RECEIVED
AUG 25 2017
S.C. SUPREME COURT

ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

August 8, 2017

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Isaac Glenard Lyles v. State
2016-CP-42-1479

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,

Susannah Ross
Attorney at Law

enclosure

cc: Office of the Attorney General
Office of Appellate Defense
Spartanburg County Clerk of Court

330 E. COFFEE ST.• GREENVILLE/SC • 29601
PHONE: (864) 242-0029
E-MAIL: SUSANNAH@ROSSENDERLIN.COM

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
AUG 25 2017
S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

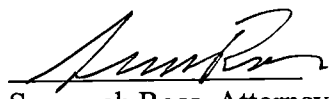
2016-CP-42-1479

Isaac Glenard Lyles, ... Appellant,
v.
The State, ... Respondent.

NOTICE OF APPEAL

Isaac Glenard Lyles appeals the Honorable Robin B. Stilwell's Order of Dismissal filed August 7, 2017.

This 22 day of August, 2017.



Susannah Ross, Attorney at Law
330 E. Coffee St.
Greenville, SC 29601
(864) 242-0029
Attorney for Appellant

Other Counsel of Record:
Valerie Giovanoli, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for Respondent

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
ISAAC GLENARD LYLES,)
APPELLANT,)
)
)
VS.)
)
)
THE STATE OF SOUTH CAROLINA,)
RESPONDANT.)
)

IN THE SUPREME COURT

CERTIFICATE OF SERVICE BY MAIL

1. I am the attorney for the Applicant in the above-captioned matter.

2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Notice of Appeal** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

Attorney General
Alan Wilson
P.O. Box 11549
Columbia, SC 29211

Attorney for Defendant

This 22 **day of** August, **2017**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	2014
Isaac Glenard Lyles, #209983,	)	Case No.: ~~2015~~-CP-42-1479
	)	
Applicant,	)	**ORDER OF DISMISSAL**
	)	**WITH PREJUDICE**
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

2017 AUG -7 AM 11:16

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Isaac Glenard Lyles (Applicant) on April 18, 2016. The State (Respondent) made its return on February 16, 2017, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on June 28, 2017 at the Spartanburg County Courthouse. Applicant was present and represented by Susannah C. Ross, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. William S. Bean, IV, Esquire, (Counsel) also testified. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's direct appeal records, the PCR application, Respondent's return, and the exhibits entered at the PCR hearing.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. Applicant was indicted by the October 2013 term of the Spartanburg County Grand Jury for possession with intent to distribute ("PWID") cocaine within one-half mile of a school or park (2013-GS-42-4570), PWID marijuana

139

within one-half mile of a school or park (2013-GS-42-4571), PWID cocaine base within one-half mile of a school or park (2013-GS-42-4572), PWID marijuana, 2nd offense (2013-GS-42-4573), trafficking cocaine, 10-28 grams, 3rd or subsequent offense (2013-GS-42-4574), trafficking in cocaine base (2013-GS-42-4575, count 1), and possession of a firearm or knife during the commission or attempt to commit a violent crime (2013-GS-42-4575, count 2). William S. Bean, IV, Esquire, represented him. The State was represented by Assistant Solicitor Scott D. Spivey of the Seventh Circuit Solicitor's Office. Prior to trial, the State served and filed notice of intent to seek life without parole based on Applicant's prior record. On December 4-5, 2013, Applicant proceeded to trial by jury pursuant to which he was found guilty as charged. He was sentenced by the Honorable Roger L. Couch to five concurrent prison terms of life without parole for the two trafficking charges and the three proximity charges; ten (10) years' concurrent imprisonment for PWID marijuana 2nd; and five (5) years' concurrent imprisonment for possession of a firearm during a violent crime.

A timely notice of appeal was filed on Applicant's behalf. The appeal was perfected Applicant was represented by Laura Baer, Esquire, (Appellate Counsel) of the Office of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion. State v. Lyles, 2016-UP-045 (filed on January 27, 2016). The Remittitur was issued on April 26, 2016.

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

1. "The trial court lacked subject-matter jurisdiction to try and convict the Applicant for unindicted drug offenses"
    a. "For evidence in support of his claim, the applicant submits that his indictments indicate that the Spartanburg County General Sessions Court began on October 7, 2013. However, the "Action of the Grand Jury" section indicates that the grand jury "True Billed"

137

the applicant's indictment on "September 27, 2013," which was nine (9) days prior to the beginning of the term of General Sessions Court in Spartanburg County."

2. Ineffective Assistance of Counsel, in that:
    a. Counsel failed to move for suppression of, or to object to, the State's drug evidence that was seized in violation of Fourth Amendment
        i. "During the execution of the search warrant, applicant was arrested and drugs were found. Nevertheless, even though the state had failed to disclose the existence of any Confidential Reliable Informant (CRI) to support probable cause for the introduction of any drug evidence against the applicant, his trial counsel did not only fail to move for suppression of the state's drug evidence against him
        ii. The record in applicant's case was devoid of any CRI to show that police had probable cause to seize the drug evidence
        iii. The police executed a search of the 533 North Forest Street residence based solely upon information from a "complaint" that was uncorroborated by any investigation of controlled drug buy from him to support any probable cause for his seizure or search by the police."
        iv. "The Applicant also contends that the state's seizure of drug evidence against him at trial did not only show that the police executed an unlawful search of the residence where he was a guest, but did also show that he was unlawfully seized in violation of the Exclusionary Rule of the Amendment
        v. Because the State failed to produce its informant prior to or during trial to establish probable cause for the admission of the drug evidence, Counsel's failure to move to suppress the evidence was ineffective because the drug evidence was the only evidence against Applicant
    b. Counsel failed to object to the court's interpretation of S.C. Code §§ 17-25-45 and 17-25-50."
        i. ...given the fact that the PWID crack cocaine is not listed under section 17-25-45, the applicant contends that inasmuch as the record showed that his burglary first and manslaughter offenses took place at the same time and place, his counsel's failure to object to the trial judge's construction of 17-25-45 in conjunction with 17-25-50 was ineffective assistance of trial counsel, and was prejudiced by the Judge's imposition of his unlawful sentence." [sic]
    c. Counsel failed to impeach the state's star witness with his prior convictions for armed robbery and third degree burglary offenses."
        i. Wesson's armed robbery and third degree burglary

convictions were punishable by imprisonment in excess of one year. S.C. Code 16-11-313; 16-11-330. Thus, the crimes were as a matter of law admissible under Rule 609(a)(1) to attack Wesson's credibility. Counsel's failure to argue the application of Rule 609(a)(1), SCRE, to impeach Wesson's credibility was ineffective assistance of counsel..."

d. "Counsel failed to object to the solicitor's vouching for the credibility of a state witness."
    i. There was no other evidence beyond Wesson's testimony connecting Applicant to the state's drug evidence
e. Counsel failed "to object to the trial judge's jury charge on the facts."
    i. "Therefore, the Jury charge by the Court in this instance was in essence a charge on the facts in violation of Article V, [Section] 22 of the S.C. Constitution; of particular note; no Court would charge a Jury the inverse of this charge—you may infer the defendant does not have dominion and control over the drugs "if he does not have control over the premises but is merely present."

On June 23, 2017, Applicant filed an Amendment to his PCR application to include the following allegation:

1. "Ineffective assistance of appellate counsel for failing to brief issues of:
    a. error in Judge's sentence of life without parole pursuant to § 17-25-45."
2. "Denial of due process when Judge sentences of life without parole pursuant to § 17-25-45."

At the evidentiary hearing, Respondent opposed the late amendment noting Rule 15(a), SCRCP. This Court allowed Applicant to proceed on all claims and agreed, if necessary, to bifurcate the proceedings to allow Respondent to supplement the record with further evidence in response to the amended claims. However, this Court finds no such bifurcation is needed

FACTS ADDUCED AT TRIAL

Applicant was arrested on October 9, 2012, during the Spartanburg City Police Department's execution of a search warrant. As the police entered the front door of a suspected drug house, Applicant exited a back door and tried to run; however, he was immediately caught

and detained. Applicant had a gun and small amounts of marijuana and cocaine on his person, and over one thousand dollars in cash fell from his pocket and was found beside him on the ground. The police then found a black bag hanging on the fence between the house and an empty lot next door. The bag contained large quantities of cocaine, cocaine base (crack cocaine), and marijuana, as well as a bottle of caffeine powder and a set of digital scales. Edward Wesson, a second individual who had also tried to run from the house testified that the bag belonged to Applicant. (R.p.26-p.39; p.43-p.622; p.90-p.101; p.107-p.125; p.135-p.146; p.153-p.166; p.170-p.178).

At trial, the State called narcotics investigator Michael Secrest to the stand. He described his role in the October 9, 2012, execution of a search warrant on a residence on North Forest Street in the city of Spartanburg. Secrest drove the tactical truck for the SWAT team members who entered the house. He identified a photograph of the house as well as a satellite image of the neighborhood which showed the location of the house in relation to Cleveland Elementary School, which was .348 miles away. After exiting the truck with the rest of the tactical team, Secrest went to the right side of the house to help secure the perimeter. As soon as entry was made at the front of the house, two individuals, including Applicant, came out the side door and tried to run. Secrest caught Applicant three or four steps from the side of the house and as they fell to the ground, money fell out of Applicant's pocket. Secrest noticed Applicant moving his hand down toward his waistline so he grabbed Applicant's hand as he detained him. Secrest discovered a handgun and a small amount of marijuana in Applicant's pocket. The handgun and bullets from that gun, as well as photographs of the money and marijuana, were identified and then admitted into evidence. (R.p.26, line 16-p.39, line 13).

Next, the State called investigator Josh Bagwell to the stand. Bagwell served as the "return officer" for the search warrant and described each of the items discovered at the scene. He first described the items found on or near Applicant, including a Hi-Point .380 handgun which was loaded with six rounds, two small containers of a green plant-like material, a small bag containing a white powder-like substance, and one thousand two hundred and eighty-one dollars ($1,281) in cash. (R.p.43, line 6-p.51, line 11). Bagwell next described a black tote bag the police found on the fence along the side of the residence, and the contents of that bag. This included more green plant-like material, a set of digital scales, a white rock-like substance, a powder-like substance, a bottle filled with crystalline powder, and a set of goggles. Bagwell testified he remembered three males being at the residence; however, Applicant was the only one who had drugs. (R.p.51, line 15-p.62, line 11).

Rule 609: Impeachment by Evidence of Conviction of Crime

Before calling Edward Wesson as the next State's witness, the solicitor handed up a copy of this Court's published opinion in State v. Broadnax[1] and asked the trial judge to address whether Appellant would be permitted to attack Wesson's credibility with his prior convictions. The judge commented that pursuant to Broadnax it appeared the court would have to determine if the underlying crime involved some type of dishonesty or false statement before it could be used to impeach. The judge said he would review the case and would rule after the State proffered Wesson's testimony and Applicant had the chance to cross-examine on the specifics of the crimes. (R.p.71, line 10-p.74, line 12). Wesson then took the stand outside the presence of the jury.

After the proffer, the solicitor moved to prohibit Applicant from using Wesson's convictions for burglary and armed robbery to impeach. The solicitor noted that regardless of

[1] 401 S.C. 238, 736 S.E.2d 688 (Ct. App. 2013), aff'd in part, rev'd in part 414 S.C. 468, 779 S.E.2d 789 (2015).

R37

the court's ruling on the two crimes in question, Wesson's prior convictions for fraudulent check would be admissible to impeach. Applicant responded that he believed Wesson's armed robbery and burglary clearly involved dishonesty and should therefore be admitted against him as well. Specifically relying on Broadnax, the trial court concluded there was not sufficient evidence to find that the two crimes were crimes of dishonesty or false statement and therefore excluded them from trial.

After the ruling, the jury returned to the courtroom and Wesson took the stand. At the beginning of his testimony Wesson admitted he had five 2006 convictions for fraudulent check. (R.p.90, line 17-p.92, line 21). He then described his relationship with Applicant and explained he was living at the residence on North Forest Street when the police conducted the search. Wesson testified he met Applicant in the summer of 2012 when Wesson was moving into the apartment and said he saw Applicant nearly every day after moving in. Wesson testified Applicant asked if he could use Wesson's apartment to sell drugs and Wesson agreed. He testified Applicant sold drugs from the residence every day from the summer of 2012 through October and during that time Applicant always carried a black bag. Wesson identified State's Exhibit 14 as the bag belonging to Applicant and the bag was admitted into evidence over Applicant's objection. The items discovered in the bag were also admitted over Applicant's objection. Wesson identified the goggles from the bag as belonging to Applicant and testified he had seen Applicant with the goggles before. According to Wesson, Applicant paid him with crack cocaine in exchange for the use of Wesson's residence to sell drugs. Wesson testified he had seen Applicant take drugs out of the bag to sell, and that most of the time Applicant kept the bag hanging on the fence outside the residence. Wesson insisted the bag belonged to Applicant. (R.p.92, line 22-p.101, line 7). Applicant cross-examined Wesson in regard to inconsistencies in

his testimony and inconsistencies between the testimony and a previous statement he had given to the police but did not ask any questions about Wesson's prior convictions. (R.p.101, line 13-p.114, line 7).

When Wesson finished testifying, the State called investigator Kirby to the stand. Kirby worked for the city police department for eleven-and-a-half years and had been assigned to the narcotics unit for nine-and-a-half years. The State offered Kirby as an expert in the street value of narcotics, how they are packaged and sold, typical intoxicating dosages, and the different habits between an addict and a dealer. Applicant objected to Kirby's qualification as an expert. The trial judge allowed Kirby's qualification as an expert. Kirby proceeded to give detailed testimony on the wholesale cost of cocaine, methods of adding a cutting agent to increase total weight of the drugs prior to sale, and how cocaine is made into crack-cocaine. He described the use of caffeine powder as a cutting agent and the use of scales to weight the product. Kirby also testified as to the street value of crack and the profit that could be made when selling it to individual users. He described the dosages typically smoked by an individual user, the frequency of ingesting those doses, and the paraphernalia associated with the use of crack. Kirby then gave similar testimony regarding the sale and use of marijuana. He testified that drug dealers typically carry cash and that it is not unusual for a dealer to sell drugs from someone else's house. (R.p.135, line 10-p.145, line 7).

The solicitor then asked for an opinion on whether Kirby thought the amount of drugs found on Applicant's person was to be sold or was for personal use; however, the trial judge sustained Applicant's objection to the form of the question. Instead, the solicitor asked Kirby for an opinion in the form of hypothetical by asking whether someone who had 1.06 grams of powder cocaine, no paraphernalia for use, $1,200 in cash and a gun on his person was likely a

user or a drug dealer. Kirby testified he would qualify that individual as a drug dealer. (R.p.145, line 8-p.146, line 7).

After Kirby completed his testimony, the State called city police department's property and evidence technician, Mylnor Beach, to the stand. He was qualified as an expert in marijuana analysis and testified the two quantities of green plant-like substance found on Applicant's person were marijuana in amounts of 3.85 grams and 1.86 grams. He further testified the green plant-like substance discovered in the black bag was 52.73 grams of marijuana. The marijuana was admitted into evidence. (R.p.153, line 22-p.166, line 12). Next, city police department chemist Mary Elizabeth Stuart was qualified as an expert in the analysis of cocaine and crack cocaine. She described her testing procedures and testified she confirmed four separate quantities of drugs submitted for testing including: 1.06 grams of cocaine, 25.87 grams of cocaine, 6.27 grams of crack cocaine, and 18.04 grams of crack cocaine. The cocaine and crack cocaine were also admitted into evidence. (R.p.170, line 15-p.178, line 11). After the State rested, Applicant moved for a directed verdict in regard to the charges stemming from the drugs discovered in the bag. The trial court denied the motion and questioned Applicant in regard to his right to testify. Appellant elected not to testify and the defense rested. (R.p.179, line 13-p.187, line 14).

During his closing argument, the solicitor acknowledged that as a drug user and a hopeless addict, Wesson was not totally innocent; however, he argued Wesson's testimony was nevertheless consistent with the evidence. The solicitor then discussed Investigator Kirby's experience and training and his knowledge about drugs, dealers and users, and paraphernalia to argue Applicant "ain't a drug user, he's a drug dealer." (R.p.187, line 22-p.200, line 4). Applicant responded by focusing on the lack of physical evidence tying him to the bag and

various problems with Wesson's credibility. (R.p.200, line 8-p.205, line 17). Following a charge conference, the trial court charged the jury on the law. The court included standard charges on the presumption of innocence, the State's burden of proof, reasonable doubt, the roles of the judge and jury, direct and circumstantial evidence, the jury's duty to assess the credibility of witnesses, expert testimony, and the crimes and the elements of those crimes. (R.p.215, line 3-p.236, line 13). Upon deliberating for thirty-two minutes, the jury found Applicant guilty of all charges.

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 at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency. A Post-Conviction Relief application is not a venue for questioning each and every decision of trial counsel. Rather, the Applicant must demonstrate by a preponderance of the evidence that trial counsel was deficient. Applicant has failed to do so.

I. Subject Matter Jurisdiction

Applicant alleges the trial court lacked subject matter jurisdiction based on defects in his indictment. Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); U.S. v. Cotton, 535 U.S. 625 (2002). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). See also S.C. Code § 17-19-20 (2003).

Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994). "[C]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry at 101.; See also S.C. Const. Art. V, § 7. Thus, Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside and Applicant has failed to do so. Applicant's conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction.

Applicant further claims that the True Bill dates on his indictments do not coincide with the dates set forth on the South Carolina Court Administration Terms of Court Calendar (admitted as Applicant's exhibit 2) has no merit. Grand juries are continuous bodies that convene all year and deliberate at various times and for various lengths of time. "After the grand jury has deliberated, it then reports its findings of "True Bill" or "No Bill" to the court of general sessions. This report may be made on the same day as the day the grand jury makes its findings, or it may be made at some later time." Brown v. State, 316 S.C. 258, 260, 449 S.E.2d 494, 495 (1994). Applicant has failed to meet his burden of proving any irregularity in the grand jury proceedings resulting in his indictments. Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986) (The regularity of the proceedings of a court of general jurisdiction will be assumed in the absence of evidence to the contrary.). Therefore, this allegation is denied and dismissed with prejudice.

II. Due Process

Applicant claims he was denied due process when the trial judge sentenced him to life without parole (LWOP) pursuant to § 17-25-45, S.C. Code Ann. (1976). This allegation is

without merit. The record indicates the notice of intent to seek life without parole was properly served and in accordance with established law. Applicant's criminal history also supports the invocation of § 17-25-45. Applicant claims that his prior conviction for possession with intent to distribute crack, 3rd or subsequent offense, could not have counted as a "strike" under § 17-25-45 because it is not a listed "serious" offense under subsection (C)(2)(b). However, in addition to the list of serious offenses in subsection (C)(2)(b), § 17-25-45(c)(2)(a) defines a serious offense as "any offense which is punishable by a maximum term of imprisonment of thirty years or more which is not listed in subsection (C)(1)[2]. Possession with intent to distribute crack, 3rd or subsequent, is punishable by up to 30 years' imprisonment. Therefore, it is indeed considered a serious offense for the purposes of § 17-25-45. Additionally, Counsel testified the State offered Applicant a plea deal of 18 years, but that Applicant rejected the offer and decided to pursue a jury trial. Applicant has failed to meet his burden to prove this allegation so it is therefore denied and dismissed with prejudice.

III. Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged 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, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

[2] This section lists "most serious offenses."

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen 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)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117 (citing Strickland). 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. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is

easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

A. Failure to move for suppression of drugs

Applicant alleges Counsel was ineffective in failing to move to suppress the drugs found during what Applicant believes was an unlawful search. Applicant testified that Counsel never challenged the search warrant and the Confidential Informant (CI) was never revealed or required to testify. Applicant complained that he was never allowed to question the CI. Applicant also claimed there were false statements in the probable cause affidavit stating that Applicant was selling drugs out of Wesson's house. Applicant introduced the Probable Cause Affidavit and an Investigator's Case Activity Summary together as Applicant's exhibit 1. Applicant pointed out that between the time when the CI left law enforcement and went to the buy location (13:54 hours) and when he arrived back to meet law enforcement (16:10 hours), over two hours had elapsed. Based on this delay, Applicant believes Counsel should have challenged the validity of the search warrant.

Counsel testified that Applicant had never been arrested or charged with the drug buys made by the CI. Because Applicant was not charged for those sales, the CI's identity did not have to be disclosed. The CI was not a witness to the charges for which Applicant was tried. His identity was irrelevant and Applicant was not entitled to a disclosure. The undercover drug buys were, however, the basis for the search warrant executed on Wesson's home. Counsel received and reviewed all the discovery with Applicant. Based on his review, Counsel believed there was no basis to challenge the validity of the search warrant. As to the delay in time from when the CI left for the buy and when he returned to meet law enforcement, Counsel stated that it is common for CIs to take alternate routes or stall before returning to the meeting location in an

effort to maintain their cover. This practice is not unusual. Counsel did, however, successfully move for suppression of DNA evidence tying Applicant to the bag which contained the drugs. (Trial Tr.p. 57 – 68). Counsel also prudently moved to exclude any evidence of the CI buy involving his client and the State agreed to start their case at the time the search warrant was executed on Wesson's home. (Trial Tr.p. 40 – 41).

This Court finds Counsel was not deficient for not challenging the search warrant. Counsel has articulated a valid strategic decision for not pursuing such a course. The record also demonstrates his strategic decisions to pursue other motions proved successful. This Court will not second guess Counsel's exercise of his professional judgment when it is clear his decision was reasonable. Additionally, Applicant has failed to prove how not challenging the search warrant prejudiced him. His claim the search warrant was invalid is speculative, at best. Therefore, this allegation is denied and dismissed with prejudice.

B. Failure to object to LWOP notice

Applicant claims Counsel was ineffective for failing to object to the LWOP notice served upon him. As discussed above, Applicant was properly served with the notice of intent to seek life without parole pursuant to § 17-25-45, S.C. Code Ann. (1976). Upon conviction, Applicant was sentenced to life imprisonment without parole in accordance with established law. Therefore, Counsel was not deficient for not objecting to the notice. This allegation is denied and dismissed with prejudice.

C. Failure to impeach State's witness using prior armed robbery and third degree burglary convictions

Applicant claims Counsel was ineffective for failing to impeach the State's witness using two prior convictions for armed robbery and third degree burglary. At trial, Counsel strenuously

argued Wesson's armed robbery and burglary convictions were admissible under Rule 609(a)(2), SCRE, as crimes of dishonesty, during an *in camera* hearing. (Trial Tr.p 121 – 140). However, Counsel did not argue for their admissibility under Rule 609(a)(1). Despite Counsel's failure to make this argument, the record clearly demonstrates that evidence of prior convictions for crimes of dishonesty were introduced into the record. There may have been additional crimes which could have been introduced to impeach the credibility of the witness. However, Applicant has failed to prove any prejudice inasmuch as Wesson's credibility had already been impeached by and through the introduction of five other prior convictions for crimes of dishonesty. Therefore, this allegation is denied and dismissed with prejudice.

D. Failure to object to the State's vouching for credibility of the State's witness

Applicant claims Counsel was ineffective for failing to object during the State's closing argument because the State improperly vouched for the veracity of Wesson's testimony. The State appropriately addressed Wesson's credibility during closing, but this did not rise to the level of improper vouching. A witness's credibility is proper argument for closing. Therefore, there was no basis for Counsel to object. Applicant has failed to prove Counsel was deficient in this regard and therefore, this allegation is denied and dismissed with prejudice.

E. Failure to object to jury charge

Applicant claims Counsel was ineffective for failing to object to the following charge the trial judge gave to the jury:

> Now mere presence at a scene where drugs are found is not enough to prove possession. Actual knowledge of the presence of a drug is strong evidence that the defendant had somehow intended control of its disposition or use.

(Trial Tr.p. 289).

RP 5

This charge is proper and in line with established law. Applicant has failed to show why it warranted an objection. This Court finds Counsel was not deficient in this regard. Therefore, this allegation is denied and dismissed.

E. Appellate Counsel

Applicant alleges his appellate counsel was ineffective for failing to brief the issue of error in judge's sentence of life without parole pursuant to § 17-25-45, S.C. Code Ann. (1976). This claim was added 5 days before Applicant's evidentiary hearing in the matter. Respondent was not prepared to proceed on this claim because it had no opportunity to subpoena Appellate Counsel for the hearing. This Court finds that Applicant has failed to meet his burden in proving Appellate Counsel was deficient or that he was prejudiced by any deficiency. Therefore, there is no reason to leave the record open for review of Appellate Counsel's performance.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (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). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). 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 (4th Cir. 1985).

The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537. 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). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Ibid.

As discussed above, Applicant was properly served with the notice of intent to seek life without parole. Upon conviction, Applicant was sentenced to life imprisonment without parole in accordance with established law. Therefore, Appellate Counsel was not deficient for not raising the issue on appeal. This allegation is denied and dismissed with prejudice.

CONCLUSION

The remainder of Applicant's allegations are without merit. Applicant essentially questions each and every action or inaction of trial counsel. A Post-conviction relief application is not a venue for second-guessing decisions of trial counsel. Applicant has the burden of proving by a preponderance of the evidence that Counsel was deficient and that the deficiency was prejudicial. Applicant has failed to do so.

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. This Court finds that Applicant has failed to prove any deficiencies on the part of trial or appellate counsel and further, Applicant has failed to prove prejudice from any alleged deficiencies in trial or appellate counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice. This Court also finds that Applicant failed to present evidence as to the other allegations, and thus, this Court deems the other allegations abandoned.

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 2 day of Aug, 2017.

ROBIN B. STILWELL
Presiding Judge
Seventh Judicial Circuit

Greenville, South Carolina

2017 AUG -7 AM 11:16
M. HOPE BLACKLEY

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

August 7, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Isaac Edward Lyles #209183
Applicant

7TH JUDICIAL CIRCUIT

CASE # 2016CP42-1479

VS

State
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Ord. Dismissing w/ prejudice
In this action dated 8-2 2017 on 8-7-17

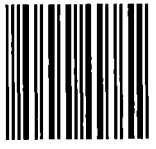
By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Brianna Greene
Olivia Deese
Susannah Ross

8-7-17
(Date)

(Signature)

SUSANNAH ROSS ESQ.
330 EAST COFFEE ST.
GREENVILLE SC 29601



1000

29211

U.S. POSTAGE
PAID
GREENVILLE, SC
29602
AUG 22, 17
AMOUNT
$1.82
R2304M110652-16

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211