THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Deadra L. Jefferson, Circuit Court Judge

Case No: 2013-CP-10-0038

Eric Sumter.....Appellant
S.C.D.C. 278658
v.
The State.....Respondent

NOTICE OF APPEAL

Eric Sumter, appeals his Denial for Post Conviction Relief in this case. The order of Dismissal was imposed and signed by the Honorable Deadra L. Jefferson, July 15, 2014, which I, Charles T. Brooks, III, received on July 18, 2014.

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PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 18th day of July 2014, I served the foregoing **Notice of Appeal, Order of Dismissal,** as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on July 18, 2014, addressed to the following as indicated below:

South Carolina Supreme Court
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Dated: July 18, 2014

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	2013–CP–10–0038
	)	
Eric Sumter, #278658,	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Charles T. Brooks, III, Esquire
Respondent's Attorney:	Ashleigh R. Wilson, Esquire
Trial Counsel:	William L. Runyon, Jr., Esquire
Date of Hearing:	May 20, 2014
Court Reporter:	Joyce C. Rueger

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 3, 2013. The Respondent made its Return on November 1, 2013. An evidentiary hearing on the matter was convened on May 20, 2014 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Charles T. Brooks, III, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying was William L. Runyon, Jr., Esquire. The Court had before it the trial transcript, the Charleston County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's Return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant was indicted at the October 2008 term of the Charleston County Grand Jury for Trafficking Cocaine-100-200 Grams[1] (2010–GS–10–7492). He was represented by William L. Runyon, Jr., Esquire.

The Applicant proceeded to trial and was found guilty as indicted. On October 19, 2010, the Applicant was sentenced by the Honorable Kristi L. Harrington to twenty-five (25) years imprisonment and a $50,000 fine.

A Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Susan Hackett, Esquire of the South Carolina Office of the Appellate Defense perfected the appeal pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Sumter, Op. No. 2012-UP-554 (S.C. Ct. App. October 10, 2012).

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
    a. Trial counsel failed to challenge the sufficiency of the subject indictment prior to taking of evidence in contravention of the Fifth Amendment and South Carolina Law.
    b. Trial counsel failed to move for dismissal or directed verdict where Applicant was not in possession of drugs for which he was arrested and indicted.
    c. Trial counsel failed to object to the Solicitor leading a witness.

[1] Trafficking Cocaine is a violent, serious felony punishable by a mandatory minimum twenty-five (25) years imprisonment, none of which may be suspended, nor probation granted, and a fifty thousand dollar ($50,000.00) fine. See S.C. CODE ANN. § 44–53–370(e)(2)(c) (2008); S.C. CODE ANN. § 16–1–10(b) (2008); S.C. CODE ANN. § 17–25–45 (2008).

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d. Trial counsel failed to object to the Solicitor testifying for, vouching for, and pitting witnesses.
e. Trial counsel failed to object to the Solicitor eliciting testimony regarding alleged prior bad acts of Applicant.
f. Trial counsel failed to object to the Solicitor bolstering witness testimony.
g. Trial counsel conceded the guilt of Applicant during trial thus depriving him of representation.
h. Trial counsel failed to object or move for a directed verdict where essential elements of the State's case were not proven.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. CODE ANN. § 17–27–80 (2003).

At the commencement of the Applicant's evidentiary hearing, the Applicant moved for a continuance of his case. The grant or denial of a motion for continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record. Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) (citing Bridwell v. Bridwell, 279 S.C. 111, 112, 302 S.E.2d 856, 858 (1983)). See Hudson v. Blanton, 282 S.C. 70, 74, 316 S.E.2d 432, 434 (Ct. App. 1984) (noting a moving party must show the absence of some material evidence and due diligence on his part to obtain such evidence to justify a continuance). Cf. Beasley v. Kerr–McGee Chem. Corp., 273 S.C. 523, 532, 257 S.E.2d 726, 730 (1979) (finding a movant failed to show due diligence to justify a continuance when he had eight months from filing of the complaint until trial to prepare).

In support of his Motion, the Applicant asserted that: (1) he did not feel comfortable going forward with his hearing at the time; (2) he recently had eye surgery and could not read; and (3) he felt that because his attorney received his case only the month before, his counsel was unprepared. In response, the Respondent stated that it was ready to go forward with the Applicant's evidentiary hearing. Thereafter, this Court denied the Applicant's Motion and placed its findings on the record. This Court finds that, although the Applicant asserted that he could not read, the Court observed him read verbatim from his paperwork at counsel's table while articulating the grounds for his Motion; therefore, the Applicant was presently able to assist counsel in his representation and able to proceed with his evidentiary hearing.[2] Further, this Court finds that the Applicant presented no reasonable grounds in support of his contention that his lawyer was unprepared. Moreover, the bald assertion that the Applicant or his counsel was not ready to go forward and the Applicant was unprepared is not a sound basis for granting a motion for continuance. See State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51–52 (1996); Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2001) ("[T]he denial of a motion for a continuance on the ground that [a party] has not had time to prepare is rarely disturbed on appeal."). Accordingly, the Applicant's Motion for Continuance is heard and respectfully denied.

Thereafter, the parties proceeded with the Applicant's PCR hearing.

Summary of the Testimony

The Applicant was present and testified he retained William Runyon, Esquire to represent him. The Applicant testified he was in jail for two and one half years (2.5) prior to trial. The Applicant testified he met with Counsel two (2) to three (3) times in jail prior to trial and that he

[2] The Court observed the Applicant read verbatim from his papers and documents during the entire proceedings. It appeared he was able to read clearly from those documents and others utilized for purposes of the hearing. While it appeared that Applicant had had some type of procedure to his eyes it was not clear what type. However, it is clear from the Court's observations that he was able to read and see clearly.

attempted to communicate with his attorney by mail and telephone. He testified Counsel reviewed the discovery materials with him and gave him a copy but denies Counsel ever reviewed possible defenses with him. He testified trial counsel always wanted him to plead guilty and he did not want to plead guilty.

The Applicant testified Counsel did not challenge the sufficiency of his indictment. He testified he knew from the indictment that he was charged with Trafficking Cocaine, but the indictment did not allege the elements of the crime of Conspiracy. He testified Counsel also failed to move for a directed verdict or dismissal at trial based on the State's failure to prove the element of possession and the fact that his co-defendant conceded her guilt on the stand and took responsibility for the drugs. However, on cross-examination, the Applicant admitted that Counsel moved for a directed verdict and renewed his motion at the end of the trial.

The Applicant testified Counsel also failed to object to the Solicitor's leading questioning of his co-defendant Tiffany Deas. He testified Counsel also failed to object to the Solicitor vouching for and bolstering the credibility of Deas in opening and closing argument. The Applicant testified Counsel failed to object to the testimony of Deas that the Applicant was engaged in prior bad acts. He also testified trial counsel conceded his guilt in closing argument and it prejudiced him at trial.

The Applicant testified he discussed his desire to testify with Counsel. He testified that he remembered being advised of his right to testify by the court and that he told the court it was his decision to not testify at trial and that he did not need more time to speak with his attorney about his right to testify. The Applicant testified Counsel told him he should not testify at trial. He testified had he taken the stand, he would have told the court there were no audio or video recordings of the arranged buy at the apartment. The Applicant testified he did not know his co-

defendant was going to testify against him because she had reached a deal with the Solicitor to that effect and Counsel told him he did not know if Deas would testify.

Bill Runyon, Esquire, testified he was retained to represent the Applicant at trial. He testified that he sent his entire file to indigent defense for purposes of the appeal and has not seen the file since, so he has no independent recollection of the exact date he was retained. Counsel has been practicing law since September 1967. He testified he was the first public defender in Charleston County in the early seventies and remained in that position for two (2) years and currently one half (1/2) of his practice is both state and federal criminal law. He further testified that he has handled criminal cases in both the Southern District of New York and the Southern District of Georgia. Counsel testified police were watching an apartment where they suspected drugs were being distributed. He testified the Applicant and his co-defendant Tiffany Deas were seen on police surveillance leaving the apartment and were stopped by police for a traffic violation shortly after leaving the apartment. Counsel testified police did not find drugs on the Applicant, but the Applicant and his co-defendant were arrested as a result of Deas' "furtive movements" as she put the drugs in her clothing allegedly at the direction of the Applicant. Counsel testified that he was able to use Deas' pretrial statements as part of the Applicant's defense. He further testified that he was able to attack Deas' credibility with her pretrial statements made shortly after arrest and her claims that the drugs belonged to the applicant.

Counsel testified he filed Brady and Rule 5 motions on the Applicant behalf. He testified he reviewed the discovery materials received with the Applicant. He testified his initial defense at trial was to argue against both actual and constructive possession by claiming the drugs belonged to Deas and were not found on the Applicant. Alternatively, counsel testified that after the co-defendant Deas "flipped" on the Applicant by testifying against him he altered his strategy to argue one of personal use versus selling the drugs. Counsel testified he discussed with the

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Applicant the elements of the charges, range of punishment and what the State was required to prove. He testified he discussed constructive versus actual possession with the Applicant, possible defenses and the Applicant's version of facts.

Counsel testified his investigation of the case involved reviewing the discovery and visiting the apartment. He testified the Applicant's case involved a larger drug investigation of which he was very familiar. He testified that his familiarity with the investigation stemmed from his representation of other defendants in federal court. Counsel testified he was prepared for trial and reviewed the Applicant's indictment prior to trial and saw no basis to challenge the indictment. Counsel testified the indictment charged the language of the trafficking statute and referred to the statute.

Counsel testified he discussed with the Applicant the possibility of Deas testifying against him at trial. He testified that the Applicant was well aware there was a great possibility of Deas testifying against him. He further testified that they discussed this possibility in thorough detail. He testified the Applicant's case was scheduled three (3) times for trial and that he was prepared each time, but that the case had to be continued the first two (2) times because of medical complications with Deas' pregnancy. He testified the Applicant was well aware of the reason for the case being continued. He further testified that he and the Applicant discussed each continuance of the case.

Counsel testified he discussed the possibility of pleading guilty with the Applicant more than one (1) time after being approached by the Solicitor. He testified the Applicant did not want to plead guilty. He testified he was approached by and spoke with the Solicitor about a plea agreement. He testified the Solicitor offered a deal for ten (10) years' imprisonment, but it was never formalized. Counsel testified the Applicant adamantly rejected the ten (10) year deal. Counsel testified initially the Applicant thought Deas was going to testify the drugs were hers

and that he was relying on her to do the "right thing," which she did not. He further testified that he and the applicant discussed in detail that Deas' testimony would be the one (1) thing to "sink" his defense.

Counsel testified Deas "flipped on" the Applicant soon after the arrest, led him to believe the opposite and testified against him at trial. Counsel testified he used letters from Deas to the Applicant and Deas' statements to impeach her at trial on cross-examination. He testified he discussed with the Applicant his right to testify and the Applicant decided not to testify. Counsel testified it was the Applicant's decision not to take the stand and the Applicant's prior record was probably a factor the Applicant considered when deciding not to take the stand.

Counsel testified he moved for a directed verdict at the conclusion of the State's case. He testified the State's closing argument included many self-serving statements, in the nature of "bootstrapping to get the defendant," to which he objected more than one (1) time. Counsel testified he elicited testimony from an officer on cross-examination that the quantity of drugs found was small enough for personal use versus trafficking. He testified he then argued to the jury in closing that it was possible the Applicant was in possession of the drugs for personal use and was not trafficking the drugs as the State claimed. In essence, Counsel testified, he argued the lesser-included offense of Possession of Cocaine to the jury. Counsel testified that after the Applicant was found guilty, he submitted his file to the Office of Appellate Defense and had not interacted with the Applicant since that time.

Ineffective Assistance of Counsel

I. Standard.

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence."

Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 622, 300 S.E.2d 482, 483 (1983)). Where the Applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2064).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. See Strickland at 690, 104 S. Ct. at 2066. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See id. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. See id. at 117–18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its "'reasonableness under prevailing professional norms.'" Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). Second, counsel's deficient performance must have prejudiced the applicant such that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 117–18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

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This Court finds that Counsel has extensive experience in the practice of criminal law and has been practicing law since 1967. This Court finds Counsel provided credible testimony, while the Applicant's testimony was not credible. This Court finds that Counsel met with the Applicant numerous times prior to trial and fully investigated the Applicant's case. This Court finds that Counsel filed Brady and Rule 5 motions on the Applicant's behalf and reviewed the received discovery with the Applicant. This Court finds that Counsel discussed with the Applicant the elements of the charges against him, range of penalty and what the State was required to prove. This Court finds that Counsel discussed the Applicant's version of the facts and possible defenses with the Applicant.

II. Sufficiency of the Indictment.

The Applicant alleges Counsel was ineffective for failing to challenge the sufficiency of his trafficking indictment. This Court finds Counsel was not deficient for failing to challenge the sufficiency of his indictment. "An indictment is merely a notice document." State v. Baker, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010) (citing State v. Gentry, 363 S.C. 93, 102–103, 610 S.E.2d 494, 500 (2005)). Whether or not the indictment could be made more definite and certain is irrelevant. Baker, 390 S.C. at 62, 700 S.E.2d at 442. "[A]n indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood." State v. Tumbleston, 376 S.C. 90, 98, 654 S.E.2d 849, 853 (Ct. App. 2007). Courts employ a two (2) prong test to determine whether an indictment is sufficient:

> The sufficiency of the indictment is determined by whether: (1) the offense charged is stated with sufficient certainty and particularity to enable a court to know what judgment to pronounce, and the defendant to know what he or she is called upon to answer and whether he or she may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that are intended to be charged.

Baker, 390 S.C. at 62, 700 S.E.2d at 442 (citing Gentry, 363 S.C. at 102–103, 610 S.E.2d at 500).

Furthermore, in order to challenge the sufficiency of an indictment, an objection must be made before the jury is sworn in. See S.C. CODE ANN. §17–19–90 (2003). A court should examine "the totality of the circumstances" to determine if the defendant was cognizant of the crimes for which he was charged. State v. Reddick, 348 S.C. 631, 636, 560 S.E.2d 441, 443 (Ct. App. 2002) (citing State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1981); State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981)).

The Applicant's indictment read as follows:

> At a Court of General Sessions convened on October 6, 2008, the Grand Jurors of Charleston County present upon their oath:
>
> **Trafficking Cocaine**
>
> That in Charleston County, South Carolina, on or about May 7, 2008, the Defendant ERIC SUMTER unlawfully and knowingly did sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did possess or attempt to possess a controlled substance of a controlled substance analogue, to wit: Cocaine, in excess of approximately 105.5 grams; in violation of 44-53-370 of the South Carolina Code of Laws (1976) as amended.

This Court finds the Applicant's Trafficking Cocaine indictment sufficiently stated the offense charged for which the Applicant was charged. This Court also finds the language of the indictment adequately informed the Applicant of what charge he was called upon to answer-Trafficking Cocaine. The Applicant was sufficiently put on notice that he could argue constructive versus actual possession and defend against the element of dominion and control of

his environment, even though his challenge was unsuccessful at trial.[3] This Court finds the indictment also stated the specific statute the Applicant was alleged to have violated. This Court finds the indictment did not have to outline the elements of the offense of Conspiracy as the Applicant claims since the Applicant was not indicted for Conspiracy. This Court finds it is unlikely any challenge to the Applicant's indictment would have been successful. This Court finds the Applicant has not proven his indictment was defective or that the outcome of his proceeding would have been different had Counsel challenged the sufficiency of his indictment. This Court finds the Applicant has failed to carry his burden of proving Counsel's performance was ineffective in this regard.

III. Directed Verdict.

The Applicant alleges Counsel was ineffective for failing to move for a directed verdict. This Court finds this allegation is wholly without merit and unsupported by the record. This Court finds and the record reflects Counsel moved for a directed verdict at the conclusion of the State's case, which the court denied. (Tr. 142:4–18, 144:8–11). This Court finds Counsel also renewed the Applicant's motions after the jury returned a guilty verdict, which the court denied.

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[3] See State v. Tabory, 260 S.C. 355, 364-65, 196 S.E.2d 111, 113 (1973) "[P]roof of possession requires more than proof of mere presence, and that the State must show defendant had dominion and control over the thing allegedly possessed or had the right to exercise dominion and control over it." United States v. Bethea, 442 F.2d 790 (1971); State v. Adams, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987) (citing State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981); State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976)) (constructive possession is "defendant's knowledge and possession may be inferred if the substance was found on premises under his control"); State v. Kimbrell, 294 S.C. 51, 54, 362 S.E.2d 630, 631 (1987) (citing State v. Lane, 271 S.C. 68, 245 S.E.2d 114 (1978)) ("Because actual knowledge of the presence of the drug is strong evidence of intent to control its disposition or use, knowledge may be equated with or substituted for the intent element."); State v. Mollison, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (Ct. App. 1995) (citing State v. Ellis, 263 S.C. 12, 22, 207 S.E.2d 408, 413 (1974)) ("Actual possession occurs when the drugs are found to be in the actual physical custody of the person. Constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs were found.).

(Tr. 198:2–15, 199:2–3). This Court finds Counsel was not deficient for failing to move for a directed verdict.

IV. Failure to Object.

"Defense counsel may decide as a strategic matter not to object because his objection would highlight the erroneous evidence, argument, or charge." State v. Torrence, 305 S.C. 45, 65, 406 S.E.2d 315, 326 (1991). Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 778–79 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. U.S., 564 F.2d 1071 (4th Cir. 1977)).

A. Leading the Witness.

The Applicant alleges Counsel was ineffective for failing to object to the Solicitor leading Deas on direct examination. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to object to the form of the Solicitor's questions to Deas. This Court finds there is no evidence of the Solicitor leading the witness inappropriately. This Court finds that the Solicitor was entitled to lead the witness on background and foundation materials, for example Tr. 89: 21–25; 90; 91; 93:1–6, et cetera. Further this Court finds and the record reflects that the Solicitor asked the witnesses open ended questions seeking her narrative of the day of the incident and events leading up to the crime, for example Tr. 94; 97:15; 98:15–16; 99:2-20, et cetera. Moreover, this Court finds that the leading questions the Solicitor asked the witness were not entirely inappropriate; at times in the record it was necessary for the

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Solicitor to lead the witness because she was speaking quickly and at times found it difficult to communicate. Additionally, Deas could be considered a hostile witness, biased or prejudiced witness, or a witness identified with the adverse party because of her romantic relationship with the Applicant and her familiar involvement and living situation with the applicant's family. See Rule 611(c), SCRE. State v. Nelson, 192 S.C. 422, 7 S.E.2d 72 (1940) ("[G]enerally, when a witness is an unwilling one, or hostile to the party calling him, or stands in a situation which makes him necessarily adverse to such party, his examination in chief may be allowed to assume something of the form and character of cross-examination, at least to the extent of permitting leading questions to be put to him."). Accordingly, this Court finds the Applicant has failed to show how Counsel's failure to object affected the outcome of his proceeding.

B. Opening and Closing Statements.

The Applicant alleges Counsel was ineffective for failing to object to the Solicitor's closing and opening arguments. The Applicant claims the Solicitor vouched for and bolstered the testimony of the State's witnesses. This Court finds Counsel was not deficient for failing to object to the State's opening and closing argument. This Court finds there was no evidence of the Solicitor vouching for the State's witnesses during either opening or closing arguments. This Court finds and the record reflects that the State's opening and closing arguments were simply the State's interpretation of the evidence presented at trial and were proper. (Tr. 43:11–12, 17–18; 44:8, 16, 22; 45:3, 19, 24; 46:2, 17, 20; 47: 3–4, 7, 18, 21; 48:2.) This Court also finds the Applicant failed to carry his burden of proving prejudice resulted from Counsel's performance. This Court finds prejudice was particularly unlikely since the Court advised the jury that opening and closing statements are not evidence. (Tr. 40:1–7). This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective in this regard.

C. Prior Bad Acts.

The Applicant alleges Counsel was ineffective for failing to object to Deas' testimony that the Applicant engaged in prior bad acts. The rule of law is that, for prior bad acts evidence to be admissible, "[t]he record must support a logical relevance between the prior bad act and the crime for which the defendant is accused." State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000) (citing State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996)). This Court finds the Applicant has failed to highlight any portions of the transcript in support of his allegation and finds that the record is void of any testimony from Deas that the Applicant was engaged in any prior bad acts. When specifically asked by Counsel for the Applicant about the Applicant's background, Deas testified she did not know the Applicant to use drugs and she did not know what the Applicant was going to do with the drugs. (Tr. 128:25–129:7). Counsel also elicited testimony from Deas that she had never seen cocaine in connection with her and the Applicant's relationship and the Applicant earned a living in the music business. (Tr. 121: 18–25, 132:1–25, 133:1–6).

Further, the State elicited testimony from Deas regarding jail house recordings of the Applicant's telephone conversations with Deas, where he makes the following comments: "as long as you played along, you guys would be getting married;" "tell her I'm sorry, tell her I'll quit, tell her I won't do this again." (Tr. 122: 7–15). The State entered the jail house recordings into evidence and published them for the jury without objection by Counsel. (Tr. 120: 15–25, 121:1–6). Moreover, this Court finds that, even if the Applicant's counsel had not consented to the admission of the jail house tapes where the Applicant and Deas' conversation suggests that the Applicant had engaged in prior drug activity, the tapes would have been admissible into evidence based on the *res gestae* exception to objectionable hearsay or character evidence and the *res gestae* of the charged offense. See Rule 404(b), SCRE; State v. Blackburn, 271 S.C. 324,

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327–28, 247 S.E.2d 334, 336–37 (1978) ("In order to qualify as a part of the *res gestae*, a statement must be substantially contemporaneous with the litigated transaction and be the spontaneous utterance of the mind while under the active, immediate influence of the event."); State v. Dennis, 321 S.C. 413, 417–18, 468 S.E.2d 674, 676–77 (1996) (citing State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995)) (same); State v. King, 334 S.C. 504, 512–13, 514 S.E.2d 578, 582–83 (1999) (citing State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370–71 (1996)) ("The *res gestae* theory recognizes 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."); see also, State v. Gagum, 328 S.C. 560, 563 & n.2, 492 S.E.2d 822, 823 & n.2 (1997) (citing State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); State v. Bolden, 303 S.C. 41, 43, 398 S.E.2d 494, 495, n.1 (1990)) ("While there are times when evidence may be admissible under *Lyle* and Rule 404(b) and the *res gestae* exception, the *res gestae* exception is properly viewed as independent of *Lyle*—that is, some evidence that would be inadmissible under *Lyle* and Rule 404(b) would be admissible as part of the *res gestae*."). In addition, the Applicant's statements on the tape are more aligned with non-hearsay admissions rather than inadmissible character evidence.

This Court finds this allegation is without merit and the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to object to alleged testimony that the Applicant engaged in prior bad acts.

V. Conceding Guilt in Closing Argument.

The Applicant alleges Counsel was ineffective for conceding the Applicant's guilt at trial during closing argument. This Court finds Counsel was not deficient and did not concede the Applicant's guilt a trial. This Court finds Counsel's statements during closing were not a concession of guilt, but an attempt by Counsel to minimize the deficits in the Applicant's defense

and argue an alternate finding if the jury concluded that the State failed to meet its burden of proof on the Trafficking offense. (Tr. 172:3–7; 173: 1–4). Counsel provided credible testimony that his strategy was to argue to the jury that they should not find the Applicant guilty of trafficking solely based on the quantity of drugs found. Counsel argued to the jury that if they believed the State met their burden of proof as to actual or constructive possession that the Applicant did not intend to traffic the drugs and the quantity could have been for personal use. (Tr. 172:8–12; 174:9–25; 175:1–6). This Court finds Counsel's strategy and argument was valid in light of testimony the defense elicited from Officer Euper on cross-examination that 100 grams could be one month's supply of cocaine for one person. (Tr. 73:10–13). This Court further finds Counsel's argument was an attempt to provide the jury with an alternative to trafficking that would not result in a guilty verdict and that Counsel's strategy was helpful to the Applicant's defense, not prejudicial. This Court finds the Applicant has failed to carry his burden of proving Counsel provided ineffective assistance of counsel for the statements he made at trial during closing argument.

All Other Allegations

As to any and all allegations that were raised in the application in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence or testimony regarding such allegations. Accordingly, this Court deems the allegations abandoned by the Applicant. Therefore, these allegations are denied and dismissed with prejudice.

CONCLUSION

Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing

proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 15th day of July, 2014

The Hon. Deadra L. Jefferson
Presiding Judge, 9th Judicial Circuit

Charleston, South Carolina
At Chambers

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July 18, 2014

South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: Eric Sumter, 278658 v State of South Carolina
2013-CP-10-0038

Dear Sir or Madam:

Enclosed herewith you will find the **Notice of Appeal, Order of Dismissal,** along with a **Proof of Service** in reference to the above named Applicant.

If you have any questions or concerns, please contact my office at the number stated above.

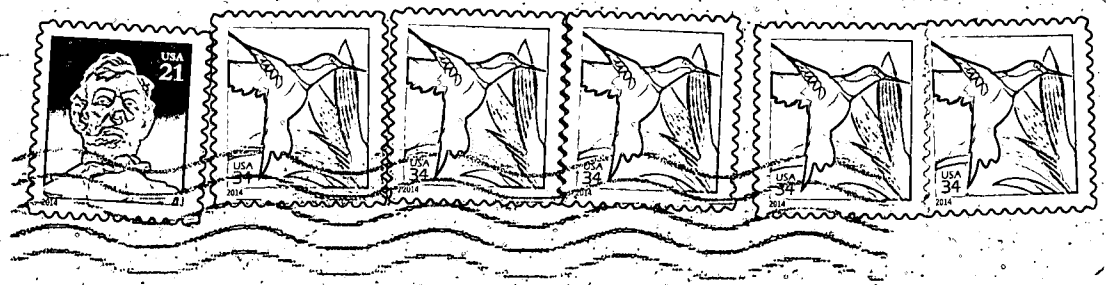
With kind regards, I am

Sincerely,

Charles T. Brooks, III
CTB/srw

Enclosed as stated

cc: Ashleigh R. Wilson, Office of Attorney's General
South Carolina Office of Appellate Defense
Eric Sumter, 278658



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