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March 24, 2015

The South Carolina Supreme Court
Daniel E. Shearouse, Clerk of Court
P.O. Box 11330
Columbia, SC 29211

RECEIVED

MAR 26 2015

S.C. Supreme Court

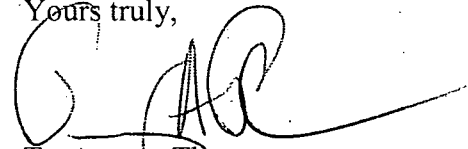
RE: Mark Watson #306011 v. State
Case No.: 2012-CP-40-1542

Dear Sir or Madam:

Enclosed please find for filing, an original and a copy of a Notice of Appeal and Certificate of Service by Mail in the above referenced matter. Kindly return a clocked copy to me in the enclosed envelope.

Thank you and should you have any questions, please feel free to contact me.

Yours truly,



Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Megan E. Harrigan, Esq.
Mark A. Watson #306011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No.: 2012-CP-40-1542

RECEIVED
MAR 26 2015
S.C. Supreme Court

Mark A. Watson #306011,..... Appellant,

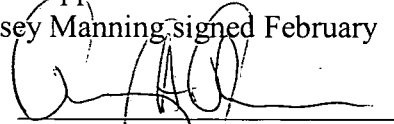
vs.

State of South Carolina,Respondent.

NOTICE OF APPEAL

An Order of Dismissal was signed by The Honorable L. Casey Manning on September 26, 2014 and filed on September 29, 2014. A timely Notice of Motion and Motion to Alter or Amend was filed and an Order Denying Applicant's Motion to Alter or Amend the Judgement and Supplement to Applicant's Motion to Alter or Amend Pursuant to Rule 59 (E) was signed by The Honorable L. Casey Manning and filed.

Mark A. Watson appeals the Order of Dismissal and Order Denying Applicant's Motion to Alter or Amend the Judgement and Supplement to Applicant's Motion to Alter or Amend Pursuant to Rule 59 (E) of the Honorable L. Casey Manning signed February 23, 2015 and filed on March 2, 2015.



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Other Counsel of Record:
Megan Harrigan Jameson, Esq.
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Attorney for Respondent

March 24, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No.: 2012-CP-40-1542

Mark A. Watson #306011,..... Appellant,

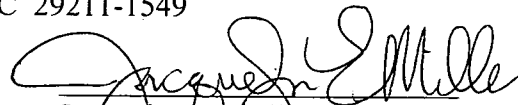
vs.

State of South Carolina,Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Applicant hereby certify that I placed in the United States Mail, a copy a Notice of Appeal with postage prepaid and the return address clearly shown on said envelope to Megan E. Harrigan Jameson, Esq. of the Attorney General's Office, at:

Megan E. Harrigan Jameson, Esq.
Attorney General's Office
P.O. Box 11549
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March 24, 2015
Irmo, SC

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
)
 Mark Watson, SCDC # 306011,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2012-CP-40-01542

ORDER OF DISMISSAL

JENNIFER W. HARRIGAN
 C.C.P. & G.S.
 2014 SEP 29 AM 11:12
 RICHLAND COUNTY
 FILED

This matter comes before the Court by way of an application for post-conviction relief filed February 23, 2012. The State made its Return on March 30, 2012, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on July 17, 2014, at the Richland County Courthouse. Applicant was present at the hearing and was represented by counsel, Tommy A. Thomas, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. After reviewing all testimony and evidence presented at the hearing, along with a review of all records provided to the Court, this Court finds that there are no constitutional deprivations or other grounds on which to grant relief and is denying and dismissing this application with prejudice.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Richland County Clerk of Court. Applicant was indicted during the December 2007 term of the Richland County Grand Jury for Distribution of Crack Cocaine – Third Offense (2007-GS-40-12278). Applicant

was represented by Cameron B. Littlejohn, Esquire. On July 9, 2009, Applicant proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr., where he was convicted as indicted. Judge Cooper sentenced Applicant to fifteen years imprisonment.

Applicant filed a notice of appeal. Following the submission of an Anders¹ brief, Applicant elected to voluntarily withdraw his appeal. The South Carolina Court of Appeals dismissed Applicant's appeal and the remittitur was sent on July 12, 2011.

On February 23, 2012, Applicant filed an application for post-conviction relief alleging "ineffective assistance of counsel" without any supporting facts or allegations. At the evidentiary hearing, Applicant proceeded forward on the following allegations of ineffective assistance of counsel:

1. Counsel failed to object to impermissible comments during the State's closing characterizing Applicant as a "breeder";
2. Counsel failed to request sequestration of the witnesses;
3. Counsel failed to object to the State's witnesses referring to the material in question as "crack cocaine" before actually being tested;
4. Counsel failed to object to Applicant being referred to as "Junior Black";
5. Counsel failed to examine the drugs prior to admission into evidence;
6. Counsel failed to object to the presumptive drug test on the basis that it changed the overall drug weight;
7. Counsel failed to object to the unduly suggestive lineup;
8. Counsel failed to object to the drugs based on chain of custody discrepancies; and
9. Counsel failed to challenge the indictment.

¹ Anders v. California, 386 U.S. 738 (1967).

SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf and called his former girlfriend, Quaticka Wright. Respondent presented testimony from trial counsel, Cameron B. Littlejohn, Esquire (hereinafter "Counsel"). This Court also had before it Applicant's trial transcript, appellate records, the records from the Richland County Clerk of Court regarding the subject convictions, and Applicant's records from the South Carolina Department of Corrections. Additionally, this Court had before it seven exhibits introduced by Applicant and one exhibit introduced by Respondent.

Applicant testified first on his own behalf. Applicant testified that he is currently serving a fifteen year sentence within the Department of Corrections for Distribution of Crack Cocaine – Third Offense. He acknowledged that other pending charges were dismissed after he was convicted. He testified that he was arrested on November 21, 2007, more than seventeen months after the sale to an undercover officer. He testified that he had retained Counsel for previous, pending charges and that Counsel assumed representation of him on these charges when he was arrested. He testified that he met with Counsel three times before trial. He testified that Counsel presented him with a plea offer for twelve years that would require him to serve eight-five percent of the sentence before becoming eligible for early release, but that he elected to turn down this offer and proceed to trial.

Applicant testified that Counsel was ineffective for failing to object various comments made by the State in its closing argument, including comments that he was a "breeder" and that member of law enforcement are professionals who put their lives on the line to clean up the

community from people like Applicant. See p. 166 lns. 2-8; p. 166 ln. 20 – p. 167 ln. 14. He testified that these comments were raised in his direct appeal brief, but were not persevered for appellate review because Counsel failed to object. Applicant also testified that Counsel was ineffective for failing to move for the sequestration of witnesses. Applicant also testified that Counsel should have objected to the State's witnesses repeatedly calling the substance "crack cocaine" before a conclusive tests confirmed its chemical composition. Additionally, he testified that Counsel never physically handled or inspected the drugs before they were introduced into evidence and failed to make any objection. Applicant also testified that Counsel should have challenged the introduction of the drugs on the basis that the presumptive field test changed the overall weight of the drugs.

Next, Applicant testified that Counsel was ineffective for failing to object to testimony regarding "Junior Black." He elaborated that this was the nickname of the suspect sought by law enforcement which was erroneously attributed to him. He testified that he has never been referred to as "Junior Black" and had not previously heard this nickname until this case. He testified that this case was essentially a case of mistaken identity and that the police were really looking for a suspect named "Junior Black," not him. He testified that although he previously lived on Norman Street (where the drug purchase took place), he lived at an entirely different address and has not been to the address where the purchase occurred.

Applicant testified that the photographic lineup that was shown to Officer Gilliam was suggestive, essentially amounting to Investigator Sheard compiling photographs of five persons who looked like Applicant and then encouraging Gilliam to pick him. He testified that Sheard

knew him from previous dealings and had a vendetta against him based on other unsuccessful attempts to arrest him. He acknowledged that Counsel moved to suppress the lineup as unduly suggestive, but testified that Counsel did not raise the issues surrounding his past dealings with Sheard as a basis for suppression.

Applicant testified that Counsel failed to object to flaws in the chain of custody for the drugs. He elaborated that the chain of custody documents have different dates than the lab report generated, which shows that the drugs were not tested on the date testified. He testified that Counsel should have moved to suppress the drugs on this basis and that his failure to object was ineffective. Additionally, Applicant testified that Counsel should have moved to quash his indictment because the indictment only lists that it is "not a first offense." Applicant testified that the indictment needed to reference that he had been convicted of a first and second offense because it was for distribution of crack cocaine – third offense.

Following Applicant's testimony, he called his former girlfriend and the mother of his children, Quatika Wright. She testified that she previously lived with Applicant at a residence on Norman Street. She testified that she has never been present when the house was searched and does not know Investigator Sheard.

Next, Respondent called Counsel to testify. He testified that he has been practicing law since 1975 and that approximately ninety-five percent of his practice is criminal defense work. He testified that his extensive criminal law background also includes a number of years as a prosecutor. He testified that Applicant retained him in June of 2006 for a number of pending charges. He testified that once Applicant was indicted on this distribution of crack cocaine –

third offense, he assumed representation of this charge at Applicant's request. He testified that Applicant was initially out on bond when he was first retained, but that Applicant was later detained and his bond revoked after receiving additional charges. He testified that he could not recall the exact number of times that he met with Applicant, but that it was several times. He testified that this charge stemmed from an undercover law enforcement officer's controlled and video recorded purchase of crack cocaine from Applicant. He testified that he reviewed the indictment and did not think that there was any reasonable basis for challenging it, including Applicant's contention that it failed to state Applicant had been convicted of two prior offenses.

Counsel testified that he filed all appropriate discovery motions and thoroughly reviewed all materials with Applicant. He testified that there was overwhelming evidence of guilt, including a video recording of the drug purchase and photographic stills that clearly identified Applicant as the suspect. He elaborated that the stills, introduced as Respondent's Ex. No. 1, clearly identify Applicant the suspect and undoubtedly match the photograph of Applicant in the lineup shown to Officer Gilliam. He testified that he informed Applicant that it was readily evident that he was the suspect in the video and photos and that Applicant would likely be convicted at trial, but that Applicant was adamant that he wanted to proceed to trial.

Counsel testified that he informed Applicant that he would make a suppression motion but that it was very unlikely that it would be successful. He testified that he made such a motion and a Neil v. Biggers² hearing was held, but that after hearing the testimony from both Officer Gilliam and Investigator Sheard, the trial court denied his motion to suppress the identification. He testified that Applicant never informed him of any previous interactions with Sheard and he

² 409 U.S. 188 (1972).

saw no reason or motive for Sheard to set-up Applicant based on all discovery materials. He testified that although it was readily apparent to anyone looking at the photographs from the purchase that Applicant was the suspect, his only possible defense was mistaken identity once Applicant insisted on proceeding to trial. He testified that there was no viable basis to challenge that the substance was not crack cocaine. He testified that he fully prepared for trial and tried to highlight any weaknesses in the State's case. Counsel testified that he did not have an arguable basis for objecting to the State's witnesses referring to the suspect as "Junior Black," particularly in light of his defense of mistaken identity.

Regarding the closing arguments allegation, Counsel testified that he has reviewed the passages in question and does not think that they are objectionable. Counsel elaborated that had he made an objection, he does not think it would have been sustained and therefore only highlighted these comments to the jury. Additionally, Counsel testified that because his defense theory was one of mistaken identity, these comments were not particularly harmful to Applicant or his case.

Regarding the sequestration of the witnesses, Counsel testified that he did not move for sequestration because it was not necessary. He elaborated that the State only called two fact witnesses, first Officer Emmitt Gilliam followed by Investigator Jackson Sheard, and that Sheard was entitled to be present regardless of any sequestration orders because he was the chief investigating officer. He testified that a sequestration order would have been pointless based on this and would have had no impact.

Regarding the allegation that he was ineffective for failing to object to any testimony referring to the substance as crack cocaine before the chemist testified, Counsel testified that

such an objection would not likely have been sustained. Additionally, he testified that this would have had no impact on Applicant's case, as his defense was mistaken identify, not mistaken substance. Furthermore, Counsel testified that he had reviewed the chemist's report prior to trial and knew that the substance tested positive for crack cocaine, so such an objection would have amounted to wasting the court's time – not a favorable tactic to employ before the jury. Counsel also testified that he did view the substance before it was introduced at the trial and there is no merit for Applicant's claim to the contrary. Counsel testified that he has prosecuted and defended numerous drug cases and that he has never before objected to the drug's admission on the basis that the presumptive field test changes the substance's weight. He testified that making such an argument would not have resulted in the suppression of the drugs and would have no effect on the case, as the amount of substance used for a presumptive field test is miniscule. Counsel additionally testified that he thoroughly reviewed all chain of custody documents regarding the drugs and saw no irregularities sufficient to warrant moving for suppression. Counsel also testified that it is not uncommon for the actual laboratory report to be printed out from the computer on a different date than when the actual testing was performed.

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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. This Court finds that Counsel's testimony is credible and should be afforded great weight; conversely, this Court finds that Applicant's testimony lacks credibility.

Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in his or her application and establishing that he is entitled to relief. Abney v. State, 408 S.C. 41, 45, 757 S.E.2d 544, 546 (S.C. Ct. App. 2014), *reh'g denied* (Apr. 24, 2014) (citing Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012)). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. An applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Abney, 408 S.C. at 46, 757 S.E.2d at 546 (citing Strickland, 466 U.S. at 690).

After careful review based on the standard discussed above, including a review of the testimony and exhibits presented at the evidentiary hearing, this Court denies this application on the basis that Counsel's performance did not fall below the standard required and there was no resulting prejudice to Applicant from these alleged deficiencies. Below are this Court's findings in regards to each of Applicant's specific allegations of ineffective assistance of counsel:

Allegation that Counsel failed to object to impermissible comments from the State's closing argument

Applicant testified that Counsel was ineffective for failing to object various comments made by the State in its closing argument, including comments that he was a "breeder" and that member of law enforcement are professionals who put their lives on the line to clean up the community from people like Applicant. See p. 166 lns. 2-8; p. 166 ln. 20 – p. 167 ln. 14. He testified that these comments were raised in his direct appeal brief, but were not persevered for appellate review because Counsel failed to object. Counsel testified that he has reviewed the passages in question and does not think that they are objectionable. Counsel elaborated that had he made an objection, he does not it would have been sustained and would only have highlighted these comments to the jury. Additionally, Counsel testified that because his defense theory was one of mistaken identity, these comments were not particularly harmful to Applicant or his case.

“A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). “The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom.” Id. at 609–10, 602 S.E.2d at 744. “On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt.” Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). “Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). “The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id.

This Court finds that Applicant has failed to meet his burden of establishing any deficiency in regards to this allegation. This Court finds that Counsel's performance was reasonable and prudent based on the facts and circumstances of this case and that Applicant has failed to establish any deficiency of Counsel. Specifically, this Court finds that the solicitor's comments during closing argument were not “calculated to arouse the jurors' passions or prejudices” and were not objectionable. See Simmons, supra. Additionally, this Court finds that had Counsel objected and preserved the issue for appellate review, Applicant's conviction would be affirmed. Furthermore, this Court finds that Applicant cannot establish any resulting

prejudice from Counsel's alleged deficiency, as there is no reasonable likelihood that the result of the proceeding would have been different based on overwhelming evidence of guilt. See Simmons, supra. Therefore, this Court finds that Applicant has failed to meet his burden of proof in regards to both deficiency and prejudice and that this allegation must be denied and dismissed with prejudice.

Allegation that Counsel was ineffective for failing to move for sequestration

Applicant alleges that Counsel was ineffective for failing to move for sequestration of the State's witnesses. This Court finds that this allegation is without merit and must be denied and dismissed with prejudice. As Counsel correctly testified that the evidentiary hearing, sequestration would not have had any impact on the State's case, as only two fact witnesses testified and the second witness was the chief investigator who would have been exempt from any sequestration order. This Court finds that Counsel's performance was reasonable and prudent based on the facts and circumstances of this case and that Applicant has failed to establish any deficiency of Counsel.

Additionally, this Court finds that Applicant cannot establish any resulting prejudice from Counsel's alleged deficiency, as "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," as sequestration would have had no impact on Applicant's trial. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Therefore, this Court finds that Applicant has failed to meet his burden of proof and that this allegation must be denied and dismissed with prejudice.

Allegation that Counsel was ineffective for failing to object to the State's witnesses referring to the substance as "crack cocaine" before the chemist testified

Applicant alleges that Counsel was ineffective for failing to object to the State's witnesses referring to the white, rock-like substance as "crack cocaine" before the chemist testified that the substance tested positive for crack cocaine. This Court finds that this allegation is without merit and must be denied and dismissed with prejudice. Counsel testified that such an objection would not likely have sustained. Additionally, he testified that this would have had no impact on Applicant's case, as his defense was mistaken identify, not mistaken substance. Furthermore, Counsel testified that he had reviewed the chemist's report prior to trial and knew that the substance tested positive for crack cocaine, so such an objection would have been wholly meritless. This Court finds that Counsel's performance was reasonable and prudent based on the facts and circumstances of this case and that Applicant has failed to establish any deficiency of Counsel. Additionally, this Court finds that Applicant cannot establish any resulting prejudice from Counsel's alleged deficiency, as there is no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," as such an objection would not have been sustained. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Therefore, this Court finds that Applicant has failed to meet his burden of proof and that this allegation must be denied and dismissed with prejudice.

Allegation that Counsel was ineffective for failing to object to the State's witnesses referring to Applicant as "Junior Black"

Applicant alleges that Counsel was ineffective for failing to object to the State's witnesses referring to the suspect as "Junior Black," arguing that this amounted to a prior bad act

because law enforcement knew “Junior Black” from previous encounters. Counsel testified that he saw no arguable basis for objecting to the reported nickname of the suspect, particularly in light of his defense strategy that Applicant was not the suspect and law enforcement had arrested the wrong individual. This Court finds that Counsel’s performance was reasonable and prudent based on the facts and circumstances of this case and that Applicant has failed to establish any deficiency of Counsel. Additionally, this Court finds that Applicant cannot establish any resulting prejudice from Counsel’s alleged deficiency, as there is no “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,” as there is overwhelming evidence of Applicant’s guilt. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Therefore, this Court finds that Applicant has failed to meet his burden of proof and that this allegation must be denied and dismissed with prejudice.

Allegation that Counsel was ineffective for failing to examine the drugs prior to introduction at trial

Applicant alleges that Counsel was ineffective for failing to examine the drugs prior to trial. This Court finds that this allegation is without merit and must be denied and dismissed with prejudice. Counsel’s credible testimony sharply refuted this allegation, as he testified that he examined the drugs prior to their admission at trial. Additionally, this Court finds that Applicant cannot establish any resulting prejudice from Counsel’s alleged deficiency, as there is no “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,” as there is overwhelming evidence of Applicant’s guilt. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Therefore, this Court finds that Applicant has

failed to meet his burden of proof and that this allegation must be denied and dismissed with prejudice.

Allegation that Counsel was ineffective for failing to object to the presumptive drug test on the basis that it changed the overall drug weight

Applicant alleges that Counsel was ineffective for failing to object to the introduction of the drugs based on the presumptive field test changing the overall weight. This Court finds that this allegation is without merit and must be denied and dismissed with prejudice. Counsel testified that he has prosecuted and defended numerous drug cases and that he has never before objected to the drug's admission on the basis that the presumptive field test changes the substance's weight. He testified that making such an argument would not have resulted in the suppression of the drugs and would have no effect on the case, as the amount of substance used for a presumptive field test is miniscule. This Court agrees and finds that Counsel's performance was reasonable based on professional standards. Additionally, this Court finds that Applicant cannot establish any resulting prejudice from Counsel's alleged deficiency, as there is no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," as there is overwhelming evidence of Applicant's guilt. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Therefore, this Court finds that Applicant has failed to meet his burden of proof and that this allegation must be denied and dismissed with prejudice.

Allegation that Counsel was ineffective for failing to object to the photographic lineup

Applicant alleges that the photographic lineup that was shown to Officer Gilliam after the drug buy was suggestive, essentially amounting to Investigator Sheard compiling photographs of five persons who looked like Applicant and then encouraging Gilliam to select Applicant's

photograph. He testified that Sheard knew him from previous dealings and had a vendetta against him based on other unsuccessful attempts to arrest him. He acknowledged that Counsel moved to suppress the lineup as unduly suggestive, but testified that Counsel did not raise the issues surrounding his past dealings with Sheard as a basis for suppression.

This Court finds that this allegation is without merit and must be denied and dismissed with prejudice. Counsel testified and the record reveals that Counsel moved to suppress the lineup and a Neil v. Biggers hearing was held, but that after hearing the testimony from both Officer Gilliam and Investigator Sheard, the trial court denied his motion to suppress the identification. Additionally, Counsel testified that Applicant never informed him of any previous interactions with Sheard and he saw no reason or motive for Sheard to set-up Applicant based on all discovery materials and that it was readily apparent to anyone looking at the photographic stills that Applicant was the suspect. This Court finds that Counsel's performance was reasonable based on professional standards. Additionally, this Court finds that Applicant cannot establish any resulting prejudice from Counsel's alleged deficiency, as there is no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," as there is overwhelming evidence of Applicant's guilt. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Therefore, this Court finds that Applicant has failed to meet his burden of proof and that this allegation must be denied and dismissed with prejudice.

Allegation that Counsel was ineffective for failing to object to the introduction of drugs based on chain of custody discrepancies

Applicant alleges that Counsel failed to object to flaws in the chain of custody for the drugs. Specifically, Applicant alleges that the chain of custody documents have different dates

than the lab report generated, which shows that the drugs were not tested on the date testified to by the State's chemist. He testified that Counsel should have moved to suppress the drugs on this basis and that his failure to object was ineffective. Counsel refuted this allegation, testifying that he thoroughly reviewed all chain of custody documents regarding the drugs and saw no irregularities sufficient to warrant moving for suppression. Counsel also testified that it is not uncommon for the actual laboratory report to be printed out from the computer on a different date than when the actual testing was performed.

This Court finds that this allegation is without merit and must be denied and dismissed with prejudice. This Court has reviewed the documents in question (entered as Applicant's Exhibits), coupled with Counsel's credible testimony based on numerous years both prosecuting and defending drug cases, and finds that no irregularities exist to warrant suppression. Therefore, this Court finds that Counsel's performance was reasonable based on professional standards. Additionally, this Court finds that Applicant cannot establish any resulting prejudice from Counsel's alleged deficiency, as there is no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," as there is overwhelming evidence of Applicant's guilt. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Therefore, this Court finds that Applicant has failed to meet his burden of proof and that this allegation must be denied and dismissed with prejudice.

Allegation that Counsel was ineffective for failing to challenge the indictments

Applicant alleges that Counsel was ineffective for failing to challenge his indictment. Specifically, Applicant alleges that the indictment states only that he has been convicted of a

prior drug offense, but fails to state that he has been convicted of the requisite two offenses necessary for an indictment of distribution – third offense. Counsel testified that he reviewed all charging documents and found no deficiencies or defects.

“The indictment is a notice document. A challenge to the indictment on the ground of insufficiency must be made before the jury is sworn as provided by § 17-19-90. If the objection is timely made, the circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged. In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances. Further, whether the indictment could be more definite or certain is irrelevant.” State v. Gentry, 363 S.C. 93, 102-03, 610 S.E.2d 494, 500 (2005) (internal citations omitted).

This Court finds that this allegation is without merit and must be denied and dismissed with prejudice. This Court has reviewed the documents in question and agrees with Counsel that there is no valid challenge to the indictment. The indictment properly put Applicant on notice that he was being charged with a third drug offense and any such challenge would not have been successful. Therefore, this Court finds that Counsel was not deficient for failing to challenge a valid, non-deficient indictment.

Additionally, this Court finds that Applicant cannot establish any resulting prejudice from Counsel's alleged deficiency, as there is no "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. Had counsel made the motion to quash the indictment as complained, it would have had no effect on the outcome of the charges as the motion would have been unsuccessful and, even if successful, would not have stopped the state from pursuing the charges at a later date. First, even had counsel made an objection or otherwise moved to quash the indictment based on the date discrepancy, the outcome would have been no different as the trial court would have denied the motion to quash. Furthermore, even if the trial court granted counsel's motion to quash the indictments, the State could still have re-indicted or directly indicted Applicant, who then could be prosecuted and sentenced for the crimes at a later date. Under S.C. Code Ann. § 17-19-90 (2003), "every objection to any indictment for any defect apparent on the fact thereof shall be taken . . . on motion to quash such indictment before the jury shall be sworn and not afterwards." Since the Double Jeopardy Clause of the Fifth Amendment attaches in a jury trial only once the jury is sworn, a successful motion to quash, by its very definition, will not work to bar subsequent prosecution on the same allegation on that grounds. See State v. Prince, 279 S.C. 30, 301 S.E.2d 471 (1983). Accordingly, this Court finds Applicant has failed to prove resulting prejudice from counsel's failure to move to quash the indictments. Therefore, this Court finds that Applicant has failed to meet his burden of proof and that this allegation must be denied and dismissed with prejudice.

CONCLUSION

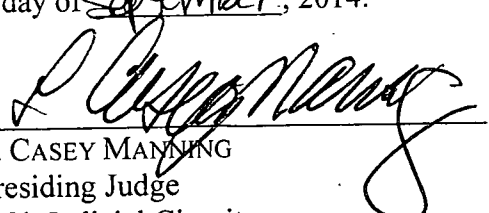
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief shall be denied and dismissed with prejudice; and
2. The Applicant shall remain remanded to the custody of the State.

AND IT IS SO ORDERED this 20 day of September, 2014.


L. CASEY MANNING
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Mark Watson, #306011)
)
 Plaintiff,)
)
 vs.)
)
 State of South Carolina)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-40-01542

**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

RICHLAND COUNTY
 FILED
 2014 SEP 29 AM 11:42
 JEANETTE W. HERRIDGE
 C.C.P. & S.

| | |
|--|---|
| Plaintiff's Attorney: Tommy A. Thomas, Bar No. 5536 Address: 7588 Woodrow St.; Harrington Bldg PO, Box 88, Irmo SC 29063 Phone: _____ Fax _____ E-mail: _____ Other: _____ | Defendant's Attorney: Megan E. Harrigan, Bar No. 100198 Address: PO Box 11549, Columbia SC 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____ |
|--|---|

MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

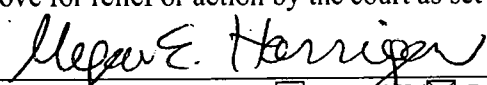
SECTION I: Hearing Information

Nature of Motion: _____
 Estimated Time Needed: _____ Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

Written motion attached
 Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


 Signature of Attorney for Plaintiff / Defendant

Date submitted: 9/24/14

SECTION III: Motion Fee

PAID - AMOUNT: \$ _____
 EXEMPT: (check reason)

- Rule to Show Cause in Child or Spousal Support
- Domestic Abuse or Abuse and Neglect
- Indigent Status State Agency v. Indigent Party
- Sexually Violent Predator Act Post-Conviction Relief
- Motion for Stay in Bankruptcy
- Motion for Publication Motion for Execution (Rule 69, SCRCPP)
- Proposed order submitted at request of the court; or,
 reduced to writing from motion made in open court per judge's instructions
 Name of Court Reporter: _____
- Other: _____

| | |
|--|---------------------------------|
| <p style="text-align: center;">JUDGE'S SECTION</p> <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____ | JUDGE CODE _____ Date: _____ |
|--|---------------------------------|

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
 MOTION FEE COLLECTED: \$ _____
 CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4001542

Mark A #306011 Watson

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other _____

RICHLAND COUNTY
FILED
25 MAR 2015
AM 10:37
JANET P. BROWN
CLERK OF COURT

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|---|---------------------------------------|--------------------------------|
| | | \$ |
| | | \$ |
| | | \$ |

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 2 March 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Mark A #306011 Watson

Tommy Arthur Thomas

Megan Harrigan Jameson

Mark A #306011 Watson

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
)
 Mark A. Watson, SCDC #306011,)
 Applicant,)
)
)
 v.)
)
 State of South Carolina,)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2012-CP-40-1542

**ORDER DENYING APPLICANT'S
 "MOTION TO ALTER OR AMEND THE
 JUDGEMENT" AND "SUPPLEMENT
 TO APPLICANT'S MOTION TO
 ALTER OR AMEND PURSUANT TO
 RULE 59(E)"**

FILED
 RICHLAND COUNTY
 2015 MAR -2 AM 10:37
 JAMES H. W. HARRIS
 CLERK OF COURT
 S.C.P. & C.S.

This matter comes before this Court by way of Applicant's "Motion to Alter or Amend the Judgment" and "Supplement to Applicant's Motion to Alter or Amend Pursuant to Rule 59(e)," asking this Court to alter or amend its Order of Dismissal denying Applicant post-conviction relief.

I.

The records before this Court show that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted during the December 2007 term of the Richland County Grand Jury for Distribution of Crack Cocaine – Third Offense (2007-GS-40-12278). Applicant was represented by Cameron B. Littlejohn, Esquire. On July 9, 2009, Applicant proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr., where he was convicted as indicted. Judge Cooper sentenced Applicant to fifteen years imprisonment.

Applicant filed a notice of appeal. Following the submission of an Anders¹ brief, Applicant elected to voluntarily withdrawal his appeal. The South Carolina Court of Appeals dismissed Applicant's appeal and the remittitur was sent on July 12, 2011.

¹ Anders v. California, 386 U.S. 738 (1967).



II.

On February 23, 2012, Applicant filed an application for post-conviction relief alleging “ineffective assistance of counsel” without any supporting facts or allegations. Respondent made its Return on March 30, 2012, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on July 17, 2014, at the Richland County Courthouse. Applicant was present at the hearing and was represented by counsel, Tommy A. Thomas, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. After reviewing all testimony and evidence presented at the hearing, along with a review of all records provided to the Court, the Court found that there were no constitutional deprivations or other grounds on which to grant relief and is denied and dismissed the application with prejudice. A formal Order of Dismissal was signed by the Court on September 26, 2014 and filed on September 29, 2014.

Applicant, by way of his counsel, received this Order of Dismissal on October 1, 2014. He filed a “Motion to Alter or Amend the Judgment” pursuant to Rule 59(e), SCRCPP, on October 10, 2014. On October 31, 2014, Applicant filed a “Supplement to Applicant’s Motion to Alter or Amend Pursuant to Rule 59(e).” In his “Supplement to Applicant’s Motion to Alter or Amend Pursuant to Rule 59(e),” Applicant states that four additional allegations should be included and addressed in this Court’s Order of Dismissal. These are as follows:

1. The Order should be altered or amended to include the issue of subject matter jurisdiction, particularly related to a purported allegation that chain of custody evidence and incident reports were withheld from Applicant;
2. The Order should be altered or amended to include the issue of an alleged due process violation pertaining to the chain of custody;

3. The Order should be altered or amended to include the issue of an alleged due process violation pertaining to the testimony of the chemist testifying at trial; and
4. The Order should be altered or amended to include the issue of prosecutorial misconduct pertaining to the alleged impermissible comments of the State during its closing argument.

Respondent filed its Return to this motion on or about November 5, 2014, arguing that the issues raised in this motion had not previously been raised and were meritless.

III.

This Court's find that its Order of Dismissal contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a) SCRPC. See also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). Having carefully reviewed the entire record in this matter, this Court finds that there is no basis for altering or amending its prior ruling.² This Court agrees with Respondent and finds that none of these allegations as set forth in Applicant's to his motion were properly raised prior. Therefore, these allegations are not properly before this Court. See Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial.). See also C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993); Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct.App.1990).

Furthermore, this Court finds these allegations must be denied and dismissed regardless. This Court finds that Applicant's first issue that the court lacked subject matter jurisdiction due to a purported delay in receiving discovery is without merit, as any discovery violation would have no impact on the trial court's ability to preside over his case. "[S]ubject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Edwards v. State, 372

² The Court, in its discretion, has considered this matter based upon the motions submitted by the parties and the post-conviction relief file, since oral argument will not aid the Court in reaching its decision. See Rule 59(f), SCRPC.

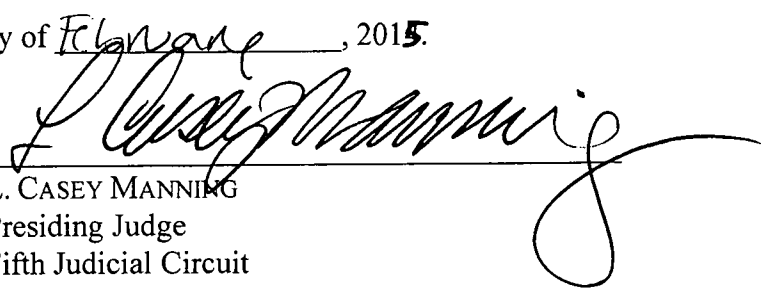
S.C. 493, 496, 642 S.E.2d 738, 739 (2007) (internal citation omitted). As discussed in the Order of Dismissal, this Court finds that there was no defect in Applicant's indictments and that the trial court properly had jurisdiction over Applicant's case.

Regarding Applicant's two claims that his due process rights were violated by alleged defects in the chain of custody, this Court also finds these claims to be meritless. See State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice."). There is nothing in the record to demonstrate that there was a defect in the chain of custody, which this Court previously found in its Order of Dismissal.

Regarding Applicant's final issue in his motion that the State committed prosecutorial misconduct, this Court finds that this allegation is also without merit. As this Court previously ruled in its Order of Dismissal, the State's comments during closing were not impermissible and certainly do not rise to the level of misconduct. Therefore, this Court hereby denies the Applicant's Motion in its entirety, and affirms its previous Order of Dismissal.

This Court notes that if Applicant desires to secure appellate review of this Order and the Order of Dismissal, a notice of appeal must be filed and served within thirty days of the service of this Order. Petitioner is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

AND, IT IS SO ORDERED this 2nd day of February, 2015.


L. CASEY MANNING
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina

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Tommy A. Thomas, P.C.
ATTORNEY AND COUNSELOR AT LAW
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The South Carolina Supreme Court
Daniel E. Shearouse, Clerk of Court
P.O. Box 11330
Columbia, SC 29211