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STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
The State of South Carolina)
)
vs.)
)
ROBERT MAX WATKINS,)
DEFENDANT.)
_____)

IN THE COURT OF GENERAL SESSIONS
THIRTEENTH JUDICIAL CIRCUIT
SC Court of Appeals

INDICTMENT: 2002-GS-23-1063

STATE'S RESPONSE TO DEFENDANT'S
MOTION FOR A NEW TRIAL PURSUANT TO
NEWLY DISCOVERED EVIDENCE

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAULEY WICKENSIMMER
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The procedural history on this case is as follows:

- (1) Defendant was arrested on December 19, 2001.
- (2) Defendant was appointed Bill Dodson on December 20, 2001. Mr. Dodson left the Public Defender's Office and the case was reassigned to Jim Bannister.
- (3) Defendant was tried by the Honorable C. Victor Pyle on October 23-25, 2002. The defendant was represented by Jim Bannister and the State was represented by Judy Munson. A jury verdict of guilty was returned on Armed Robbery and Possession of a Weapon During the Commission of a Violent Crime. Defendant was sentenced to 30 years and 5 years to run concurrent.
- (4) Defendant filed an appeal which was dismissed by the Court of Appeals, Op. No. 2004-UP-406 (filed June 22, 2004).
- (5) Defendant filed a PCR on October 22, 2004 and a hearing was held on April 8, 2005 by the Honorable Larry R. Patterson. On January 17, 2006 Judge Patterson denied the defendants application for relief.
- (6) The Supreme Court granted the Defendants Petition for Writ and reversed Judge Patterson's ruling and Remanded the case for a new trial. Watkins v. State, Op. No. 2008-MO-001 (filed January 14, 2008).
- (7) Upon the Defendant's return to the Greenville Detention Center he was appointed John Mauldin. On March 14, 2008 Judge Patterson held a bond hearing and set the defendant's bond at \$70,000 (which was the original bond amount on this case and other unrelated cases that the State chose not to proceed on after the conviction in 2002). The Court also ordered the case to be tried within 120 days.

- (8) On March 27, 2008 Judge Patterson relieved John Mauldin and his office from representing the defendant at the Defendant's request due to the fact that Jim Bannister was a public defender in the first trial and therefore a conflict existed. The defendant requested to move forward Pro Se or retain private representation.
- (9) On May 30, 2008, the Friday before the Monday start of trial on June 2, 2008, a hearing was held wherein the defendant requested counsel be appointed to him. Judge Patterson granted the request and ordered the Defendant to be represented by Stephen J. Henry.
- (10) On September 11, 2008 the Defendant moved the Court to have Stephen Henry relieved because a "conflict" existed due the fact that Mr. Henry was on the Public Defender Board and thus he was essentially in the same "office" as Mr. Mauldin. Judge Patterson denied the Defendant's request to have Mr. Henry relieved.
- (11) On September 22, 2008, the defendant filed a Motion to Proceed Pro Se, which was day one of the retrial. Stephen Henry was relieved and the Defendant was allowed to proceed Pro Se. Mr. Henry was ordered to remain as stand-by counsel throughout the trial.
- (12) Defendant was convicted on his retrial on September 24, 2008. He was sentenced to 25 years on the armed robbery and a consecutive 5 years on the possession of a weapon during the commission of a violent crime.
- (13) Defendant appealed his conviction on September 29, 2008. The Court of Appeals reversed his conviction citing that the Trial Judge could not have presided over the trial as he was the PCR Judge on the first trial. State v. Watkins, Op. No. 2011-UP-091 (S.C. Ct.App. Filed March 8, 2011).
- (14) The State petitioned the Supreme Court for Writ of Certiorari which was granted and oral arguments were heard. The Supreme Court reversed the Court of Appeals and upheld the Defendants conviction on December 4, 2013. State v. Watkins, 406 SC 360 (2013).
- (15) On June 10, 2014 the defendant filed a Motion for a new trial based on After Discovered Evidence Rule 29(b), claiming that State failed to turn over fingerprint analysis information. The State submitted its response on July 8, 2014 and following that the defendant submitted a reply on July 17, 2014.
- (16) On June 18, 2014 the defendant requested an Evidentiary hearing before then Chief Administration Judge Edward W. Miller.
- (17) On August 8, 2014 Judge Miller reviewed the written motions and handed down an order denying defendant's Motion for a new trial based off After Discovered Evidence.

(18) The Defendant filed a Post-Conviction Relief Action on January 31, 2014. Respondent made its return on July 11, 2014. An evidentiary hearing was held on April 22, 2015. An Order of Dismissal was signed and filed on October 2, 2015 (Attachment "C" – 11 pages).

Defendant moves this honorable court that he is entitled to a new trial based off After-Discovered Evidence, Rule 29(b) SCRCrimP. In order for the court to grant a new trial based off of newly discovered evidence the Court must find the following: that the evidence (1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial (4) is material; and (5) is not merely cumulative or impeaching. *State v. Prince*, 316 S.C. 57, 447 S.E.2d 177 (1993).

The defendant's position is that the 911 call came in at 1:06:20, the call was dispatched at 1:07:35 a.m., and that he was stopped at 1:10 a.m. Using the call dispatch report (Defendants Exhibit #1), he states that law enforcement did not receive the information that the suspect was driving the white Ford Taurus until 1:21:13 a.m. and that Officer Thompson could not have arrived on the scene until 1:26:34 a.m. The defendant argues law enforcement had no reasonable suspicion to stop his vehicle at 1:10 a.m. because they did not have a description of the car prior to him being stopped and therefore the stop was unconstitutional. He further argues that the call detail report shows that Officer Thompson could not have been the officer who conducted the stop at 1:10 a.m. because the call detail report indicates that Thompson did not arrive on scene until 1:26:34 a.m.

It is the States' position that the defendant's argument is based on the erroneous position that the only evidence presented at trial was that he was stopped at 1:10 a.m. Although defendant is correct in stating that Pelzer testified that they were stopped at 1:10 a.m., she also testified that the time could have been 20 to 25 minutes later than what she recalled and that she was "averaging" out the time (Defendant Exhibit #14). Furthermore, other evidence presented at trial shows that the defendant and Pelzer were stopped after the information regarding the white Ford Taurus was dispatched. Officer Thompson's report (Defendant Exhibit #15) and his testimony (Defendant Exhibit #5) show that he was the one who stopped the defendant, and Officer Jones report (Attachment "A" – 2 pages) as well as his trial transcript (Attachment "B" – 17 pages) indicates that Officer Thompson is the officer that stopped the defendant (Attachment "B" – pg., 155 line 14).

The defendant has misread and misinterpreted the reports he referenced in this case and is applying information from multiple reports of the various agencies that were associated in this incident to draw speculative conclusions as to the events that took place on the early morning of December 19, 2001. In order for the Court to conduct any analysis of the standard above, the State submits that the following is an account of how events unfolded that evening.

The Chuck E Cheese restaurant located at 253 Congaree Road is robbed at some point prior to 1:06:20 a.m., which is the time dispatch received the 911 robbery call indicating that a 5'10" Black Male, wearing a blue coat and ski mask, stuck a pistol to an employee's head. Dispatch then disseminates information out to all law enforcements officers who are available to handle the call. The area beat Officer Jones was very close to the restaurant and his testimony indicates that it took him less than one minute to arrive (Attachment "B" – pg. 153, lines 18-19). The dispatch report (Defendant Exhibit #1) indicates that he was dispatched at 1:07:35 a.m., and arrived at the incident location within a very short period of time. Dispatch relates additional information about this incident at 1:21:13 a.m., to include that a white Ford Taurus had been seen circling the building several times in the past week, and that the robber left on foot possibly towards the apartments behind the restaurant. In reviewing dispatch records as it relates to Officer Thompson, he is "dispatched", "en route" and "arrives" all at exactly 1:26:34 a.m. Officer Thompson testified that he did not go to the restaurant but instead went directly to the area of the complex located behind the restaurant where he subsequently conducted a traffic stop on the white Ford Taurus (Defendant Exhibits #5 and #15) which the defendant was driving. After making the traffic stop, that Officer Thompson called into dispatch.¹ When he approached the defendant, the defendant admitted he did not have a license with him, he gave the name Robert Base and when he was asked to step from the car, Officer Thompson spotted the defendant attempting to hide an amount of U.S. Currency, all of which raised Officer Thompson's suspicion.

¹ The call dispatch report indicates that Thompson's "dispatch", "en route", and "arrival" time all occurred at 1:26:34. It is a common practice in the law enforcement arena not to "call out" on the radio when an incident like this is occurring so as not to tie up radio traffic which could interfere with the dissemination of additional suspect information.

It is the States position that the evidence presented at trial is truthful and accurate. The defendant is attempting to color the evidence by drawing inferences in the reports to make it appear as though a discrepancy exists which could be construed as material. Forensic Officer Pratts report (Defendant Exhibit #16) indicates that he met with the investigating officer at the restaurant and vehicle stop, however it does not indicate that Officer Jones is the officer who made the stop on the white Ford Taurus. In fact the defendant specifically questioned Officer Jones on this issue as well as the issue of whether or not he was the officer who made the stop and whether he was the investigating officer as listed in Officer Pratts report. Officer Jones testified that he did not stop the defendant (Attachment "B" – pg. 163, lines 13-15) and he was not the investigating officer (Attachment "B" – pg. 163, lines 23-25). There is absolutely no evidence indicating that Officer Jones is the one who stopped this defendant. Both Officer Jones report, Officer Thompsons report and the trial transcript make it very clear that Officer Thompson is the one who stopped the defendant, and that Officer Thompson did so only after being informed that a white Ford Taurus could be involved in this incident. The defendant would also have the court believe that the testimony of States witness Elena Pelzer's recollection of the timing of this incident would be so great as to indicate that law enforcement must be fabricating information with respect to the stop. Again, Ms. Pelzer testified that she recalled that they were stopped at 1:10, and she makes it clear that the time could have been up to 20 to 25 minutes later than what she recalled. The defendant is attempting to join what is uncertain time recollection testimony from Ms. Pelzer and a call report to conclude that Officer Thompson could not have been the one who made the stop. The call dispatch report does not provide evidence of which officer actually made the stop. It does not provide any evidence which could have been used to impeach the officers' testimony nor does it provide evidence to show that the stop was unconstitutional. Rather, the call dispatch report confirms the officers' testimony. Therefore the defendant cannot show that the evidence is material.

The Court has already heard this and other similar arguments from the defendant during the Post-Conviction Relief process and hearing on April 22, 2015. (Attachment "C").

The State submits that the motion does not meet the standards set forth in *Prince* based on the aforementioned response. Additionally, this information is not information such that it would be probably change the result if a new trial were granted.

Taking all this into consideration and reviewing the information in conjunction with the factors cited in *Prince*, this information does not rise to the level that would have materially changed the result of the trial of the defendant. Furthermore, it is the States position that the defendants request should be denied based off all information the court has been presented with and that no need exists for any additional "evidentiary hearing" as requested by the defendant.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "LucMA", written over the printed name.

Lucas C. Marchant

Asst. Deputy Solicitor, 13th Judicial Circuit

AGENCY I.D.
SC0230200

SUPPLEMENTAL REPORT

10:864 467 8582
CASE NUMBER

PAGE: 10

01,000,095,052

NCIC
ING. ENT.

ORIGINAL REPORT
 SUPPLEMENTAL REPORT

STATUS CHANGE
 ADDITIONAL VICTIMS
 ADDITIONAL STOLEN PROPERTY
 ADDITIONAL OFFENDERS
 ADDITIONAL RECOVERED PROPERTY

INCIDENT TYPE: ARMED ROBBERY

PATROL DISTRICT: NECTOR PAGE 1 OF 2 PAGES

I.D. OVERFLOW

COMPLAINANT
 VICTIM #
 SUBJECT #
 RUNAWAY
 WANTED
 WARRANT
 ARREST
 MISSING
 JAIL

NAME (LAST, FIRST, MIDDLE): _____

VICTIM RELATIONSHIP TO SUBJECT: #1 #2 #3

RESIDENT: YES NO RACE: _____ SEX: _____ AGE: _____ D.O.B.: _____ ETH: _____

ADDRESS: _____ CITY: _____ STATE: _____ ZIP CODE: _____ PATROL DISTRICT: _____

DAY PHONE: _____ EVENING PHONE: _____

HEIGHT: _____ WEIGHT: _____ HAIR: _____ EYES: _____ FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.: _____

VICTIM NO. _____ VISIBLE INJURY: YES NO COMPLAINANT OF NON-VISIBLE INJURIES: NO YES

VICTIM USING ALCOHOL: NO YES UNK. DRUGS: NO YES TYPE: UNK.

TWO-MAN VEHICLE DETECTIVE/SPL. ASMT. ALONE
 ONE-MAN VEHICLE OTHER ASSISTED

USING ALCOHOL: NO YES UNK. USING DRUGS: NO YES TYPE: UNK.

ARRESTED ON CURRENT OFFENSE
 CLEARED BY ARREST ON PRIOR OFFENSE

ARRESTEE ARMED YES NO WEAPON TYPE: _____

JUVENILE DISPOSITION: 1. HANDLED, RELEASED REFERRED TO OTHER AUTHORITY

SEMI-AUTO FULL-AUTO ON VIEW ARREST SUMMONED CUSTODY

ON 12-19-01 MYSELF AND SEVERAL OTHER OFFICERS RESPONDED TO THE AREA OF 245 CONGAREE RD. IN RESPONSE TO A ROBBERY AT THE (HUNK-E-CHEESE). WHILE RESPONDING TO THE AREA DISPATCH ADVISED THE DESCRIPTION AS A B/M WITH A BLUE JACKET AND THAT HE WAS POSSIBLY IN A WHITE FORD TAURUS. I ARRIVED ON THE SCENE ALMOST IMMEDIATELY AFTER IT CAME OUT AND WATCHED THE ENTRANCE TO PARK HAYWOOD APARTMENTS SINCE THE SUSPECT HAD RAN INTO THE APARTMENT COMPLEX. I PARKED THE CORNER OF THE ENTRANCE SO THAT I COULD SCAN EVERY VEHICLE / PERSON LEAVING THE COMPLEX, WHILE OFFICER HAMILTON GOT INFORMATION FROM THE VICTIMS, ONLY TWO CARS EXITED THE COMPLEX AT THAT SHORT TIME PERIOD, (ONE WAS A W/F THAT WORKED FOR CHANNEL 4 NEWS AND THE OTHER WAS A W/M IN A YELLOW CAB). AFTER SEVERAL MINUTES A WHITE FORD TAURUS WITH A B/M AND B/F DROVE PAST ME (I WAS ON FOOT BY THIS TIME) AND WAS STOPPED BY OFFICER THOMPSON. AFTER AN AMOUNT OF MONEY WAS FOUND IN THE CAR BY OFFICER THOMPSON THE MALE AND FEMALE WERE REMOVED FROM THE TAURUS AND THE MALE WAS PLACED IN OFFICER THOMPSON'S CAR WHILE THE FEMALE WAS PLACED IN THE BACK OF MINE. SHE WAS LATER

TYPE	STOLEN	DAMAGED	BURNED	RECOVERED	SEIZED	TOTAL VALUE

SUBJECT IDENTIFIED: YES NO SUBJECT LOCATED: YES NO

ACTIVE ADMIN. CLOSED UNFOUNDED ARRESTED UNDER 18 ARRESTED 18 AND OVER EX-CLEAR UNDER 18 EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1. OFFENDER DEATH 2. NO PROSECUTION 3. VICTIM/DECEASED COOPERATION 4. EXTRADITION DENIED 5. JUVENILE-NO ARREST

REPORTING OFFICER(S): DE JONES 378 DATE: 12-19-2001 UNIT NO.: 208 APPROVING OFFICER: [Signature] DATE: 12-19-01 UNIT NO.: 202

FOLLOW UP INVESTIGATION: YES NO

AGENCY I.D.
SC0230200

SUPPLEMENTAL REPORT

01,0,0,0,0,9,5,0,52 INQ. ENT.

ORIGINAL REPORT STATUS CHANGE ADDITIONAL VICTIMS ADDITIONAL STOLEN PROPERTY
 SUPPLEMENTAL RPT ADDITIONAL OFFENDERS ADDITIONAL RECOVERED PROPERTY

INCIDENT TYPE: ARMED ROBBERY
 PATROL DISTRICT: HECTOR PAGE 2 OF 2 PAGES

I.D. OVERFLOW

COMPLAINANT NAME (LAST, FIRST, MIDDLE)
 VICTIM # VICTIM RELATIONSHIP TO SUBJECT: #1 #2 #3
 SUBJECT # RESIDENT RACE SEX AGE D.O.B. ETH
 RUNAWAY ADDRESS CITY STATE ZIP CODE PATROL DISTRICT DAY PHONE EVENING PHONE
 WANTED HEIGHT WEIGHT HAIR EYES FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL, PECULIARITIES, ETC.
 WARRANT
 ARREST
 MISSING
 JAIL

VICTIM NO. VISIBLE INJURY: YES NO COMPLAINT OF NON-VISIBLE INJURIES: NO YES
 SUBJECT NO. USING ALCOHOL: NO YES UNK. USING DRUGS: NO YES UNK. TYPE

VICTIM USING ALCOHOL: NO YES UNK. DRUGS: NO YES TYPE: UNK.
 TWO-MAN VEHICLE DETECTIVE/SPL. ASMT. ALONE
 ONE-MAN VEHICLE OTHER ASSISTED
 ARRESTED ON CURRENT OFFENSE
 CLEARED BY ARREST ON PRIOR OFFENSE

ARRESTEE ARMED YES NO WEAPON TYPE: SEMI-AUTO FULL-AUTO
 JUVENILE DISPOSITION: 1. HANDLED, RELEASED REFERRED TO OTHER AUTHORITY ON VIEW ARREST SUMMONED CUSTODY

TAKEN OUT AND PLACED IN OFFICER ELLIS'S CAR SO THAT BOTH SUBJECTS COULD BE TAKEN TO THE DETECTIVES DIVISION AT LEL, WHILE I STOOD BY FOR THE CAR TO BE TOWED. THE ONLY THING THAT I HEARD THE FEMALE SUBJECT SAY WHILE I WAS WRITING THE TOW REPORT WAS "I DON'T UNDERSTAND WHY I AM HERE, I'M NOT THE ONE THAT DID ANYTHING." AFTER I TOOK PICTURES OF THE CAR AND INTERIOR (INCLUDING MONEY LAYING ON THE SEAT,) I SEPERATED AND COUNTED THE MONEY. THERE WERE (20) \$5.00 BILLS AND (150) \$1.00 BILLS LAYING ON THE PASSENGER FRONT SEAT. ALSO IN THE CAR WAS A BLACK TIMBERLAND HAT, BLACK STOCKING CAP, AND 2 BLUE SMALL TALK-ABOUT RADIOS; THAT WERE ALL TAKE TO THE DETECTIVES DIVISION AFTER SMITH AND CHILES TOWED THE VEHICLE. AFTER THE FEMALE WAS REMOVED FROM MY CAR I FOUND A \$5.00 BILL SHOVED BEHIND THE REAR SEAT THAT WAS NOT THERE BEFORE SHE WAS.

TYPE	STOLEN	DAMAGED	BURNED	RECOVERED	TOTAL VALUE

SUBJECT IDENTIFIED YES NO SUBJECT LOCATED YES NO ACTIVE ADMN. CLOSED UNFOUNDED ARRESTED UNDER 18 EX-CLEAR UNDER 18 ARRESTED 18 AND OVER EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1. OFFENDER DEATH. 2. NO PROSECUTION. 3. VICTIM/DECLINES COOPERATION. 4. EXTRADITION DENIED. 5. JUVENILE-NO ARREST

REPORTING OFFICER(S) DE JONES #378 DATE 12-19-2001 UNIT NO. 208 APPROVING OFFICER [Signature] DATE 12-19-01 UNIT NO. 202

REVIEW UP INVESTIGATION YES NO

1 white Ford Taurus, to connect the white Ford Taurus to
2 me. There be -- in other words, the State will have to
3 prove that all of the evidence is consistent with one
4 another. And the evidence will show that the evidence is
5 not consistent with each other to find me guilty beyond a
6 reasonable doubt. Thank you, ladies and gentlemen.

7 THE COURT: I need to put in the record that I did
8 have a hearing, and I found affirmatively that it was
9 implied that Mr. Watkins knowingly, intelligently and
10 voluntarily waived his right to council and decided to
11 proceed with himself. And I find that he did it
12 knowingly, voluntarily and intelligently. I want to put
13 that in the record. Okay.

14 MR. WATKINS: Thank you, ladies and gentlemen.

15 THE COURT: All right. We're ready to proceed, Mr.
16 Marchant.

17 MR. MARCHANT: The State calls David Jones.

18 THE CLERK: Sir, if you'll please place your left
19 hand on the Bible and raise your right hand.

20 DAVID JONES

21 Having been first duly sworn, testified as follows:

22 THE CLERK: Thank you. Please be seated. Please
23 state your name for the record.

24 THE WITNESS: David E. Jones.

25 THE CLERK: Thank you.

DIRECT EXAMINATION

1
2 BY MR. MARCHANT:

3 Q Mr. Jones, what is your occupation with the
4 Greenville police department?

5 A I'm currently assigned downtown. I've been there
6 for a year. I've been serving with the police department
7 since 2000. Years before that I was on patrol and
8 responding to routine calls for service, such as 911
9 calls, alarm calls, traffic calls, that type of stuff.

10 Q Have you been to the criminal justice academy?

11 A Yes, sir.

12 Q What is the reason for any officer going to the
13 criminal justice academy?

14 A So that we're actually certified by the State to be
15 a police officer.

16 Q Are you allowed to be a police officer with the
17 Greenville unit without having that certification?

18 A No, sir.

19 Q Were you working in December of 2001 with the
20 Greenville City PD?

21 A Yes, sir.

22 Q Specifically were you working the night of 19th, or
23 the morning of the 19th?

24 A Yes, sir.

25 Q What were your duties at that time?

1 A I was on routine patrol that night. Just ---

2 Q Okay. Please describe for the jury what routine
3 patrol means?

4 A On the patrol division we generally take care of
5 everything, especially on the night shift. We respond if
6 you need 911 calls, alarm calls, traffic offenses, DUIs.
7 Pretty much anything that you're ever going to have to
8 call the police department for we cover that all night
9 long, all shift.

10 Q And did you receive a call that evening in reference
11 to what we're here about today?

12 A Yes, sir.

13 Q What information did you receive about this
14 incident?

15 A Initially it came out as an armed robbery that had
16 just occurred at the Chuck E Cheese on Congaree Road.

17 Q And were there any details given about suspect or
18 anything of that nature?

19 A When I almost was on the scene they advised across
20 the radio that we were looking for a black male wearing
21 dark clothing, dark jacket, driving possibly a white Ford
22 Taurus with I believe they even said had a paper tag at
23 the time.

24 Q Okay. I'm going to show you what's been marked as
25 State's Exhibit Number 2. Do you recognize this exhibit?

1 A Yes, sir.

2 Q And how is it you recognize this exhibit?

3 A This is an overhead picture of the area that got
4 robbed and also the apartments directly behind the Chuck
5 E Cheese.

6 Q Is this a fair and accurate representation of that
7 area?

8 A Yes.

9 MR. MARCHANT: The State would move Exhibit Number 2
10 into evidence.

11 THE COURT: Okay. Without objection.

12 (State's Exhibit Number 2 was filed.)

13 MR. MARCHANT: Permission to publish?

14 THE COURT: Yes, sir.

15 MR. MARCHANT: Officer Jones, if you would step down
16 for me.

17 THE COURT: Since you're not at the microphone,
18 Officer, speak up so everybody in the courtroom can hear
19 you.

20 THE WITNESS: Okay.

21 BY MR. MARCHANT:

22 Q Would you please point out for the jury where the
23 Chuck E Cheese is located?

24 A It's located right here.

25 Q Okay. And do you know what those buildings behind

1 it represent?

2 A Yes, sir.

3 Q What is that?

4 A These would be the Park Haywood Apartments from here
5 all the way to the back side here.

6 Q Okay. Would you please point out to the jury where
7 the entrance for the Park Haywood Apartments is?

8 A It's got an entrance that comes in off of Congaree
9 Road and then comes right here. It's the only entrance
10 in and out of the apartments.

11 Q Okay. Now, when you say the only entrance, what do
12 you mean?

13 A It's the only actual entrance for vehicles to come
14 in and out.

15 Q Okay. Do you recall back in 2001 whether or not
16 there was a fence in between the back of the Chuck E
17 Cheese and the apartment complex?

18 A No, there is no fence.

19 Q Now, would you please tell the jury specifically
20 where you responded to and parked your vehicle that
21 evening?

22 A That evening I came in actually on the backside up
23 to Congaree road here. Instead of coming in front of the
24 Chuck E Cheese, there's an actual back way to get here.
25 I pulled in, stopped right here at the very front

1 entrance and waited for other units to respond. And when
2 they arrived, actually got out of the car and walked up
3 to the -- about right here in this corner.

4 Q Okay. Please explain to the jury what I'm handing
5 to you?

6 A It's a stick note with my name on it.

7 Q Okay. Would you please place that where you parked
8 your vehicle that evening? Okay. Now, as soon as you
9 parked your vehicle, what did you do?

10 A I got out of my vehicle and actually walked over to
11 where I could actually observe cars coming in and out,
12 trying to see if anybody was out on foot, maybe if I saw
13 the suspect, or any type of foot traffic or car traffic.

14 Q Okay. And do you recall specifically what time you
15 arrived at the apartment complex?

16 A I want to say it was shortly right after the call
17 came out. I mean, it was right after one o'clock, 1:03,
18 1:04, something like that, and I arrived on scene
19 probably a minute after the call came out.

20 Q Now, when you got out and started walking, what is
21 it you're looking for?

22 A At the time they had said -- I mean, I'm looking for
23 any possible person that might have been that suspect,
24 any person that type of night, anybody running from the
25 area, the car specifically we were looking for that

1 night, basically anything at one o'clock in the morning
2 that might draw my attention to that.

3 Q Okay. If you want you can have a seat back there in
4 the witness chair. Now, you mentioned that you would be
5 looking for anything that would draw your attention. Did
6 you see anybody in the period of time that you were
7 outside of the vehicle that matched the description that
8 was given to you?

9 A Shortly after that there were three cars that
10 actually left as I was standing there. The first car I
11 believe was a white female that worked for Channel 4
12 news. The second car was a white male in a yellow taxi
13 that left the apartments. And the third car was a white
14 Ford Taurus that came through there that I was not
15 actually able to stop, drove past me at that time.

16 Q Okay. So did you stop the first two cars?

17 A The first two I did not.

18 Q Okay. How is it that you know one of the vehicles
19 was a News 4 vehicle?

20 A I believe it was actually marked. I think it was an
21 SUV that was marked.

22 Q Okay. In your short time, after you've responded to
23 the scene, you only saw three vehicles?

24 A Yes, sir.

25 Q Did you see anybody walking throughout the complex

1 that matched the description you were given?

2 A No.

3 Q As soon as you saw the third vehicle, which was a
4 white Taurus, what did you do?

5 A I tried to get on the radio to let the other
6 officers who were actually on the scene then know that
7 there was a white Ford Taurus leaving the parking lot and
8 was headed towards the entrance, that was trying to get
9 out of the entrance onto Congaree Road.

10 Q Do you know whether or not that white Taurus was
11 stopped?

12 A Yes.

13 Q Do you know who it was stopped by?

14 A It was stopped by at the time Corporal Thompson,
15 which is Lieutenant Thompson.

16 Q Okay. Did you then go down to where he had the
17 vehicle stopped?

18 A Yeah.

19 Q Why did you do that?

20 A Because of high risk that an armed robbery had just
21 occurred and to assist, just for safety issues, to make
22 sure.

23 Q To make sure I'm clear, you did or did not see who
24 was in the vehicle when it passed you?

25 A I did not see at the time when it passed by me.

1 Q Okay. When you got down to the vehicle, what did
2 you do?

3 A When I got to the vehicle basically helped the other
4 officers over there in getting -- they had already got
5 Mr. Watkins out of the car, and assisted them, basically
6 just doing some of the paperwork. He was already out.
7 The lady that was also in the car was actually placed in
8 the back of my car for a time being to keep her separated
9 away from him until we could figure with investigation
10 what all was going on. Once other units arrived
11 eventually she was transported along with him to the law
12 enforcement center, and I actually stood by with the car
13 to have the car towed and processed.

14 Q What's the purpose of separating suspects?

15 A Basically so that they can't get the story going
16 together. Don't want them collaborating any type of
17 story. We generally try to separate people and that way
18 they can't get the same story going.

19 Q Now, did you have any conversation with the woman
20 that you had placed in the rear of your vehicle?

21 A I did not.

22 Q Following that, and once the duty wrecker came and
23 picked up the vehicle, did you have any other involvement
24 in this case?

25 A No, sir.

1 MR. MARCHANT: I have no further questions. Please
2 answer any questions Mr. Watkins may have.

3 CROSS-EXAMINATION

4 BY MR. WATKINS:

5 Q Excuse me one second. How you doing? Good
6 afternoon, sir.

7 A Good afternoon.

8 Q I'd like to ask you a couple questions. Were
9 there -- did you notice any tag numbers on the car? Were
10 there any tag numbers given over dispatch in the 911 call
11 that you received about this white Ford Taurus?

12 A I believe that they had said on the -- across the
13 radio to us that it possibly had a paper tag. Didn't say
14 it had a tag, it had some type of paper tag.

15 Q And this -- was this in reference to a car seen at
16 Chuck E Cheese, or was this in reference to an officer
17 seeing -- seeing the car in the parking lot?

18 A This was in reference to people on the scene who had
19 said that previous nights before, before this had
20 happened, two or three nights before about the same time
21 at, closing, they had seen that same vehicle -- or they
22 had seen a white Ford Taurus with a paper tag circling
23 the parking lot and didn't think anything about it at the
24 time, but after this had happened they thought that this
25 might be the same vehicle. This person may have gotten

1 into that vehicle.

2 Q Do you know which witness that were that said this?

3 A No, I do not.

4 Q Okay. Do you know whether or not there was any --
5 this information provided in any of the witnesses'
6 statement about a paper tag in reference to this car?

7 A I'm sorry.

8 Q The statements or -- that the witnesses gave, are
9 you aware of there -- did any of them put any statements
10 in their statements about a tag being on the car?

11 A I do not know.

12 Q Okay. On the night that you took a suspect out of
13 your car, you found a five dollar bill, was it a five
14 dollar bill?

15 A I believe so.

16 Q What happened to that five dollar bill?

17 A It was put with the other money in property and
18 evidence to be returned to the store eventually.

19 Q Would you say that money was taken out my pocket?
20 The five dollar bill that you got, that was taken from
21 the back of your car, was it taken out of my pocket?

22 A No, not that I'm aware of.

23 Q So there's no connection between that five dollar
24 bill and me?

25 A I don't know. But the back of my car was completely

1 clean. There was no money in the back seat of my car.
2 When the lady that was in the car with you was placed
3 into the back of my car, after we got her out of my car,
4 I searched my car and there was a five dollar bill hidden
5 underneath the seat.

6 Q All right. Did -- at any time did you go towards
7 the white Ford Taurus? Did you have anything to do with
8 the white Ford Taurus that I was stopped in?

9 A I stood by while the pictures were taken of the
10 money that was in it and while it was processed --
11 basically while they took the pictures earlier and then
12 after they towed it, yeah.

13 Q Did you ever separate the money or count any of the
14 money that was in the car?

15 A I don't remember if I actually did or not.

16 Q Well, I have a copy of your statement here. I'd
17 like -- can I introduce this?

18 THE COURT: No.

19 MR. WATKINS: Well ---

20 THE COURT: You can't ask me questions, Mr. Watkins.
21 You can just -- it's up to Mr. Marchant.

22 BY MR. WATKINS:

23 Q I'll -- the statement I want you to read right here
24 where it says -- read this part of this statement right
25 here.

1 A What part?

2 Q All of it right here. Start here.

3 A Okay. My report from that night says, after an
4 amount of money was found in the car by Officer Thompson,
5 the male and female were removed from the Taurus. The
6 male was placed in Officer Thompson's car, while the
7 female was placed in the back of mine. She was later
8 taken out and placed in Officer Ellis' car so that both
9 suspects could be taken to the detective division at the
10 law enforcement center. While I stood by for the car to
11 be towed the only thing that I heard the female subject
12 say while I was writing the report was, I don't
13 understand why I'm here, I'm not the one that did
14 anything. After ID took pictures of the car and
15 interior, including money laying on the seat, I separated
16 and counted the money. There were 20 five dollars bills,
17 and 150 dollar bills laying on the passenger front seat.
18 Also in the car was a black Timlin hat, a black stocking
19 cap, and two blue small talk about radios that were all
20 taken to the detective division after Smith and Childs
21 towed the vehicle away. After the female was removed
22 from my car I found a five dollar bill showed up behind
23 the rear seat that was not there before she was.

24 Q Okay. Thank you. Okay. Let me -- okay. Right
25 here, do you know what this is right here?

1 A Yes, sir.

2 Q What would this be? Can you tell what this would
3 be?

4 THE COURT: Wait just a second. Let me see what you
5 got. Okay. Y'all step out just for one minute.

6 (The jury exited the courtroom at 9:55 a.m.)

7 THE COURT: I don't want anything to come in where I
8 have to declare a mistrial. A mistrial is a drastic
9 remedy. Now, Mr. Watkins, again, I don't want to be
10 sending the jury in and out. You asked him what this
11 was. He doesn't know what your questions are going to
12 be. He could -- he could have easily responded and said
13 this is my testimony in your first trial, and that would
14 have let the jury know you've already been tried. And
15 you know, they're going to wonder what that was and what
16 we're doing here. We're not supposed to go into your
17 first trial. This is supposed to be your trial here
18 today. And it's questions like this that I was concerned
19 about.

20 Now, you can use a prior statement to impeach him if
21 he testifies under oath something contrary to what he
22 said previously. And I'm just anticipating. I don't
23 know what you -- but you asked what this was, and this is
24 his testimony from the previous trial.

25 MR. WATKINS: I was going to try to get him to where

1 it showed ---

2 THE COURT: No, but you asked him what this was, and
3 he's going to tell you that's my testimony from the
4 previous trial. Then what we going to do about them
5 knowing that you had already been tried?

6 MR. WATKINS: Yes, sir.

7 THE COURT: You go talk to Mr. Henry about that and
8 then I'm going -- we can't be interrupting this for you
9 to be talking to him.

10 MR. WATKINS: Okay. I understand.

11 (Mr. Watkins talked to Mr. Henry.)

12 THE COURT: If they're ready bring them back in.

13 (The jury entered the courtroom at 9:59 a.m.)

14 THE COURT: All right. Mr. Watkins, the bailiff
15 has informed -- I mean, the jury has informed the
16 bailiff that you need to talk louder, that they can't
17 hear you.

18 MR. WATKINS: Okay. I'm sorry..

19 BY MR. WATKINS:

20 Q Officer Jones, this is a copy of the Greenville
21 police report tow sheet. Can you tell me if this is
22 correct where the -- right there about the units that
23 y'all were in that night?

24 A Yeah, that's several people that were there.

25 Q I mean, the unit, the car that you was in, the

1 unit?

2 A Not the car number, that's our unit number. That's
3 our actual unit number ourselves. We have actual
4 separate numbers that's on the cars.

5 Q So is that your unit number?

6 A At the time it was, 208.

7 Q No, see where it says right here, it says Deputy
8 Jones, 12-- 212?

9 A Yeah, that would be -- they were just reversed
10 there.

11 Q Okay.

12 A Somebody else did that.

13 Q All right. Thank you. Okay. But you were not the
14 officer that stopped me in the white Ford Taurus?

15 A No.

16 Q You did not request that digital images be taken of
17 the car once it was stopped by forensic officer S. E.
18 Pratt?

19 A No.

20 Q Okay. So this would be -- right here this is -- all
21 right. Okay. So you did not request them digital
22 imagery -- you did not request digital images of the car
23 to be taken? You did not request images of this car to
24 be taken by S. E. Pratt, and you wasn't the investigating
25 officer on the scene?

1 A Not that I'm aware of, no.

2 MR. WATKINS: Okay. Thank you no more questions.

3 THE COURT: Mr. Marchant?

4 MR. MARCHANT: Just one, Your Honor.

5 REDIRECT-EXAMINATION

6 BY MR. MARCHANT:

7 Q Do you recall the name of the person that you had
8 secured in your vehicle?

9 A Off the top of my head I do not, I'm sorry.

10 Q Do you recall of the sex of that person?

11 A It was a black female.

12 MR. MARCHANT: Thank you. No further questions.

13 Ask that this witness be excused.

14 THE COURT: Thank you, sir. Mr. Marchant?

15 MR. MARCHANT: The State calls Marcus Scarabino.

16 THE CLERK: Please pause at the end of the bench.

17 Please place your left hand on the Bible and please raise
18 your right hand.

19 MARCUS SCARABINO

20 Having been first duly sworn, testified as follows:

21 THE CLERK: Thank you. Please be seated. Sir,
22 please state your full name for the record and would you
23 please spell your last name.

24 THE WITNESS: Marcus Scarabino, S-c-a-r-a-b-i-n-o.

25 THE CLERK: Thank you.

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Robert Max Watkins,)
S.C.D.C. No. 243803,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
C.A. No. 2014-CP-23-0589

ORDER OF DISMISSAL

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL D. WICKENSIMMER
2015 OCT 2 PM 1 41

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 31, 2014. The Respondent made its return on July 11, 2014. An evidentiary hearing was held on April 22, 2015 at the Greenville County Courthouse. The Applicant was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's standby counsel, Stephen J. Henry, Esquire. The Court had before it the transcripts from the pre-trial hearings and the trial, the Greenville County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, the return, the appellate records, and Applicant's Exhibit 1.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the February 2002 term of the Greenville County Grand Jury for armed robbery (2002-GS-23-1063, count 1) and possession of a weapon during commission of a violent crime (2002-GS-23-

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1063, count 2).

The State brought the case to trial.¹ After trial began, the Applicant successfully argued to have counsel relieved and proceeded pro se. Stephen J. Henry, Esquire was present as standby counsel. On September 24, 2008, the jury found the Applicant guilty and the Honorable Larry R. Patterson sentenced him to consecutive terms of 25 years for armed robbery and 5 years for possession of a weapon during commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. Elizabeth A. Franklin-Best, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals reversed the Applicant's convictions and sentences. State v. Watkins, Op. No. 2011-UP-091 (S.C. Ct. App. filed March 8, 2011). The Respondent filed a petition for writ of certiorari at the South Carolina Supreme Court. The Applicant was represented by David C. Alexander, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense. The Supreme Court granted the petition and the parties submitted briefs. The Supreme Court reversed the decision of the Court of Appeals on December 4, 2013. State v. Watkins, 406 S.C. 360, 752 S.E.2d 261 (2013). The Remittitur was sent on December 20, 2013.

ALLEGATIONS

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

1. Ineffective assistance of counsel (Stephen J. Henry) during a pre-trial suppression hearing:
 - a. Failed to articulate a Fourth Amendment claim pursuant to Franks

¹ The Applicant was originally convicted of these charges on October 20, 2002 and was unsuccessful in his subsequent direct appeal and PCR actions. Upon appeal from the denial of PCR, however, the South Carolina Supreme Court reversed and remanded the case for a new trial. Watkins v. State, 2008-MO-001 (S.C. Sup. Ct. filed Jan. 14, 2008).

v. Delaware.

- b. Failed to call the victims, officers, and defendants during the hearing to show false statements were made with reckless disregard for the truth.
 - c. Failed to challenge the search warrant pursuant to S.C. Code Ann. § 17-13-141.
 - d. Failed to file a motion for the trial judge to recuse himself pursuant to Canon 3(E)(a)(1).
 - e. Failed to “inform the trial court that Applicant was making a special appearance, and motion the trial dismiss or squash the indictment on grounds it was obtained in violation of Applicant’s procedural due process of rights and equal protection of rights, to SCRCrimPRule 3(c), and that the court lacks personal jurisdiction over Applicant due to an illegal process, and a practice that is unconstitutional.”
 - f. Failed to inform the Applicant he had access to an identification expert.
 - g. Failed to inform the Applicant what State witness Reilly told him when he interviewed her and what he testimony would be.
 - h. Waited “up until the trial date to coerce Applicant to agree to allow him to review the motion for Applicant to proceed pro se after Applicant decided to allow counsel to represent him, because Applicant, did not understand or know the rules of Criminal Procedures or Rules of Evidence.”
 - i. Failed to “disqualify himself under conflict of interest once [the trial judge] decided to appoint him a counsel, because of the assisting conflict of interest.”
2. Ineffective assistance of appellate counsel (Elizabeth A. Franklin-Best):
- a. Failed to “protect Applicant’s rights to a new trial granted to him by S.C. Court of Appeals.”
 - b. Failed to file a return to the State’s expedited motion to recall remittitur.
 - c. Failed to “file a motion to vacate the . . . order recalling the remittitur pursuant to SCRCP 60b(3).”
3. Ineffective assistance of appellate counsel (David C. Alexander):
- a. Failed to “bring to the SC Supreme Court attention the acts of fraud upon the S.C. Court of Appeals by [the State] by including false statements in an expedited motion to recall the remittitur.”
 - b. Stated “there is nothing he can do since the remittitur has been recalled.”
 - c. Failed to “file a return motion pursuant to SCACR 240(e) to [the State’s] motion out of time to argue against precedent.”
 - d. Failed to “present evidence to show judicial bias disqualifying [the trial judge] pursuant to SCACR 501 Canon 3E(a)(1) during oral argument.

- e. Failed "to take any exception to the recalling of the remittitur."
- 4. Lack of subject matter jurisdiction:
 - a. Violation of Rule 3(c), SCRCrimP.
- 5. Brady violation.
- 6. Double jeopardy.

In an "Amendment to PCR Application" filed May 2, 2014, the Applicant made the following additional allegations:

- 1. Ineffective assistance of appellate counsel (Elizabeth A. Franklin-Best):
 - a. Failed to "[f]ile a return pursuant to SCACR 240(e), to . . . expedited motion to recall the remittitur."
 - b. Failed to "[f]ile a motion pursuant to SCRCP Rule 60(b), (3)(4) to dismiss . . . Petition for a Writ of Certiorari, on grounds of fraud upon the Court, misrepresentation, or other Misconduct of adverse party and Judgement [sic] of S.C. Court of Appeals order recalling the remittitur is void."
- 2. Ineffective assistance of appellate counsel (David C. Alexander):
 - a. Failed to "[f]ile pursuant to SCRCP Rule 60(B)(3)(4) motion to dismiss the State's . . . Petition for a Writ of Certiorari, on grounds of fraud upon the court, misrepresentation or misconduct of the adverse party."
 - b. Failed to "take a position with respect to the reason for the recall of the remittitur, and bring to the attention of the court, the misconduct of the adverse party . . . fraud upon the court, to get the remittitur recalled so he could file a Petition for a Writ of Certiorari."
 - c. Failed to "[f]ile a petition for rehearing in reference to SC Supreme Court reversal of SC Court of Appeal reversal of my conviction. . . . Counsel should have filed a petition for rehearing in order to protect my rights to Federal Habeas Corpus by exhausting all states redemies [sic] and procedures such a petition for rehearing."
- 3. Indictment 2002-GS-23-1063 is void and the trial court lacked subject matter jurisdiction due to "the unconstitutional local practices of the Solicitors Office of Greenville County and violations of: of Due Process, Equal Protection, and the Fifth and Fourteenth Amendments of the state and federal constitution."

This Court does not take into consideration any pro se amendments filed after the appointment of PCR counsel on November 4, 2014. See Rule 11(a), SCRCP; Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (holding there is no constitutional right to hybrid

representation either at trial or on appeal).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

A.

The Applicant argued Counsel improperly handled the Franks hearing in his case.² The Applicant argued Counsel failed to challenge the truthfulness of the statements in the search warrant affidavit. The Applicant argued Counsel should have called the victims as witnesses at the Franks³ hearing to show they did not provide the information used in the affidavit. The Applicant argued Counsel failed to object after the Franks hearing in order to preserve the issue for appeal.

Counsel testified he was aware of inconsistencies between the testimony at the first and second trials. Counsel testified he questioned the magistrate about the time frame involved and the information she received from the officer. Counsel testified the officer admitted some of the information in the affidavit did not match the victims' statements. Counsel, however, testified it would have been foolish to call the victims as witnesses at the Franks hearing.

Initially, this Court notes Counsel is an experienced and accomplished criminal defense attorney. This Court finds Counsel was familiar with the issues, arguments, and testimony from

² This hearing was held before Counsel was relieved by the trial judge and ordered to remain as standby counsel.

³ Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978).

the Applicant's first trial. This Court has reviewed the transcript and can find no deficiency in how Counsel conducted the Franks hearing. This Court finds Counsel's decision not to call the victims as witnesses at this hearing was entirely proper, as doing so would likely have harmed the Applicant's case. This Court further notes it was not necessary for Counsel to have objected to the trial judge's ruling at the Franks hearing in order to preserve the issue for appellate review. This Court concludes the Applicant has not met his burden of proving this issue by a preponderance of the evidence. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (holding that, in a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence").

B.

The Applicant argued Krystyna Reilly was a surprise witness and Counsel did not tell him what he had discussed with Reilly. Counsel testified the State found Reilly (who was the missing fifth victim) and he was allowed to interview her. Counsel testified Reilly was not helpful and that he relayed this to the Applicant. This Court finds Counsel's testimony is credible. This Court finds the Applicant has failed to articulate what impact Reilly's testimony could have had upon the trial and, as Reilly did not testify at the PCR hearing, this Court cannot engage in speculation. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis in original). This Court concludes the Applicant has not met his burden of proving this issue by a preponderance of the evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

C.

The Applicant argued Counsel did not tell him that he had obtained an identification expert. The Applicant, however, failed to present this alleged expert witness – or any identification expert witness – at the PCR hearing, so this Court cannot speculate as to the impact such testimony may have had upon the trial. See Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 777 (2008) (finding that, as the applicant failed to present any expert testimony at the PCR hearing, “it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense”). This Court concludes the Applicant has not met his burden of proving this issue by a preponderance of the evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

D.

The Applicant argued appellate counsel was ineffective because (1) the issue of personal jurisdiction was not raised on appeal and (2) counsel failed to file a motion arguing “fraud against the court” related to the State’s motion to recall the remittitur.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). In analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009).

This Court finds the Applicant has failed to demonstrate appellate counsel was deficient in failing to argue the State committed “fraud against the court” in filing his motion to recall the

remittitur. The Applicant did not present testimony from appellate counsel at the PCR hearing, so this Court cannot speculate as to whether appellate counsel considered filing such a motion or believed it would have any merit. See Bannister v. State, 333 S.C. at 303, 509 S.E.2d at 809. Regardless, the timeline of when the State received the Court of Appeals' denial of its petition for rehearing was presented to the Supreme Court and that Court chose to grant the State's motion. This Court finds the Applicant has failed to demonstrate either that appellate counsel was ineffective in his representation or that the lack of such a motion prejudiced his appeal.

This Court finds the allegation that appellate counsel was ineffective in failing to raise the personal jurisdiction issue on appeal is without merit. Appellate counsel, however, is not required to raise every non-frivolous claim, but instead may select among them in order to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000). The Applicant has failed to demonstrate either that this issue was meritorious or that raising this issue would have changed the outcome of his appeal.

This Court concludes the Applicant has not met his burden of proving this issue by a preponderance of the evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

E.

The Applicant argued he was subjected to double jeopardy because he already served the 5-year sentence for the weapons charge. This Court finds the Applicant failed to demonstrate there was a violation of the Double Jeopardy Clause in his case. While he was convicted of these charges in 2002, these convictions were reversed and remanded for a new trial in 2008. Conviction after this re-trial does not constitute a violation of double jeopardy. See, e.g., State v. Nelson, 336 S.C. 186, 196, 519 S.E.2d 786, 791 (1999) (finding "the Double Jeopardy clause does not preclude retrial of a defendant whose conviction was set aside because of trial error").

Further, this Court notes the Applicant received credit for the time served since his original conviction on these charges. This Court concludes the Applicant has not met his burden of proving this issue by a preponderance of the evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

F.

The Applicant argued S.C. Code § 17-13-141 was violated due to the magistrate's non-compliance. The Applicant, however, failed to present any evidence the magistrate did not comply with this statute. Regardless, this Court finds the Applicant failed to demonstrate prejudice. See State v. Wise, 272 S.C. 384, 252 S.E.2d 294, 295 (1979) (holding the State's failure to fulfill a ministerial requirement only voids the search warrant if the defendant demonstrates prejudice). This Court concludes the Applicant has not met his burden of proving this issue by a preponderance of the evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

G.

The Applicant argued the trial judge lacked subject matter jurisdiction because of a violation of Rule 3(c), SCRCrimP. This Court finds the Applicant has not met his burden of proving the warrant in his case was invalid or that the trial court lacked subject matter jurisdiction. See State v. Culbreath, 282 S.C. 38, 40, 316 S.E.2d 681, 681 (1984) (“[T]he failure of the solicitor to act upon a warrant within ninety (90) days . . . does not within itself invalidate a warrant or prevent subsequent prosecution.”); see also State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (noting one must prove prejudice in order to prevail on an allegation that one's speedy trial rights were violated). The Applicant also argued his arraignment on the day of trial was improper. An arraignment is a mere formality and the arraignment in this case gave the

Applicant adequate notice of the charges he was facing. See State v. Ariail, 311 S.C. 35, 426 S.E.2d 751 (1993). This Court concludes the Applicant has not met his burden of proving these issues by a preponderance of the evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

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

CONCLUSION


Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial, sentencing, and appellate proceedings. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

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



Edward W. Miller
Presiding Judge
Thirteenth Judicial Circuit

Mal, South Carolina.