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Robert M. Dudek, Chief Appellate Defender
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February 27, 2012

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

Jabbar J. Straws v. State of South Carolina 2/27/2012

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Sharon A. Graham

Sharon A. Graham
Administrative Coordinator

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January 31, 2012

Rema K. Gantt Thomas
P.O. Box 562
Chapin, SC 29036

Re: State of South Carolina, Respondent vs. Jabbar Straws, Appellant
Case No: 2009-CP-32-04805

Dear Rema:

On February 3, 2011, the above case was tried before the Honorable R. Lawson McIntosh, Circuit Court Judge, in Lexington, South Carolina. My records indicate that you were the court reporter for this case.

I request that you provide me with a transcript of the proceedings. Please transcribe the entire record.

I agree to pay the per page charge for this transcript as provided by Rule 6074, SCACR.

Sincerely,

Jake Moore, Jr.

SJMjr/klc

*Fellow of the American Academy of Matrimonial Lawyers
**Certified Specialist in Bankruptcy & Debtor/Creditor Law

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January 31, 2012

VIA HAND DELIVERY

The South Carolina Supreme Court
Attn: Clerk of Court
1015 Sumter Street, Ste. 305
Columbia, SC 29201

RE: State of South Carolina, respondent vs. Jabbar J. Straws, #231018, appellant.
Case No: 2009-CP-32-04805

Dear Clerk:

Attached for filing is the original and five copies of a Notice of Appeal in the above case. Also attached are the following:

Proof of Service of the Notice of Appeal on the Respondent,

A copy of the Order which is to be challenged on appeal,

Please file the original and return the clocked-in copies to me.

By copy of this letter, I am serving the State of South Carolina's attorney of record, Salley Elliot and filing a copy with the Lexington County Court of Common Pleas.

With kindest regards, I am,

Yours very truly,

Jake Moore, Jr.

SJMjr/klc
Attachments
cc: Salley Elliot, Esquire
Lexington County Court of Common Pleas

*Fellow of the American Academy of Matrimonial Lawyers
**Certified Specialist in Bankruptcy & Debtor/Creditor Law

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Lawson McIntosh, Circuit Court Judge

Case No. 2009-CP-32-04805

State of South Carolina.....Respondent,

v.

Jabbar J. Straws, #231018.....Appellant.

NOTICE OF APPEAL

Jabbar J. Straws appeals the order of the Honorable R. Lawson McIntosh dated July 28, 2011. Counsel of record for Appellant was served with written notice of entry of this Order on January 3, 2012.

January 31, 2012

S. Jahue Moore, Jr.
P.O. Box 5709
West Columbia, South Carolina 29171
(803) 796-9160

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Lawson McIntosh

Case No. 2009-CP-32-04805

State of South Carolina.....Respondent

v.

Jabbar J. Straws, #231018.....Appellants.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on January 31, 2012, addressed to its attorney of record Salley Elliot, Post Office Box 11549, Columbia, South Carolina 29211.

January 31, 2012

S. Jahue Moore, Jr. Esquire
P.O. Box 5709
West Columbia, South Carolina 29171
(803) 796-9160

ORIGINAL

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 11TH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	Case No.: 2009-CP-32-04805
Jabbar J. Straws, #231018	)	
	)	
Applicant,	)	**ORDER OF DISMISSAL**
	)	
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed October 28, 2009. Respondent made its Return on February 23, 2010. An evidentiary hearing into the matter was convened on February 3, 2011, at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by Jonathan Goode, Esquire. The Respondent was represented by A. West Lee of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. The State offered the testimony of Ms. Elizabeth Fullwood, Esquire (Ms. Fullwood) Applicant's trial counsel. This Court also had before it the records of the Lexington County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections, and the records from Applicant's prior appeal proceeding.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the April 2006 term of the Lexington County Grand Jury for two counts of kidnapping (2006-GS-32-1298, -1304), two counts of assault and battery with intent to kill (ABWIK), possession of firearm or knife

during commission of violent crime (2006-GS-32-1302), and armed robbery (2006-GS-32-1300). Elizabeth C. Fulwood, Esquire, represented him. On June 26-28, 2006, Applicant underwent trial, pursuant to which he was found guilty as indicted. The Honorable R. Knox McMahon sentenced him to confinement for a period of thirty (30) years for each count of kidnapping; five (5) years of possession of a firearm; twenty (20) years for each count of ABWIK; and thirty (30) years for armed robbery. The sentences for kidnapping were ordered to be served consecutively to each other. The sentence for armed robbery was ordered to be served consecutively to both kidnapping sentences and the sentence for ABWIK. The sentence for ABWIK was ordered to be served consecutively to the sentences for kidnapping.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals dismissed Applicant's appeal. State v. Straws, Op. No. 2009-UP-425 (S.C. Ct. App. filed September 8, 2009). The Remittitur was sent on September 24, 2009.

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

1. Ineffective Assistance of Counsel.
2. Lack of Subject Matter Jurisdiction.
3. Prosecutorial Misconduct.
4. Ineffective Assistance of Appellate Counsel.

II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING

Applicant's Testimony

At the evidentiary hearing the Applicant testified that at his bond hearing he requested a preliminary hearing and that he was represented by counsel at the time of his bond hearing, but

counsel was not present at the bond hearing. (Tr. p.10, lines 3-5; p.11, lines18-25). Applicant testified that his preliminary hearing was scheduled but never occurred because the Judge told Applicant. Applicant's attorney waived the preliminary hearing. (Tr. p.12, lines2-11). Applicant testified that his attorney visited him one time prior to Applicant being told, that his attorney had waived the preliminary hearing. (Tr. p.12, line24 – p.13, line2). Applicant testified that his attorney visited him the day after she waived his preliminary hearing and that Applicant told his attorney at that time he did not want her to represent him anymore. (Tr. p.13, lines4-6). Applicant testified that with regard to his claim of ineffective assistance of counsel with fraud, his attorney breached the confidence in their relationship and that she broke that trust to where Applicant did not have anymore trust for her after she made the decision to waive Applicant's preliminary hearing without Applicant's consent. (Tr. p.15, lines16-25). Applicant testified that his trial counsel helped shift the burden of proof over to the defense because she did not challenge the probable cause of Applicant's initial arrest. (Tr. p.16, lines1-8). Applicant testified the arrest was warrantless. (Tr. p.16, line14).

Applicant testified that he wrote a letter to the court requesting Ms. Fullwood be relieved as his counsel and that Ms. Fullwood claimed she never received the letter. (Tr. p.17, lines14-19). Applicant testified that he felt he was not properly represented at all and that his attorney did not inform Applicant of the charges against him. (Tr. p.19, lines16-17; p.20, lines12-14). Applicant testified that after he told his attorney he wanted her relieved from his case, Applicant's attorney subsequently met with the Applicant about a plea offer from the prosecutor. (Tr. p.20, lines18-23). Applicant testified that trial counsel told Applicant the prosecution offered to drop 4 charges and Applicant would plead to armed robbery and assault and battery with intent to kill. (Tr. p.20, line25 – p.21, line2). Applicant testified that he told trial counsel that was not a bad deal and asked his

attorney to speak with the prosecutor about 'numbers,' which was on a Friday and then Applicant was taken to court the following Monday. (Tr. p.21, lines8-16).

Applicant testified trial counsel did not properly investigate his case, did not meet with any of the witnesses, and did not speak with either of the victims. (Tr. p.23, lines14-20; p.24, lines1-5). Applicant testified that trial counsel should have moved to have the DNA suppressed because it was obtained illegally. (Tr. p.24, lines6-12). Applicant testified that trial counsel made one objection to one specific juror. (Tr. p.26, lines5-9). Applicant testified that he gave trial counsel a name for a defense witness and that counsel went to meet with said witness and that counsel obtained a statement from the witness, but Applicant never saw the statement. (Tr. p.28, lines3-6). Applicant also testified that said witness was present during the trial but was never called to testify. (Tr. p.28, lines7-10). Applicant testified that trial counsel did not make a contemporaneous objection to the first victim's perjured statement. (Tr. p.28, lines12-15; p.29, lines1-7). Applicant testified that trial counsel should have moved for a change of venue because the Sheriff made a statement in a news report that, "It's a good thing we caught this individual because he would have struck again," and that by making the statement, the Sheriff was saying that Applicant was already guilty. (Tr. p.29, lines21-25; p.30, lines1-5; p.30, lines9-11).

Applicant testified that trial counsel failed to obtain a psychiatrist, who would have testified to the condition that Applicant was in at the time of arrest. (Tr. p.31, lines11-17). Applicant testified that trial counsel failed to obtain medical records concerning the concussion suffered by the Applicant. (Tr. p.31, line23 – p.32, line2). Applicant testified that trial counsel should have raised self-defense and that trial counsel never consulted with Applicant about the issue of temporary insanity. (Tr. p.32, lines3-6; p.32, lines6-8). Applicant testified that the DVD never showed any fight, maybe because the prosecutor modified the video, and that one accuser never testified, which

violated Applicant's right to confrontation. (Tr. p.32, lines 16-25). Applicant testified that the oral statement Applicant allegedly gave to the police was prejudicial and trial counsel should not have let it come in at trial. (Tr. p.34, lines14-17). Applicant testified that trial counsel did not discussed alibi testimony with him and that trial counsel sent Applicant the discovery material, but that the DVD of the crime scene was never provided to Applicant until the day of trial. (Tr. p.35, lines1-4; p.37, lines19-22). Applicant testified that trial counsel should have challenged the indictment at the preliminary hearing that trial counsel waived. (Tr. p.38, lines9-13).

Applicant testified that the trial judge gave Applicant two options, which included: to go to trial with his counsel or represent himself *pro se* in two days. (Tr. p.39, lines16-22). Applicant further testified that the following constituted prosecutorial misconduct: an in-court identification, lack of a Biggers hearing, hearsay testimony, and that the prosecutor played on the sympathy of the jury. Lastly, Applicant testified that the DVD was not completely authenticated. (Tr. p.42, line25).

Ms. Fullwood's Testimony

At the evidentiary hearing Applicant's trial counsel testified that she met with the Applicant 4 times at the detention center and 1 time when Applicant was brought to court, and that during the meetings she reviewed the charges with the Applicant and his version of the events. (Tr.p.47, lines12-22). Trial counsel testified that the Applicant's version of the facts were that he was a regular customer of the convenience store; on the night of the incident, Applicant was drunk, so he decided to rob the store; Applicant took duct tape to the store, went inside, said he had a weapon with hands in his pocket; Applicant got a gun from behind the register and asked for the surveillance tape; when Applicant was trying to open the door he set down the gun and victim number two grabbed the gun, they got into a tussle and victim number two was shot. (Tr. p.48). Trial counsel testified that she filed a Rule 5 Brady motion, received the State's evidence, and that the evidence consisted of police

reports, synopsis of what the witnesses said happened, results of DNA testing, photographs, and a digital video of the store. (Tr. p.48, lines19-24; p.49, lines1-13). Trial counsel testified that one of the victims was shot at the top of his neck and paralyzed from the neck down so that victim did not testify at trial. (Tr. p.51, lines7-12). Trial counsel testified that after meeting with the Applicant, the only witnesses Applicant provided her with was a cousin, or a friend of a cousin, or a friend who attended Lexington High. (Tr. p.51, lines18-25). Trial counsel testified that the clothing Applicant wore that night had DNA of the victim on it, the victim who did not testify. (Tr. p.52, lines6-12).

Trial counsel testified she engaged in plea negotiations on behalf of the Applicant and that the solicitor made a plea offer at the second appearance on March 23, 2006, which was one count of armed robbery and one count of assault and battery with intent to kill. (Tr. p.52, line23 – p.53, line4). Trial counsel testified that she discussed this offer with the Applicant on April 26, 2006, but that Applicant was more concerned with federal charges he had pending at that time. (Tr. p.53, lines5-9). Trial counsel testified that she met again with the Applicant to discuss the plea offer on May12, 2006, and probably reiterated there would be no sentencing cap recommended by the solicitor. (Tr. p.53, lines17-20). Trial counsel testified that the solicitor brought the Applicant to court on May 15, 2006, and Applicant declined the plea offer and a trial date was set for June 19, 2006. (Tr. p.53, lines21 – p.54, line1).

Trial counsel testified that she discussed trial strategy with the Applicant, which included attacking the state's evidence with a Jackson v. Denno hearing on the voluntariness of the statement. (Tr. p.54, lines5-18). Trial counsel testified that the trial strategy was to show the jury the oral statement was never put into writing for the Applicant to sign, and that the statement was memorialized in a police report. (Tr. p.54, lines17-22). Trial counsel testified further that the trial strategy was arguing the failure to preserve or somehow record the statements to make the jury

doubt: first, that there was statement made; and second, the contents of the statement. (Tr. p.54, line23 – p.55, line3). Trial counsel testified that the trial strategy was to poke holes in the state's case, and that she went to the scene of the robbery and spoke with the people there. (Tr. p.55, lines12-17). She testified that she interviewed the DNA technician from SLED and that when the preliminary hearing was scheduled trial counsel already had the discovery materials and it was an exercise in futility. (Tr. p.55, lines20-23; p.56, lines6-9). Trial counsel testified that she did not consider a challenge to the probable cause of the initial arrest as an option because once the Applicant is indicted the case goes to court. (Tr. p.56, lines10-16).

Trial counsel testified her investigation of the Applicant's case also included legal research in the area of ABWIK versus ABHAN, to try to get the Judge just to send an ABWIK to the jury, and no ABHAN charge to the jury with respect to the store owner. (Tr. p.56, line25 – p.57, line3). Trial counsel testified she did not make a motion to suppress evidence based on a search because she was not aware of the State offering evidence that was the result of any search. (Tr. p.57, lines4-10). Trial counsel testified that she would have struck from the jury anyone who had been a student at Lexington High during the voir dire of the jury. (Tr. p.57, lines18-24). Trial counsel testified that she did not see anything objectionable with respect to the amount of money involved in the robbery because the amount of money is irrelevant in an armed robbery case, that under the facts of the case and the way, the particular manner this witness that you would impeach that way, it would not have been helpful to try to do that. (Tr. p.58, lines17-22). Trial counsel testified that she did not make a motion for a change of venue because after the voir dire of jurors there was nothing to show that there was exposure to pre-trial publicity to the extent that you would need to make that motion. (Tr. p.59, lines1-8).

Trial counsel testified that she did not consult with a psychologist or a psychiatrist concerning the voluntariness of Applicant's statements because it would not have been helpful. (Tr. p.59, lines13-20). Trial counsel testified that the Applicant never alerted her that Applicant may have been suffering from a slight concussion at the time Applicant gave the statement. (Tr. p.59, lines21-25). Trial counsel testified that she did not discuss with the Applicant self-defense because it was not available and that it did not fall within the four elements. (Tr. p.60, lines1-6). Trial counsel also testified that the she did not discuss with the Applicant the issue of temporary insanity because the Applicant never communicated to trial counsel that he had ever suffered from any mental illness or was insane. (Tr. p.60, lines7-11). Trial counsel testified that in regards to the Applicant's written request for an attorney on the Miranda rights sheet, that if she thought they had talked to the Applicant after he requested an attorney, trial counsel would have raised the issue. (Tr. p.60, lines12-23). Trial counsel further testified that she felt she provided Applicant with effective assistance and that they did not discuss alibi testimony because the Applicant told trial counsel he was at the scene of the crime. (Tr. p.61, lines21-23).

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered

adequate assistant and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 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.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, the exhibits introduced into evidence at the hearing, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

1. Ineffective Assistance of Counsel

(a) Applicant's allegation that trial counsel was ineffective based on fraud.

Applicant's allegation that trial counsel was ineffective based on fraud is without merit. The Applicant claims he was prejudiced by trial counsel waiving the preliminary hearing because

valuable evidence was lost such as possible impeachment, warrants should have been challenged, and knowing what the state planned to produce at trial was important. Trial counsel testified that when the preliminary hearing was scheduled, she had already received the discovery materials from the State. Trial counsel also testified that she did not consider a challenge to the probable cause of the initial arrest as an option because once the Applicant is indicted, the case goes to trial. Trial counsel stated under oath that she gave the discovery materials to the Applicant and met with him multiple times to discuss Applicant's case. This Court finds no evidence suggesting any type of fraudulent actions by trial counsel. Applicant has failed to meet his burden of proving trial counsel's performance was deficient. This Court finds that Applicant failed to show that he was prejudiced by counsel's alleged deficient performance. Furthermore, our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Applicant's trial counsel articulated valid strategic reasons for waiving the preliminary hearing. This Court finds that Applicant has not shown that counsel was deficient in that choice of tactics. Therefore, this allegation is denied and dismissed.

(b) Applicant's allegation that trial counsel was ineffective for failing to spend enough time with Applicant in preparing for trial.

Applicant's alleges that trial counsel was ineffective for failing to spend enough time with Applicant preparing for trial; specifically, the Applicant alleges trial counsel was ineffective for failing to inform Applicant of the nature and elements of the charges against him; for failing to discuss defenses of self-defense and temporary insanity; and for failing to discuss and/or investigate

alibi testimony. As to Applicant's allegation trial counsel failed to inform him of the nature and elements of the charges, this Court finds Applicant's testimony to be not credible. This Court does find trial counsel credible. Trial counsel stated under oath that during her meetings with the Applicant, trial counsel reviewed the charges with the Applicant and discussed with him the Applicant's version of the events. This Court finds and the record reflects the Applicant was fully apprised of the charges against him and the nature of such charges, therefore Applicant is unable to prove trial counsel's performance was deficient.

As to Applicant's allegation trial counsel failed to discuss potential defenses of self-defense and temporary insanity, this Court finds Applicant has failed to meet his burden of proof. Trial counsel testified that she and the Applicant did not discuss self-defense because it would not be available to the Applicant because Applicant's case and the facts surrounding his case did not fall within the four (4) elements. Additionally, trial counsel testified that she and the Applicant did not discuss the defense of temporary insanity because the Applicant never communicated to trial counsel that he had ever suffered from any mental illness or was insane. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds that trial counsel articulated valid strategic reasons for not pursuing defense of self-defense and temporary insanity. The Applicant has not shown that counsel was deficient in that choice of tactics.

As to Applicant's allegation that trial counsel failed to discuss and/or investigate alibi testimony, this Court finds Applicant's allegation is without merit. To establish an alibi defense and thus be entitled to an instruction of alibi, a defendant must present some evidence that he was at

another place at the time of the crime and could not therefore have committed the crime. State v. Diamond, 280 S.C. 296, 297, 312 S.E.2d 550 (1984), *quoting* State v. Robbins, 275 S.C. 273, 271 S.E.2d 319 (1980). A simple denial of one's presence at the scene does not constitute an alibi. *Id.*

This Court finds the Applicant presented no evidence of any alleged alibi. Trial counsel testified that she did not discuss alibi testimony with the Applicant because the Applicant told trial counsel that he was present at the scene of the crime. Furthermore, Applicant failed to produce any alibi witnesses at the PCR evidentiary hearing. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court finds that the Applicant has failed to meet his burden of proof; therefore, this allegation is denied and dismissed.

(c) Applicant's allegation that trial counsel was ineffective for failing to interview witnesses and victims prior to trial, and not calling witness to testify at trial.

This Court finds that Applicant's allegations that trial counsel was ineffective for failing to interview witnesses and victim prior to trial and not calling a witness to testify at trial are without merit. At the PCR evidentiary hearing, the Applicant presented no witnesses on his behalf nor did either of the victims testify. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). An Applicant must produce the testimony of a favorable witness

or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court finds that the Applicant has failed to meet his burden of proof; therefore, this allegation is denied and dismissed.

(d) Applicant's allegation that trial counsel was ineffective for failing to investigate and failing to review discovery material.

Applicant alleges that trial counsel was ineffective for failing to adequately investigate Applicant's case and preparing for trial, for failing to challenge the indictments, and for failing to review discovery materials with the Applicant. As to Applicant's allegation that trial counsel failed to adequately investigate Applicant's case, this Court finds Applicant's allegation is without merit. At the PCR evidentiary hearing, trial counsel testified that she filed a Rule 5 Brady motion and received the state's evidence. Said evidence consisted of police reports, synopsis of witness statements, results of DNA testing, photographs, and a digital video of the store. Trial counsel testified she and the Applicant reviewed the discovery materials together. Trial counsel testified that in her investigation she interviewed the DNA technician from SLED; trial counsel conducted legal research in the area of ABWIK versus ABHAN; and trial counsel visited the scene of the robbery and spoke with people at the scene. Additionally, trial counsel testified that she and the Applicant met four (4) times, during which they discussed the charges against the Applicant and the Applicant's version of the events. This Court finds that, contrary to Applicant's claim, counsel conducted an investigation into the Applicant's case and the Applicant's assertions are mere speculation. Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). To establish counsel failed to adequately

prepare for trial, Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). Here, the Applicant did not present any evidence of what counsel failed to discover or other defenses that could have been pursued had counsel more fully prepared. This Court finds there has been no showing by the Applicant of what counsel could have discovered based upon additional investigation. Id. This Court finds that Applicant has failed to meet his burden of showing that counsel was deficient in his investigation; therefore this allegation is denied and dismissed.

(e) Applicant's allegation that trial counsel was ineffective for the trial strategy employed at trial.

Applicant alleges that trial counsel was ineffective for the trial strategy employed at trial in the following ways: failing to object to perjurious testimony by the victim regarding the amount of money taken; failure to put Miranda right sheet (signed by Applicant and asking for an attorney) into evidence; and failing to object to any testimony regarding oral statement given by Applicant in violation of Applicant's 5th Amendment rights. As to Applicant's allegation that trial counsel was ineffective in failing to object to inconsistent testimony regarding the amount of money taken by the victim, this Court finds this allegation is without merit. Trial counsel testified that she did not see anything objectionable with respect to the amount of money involved in the robbery because the amount is irrelevant in an armed robbery case. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Trial counsel further stated that under the facts of the case and the way, the particular manner this witness

that you would impeach that way, it would not have been helpful to try to do that. This Court finds that trial counsel articulated valid strategic reasons for not objecting to testimony regarding the amount of money involved in the robbery, and that Applicant has not shown that counsel was deficient in that choice of tactics. This Court, further, finds that the Applicant has failed to show that he suffered any prejudice from counsel's alleged deficient performance. This Court finds that Applicant has failed to meet his burden of proof; therefore, this allegation is denied and dismissed.

As to Applicant's allegations that trial counsel was ineffective for failing to put the Miranda right sheet signed by Applicant into evidence, as well as for failing to object to any testimony regarding the oral statement given by the Applicant, this Court finds that Applicant has failed to meet his burden of proving trial counsel's performance was deficient. At the PCR evidentiary hearing, trial counsel testified that if she had thought that the police had talked to the Applicant after Applicant requested an attorney, then trial counsel would have raised the issue. Also, trial counsel testified that her trial strategy concerning this matter was to show the jury the Applicant's oral statement was never put into writing for the Applicant to sign, that it was memorialized in a police report. Trial counsel further explained the strategy included arguing failure to preserve [on the part of the investigating officers] or somehow record the statements to make the jury doubt; first, that there was a statement; and second, the contents of the statement. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds that trial counsel articulated valid strategic reasons for not introducing the Miranda right sheet into evidence and not objecting to testimony regarding oral statements made by the Applicant, and that Applicant has not shown that counsel was deficient in that choice of tactics. This Court finds

that Applicant has failed to meet his burden of proof; therefore, this allegation is denied and dismissed.

(f) Applicant's allegation that trial counsel was ineffective for failing to employ a psychiatrist at trial and failing to obtain Applicant's medical records.

Applicant alleges that trial counsel was ineffective for failing to employ a psychiatrist at trial to testify about Applicant's condition at the time of his arrest, and for failing to obtain Applicant's medical records to show Applicant's condition. At the PCR evidentiary hearing, trial counsel testified that she did not consult a psychiatrist concerning the voluntariness of Applicant's statement because it would not have been helpful. Trial counsel also testified that the Applicant never alerted her that he may have been suffering from a slight concussion at the time Applicant gave the statement. This Court finds that Applicant did not present any testimony from a psychiatrist or psychologist regarding his mental state and/or condition at the time of Applicant's arrest at the PCR hearing. This Court finds that prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post conviction relief hearing. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court further finds that Applicant did not present any medical records at the PCR hearing. The

Applicant failed to present any such witnesses or evidence at the PCR hearing. This Court finds that Applicant has failed to meet his burden of proof; therefore, this allegation is denied and dismissed.

(g) Applicant's allegation that trial counsel was ineffective for failing to move for a change of venue and in the jury selection process.

This Court finds Applicant's allegations that trial counsel was ineffective for failing to move for a change of venue and during the jury selection process are without merit. At the PCR evidentiary hearing, trial counsel testified that she did not make a motion for a change of venue because after voir dire of the jurors there was nothing to show that there was pre-trial publicity exposure to the extent that one would need to make that motion. Exposure to pretrial publicity does not automatically disqualify a prospective juror. Instead, an Applicant must show that the jury was unable to lay aside any impressions or opinions and could not render a verdict based on the evidence presented at trial. "The relevant question is not whether the community remembered the case, but whether the jurors...had such fixed opinions that they could not judge impartially the guilt of the defendant." Patton v. Yount, 467 U.S. 1025, 1035, 104 S. Ct. 2885, 2891, 81 L.Ed.2d 847, 856 (1984). The defendant bears the burden of showing actual prejudice. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). This Court finds that aside from his bare assertions, the Applicant has failed to present any support, testimony, or evidence that the jury at Applicant's trial was unable to lay aside any impressions and could not render an impartial verdict. This Court finds that Applicant failed to meet his burden of proof that trial counsel's performance in not moving for a change of venue was deficient. The Applicant additionally, has failed prove any resulting prejudice from trial counsel's alleged deficient performance. This Court finds that this allegation is denied and dismissed.

As to Applicant's allegation that trial counsel was ineffective during the jury selection

process, the Applicant alleges that "counsel did not object to the jury not being drawn from a fair cross-section of the community." At the PCR evidentiary hearing, trial counsel testified that in regards to the jury selection, she would have struck anyone who had been students at Lexington High. In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show that 1) the group excluded is a "distinctive" group in the community; 2) the representative of this group in venires from which juries are selected is not a fair and reasonable in relation to the number of such persons in the community; and 3) this underrepresentation is due to a systematic exclusion of the group in the jury selection process. State v. Patterson, 324, S.C. 5, 21, 482 S.E.2d 760, 767-68 (1997). This Court finds that except for the Applicant's broad assertion that the jury pool was not an adequate cross-section of the community, the Applicant has failed to provide any evidence or testimony concerning this matter. The Applicant has not offered a different strategy than what trial counsel used, nor has the Applicant shown he was prejudiced by the jury. This Court finds that Applicant has not presented any evidence that a distinctive group was underrepresented or that there was a systematic exclusion of a distinctive group. This Court finds that Applicant has failed to meet his burden of proof; therefore, this allegation is denied and dismissed.

2. Lack of Subject Matter Jurisdiction

The Applicant alleges that the trial court lacked subject matter jurisdiction due to defects in his indictment. Defects in the indictment do not affect subject matter jurisdiction. *See* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). *See also* S.C. Code § 17-19-20 (2003). Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. *See* Gentry, *supra*; Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d

598 (1994).

This Court finds that Applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. *See* Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), *overruled in part by* Gentry, *supra*. However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry, *supra*, 610 S.E.2d at 499; *See also* S.C. Const. Art. V, § 7. This Court finds that the Applicant has failed to present evidence that his case is of some class over which the circuit court does not have the authority to preside. The Applicant's conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction. Therefore, this Court finds that this allegation is denied and dismissed.

3. Prosecutorial Misconduct

The Applicant has alleged prosecutorial misconduct in the following instances: by not allowing a preliminary hearing; by the solicitor inserting his personal opinion in opening and closing arguments as to what occurred the night of the crime and pointing and identifying Applicant as the perpetrator; by the solicitor eliciting perjurious testimony; and Brady violations. It is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). This Court finds that trial counsel waived the preliminary hearing, and that the prosecution did not engage in any misconduct. Additionally, this Court finds that the Applicant has not pointed to any specific comments made by the solicitor during his opening and closing, except for Applicant's broad assertion that the solicitor inserted his personal opinion. This Court finds that the solicitor's closing arguments must be viewed in the context of the entire record. McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). While the State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence, State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996); to be entitled to a new trial for improper closing arguments

Applicant must show "the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (2001). After reviewing the entire record, this Court does not find that any comments or questions by the solicitor so infected the trial that a new trial is warranted. This Court is not convinced that the solicitor's arguments even reach the level of being improper, but certainly there is no evidence that Applicant was prejudiced.

As to Applicant's allegation of a Brady violation, this Court finds this allegation is without merit. Trial counsel testified that she received the state's evidence, including but not limited to police reports, summaries of witness statements, DNA results, photographs, and a digital video of the store. The Applicant provided no evidence or testimony showing that the state withheld any evidence from the defense in this case at the PCR hearing. In evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268. Accordingly, the Applicant has failed to meet his burden of proof, therefore this allegation is denied and dismissed.

4. Ineffective Assistance of Appellate Counsel

This Court finds that Applicant's allegation that appellate counsel was ineffective is without merit. The Applicant did not present testimony or evidence concerning this claim at the PCR hearing. This Court finds that a defendant is constitutionally entitled to effective assistance of appellate

counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, Id. at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id. This Court finds there is nothing in the record to indicate that the alleged ignored issues are clearly stronger than those actually raised. This Court finds that Applicant has failed to meet his burden of proof; therefore, this allegation is denied and dismissed.

V. CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post conviction relief. 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 intent to appeal within thirty

(30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 28 day of July, 2011.

R. Lawton McIntosh
Presiding Judge
Eleventh Judicial Circuit

Anderson, South Carolina