THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Oconee County Court
of Common Pleas
Brooks P. Goldsmith, Presiding Judge

Case No. 2013-CP-37-0272

James Tinsley, ... Appellant,

vs.

State of South Carolina, . . . Respondent.

NOTICE OF APPEAL

James Tinsley hereby appeals the Final order of Dismissal of the Honorable Brooks P. Goldsmith, dated June 21, 2016; Filed July 1, 2016 and received by Appellant on July 5, 2016.

This is an appeal of a post-conviction case in which the lower courts decision was not supported by any evidence of probative value; was contrary to prior case law; and

failed to address all of Applicants claims and Federal Constitutional Issues. Applicant Filed a Motion to Alter or Amend the courts errors but the court has failed to take Appellants claims seriously and has neglected to address the Remaining issues overlooked in its prior decision,

July 5, 2016

s/ James Douglas Tinsley IV
James Tinsley
1004 South Welcome Rd.
Greenville, SC 29611

CERTIFICATE OF SERVICE

I, James Tinsley did serve the lower court and counsel of record this 5th day of July, 2016, by placing a true and correct copy of this document in the U.S. mail, with proper postage affixed thereto and addressed as follows;

Oconee County Clerk
P.O. Box 678
Walhalla, S.C. 29691

S.C. Attorney General
P.O. Box 11549
Columbia, S.C. 29211

s/ James Douglas Tinsley
James O. Tinsley

STATE OF SOUTH CAROLINA COUNTY OF OCONEE	)	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT
James Tinsley, #171943, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2013-CP-37-0272 **ORDER**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 4, 2013. An evidentiary hearing was convened on February 10, 2016, at the Anderson County Courthouse. The Applicant was present and proceeded *pro se*. The Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office. The Court denied relief by an order dated May 10, 2016, and filed May 16, 2016. Applicant subsequently filed a motion on May 26, 2016, asking the Court to reconsider the findings of fact and conclusions of law contained in the order of dismissal. Respondent made its return to the motion, requesting this motion be denied.

[*Signature follows*]

Based upon careful reconsideration of the evidence in this case, including Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend its judgment. This Court further finds oral argument would not aid in the reconsideration of the original judgment. The Order of Dismissal issued by this Court contains the required findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2016) and Rule 52(a) of the South Carolina Rules of Civil Procedure.

IT IS THEREFORE ORDERED that Applicant's motion be denied and dismissed.

AND IT IS SO ORDERED this 21 day of June, 2016.

BROOKS P. GOLDSMITH
Presiding Judge
Tenth Judicial Circuit

_____, South Carolina

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CLERK OF COURT
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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF OCONEE)	FOR THE TENTH JUDICIAL CIRCUIT
)	
)	
James Tinsley,)	C.A. No. 2013-CP-37-0272
S.C.D.C. No. 171943,)	
)	
Applicant,)	**ORDER OF DISMISSAL**
)	
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	
)	

PROCEDURAL HISTORY

Applicant is presently confined in the Department of Corrections pursuant to orders from the Oconee County Clerk of Court. Applicant was indicted by the Oconee Grand Jury for Receiving, Possessing, Concealing, Selling, or Disposing of a Stolen Vehicle over $5,000 pursuant to S.C. Code §16-21-80(30) (2008-GS39-881), and four counts of Receiving Stolen Goods over $5,000 (2008-GS-39-882 through 885). Applicant was tried before a jury, representing himself *pro se*, and found guilty as charged. After consolidating indictments 882 through 884, Judge Nicholson sentenced Applicant to ten years imprisonment suspended on service of seven years and five years probation for both the consolidated indictment and the stolen vehicle indictment, and five years imprisonment suspended to five years probation on the remaining indictment. The sentences were to be served consecutively. Judge Nicholson made restitution to various victims a condition of probation.

A timely notice of appeal was filed and perfected by Tristan Shaffer, Esq., of the Office of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion. State v. James Douglas Tinsley, (2012-UP-321, filed

May 30 2012). A pro se petition for writ of certiorari was filed at the South Carolina Supreme Court on October 2, 2012. The South Carolina Supreme Court denied certiorari from his direct appeal on February 6, 2014. The Remittitur was issued on February 18, 2014.

While his direct appeal was pending, Applicant filed an application for post-conviction relief on April 4, 2013. Respondent filed its Return and Motion to Dismiss without prejudice on or about July 23, 2013. Thereafter, on September 13, 2013, the Honorable Alexander Macaulay issued a conditional order dismissing the application without prejudice, filed September 30, 2013. Applicant's appeal was subsequently dismissed, and the State withdrew its request to dismiss the application.[1] An evidentiary hearing was convened into the matter on February 10, 2016. Applicant was present proceeded *pro se*.[2] Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf. Applicant's plea counsel also testified.

At the outset of the hearing, Applicant made a motion for summary judgment. That motion was denied. Respondent subsequently moved for partial summary judgment on two issues. The Court granted Respondent's motion, and summarily dismissed Applicant's allegations that 1) his sentence was disparate from his co-defendant as a result of the trial judge's vindictiveness; and 2) that defects in his indictment violated his Due Process rights. Applicant subsequently filed an objection and motion for reconsideration on these issues. Respondent filed its Return.

Following testimony, the Court directed parties to submit written memoranda summarizing arguments presented at the evidentiary hearing.

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[1] In the interim, Applicant also filed an application on February 16, 2014 (2014-CP-37-0737). That application was merged into the present proceeding and dismissed by the Honorable J. Cordell Maddox in a written order signed December 1, 2015, and filed December 10, 2015.

[2] Applicant's appointed counsel, Hugh Welborn, Esquire, was relieved via written order filed March 14, 2016.

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 guilty plea, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court makes the following findings of fact based upon all of the probative evidence presented.

APPLICANT'S BURDEN

In a PCR action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983).

DISCUSSION

Ineffective Assistance of Appellate Counsel

Applicant's first allegation is one of ineffective assistance of appellate counsel. A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999).

To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id., *citing* Evitts, 469 U.S. 387, 105 S.Ct. 830 (1999). Appellate

counsel is not required to raise every nonfrivolous issue that is presented by the record,[3] but instead has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983).

"For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy...." Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (*quoting* Jones v. Barnes, 463 U.S. 745, 754, 103 S.Ct. 3308 (1983)); see also Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985) (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).

When a claim of ineffective assistance of appellate 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. Applicant has failed to meet his burden with respect to each of his allegations.

a. Failure to argue the trial judge erred in refusing to charge the jury on the distinction between larceny and receiving stolen goods, where if the jury found Applicant was the thief who stole the goods, the jury must find him not guilty of the indicted offense.

This Court finds appellate counsel was not ineffective for failing to raise this issue. First, it was not adequately preserved for appeal. An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review. State v. Nichols, 325 S.C. 111, 120-21, 481 S.E.2d 118, 123 (1997). Where an objection and the ground therefore is not stated in the record, there is no basis for appellate review. State v. Morris, 307

[3] Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990).

S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991). Moreover, the Supreme Court has held that a jury charge must be requested or objected to on the record in order to remain preserved for appeal, *even if* a proposed charge was submitted to the trial court in writing. See Whipple v. State, 324 S.C. 43, 476 S.E.2d 683 (1996).[4]

Applicant did not, at any point on the record, ask the trial judge to make the requested charge. Accordingly, this Court finds counsel could have reasonably decided that focusing in on an issue that was not properly preserved was not the best route to getting Applicant's conviction overturned. Applicant has therefore failed to meet his burden to overcome the "strong presumption that counsel rendered effective assistance" with respect to this allegation. This allegation is therefore be denied and dismissed.

b. Failure to argue the trial judge erred in refusing to charge the jury with "mere presence" and "abandonment."

The trial judge explained at trial that his reasoning for declining to charge abandonment was that there was no testimony that would indicate any abandonment. Trial Tr., p. 335. This Court finds the trial judge's ruling was correct, and that there was no basis for appealing this issue.

With respect to a jury charge on "mere presence," Applicant abandoned that issue at trial. While the trial court initially seemed resistant to charging the jury on mere presence, it eventually conceded that it may have "misunderstood the issue." Trial Tr., p. 338. Rather than continue to press his argument, however, Applicant withdrew his request to have mere presence charged:

> "If it's complicated, would it be all right that I be allowed to argue constructive possession and mere presence to the jury **and just your other charge cover the rest of it**?"

[4] See also State v. Johnson, 333 S.C. 62, 64, n.1, 508 S.E.2d 29, 30, n.1 (1998) (clarifying the issue preservation requirements addressed in Whipple, supra).

Trial Tr., p. 338. The trial judge acquiesced, and the issue was resolved. Applicant received what he asked for. C.f., State v. Wilson, 389 S.C. 579, 583-84, 698 S.E.2d 862, 864 (Ct. App. 2010) (finding where party receives favorable ruling in form of curative instruction, no appealable issue absent contemporaneous objection that curative instruction was inadequate; "[o]n the other hand, when an objection has been *overruled*, the objecting party has suffered an adverse ruling which can be appealed without any further allegation of error"); see also State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984)(A party may not complain of an error which his own conduct has induced). Applicant ultimately argued mere presence to the jury during his closing arguments. Trial Tr., p. 347. Accordingly, there was no issue for appeal. This allegation is therefore denied and dismissed.

c. Trial judge erred in failing to grant a continuance or otherwise provide funds for an expert handwriting analysis to dispute the State's surprise evidence.

This Court finds this issue is not a "significant and obvious issue[] on appeal." See Gray v. Greer, supra. The granting or refusal of a motion for continuance is within the discretion of the trial judge and his disposition of such a motion will not be reversed on appeal unless it is shown that there was an abuse of discretion to the prejudice of [the defendant]. State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957). Reversals of a refusal of continuance are about as rare as the proverbial hens' teeth. Id. There is no indication in the record that the trial court abused its discretion in refusing to grant a continuance, particularly where the Applicant's grounds were the pendency of several motions – most of which had been raised right before trial. Trial Tr., p. 11-12.

Nor is there any evidence that the trial court erred in finding Applicant's request for funding for an expert was untimely. The record reflects that Applicant did not file his request

until a mere *ten days* before his trial. Trial Tr. p. 22. Applicant has failed to meet his burden with respect to this allegation. It is therefore denied and dismissed.

d. Trial judge erred in failing to merge all of the indictments into a single offense which violated S.C. Code § 16-13-180, and the multiple convictions and consecutive sentences constitute a double jeopardy violation;

This Court finds there was no error as the indictments alleged sufficient facts to preclude consolidation, and there was evidence presented at trial indicating that Applicant actually received the stolen goods on different days. The relevant statute provides that "the receipt of multiple items in a single transaction or event constitutes a single offense." § 16-13-180(D). Indictments -882, -883, and -884 alleged that on January 22, Applicant received a number of stolen items. Based on those allegations and Applicant's motion, the trial judge merged -882, -883, and -884 into one charge. Trial Tr., p. 332. The trial judge did not merge the remaining two indictments, because they were alleged to have occurred on different days.

Evidence presented at trial supports the multiple indictments. Applicant was observed with a stolen six wheeler on January 30th or "towards the end of January." Trial Tr. p. 140. Stolen four wheelers were seen in Applicant's possession roughly two weeks earlier. Id. The four wheelers were reported stolen on January 15th. Trial Tr. p. 111. One witness, who rented several storage units to Applicant, testified that he saw Applicant photographing "brand-new-looking ATV's" in the storage units on one occasion. Trial Tr., p. 118. He said that a number of trailers came in "at a later time." Trial Tr., p. 119. Darrell Slusser, an RV dealer, testified that he had an RV camper turn up missing December 11. Trial Tr., p. 144. He testified that the camper Applicant had been using was the camper that had been stolen from his lot. Trial Tr., p. 146-47.

Because the State alleged facts sufficient to justify multiple indictments – and there were facts presented at trial from which a jury could reasonably find Applicant received the stolen

items at different times and as part of different events – this Court finds the trial court appropriately denied in part Applicant's motion to consolidate. Accordingly, Applicant has failed to meet his burden to prove appellate counsel was deficient in failing to brief this issue. It is therefore denied and dismissed.

e. Trial judge erred in refusing to conduct an in camera suppression hearing or in failing to allow Applicant an opportunity to present his own evidence in support of his motion.

Applicant has also failed to meet his burden with respect to this allegation. The trial judge heard testimony from law enforcement,[5] and found suppression was not necessary at the conclusion of Officer Smith's testimony. In any event, this Court finds Applicant has failed to make even a threshold demonstration of a legitimate expectation of privacy in connection with the purportedly searched premises – it seems unlikely that Applicant would have been able to prevail on a claim that he had a legitimate privacy interest in an outdoor area owned by a third party. See, e.g., State v. Herring, 387 S.C. 201, 209, n. 4, 692 S.E.2d 490, 494, n. 4 (2009) (What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection); State v. Crane, 296 S.C. 336, 341, 372 S.E.2d 587, 589 ("No property law concept nor societal 'understanding' . . . accords any appellant any expectation of privacy in another individual's woods"). This allegation is therefore be denied and dismissed.

[5] Officer David Smith testified in detail as to what led him to obtain search warrants of Applicant's camper. After obtaining a valid warrant to search Applicant's rented storage unit at another location, Trial Tr., p. 188, law enforcement recovered a number of stolen four wheelers and a stolen trailer, but were still searching for more stolen items. Trial Tr., p. 188-89. Police were then able to intercept Applicant in his vehicle en route to his campsite. Trial Tr., p. 190-91. One of the passengers in Applicant's vehicle, Mr. Boles, informed police that there were trailers and ATVs in Applicant's campsite. Id. Mr. Boles led police to the campsite, where they saw several trailers and ATVs. Trial Tr. p. 192. Law enforcement ran the tags, found they were stolen, and subsequently obtained a search warrant. Trial Tr. p. 192-93.

PROCEEDING *PRO SE*

Ineffective assistance of appellate counsel

Applicant claims that his rights were violated when he was not given standby counsel or access to legal resources leading up to his trial.

Applicant first claims appellate counsel was ineffective for failing to argue his waiver of counsel was rendered involuntary because he did not receive the assistance of standby counsel in the time period leading up to trial. Applicant conceded at the evidentiary hearing that he had the assistance of standby counsel during his actual trial. PCR Tr. p. 76.

The Sixth Amendment does not require a court to grant advisory counsel to a criminal defendant who chooses to exercise his right to self-representation by proceeding *pro se*. United States v. Lawrence, 161 F.3d 250, 253 (4th Cir. 1998). The Fourth Circuit has also noted that lower courts have "broad discretion" to guide what, if any, assistance standby, or advisory, counsel may provide to a defendant conducting his own defense. Id. There is no Sixth Amendment right to hybrid representation. State v. Stucky, 333 S.C. 56, 57, 508 S.E.2d 564, 564 (1998). Moreover, "[a] defendant does not have a constitutional right to choreograph special appearances by counsel." Id.

Applicant's rights were not violated. He made a valid waiver of his right to counsel, as discussed below, and was not entitled to hybrid representation. Further, even *at trial*, Applicant's representations to the judge indicate he was aware that he was not entitled to counsel. He stated:

> "I understand I might not have a right to represent myself and have an attorney, but I believe it's **within the court's discretion** to give me someone who can assist me, getting some of this stuff done."

Trial Tr., p. 10 (emphasis added). Nor did Applicant, at any point, reassert his right to counsel after being denied standby counsel prior to the trial. C.f. State v. Reed, 332 S.C. 35, 44, 503 S.E.2d 747, 751 ("While the right to counsel once waived is no longer absolute, there is a strong presumption that a defendant's post-trial request for the assistance of counsel should not be refused"). In light of the record, including Applicant's representations at trial, this allegation is denied and dismissed.

Valid Waiver

This Court also finds Applicant's waiver was voluntary in light of his background, knowledge of the legal system, performance at trial, and testimony at the evidentiary hearing. It is well-established that a defendant may waive the right to counsel and proceed *pro se*. Dearybury v. State, 367 S.C. 34, 39, 625 S.E.2d 212, 215 (2006) (*citing* Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). Although a defendant's decision to proceed *pro se* may be to the defendant's own detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law." Id. In a PCR action, if the record fails to demonstrate the petitioner made an informed choice to proceed *pro se*, with "eyes open," then the petitioner did not make a knowing and voluntary waiver of counsel and the case should be remanded for a new trial. Watts v. State, 347 S.C. 399, 402-03, 556 S.E.2d 368, 370 (2001).

Absent a specific inquiry by the trial court into the hazards of proceeding *pro se*, reviewing courts must look into the record to determine whether a defendant had sufficient background or was apprised of his rights by some other source. Gardner v. State, 351 S.C. 407, 412, 570 S.E.2d 184, 185 (2002). When determining if an accused has a sufficient background to understand the dangers of self-representation, the courts consider may factors including: (1) the accused's age, educational background, and physical and mental health; (2) whether the

accused as previously involved in criminal trials; (3) whether the accused knew the nature of the charge(s) and of the possible penalties; (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; (5) whether the accused was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether the accused knew of legal challenges he could raise in defense to the charge(s) against him; (9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment. Gardner v. State, 351 S.C. 407, 412-13, 570 S.E.2d 184, 186-87 (2002).

Applicant was between 37 and 38 years old when at trial. The record reflects that he had a tenth grade education, and had been working as a machinist for most of his life. Trial Tr., p. 210. Applicant testified at trial that he had never been treated for alcohol or drug abuse, and had never been treated for mental illness. Id. Applicant testified that he had been examined by a doctor to determine his mental competence to stand trial roughly "15, 16, 17 years ago," and was found competent. Trial Tr., p. 211. Applicant explained at the evidentiary hearing, he clearly has *some* experience in legal matters. Applicant stated that he had been studying the law for roughly twenty (20) years, and had "handled a lot of [his] own cases, civil suits, and things like that." PCR Tr. p. 7. Applicant further testified that he had been conducting legal research in this case. Trial Tr., p. 212. He said that he had been getting his father to "get stuff from the law library and mail to in to [him] at the jail." Id. Applicant testified that he got a previous criminal conviction overturned on post-conviction relief without the assistance of an attorney. Id. Applicant even acknowledged that the fact that Judge Maddox did not give him the specific

warnings of the dangers of representing himself on the record was "not necessarily that big of a deal in this case." PCR Tr. p. 49. He repeatedly emphasized his knowledge and confidence with respect to legal matters: "I think we made it kind of clear that I know a little bit about the law, and so you can go based on my prior knowledge also as to whether or not I would understand what I was waiving." PCR Tr. p. 54. Applicant also conceded at the evidentiary hearing that he was fully aware of the dangers of self-representation at the time of his trial, other than he believed he would receive standby-counsel to assist in research and representation prior to trial. PCR Tr. p. 75. Applicant also appeared to be familiar with the nature of the charges he was being accused of, their potential penalties, as well as a number of possible defenses to them, as evidenced by his use of them at trial. The record reflects that Applicant was represented by counsel before the trial, and that he received the benefit of standby counsel at trial. It does not appear from the record that Applicant was trying to delay or manipulate the proceedings, but rather attempted to represent himself to the best of his abilities. He has continued to represent himself *pro se* in his post-conviction relief proceedings. Clearly Applicant knew he was required to comply with the rules of procedure at trial, as evidenced by the fact that he made motions and objections throughout the course of the proceedings. Similarly, Applicant raised a number of legal challenges during the course of his trial. Applicant moved to suppress evidence pursuant to the Fourth Amendment prohibition on unreasonable searches and seizures. Trial Tr., p. 81. Applicant moved for a directed verdict at the conclusion of his trial, arguing that "one who commits a larceny cannot be found guilty of criminally receiving or possession the property that was stolen." Trial Tr., p. 257-58. There is no evidence that Applicant's waiver resulted from coercion or mistreatment, but rather from his honest belief that he could do a better job representing himself than his appointed attorney.

This Court finds that these factors show Applicant had a sophisticated knowledge of the workings of the legal system at the time of his trial, and was fully aware of the dangers of proceeding *pro se*. In light of those dangers, Applicant made the calculated decision that he could represent himself more effectively than his appointed attorney. This allegation is therefore denied and dismissed.

Brady Violation

Applicant's allegation appears to be that the State failed to disclose information regarding his co-defendant's plea negotiations, constituting a Brady violation. A Brady claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). This rule applies to impeachment evidence as well as exculpatory evidence. Id. This Court finds Applicant's allegation of a Brady violation is clearly deficient.

Applicant has failed to show that the evidence that was purportedly suppressed was material to guilt or punishment. Favorable evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Sheppard v. State, 357 S.C. 646, 660, 594 S.E.2d 462, 471 (2004). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Id. In the present case, the evidence in question was clearly not material because it was before the jury and Applicant was still convicted. Applicant asked his co-defendant, Mr. Hogan Hugh Justice, whether as a part of his guilty plea he was required to testify against him. Trial Tr. p. 234. Mr. Justice testified that he "was required to tell the truth." Id. Mr. Justice explained his understanding of his plea – he said there was not a *quid pro quo* arrangement concerning

probation. Trial Tr., p. 248. Instead, he said that he was told to be honest, and that his testimony would be taken into consideration at sentencing. Id. Moreover, the solicitor stated during closing arguments that "[t]he deal was to tell the truth," and that the "State ha[d] a recommendation of a probation sentence," and "to pay back the victims." Trial Tr., p. 353.

Even after hearing this testimony and weighing its impeachment value against Mr. Justice, the jury convicted Applicant. Accordingly, even assuming the solicitor's office failed to comply with the requirements of Brady, Applicant has failed to show a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. This allegation is therefore denied and dismissed.

After-Discovered Evidence

Applicant appears to be alleging that has discovered evidence since his conviction that entitles him to a new trial. In order to warrant the granting of a new trial on the ground of after-discovered evidence, it must appear (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; and (4) that it is material to the issue; and (5) that it is not merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

In the present case, Applicant has failed to show that the purported new evidence "is such as will probably change the result if a new trial is granted." Clark, supra. He apparently takes issue with Officer Arnold's testimony, who said that he took pictures inside the camper and located several bills of sale in the cabinets of the camper. Trial Tr. p. 220-21. This Court first notes that the bills of sale introduced at trial were admitted into evidence **without objection**, and authenticated by a prior witness – Officer David Smith. Trial Tr., p. 197-98. Applicant has not

raised any question about Officer Smith's credibility. In any event, the long period of time between trial and the purported deposition[6] may very well have impacted his memory. Even Applicant conceded that the deposition took place roughly four years after the actual search of the camper. PCR Tr. p. 83.

Even without the bills of sale, there was substantial evidence in the record to indicate Applicant knew the items were stolen. First, Applicant's co-defendant – Mr. Justice – testified that Applicant was aware the items were stolen. Trial Tr., p. 227. He testified that both he *and Applicant* came up with the idea to deal in stolen property jointly, and that Applicant "took the lead" in terms of selling the items on eBay. Id. He said that he and Applicant would remove the VIN numbers from equipment, and then replace them with laminated numbers generated on Excel. Id.

Second, Applicant was selling these items – many of them brand new – at prices substantially below market value. .In fact, the deal Applicant was offering was so good that one of his buyers – Wesley Crawford – was immediately put on notice by friends that he ought to check with police to make sure the four wheeler he bought was not stolen. Trial Tr., p. 108. The four wheeler had "roughly about 60 hours on it," and was "[b]asically brand new." Trial Tr., p. 113. Mr. Tinsley sold it for five thousand dollars. Id. Testimony from James Haddad, the victim and owner of the Polaris dealership that had been robbed, indicated the four wheeler was worth roughly twelve thousand five hundred dollars. PCR Tr. p. 161. When asked, on cross-examination, whether he was aware that "sometimes things sell for less than they're worth on eBay," he responded "[n]ot at that price." Trial Tr., p. 163-64. As a result, Officer Smith's

[6] The later testimony raised by Applicant is not in evidence, and was not presented as evidence by Applicant during the course of the evidentiary hearing.

testimony at trial – *even if* contradicted in a deposition three years later – is not material to the issue of guilt or innocence. This Court therefore request that this allegation be denied.

SUMMARY JUDGMENT

As stated previously, this Court also granted the State's motion for partial summary judgment at the evidentiary hearing on two issues: Applicant's allegations that 1) his sentence was disparate from his co-defendant as a result of the trial judge's vindictiveness; and 2) that defects in his indictment violated his Due Process rights. This Court's findings of fact and conclusions of law on these issues are set forth below.

Discussion

Under Rule 56, SCRCP, a party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. Law v. South Carolina Dept. of Corrections, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Fleming v. Rose, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002).

In the present case, Applicant conceded at the evidentiary hearing when making his motion for summary judgment that there were no factual issues in dispute, but that each issue was "part of the record," and "could be resolved by looking at the trial transcript." PCR Tr. p. 11. This Court agrees. Respondent has not disputed, for purposes of this motion, that Applicant was given a different sentence than his co-defendant; that Applicant was sentenced to consecutive terms of imprisonment; that Applicant exercised his rights to proceed to trial and

represent himself *pro se*; and that Applicant was engaged in a civil action against the Oconee County Sheriff's Department at the time of his trial. With respect to Applicant's second issue, Respondent has not disputed for purposes of this motion that Applicant was indicted outside a term of General Sessions. Accordingly, summary disposition is appropriate.

I. Sentencing

Applicant alleged his consecutive sentences violate equal protection of the law, and that he was given a disparate sentence in retaliation for his legal activities. Specifically, he contended that the trial judge issued a vindictive sentence in retaliation for having exercised his rights to a jury trial, self-representation, and redress of grievances for the return of his property.

As evidenced for this allegation, Applicant argued the disparity between his sentence and his co-defendant's sentence creates a presumption that his sentence was the result of improper prejudice or vindictive and corrupt motive, as well as the fact that the trial judge ruled against him on a number of issues.

1. Applicant's sentence was lawful.

A trial judge is allowed broad discretion in sentencing within statutory limits. Garrett v. State, 320 S.C. 353, 465 S.E.2d 349 (1995). A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against the state. Id. A trial judge generally has wide discretion in determining what sentence to impose. State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976). It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come. Id.

This Court finds Applicant was sentenced within the statutory limits. He was sentenced for ten (10) years for possession of a stolen vehicle (2008-GS-37-0881); five (5) years for

receiving stolen goods (2008-GS-37-0885); and ten years for receiving stolen goods (2008-GS-37-0882, 0883, and 0884). See S.C. Code § 16-21-80 (2008); S.C. Code § 16-13-180 (2008); S.C. Code § 16-13-180 (2008). Understandably, Applicant may have preferred concurrent sentences. However, there was evidence presented at trial supporting the judge's finding that the offenses were separate and distinct offenses. In fact, Applicant was observed with a stolen six wheeler "towards the end of January," Trial Tr., p. 140, with stolen four wheelers two weeks earlier, Id., and an RV camper that went missing in December, Trial Tr., p. 144. Further, many of the stolen items were taken from distinct victims. Trial Tr., p. 144-153; 149; 156-59. The Supreme Court of South Carolina has affirmed consecutive sentences on similar facts. See Bryant v. State, 384 S.C. 525, 683 S.E.2d 280 (2009) (finding three separate armed robberies on different days, at different locations, and involving different victims were separate and distinct crimes, were not inextricably connected, and did not share an immediate temporal proximity). Accordingly, this Court finds Applicant's sentence was lawful.

2. Applicant has not presented any specific facts which would indicate his sentence was the result of prejudice or vindictiveness.

This Court further finds Applicant has failed to raise any specific facts which would indicate his sentence was the result of prejudice or vindictiveness. See Singleton v. Sherer, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008) (once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on the mere allegations or denials contained in the pleadings but rather must come forward with specific facts showing there is a genuine issue for trial). Instead, he has made conclusory assertions, none of which provide any actual support for his allegation.

There is no dispute, for example, that the trial judge ruled against Applicant on a number of issues at trial.[7] However, the fact that a trial judge ultimately rules against a litigant is not proof of prejudice by the judge. See Mortgage Electronic Systems, Inc. v. White, 384 S.C. 606, 616, 682 S.E.2d 498, 503 (Ct. App. 2009). This is true even if it is later held the judge committed error in his rulings. Id.

In addition, there is nothing in the record or in the pleadings that indicate vindictiveness or prejudice as a result of Applicant exercising any of his rights. A trial judge abuses his discretion in sentencing when he considers the fact that the defendant exercised his right to a jury trial. Davis v. State, 336 S.C. 329, 332, 520 S.E.2d 801, 802 (1999). Applicant, however, has failed to raise specific facts indicating such prejudice with respect to his right to trial, his right to proceed *pro se*, or his civil lawsuit with the Oconee County Sheriff's Department.[8] Compare State v. Hazel, 317 S.C. 368, 369-70, 453 S.E.2d 879, 879-80 (1995) (remanded for resentencing where trial judge's statements indicated he relied heavily on the defendant's exercise of his right to a jury trial in determining sentence).

Finally, Applicant's contention that an improper motive should be presumed because his sentence was issued after he exercised a legal right is illogical and unsupported by law. Applicant's Motion to Reconsider, p. 2-3. Without a doubt, an individual may not be punished for exercising a protected statutory or constitutional right. U.S. v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485 (1982). There is, however, no presumption of vindictiveness where two co-defendants receive different sentences. The presumption Applicant cites to in Goodwin comes from North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1969), and refers only to cases

[7] The trial judge also granted part of Applicant's motion to consolidate his indictments. Trial Tr., p. 332.
[8] Crucially, the trial judge was not a party to the civil lawsuit, and Applicant has not brought to this Court's attention any facts which would support his allegation that the trial judge and the solicitor colluded against him as a result of that lawsuit.

where the same defendant has received heavier sentence after having a conviction vacated, and is then given a lengthier sentence following retrial.[9] In the absence of such a presumption, a defendant must prove actual vindictiveness to obtain relief. State v. Hilton, 291 S.C. 276, 279, 353 S.E.2d 282, 284 (1987). Applicant has failed to raise any specific facts which would prove vindictiveness. See Garrett at 356, 465 S.E.2d 349 at 350 (A sentence is not excessive if it is within the statutory limits and there are no fact supporting an allegation of prejudice). Because Applicant has failed to raise any specific facts to prove his claims – claims which he would have the burden of proving at an evidentiary hearing – this Court finds that summary judgment is appropriate. Applicant's motion to reconsider is therefore denied.

II. Irregularities in the Indictment

Applicant next argued that he was denied due process of law under both his federal and state constitutional and statutory rights where the state did not obtain a lawful true bill indictment. Specifically, Applicant alleged that his indictment was deficient because the grand jury convened outside a term of general sessions.

On June 28, 2007, then Chief Justice Jean Hoefer Toal issued an order outlining the authority of judges designated as a chief judge for administrative judge in circuit court. That order indicates in paragraph nine (9) that the chief judge for administrative purposes may convene the grand jury at times other than during a term of general sessions.[10]

To the extent Applicant argues in his post-hearing motion that the order took place before his conviction, this Court finds he is mistaken as to the date the order was issued. To the extent

[9] As this state's Supreme Court has pointed out, in the years since the United States Supreme Court decided Pearce, it has interpreted and restricted the rule several times. State v. Hilton, 291 S.C. 276, 277-78, 353 S.E.2d 282, 284 (1987).

[10] This Order has been amended a number of times since its initial filing, most recently on February 4, 2011. None of the amendments have altered the underlying provision at issue in this case.

Applicant argues the administrative order is contrary to the laws of this State, this Court finds summary judgment appropriate, and supported by the Supreme Court's Order. A finding by this Court that the Supreme Court issued its order in error would be inappropriate in light of the structure of our judicial system. See American Fast Print, Ltd. v. Design Prints of Hickory, 288 S.C. 46, 47, 339 S.E.2d 516, 517 (Ct. App. 1986) ("The Supreme Court may want to grant certiorari in the instant case and modify or overrule its previous decision, but this court has no authority to change it"); see also Bain v. Self Memorial Hospital, 281 S.C. 138, 141, 314 S.E.2d 603, 605 (Ct. App. 1984) ("Where the law has been recently addressed by our Supreme Court and is unmistakably clear, this court has no authority to change it"). Accordingly, summary judgment is warranted on this issue, and Applicant's motion to reconsider is denied.

[*Signature Follows*]

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 for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice. Further, Applicant's motion to reconsider this Court's grant of partial summary judgment is denied.

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 10 day of May, 2016.

A TRUE COPY
MAY 16 2016
CLERK OF COURT OCONEE COUNTY

BROOKS P. GOLDSMITH
Presiding Judge
Tenth Judicial Circuit

_____, South Carolina

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BEVERLY H. WHITFIELD
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James Tinsley
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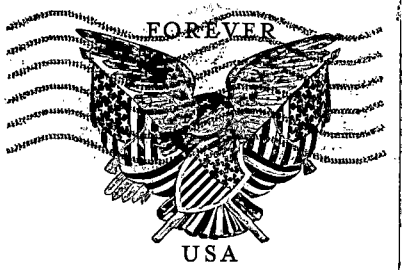

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