THE

GIESE

LAW FIRM, LLC

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JUN 26 2017

S.C. SUPREME COURT

June 23, 2017

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Ontaney V. Jackson vs. State of South Carolina
C/A No: 2014-CP-21-01889

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Jackson in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-708-6767.

Sincerely,

Jonathan D. Waller

Cc: Lindsey A. McCallister, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Paul M. Burch, Jr., Circuit Court Judge

2014-CP-21-01889

RECEIVED

JUN 26 2017

S.C. SUPREME COURT

Ontaney V. Jackson, #210570,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Ontaney V. Jackson, #210570, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed June 14, 2017, issued by the Honorable Paul M. Burch, Jr., Presiding Judge, Twelfth Judicial Circuit.

Jonathan D. Waller

Giese Law Firm
SC Bar No.: 76290
1315 Blanding Street
Columbia, SC 29201
803-708-6767 (phone)
803-708-6769 (fax)
jwaller@thegieselawfirm.com
ATTORNEY FOR PETITIONER

This 23 day of June, 2017.

Other Counsel of Record:
Lindsey A. McCallister, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Paul M. Burch, Jr., Circuit Court Judge

2014-CP-21-01889

Ontaney V. Jackson, #210570,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RECEIVED

JUN 26 2017

S.C. SUPREME COURT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Lindsey McCallister, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 23rd day of June 2017, to her office located at P.O. Box 11549, Columbia, SC 29211.

Kelly Giese

FORM 4

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

FILED
2017 JUN 14 AM 9:37
DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP2101889

Ontaney V Jackson	**State**	
PLAINTIFF(S)		**DEFENDANT(S)**

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	**Judge Code**	6/14/2017 **Date**

For Clerk of Court Office Use Only

CERTIFIED: A TRUE COPY
Doris Poulos O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

This judgment was entered on **June 12, 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **June 14, 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Jonathan D Waller 1315 Blanding Street Columbia, SC 29201

Lindsey Ann McCallister PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P. O'Hara

Court Reporter

Doris Poulos O'Hara - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF FLORENCE	IN THE COURT OF COMMON PLEAS FOR THE TWELFTH JUDICIAL CIRCUIT
Ontaney Ventrell Jackson, #210570, Applicant, v. State of South Carolina, Respondent.	Case No. 2014-CP-21-1889 **ORDER OF DISMISSAL**

FILED
2017 JUN 12 PM 3:33
FLORENCE COUNTY, SC

Presiding Judge:	Paul M. Burch, Jr.
Applicant's Attorney:	Jonathan Waller, Esquire
Respondent's Attorney:	Lindsey A. McCallister, Esquire
Trial Counsel:	Carrington Wingard, Esquire
Date of Hearing:	March 15, 2017
Court Reporter:	Lisa S. Carter

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 7, 2014. Respondent made its return on October 15, 2016. An evidentiary hearing on the matter was convened on March 15, 2017, at the Florence County Courthouse. Applicant was present at the hearing and represented by Jonathan Waller, Esquire. Lindsey A. McCallister, Esquire, of the South Carolina Office of the Attorney General represented Respondent.

Applicant testified on his own behalf. Carrington Wingard, Esquire, also testified. The Court had before it the trial transcript, the Florence County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's application, Respondent's return, and Applicant's appellate records.

CERTIFIED: A TRUE COPY
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Florence County Clerk of Court's orders of commitment. Applicant was indicted at the June 2010 term of the Florence County Grand Jury for one count of possession with intent to distribute (PWID) cocaine base, third or subsequent offense; one count of PWID cocaine, third or subsequent offense; and one count of possession of marijuana (2010-GS-21-0673). Applicant was represented by Carrington Wingard, Esquire (Trial Counsel), and Vick Meetze, Esquire (Sentencing Counsel). Following Applicant's trial *in absentia* on August 10, 2010, the jury found Applicant guilty as indicted. He was sentenced by the Honorable Michael D. Nettles to fifteen years for each count of PWID cocaine and PWID cocaine base, and one year for possession of marijuana, to be served concurrently.

Applicant filed a timely notice of appeal. An appeal was perfected by LaNelle Cantey Durant, Esquire, of the South Carolina Office of Appellate Defense, who submitted an Anders[1] brief on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction on December 11, 2013. State v. Jackson, Op. No. 2013-UP-453 (S.C. Ct. App. 2013). The Remittitur was returned on January 8, 2014.

ALLEGATIONS

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

1. Ineffective assistance of counsel:
    a. "Trial Counsel failed to be present denied Applicant's right to counsel at a critical stage of criminal prosecution;"
    b. "Counsel was ineffective for failing to ascertain the term and day of court in which petition was to be tried, which is amply supported by record;"
    c. "Counsel was ineffective for lack of preparedness which prejudiced the petitioner's trial;"

[1] Anders v. California, 386 U.S. 738 (1967).

d. "Trial counsel was ineffective for failing to object on all possible grounds to preserve issues for Appellate review."
e. "Trial counsel's performance during sentencing phase [was] both unreasonable and prejudicial. . . . [Counsel failed] to adequately inform applicant of the nature of the State's initial plea offer."
f. "Counsel's failure to be present at pretrial stage, which extends to plea bargaining process, was deficient and cause[d] applicant to be tried in his absence . . . ."

2. Due Process Violation
   a. "Prosecutor's remarks during guilt-or-innocence phase and closing argument of trial were inflammatory and inconclusive to the evidence presented, and misleading to the jury . . . ;"
   b. "Prosecutor failed to correct numerous inconsistent and false statements made by the State's primary witness;"
   c. "Prosecutor improperly bolstered Deputy Chamberlain's testimony thereby impermissibly vouching for Deputy's credibility;"
3. "Prosecutor improperly attacked the character of defendant to arouse passion, emotion, and personal bias from the jury."

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 conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant

decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. 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).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 300 S.C. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688 (1984). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

A. Ineffective Assistance of Counsel

1. Trial in Absentia

Applicant alleges Trial Counsel was ineffective for allowing him to be tried in his absence. This Court finds Applicant has failed to prove either deficiency or prejudice regarding this allegation. It is well established that, although the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived, and a defendant may be tried in his absence. State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct. App. 2007). In order to claim the protection afforded by the rule of law that a criminal defendant may be tried in his absence only upon a trial court's finding (1) the defendant has received notice of his right to be present, and (2) he was advised the trial would proceed in his absence if he failed to attend. State v. Williams, 292 S.C. 231, 232, 355 S.E.2d

861, 862 (1987). Notice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at his trial. Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976); Fairey, 374 S.C. at 99, 646 S.E.2d at 448. Further, a bond form that provides notice that a defendant can be tried in absentia may serve as the requisite warning that he may be tried in his absence should he fail to appear. Fairey, 374 S.C. at 101, 646 S.E.2d at 449.

Applicant testified he met with Trial Counsel twice and discussed the charges and possible sentences. Applicant stated he knew the offenses were classified as "serious" and that this was not a first offense. Applicant further stated Trial Counsel discussed plea offers generally, but did not give him details. Applicant testified Trial Counsel conveyed an offer for ten years, but Applicant wanted to know if he would have to serve 65% or 85% of his sentence before becoming eligible for parole, and he expected Trial Counsel to get back in touch with him. Applicant testified Trial Counsel never provided him with an answer, and when he asked the solicitor about it, the solicitor told him he needed to speak with Trial Counsel. Applicant testified he never accepted nor rejected the offer because he wanted more information. Applicant stated he tried to call Trial Counsel, but never spoke with her. Applicant further testified he did not want to accept a ten-year sentence, but he would have pleaded guilty if he only had to serve 65% of it.

Applicant testified he was released on bond shortly after his arrest on these charges, and at the time of trial, he was working in Greenwood. He testified he would take a work van with his coworkers, and they would stay the entire week. Applicant further testified he would call the court hotline number to find out if his case was scheduled, and if he did not hear his name, he

would get on the van to work in Greenwood. Applicant stated if he knew he had a court appearance, he would miss that week of work, which happened at least twice.

According to Applicant, he appeared during the first week of his trial term, and the solicitor told him his case would not be called that week, and he was free to go. Applicant testified he did not see Trial Counsel at that time, but he called Trial Counsel's office "once or twice" after that and got no answer. Applicant stated he called the court hotline before the second week of the trial term, and his name was not on the list, so he got on the work van and went to Greenwood for the week. Applicant offered conflicting testimony as to when he was notified of his trial date. Applicant testified Trial Counsel called to tell him his case was being called for trial the following day, but because he was out of town without a car, he had no way to get back to Florence. Applicant testified he was tried in his absence and was later picked up. Applicant also testified he was not aware his case was going to trial that day, and he did not speak with Trial Counsel either the week leading up to trial or afterward.

Trial Counsel testified she has been practicing law for approximately forty-five years, with approximately half of that time spent on criminal work. Trial Counsel explained she has a private practice and has also been a part-time public defender since 2000. Trial Counsel was appointed to represent Applicant through the Public Defender's Office.

Trial Counsel testified her notes indicate her first meeting with Applicant was April 30, 2010, at his docket appearance. Trial Counsel testified she discussed a ten-year plea offer with Applicant at that time, but the plea offer expired at the end of that day. Trial Counsel further testified Applicant refused the plea offer, and she did not recall him asking any questions regarding what percentage of the sentence he would be required to serve before becoming eligible for parole. Trial Counsel further testified the mandatory minimum sentence Applicant

faced was greater than ten years on the charges as indicted, but the State was offering to allow Applicant to plead to a lesser-included offense with a reduced sentence. Trial Counsel testified Applicant never indicated to her that maximum term he would accept.

Trial Counsel stated investigators from the Public Defender's Office met with Applicant on December 9, 2009, to go over the details of the incident and obtain contact information. Trial Counsel's file reflects Applicant requested a jury trial at that time. Trial Counsel testified she obtained discovery pursuant to Rule 5, SCRCrimP. She also testified Applicant contacted her office on June 9, 2010, inquiring about a letter regarding the upcoming court term, at which time she confirmed his address was the same as the one given to the investigator.

Trial Counsel further testified the first week of the court term was July 27, 2010, at which time Applicant was excused by the solicitor and told his case would be called during the third week of the term. Trial Counsel's testified she did see and speak with Applicant when he was present on the first day of the term. Further, she testified, based on her notes, she called Applicant on August 9, 2010, to inform him his case was being called for trial the next day. Trial Counsel stated Applicant told her he would be present for trial, but he did not appear by 8:30 am the next day, at which time she called him again. Trial Counsel testified Applicant did not answer, but she left him a voice message asking him to come to the fourth floor courtroom as soon as possible and explained he would be tried in his absence if he did not appear.

Trial Counsel further testified she could not recall the specifics of what she discussed with Applicant when she reached him by phone on August 9, 2010, but her file reflects they reviewed the incident report, and she verified his prior convictions. She explained her usual practice is to discuss the State's evidence and burden of proof, review the client's criminal record and explain the impact that will have, and try to ascertain the client's wishes for how to proceed.

Trial Counsel stated Applicant denied ownership of the drugs, although he had a small amount of marijuana on his person when he was arrested. Trial Counsel further testified the State's primary evidence was the eyewitness testimony of the police officer who saw Applicant throw several bags, which turned out to have cocaine in them.

This Court finds Trial Counsel's performance with respect to Applicant's trial in absentia was not deficient. This Court finds Trial Counsel's testimony on this issue to be credible, while also finding Applicant's testimony not credible. Trial Counsel conferred with Applicant on multiple occasions, during which they discussed the pending charges, Applicant's constitutional rights, the State's evidence, and possible defenses. This Court finds Trial Counsel conveyed the plea offer to Applicant, who chose not to accept it because he did not like the offer. Trial Counsel made reasonable efforts to locate Applicant once she knew his case was being called for trial, including speaking with him by telephone to inform him of the trial date and explaining that he would be tried in his absence if he failed to appear. The record reflects Counsel made a motion for a continuance, requested a bench warrant be issued, and objected to Applicant being tried in his absence. Transcript, p. 29. The trial court found Applicant was given adequate notice of the court date and that he would be tried in his absence if he failed to appear. Transcript, p. 33-39. Based on the foregoing, this Court finds Trial Counsel's performance was not deficient based on professional norms.

Additionally, this Court finds Applicant has not met his burden of establishing the requisite prejudice for relief because he did not present any evidence at the PCR hearing to show he was prejudiced as a result of being tried in his absence. See Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (finding where Applicant presented no witnesses or any specific testimony establishing he would have had a defense if he had had additional time to prepare for trial that he

failed to prove prejudice as required by Strickland). Applicant did not call any witnesses or introduce any evidence that he was unable to present at trial due to his absence. The Court finds there is no reasonable probability the result of his trial would have been different but for his absence at trial.

Accordingly, this Court finds Trial Counsel's performance was not deficient, nor was Applicant prejudiced by any alleged deficiency. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The allegation is therefore denied and dismissed.

2. Trial Strategy

Applicant alleges Trial Counsel was ineffective for failing to object to the solicitor's opening statement, for failing to object to the recall of the State's lab witness, and for stipulating that the marijuana found on Applicant was his. This Court finds Trial Counsel rendered effective assistance because she articulated a valid trial strategy for those decisions. The Court further finds Applicant presented no evidence that he was prejudiced in any way by Counsel's alleged deficiency.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778

pwb

(1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)). Trial counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

Trial Counsel testified extensively regarding the strategic choices she made during trial. She stated her general strategy of the case was to admit to the small amount of marijuana found on Applicant's person, but contest the charges arising from the bags of cocaine found on the ground, which she did in a suppression hearing. Trial Counsel explained she felt it would help Applicant to take responsibility for the marijuana possession, and she didn't want to appear to be contesting something simply for the sake of it when she knew there was no way to refute the testimony on that charge. Trial Counsel further testified she believes sometimes it is best to acknowledge bad facts up front. She also testified she did not object to the State's lab witness being recalled because she knew the court would allow it, and she instead made a continuing objection to the admission of the drug evidence, which she renewed when the witness was recalled. Transcript, p. 155.

In his opening statement, the solicitor told the jury, "[I]f I don't prove my case, and you are firmly convinced of his innocence, you will find him not guilty." Transcript, p. 86. Trial Counsel stated she generally does not object to opening or closing arguments because she gets a

chance to respond in her own argument. She stated her strategy in her opening statement was to be honest with the jury as to Applicant's absence, but she also made sure to explain that the State's burden and to stress that the burden did not change because of Applicant's absence. Trial Counsel explained her philosophy is to "pick your battles" in trial and not make every possible objection, especially on issues that won't make a difference in the outcome of the trial.

This Court finds Trial Counsel was not deficient. She is a trial practitioner who has extensive experience trying criminal offenses, and she articulated a valid trial strategy in support of her performance. See Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective."). This Court will not second guess her trial tactics, especially in light of the Court's finding Applicant has not met his burden of proving he was prejudiced by Trial Counsel's performance. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691, 104. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Applicant did not present any evidence he was prejudiced by Counsel's performance at trial. Applicant did not call any witnesses or present any defense that he was unable to present at trial due to Trial Counsel's alleged deficiencies. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This 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. . . .).

Therefore, this Court finds Counsel's performance was not deficient, nor was Applicant prejudiced by any alleged deficiency. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The allegation is therefore denied and dismissed.

3. Sentencing

Applicant's trial was concluded on August 10, 2010, and Judge Nettles sealed the sentence. Applicant was not sentenced until January 31, 2012, by which time Trial Counsel was no longer with the Public Defender's Office. Applicant was represented at sentencing by Vick Meetze, Esquire. This Court finds Sentencing Counsel also provided effective assistance in this case, as he conferred with Applicant prior to the pronouncement of Applicant's sentence, ensured Applicant received time-served credit against his sentence, and filed a timely notice of appeal at Applicant's request. Further, this Court finds Applicant's testimony failed to articulate any deficiency or prejudice he suffered as a result of Sentencing Counsel's performance.

Applicant testified he was represented at sentencing by Vick Meetze, Esquire. Applicant stated the trial judge had already decided the sentence, but Mr. Meetze was present with him when the sentence was unsealed and read into the record. Applicant further testified he asked Mr. Meetze to file a notice of appeal, which Mr. Meetze did. Applicant stated after his trial in Florence, he was incarcerated in Darlington from December 31, 2010, until sometime in January 2012. According to Applicant, he talked to Mr. Meetze about the time he had served on other charges, and, ultimately, Applicant received time-served credit of 140 days against his sentence.

Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Sentencing Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Sentencing Counsel committed either errors or omissions in his representation of Applicant.

PWB

This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Sentencing Counsel's performance. Applicant received concurrent sentences of fifteen years for each PWID charge and one year for possession of marijuana, which is well within the sentencing range. Further, the sentences were sealed at the end of Applicant's trial, and there was nothing Sentencing Counsel could do to influence the length of the sentence at the time it was read into the record. This Court finds Sentencing Counsel's performance was not deficient, nor was Applicant prejudiced by any alleged deficiency. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The allegation is therefore denied and dismissed.

4. **Prosecutorial Misconduct**

As to any and all allegations that were raised in the application or at the hearing on this matter and not addressed in this Order, specifically Applicant's allegations regarding prosecutorial misconduct, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed with prejudice.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Neither Trial nor Sentencing Counsel was deficient, nor was Applicant prejudiced by either counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice. This Court also finds, as to all other allegations, Applicant failed to present evidence of such claims, and thus, this Court deems them abandoned.

pwb

The Court notes Applicant must file and serve a notice of appeal within thirty 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), SCRCP, 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:

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

AND IT IS SO ORDERED this 31st day of May, 2017.

Paul M. Burch, Jr.
Presiding Judge
Twelfth Judicial Circuit

Pageland, South Carolina.

FILED
2017 JUN 12 PM 3:33
DARIS PAUL O'HARA
CLERK C.P. & G.S.
FLORENCE COUNTY, SC

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Daris Paul O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

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Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211