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S.C. SUPREME COURT

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August 26, 2017

Supreme Court of South Carolina
PCR Appeals
P.O. Box 11330
Columbia, SC 29211

RE: State v. Kinlaw; 2015-CP-2603714

Dear Sir or Madam:

Enclosed is a copy of a notice of appeal on behalf of the above Defendant. Mr. Fowler was appointed to represent the Defendant in the Court of Common Pleas, however, he does not represent him on this appeal.

FOWLER LAW FIRM

Patricia F. Clapper
Advanced Certified Paralegal
NC Certified Paralegal

cc: Horry County Clerk of Court
South Carolina Commission on Indigent Defense

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SEP 06 2017

APPEAL FROM HORRY COUNTY

S.C. SUPREME COURT

Court of Common Pleas

The Honorable Roger E. Henderson, Circuit Court Judge

Case No. 2015-CP-2603714

Henry Lee Kinlaw Jr. #271267, Petitioner,

v.

State of South Carolina,Respondent.

NOTICE OF APPEAL

The Petitioner appeal the Honorable Roger E. Henderson's Order dated August 10, 2017 denying post conviction relief to the Petitioner. The Order was received by the undersigned counsel on August 23, 2017 . A copy of the Order on appeal is attached to this notice.

This 23rd day of August, 2017.



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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	
Henry Lee Kinlaw,)	Case No.: 2015-CP-26-03714
S.C.D.C. No. 271267,)	
)	
Applicant,)	
)	ORDER OF DISMISSAL
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	

FILED
 2017 FEB 19 PM 1:53
 CLERK OF COURT
 HORRY COUNTY S.C.

This matter comes before the Court by way of an application for post-conviction relief filed by Henry Lee Kinlaw (“Applicant”) on May 19, 2015. Respondent made its return on or about February 17, 2016. The Court convened an evidentiary hearing into the matter on May 24, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Steven W. Fowler, Esquire. Johnny Ellis James Jr., of the South Carolina Attorney General’s Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant’s plea counsel, Russell Blake Long, Esquire (“Counsel”) also testified. The Court had before it Applicant’s records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Horry County Clerk of Court regarding the subject convictions, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the May 2012 term of the Horry County Grand Jury trafficking cocaine base more than 28 grams, less than 100 grams, second offense (2012-GS-26-01698); distribution of crack cocaine, second offense (2012-



GS-26-01699); and trafficking cocaine more than 28 grams, less than 100 grams, second offense (2012-GS-26-01700). Russell Blake Long, Esquire represented Applicant; Steven Grooms and Travis Hyman, both of the Fifteenth Circuit Solicitor's Office, prosecuted the case.

At trial, during consideration of the State's motion for joinder, the State summarized, and Counsel largely agreed with, the following summation of the investigation:

MR. GROOMS: [. . .] [T]he DEU, Drug Enforcement Unit, is sitting outside the hotel where [Applicant] is alleged to be staying[.]

...

MR. GROOMS: The DEU watches [Applicant] for a couple of days, they see his car in the parking lot, they run the plates, come back to [Applicant]. One of the agents will testify that he ID'd [Applicant] via the picture. They watched him for a number of days, they were on surveillance before they do anything. Once they see a lot of cars coming and going, and [Applicant's] car being the only one in the parking lot other than these cars coming and going, they determined we have suspicion of drug activity.

At that point, Agent Phillips calls in other officers to help in surveillance. They make the decision to follow one of these vehicles that comes and goes, Keith Buffkin. He pulls up, he's by himself, he goes in the stairwell, he's in and out twenty or thirty seconds. Agents follow him. Agents follow him down 17, he commits a traffic violation, they pull him over. Agents approach him and explain to him who they are and why they're there, they say they're investigating narcotics activity, ask him if he has any drugs on him. He says, yes, I do, I bought them at the hotel, brought them in the stairwell. They say, who did you buy them from, he says Gutter or Gunner, he has a nickname for him. They show him the DMV photo, he says that's him. The photo is [Applicant]. He goes on to say in his statement that he's bought from [Applicant] up to eighteen times, six by himself, twelve with somebody else. So, officers at that point - he does give them the drugs, it is crack cocaine or presumed to be at that time, it does test positive a little bit later for crack cocaine.

Agents respond to the magistrate the next morning to get a warrant for distribution of cocaine base. That day, they continue surveillance. While they're doing surveillance, one of the other agents just happens to be at the same gym as [Applicant]. He calls the lead agent and says, hey, you're never gonna believe who is here, [Applicant] is here. He says, all right, let's go ahead and take him



down today. All agents respond to the gym. [Applicant] is taken into custody at that time.

A search is done of him, he has a key card in his pocket that goes to the Days Inn Motel. It doesn't say a room number on it. Agents read him Miranda and ask him if he wants to cooperate. He says, I don't know what you're talking about, I've never been to that hotel. Agents respond immediately to the hotel, talk to the front desk and they say, yep, [Applicant] has been here, he's been staying here, he's in Room 205. Agents go up to Room 205, test the key and make sure it works, they don't open the door, it does match. They bring a drug dog who does alert on the door.

With the information, with the tip, the tip corroborated the distribution and the key card. They get a search warrant as well as the drug dog hit. And in that hotel room, he has trafficking weight cocaine, trafficking weight crack cocaine, scales, baggies, razor blades, residue, money, the whole nine yards. There is nothing in that room that says the name [Applicant]. So, for me to try my trafficking case, I need to have Keith Buffkin here to say I bought from [Applicant] when I was in the hotel that day or that day before which corroborates my agent's testimony that he's been watching [Applicant] at that hotel. The CI¹ would further testify that [Applicant] went upstairs and he left that stairwell. The CI would further testify that [Applicant] went upstairs and he left that stairwell. Police put them on, not the first floor, I think there's four floors.

Tr. 28, l. 9 – p. 30, l. 20 (formatting added).

On November 3, 2014, after voir dire and rulings on Applicant's pre-trial motions, Applicant pled guilty as indicted. The Honorable John C. Hayes sentenced Applicant to imprisonment for concurrent terms of 15 years imprisonment for trafficking in cocaine base 28 to 100 grams, second offense; 15 years imprisonment for possession with intent to distribute cocaine base or meth, second offense; and 15 years imprisonment for trafficking in cocaine, 28 to 100 grams, second offense. Applicant did not appeal his plea or sentence.

¹ Contextually it appears that the State here refers not to the confidential informant who prompted the surveillance, but to the individual arrested, Mr. Buffkin.

Current Application

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

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to adequately prepare to argue his motion to suppress the search warrant;
 - i. "Failure to investigate, prepare for and motion to dismiss charges of distribution of crack cocaine: trafficking in crack-cocaine 28-100 grams: and trafficking cocaine 28-100 grams because arrest warrant and affidavit in support of was not supported by probable cause."
 - ii. "Arrest warrant was invalid and counsel should have objected to and motioned to dismiss warrant because of its invalidity."
 - iii. "Counsel was ineffective during his presentation regarding the suppression hearing. Counsel failed to investigate adequately prepare and thoroughly argue the suppression of the drug evidence."
 - iv. "Plea counsel's representation fell below an objective standard of reasonableness and prejudiced Kinlaw."
 - b. Counsel failed to communicate a plea offer of five years;
 - i. "Defense counsel advised Kinlaw that the State would allow him to plead guilty to all charges for a five (5) year total sentence. Counsel did not inform Kinlaw when the plea offer expired."
 - ii. "Plea counsel's performance was deficient as it fell below 'an objective standard or reasonableness' when plea counsel failed to inform Kinlaw when the State's plea offer would expire."
 - c. Counsel failed to investigate the confidential informant;
 - i. "Failure to investigate the confidential driver, failed to do a supplemental Brady/Rule 5 motion, when five 5 days prior to trial, the State released the name of the confidential driver to counsel."
 - ii. "Failure to obtain confidential driver's criminal history and any and all information concerning his being a potential confidential informant ("CI") and, if so, his credibility and reliability."
 - d. Counsel failed to investigate the traffic stop leading to the arrest of the individual who departed from the hotel searched;
 - i. "Counsel failed to obtain any and all surveillance videos and audio recordings and any video(s) of the traffic stop of the driver; and"
 - ii. "Counsel failed to obtain any agreement for driver for his/her cooperation and agreement to testify against Kinlaw."

- e. "Counsel did not advise me that I had a meritorious State and Federal Constitutional claim and that if I went on to trial, that I could challenge the trial judge's denial of suppression motion."
 - f. "Failure to file direct appeal."
 - i. "Instructed counsel to file an appeal. Counsel did not file direct appeal."
 - ii. "Failed to file an appeal or notice of intent to appeal the convictions and sentences in order to protect Kinlaw constitutional rights, therefore the counsel was constitutionally ineffective and as a result Kinlaw was denied his only appeal as matter of right."
2. Involuntary Guilty Plea
- a. "Counsel coerce Kinlaw to enter a plea of guilty."
 - b. "Counsel's inaccurate advice and failure to thoroughly prepare for trial led to Kinlaw's guilty plea."
 - c. "Counsel advice to plead guilty was deficient, because Kinlaw had a valid legal challenge to the denial of the suppression motion on direct appeal."
 - d. "Kinlaw plead guilty because of deficient advice and lack of an alternative, and he did not do so voluntarily or knowingly."

At the outset of the hearing, Applicant's counsel offered to the Court a "Pro Se Brief" prepared by Applicant himself. Respondent objected to the brief to any extent it may be construed as raising new allegations not presented in the original application, and further objected that the brief constituted "hybrid representation." This Court agreed that it would not consider any portion of the brief as raising new allegations for reasons set forth in greater detail below.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Applicant's Briefs Are Not Properly Before This Court

As an initial matter, the Court is obliged to address the validity of two filings submitted in the course of this matter: Applicant's *pro se* brief submitted on the morning of the evidentiary hearing, and Applicant's "Brief in response to case laws submitted by the SC Attorney General at PCR hearing,"² initially filed by Applicant *pro se* on June 16, 2017, but thereafter filed by PCR counsel without meaningful modification on June 27, 2017. While this Court did grant both parties until June 26, 2017, to file briefs in support of their respective positions, it was clearly indicated that any such briefs must come from the attorneys for each party. It is clear from the face of the document that the June 16 and June 27 filings are not the work of counsel, but that of Applicant himself, in continuation of this matter's unfortunate trend of voluminous, last minute *pro se* filings.

The Court *cannot* consider these filings. The Supreme Court of South Carolina has repeatedly held that there is no right to hybrid representation, and that "substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel." Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010) (citing State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989)). The Court in Miller goes further to remind both judges and Clerks of Court that they are not to accept *pro se* filings of represented individuals unless the filing is a motion to relieve counsel. Id.

"[C]ounsel cannot serve as a mere conduit for *pro se* documents in an effort to avoid the prohibition against hybrid representation and the displeasure of his client." Jones v. State, 348

²At the end of Respondent's closing argument, Respondent provided to opposing counsel and the Court a number of cases in support of its position, which the Court accepted over Applicant's objection: Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); State v. Humphries, 354 S.C. 87, 579 S.E.2d 613 (2003); State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (2003); State v. Moultrie, 316 S.C. 547, 451 S.E.2d 34 (1994); State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (2003); and State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (2002).

S.C. 13, 14, 558 S.E.2d 517 (2002). Counsel must “use professional judgment in reviewing the documents and [] submit the client’s arguments only if relevant and only after they have been edited by counsel for review by the Court.” Id., 558 S.E.2d at 518, see also City of Columbia v. Assa’ad-Faltas, Op. No. 27723, 11 n.13, 2017 WL 2665155, 6 n.13 (S.C. Sup. Ct. filed June 21, 2017) (“Tails should not wag dogs. Merely because an appellant believes that the irrelevant is relevant is no reason to turn the system on its head and solemnly contemplate the wisdom of a person who does not have the sense to be guided by experts in an area where he himself possesses no expertise.”); Id. at 17, 2017 WL at 9 (quoting Jones where abusive litigant continuously manipulated right to counsel to abuse the judiciary and others).

The “Brief in Response” from Applicant bears no indicia that PCR counsel reviewed or modified the documents using his professional judgment. The June 16, 2017, filing, as well as the “Pro Se Brief” submitted on May 24, 2017, are both rejected by this Court as impermissible hybrid representation pursuant to the above cited authorities.³

B. Ineffective Assistance of Counsel and Involuntary Guilty Plea

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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.” Butler, 286 S.C. at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

³ The Court notes, however, that much of the substance of the *pro se* brief provided at the evidentiary hearing was offered by Applicant in his exhaustive, if not repetitive, testimony.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (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, 386 S.E.2d at 625 (citing Strickland, 66 U.S. at 688). 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 (citing Strickland, 66 U.S. at 694). 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, 66 U.S. 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.

Where an applicant alleges his guilty plea was not voluntarily and knowingly entered into, the record must establish Applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. See Harris v. Leeke, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he should be allowed to depart from the truth of his statements. See Crawford v. U.S., 519 F.2d 347, 350 (4th Cir. 1975) (overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4th Cir.1985)).

An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial instead. See Roscoe v. State, 345 S.C.16, 20, 546 S.E.2d 417, 419 (2001); see also Richardson v. State, 310 S.C. 360, 362 426 S.E.2d 795, 797 (1993). Given Applicant's burden of proof and the analysis to be applied to this claim, Applicant's claims of involuntary plea are, in essence, claims of ineffective assistance of counsel, and are treated as such.



IAC Allegation #1 – Failure to Prepare for Motion to Suppress Arrest & Search Warrants

The Court finds that Applicant has proven neither prong of Strickland through his allegation that Counsel failed to adequately prepare for his argument to suppress the search warrant for Applicant's hotel room. To establish counsel failed to adequately prepare for trial, an applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 131-32 (1997).

At the evidentiary hearing, Applicant testified to what he believed were deficiencies in the warrant for his arrest, such that there was not probable cause:

- 1) The warrant lacked sufficient facts to establish probable cause that a crime had been committed;
- 2) The warrant lacked sufficient facts to establish probable cause that Applicant was the person who committed the crime;
- 3) The warrant did not specifically identify the source of the allegations;
- 4) The warrant did not contain any information to establish the reliability of the confidential informant;
 - a. The warrant was based on an unreliable confidential informant.
- 5) There was no independent verification of the facts in the arrest warrant.

Applicant additionally testified to what he believed were deficiencies in the search warrant permitting law enforcement to search his hotel room:

- 1) The warrant lacked sufficient facts to show why officer would believe a crime had been committed;
- 2) The warrant did not contain any information to establish the reliability of the confidential informant;
- 3) The warrant did not set forth facts to show that drugs were ever bought or sold from the hotel room;
- 4) There was no independent verification of the facts in the search warrant;
- 5) There were no facts to establish the reliability of the canine who alerted to the presence of illegal drugs
- 6) The canine sniff was performed without a search warrant;

- 7) The warrant was supported by false statements and facts misrepresented by Officer Phillips:
- a. The confidential informant gave a nickname, "Gutter," not Applicant's legal name;
 - b. The warrant indicated that Applicant was staying at the hotel;
 - c. The drug transactions to support the warrant occurred in a stairwell near the room, not the room itself;
 - d. The warrant indicated that the blue Chevrolet Impala was Applicant's vehicle;
 - e. The warrant indicated that crack was found on a confidential informant who bought it from Applicant
 - f. The keycard found in Applicant's possession belonged to the room to be searched;
 - g. Law enforcement conducted a canine sniff of the room exterior.

Applicant testified to his belief that Counsel could have spent more time preparing for the motion to suppress and that, had he done so, Counsel could have raised each and every one of the above listed issues such that the warrants would have been suppressed. On cross-examination, Applicant conceded that Counsel argued to the court that the warrant was "based on a total stranger's statement,"⁴ that the identification was based on "the most suggestive lineup [Counsel had] ever heard of,"⁵ and that Counsel argued the drug dog sniff was invalid under Florida v. Jardines, 569 U.S. 1 (2013).⁶ Applicant further conceded that Counsel sought both a motion to dismiss based on the State's nondisclosure of the confidential informant's identity and, in the alternative, a continuance to further investigate the individual—both were denied.

Counsel testified that Applicant's entire case hinged on the outcome of the pre-trial motions to suppress the search and arrest warrants. Counsel reaffirmed his arguments made during the hearing on his motion: the warrants were based on information provided by total strangers; the photo "lineup" was the showing of a single photo of Applicant; and the drug dog

⁴ Tr. 58, l. 10-11.

⁵ Tr. 59, ll. 6-16.

⁶ Tr. 59, l. 16 - p. 60, l. 2.

sniff was constitutionally suspect pursuant to Jardines. Counsel testified to his belief that had he made the “less important” arguments and motions as demanded by Applicant, that the proceeding would not have gone well. Counsel further testified that the statements in the warrants were all true, that he had no reason to believe them to be false, and that he did not know why Applicant claimed Officer Phillips made false statements. Counsel indicated Applicant was very involved with the law, but offered little to no facts to support his defense. Counsel’s testimony demonstrated thorough command of the facts of the case.

The Court finds Counsel’s testimony credible. Furthermore, the Court finds Applicant’s testimony regarding the veracity of the information in the warrants not credible. Both the transcript and Counsel’s testimony demonstrate that Counsel clearly, concisely, and effectively advanced the best available arguments against the validity of the warrants for Applicant’s arrest and search of the hotel room. Counsel is not obliged to act as a conduit for every argument desired by his client, but must use his or her good judgment to communicate the best arguments available—Counsel did so. The Court concurs in Counsel’s judgment that offering every argument provided by Applicant at the evidentiary hearing would have only hurt Applicant’s cause—“[l]egal contentions, like the currency, depreciate through over-issue. [. . .] Multiplicity hints at lack of confidence in any one.” Jones v. Barnes, 463 U.S. 745 (1983) (quoting Jackson, Advocacy Before the Supreme Court, 25 Temple L.Q. 115, 119 (1951)). The Court finds Counsel was thoroughly prepared to argue the motion. Accordingly, Applicant’s request for relief based upon this allegation is **DENIED**.

IAC Allegation #2 – Failure to Explain Plea Offer

The Court finds that Applicant has proven neither prong of Strickland through his allegation that Counsel failed to adequately explain a plea offer of five years. “Defense counsel has the duty to communicate *formal* offers from the prosecution to accept a plea on terms and



conditions that may be favorable to the accused.” Missouri v. Frye, 566 U.S. 133, 145 (2012) (emphasis added); see also Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009). “When a criminal defendant rejects a plea bargain, [the Court examines] separately whether trial counsel was ineffective with respect to both the defendant’s rejection of the offer and his ultimate decision to plead guilty.” Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012) (citing Kolle v. State, 386 S.C. 578, 590, 690 S.E.2d 73, 79 (2010)).

Applicant testified that though Counsel communicated to him the State’s plea offer of five years, Counsel did not tell him when that plea offer would expire. Counsel testified that Applicant specifically and firmly rejected the State’s offer of five years when it was presented, even though in Counsel’s opinion it was a great offer that Applicant should have accepted. Counsel testified that he did indicate as a general principle that the offer would expire. On cross-examination, Counsel testified that he received the offer orally from Asst. Sol. Steven Grooms and that it was effectively dead when Applicant refused the offer and demanded a trial. The State orally withdrew the offer about a month before trial. Counsel tried to get another offer the morning of trial, but the State was disinclined to put five years back on the table. Finally, Counsel emphasized Applicant never wanted the five years, but wanted to proceed to trial.

The Court finds Counsel’s testimony credible. Counsel adequately communicated the *informal* plea offer and Applicant threw it away on his own initiative. Notably, there is no evidence before the Court that the plea offer, orally communicated, ever had a fixed expiration date to communicate. Applicant has no constitutional entitlement to any particular plea offer. Accordingly, Applicant’s request for relief based upon this allegation is **DENIED**.

IAC Allegation #3 – Failure to Investigate/Disclose Confidential Informant

The Court finds that Applicant has proven neither prong of Strickland through his allegation that the State failed to disclose, and that Counsel failed to adequately investigate, the

confidential informant ("CI"). An applicant may challenge the voluntary nature of his guilty plea in a PCR action by alleging a Brady violation. Hyman at 46, 723 S.E.2d at 380 (quoting Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999)). In evaluating whether a guilty plea was involuntary due to a Brady violation, the Court considers: "(1) whether the evidence in question was favorable to the applicant; (2) whether the prosecution knew of or had the evidence in its possession; (3) whether the prosecution suppressed the evidence; and (4) whether the evidence was material to Petitioner's guilty or punishment." Id. "[A]n informant's identity need not be disclosed where he possesses only a peripheral knowledge of the crime or is a mere "tipster" who supplies a lead to law enforcement." State v. Humphries, 354 S.C. 87, 90, 579 S.E.2d 613, 615 (2003).

It is uncontested that the State did not disclose the identity of the CI to Counsel prior to the hearing on Applicant's motion to suppress. Counsel testified that he attempted to get the identity of the CI but was told nothing by the State. At trial, during the hearing on the motion to suppress, Counsel objected on hearsay grounds during law enforcement testimony that hinted to the substance of the tip that led them to surveil the Days Inn. Tr. 37-40. Counsel sought to dismiss the charges and, in the alternative, a continuance to investigate the CI. Judge Hayes denied both requests.

The Court is inclined to agree with the conclusion of Judge Hayes in denying Applicant's motion for a continuance: "The only relevance of this so-called CI or Ms. China or whatever her last name was, has to do with the instigation of investigation, hard to say, and that her identity and her involvement is limited to the extent that I'm not gonna grant the continuance." Tr. 64, ll. 18-23. The CI merely prompted law enforcement to begin surveillance at the Days Inn, at which point the information she provided was corroborated by independent observation. As the CI was merely a tipster, the State was under no obligation to disclose her identity at all under

Humphries. With the State under no obligation to disclose the identity of the CI, the Court can conceive of no honest means by which the identity of the CI could have been ascertained by Counsel. As such, Applicant demonstrate neither the factors set forth in Hayes nor satisfy the prongs of Strickland—the CI's identity was a peripheral matter and, even if Applicant were entitled to it, the lack of it caused him no prejudice. Accordingly, Applicant's request for relief based upon this allegation is **DENIED**.

IAC Allegation #4 – Failure to Investigate Traffic Stop

The Court finds that Applicant has proven neither prong of Strickland through his allegation that Counsel failed to adequately investigate the traffic stop of an individual departing from the Days Inn while it was under surveillance. As previously explained, to establish counsel failed to adequately prepare for trial, an applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998); Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (“Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.”) (citation omitted); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (relief denied where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial).

As previously discussed in II.B.1, addressing the search warrant, Counsel argued during the suppression hearing that the warrant's reliance on Mr. Buffkin was deficient given Mr. Buffkin was “total stranger” and that his identification of Applicant was based on “the most suggestive lineup [Counsel had] ever heard of[.]” Mr. Buffkin did not testify at the evidentiary hearing.



Based on the record and testimony presented, the Court could only speculate as to what, if any, additional advantage Applicant would enjoy had Counsel conducted additional investigation of Mr. Buffkin. From the record it appears that Counsel effectively identified and argued the key weaknesses of the witness during the suppression hearing. Importantly, without any testimony from Mr. Buffkin, Applicant cannot demonstrate prejudice. Accordingly, Applicant's request for relief based upon this allegation is **DENIED**.

LAC Allegation #5 – Failure to Advise of Valid Constitutional Claim

The Court finds that Applicant has proven neither prong of Strickland through his allegation that Counsel failed to advise him that he had a valid grounds to appeal the Court's denial of the suppression motions. At the evidentiary hearing, Applicant testified broadly that Counsel failed to communicate with him. Applicant immediately thereafter conceded that Counsel shared and discussed discovery with him, but questioned whether Counsel had everything necessary given he lacked the CI's identity. Applicant claimed that he was not informed of the specific issues that would be raised in the suppression hearing and that he did not have a good understanding of his case. On cross-examination, Applicant conceded that Counsel did discuss possible defenses with him—namely that the search warrant was arguably invalid. Counsel testified that he timely received discovery and reviewed everything with his Client, and that his Client was very involved in the law of his case. Counsel explained to Applicant all of his constitutional rights prior to the guilty plea.

The Court finds Counsel's testimony credible and Applicant's testimony not credible. Counsel consistently demonstrated command of the facts and law in this matter and his communication of as much with his client. Counsel's testimony at the evidentiary hearing was consistent with statements Counsel offered in mitigation at the plea proceeding. See Tr. 75, ll. 5-15. Applicant is very clearly cognizant of his constitutional rights. In particular, the Court finds

that one exchange from the plea proceeding unequivocally demonstrates that Applicant was aware of his rights and that he was giving them up by pleading guilty:

THE COURT: Okay. [Applicant], I advise you that by entering a plea of guilt to these charges and as to these charges, you are giving up all those rights I've gone over and you're also giving up any defense that you might have to the charges; do you understand that?

[APPLICANT]: So, I'm giving up all my rights from the motion hearing, too, pretrial motion?

THE COURT: Yes. Do you understand that?

[APPLICANT]: Yes, sir.

THE COURT: All right. Knowing all those things, do you still wish to plead guilty?

[APPLICANT]: Yes, sir.

THE COURT: All right. To all three charges?

[APPLICANT]: Yes, sir.

Tr. 72, ll. 12-25. The Court finds Applicant knew what he had and what he gave up. Accordingly, Applicant's request for relief based upon this allegation is **DENIED**.

LAC Allegation #6 – Failure to File Notice of Appeal

The Court finds that Applicant has failed to meet his burden as to his allegation that Counsel failed to file a notice of appeal as instructed. Though counsel is required to make certain that a defendant is made fully aware of his or her right to appeal after a *trial*, a different standard applies to a guilty plea:

Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.

Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (citations omitted). Therefore, in a collateral action attacking a guilty plea, the “bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief.” Jones v. State, 382 S.C. 589, 598, 677 S.E.2d 20, 23-24 (2009) (quoting Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)).

In his application, Applicant alleges that he asked Counsel to file an appeal on his behalf and that Counsel failed to do so. At the evidentiary hearing, Applicant testified that *if* Counsel had informed him that the defects in the warrants could be challenged on appeal, then he would not have pled guilty, but proceeded to trial. Counsel testified that Applicant never asked for an appeal, but that if Applicant had done so, Counsel would have promptly filed a notice of appeal on his behalf.

The irreconcilable inconsistency between Applicant’s allegations at the evidentiary hearing and the allegations set forth in the original application clearly demonstrates the specious character of his testimony. Put simply, the Court does not find Applicant credible as to this or any issue. The Court finds Counsel’s testimony credible and finds that Applicant did not ask for an appeal or otherwise indicate his desire for one after the guilty plea. Accordingly, Applicant’s request for relief based upon this allegation is **DENIED**.

B. Direct Appeal Issues

Throughout his pleadings and his testimony, Applicant consistently alleged, both in the context of ineffective assistance of counsel and independent of that context, that the trial court erred in denying his motion to suppress the search and arrest warrants, and in denying his attorney’s request for a continuance. An application for post-conviction relief does not serve as a substitute for direct appeal, and an issue that could have been raised at applicant’s trial or on appeal is not cognizable in an application for PCR. S.C. Code Ann. § 17-27-20(b); Simmons v.

State, 264 S.C. 417, 215 S.E.2d 883 (1974). Trial court error is not a cognizable claim for PCR. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). To the extent that Applicant seeks relief on the basis that the trial court erred in any of its rulings, this Court finds that those issues could have been raised at trial and thereafter on appeal. Therefore, Applicant's request for relief based upon his allegations that the warrants were defective is **DENIED**.

V. CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

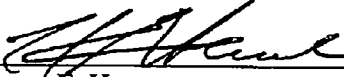
[Signature on following page]



IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 31ST day of July, 2017.



ROGER E. HENDERSON
Presiding Judge
Fifteenth Judicial Circuit

Chesterfield, South Carolina

FILED
2017 AUG 10 PM 1:50
CLERK OF COURT
HONORABLE COURT, SC

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FOREVER



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