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July 27, 2017

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

RE: Kenneth Craig Appeal

Please find enclosed for filing:

- Notice of Appeal
- Proof of Service of the Notice of Appeal
- Copy of the final Order being appealed

If you have questions or concerns, please do not hesitate to contact me.

Sincerely,

s/ *Brandt Rucker*

Brandt Rucker, Esq.

CC:

Valerie Giovanoli, Esq.
S.C. Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Circuit Court

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2015-CP-42-0937

State of South Carolina,

Respondent,

v.

Kenneth Jowan Craig,
#310521,

Appellant.

Notice of Appeal

Kenneth Craig appeals the order of the Honorable R. Ferrell Cothran, Jr., dated June 16, 2017. Appellant received written notice of entry of this order on July 27, 2017.

July 27, 2017

Sincerely,

Brandt Rucker
128 Millport Circle, Suite 200
Greenville, South Carolina 29607
(864) 271-9925
Attorney for Appellant

Other Counsel of Record:

Valerie Giovanoli, Esq.
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
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APPEAL FROM SPARTANBURG COUNTY
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The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2015-CP-42-0937

State of South Carolina,

Respondent,

v.

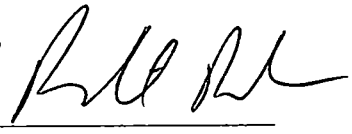
Kenneth Craig, # 00310521, Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on The State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on July 27, 2017, addressed to its attorney of record, Valerie Giovanoli, Esq., SC Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211.

July 27, 2017

Sincerely,



Brandt Rucker
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(864) 271-9925
Attorney for Appellant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Kenneth Jowan Craig, #310521,	)	C/A No.: 2015-CP-42-0937
	)	
Applicant,	)	
	)	**ORDER OF DISMISSAL**
v.	)	**WITH PREJUDICE**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed March 6, 2015. Respondent made its Return on December 18, 2015, requesting an evidentiary hearing solely on the issue of ineffective assistance of counsel. The Court convened an evidentiary hearing into the matter on June 13, 2016, at the Spartanburg County Courthouse before the Honorable R. Ferrell Cothran, Jr. Applicant was present at the hearing and represented by J. Brandt Rucker, Esquire. Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Richard Whelchel, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings. Following the hearing, the parties requested the opportunity to submit post-hearing memoranda. Respondent would respectfully submit the following:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted at

the December 2012 term of the Spartanburg County Grand Jury, and amended June 2013, for armed robbery and possession of firearm during the commission of a violent crime (2012-GS-42-2199, counts one and two). He was indicted during the June 2013 term for armed robbery (2013-GS-42-2855) and 11 counts of attempted armed robbery (2013-GS-42-2844,-2845,-2846,-2847,-2848,-2849,-2850,-2851,-2852, -2853, and -2854). Richard Whelchel, Esquire, ("Counsel") represented Applicant. Applicant was tried before the Honorable Roger L. Couch and a jury on July 22-25, 2013. The jury found Applicant guilty as indicted on all charges. Judge Couch sentenced Applicant to imprisonment for a term of 20 years for armed robbery (2012-GS-42-2199), and 10 years for attempted armed robbery (2013-GS-42-2844) to run consecutive to one another and concurrent to the following sentences: 20 years for armed robbery (2013-GS-42-2855), 10 years each for each remaining count of attempted armed robbery, and five years for possession of a weapon during the commission of a violent crime.

Applicant filed a timely notice of appeal. Robert M. Dudek, and Dennis G. Placone, Esquires, represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on November 26, 2014. State v. Craig, Op. No. 2014-UP-431 (S.C. Ct. App. filed November 26, 2014). The remittitur was returned on December 12, 2014.

II. ALLEGATIONS

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

1. "Ineffective Assistance of Counsel"
   a. "Failed to object to 'invalid warrant'"
   b. "Failed to instruct the jury on a lesser included offense of 'strong arm robbery'"
   c. Counsel never argued that no gun or weapon was presented as evidence
   d. Counsel failed to request photo lineup
   e. "Counsel failed to present G.S.R. expert"

f. "[Counsel] failed to file a motion to suppress"

2. 6th and 14th Amendment Violations
   a. "Due Process rights were violated"
3. "Conflict of Interest"
   a. "Judge that signed my arrest warrant(s) was the mother of one of the victim/witness"

A. Summary of Testimony

Applicant testified that he met with Counsel three times for about five to ten minutes each time. Applicant testified that Counsel reviewed discovery with him and talked to him about all of the evidence, but he did not remember Counsel discussing with him the strength of the State's case against him. Counsel did not tell him about the identification witness. Counsel did discuss with him the gunshot residue found on his clothes. He was arrested approximately twenty-one hours after the robbery and was at his house when he was arrested. He testified there was no arrest warrant. He testified he discussed the arrest with Counsel. He said the arrest was invalid and that he was never pointed out (or identified) prior to the arrest. The State never conducted a photo line-up. He testified Counsel should have objected to the warrant and indictment. Applicant testified Justin Harrison identified him from seeing his photograph on the news and that this was a tainted identification because he never gave a description. Applicant testified there was no Biggers hearing, but also testified that the witness was never shown any photographs by the State. He stated he asked Counsel to do a lineup. Applicant agreed that Counsel did raise the identification issue at trial.

Applicant testified the charge that the hand of one is the hand of all should not have been given at trial. He stated his attorney did not object to the charge. However he agreed his attorney did request a mere presence charge and the trial judge did charge mere presence. Applicant also testified he thought Counsel should have hired a gunshot residue expert who could have testified that the particles did not match, although Applicant did not present an expert at the hearing.

Applicant testified that Gerald Davis should have been presented as a defense witness. He testified Davis was present in the courtroom because he was going to be presented as a State's witnesses. Applicant said there was reason to believe Davis was responsible for the crime, but Applicant stated he did not know what Davis would have testified to if he had been called as a witness. He further testified Counsel could not have done anything better.

Applicant testified Counsel did not produce any other witnesses. Applicant never spoke to the investigator and did not even know he had one. If he had spoken to the investigator he would have told him to get a video recording from the gas station. Applicant testified the magistrate who issued the arrest warrant had a conflict of interest because she was the mother of one of the victims of the robbery. Applicant agreed this folded into the invalid arrest warrant argument and that Counsel raised the issue at trial but "did not push it." Applicant testified that Brittany McSwain, the deceased's cousin, provided a statement and that the defense did not receive her statement until a week before trial. He stated Counsel could have gotten her statement and her testimony completely thrown out. Applicant testified that Counsel failed to speak with McSwain before trial. Applicant testified Counsel relayed a twenty year plea offer to him, which he rejected.

Counsel testified that he has been practicing law for 34 years and that all of his practice has been criminal law. Contrary to Applicant's testimony, Counsel testified that he met with Applicant 12 times prior to trial and that the meetings were lengthy and substantially longer than five or ten minutes. Counsel testified he made discovery motions, reviewed all discovery with Applicant, and discussed all the elements of the charges and what the State would have to prove. Counsel stated that the evidence against Applicant at trial consisted primarily of the statements of the patrons and employees at Waffle House, including one patron's identification of Applicant

as the other person involved in the robbery, statements of persons present at the home of Applicant's co-defendant who heard Applicant saying he wanted to "hit a lick" that night, and the gunshot residue that was found on Applicant's clothing. He testified Applicant's story was that he had driven Dante (the deceased victim) and Davis to the Waffle House, but Applicant was not involved in the robbery itself and did not know why he was dropping them off at Waffle House. He testified he discussed the hand of one hand of all with Applicant and Applicant understood those discussions.

Counsel stated he raised the issue of whether the arrest warrant was issued by a neutral and detached magistrate. When asked on cross-examination, he stated he did not know if the issue was preserved. Counsel testified he did not ask the witness, Brett Atkins, on the record if he had talked to his mother (the magistrate) about the robbery. Counsel stated McSwain's testimony was consistent with her statement. Counsel testified he also objected to the arrest warrant and indictment in a preliminary hearing based on lack of probable cause. Counsel testified he also challenged the identification issue at trial. Counsel testified he did speak with a gunshot residue expert but he did not call the expert to testify because his testimony would not have been helpful to the defense. Counsel testified he did not call Gerald Davis to testify because he likely would not have been able to, and his testimony would not have been helpful. Counsel testified he tried to speak with Brittany McSwain. He went to the home where Applicant was and tried to talk to all who were there, but they were not cooperative. Counsel testified he sent his investigator to the service station to see if there was a video recording that would support Applicant's story, but there was no video.

Counsel testified his trial strategy was to convince the jury to accept or understand that someone else was the responsible party. He also stated he opposed the State's motion to exclude

third party guilt and asked for a mere presence instruction, which the judge charged. Counsel testified he had ample time to prepare for trial and had no reason to ask for a continuance.

B. Ineffective Assistance of Trial Counsel

This Court finds Applicant's allegations of ineffective assistance of counsel are without merit. In a post-conviction relief action, 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 counsel 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)). The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). 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 Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced 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.

Counsel had been practicing exclusively criminal law for a substantial amount of time when he was appointed to represent Applicant. Counsel made the appropriate motions for discovery, reviewed all discovery with Applicant, discussed the State's evidence against him and what the State would have to prove at trial. Furthermore, Counsel discussed the concept of the hand of one as the hand of all with Applicant and stated Applicant understood those discussions. Counsel also discussed possible defenses with Applicant and conducted a thorough investigation, which included, among other things, reviewing witness statements, interviewing all potential witnesses and determining whether there was a video from the convenience store across the street from the Waffle House to support Applicant's story. Counsel challenged the identification of Applicant, challenged Applicant's arrest, and Counsel moved for and renewed his motion for a directed verdict at the appropriate times at trial. This Court finds Counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation. Accordingly, this Court denies and dismisses applicant's application for PCR because he has failed to satisfy his burden of proving either deficiency or prejudice as to all allegations of ineffective assistance. This Court addresses Applicant's specific allegations below.

Failure to object to invalid arrest warrant and move to suppress evidence

Applicant argued at the PCR hearing that Counsel failed to properly challenge the validity of the arrest warrant. Applicant alleges that Counsel was ineffective for not arguing at trial that Applicant's arrest was invalid because the arrest warrant (1) was not supported by probable cause, and (2) was not issued by a neutral and detached magistrate. Applicant has failed to show that Counsel's performance in challenging the arrest warrant was deficient or that there

is a reasonable probability that but for the alleged error the outcome of trial would have been different.

1. Probable Cause

Counsel argued at trial that the arrest warrant was not supported by probable cause because no one had identified Applicant at that point and the only evidence against him was the fact that he was at the Alexander Avenue residence and left with another male. Counsel argued that no one at that time had placed him at the Waffle House. (Tr. p. 168). Counsel argued that as a result of Applicant's arrest, his photograph was taken and used by the media, and police then went to the witness (Justin Harrison) and asked him if he had seen the news. (Tr. p. 168). Based on this, Counsel moved at trial to suppress the arrest warrant and to suppress the alleged identification leading from the warrant and property evidence that was taken as a result of the arrest. (Tr. p. 169). Counsel argued that when Applicant was arrested without probable cause, everything that stemmed from his arrest was tainted and should not be allowed to go to the jury, including photographs of Applicant. (Tr. p. 172). The State argued that the arrest was based on a judge signing a warrant for probable cause and there was also a probable cause hearing at which a different magistrate judge again found probable cause. (Tr. p. 170). The trial judge then allowed Counsel to make a proffer concerning the probable cause argument. (Tr. pp. 179-80). Counsel presented the testimony of Investigator Bryant. Counsel questioned him about whether he was aware at the time he obtained the arrest warrant that the magistrate who issued the warrant was the mother of one of the victims. Investigator Bryant testified that he was not aware at that time. Counsel argued that because the magistrate was the mother of one of the victims she could not have been neutral and detached. The State objected on the grounds that Counsel was procedurally barred from making the argument because it should have been raised pretrial. The

Court stated it would "go ahead and let [Counsel] make his proffer." (Tr. p. 184).

Investigator Bryant stated that the facts supporting the warrant were that the investigators had spoken to Brittany McSwain, the individuals from the family members of Dante Williams, and the people at 351 Alexander Avenue. Investigator Bryant stated that none of those individuals had been at the Waffle House, but that they indicated that Applicant had left with Dante Williams, the decedent, after they discussed wanting to "hit a lick" that night. (Tr. pp. 185-87). Bryant stated he told the magistrate "they had planned the robbery, changed clothes, came back in for the gloves, and had left together, and shortly afterwards, and that the only one that had [come] back was [Applicant]." (Tr. p. 195). Bryant also testified he and the other officers on the scene at the Waffle House had obtained general information as to the race and sex of the defendant and that there was also a video that captured the entire crime on it. (Tr. p. 198). The trial judge ultimately ruled the information presented to the magistrate was sufficient and probable cause did exist. (Tr. p. 213-14).

2. Neutral and Detached Magistrate

Applicant argues Counsel failed to preserve the issue that Applicant's arrest was invalid because the magistrate who issued the arrest warrant was not neutral and detached because her son was a victim. This allegation is without merit.

"When [an applicant] claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is *meritorious* and that the verdict would have been different absent the evidence that *should* have been excluded." McHam v. State, 404 S.C. 465, 475-76, 746 S.E.2d 41, 47 (2013) (quoting Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994)).

Here, Counsel did raise the issue at the trial, and there was no finding on appeal that it

was not preserved. Investigator Bryant testified he was not aware at the time that the magistrate who issued the warrant was the mother of one of the victims. Regardless, the fact the magistrate's son was a victim—whether she was aware of that fact at the time or not—is not evidence that she was not neutral and detached such that the trial judge would have held the arrest warrant was invalid. See, e.g., Lo-Ji Sales, Inc. v. New York, 422 U.S. 319 (1979) (finding magistrate was not neutral and detached where he "allowed himself to become a member, if not the leader, of the search party which was essentially a police operation. . . . conducted a generalized search under authority of an invalid warrant [and in doing so] he was not acting as a judicial officer but as an adjunct law enforcement officer"). In addition, post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). This is an issue that could have been raised on direct appeal, and Applicant's failure to do so precludes him from raising this issue in a post-conviction relief action. See also Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973) (holding a post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal).

Nevertheless, even if Applicant had proved the magistrate was not neutral and detached, Applicant has failed to show what, if any, affect this would have had on his trial because the exclusionary rule would not have applied pursuant to the good faith exception. See State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009). "The fact that a Fourth Amendment violation occurred—*i.e.,* that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies." Herring v. United States, 555 U.S. 135, 140 (2009) (citing Illinois v. Gates, 462 U.S. 213, 223, (1983)). Rather, "the exclusionary rule is not an individual right and applies only where it 'results in appreciable deterrence.' . . . [And] the benefits must outweigh the costs. Id. at 140-41 (quoting Leon v. United States, 468 U.S. 897, 909-10 (1984)). "[W]hen

police mistakes are the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.'" Id. (quoting Leon, 468 U.S. at 909-10) (upholding the trial court's denial of the defendant's motion to suppress evidence obtained as the result of a search incident to an arrest where the arrest was found to be invalid)). In State v. Herring, 387 S.C. 201, 692 S.E.2d 490, the South Carolina Supreme Court held that even if the Court determined that an affidavit was improper, it would find that the investigators acted in good faith and reasonably believed the warrant valid, such that the search should be upheld.

Here, Investigator Bryant testified he had no knowledge that the magistrate was related to one of the victims at the Waffle House. Moreover, he testified the information he provided the magistrate in obtaining the search warrant was obtained from people who were not present at the location where the robbery occurred. He testified he had spoken to individuals who saw Applicant and the decedent that night and they had discussed carrying out a robbery in celebration of the decedent's birthday. They also stated only Applicant returned to the house that evening. The trial judge ruled there was probable cause to issue the arrest warrant. Applicant has failed to present any evidence that the investigators were not acting in good faith. Accordingly, Applicant has failed to show that but for the alleged deficiency of Counsel, there is a reasonable probability that the gunshot residue or clothing would have been excluded or that the failure to exclude the evidence would have been reversible error. See, e.g., State v. Tisdale, 338 S.C. 607, 611-15, 527 S.E.2d 389, 391-94 (Ct. App. 2000) ("The admission of evidence is within the sound discretion of the trial court."). This Court finds, as a result, Applicant has failed to satisfy his burden of proving either deficiency or prejudice.

Failure to Suppress Identification by Justin Harrison

Applicant also alleged Counsel was ineffective for not suppressing his identification and all evidence that flowed therefrom. He argued Harrison's identification led to the arrest and as a result of the arrest, the physical evidence implicating Applicant was discovered pursuant to a search incident to arrest. This allegation is meritless and is not supported by the record. Applicant had already been arrested when Harrison identified him. Counsel challenged the arrest itself, the identification that resulted from the arrest, and the reliability of the identification, arguing that the State intentionally avoided conducting an identification process and instead allowed the process to occur in the media. Counsel argued that if the arrest was illegal, and Applicant's picture was on the news as a result of his arrest, then Harrison's identification must be thrown out also. Counsel argued at trial that the State allowed the identification process to occur in the press, but, no evidence has been presented to indicate the State actually sponsored the activity. See State v. Tisdale, 338 S.C. 607, 611-15, 527 S.E.2d 389, 391-94 (Ct. App. 2000) (finding pretrial identification of defendant by three tellers who witnessed the armed robbery was properly admitted because the television and newspaper were nongovernmental sources of the suggestiveness). Harrison testified that after Applicant's arrest, the police called him and asked him if he could identify the second suspect from a police lineup but he told the police "there was no use, that's the guy, y'all caught him." (Tr. p. 228). The Court overruled Counsel's objection to the reliability of Harrison's identification and allowed the identification to go forward. The Court ruled that, pursuant to Tisdale, the identification should not be excluded merely because it was made as the result of Applicant's photo being shown by the media. (Tr. p. 214). Therefore, the record reflects that Counsel properly challenged the identification, both on the basis that it flowed from the allegedly illegal arrest, on the basis that it was unreliable, and that the Court

ruled on both. This issue was also raised in Applicant's appeal. The Court of Appeals affirmed Applicant's conviction, and made no finding that the issue was not preserved. Accordingly, Applicant has failed to identify any deficient performance concerning Counsel's handling of the identification issue and has provided no example of what Counsel could or should have done to have the identification thrown out. See State v. Tisdale, 338 S.C. 607, 611-15, 527 S.E.2d 389, 391-94 (Ct. App. 2000) ("the Neil analysis is inapplicable where there is a nongovernmental identification source.").

Further, Applicant has failed to show that but for the alleged deficiency the outcome of the proceeding would have been different. Applicant has failed to set forth what Counsel could have done differently, and has made no showing that the trial judge would have ruled differently than he did. See State v. Brown, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App. 2003) ("[T]he decision to admit an eyewitness identification is in the trial [court]'s discretion and will not be disturbed on appeal absent an abuse of discretion, or the commission of prejudicial legal error."); State v. Singleton, 395 S.C. 6, 13-14, 716 S.E.2d 332, 335-36 (Ct. App. 2011) (quoting Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof.")). Applicant was already under arrest at the time, therefore, Harrison's identification, even if Applicant had shown it was unreliable, would not have resulted in the exclusion of evidence seized as a result of his arrest. See Herring, 555 U.S. at 140-41 (upholding the trial court's denial of defendant's motion to suppress evidence obtained as the result of a search incident to an arrest where the arrest was found to be invalid). Accordingly, this allegation is without merit. This Court finds Applicant has failed to show either

deficiency or prejudice as to these allegations and they are denied and dismissed.

Failure to request a photo line-up

Applicant alleged in his application Counsel was ineffective for not requesting a photo line-up. The only testimony Applicant provided at the hearing was that the witness was never shown any photographs by the State and he asked Counsel to do it. Counsel testified he challenged the identification of Applicant at trial and Applicant agreed. This Court finds Applicant produced no evidence at the PCR hearing in support of this allegation. Therefore, this Court denies and dismisses this allegation.

Failure to present a gunshot residue expert

Applicant thought Counsel should have hired a gunshot residue expert. Applicant said he could have testified that the particles did not match. However, Applicant did not present an expert at the hearing. Counsel testified he did speak with a gunshot residue expert but did not call the expert to testify because his testimony would not have been helpful to the defense. This Court finds Applicant has failed to show either deficiency or prejudice with respect to this allegation. See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) ("[An] applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence.")); Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir.1977) ("[W]here counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.")).

Failure to argue third party guilt

This Court finds Applicant presented no evidence in support of this allegation. Applicant alleged at the PCR hearing that Counsel should have presented Gerald Davis as a defense witness to show that it was Davis, and not Applicant, who was responsible for the crime. Applicant testified Davis was present at the trial because the State was intending to call him as a witness. Counsel did pursue the third party guilt theory. He opposed the State's motion to exclude third party guilt at trial. He testified he could not have presented Davis as a defense witness in support of the third party guilt theory, and that regardless, his testimony would not have been helpful. Counsel has articulated a valid trial strategy in not presenting Davis as a witness. See Whitehead, 308 S.C. at 122, 417 S.E.2d at 531. In addition, Applicant testified he did not know what Davis would have testified to at trial, and Davis was not called as a witness at the PCR hearing. He further testified Counsel could not have done anything better. Applicant has failed to show he was prejudiced by the alleged deficiency. See Dempsey v. State, 363 S.C. at 369, 610 S.E.2d at 814. Accordingly, this Court finds Applicant has failed to satisfy his burden of proving either deficiency or prejudice with regard to this allegation. Therefore, the allegation is denied and dismissed.

Counsel never argued that no gun was presented as evidence

This Court finds Applicant failed to produce any evidence in support of this allegation at the PCR hearing. Accordingly, Applicant has failed to satisfy his burden as to this allegation and the allegation is denied and dismissed.

Failure to instruct the jury on the lesser included offense of strong arm robbery

This Court finds Applicant failed to produce any evidence in support of this allegation at the PCR hearing. Accordingly, Applicant has failed to satisfy his burden as to this allegation and

the allegation is denied and dismissed.

C. Sufficiency of Indictments

Applicant claimed at the PCR hearing that the Court lacked subject matter jurisdiction because the indictment did not have "hand of one hand of all" language. "An indictment is merely a notice document." State v. Baker, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010) (citing State v. Gentry, 363 S.C. 93, 102-103, 610 S.E.2d 494, 500 (2005). Whether or not the indictment could be made more definite and certain is irrelevant. Baker, 390 S.C. at 62, 700 S.E.2d at 442. "[A]n indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood." Id. at 63, 700 S.E.2d at 443 (citing State v. Tumbleston, 376 S.C. 90, 98, 654 S.E.2d 849, 853 (Ct. App. 2007)). Furthermore, to challenge the sufficiency of an indictment, an objection must be made before the jury is sworn in. S.C. Code Ann. § 17-19-90 (2003). A court reviewing an indictment for sufficiency should consider the indictment "'on its face,' *and* consider the events at trial." State v. Reddick, 348 S.C. 631, 636, 560 S.E.2d 443, 443 (Ct. App. 2002). Here, the indictments against Applicant are sufficient on their face. Applicant has failed to show he did not understand the nature of the charges against him. Applicant was unquestionably on notice of the charges waged against him. In addition, this claim in no way affects the circuit court's jurisdiction. This Court finds Counsel's testimony is persuasive on the issue as he reviewed all indictments and elements of all charges brought against Applicant. Counsel testified he explained hand of one hand of all to Applicant and he understood those discussions. Therefore, this allegation is denied and dismissed.

D. 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 herein, Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 16 day of June 2017.

R. FERRELL COTHRAN, JR.
Presiding Judge
Seventh Judicial Circuit

Laurens, South Carolina

CLERK OF COURT SPARTANBURG, SC
2017 JUN 27 AM 8:52
M. HOPE BLACKLEY

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