

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County

Tanya A. Gee, The Honorable Tanya A. Gee

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MAY - 2 2016

SC SUPREME COURT

TREVIS E. JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001537

APPENDIX

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TREVIS EUGENE JOHNSON - CROSS BY GOURLEY

1 Q. Okay. Well, I'll withdraw that.

2 But it was also alleged that maybe you fled from
3 your car because you didn't have a driver's license and
4 you didn't want to get arrested right before Christmas?

5 A. Right, right.

6 Q. Is that fair?

7 A. Yes.

8 Q. So your whole defense at trial was 'this isn't my
9 bag, they're just pinning it on me', right?

10 A. Yes.

11 Q. Okay. Did you ever give your attorney any kind of
12 leads or witnesses to look into to support this defense?

13 A. Witnesses?

14 Q. Uh-huh.

15 A. No, there were no witnesses.

16 Q. Okay. And there was never a plea offer to you,
17 right?

18 A. During trial.

19 Q. There was a plea --

20 A. After trial, yes.

21 Q. After trial --

22 A. After trial started, yes.

23 Q. And you turned that down?

24 A. Yes.

25 Q. Okay. So jumping into your allegations. Your

TREVIS EUGENE JOHNSON - CROSS BY GOURLEY

1 first allegation is failure to investigate. And
2 specifically -- well, what specifically did your attorney
3 not look into?

4 A. Like he said, he didn't investigate the possible
5 framing or --

6 Q. Okay.

7 A. -- the misconduct by the NAPD.

8 Q. But you would agree with me that he did cross-
9 examine the officers during your trial, right?

10 A. He did.

11 Q. Okay. That's basically the crux of your issue was
12 the failure to investigate?

13 A. Right.

14 Q. And then I guess the allegation for failure to
15 request a continuance kind of plays into that, that had
16 he had more time he could have then further investigated
17 into the officers' alleged corruption?

18 A. That's correct.

19 Q. Okay. Your next allegation, I believe, was -- bear
20 with me here -- a failure to provide case law that
21 establishes a probable cause precedent.

22 Just, again, what do you mean by that?

23 A. He made a motion and wasn't prepared to argue it
24 with, or back it up with case law.

25 Q. Okay. And that motion was at the beginning of

TREVIS EUGENE JOHNSON - CROSS BY GOURLEY

1 trial, a motion to try to suppress the drug evidence that
2 was found in the black bag?

3 A. Right.

4 Q. Okay. And I think his argument was that there
5 wasn't any evidence alleging that this was your bag,
6 right?

7 A. I think his argument to that motion was that he
8 didn't issue me a ticket --

9 Q. Right.

10 A. -- for the speeding that he said he pulled me over
11 for.

12 Q. Okay. But I think the State pointed out or alleged
13 that you had pled guilty to some kind of traffic offense
14 as related to this crime, right?

15 A. Yes.

16 Q. Okay. And after that motion Judge Early obviously
17 denied it, correct?

18 A. Right, right. Right, he did.

19 Q. Okay. Now, regarding the chain of custody I think,
20 and correct me if I'm wrong, your biggest issue is the
21 whole Clay Adams or -- what was it, Detective Turner took
22 it to Clay Adams or Clay Adams took it to Detective
23 Turner, which one?

24 A. Clay Adams did the analyzing.

25 Q. Okay. Clay Adams did the analyzing. He was the

TREVIS EUGENE JOHNSON - CROSS BY GOURLEY

1 fingerprint expert?

2 A. Right.

3 Q. And Mr. Adams stated that he took or he received
4 the bag from Phillip Turner?

5 A. Yes.

6 Q. Okay. And you're saying Phillip Turner never
7 testified that he actually took the bag to Clay Adams?

8 A. Phillip Turner testified he never entered it into
9 evidence.

10 MR. GOURLEY: Your Honor, may I approach?

11 THE COURT: You may.

12 BY MR. GOURLEY:

13 Q. Mr. Johnson, I'm going to show you page 328 of the
14 trial transcript. And I just want you to read lines four
15 through 11. Okay?

16 A. Yes. And this is?

17 Q. This is Phillip Turner.

18 A. Phillip Turner.

19 Q. And is he not testifying at that point in time that
20 he actually took the bag to Investigator Adams?

21 A. He said -- the question was: "And do you do
22 anything with regard to that bag personally?" He said,
23 "I signed it out of evidence and took directly to
24 Lieutenant Clay Adams who testified here earlier so that
25 a third-party, independent party could possess it, an

TREVIS EUGENE JOHNSON - CROSS BY GOURLEY

1 expert, because I'm not good with fingerprints."

2 Q. So Mr. Turner did testify that he took the bag to
3 Adams during your trial, according to this?

4 A. Okay.

5 Q. All right. Now, your next allegation is the
6 fingerprint evidence. And you would agree with me that
7 your trial counsel, and I think most of your trial
8 strategy based, was based off of the fact that no one
9 could link you to this bag. And the fact that this
10 fingerprint evidence, no fingerprint evidence on this bag
11 kind of supported your trial strategy, right?

12 A. Right.

13 Q. There's no evidence of you on this bag whatsoever,
14 right?

15 A. Right.

16 Q. And I think you would agree with me, again, that
17 Mr. Watson cross-examined everybody on this point and
18 really harped on it during the trial, right?

19 A. Okay.

20 Q. Okay. So would you agree with me the fact that
21 there was no fingerprint evidence on this bag helped your
22 case?

23 A. Yes.

24 Q. Okay. I'm going to skip over the circumstantial
25 evidence. I think you covered that with Ms. Pope very

TREVIS EUGENE JOHNSON - CROSS BY GOURLEY

1 thoroughly, and I don't have any questions for you on
2 that one.

3 The failure to request a mere presence
4 instruction. You felt Judge Early should have requested
5 or your attorney should have requested a mere presence
6 instruction?

7 A. Yes.

8 Q. Okay.

9 Your Honor, I'm going to turn to page 421 of the
10 record. Your Honor, may I approach?

11 THE COURT: You may.

12 BY MR. GOURLEY:

13 Q. All right. Mr. Johnson, let's read page 421. This
14 is Judge Early's jury charge, lines 19 through 22.

15 A. "Mere presence at the scene where drugs are found
16 does not prove possession. Actual knowledge of
17 possession of the presence of the cocaine is strong
18 evidence of the Defendant's intent to control its
19 disposition or use."

20 Q. Okay. So you would agree with me then that Judge
21 Early did charge the jury about the fact that you were
22 just merely there doesn't necessarily make you guilty of
23 this crime?

24 A. Not in conjunction with the fact that trafficking
25 is an enhanced possession offense.

TREVIS EUGENE JOHNSON - CROSS BY GOURLEY

1 Q. Okay. I gotcha. Fair enough.

2 And then regarding the objections with the jury,
3 Mr. Watson did object to the whole DNA stuff, right, and
4 Judge Early overruled him?

5 A. No, I don't think he did.

6 Q. That last allegation that Ms. Pope went over with
7 you about the solicitor's closing argument, I think you
8 testified that Mr. Watson did object to part of Ms. Beth
9 Ann Young's closing statement?

10 A. He objected but the judge overruled him before he
11 gave his reasons for objecting.

12 Q. Okay.

13 A. And I believe he has to be specific in order to
14 inform the Court about what's being objected to.

15 Q. Okay. You felt like he should have some more
16 argument, a little bit more meat to it?

17 A. Specific to his objection, yes.

18 Q. Okay. And then the rest of the arguments that you
19 pointed out he did not object to those?

20 A. Right.

21 Q. Okay. Mr. Watson filed a notice of appeal,
22 correct?

23 A. Yes, he did.

24 Q. And then Ms. Wanda Carter from Appellate defense
25 handled your appeal, correct?

TREVIS EUGENE JOHNSON - CROSS BY GOURLEY

1 A. Yes.

2 Q. She actually submitted an Anders brief which means
3 in her opinion she didn't find any meritorious issues?

4 A. Right.

5 Q. And you had the opportunity to submit it pro se
6 which I think you did, right?

7 A. I did.

8 Q. And what issues did you raise in your pro se brief?

9 A. There were a number but, like I said, at that time
10 I'm not a lawyer.

11 Q. Certainly.

12 A. And what I know of Anders brief, like I said, it
13 was her thing that there there were no -- nothing
14 reasonable that she could move to in the appeal. And I
15 felt like there was so -- there were -- there were a
16 couple of things.

17 Q. Do you remember what they were? I know it was a
18 long time ago so if you don't that's fine. I was just
19 curious.

20 A. Yeah. I can't be specific actually as to what they
21 were.

22 Q. Okay. That's perfectly fine, Mr. Johnson. I
23 certainly understand that.

24 But an Anders brief, though, means that the Court
25 of Appeals actually has attorneys there that reviews your

TREVIS EUGENE JOHNSON - REDIRECT BY POPE

1 entire transcript to make sure that there was no
2 meritorious issue but certainly if there was we want to
3 address that?

4 A. Okay.

5 Q. So just for your knowledge, your whole transcript
6 was reviewed by multiple attorneys at the Court of
7 Appeals looking for issues in addition to the issues that
8 you were able to point out in your pro se brief.

9 A. Okay.

10 Q. I think the evidence discovered after trial, I
11 think you've addressed that maybe you were just a little
12 misunderstood on what you could raise in a PCR as far as
13 that?

14 A. Right.

15 Q. That's fair. Thank you, Mr. Johnson. I appreciate
16 it.

17 Your Honor, I don't have any other questions

18 THE COURT: Ms. Pope, any redirect?

19 MS. POPE: Just very briefly.

20 THE COURT: Okay.

21 REDIRECT EXAMINATION

22 BY MS. POPE:

23 Q. Mr. Johnson, you and I have discussed this, this,
24 this fingerprint issue?

25 A. Yes.

TREVIS EUGENE JOHNSON - REDIRECT BY POPE

1 Q. Okay. And you did just testify that it, it was
2 good towards your defense; is that correct?

3 A. Yes.

4 Q. But, is it true that you witnessed someone else
5 touching the bag?

6 A. Yes.

7 Q. Okay. And did you believe that someone's
8 fingerprints should have been on that bag?

9 A. Definitely.

10 Q. Do you think that because someone's fingerprints
11 should have been on the bag that it was odd that no one's
12 fingerprints were on the bag?

13 A. Exactly.

14 Q. And does that go toward your misconduct theory --

15 A. Yes.

16 Q. -- on behalf of the North Augusta Police
17 Department?

18 A. Yes.

19 Q. Is that why that fingerprint analysis was so
20 important to you?

21 A. Correct. And the fact that Phillip Turner gave two
22 different testimonies as to handling that evidence.

23 Q. Yes, sir.

24 A. He went from saying he handled -- he signed the
25 evidence out to saying he never handled the evidence.

TREVIS EUGENE JOHNSON - REDIRECT BY POPE

1 Q. Yes, sir. Now, I just want to clean up the, your
2 testimony regarding the chain of custody document.

3 A. Yes.

4 Q. Why was the chain of custody so important to you in
5 this case?

6 A. Because it, the chain of custody should have
7 everyone's signature as to who signed it out. Like I
8 say, I applied to North Augusta for those documents
9 myself under the Freedom of Information Act and the
10 documents that I have does not include Detective Turner's
11 fingerprints -- I mean, signatures anywhere.

12 Q. And do you believe that should have been an issue
13 at your trial?

14 A. Definitely.

15 Q. Had you seen the documents, would you have made
16 Mr. Watson aware of that issue?

17 A. Yes.

18 Q. And, again, you were not given the opportunity to
19 go over those documents with Mr. Watson?

20 A. We did not.

21 Q. Let me ask you this -- well, those are all the
22 questions that I have.

23 THE COURT: All right. Thank you. Any
24 recross?

25 MR. GOURLEY: No, Your Honor.

JOHNNY E. WATSON, SR - DIRECT BY GOURLEY

1 THE COURT: All right. Thank you. You may
2 step down.

3 Ms. Pope, any additional witnesses?

4 MS. POPE: We have no additional witnesses
5 from this State -- from the Plaintiff.

6 THE COURT: Okay. Mr. Gourley?

7 MR. GOURLEY: Your Honor, we call
8 Mr. Watson.

9 THE COURT: All right. Mr. Watson, if you
10 could just step here to be sworn in and then take
11 the witness stand. Thank you.

12 JOHNNY E. WATSON, SR., having been duly
13 sworn, was examined and testified as follows:

14 THE CLERK: Please have a seat on the
15 witness stand and state your full name for the
16 Court.

17 THE WITNESS: My name is Johnny E. Watson,
18 Sr.

19 DIRECT EXAMINATION

20 BY MR. GOURLEY:

21 Q. All right. Mr. Watson, how long have you been
22 practicing law?

23 A. Let's see. I graduated in a class with David
24 Beasley in 1983.

25 Q. Do you recall whether -- were you retained in this

JOHNNY E. WATSON, SR - DIRECT BY GOURLEY.

1 case?

2 A. I was.

3 Q. And how many times did you meet with Mr. Johnson
4 prior to his trial?

5 A. I rely on what he says.

6 Q. Okay. Did you file a Rule Five and Brady or
7 receive that material?

8 A. Of course.

9 Q. Did you have the opportunity to review that
10 material with Mr. Johnson?

11 A. We did.

12 Q. Did that material contain the chain of custody from
13 SLED?

14 A. Quite frankly, I don't recall. But to my strategy
15 it doesn't matter whether it was a proper chain of
16 custody or not because our whole position was it was not
17 his bag. He never touched it. So we don't care what bag
18 they found or who handled it.

19 Q. Okay. Regarding your -- Mr. Johnson has alleged a
20 failure to investigate, specifically, into police
21 misconduct. Did you have any opinion on that or?

22 A. The -- during the course of the, reviewing the
23 evidence there was one point where one of the officers
24 indicated to Mr. Johnson that "If you don't claim this
25 drug," or something to that effect "everything we have

JOHNNY E. WATSON, SR - DIRECT BY GOURLEY

1 found we're going to put on you."

2 Q. Uh-huh.

3 A. In fact, if you read the transcript I had that
4 particular thing played repeatedly to the jury. We're
5 going to put it on you, we're going to put it on you.

6 And we objected to that ultimately but --

7 Q. Yes, sir.

8 A. -- that was part of the strategy.

9 Q. And you actually used it in your closing argument
10 as well --

11 A. That's correct.

12 Q. -- quite prominently?

13 A. Right.

14 Q. He's also alleged a failure to request a
15 continuance. Did you -- were you prepared to try this
16 case?

17 A. There's never enough tried -- time to try a case,
18 in my opinion.

19 But from what he said -- because I was hired in, I
20 believe I was hired in mid February. We went to court in
21 March. I had about a month to prepare with all of my
22 other duties. Of course I could've used more time. I'm
23 sure I requested if not formally in the record but the
24 solicitor's office was adamant about going to trial and
25 not continuing this case.

JOHNNY E. WATSON, SR - DIRECT BY GOURLEY

1 So, yeah, I certainly could have used more time.

2 Q. Okay. And more time to do what, exactly, in your
3 opinion?

4 A. To address issues like that, the possible police
5 misconduct. As part of my preparation at that time I
6 represented several people involved in drug activity in
7 the Aiken area. So, of course I did my legwork, went on
8 the ground, followed the path they alleged that he did,
9 considered who all, what other drug dealers might have
10 been in that area.

11 I did everything I could have done in the time
12 allotted.

13 Q. And certainly this wasn't your first drug trial?

14 A. No.

15 Q. Mr. Johnson has also alleged a failure to provide
16 case law that establishes a probable cause precedent. I
17 think it was going to your motion to dismiss or suppress
18 the drugs specifically due to a lack of the officer
19 giving him a ticket.

20 A. Right. Person of probable cause, I guess, you
21 know, that's criminal law 101, basic probable cause. So
22 naturally I'm going to attack that since he wasn't given
23 any citation. To me it didn't show any reason why -- if
24 they had no reason to stop him, then everything else
25 should have fallen out after that. But of course that

JOHNNY E. WATSON, SR - DIRECT BY GOURLEY

1 was denied.

2 Q. Right. So you feel you adequately presented the
3 motion?

4 A. To me that's elementary evidence from basic, I
5 mean, judicial knowledge.

6 Q. And I guess the State alleged that he was speeding
7 and then he didn't have a driver's license. And I think
8 he ultimately pled guilty to some traffic citation later
9 on?

10 A. I, I don't recall the details of that.

11 Q. Okay. That's fine. I certainly understand it was
12 a long time ago.

13 And, Mr. Watson, during the course of trial, would
14 you agree with me that you adequately cross-examined the
15 police officers regarding the chain of custody and who
16 had the drugs at what point in time?

17 A. Our whole case was based on creating reasonable
18 doubt and -- because we had no witnesses to put up. He
19 was apprehended right there in the area. And they had a
20 video of him leaving the car.

21 So there was no other witnesses to interview or
22 anything, just basically all we could do was attack their
23 case. And their best case being they had no fingerprints
24 of him on the bag. There were other drug dealers in that
25 area.

JOHNNY E. WATSON, SR - DIRECT BY GOURLEY

1 So all we could do was attack their case.

2 Q. You also kind of harped on the whole open air
3 search by the dog?

4 A. Exactly. And, in fact, the dog -- I believe it was
5 a video of the dog allegedly finding the drugs, but I
6 felt that the dog couldn't find any drugs. The officer
7 kept leading the dog around. I felt the officer actually
8 put the dog on the drugs that he somehow found
9 previously. And I tried to harp on that.

10 Q. Yes, sir.

11 A. And I tried to point out the fact that there was
12 great hoopla about the success of these dogs in the
13 newspaper leading up to that and all that. And the
14 expert they put on the witness stand, his whole business
15 depends on that dog, the success of those dogs. So I
16 attacked that as best I can.

17 Q. Yes, sir. Certainly.

18 What about Mr. Johnson has alleged a failure to
19 request that the jury be charged that trafficking is an
20 enhanced possession charge? Do you know anything such as
21 that?

22 A. I don't know. I mean --

23 Q. Okay.

24 A. -- I don't know anything about that.

25 Q. Did you have an opportunity to review the judge's

JOHNNY E. WATSON, SR - DIRECT BY GOURLEY

1 charges before he gave them to them?

2 A. Yes.

3 Q. And did you feel they were sufficient in nature?

4 A. Yes.

5 Q. Regarding the solicitor's closing arguments, I
6 think Mr. Johnson has pointed out a couple specifics.
7 What's your general thought process with closing
8 arguments?

9 A. Well, I tell you my general thought process during
10 trials in general. I'm not one of those people who
11 object a whole lot.

12 Q. Okay.

13 A. You know, I figure objections are distracting. If
14 it's something that I don't think is hurting me, even I
15 know I could do an objection I don't object every time if
16 I don't -- think it's not hurting me. So I don't think
17 they were hurting us many times that I didn't object.

18 Q. And is that because you don't want to draw more
19 attention to what's being said?

20 A. Yeah, of course. And, again, not only that,
21 excessive objections, you know, disrupt the flow and
22 everything. If it's something that's crucial that's
23 going to hurt my client, I'm definitely going to object.
24 But I think if it's a minor breach that's not hurting my
25 client, then I don't object to everything.

JOHNNY E. WATSON, SR - DIRECT BY GOURLEY

1 Q. All right. And certainly you were paying attention
2 to Solicitor Young's closing arguments?

3 A. Certainly. And the fact that there were closing
4 arguments and of course the judge instructs the jury,
5 look this is this lawyer's opinion. That's not
6 evidence. You've heard the evidence from the stand. So
7 I don't object to everything in opening or closing.

8 Q. And, Mr. Watson, would you agree with me the fact
9 that there were no fingerprints found on this bag helped
10 your case greatly?

11 A. Yes. That was our whole strategy. That goes to
12 the chain of custody issue as well because if this is not
13 my client's bag, I don't care who handled it because it's
14 not his bag.

15 Q. Right.

16 A. So they can show that they found a bag and
17 everybody properly handled it, but so what. It's not his
18 bag.

19 Q. Yes, sir. And a reasonable person would believe
20 that chances are there's probably some fingerprints of
21 the police officers on this bag?

22 A. Uh-huh. That's correct. I mean, like I said, the
23 fact that my client's fingerprints are on -- I didn't
24 make a whole issue out of the chain of custody argument
25 because our basic strategy is it's not his.

JOHNNY E. WATSON, SR - DIRECT BY GOURLEY

1 Q. Right.

2 A. Okay. So.

3 Q. Yes, sir. Now, he was on video carrying a black
4 bag when he was fleeing the scene though, right?

5 A. Okay.

6 Q. And, again, going back to the closing arguments.
7 Sorry to jump around.

8 You did object to when the solicitor began to
9 comment on the lack of DNA evidence, and had DNA evidence
10 been found it would have been Mr. Johnson's, right?

11 A. If I thought that the solicitor was saying
12 something that the jury could interpret that would hurt
13 Mr. Johnson, I objected.

14 Q. And as far as you know, that objection was properly
15 preserved for appellate review?

16 A. Yes.

17 Q. And you actually -- you submitted a notice of
18 appeal, correct?

19 A. I submitted a notice of appeal but the notice of
20 appeal is not binding. You can explore -- after reading
21 a transcript, you can argue other issues that are not in
22 the notice. That just gets you to the next level.

23 Q. Yes, sir. And certainly you didn't handle
24 Mr. Johnson's appeal?

25 A. No.

JOHNNY E. WATSON, SR - CROSS BY POPE

1 Q. Appellate Defense did, correct?

2 A. I turned it over to Appellate Defense.

3 Q. Okay. And are you familiar with an Anders brief?

4 A. Yes.

5 Q. And an Anders brief means that the Court of Appeals
6 actually reviews the entire records for any meritorious
7 issues, correct?

8 A. That's correct. The lawyer in this case, Wanda
9 Hagler, reviewed the transcript and didn't think there
10 were any issues for appeals. And when an Anders brief is
11 submitted, as you indicated, the defendant can submit his
12 own brief and the Court of Appeals' lawyers also review
13 the transcript.

14 MR. GOURLEY: Yes, sir. Mr. Watson, that's
15 all I have. Thank you so much.

16 THE COURT: Ms. Pope?

17 CROSS-EXAMINATION

18 BY MS. POPE:

19 Q. Good afternoon, Mr. Watson.

20 A. Good afternoon.

21 Q. I do have a couple of questions for you with regard
22 to these, Mr. Johnson's application.

23 Now in the appeal, you did -- you did state that
24 you had an inadequate amount of time allowed; is that
25 correct?

JOHNNY E. WATSON, SR - CROSS BY POPE

1 A. Correct. I only had about a month or so. He said
2 he hired me in mid February. We went to trial in March.
3 I tried to get the case continued and I was denied. I
4 don't know I did that on the record. Certainly I tried
5 off the record.

6 Q. Yes, sir.

7 A. I believe I may have tried at the beginning of the
8 trial again and the judge denied it.

9 Q. Okay. Mr. Watson -- how long have you been
10 practicing law, Mr. Watson?

11 A. Since 1983.

12 Q. So roughly about 30, 30-some, approximately 30
13 years?

14 A. That's correct.

15 Q. My math is not that good but roughly about 30
16 years?

17 A. That's correct.

18 Q. And, Mr. Watson, you handle a number of drug cases;
19 is that correct?

20 A. That's correct.

21 Q. And trials?

22 A. Yes.

23 Q. And how long do you usually take to prepare for
24 those trials?

25 A. It takes me how much time I have. If I have a day,

JOHNNY E. WATSON, SR - CROSS BY POPE

1 I'll prepare in a day. If I have a year, I'll prepare in
2 a year.

3 Q. Yes, sir. Do you feel as though you had an
4 adequate amount of time to prepare?

5 A. No. I agree with Mr. Johnson that there wasn't
6 adequate time. I mean, I wanted more time. That's why I
7 asked for a continuance. I mean, I only had -- he was
8 facing 25 years and, I mean, one month was a minimal
9 amount of time to prepare. I wanted more time. I agree
10 with him on that.

11 Q. Okay. But you do not recall making a formal motion
12 for, a motion on the record for a continuance?

13 A. I don't know. I mean, you'd have to rely on what's
14 in the transcript.

15 But the solicitor's office viewed this as a
16 non-negotiation case. They offered Mr. Johnson 20 years
17 before the trial. So the difference between 20 and 25
18 might as well go to trial. And so he chose to go to
19 trial because they would not come off of that 20 years.

20 However, during the course of the trial after they
21 feel that we're beating up on them pretty good, I guess
22 they came, said, we'll take 15 years. At that point I
23 told Mr. Johnson if they'll offer 15, I can get 12. And
24 he turned it down.

25 Q. Was it your advice that he take that plea?

JOHNNY E. WATSON, SR - CROSS BY POPE

1 A. Yes. I told him juries are unpredictable. No
2 matter how good you think you're doing, the jury's
3 unpredictable.

4 Q. Now, Mr. Watson, I do want to go to allegation C
5 which is failure to provide case law when you made that
6 probable cause motion. You asked that the evidence be
7 suppressed due to lack of probable cause?

8 A. Right.

9 Q. And it's your testimony that it's sort of an
10 elementary tactic, that if there's no probable cause then
11 there's no case?

12 A. I mean, everybody knows the officers have to have
13 probable cause for everything to proceed. After the
14 initial probable cause, if they didn't give him a ticket
15 in this case I feel that everything else should have
16 fallen out because they didn't show any probable cause.
17 But I didn't cite any cases. I mean, that's elementary.

18 Q. Well, that's my next question. If it was so
19 elementary, you did not have any case law? Were you
20 prepared to make that motion?

21 A. Yeah, I was prepared to make the motion based on
22 the fact that every lawyer knows that you need probable
23 cause. Certainly the judge knows, the solicitor, and
24 every lawyer knows that. Every police officer knows
25 that.

JOHNNY E. WATSON, SR - CROSS BY POPE

1 Q. Mr. Watson, if it is so elementary why did -- do
2 you know why you would have been asked for case law?

3 A. Why I was asked for case law? I don't know if the
4 judge asked me for case law. Again, I could use more
5 time to give him some case law but, again, I only had 30
6 days to investigate and develop strategy and try to
7 find -- go over the area and see what I can learn, to see
8 if there are any witnesses available.

9 Q. Okay.

10 A. As I indicated, I certainly wished I had more than
11 30 days.

12 Q. Mr. Watson, do you believe that you met with
13 Mr. Johnson to his satisfaction?

14 A. Probably not. I mean, I -- no lawyer ever meets
15 with clients enough to their satisfaction, but I had met
16 with him as many times as I can. Again, we had about 30
17 days to go to trial.

18 Q. Mr. Watson, my next question is regarding your
19 defensive strategy. Was that defensive strategy ever
20 discussed with Mr. Johnson?

21 A. Of course.

22 Q. Do you feel that he had knowledge of what you would
23 be doing during the trial?

24 A. Yes.

25 Q. Okay. So it's your testimony that you all did

JOHNNY E. WATSON, SR - CROSS BY POPE

1 discuss these things during your appointments with him?

2 A. Yeah. I mean, that's the whole point of preparing
3 for trial. I met with him three or four times. We're
4 getting ready for trial. I feel I informed him that the
5 solicitor wouldn't continue the case to allow me more
6 time so we had to get ready.

7 Q. Did you ever present to him the chain of custody
8 documents?

9 A. I don't know that we specifically went into that
10 but, again, my strategy was it wasn't important. If it's
11 not his drugs, I don't care who handled it.

12 Q. Well, what exactly was your defensive strategy in
13 this case?

14 A. My defensive strategy is that the State could not
15 show that the drugs were his.

16 Q. Now there are some times during this trial,
17 Mr. Johnson -- Mr. Watson, that you made some allegations
18 regarding some possible planting or misconduct; is that
19 correct?

20 A. Came straight out of the mouth of the officer.

21 Q. Okay. But that being said, was that considered an
22 alternative defense strategy?

23 A. What do you mean?

24 Q. What I mean is you testified that your strategy was
25 that the bag was not his.

JOHNNY E. WATSON, SR - CROSS BY POPE

1 A. Right.

2 Q. However, there are -- in your closing, you do
3 mention that perhaps there are three scenarios; is that
4 correct? Do you remember that closing?

5 A. I don't remember. I remember closing. I haven't
6 reviewed the transcript.

7 MS. POPE: Your Honor, may I approach?

8 THE COURT: What page are you on?

9 MS. POPE: I'm sorry, Your Honor. I am on
10 page 364 and 365.

11 THE COURT: Okay.

12 MS. POPE: I beg your indulgence, Your
13 Honor.

14 Q. Okay. Mr. Watson, on page 365, can you read -- can
15 you read line 13 through 15?

16 A. Thirteen through 15. "If the police officers
17 stopped my client on that day, and he had in his
18 possession 200 grams of cocaine, clearly he possessed it.
19 If it is in his hand and the officer caught it in his
20 hand, the case is over so there would not be" -- okay.

21 Q. I'm sorry?

22 A. The case is over. Okay.

23 Q. Mr. Watson, now can you tell us what your point was
24 in saying that argument during that closing?

25 A. I don't know. I'd have to put myself in the

JOHNNY E. WATSON, SR - CROSS BY POPE

1 moment, you know. I'm responding to things that are
2 happening in trial. This is a case -- it had to be about
3 constructive possession because no one ever put the drugs
4 in his hand. So there's no actual possession.

5 Q. Yes, sir. And as you testified before, that was
6 really your main strategy; is that correct?

7 A. Correct.

8 Q. Okay. Can you turn with me to page 366 line 15,
9 lines 15 through 18?

10 A. Okay. It says: "There are really only three
11 possibilities as to how this bag with the 200,
12 approximately 250 grams of cocaine, there are only three
13 possibilities as to why that bag was here."

14 Q. Okay. And that's a part of your closing as well,
15 Mr. Watson; is that correct?

16 A. Correct.

17 Q. And during that closing, you did give three
18 possibilities; is that correct?

19 A. If the transcript reflects that.

20 MS. POPE: May I refresh, Your Honor?

21 THE COURT: Sure.

22 BY MS. POPE:

23 Q. Okay. Line 19 through 20.

24 A. Nineteen. "Well, one possibility is that the bag
25 in fact belonged to my client Mr. Johnson. And therefore

JOHNNY E. WATSON, SR - CROSS BY POPE

1 you find him guilty. I'm not going to come back and tell
2 you why. That's not the case."

3 Q. All right. Now, on page 367, can you read for me
4 lines two through seven?

5 A. Two: "Because there's an inference that the drugs
6 possibly could have been put there by the sheriff's
7 department. I am not saying it is. I have no proof that
8 it is and I don't want anybody running out there saying
9 that Attorney Watson said that North Augusta Police
10 Department planted drugs. I'm only saying that it's a
11 real possibility because the officer raised that
12 possibility himself."

13 Q. All right. Thank you.

14 Now, Mr. Watson, during that closing you did
15 establish that the officer did raise some -- or did have
16 some questionable testimony; is that correct?

17 A. Right. The officer indicated that if he didn't
18 claim the drugs, everything they found in the area
19 they're going to put on him.

20 Q. Okay. So just to bring it full circle. The chain
21 of custody -- had there been a flaw in the chain of
22 custody, would that have supported that there was some
23 misconduct?

24 A. If there had been a flaw in the chain of custody.
25 Not necessarily.

JOHNNY E. WATSON, SR - CROSS BY POPE

1 Q. Would it have supported more than it would have
2 hurt that theory?

3 A. I don't know. It could go either way, I guess.

4 Q. Okay. All right. Did you object when Exhibit 15
5 was admitted into evidence, the black bag?

6 A. Did I -- I don't recall.

7 But, again, I don't care whether they admitted it
8 or not. At that point I'm sure they'd already put on a
9 case that it was his. My whole thing was, yeah, here's a
10 bag. There are drugs in the bag, but it's not my
11 client's bag. Y'all didn't put the bag in my client's
12 hand. So I don't care who handled it.

13 Q. Okay. Mr. Watson, I do want to move onto the
14 objection -- the allegations J and K which state that you
15 failed to make some objections.

16 Now, you testified a few minutes ago that sometimes
17 there are objections that you can make but you choose not
18 to make those; is that correct?

19 A. In every trial, every trial I do, I don't object.
20 I mean, that's my strategy. I don't object a lot.

21 Okay. If it's not hurting my client in my opinion, I'm
22 not going to object, even if it's something I could
23 object to.

24 Q. How do you make the determination as to whether or
25 not that is hurting your client?

1 A. Thirty-three years of experience.

2 Q. So there's no real science to it?

3 A. No, no.

4 Q. All right, Mr. Watson.

5 Beg the Court's indulgence, Your Honor. (Pause.)

6 Mr. Watson, just for the record, did my office
7 request from you a copy of your file in this matter?

8 A. Yes, you did. Several times. I tried finding it
9 and I couldn't find it. I've moved my home and my
10 office. You called me several times requesting that
11 file.

12 Q. Thank you, Mr. Watson.

13 Those are all the questions that I have, Your
14 Honor.

15 THE COURT: All right. Mr. Gourley?

16 MR. GOURLEY: I have no further questions,
17 Your Honor.

18 THE COURT: All right. Mr. Watson, you may
19 step down.

20 THE WITNESS: Thank you.

21 MR. GOURLEY: The State has no additional
22 witnesses, Your Honor.

23 THE COURT: All right. Now, unless anybody
24 would like a brief closing, I think I have a good
25 grasp of the issues. But I'll entertain closing

1 if anybody wants to do a closing, very briefly.

2 MS. POPE: Yes, Your Honor. Just a brief
3 closing on behalf of my client.

4 THE COURT: Sure.

5 MS. POPE: I do -- again, I do think that
6 my client is entitled to some type of post-
7 conviction relief.

8 Mr. Watson has openly admitted in both his
9 appeal and in open court that there was an
10 inadequate amount of time to prepare for a trial
11 of this magnitude.

12 Your Honor, he has also admitted that he
13 does not make every objection that is required of
14 him.

15 I think that the Court should also note
16 that there were some alternative defensive
17 strategies located within his closing argument.
18 And for that reason the chain of custody and the
19 lack of the fingerprint analysis was imperative
20 to my client's case.

21 And it is his belief and my belief that
22 there would have been a different outcome at this
23 trial if some of those objections had been made
24 as well as some of that documentation had been
25 requested.

1 THE COURT: All right.

2 MS. POPE: Thank you, Your Honor.

3 THE COURT: Thank you very much. All
4 right.

5 I have reviewed this entire transcript.
6 I've looked at the application for PCR as well as
7 the return and listened very carefully during the
8 arguments. I want to say at the outset,
9 Ms. Pope, I know you asked for a continuance that
10 I denied. And I want to compliment you on how
11 well prepared you were to go forward with this
12 hearing.

13 The decision of the Court is to deny this
14 PCR. I ask Mr. Gourley to prepare the order
15 within 30 days. I'm going to go through and make
16 some factual findings as to each of the
17 allegations.

18 With regard to Mr. Johnson's ineffective
19 assistance of counsel claims. The first was that
20 Mr. Watson was -- had failed to prepare for
21 trial, that Mr. Johnson wanted Mr. Watson to
22 investigate into the officers' possible
23 corruption.

24 The testimony from defense counsel and the
25 record reflects that he was well prepared to try

1 this case. Although Mr. Watson testified that he
2 could have always used additional time, he
3 certainly was well prepared during trial.

4 He did raise the officers' possible
5 corruption throughout the trial. That was, in
6 fact, one of the main strategies was focusing on
7 that recorded statement from the officer saying
8 that anything he found would be put on
9 Mr. Johnson. And so Mr. Watson was well prepared
10 for trial. And I find that his performance was
11 not deficient.

12 With regard to the allegation that
13 Mr. Watson should have requested a continuance.
14 I find that defense counsel's testimony was
15 credible, that he did ask for additional time
16 although it was off the record and that that
17 request was denied. And, again, I reiterate that
18 Mr. Watson was well prepared for trial and so
19 there was in any event no prejudice. So, number
20 one, he was not deficient because he did ask for
21 a continuance and, number two, there was no
22 prejudice.

23 With regard to the allegation that Mr. Watson
24 failed to provide case law with his pretrial motion on
25 probable cause. Again, this was not deficient

1 performance. Mr. Watson was arguing for his client.
2 Mr. Johnson said that if there was no case law then
3 perhaps Mr. Watson should not have antagonized the judge
4 by making this motion.

5 But certainly it's not deficient to argue a perhaps
6 novel issue. Although probable cause isn't a novel
7 issue, the issue that was specifically argued about the
8 lack of a traffic ticket was perhaps something that there
9 was no specific case law on but the general law on
10 probable cause would support that motion and make it a
11 non-frivolous motion.

12 With regard to the chain of custody. I listened
13 real carefully and looked carefully at the arguments on
14 this. The chain of custody has to do with the black bag,
15 not the drugs necessarily found in this black bag. And
16 the argument was about Exhibit 15. And Exhibit 15 was
17 the black bag.

18 So, as a threshold matter a black bag is a
19 non-fungible item and chain of custody isn't required for
20 non-fungible items. Furthermore, as Mr. Watson
21 testified, his strategy was to say that there was no
22 connection between his client and the black bag, not that
23 the officers in some way mishandled the black bag once it
24 got into their custody. So there's no deficient
25 performance. It was a strategic decision not to object.

1 And, again, with regard to a black bag, that's a
2 non-fungible item. There is no chain of custody
3 requirement.

4 With regard to the allegation that defense counsel
5 should have objected because they had not been provided
6 with a fingerprint results. The fingerprint results, as
7 was testified by Mr. Johnson himself and defense counsel,
8 actually was very helpful to his case. His fingerprints
9 were not found on the black bag.

10 And, again, when it's helpful to your case although
11 there could have been perhaps another angle defense
12 counsel could have taken in hindsight to argue that lack
13 of fingerprints may have supported his strategy regarding
14 the police corruption, defense attorneys are not supposed
15 to be omniscient. In hindsight perhaps we would all do
16 things differently, but certainly the decision to allow
17 that testimony to come in to show that his client's
18 fingerprints were not on the bag was a reasonable
19 strategy to employ.

20 With regard to the jury charge arguments. One of
21 the allegations is that there should have been a jury
22 charge that trafficking is an enhanced possession
23 charge. As we all know it's not for the jury to decide
24 the sentence or punishment. So there's no reason for
25 such a charge to be given.

1 With regard to the circumstantial evidence charge.
2 Mr. Johnson is arguing that Judge Early should have
3 stated that circumstantial evidence is not enough. Well
4 that's not the law. Judge Early's charge on the law was
5 the current and correct law. And so it was not deficient
6 obviously for the defense attorney to object when the
7 jury instruction was correct.

8 With regard to the allegation that a mere presence
9 charge should have been given. In fact, that charge was
10 given on page 421 of the record, lines 19 through 22.

11 With regard to the allegations about defense
12 attorney's failure to object during closing. Mr. Watson
13 did object at one point during closing. Judge Early
14 understood the objection and ruled on it. There was no
15 further argument that was necessary.

16 And as Mr. Watson testified to, the other points at
17 which his client wishes that he would have objected he
18 did not believe those were actually hurting his client.
19 And it was a strategic decision that he used not to
20 object and he made that strategic decision with his 33
21 years of experience.

22 The after-discovered evidence allegation has been
23 withdrawn. There was no evidence to support -- there was
24 no, nothing that supported that allegation anyway as
25 Mr. Johnson recognized himself.

1 Although not raised in the petition, I think it was
2 fairly raised during the testimony. There was, it seemed
3 to be, an allegation of ineffective assistance of
4 Appellate counsel. Of course, that's not on Mr. Watson
5 who properly filed and served the notice of appeal and
6 then Appellate Defense took over. Appellate Defense
7 filed an Anders brief and as Mr. Gourley pointed out, the
8 Defendant was allowed to raise all the issues he thought
9 should have been raised on appeal in his pro se brief.

10 In addition to that, the Anders procedure that's
11 used in our State also gave him the added protection of
12 the Court of Appeals' judges scouring through the record
13 and would have asked Appellate Defense to brief any issue
14 that might have been raised. And so there was no
15 evidence of deficient performance of Appellate counsel.

16 I believe that addresses each of the allegations
17 raised but if there is something that I missed, I ask
18 that you bring it up to me now.

19 And this is not a time to raise additional issues.
20 This is just as to the issues that you raised to me
21 today. Is there anything that I have not ruled on,
22 Mr. Gourley?

23 MR. GOURLEY: None that I'm aware of, Your
24 Honor.

25 THE COURT: Ms. Pope?

1 MS. POPE: None that I'm aware of, Your
2 Honor.

3 THE COURT: All right. Thank you very much

4 MR. GOURLEY: Thank you, Judge.

5 END OF PROCEEDINGS: 12:34 P.M.

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1 CERTIFICATE OF REPORTER

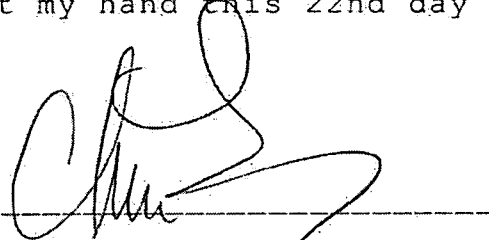
2 STATE OF SOUTH CAROLINA)

3 COUNTY OF AIKEN)

4 I, Cheri L. Young, Registered Professional Reporter
5 and Official Court Reporter for the State of South
6 Carolina, Second Circuit-At Large, do hereby certify that
7 the foregoing proceedings were written stenographically
8 by me using computer-aided translation; further, that the
9 foregoing is a true, accurate and complete record, to the
10 best of my skill and ability, of all the proceedings had
11 and evidence introduced in the hearing of the captioned
12 case, relative to appeal, in the Court of Common Pleas
13 for Aiken, on the 21st day of May, 2015.

14 I do further certify that I am neither of kin,
15 counsel, nor interest to any party hereto.

16 I have hereunder set my hand this 22nd day of
17 November, 2015.

18
19 

20 Cheri L. Young, RPR
21 Official Court Reporter
22
23
24
25

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS)
FOR THE SECOND JUDICIAL CIRCUIT)

Trevis Eugene Johnson, #251600,)

Case No. 2012-CP-02-02248)

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on September 6, 2012. Respondent filed an amended return on July 10, 2014. An evidentiary hearing was convened on May 21, 2015, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Courtney Pope, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

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 of the Aiken County Clerk of Court. The Applicant was true bill indicted at the April 2008 term of the Aiken County Grand Jury for Trafficking in Cocaine, Morphine, Opium, Salt, Isomer, Salt of an Isomer or Heroin, >200 g <400 g (2008-GS-02-0522) and Possession with Intent to Distribute Cocaine within the Proximity of a School (2008-GS-02-0523). Johnny Watson, Sr., Esquire, represented him. On March 17-19, 2009, Applicant proceeded to a jury trial before the Honorable Doyet A.

Early, III. On March 19, 2009, Applicant was found guilty of Trafficking Cocaine more than

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

10 day of July, 2015
Liz Godard
C.C.P. & G.S., Aiken County, S.C.
DAN BACCIO

FILED *July 15 2015*
Liz Godard
C.C.P. & G.S.
Dan Baccio
17:20PM

200 grams less than 400 grams and not guilty of Possession with Intent to Distribute Cocaine within the Proximity of a School. Judge Early sentenced Applicant to twenty-five years' imprisonment and a \$100,000.00 fine.

Applicant appealed his convictions, and an appeal was perfected. The South Carolina Court of Appeals dismissed the appeal. State v. Trevis Eugene Johnson, 2012-UP-244 (S.C. Ct. App. filed April 25, 2012). The Remittitur was issued on May 15, 2012.

ALLEGATIONS

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

1. Ineffective assistance of counsel
 - a. "failure to prepare for trial"
 - b. "failure to request a continuance"
 - c. "failure to provide case law that establishes probable cause precedent"
 - d. "failure to request chain of custody documents associated with presented evidence (i.e. the black bag [state's exhibit 15])"
 - e. "failure to object to state's exhibit 15 being admitted into evidence with no valid chain of custody documents"
 - f. "failure to object to defense not being provided with fingerprint results before, during, or after trial"
 - g. "failure to request that the jury be charged that trafficking is an enhanced possession charge"
 - h. "failure to request that the jury be charged that S.C. law prescribes that circumstantial evidence is not enough to convict on a charge of possession without more"
 - i. "failure to request a mere presence instruction"
 - j. "failure to object to solicitor's statement that jury should disregard statements made by officers that implies intent to frame defendant"
 - k. "failure to object to argument that misled the jury as to what evidence was presented (i.e. "if I could blow this up you would see that this is the bag" and "if we did do a DNA test they might have found some - whose DNA might they have found? Well, Mr. Johnson's first of all.")"
2. "Evidence discovered after trial."
 - a. "Evidence discovered after trial (mishandled evidence)."

During the evidentiary hearing Applicant stated that he wanted to abandon the allegation of newly discovered evidence.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from Johnny Watson, Sr., Esquire. (hereinafter "Trial Counsel"). This Court also had before it a copy of the trial transcript, the Aiken County Clerk of Court records, Applicant's South Carolina Department of Correction records, appellate records, the PCR application, and return.

At the beginning of the evidentiary hearing, PCR Counsel moved for a continuance. This matter had previously been continued from the January 2015 term of court, and this court denied the motion.

During the evidentiary hearing, Applicant testified that he was charged in December 2007 with trafficking cocaine 200-400 grams and possession with intent to distribute cocaine within ½ mile of a school or park. Applicant stated his trial was in March 2009. Applicant stated he was initially represented by Christopher Hart, but he retained Trial Counsel about a month before trial. Applicant stated he met with Trial Counsel approximately four times prior to trial. Applicant stated the meetings lasted an average of forty-five minutes, and in Applicant's opinion, he did not have enough time to meet with Trial Counsel prior to his trial.

Applicant stated he told Trial Counsel his version of events. Specifically, Applicant stated that he did not own or ever possess cocaine. Applicant stated fingerprint evidence would have shown that he did not touch the bag. Applicant stated Trial Counsel should have requested a continuance to investigate into alleged misconduct by the police officers involved in the case.

Applicant also complained about the way in which Trial Counsel handled a motion to suppress the arrest warrant. During the motion hearing, Trial Counsel argued that Applicant was never cited for speeding, which was the basis for the stop, and therefore the officers did not have probable cause. Applicant stated Trial Counsel did not have case law to cite to the trial judge and that Trial Counsel antagonized the judge by filing a motion without supporting case law.

Applicant also stated that Trial Counsel failed to review chain of custody documents with him prior to trial regarding the black bag. Applicant expressed concerns that Investigator Turner claimed to have he never handled the black bag, yet Clay Adams testified that he received the bag from Investigator Turner. Applicant stated that either Investigator Turner or Clay Adams was lying. However, on cross-examination, Applicant conceded that Investigator Turner testified that he gave Clay Adams the black bag for fingerprint analysis. Applicant believed the bag should not have been introduced due to the lack of chain of custody.

Additionally, Applicant stated Trial Counsel failed to provide him with fingerprint evidence and that he and Trial Counsel never discussed using the lack of fingerprint evidence as a theory of defense. Applicant complained that Trial Counsel should have objected to testimony that indicated there were no fingerprints on the bag.

Applicant also stated Trial Counsel was ineffective for failing to request a mere presence jury charge and for failing to request a charge that trafficking is an enhanced possession. However, on cross-examination, Applicant conceded that the trial court charged the jury on mere presence. Applicant further stated Trial Counsel should have objected to the solicitor's closing argument requesting that the jury disregard the officer's comments about pinning all drugs found in the area on Applicant. However, on cross-examination, Applicant conceded that Trial Counsel did object to various portions of the solicitor's closing arguments. Applicant stated

Trial Counsel failed to object to solicitor's closing argument that vouched for the canine officer, Fila. Specifically, Applicant stated the solicitor told the jury that Fila did not know Applicant nor had she seen the black bag containing the drugs. Applicant further stated Trial Counsel should have objected to solicitor's closing argument where she argued that had DNA been tested then it would have come back as a match to Applicant. However, on cross-examination, Applicant conceded that Trial Counsel had objected to the solicitor's argument and was overruled by the trial judge.

Applicant stated that Appellate Counsel filed an Anders brief. Applicant stated that he was given an opportunity to raise any additional allegations that he wanted the Court of Appeals to review. Applicant stated he did file a *pro-se* response raising additional issues, but could not specifically recall which issues he raised.

Following Applicant's testimony, Trial Counsel was called to testify by the State. Trial Counsel stated that he has been practicing law since 1983 and that he has tried multiple drug cases. Trial Counsel stated that he filed for and reviewed all Rule 5 and Brady material with Applicant. Trial Counsel could not recall whether the discovery material contained the chain of custody. However, Trial Counsel stated that the chain of custody was not an issue in this case because Applicant claimed he never possessed the bag. Trial Counsel stated he requested a continuance and it was denied. Trial Counsel stated that he could always use more time to prepare a case, but the Solicitor was adamant that the case go forward. Trial Counsel stated he met with Applicant at least four separate times. Trial Counsel stated he investigated the scene and visited the shed where the drugs were found.

Trial Counsel stated that he did not feel it was necessary to provide case law on probable cause to the trial judge during the motion to suppress because he was relying on basic principles

of probable cause. Trial Counsel stated he attempted to suppress the drugs due to a lack of probable cause because Applicant was never cited for speeding. According to Trial Counsel, he was prepared to make the motion.

Trial Counsel stated that he discussed trial strategy with Applicant prior to trial. Specifically, Trial Counsel stated it was his strategy to argue that the State could not prove that the drugs were Applicant's.

Trial Counsel stated he investigated into the police misconduct, and during the trial, counsel continually brought up the officer's statement that the police were going to pin any drugs found in the area on the Applicant. Trial Counsel stated that he thoroughly cross-examined the officers regarding any alleged misconduct. Trial Counsel further stated that he researched the drug dog issue and felt he cross-examined the officers regarding the "open air sniff" technique employed in Applicant's case.

Trial Counsel stated that the lack of fingerprint evidence helped Applicant's case. Trial Counsel stated he continuously argued to the jury that the Applicant's fingerprints were not found on the black bag that he had allegedly possessed. However, Trial Counsel pointed out that Applicant's case was deficient because Applicant was on video holding a black bag.

Trial Counsel stated that he was unaware of any case law regarding a jury charge for enhanced possession. Trial Counsel stated that his strategy is not to continually object during solicitor's closing argument, and he will object only when he believes the solicitor says something that could potentially be damaging. Trial Counsel further pointed out that the trial judge instructed the jury that opening/closing arguments are not evidence.

Trial Counsel stated that he made a constructive possession argument because no one could place the drugs in the Applicant's hands. Trial Counsel stated the Solicitor offered

Applicant a twenty-year plea offer prior to the start of trial; however, Applicant refused to accept the plea deal. Trial Counsel stated he filed a notice of appeal as requested by Applicant.

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. 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 TRIAL COUNSEL

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 (1985).

The proper measure of performance is whether the 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 (1985). The 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.

Counsel was prepared for trial

Applicant argues that he received ineffective assistance of counsel because Trial Counsel failed to adequately prepare for trial. I disagree. Applicant argued that Trial Counsel should have investigated into the police misconduct.

However, Applicant's bare assertion that Trial Counsel failed to investigate his case - without more - is insufficient to meet his burden of proof. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."); See also Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

Furthermore, Trial Counsel credibly testified that he met with Applicant at least four separate times he reviewed the scene, he reviewed the discovery material, and he discussed trial strategy with Applicant prior to trial. The trial transcript reveals that Trial Counsel vigorously cross-examined the police officers about their alleged misconduct, and during closing, Trial Counsel argued that there was police misconduct. (Tr. p. 366-367). Accordingly, Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test - that Trial

Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions that prejudiced the Applicant and therefore failed to prove the second prong of Strickland as well.

Continuance

Applicant next argues allegation that he received ineffective assistance of counsel due to trial counsel's failure to request a continuance. I disagree.

Trial Counsel credibly testified that he requested a continuance off the record and the continuance was denied. The grant or denial of a continuance is in the sound discretion of the trial court, and the reversal of a trial court's denial of a continuance is "as rare as the proverbial hen's teeth." State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51-52 (1996). Accordingly, Trial Counsel was not deficient for failing to seek a continuance on the record, and even if he was, Applicant was not prejudiced.

Trial Counsel was prepared for the motion to suppress

Applicant argues that Trial Counsel was ineffective for failing to provide the judge with case law on probable cause during the motion to suppress. I disagree.

At the PCR hearing, Applicant failed to present any case law or arguments in support of his allegation. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Accordingly, Applicant has failed to present specific and compelling evidence that he was prejudiced by Trial Counsel's performance.

Chain of Custody

Applicant argues that he received ineffective assistance of counsel because Trial Counsel did not object to the chain of custody regarding the black bag. I disagree.

As an initial matter, Applicant's allegation that the chain of custody was broken because Phillip Turner never testified that he gave the black bag to Clay Adams is factually inaccurate. Phillip Turner testified that he "signed the black bag out of evidence and took it directly to Lieutenant Adams," (Tr. t. p. 328 lines 4-11). Furthermore, the black bag is a non-fungible item which does not require strict a chain of custody. See State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741-42 (2005) ("While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence—that is, evidence that is unique and identifiable—the establishment of a strict chain of custody is not required: If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition."). Accordingly, Trial Counsel's performance was neither deficient nor prejudicial.

Fingerprint Evidence

Applicant next argues that Trial Counsel was ineffective for failing to object to the lack of fingerprint evidence found on the black bag. I disagree.

Trial Counsel testified it was his strategy to argue that the lack of Applicant's fingerprints on the black bag meant he never possessed the bag. Trial Counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore,

judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Here, Trial Counsel's strategy was reasonable. Accordingly, Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms.

Jury Charge.

Applicant argues that Trial Counsel was ineffective for failing to object to the trial court's charge on trafficking as an enhanced possession and circumstantial evidence charge. Applicant further argues that Trial Counsel should have requested a mere presence charge. The trial court's jury charge reflects the current and correct law and included a charge on mere presence. (Tr. t. p. 421 lines 9-22). Accordingly, Applicant has failed to present sufficient evidence to prove trial counsel's representation was deficient.

Closing Arguments.

Finally, Applicant argues Trial Counsel was ineffective for failing to object when the solicitor argued at closing that Applicant's DNA would have been found on the black bag had a DNA test been conducted. I disagree. Trial Counsel objected to this argument and his objection was overruled. (Tr. p. 402, line 23-p. 403, line 5). To the extent Applicant argues that Trial Counsel should have continued to object, I find that counsel articulated a valid strategic reason

for not doing so (futility and a desire not to draw more attention to the argument). See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996) (explaining that where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective).

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.

[signature to follow]

CONCLUSION


Based on the foregoing, this Court finds that the 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 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), SCRCR, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant is remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 30th day of June, 2015.


 TANYA A. GEE
 Presiding Judge
 Second Judicial Circuit

Columbia, South Carolina

DOCKET NO. 2008-GS-02. 522

The State of South Carolina
County of Aiken

COURT OF GENERAL SESSIONS

APRIL 21, TERM 2008

THE STATE
vs.

TREVIS EUGENE JOHNSON

Indictment for

TRAFFICKING IN COCAINE MORPHINE, OPIUM,
SALT, ISOMER, SALT OF AN ISOMER OR
HEROIN >200GM <400GM

SC Code: 44-53-370(e)(7)(d)
CDR Code: 0228
Class FELONY(V)

WITNESSES

R.A. FITZROY, N.A.D.P.S.

FILED April 17 2008

Sp. Foreman

Deputy Clerk
(Deputy Clerk)

ARREST WARRANT NUMBER

H-738948

ACTION OF GRAND JURY

Paul Bill

Foreperson of Grand Jury
Date: April 17, 2008

VERDICT

Guilty
3. 19. 08

Foreperson of Petit Jury
Date:

DOCKET NO. 2008-GS-02- 523

The State of South Carolina
County of Aiken

COURT OF GENERAL SESSIONS

APRIL 21, TERM 2008

THE STATE
vs.

TREVIS EUGENE JOHNSON

Indictment for

POSSESSION WITH INTENT TO
DISTRIBUTE COCAINE WITHIN
PROXIMITY OF A SCHOOL

SC Code: 44-53-445(B)(1)
CDR Code: 0107
Class: FEL/F

WITNESSES

R.A. FITZROY, N.A.D.P.S.

TITLED April 17 2008

[Signature]

[Signature]

[Signature]

[Signature]

ARREST WARRANT NUMBER

H-738949

ACTION OF GRAND JURY

[Signature]

[Signature]

Foreperson of Grand Jury

Date: April 17, 2008

VERDICT

Not Guilty

[Signature]

3-19-09

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

INDICTMENT

At a Court of General Sessions, convened on April 21, 2008, the Grand Jurors of Aiken County present upon their oath:

POSSESSION WITH INTENT TO DISTRIBUTE COCAINE WITHIN
PROXIMITY OF A SCHOOL

That TREVIS EUGENE JOHNSON did in Aiken County on or about December 18, 2007, knowingly or intentionally possess with intent to distribute a controlled substance, to wit: Cocaine, a controlled substance under provisions of §44-53-110, et seq, Code of Laws of South Carolina (1976), as amended, such possession not having been authorized by law. while in, on, or within a one-half mile radius of the grounds of a public or middle school, to wit: North Augusta Middle School.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


BARBARA R. MORGAN, SOLICITOR