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**RECEIVED**

JUN 09 2015

**S.C. SUPREME COURT**

June 5, 2015

Via Regular Mail

Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: LORENZO RANTELLE NICHOLSON v. State

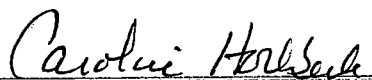
Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,

  
Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General  
Office of Appellate Defense

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
THE HONORABLE Edward W. Miller

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CA No. 2014-CP-23-3378

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSHER  
2015 JUN 5 AM 11 36

LORENZO RANTELLE NICHOLSON,

APPELLANT,

vs.

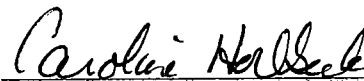
STATE OF SOUTH CAROLINA

RESPONDENT.

NOTICE OF APPEAL

Appellant LORENZO RANTELLE NICHOLSON, appeals from the Order of the Honorable Edward W. Miller, Circuit Court Judge clocked May 19, 2015.

Respectfully submitted,



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Caroline M. Horlbeck, Esq.  
101 Whitsett St  
Greenville, SC 29601

Date: June 5, 2015

Other Counsel of Record: Karen Ratigan, Esq.  
Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211



STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Lorenzo Rantelle Nicholson, )  
 S.C.D.C. No. 273996, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2014-CP-23-3378

**ORDER OF DISMISSAL**

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSMAIER  
 2015 MAY 19 AM 9 52

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 17, 2014. The Respondent made its return and partial motion to dismiss on November 22, 2014. An evidentiary hearing was held on April 21, 2015 at the Greenville County Courthouse. The Applicant was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Christopher D. Scalzo, Esquire. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, the return and partial motion to dismiss, and the appellate records.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the April 2009 term of the Greenville County Grand Jury for possession of a weapon during

commission of a violent crime (2008-GS-23-4268, count 1) and trafficking cocaine (2008-GS-23-4268, count 2). He was represented by Christopher D. Scalzo, Esquire.

Though the case began as a jury trial, the Applicant eventually opted to have the matter proceed as a bench trial. On August 13, 2009, the Honorable John C. Few found the Applicant guilty and sentenced him to concurrent terms of 5 years for possession of a weapon during commission of a violent crime and 13 years for trafficking cocaine, second offense.

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Nicholson, Op. No. 2011-UP-588 (S.C. Ct. App. filed Dec. 21, 2011). The South Carolina Supreme Court denied the Applicant's subsequent petition for writ of certiorari by order dated July 25, 2013. The Remittitur was sent on July 31, 2013.

### ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:<sup>1</sup>

1. Illegal search and seizure of the Applicant's home.
2. Ineffective assistance of counsel.
3. "[W]as unlawfully sentenced."
4. "The Courts did not have proper Jurisdiction to impose a sentence on the [A]pplicant."
5. "[S]entence ws unlawfully enhanced."
6. "[D]eprived of the right to have meaningful access to the Courts."
7. Deprived of equal protection and due process.

On December 31, 2014, the Applicant filed a pro se amendment to his PCR application that contained an additional 157 issues. The Applicant, however, was represented by counsel at

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<sup>1</sup> The Applicant raised 237 issues in his PCR application.

that time, so this Court will not consider the issues raised in this amendment. See Rule 11(a), SCRPC; *Jones v. State*, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (holding there is no constitutional right to hybrid representation either at trial or on appeal).

At the beginning of the PCR hearing, counsel for the Applicant listed the sole issues they would be proceeding on in this action. Aside from the issues listed below, this Court finds the Applicant abandoned all other issues:

1. Ineffective assistance of trial counsel:
  - a. Failed to raise a violation of § 22-5-180.
  - b. Failed to object to the judge's abuse of discretion.
  - c. Failed to adequately attack the search and seizure.
  - d. Failed to move for the trial judge to recuse himself.
  - e. Failed to object to the trial judge's decision to incorporate the testimony from the suppression hearing.
  - f. Failed to properly argue against sentence enhancement.
2. The Grand Jury did not have permission to meet when they did.

### **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).

#### **Ineffective Assistance of Counsel**

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he

must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he had two meetings with trial counsel. The Applicant stated they reviewed some evidence but did not outline a strategy. The Applicant stated he received three plea offers but that he always wanted a trial. The Applicant stated he and plea counsel decided together to proceed with a bench trial because the trial judge "knew the law best." The Applicant stated trial counsel failed to raise a violation of S.C. Code Ann. § 22-5-180 at the suppression hearing. The Applicant stated trial counsel failed to object to the trial judge's abuse of discretion in denying the motion to suppress. The Applicant stated trial counsel failed to argue the officers had an arrest warrant (not a search warrant) but searched the entire residence. The Applicant stated trial counsel should have impeached the officers regarding where the arrest took place. The Applicant stated trial counsel should have asked the trial judge to recuse himself. The Applicant stated he was prejudiced when the trial judge incorporated the suppression hearing testimony into the bench trial. The Applicant stated trial counsel did not properly argue against sentence enhancement.

Trial counsel testified he filed discovery motions and received those materials. Trial

counsel testified he met with the Applicant at the detention center and reviewed: the State's evidence, the Applicant's version of events, and the possibility of the Applicant's sister as a witness. Trial counsel testified that, once the case was on the trial docket, the Applicant's primary concern was arguing the search and seizure issues. Trial counsel testified the case hinged on a legal issue and so they decided to proceed with a bench trial. Trial counsel testified he was not familiar with § 22-5-180 before the PCR hearing but that, upon review, he did not believe it would apply in this case. Trial counsel stated they did not discuss asking the trial judge to recuse himself. Trial counsel testified there was no detriment to incorporating the suppression hearing into the bench trial.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have argued there was a violation of S.C. Code Ann. § 22-5-180. While the Applicant argues this this would have shown the police officers "broke the law" in his case, trial counsel testified he believed this was a vague statute and would not be applicable. This Court agrees with trial counsel's assessment. This Court finds raising this statute in the suppression hearing would not have led to the suppression of the evidence. This Court finds the Applicant failed to demonstrate either that § 22-5-180 was applicable or that arguing a violation of this statute would have changed the outcome of his case. See Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded.") (citation omitted).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the trial judge's alleged abuse of discretion. Specifically, the Applicant argues

trial counsel should have objected when the trial judge denied the motion to suppress and that the failure to do so meant he could not argue this issue on appeal. (Trial transcript, p.75, lines 2-6). This Court finds there was no error and that it was not incumbent upon trial counsel to have objected and argued an abuse of discretion. The suppression issue was preserved and was, in fact, the subject of the Applicant's appeal.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly argue the search and seizure issues in his case. The Applicant argued the arrest was completed outside or in the threshold of the door but that the officers searched the entire house. This Court finds the Fourth Amendment issues in question were the subject of the Applicant's direct appeal. This Court finds the Applicant has failed to articulate what else trial counsel should have argued in order to challenge the arrest and search in this case. See Sikes v. State, 323 S.C. at 30, 448 S.E.2d at 562.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have moved for the recusal of the trial judge. Specifically, the Applicant points to a section of the transcript – after the denial of the suppression motion but before jury selection and the judge's eventual decision to have a bench trial<sup>2</sup> – where the trial judge stated he did not wish to have a bench trial at that time because “it puts me in a position that I don't choose to be put in.” (Trial transcript, p.85, lines 10-14). This Court finds trial counsel did not err in failing to move for recusal. “A motion to recuse may not be predicated on the judge's rulings in the case before him or on rulings in a related case, nor on his demonstrated tendency to rule in any particular manner, or on a particular judicial leaning or attitude derived from his experience on the bench.” Mallet v. Mallet, 323 S.C. 141, 146-47, 473 S.E.2d 804, 808 (Ct. App. 1996). This Court further

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<sup>2</sup> Trial transcript, p.109.

finds the Applicant has failed to demonstrate any evidence the trial judge was, in fact, biased or prejudiced against him. See Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004) (stating “[i]t is not sufficient for a party seeking disqualification to simply allege bias; the party must show some evidence of bias or prejudice.”).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected when the trial judge incorporated the suppression hearing testimony into the bench trial. Specifically, the Applicant points to the trial judge’s comments that he would “incorporate by reference the testimony from the suppression hearing.” (Trial transcript, p.113, line 14 – p.114, line 11). Trial counsel testified there was no detriment to incorporating the suppression hearing testimony because he was able to cross-examine the witnesses on those issues. This Court finds the Applicant has failed to present a cognizable basis upon which trial counsel could have made a successful objection. Further, this Court finds the Applicant failed to demonstrate he suffered any prejudice from the incorporation of the suppression hearing testimony. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

This Court finds the Applicant failed to meet his burden of proving both that trial counsel did not properly argue against sentence enhancement and that he was prejudiced as a result. Specifically, the Applicant argues trial counsel should not have argued State v. Spratt, 383 S.C. 212, 678 S.E.2d 266 (Ct. App. 2009). (Trial transcript, pp.130-31). The Applicant argues he should have been sentenced as a first offense. This Court finds the Applicant was properly sentenced as a second offense and has failed to produce any evidence that the sentence enhancement in his case was improper.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under

prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

### Grand Jury

The Applicant argued the Grand Jury did not have permission to convene when they considered the indictments in his case. This Court finds this allegation is without merit. A grand jury may meet at any time ordered by a circuit judge. See S.C. Code Ann. §§ 14-5-910 to -940 (allowing for terms of court not provided for by law); see also Order No. 2011-02-04-01 (S.C. Sup. Ct. Order dated Feb. 4, 2011) (authorizing chief judge for administrative purposes to “determine the dates for the convening of the grand jury in the various counties within the judicial circuit”). Accordingly, a grand jury is not unlawfully impaneled simply because it does not meet during a term of court as provided for in sections 14-5-620 to -820. See State v. Jeffcoat, 26 S.C. 114, 1 S.E. 440, 441 (1887) (“[M]erely changing the time for holding the court did not make the grand jury illegal.”).

### All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

## CONCLUSION

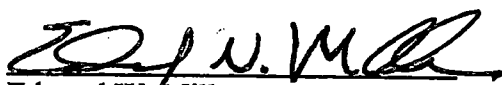
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this 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 also 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 12 day of May, 2015.

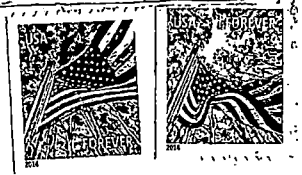
  
Edward W. Miller  
Presiding Judge  
Thirteenth Judicial Circuit

G'ville, South Carolina.

**CAROLINE M. HORLBECK**

*Attorney At Law*

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GREENVILLE, SOUTH CAROLINA 29601



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