wanted to do with it. I
2 mean the question would be we disagree and, of course, we
3 put our objections in.

4 Q. Right. Correct if I'm wrong. I think the solution
5 that the Court comes up with is to tell the jury to pay
6 close attention to the documents.

7 A. I'm not sure. I thought he was supposed tell the jury
8 that they were suppose to deal with the facts of the case.

9 Q. Yes sir.

10 A. And that was a fact of the case.

11 Q. Do you remember the judge instructing the jury to
12 carefully examine the documents?

13 A. I don't.

14 Q. And that's on 317, Your Honor. Do you remember the
15 court saying that perhaps it was an error in regards to the
16 corrective charge? I'm sorry do you need to transcript?

17 A. Yeah. Yeah.

18 MR. THOMAS: Your Honor, this is on Page 319. I
19 apologize I had it noted in my record that it was 319 and
20 in light of time, I will move on.

21 THE COURT: Okay.

22 Q. Okay. But the search warrant becomes a problem, and
23 it arises with the jury. Is that safe to say?

24 A. Yeah I think so. I think that's safe to say. I don't
25 recall I mean we, you know, we tried to do what we could

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1 with it to protect him. And so you got a record there for
2 it.

3 Q. Right.

4 A. You know people work for an appeal. I did what I
5 could.

6 Q. Did you know there was an error prior to trial? That
7 there was an error in the locations of the ...

8 A. I did not.

9 Q. ... Of the search warrant?

10 A. I did not.

11 Q. So it's something that really didn't come up in
12 trial?

13 A. It's something that didn't really come up in trial.

14 Q. Okay. Now a couple other questions kind of moving on
15 from there. You have a Police Officer, Officer Kevin ---
16 and let's see. I take that back. Officer Steve Hall.
17 Officer Steve Hall. Do you remember him? And Officer Hall
18 testifies about kind of the drug business. He talks about
19 Swisher Sweets, the cookie, how cocaine base is sold the
20 value. He talks about a trap house. He talks about heroin
21 what it would bring on the street. You remember any of
22 that?

23 A. Yes sir some of it.

24 Q. Yes sir.

25 A. I mean yeah.

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1 MR. THOMAS: And, and for the Court's
2 information, Your Honor, that starts on page 225 and runs
3 through 232.

4 Q. The thing that crossed my mind when I saw that or two
5 things. One, did the state qualify him as an expert
6 witness? How could he talk about values of drugs on the
7 street, talk about how drugs are made, talk about trap
8 houses when he is an officer? And I didn't see an objection
9 to any of that. Was that something that you felt like could
10 have been objected to?

11 A. You know, that's one of those ones even in retrospect
12 it's, you know, you try to look and see how the flow of
13 things are going in the court room and see whether or not
14 it's going to be impactful.

15 Q. Yes sir.

16 A. And so I had co-counsel with me who is an experienced
17 lawyer, and that's one of the reasons
18 why she was there. You know, we saw it, we thought it, .
19 you know, it was something like piling the woodwork in the
20 way that okay, you know, it doesn't prove the case?

21 Q. Yes sir.

22 A. Does that prove that what he was doing had to do with
23 everything. So I think that's one of the reasons why we
24 didn't jump all over it because, you know ...

25 Q. Right.

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1 A. ... objections sometimes can hurt you.

2 Q. Have you had cases where the state has qualified
3 police officers as experts so they could testify in regards
4 to evaluations and those kinds of things?

5 A. Well, no I haven't.

6 Q. Okay.

7 A. You know because the extent of what we're doing in a
8 lot of the time in these cases don't involve that. But it
9 just it, it just, you know, according to what we were doing
10 and it's not like were forewarned that that's what he was
11 going to testify to ...

12 Q. Yes.

13 A. I remember that. So you know we just saw it as saw it
14 as blue line talk.

15 Q. Had they attempted to qualify him as an expert would
16 you have objected?

17 A. Oh yeah. He wasn't going to be an expert. But now you
18 got to remember too he wasn't going to be an expert. No way
19 in the world he was going to be an expert. But you know,
20 unfortunately, I think when you do this kind of work, you
21 deal with the fact that people who have a constant exposure
22 to things are recognized by having specialized knowledge of
23 stuff. But at any rate, yeah. It didn't seem it didn't seem
24 to charge the courtroom against Kevin.

25 Q. Yes sir.

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1 MR. THOMAS: Your Honor may I approach?

2 THE COURT: Yes sir.

3 Q. Your Honor, this is Page 233 of the trial transcript,
4 beginning on page, I mean, on lines nine through 23.
5 Council I'm going to show you this and ask you please to
6 look over that.

7 A. Yeah.

8 Q. Is that one of the police officers testifying? Is he
9 testifying about money?

10 A. Yeah. That's what I was saying.

11 Q. Yes, sir.

12 A. A lot of times they get that one that was one of the
13 ones that kind of got bias a little bit. Because again
14 that's one of the ones where these people who are, you
15 know, the whole thing when you try to give the the basis
16 for submission. You know, reasonable suspicion.

17 Q. Right.

18 A. You get a lot of that.

19 Q. Right. Let me and I apologize for this. Let me ask
20 you if you would for me question on nine and 10, and then
21 here from 18 to 21. If you'll just read those for me.

22 A. You want me to do nine and 10?

23 Q. Nine and 10. Yes, sir.

24 A. Now the question says, Now in your experience is it
25 common to find drug dealers with hundreds of dollars in his

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1 possession?. Do you want me to keep reading?

2 Q. And then the other one down. Sorry, 17 through here.

3 A. Okay, so then another question he said. The amount of
4 money someone has on them?. And the answer was if they have
5 a large quantity of money is obviously an indication that
6 there is, you know, especially in small denominations and
7 bills, stuff like that. Because drug dealers normally deal
8 in cash and he said Yes.

9 Q. Okay. Now given that testimony, would it have been
10 fair to object to that, especially the statement by the
11 officer that a large quantity of money is obviously an
12 indication that there is, you know, especially in small
13 denominations and bills, stuff like that, because drug
14 dealers normally deal in cash. I mean, do you think that
15 could have been or should have been objective to?

16 MR. HALL: Your Honor, I'm going to object here.

17 A. That's a tough one.

18 THE COURT: Wait a minute. What's your objection?

19 MR. HALL: This was not an allegation raised in
20 this application.

21 MR. THOMAS: I'm going to tie --- The next
22 question is going to tie it in.

23 THE COURT: I think the question whether counsel
24 thinks he should have objected, I don't know what
25 allegations he ...

1 MR. THOMAS: I'll move on, Your Honor. I'll move
2 on.

3 THE COURT: Okay. Maybe you'll come back to it.
4 We'll see what the next question is.

5 Q. Counsel given that testimony, don't you think it was
6 important to put his father up to explain where the \$400
7 came from?

8 A. Like I said, I give his father every opportunity to
9 testify.

10 SPEAKER: No true.

11 THE COURT: I would appreciate it when we're in
12 the Courtroom, the only people that should be speaking are
13 the attorney and the witness and me. Thanks. All right. The
14 witness may continue.

15 A. I gave him every opportunity. Now if anything now I
16 probably should have had somebody with me when I talked
17 with him. But you know, I know this family so I didn't
18 think I needed to do that. And I really didn't want to have
19 to testify about this part but I gave him a whole bunch,
20 you know, it was on the table and what was going on in the
21 courtroom.

22 Q. Yes sir.

23 A. His testimony would be helpful in those regards.

24 Q. Right.

25 A. You know, let me say it like this, you know, his son

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1 wanted him to testify.

2 THE COURT: Let's hold on. Let's keep the noise
3 down here please.

4 Q. The ...

5 THE COURT: Hold on Mr. Thomas. I'll wait until
6 the doors are shut. All right, continue.

7 Q. The \$400 became important.

8 A. Yes, sir, it did.

9 Q. Yeah. Now we you talked about the pictures, did you
10 have an opportunity to view the photos of the scene and of
11 the drugs?

12 A. I did. I do recall that.

13 Q. Okay.

14 A. I did and I don't remember beyond that time. You
15 would have to show me those things again.

16 Q. Right. But when you looked at them the first time,
17 you didn't see any problems with the way they were grouping
18 things together?

19 A. I didn't. I didn't look at them by myself. I had
20 somebody else look at them with me.

21 Q. Yes, sir.

22 A. Yeah. I didn't --- I didn't notice anything.

23 Q. Yes sir. Yes sir. Now your sister was with you at the
24 trial?

25 A. Yes.

1 Q. Who asked - I apologize. Who is she?

2 A. Cheryl Whipper Hamilton.

3 Q. She's an attorney?

4 A. She is.

5 Q. Okay. Okay. So she was kind of like co-counsel in the
6 case?

7 A. Yeah she was there to assist me and help me out and
8 keep an eye on things.

9 Q. And she was active with your decision in regards to
10 him testify in trial?

11 A. Yeah we all talked about it.

12 Q. All talked about it. Okay.

13 A. Yes sir.

14 MR.. THOMAS: Your Honor, if I could beg the
15 Court's indulgence just for a second.

16 THE COURT: Yes sir.

17 MR. THOMAS: Your Honor, I'm still trying to find
18 one thing, if I may. Okay, may I approach one more time?

19 THE COURT: Yes sir.

20 Q. Counsel thank you so much.

21 A. Yes sir. Thank you.

22 Q. Look at page 319. I found that area that I was
23 looking at. It begins on line eight, and I think it just
24 moves down through 11 or 12. If you would just look at that
25 for me please.

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- 1 A. Look at it?
- 2 Q. Yeah.
- 3 A. Tell me again.
- 4 Q. It's eight begins right here.
- 5 A. Yes sir. And that's something the Court is saying.
- 6 Q. From the court.
- 7 A. Judge Young.
- 8 Q. And does he mention that maybe there was a problem?
- 9 A. Court says, again, we talked about it and there was
10 no objection in chambers. I think that was probably the
11 wrong instruction. I would have to go back and find it.
12 It's not a fact for them to consider that's a ruling on the
13 law that I make. Therefore, I think I cured what I thought
14 was a mistake by sending them back. It says what's your
15 objection ...
- 16 Q. Okay. Okay.
- 17 A. That's stopped at 13.
- 18 Q. Yes sir.
- 19 A. Is that what you wanted?
- 20 Q. Yes sir it does. It does. Because I was looking for
21 that earlier.
- 22 A. Yes sir.
- 23 Q. And he's talking about that, that note that he gets
24 from the jury about the two ...
- 25 A. From early on that was something that was sent back.

1 SETH WHIPPER - REDIRECT BY MR. HALL

2 I didn't go that far in the transcript before this today.

3 MR. THOMAS: Your Honor, I have no further
4 questions.

5 THE COURT: Redirect?

6 MR. HALL: Briefly, Your Honor.

7 **Mr. Seth Whipper - Redirect Examination by Mr. Bryan Hall**

8 Q. Mr. Whipper regarding Steve Halls's testimony, and
9 him not being an expert, was he allowed to testify to his
10 experience as a narcotic officer?

11 A. Yeah he essentially his testimony is sort of what
12 he's seen in his time serving in those areas.

13 Q. And regarding Timothy Elliot, do you believe calling
14 him to testify would have changed the outcome of this case?

15 A. I can't say that. I can't read the jury's mind with a
16 question like that. All I know is I did not keep not keep
17 him from testifying. I explained to him what was going on
18 in the Court. I explained to him I wanted him to testify. I
19 thought it would be good for him to testify.

20 Just you should that was his calling. He had the testimony
21 to give and he did not think he should and he didn't. And
22 that was his call.

23 Q. Okay. I just want to move along to the warrant, just
24 so the Court's clear regarding the issues and the warrant.
25 So you made a pre trial objection to the drug seized at the

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1 house. And the Court --- did the court rule that Mr.
2 Middleton didn't have standings to challenge that? Or can
3 you tell us --- Tell us what the Court's ruling was
4 regarding that?

5 A. We spent a lot of time comparing the case law in this
6 situation and on page 57 of the transcript Judge Young
7 says, Okay and one thing I'm noting in Seagull case is that
8 they were looking for a Mr. Lyons when he went in, Mr.
9 Lyons wasn't there. Here is the difference Mr. Whipper is
10 that they always have a right to knock on the door. Door
11 opens, there is the man they have the warrant for, this is
12 Judge Young. Everything is in plain view. I think most of
13 the rules that protect the fourth amendment because his
14 presence there with drugs and his active arrest warrant
15 certainly give them probably cause to go further. Now,
16 whether or not the jury will find without reasonable doubt
17 that they were his drugs is a different matter. As the
18 finder of the law in this case, I'm going to find that
19 there was probable cause and then he says to me, All right.
20 Thank you. Have all of your objections have been observed
21 and protected from possible appeal.

22 Q. And so based on the court's ruling, regardless of the
23 warrant, the officers saw the drugs in plain view, and the
24 judge found, as a matter of law that they have probably
25 cause to be there?

1 A. Yes sir.

2 Q. And then I want to go back just briefly to the issue
3 regarding the jury's question to the Court. The judge ruled
4 at page, page 293, of the record of appeal, and it's page
5 318 of the trial transcript, beginning at line eight
6 through nine. The court said, and I quote "I said, please
7 review the exhibit in light of all the evidence presented
8 to you" end quote. That was the court's response to the
9 jury. Or was that the court's response to the jury?

10 A. Yes I think it was; yes.

11 Q. Okay. And on the following page, page 319, of the
12 trial transcript, page 294, on the record of appeal, the
13 judge, the court stated, the judge stated, quote beginning
14 at line 10, "It's not a fact for them to consider. It's a
15 ruling on the law that I made and therefore I think I cure
16 what was a mistake by sending by sending the note back
17 there but your objection was noted". And was the court's
18 ruling at that time, that it had already made the ruling on
19 the law, so it had made its ruling, and therefore that
20 issues had been decided?

21 A. Yes sir. He thought he had.

22 Q. And do you believe that that based on those rulings,
23 any other objections to the warrant would have been
24 successful?

25 A. No, sir, I know that we've done as much as we could

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1 with the judging of the Court. Again that was post trial at
2 that point where we had done what we could.

3 MR. HALL: No further questions, Your Honor.

4 THE COURT: Any recross?

5 MR. THOMAS: No, Your Honor.

6 THE COURT: All right. The witness may step down.
7 Any more witnesses for the state?

8 MR. HALL: No, Your Honor, the State rest.

9 THE COURT: All right. Mr. Thomas, you want to
10 give me your quick bullet points.

11 MR. THOMAS: I will, I will, Your Honor. I was
12 just thinking about that.

13 THE COURT: If it's, and frankly, it's late in the
14 day. If you'd rather submit something in writing.

15 MR. THOMAS: I'll be glad to just a minute, Your
16 Honor. I'll hit what I think of the three most important.

17 THE COURT: And I don't even mean a proposal or, I
18 mean, just post hearing memo, what you're hanging your hat
19 on for ...

20 MR. THOMAS: I will be glad to that. Yeah, I will
21 be glad to do. ah I'll be glad to do that.

22 THE COURT: ... I mean any issues with the state?

23 MR. HALL: I'm okay with that too, Your Honor.
24 When would you like that by?

25 THE COURT: Because it's memo it's somewhat

1 informal. I don't need you to get a transcript for that. I
2 just want you to tell me get it while it's fresh in your
3 head, tell me that ...

4 MR. THOMAS: I will, Your Honor.

5 THE COURT: ... And then the state can reply.

6 MR. THOMAS: Certainly.

7 SOMEONE: Should the state reply after he ...

8 THE COURT: That would be fine.

9 SOMEONE: ... goes? Okay.

10 MR. THOMAS: Let's see ...

11 THE COURT: You want to reply to the state too?

12 MR. THOMAS: No sir. Can I have 20 days? I've got
13 a couple of things coming up.

14 THE COURT: Did I hear correctly, that it's your
15 birthday?

16 MR. THOMAS: It is.

17 THE COURT: Then you can have as much time as you
18 want since it's your birthday. 20 days.

19 MR. THOMAS: 20 days. Thank you, Your Honor.

20 THE COURT: Anything else for the record
21 today?

22 SOMEONE: No sir. Well I should let you do the
23 talking. Nothing else for the record, Your Honor.

24 THE COURT: All right, we'll recess for the day
25 and start tomorrow morning. Tomorrow is what Wednesday. We

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1 can go off the record.

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3 **(End of Hearing)**

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Kevin Middleton vs. State of South Carolina

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1 STATE OF SOUTH CAROLINA)
 2) CERTIFICATE
 3 COUNTY OF CHARLESTON)
 4

5 Be it known that I, the undersigned Melissa R.
 6 Singletary, Certified Verbatim Reporter, for the State of
 7 South Carolina, do hereby certify that the foregoing
 8 transcript represents a true, accurate and complete
 9 transcript of record of the testimony and evidence
 10 introduced in during this testimony of the captioned case,
 11 before the Circuit Court for Charleston County, South
 12 Carolina, so given on March 12, 2024 to the best of my
 13 skill and ability;

14 That I am not related to nor an employee of any of
 15 the parties hereto, nor a relative or employee of any
 16 attorney or counsel employed by the parties hereto, nor
 17 interested in the outcome of this action.

18 IN WITNESS WHEREOF I have here unto set my hand this
 19 8th day of May, 2025.

20 *Melissa R. Singletary*

21

22 Melissa R. Singletary, CVR
 23 Certified Verbatim Reporter
 24
 25

STATE OF SOUTH CAROLINA)
 COUNTY OF CHARLESTON)
)
 Kevin L. Middleton, SCDC #363735,)
)
 Applicant,)
 v.)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2020-CP-10-04498

ORDER OF DISMISSAL

FILED
 2025 JAN 29 PM 1:01
 JUDGE J. AMBERSON
 CLERK OF COURT

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), SCRPC; *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 “█ 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 “█ 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

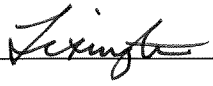
a valid search warrant. Thus, this Court finds Applicant failed to prove he was prejudiced by Counsel's failure to object because there is sufficient evidence to support the trial court's ruling that the drugs seized were admissible such than an appellate court would have affirmed. *See Millidge*, 422 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.

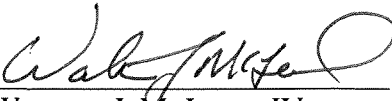
CONCLUSION

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.


_____, South Carolina
1/24/2025



WALTON J. MCLEOD, IV
Presiding Judge
Ninth Judicial Circuit

STATE OF SOUTH CAROLINA

County of Charleston

City of North Charleston

SEARCH WARRANT

OCA: 2013013149

**Location: [REDACTED] Leslie Street, Lot B
North Charleston, SC 29418**

Date: 04-19-2013

Officer: Detective S. Hall



STATE OF SOUTH CAROLINA

AFFIDAVIT

COUNTY OF CHARLESTON

Personally appeared before me, one Steve P. Hall

who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

INTRODUCTION

I am a Detective with the North Charleston Police Department and have been assigned to the Narcotic Unit for the past three years. I have been employed with the City of North Charleston since 2006. I have been trained in various aspects of law enforcement, particularly the investigation of narcotics. During my employment with the City of North Charleston, I have participated in numerous drug arrests and investigations. I am the case agent involved in this case along with the co-case agent Charles Hurst. I am jointly responsible for coordinating and overseeing all aspects of the current investigation and thoroughly familiar with all information contained in this affidavit.

DESCRIPTION OF PROPERTY SOUGHT

1. Illegal drugs commonly known as cocaine base but not limited to, also cocaine, marijuana, methamphetamine, heroin, opiates, LSD, hashish, prescribed controlled medication and any other illegal drug or controlled substances.
2. Paraphernalia used for the administration of illegal drugs by oral, intravenous, subcutaneous, inhalation, to include, but not limited to, small hollow metal/glass pipe, copper in color mesh, drinking straws, rolling papers, syringes, spoons and any other instrument fashioned in such a way as to assist in the administration of illegal or controlled substances.
3. Books, records, notes, ledgers and other papers relating to the transportation, ordering, purchasing and distribution of controlled substances. Narcotic traffickers commonly "front" (provide narcotics on consignment) narcotics to their clients; and that the aforementioned books, records, receipts, notes, ledgers, etc: are maintained where the traffickers have ready access to them.
4. Papers, tickets, notes, schedules, receipts and other items relating to domestic and international travel.
5. Books, electronic documents, records, receipts, bank statements / records, currency drafts, letters of credit, money orders, cashier's checks, passbooks, bank checks, safe deposit box keys and other items evidencing the obtaining, secreting, transfer, concealment, and/or expenditure of currency.
6. United States currency (or currency from abroad), precious metals, jewelry, financial instruments, including but not limited to, stocks and bonds in the amount indicative of the proceeds of illegal drug enterprising.
7. Photographs, in particular photographs of conspirators and co-conspirators, of assets and/or controlled substances, still photographs, negatives, video tapes, cassette tapes, films, undeveloped film, slides and undeveloped film and the contents therein.
8. Electronic related device that may house information pertaining to sales, purchase, co-conspirators information or any information pertaining to illegal drug enterprising. To include but not limited to computers, floppy disc, compact disk, lap top, hard drive, organizers, cellular phones and pagers.
9. Papers, records and any other item showing a combination or relationship among conspirators and co-conspirators by real or alias names, correspondence, papers, records and any other items showing employment or lack of employment, or reflecting income or expenses.
10. Paraphernalia for packaging, manicuring, weighing and distributing illegal drugs, including but not limited to, scales, measuring devices, bags, grinders, diluters, wrapping boxes and tape.

OCA # 2013013149

11. Indicia of occupancy, residency and/or ownership of the premises described above, including but not limited to, utility bills, telephone bills, water bills, concealed envelopes, keys and misc. bills or letters identifying such occupant / owner.
12. Firearms and ammunition, including but not limited to, handguns, pistols, revolvers, rifles, shotguns or any other weapons and any receipts or records pertaining to firearms and ammunition.
13. Receipts for items evidencing the expenditure of the proceeds of drug distribution, including but not limited to, clothing, furniture and electronic equipment or any other fruits of illegal drug sales.
14. That drug traffickers very often place their assets, including but not limited to automobiles, residences, phones and bank accounts in names other than their own in order to avoid detection of these assets by government agencies.
15. That drug traffickers often store information relating to their drug trafficking activities in home safes, lock boxes, and other sealed containers.
16. That drug traffickers utilize cellular telephones, e-mail accounts and other communications devices to transmit information relating to their drug trafficking activities and that these devices store information of such communications.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

The location to be searched is located at [REDACTED] Leslie Street, Lot B, North Charleston, SC 29418. The location is better described as a single wide trailer with white in color siding and brown in color trim. The letter B is clearly visible on the front left side of the trailer.

Based on information detailed later in this affidavit, I have reason to believe that unknown individuals have used and continue to use [REDACTED] Leslie Street, Lot B, to commit violations connected to illegal drug use and distribution. To get to this location from North Charleston City Hall located at 2500 City Hall Lane one would turn left onto Mall Drive. Continue on Mall Drive until one reaches W. Montague Avenue. One would then turn right onto W. Montague Avenue and continue on W. Montague Avenue until one reaches Dorchester Road. One would then turn right onto Dorchester Road and continue on Dorchester Road until one reaches Leslie Street. One would then turn left onto Leslie Street and continue on Leslie Street until one reaches [REDACTED] Leslie Street, Lot B which is located on the left side of the roadway.

This search warrant is to include all rooms, attics, basements, closets, cabinets, safes, false walls, and any other location that could conceal illegal narcotics or evidence of illegal narcotics trafficking and/or sales. Also to include any out buildings or storage areas located on the property and the grounds within the property's borders. The location has been identified as a place where illegal narcotics are used, sold, or stored, and it is common in such places that subjects conceal illegal narcotics and/or weapons on their person, therefore, also to include all persons located at the residence at the time the search is executed. Also in these locations, it is common to have numerous vehicles coming to and from the residence, and that illegal narcotics are transported in these vehicles, therefore, also to include any vehicles located at the residence at the time the search is executed.

REASON FOR AFFIANTS BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

+

Since the affidavit is being submitted for the limited purpose of securing authorization to search the residence located at [redacted] Leslie Street, Lot B, in North Charleston SC 29418. I have not included each and every fact known to me concerning this investigation. I have only set forth the facts and circumstances that I believe are sufficient to establish the requisite amount of probable cause to support the issuance of a search warrant for [redacted] Leslie Street, Lot B, North Charleston SC 29418.

- 1. On April 19, 2013 at approximately 0445 hours the North Charleston Police Department ILP Unit responded to [redacted] Leslie Street, Lot B in reference to serving a warrant on a wanted subject who lives at this residence. Upon arrival at [redacted] Leslie Street, Lot B, Officers approached the trailer and noticed that the front door was partially open. While approaching the front door, Officers observed the wanted subject in plain view sitting inside the trailer. As Officers attempted to knock and announce their presence the wanted subject observed the Officers and attempted to flee further into the trailer. Officers were then able to detain the wanted subject inside the trailer. While detaining the wanted subject, Officers observed an off white rock substance and a green plant material laying on a living room end table in plain view. The off white rock substance field tested presumptive for cocaine and the green plant material field tested presumptive for marijuana. The Officers secured the residence at that time and it is believed that a search of the residence will reveal additional evidence of illegal narcotics trafficking and/or sales.

Conclusion

Wherefore, I respectfully submit that there is probable cause to believe that the residence located at [redacted] Leslie Street, Lot B, North Charleston SC 29418 will contain material and relevant evidence of drug trafficking, distribution and packaging activities related to the violations of the state and city offenses enumerated hereinabove.

Sworn to and Subscribed before me

this 20th day of [redacted], 2013.

[Signature of Judge] (L.S.)
Signature of Judge

[Signature of Affiant] 164
Affiant

Address: 2500 City Hall Lane
North Charleston, SC 29406
Phone: 554-5700

OCA# 2013013149

STATE OF SOUTH CAROLINA

SEARCH WARRANT

COUNTY OF CHARLESTON

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY OF NORTH CHARLESTON.

If appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED

The location to be searched is located at [redacted] Park Gate Drive, North Charleston, SC 29418. The location is better described as a single wide trailer with white in color siding and brown in color trim. The letter B is clearly visible on the front left side of the trailer.

Now, therefore, you are hereby authorized to search the subject premises for the property described below, and to seize such property if found:

DESCRIPTION OF PROPERTY

[Redacted description of property]

-See Affidavit-

This Search Warrant shall not be valid for more than ten days from date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to Issuing Judge within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of premises searched at the time of such search if practicable, and if not, to such person as soon thereafter as is practicable; in the event the identify of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to prominent place on such premises.

[Signature] , S. C.
April 20 2013.

[Signature] (L.S.)
Signature of Judge

RETURN

I received the attached Search Warrant April 19, 2013, and have executed it as follows:

On April 19, 2013 at 7:28 o'clock AM, I searched (the person(s) and premise or premises) described in the warrant.

I left a copy of the warrant on the kitchen table along with this receipt/return for the items seized.

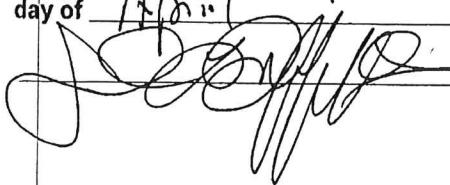
The following is an inventory of property taken pursuant to the warrant:

<u>Property</u>	<u>Recovered by</u>	<u>Location Recovered</u>
1) Off white rock substance	Hall	End table living room
2) clear plastic bag with off white rock	Hall	End table on floor of living room
3) off white rock	Hall	Livingroom floor on dollar bill near end table
4) two off white rocks	Hall	Hallway floor
5) two clear plastic bags with green plant like material	Hall	End table living room
6) clear plastic bag with brown powder	Hall	Livingroom floor inside of cigarette container
7) two clear plastic bags with white powder substance	Hall	Livingroom floor under end table
8) black digital scale	Hall	Livingroom floor in front of end table
9) paper document with the name George Wilson Jr.	Hall	Back bedroom bed
10)	Hall	
11)	Hall	
12)	Hall	

This inventory was made in the presence of Detectives , Hall, Hurst, Sgt. Kruger and Fogel

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this 19th day of Apr, 2013.

 (L.S.)


(Signature of Officer Executing Warrant)

Form Approved by
S. C. Attorney General
Section 17-13-160
March 15, 1978