

The Law Office of Tristan M. Shaffer

Litigation • Injury Law • Criminal Defense

April 7, 2017

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APR 11 2017

S.C. SUPREME COURT


Daniel E. Shearouse
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Johnny Jones # 318253 v. State 2011-CP-17-0153

Dear Mr. Shearouse,

Please find the enclosed Notice of Appeal, Certificate of Service, Order of Dismissal, and Order Granting Appeal Pursuant to *Austin v. State*.

Sincerely,



Tristan M. Shaffer

CC:
Johnny James, Jr.
Dillon County Clerk of Court
Johnny Jones # 318253

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Case No. 2011-CP-17-0153

Johnny Jones # 318253,

Petitioner,

v.

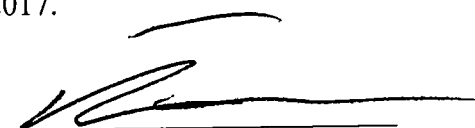
The State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner appeals the order of the Hon. Thomas Russo dismissing his post-conviction relief action filed on December 17, 2014. This order was mailed to Counsel's office on January 26, 2015, but Counsel was unaware of it. In an order dated February 11, 2017, Petitioner was granted a belated appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.3d 395 (1991). The *Austin* order was mailed to Counsel and received on March 13, 2017.

April 7, 2017



Tristan M. Shaffer (SC Bar 77565)
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tristan@shafferlawsc.com
Attorney for Petitioner

Other Counsel of Record:
Johnny E. James, Jr.
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
Attorney for Respondent

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Case No. 2011-CP-17-0153

Johnny Jones # 318253,

Petitioner,

v.


The State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that on the date below I served the Notice of Appeal on The State of South Carolina by mailing a copy to the Attorney General's Office at P.O. Box 11549, SC 29211.

April 7, 2017



Tristan M. Shaffer (SC Bar 77565)
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Attorney for Petitioner

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Attorney for Respondent

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
 COUNTY OF DILLON)
)
 Johnny Jones, #318253)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FOURTH JUDICIAL CIRCUIT

2011-CP-17-0153 S.C. SUPREME COURT

ORDER GRANTING AN APPEAL
 PURSUANT TO AUSTIN V. STATE¹

RECEIVED
 APR 11 2017

This matter comes before the Court by way of an application for post-conviction relief filed May 6, 2011. Respondent made its Return on October 19, 2011, requesting an evidentiary hearing. An evidentiary hearing on the matter was convened on July 21, 2014, at the Darlington County Courthouse. Applicant was present at the hearing and represented by Tristan M. Chaffer, Esquire. Joshua I. Thomas, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

FILED
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 CLERK OF COURT
 DILLON COUNTY

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dillon County Clerk of Court. In May 2006, the Dillon County Grand Jury indicted Applicant for trafficking cocaine, 100-200 grams (2006-GS-17-441). Lois E. McMillan, Esquire ("trial counsel"), represented Applicant. On October 17, 2006, Applicant proceeded to trial before the Honorable John L. Breeden Jr. and a jury. On October 20, 2006, the jury found Applicant guilty as indicted. Judge Breeden sentenced Applicant to twenty-five (25) years imprisonment.

Applicant filed a timely notice of appeal, and Robert M. Pachak, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed

¹ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Applicant's conviction on December 18, 2008. State v. Jones, Op. No. 2008-UP-715 (S.C. Ct. App. filed December 18, 2008). The remittitur was returned to the circuit court on January 5, 2009.

ALLEGATIONS

In his application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of counsel"
2. "Ineffective appellate counsel"

On or about July 15, 2013, Applicant filed an amendment to the application alleging the following grounds for relief:

1. "Ineffective assistance of appellate counsel for failure to argue that the drugs should have been suppressed based on the termination of the stop."
2. "Ineffective assistance of trial counsel for failure to argue that "suspicious" behavior and presence alone are insufficient to prove constructive possession."
3. "[I]neffective assistance of appellate counsel for failure to adequately argued that that "suspicious" behavior and presence alone are insufficient to prove constructive possession."
4. "Ineffective assistance of trial counsel for failure to object to the solicitor's closing arguments concerning the war on drugs."
5. "Ineffective assistance of counsel for failure to object to the "strong evidence" language in the constructive possession charge."

At the evidentiary hearing, Applicant proceeded on the allegations contained in his amendment, as well as an allegation of ineffective assistance of counsel for failing to convey a plea offer.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his prior application. Applicant's PCR Counsel never placed the

signed Order of Dismissal in Applicant's file; therefore, Applicant was never notified of a final resolution of his case and missed the deadline to file an appeal of his PCR application.

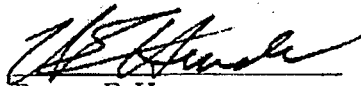
After review of the facts and circumstances surrounding the waiver of Applicant's right to appeal the denial of his post-conviction relief application, this Court finds that Applicant is entitled to appeal the denial of his post-conviction relief application (2011-CP-17-0153) pursuant to Austin v. State. This Court finds that Applicant did not voluntarily waive his right to appeal the post-conviction relief court's denial and dismissal of his prior post-conviction relief action.

Based upon the foregoing, this Court finds that the granting of an appeal of Applicant's post-conviction relief action (2011-CP-17-0153) pursuant to Austin v. State is warranted.

IT IS THEREFORE ORDERED:

1. That Applicant be granted an appeal of case 2011-CP-17-0153 pursuant to Austin v. State; and
2. That Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 20th day of December, 2016.


ROGER E. HENDERSON
Chief Administrative Judge
Fourth Judicial Circuit

Chesertfield, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF DILLON
IN THE COURT OF COMMON PLEAS

JOHNNY JONES, #318253,

Applicant,

v.

STATE OF SOUTH CAROLINA,

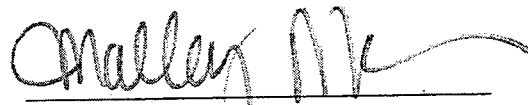
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order Granting an Appeal Pursant** to **Austin v. State** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Tristan Shaffer, Esquire
225 Columbia Avenue
Columbia, SC 29036

This 9th day of March, 2017.



Mallory Morris
Legal Assistant for Respondent

SWORN to before me this 9th day of March, 2017.

A. V. Hay
Notary Public for South Carolina.
My Commission Expires: 04-21-2018

STATE OF SOUTH CAROLINA)
COUNTY OF DILLON)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

Johnny Jones, #318253,)
)
Applicant,)

Case No. 2011-CP-17-153

v.

State of South Carolina,)
)
Respondent.)

A CERTIFIED
TRUE COPY

ORDER OF DISMISSAL

[Signature]
CLERK OF COURT
DILLON COUNTY

CLERK OF COURT
DILLON COUNTY

2014 DEC 17 AM 10:42

FILED
GWENTHYATT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 6, 2011. Respondent made a timely Return on or about October 19, 2011. The Court convened an evidentiary hearing into the matter on July 21, 2014, at the Darlington County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Also testifying were Applicant's trial counsel, Lois E. McMillan, Esquire, and Deputy Solicitor Kenard E. Redmond, Esquire. The Court had before it a copy of the trial transcript, the records of the Dillon County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief and amendments, the return, and the exhibits introduced at the hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dillon County Clerk of Court. In May 2006, the Dillon County

Grand Jury indicted Applicant for trafficking cocaine, 100-200 grams (2006-GS-17-441). Lois E. McMillan, Esquire ("trial counsel"), represented Applicant. On October 17, 2006, Applicant proceeded to trial before the Honorable John L. Breeden Jr. and a jury. On October 20, 2006, the jury found Applicant guilty as indicted. Judge Breeden sentenced Applicant to twenty-five (25) years imprisonment.

Applicant filed a timely notice of appeal, and Robert M. Pachak, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on December 18, 2008. State v. Jones, Op. No. 2008-UP-715 (S.C. Ct. App. filed December 18, 2008). The remittitur was returned to the circuit court on January 5, 2009.

II. ALLEGATIONS

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

1. "Ineffective assistance of counsel"
2. "Ineffective appellate counsel"

On or about July 15, 2013, Applicant filed an amendment to the application alleging the following grounds for relief:

1. "Ineffective assistance of appellate counsel for failure to argue that the drugs should have been suppressed based on the termination of the stop."
2. "Ineffective assistance of trial counsel for failure to argue that "suspicious" behavior and presence alone are insufficient to prove constructive possession."
3. "[I]neffective assistance of appellate counsel for failure to adequately argued that that "suspicious" behavior and presence alone are insufficient to prove constructive possession."
4. "Ineffective assistance of trial counsel for failure to object to the solicitor's closing arguments concerning the war on drugs."
5. "Ineffective assistance of counsel for failure to object to the "strong evidence" language in the constructive possession charge."

At the evidentiary hearing, Applicant proceeded on the allegations contained in his amendment, as well as an allegation of ineffective assistance of counsel for failing to convey a plea offer.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The 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. Summary of Testimony

Deputy Solicitor Redmond (“the solicitor”) testified he recalled having informal discussions with trial counsel about plea offers. He testified he recalled possibly making an eight (8) year offer, but could not remember specifics details of the offer. He testified he normally makes formal offers in writing, but was not aware of any written offers in this case. The solicitor specifically recalled trial counsel informing him Applicant desired a trial and was not interested in a plea.

Trial counsel testified she was a part-time public defender when appointed to Applicant’s case. She recalled her trial strategy was to challenge the traffic stop based on the recent Pichardo¹ case. She also recalled challenging the admission of the drug evidence because of discrepancies in the physical evidence. Trial counsel testified she discussed these strategies with Applicant prior to trial. She testified she did not promise Applicant the case would be dismissed

¹ State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005).

based on the stop, and told him he was "rolling the dice" by going to trial. Trial counsel recalled objecting to the solicitor's closing argument about law enforcement's role in maintaining law and order. She also recalled arguing mere presence in the car was not sufficient to convict Applicant.

Trial counsel testified her file indicates she met with the solicitor on July 15, 2006, and discussed the possibility of a plea. She recalled the solicitor discussed a potential five (5) year sentence, but did not make an official offer. She testified she did not think this was an official offer at that time. However, she testified she discussed the possibility of a five (5) year offer with Applicant on July 26, 2006. At that time, Applicant signed her notes indicating he did not want to accept a five (5) year offer. A copy of this page of trial counsel's notes was entered into evidence at the evidentiary hearing.

Applicant testified he spoke to his attorney about a plea, but she never addressed the issue. He testified he first heard about the eight (8) year plea offer when he arrived at the department of corrections. Applicant maintained he learned of the eight (8) year offer from paperwork in his possession, and not from information provided by his current attorney. He testified he would have accepted an eight (8) year offer, and thinks twenty-five (25) years is an excessive sentence.

B. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his 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)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's

conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

1. Failure to argue suspicious behavior and presence alone are insufficient to prove constructive possession.

The Court finds Applicant failed to meet his burden of proving counsel ineffective for failing to further argue against Applicant's constructive possession of the drugs. Trial counsel and counsel for Applicant's co-defendant presented a lengthy suppression motion in an effort to invalidate the traffic stop. In that argument, the parties argued there was no reasonable suspicion

to prolong the traffic stop. Trial counsel also argued the State had not proven constructive possession merely because Applicant was a passenger in the car. (Trial Tr. p. 126, line 25-p.128, line 10). She raised this same argument in her directed verdict motion. (Trial Tr. p. 307, lines 8-16; p. 309, lines 3-10). Trial counsel also re-raised the argument in her post-trial motions. (Trial Tr. p. 397, line 22 – p. 399, line 16). In light of these thorough arguments regarding constructive possession, the Court finds Applicant has not demonstrated trial counsel was ineffective in failing to further argue this issue.

2. Failure to object to the solicitor's closing arguments.

The Court finds Applicant failed to meet his burden of proof to show trial counsel ineffective for failing to object to the solicitor's closing arguments concerning the "war on drugs." The Court notes trial counsel objected to the solicitor's argument defending the actions of law enforcement. (Trial Tr. p. 322, lines 8-14). Her objection was apparently overruled by the trial judge, as he allowed the solicitor to continue his arguments. The Court finds trial counsel was not deficient in failing to further object later in the solicitor's closing because the trial court had already allowed such references.

The Court further finds Applicant has not demonstrated he was prejudiced by the lack of a second objection. Even improper closing arguments may be harmless if, viewed in the context of the entire record, they did not so infect the trial with unfairness as to offend due process. State v. Libarte, 336 S.C. 648, 655-56, 521 S.E.2d 744, 748 (Ct. App. 1999) (citing State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981)). Here, the solicitor's comments did not rise to such a level. Initially, the Court notes Applicant's reliance on Libarte is misplaced. Although Libarte stands for the proposition that comments

about "the war on drugs" are improper, the Court of Appeals reversed Libarte's conviction based on an "improper argument [that] invited the jury to disregard the reasonable doubt standard[.]" Id. at 656, 521 S.E.2d at 748. In Applicant's case, the solicitor did not directly argue Applicant was attempting to use the reasonable doubt standard to protect himself from conviction. Instead, he referenced the "war on drugs" briefly at the conclusion of his closing argument. Viewed in light of the entire record, the Court finds this argument did not so infect the trial with unfairness as to require reversal. Furthermore, the record contains substantial circumstantial evidence of Applicant's guilt. See Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (no prejudice where there is overwhelming evidence of guilt); Brown v. State, 383 S.C. 506, 518, 680 S.E.2d 909, 916 (2009) (same); Franklin v. Catoe, 346 S.C. 563, 574, 552 S.E.2d 718, 724 (2001) (same). Accordingly, Applicant has not demonstrated he was prejudiced by lack of a further objection by trial counsel.

3. Failure to object to "strong evidence" language in constructive possession charge.

The Court finds Applicant has not demonstrated trial counsel was ineffective for failing to object to the trial judge's charge that "[a]ctual knowledge of the presence of the cocaine based drugs is strong evidence of the defendant's intent to control its disposition or use." (Trial Tr. p. 359, lines 18-21). Such language was appropriate prior to the Supreme Court's decision in State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013). There, the Supreme Court overruled its holding in Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994), which specifically approved of the use of the charge. Thus, the law in effect at the time of Applicant's trial allowed use of the "strong evidence" charge. Accordingly, trial counsel was not deficient for failing to make an objection to a proper jury charge. See Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456

(1994) (citations omitted), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) (attorney not required to be clairvoyant or prophetic in anticipating changes in law). Furthermore, Applicant has not shown he was prejudiced by the charge based on the overwhelming evidence of his guilt. Cheeks, 401 S.C. at 329, 737 S.E.2d at 484.

4. Failure to convey plea offer.

The Court finds Applicant failed to meet his burden of proof to show trial counsel failed to convey any plea offer to him. Regarding this allegation, the Court finds the testimony of trial counsel and the solicitor credible. Correspondingly, the Court finds Applicant's testimony not credible.

To be successful on an allegation of an un-conveyed plea offer, Applicant must prove: (1) trial counsel's failure to communicate the State's initial plea offer constituted deficient performance, and (2) Applicant was prejudiced by the deficient performance, or there was a reasonable probability that but for this deficient performance, he would have accepted he original plea offer. Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009). Generally, failure to convey a plea offer constitutes deficient performance, although the existence of prejudice needs to be evaluated on a case-by-case basis. Id. at 613, 675 S.E.2d at 422. To show prejudice from a failure to convey a plea offer, Applicant must:

demonstrate a reasonable probability [he] would have accepted the earlier plea offer had they been afforded effective assistance of counsel. [He] must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Missouri v. Frye, ___ U.S. ___, 132 S.Ct. 1399, 1409 (2012).

Here, the Court finds Applicant failed to demonstrate trial counsel was deficient in failing to convey the solicitor's offer. Trial counsel discussed a five (5) year plea offer with Applicant, who rejected it. Trial counsel wisely had Applicant indicate his rejection in writing. The Court finds this evidence credible and gives it great weight. Accordingly, the Court finds trial counsel relayed the five (5) year plea offer to Applicant, and Applicant made the decision to decline the offer.

Applicant alleged he learned of an eight (8) year offer upon his review of documents after his conviction. However, his testimony in this regard was suspect and not credible. Although the solicitor testified there may have been discussion of an eight (8) year offer, he maintained there was no formal, written offer for eight (8) years. Assuming, *arguendo*, such an offer existed and trial counsel failed to relay it to Applicant, he has not shown he was prejudiced. Because the record indicates Applicant rejected a five (5) year offer, the Court finds he has not demonstrated he would have accepted an eight (8) year offer. Frye, 132 S.Ct. at 1409. Furthermore, the testimony of the solicitor and trial counsel indicates Applicant always intended to stand trial on this charge. Accordingly, the Court finds Applicant has not demonstrated a reasonable probability he would have entered into any plea agreement the State offered. Davie, 381 S.C. at 608, 675 S.E.2d at 420. Therefore, he has not shown he was prejudiced by trial counsel's performance regarding plea negotiations.

C. Ineffective Assistance of Appellate Counsel.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397

S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

An applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537, 397 S.E.2d at 526; Strickland, 466 U.S. at 687. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Furthermore, the applicant must prove prejudice by showing "there is a reasonable probability he would have prevailed on appeal." Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (citations omitted).

1. Failure to argue drugs should have been suppressed based on the termination of the stop.

The Court finds Applicant failed to meet his burden of showing ineffective assistance of appellate counsel for failing to challenge the trial judge's admission of the drug evidence over Applicant's Fourth Amendment objection. Initially, the Court notes Applicant failed to present any testimony from appellate counsel on this issue. As such, the Court cannot speculate as to why certain issues were not briefed. Cf. Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, without a witness's testimony, "any finding of prejudice is merely speculative").

Regardless, Applicant has not demonstrated he would have been successful had appellate counsel challenged the admission of this evidence. An officer may continue questioning a vehicle's driver and passenger outside the scope of an initial traffic stop when either 1) the officer has a reasonable articulable suspicion of other illegal activity or 2) the stop has become a consensual encounter. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. Here, ample evidence supports the trial judge's ruling there was reasonable suspicion to extend the stop. There was an automobile lease indicating the car was to remain in Florida, and Applicant and the co-defendant gave conflicting and inconsistent answers to general questions about their destination and purposes. State v. Jones, 364 S.C. 51, 53-54, 610 S.E.2d 846, 847 (Ct. App. 2005) (reasonable suspicion where driver and passenger gave incomplete and inconsistent answers). The record also supports the trial judge's finding the co-defendant gave a voluntary consent to search the vehicle. State v. Provet, 405 S.C. 101, 114, 747 S.E.2d 453, 460 (2013) (consent voluntary when given after officer had returned driver's license and registration and issued citation, and there was no show of force constraining driver). The Court also notes Applicant's co-defendant unsuccessfully challenged the traffic stop on these same grounds in his direct appeal. State v. Burns, Op. No. 2009-UP-262 (S.C. Ct. App. filed June 1, 2009). This Court has no reason to believe the Court of Appeals would have come to a different conclusion in Applicant's case had the same issue been argued. Accordingly, Applicant has not shown he would have been successful if this issue had been raised. Anderson, 354 S.C. at 434, 581 S.E.2d at 835.

2. Failure to adequately argue "suspicious" behavior and presence alone are insufficient to prove constructive possession.

The Court finds Applicant failed to carry his burden of proving appellate counsel ineffective for failing to further argue against constructive possession. Initially, the Court notes

this ground for relief is procedurally barred as an attempt to re-litigate an issue already decided by the Court of Appeals. See Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (“It is uniformly held that an application for post-conviction relief is not a substitute for an appeal.”). The issue in Applicant’s direct appeal was “[w]hether the trial counsel erred in refusing to grant a directed verdict ...when the State failed to present any substantial evidence [Applicant] was in constructive possession of the cocaine[.]” (Brief of App. p. 3). In making this argument, appellate counsel averred Applicant’s presence in the car was not sufficient to establish constructive possession. He also argued “[s]uspicion and conjecture should not be use [sic] to convict [Applicant].” (Brief of App. p. 9). Because this issue was directly raised on direct appeal, Applicant cannot now raise it in a collateral attack. Regardless, the Court notes the record contains sufficient evidence to support the trial judge’s denial of Applicant’s directed verdict motion based on the constructive possession issue. Accordingly, Applicant has not shown he would have been successful if this issue had been further argued or presented differently on direct appeal. Anderson, 354 S.C. at 434, 581 S.E.2d at 835.

C. 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, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application.

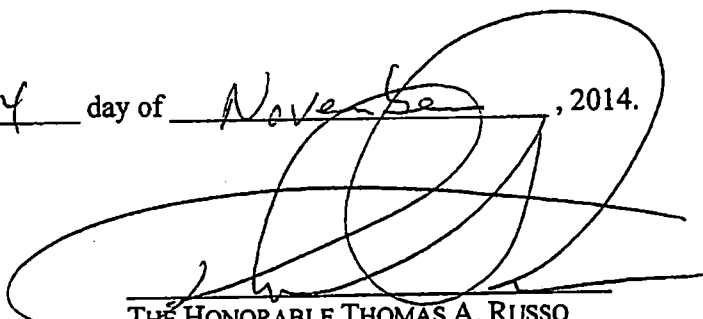
Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 24 day of November, 2014.



THE HONORABLE THOMAS A. RUSSO
Presiding Judge

Lexington, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF DILLON
IN THE COURT OF COMMON PLEAS

RECEIVED

APR 11 2017

S.C. SUPREME COURT
Applicant,

JOHNNY JONES, 318253,

v.

STATE OF SOUTH CAROLINA,


Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

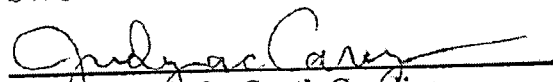
Tristan M. Shaffer, Esquire
Axelrod & Associates, PA
4701 Oleander Drive
Myrtle Beach SC 29577

This 26th day of January, 2015.



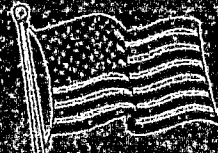
JOSHUA L. THOMAS
ATTORNEY FOR RESPONDENT

SWORN to before me this 26th day of January, 2015.



Notary Public for South Carolina.
My Commission Expires: May 14, 2024

Shaffer



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The Supreme Court of South Carolina
P.O. Box 11330
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