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September 14, 2017

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SEP 18 2017

S.C. SUPREME COURT

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

RE: Karlin Foster, #271782 v. State of South Carolina
2015-CP-24-00276

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal along with the accompanying Order for the above-referenced matter. By way of this letter I am copying the Office of Appellate of Defense, as I was appointed to represent Mr. Foster.

Best regards,

ASHLEY A. MCMAHAN
ATTORNEY AT LAW

AAM

cc: Karlin Foster
Justin J. Hunter, Asst. Attorney General
Greenwood County Clerk of Court
Office of Appellate Offense

Enclosures

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

SEP 18 2017

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable G. Thomas Cooper, Circuit Court Judge

Case No. 2015-CP-24-00276

Karlin Foster, #271782, Petitioner,

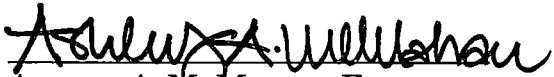
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant, Karlin Foster, appeals the order of the Honorable G. Thomas Cooper, dated August 24, 2017, and filed September 6, 2017. This Order was received by the undersigned on September 13, 2017.

September 14, 2017


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ATTORNEY FOR APPLICANT

Opposing Counsel:
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S.C. Attorney General's Office
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Columbia, SC 29211-1549

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

RECEIVED

The Honorable G. Thomas Cooper, Circuit Court Judge

SEP 18 2017

S.C. SUPREME COURT

Case No. 2015-CP-24-00276

Karlin Foster, #271782, Petitioner,

v.

State of South Carolina, Respondent.

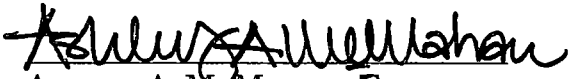
PROOF OF SERVICE

I, Ashley A. McMahan, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Justin J. Hunter, Asst, Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

I further certify that all parties required by Rule to be served have been served.

September 14, 2017


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STATE OF SOUTH CAROLINA)
 COUNTY OF GREENWOOD)
)
 Karlin Foster, SCDC # 271782)
)
 Applicant)
)
 v.)
)
 State of South Carolina)
)
 Respondent)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE EIGHTH JUDICIAL CIRCUIT

Case No.: 2015-CP-24-0276

ORDER OF DISMISSAL

FILED COMMON PLEAS
 8th JUDICIAL CIRCUIT
 GREENWOOD, SC

2017 SEP -6 PM 12:02

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed March 23, 2015. An evidentiary hearing into the matter was convened on June 7, 2017, at the Laurens County Courthouse in Laurens, South Carolina. Applicant was present at the hearing and represented by Ashley McMahan, Esquire. Assistant Attorney General Judah N. VanSyckel, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Thomas Austin, Esquire, also testified. This Court had before it a copy of Applicant's records from the Greenwood County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the plea transcript, Applicant's PCR Application, and Respondent's Return:

I. Procedural Posture

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenwood County Clerk of Court. The Greenwood County Grand Jury Applicant indicted Applicant at the April 2014 term of for Trafficking in Cocaine (2014-GS-24-0453) and Trafficking in Cocaine Base (Crack Cocaine) (2014-GS-24-0452). Thomas Philip Austin, Esquire, represented Applicant. On May 15, 2014, Applicant appeared before the Honorable Robin B. Stilwell and Applicant pled guilty as indicted. The State was

represented by Assistant Solicitor Shannon Odom, Esquire. Applicant faced a sentencing range of seven to twenty-five years on each charge. (Plea Tr. 24.) The State asked for a substantial prison sentence. (Plea Tr. 34.) The Greenwood County Sheriff spoke at the proceeding in order to advocate for a longer prison sentence. (Plea Tr. 27.) Applicant's mother spoke on his behalf in mitigation. (Plea Tr. 32-33.) Counsel put on the record that Applicant had been willing to cooperate with the State as a witness and assist them in bringing other criminals to justice. (Plea Tr. 29-30). Counsel also put on the record that as part of the plea, all other pending cases against Applicant were being dismissed. (Plea Tr. 30.). Judge Stilwell sentenced Applicant to concurrent ten-year terms of imprisonment on each charge.

Applicant did not appeal his guilty plea or sentence.

II. Facts of the Case from the factual basis for the Guilty Plea

Applicant trafficked drugs in Greenwood County, South Carolina. (Plea Tr. 25-26.) On September 18, 2013, Applicant had an outstanding arrest warrant for his arrest. Id at 25. Agents with the Greenwood County Drug Enforcement Unit went to a home located at 324 Morton Road, Greenwood, S.C. to find Applicant and serve the arrest warrant on him. Id. Applicant's girlfriend, Ms. Brooks, was home at the time and denied that Applicant was at the residence. Id. Law enforcement asked for permission to search the residence. Id. Ms. Brooks denied their request. Id. Law enforcement smelled marijuana coming from the home. Id. The agents secured the home and one of them went and obtained a search warrant. Id. Upon receipt of the warrant, the agents searched the home (the Search). Id at 25-26. The agents discovered a gun, ammunition, and powder and crack cocaine in a closet in Mr. Foster's bedroom. Id at 26. The agents arrested Ms. Brooks on the scene. Id. Later that day, Applicant came to the Sheriff's Office and gave a statement that all the drugs from the Search were his. Id.

A handwritten signature and the number '2' are located at the bottom left of the page.

III. Applicant's Guilty Plea Statements

At the Guilty Plea, Applicant admitted to the above facts. (Plea Tr. at 26.) Applicant did not say anything at the plea to justify his conduct, to ask for mercy, or to provide some sort of mitigation. Id at 33.

IV. Applicant's PCR Filings

Applicant filed his original PCR application on March 23, 2017. Applicant filed his PCR on the following grounds:

1. That Applicant received ineffective assistance of counsel because Counsel failed to inform him that the Greenwood County law enforcement agents who were in charge of a drug sting targeting the sale of drugs (the Drug Sale) by Applicant and subsequently obtained warrants based upon the sale were without jurisdiction to operate in Abbeville County.
2. That Applicant received ineffective assistance of counsel because Counsel failed to inform Applicant that Applicant could have challenged the arrest warrant based on the Drug Sale as the warrant affidavit did not contain testimony as to the reliability of the confidential informant.
3. That Applicant received ineffective assistance of counsel because Counsel failed to tell Applicant that if Applicant challenged the arrest warrant, on the grounds that Greenwood County agents did not have jurisdiction over anything that happened in Abbeville County, and was able to have the arrest warrant dismissed, then applicant would be able to challenge the Search on the grounds that Greenwood County agents would not have been able to be at the home and smelled marijuana.



4. That Applicant received ineffective assistance of Counsel because Counsel failed to tell Applicant that he could challenge the issuance of the warrant for the Search in a Franks v. Delaware hearing. 438 U.S. 154 (1978).
5. That Applicant received ineffective assistance of Counsel because Counsel failed to tell Applicant that he could challenge the arrest warrant for trafficking crack cocaine as the warrant lacked insufficient probable cause because the warrant affidavit failed to allege that Applicant possessed the crack cocaine.
6. That Applicant received ineffective assistance of Counsel because Counsel failed to tell Applicant that he could challenge the arrest warrant for trafficking cocaine as the warrant lacked insufficient probable cause because the warrant affidavit failed to allege that Applicant possessed the cocaine.

Applicant, acting *pro se*, then amended his application of June 9, 2016 to reflect the following claims:

- A. That Applicant received ineffective assistance of Counsel for failing to give Applicant a copy of the grand jury empanelment documents.
- B. That Applicant received ineffective assistance of Counsel due to Applicant's failure to file for a Franks v. Delaware Hearing regarding the issuance of the warrant for the Search. 438 U.S. 154 (1978).
- C. Applicant claimed that the General Sessions Court lacked Subject Matter Jurisdiction to hear the case because the Magistrate did not hold a preliminary hearing.



- D. Applicant claimed that Greenwood County law enforcement agents were without authority to arrest a defendant in another county when there was no valid agreement between the counties.
- E. That Applicant received ineffective assistance of Counsel because Counsel failed to investigate Robbie Byrd. That Counsel was ineffective for inducing him to plead based on false information. That had Counsel done his job the outcome of the case would have been different, that had Counsel filed for a suppression motion and had counsel prepared for the case properly the case would have been different; the defendant would have gone to trial.

Applicant, through his second PCR Counsel, then filed an Amended Post-Conviction Relief Application on April 3, 2017. Applicant's amended claims are as follows:

- 1. Ineffective Assistance of Counsel
 - a. Did not move to suppress the confessions and arrests based on State v. Boswell. 391 SC 592 (2011) as the officers were without jurisdiction.
Applicant is combining this allegation with that of Allegations 1, 2, and 3, of the PCR Application and Allegation D in the Amended Application.
 - b. Counsel did not challenge the sufficiency of the indictment. See e.g. Padgett v. State. 324 SC 22 (1997).
- 2. After-Discovered Evidence
 - a. Officer Byrd was subsequently indicted for Misconduct in Office. See Exhibit 1, attached and incorporated herein. Applicant asserts that that Officer Byrd's now lack of credibility affects his case as Byrd was the one who signed the search warrant on the Applicant's home. See Havden v. State, 278 SC 610



(1983). Applicant is abandoning allegations A and C in the Amended Application for Post-Conviction Relief.

In Applicant's filing he further abandoned allegations A and C in the Amended Application for Post-Conviction Relief.

In sum, Applicant's claims for Post- Conviction Relief are as follows:

1. Ineffective Assistance of Counsel:

- a. Did not move to suppress the confessions and arrest based on State v. Boswell, 391 SC 592 (2011) as the officers were without jurisdiction.
- b. Counsel failed to conduct a Franks v. Delaware hearing regarding the search warrant affidavit. 438 US 154 (1978).
- c. Counsel failed to inform the Applicant that he could move pre-trial to try to have the evidence suppressed that was seized from the home.
- d. Counsel did not inform the Applicant that he could move to suppress the search warrant and move to quash the indictment.
- e. Counsel did not inform the Applicant that he could challenge probable cause for trafficking cocaine.
- f. Counsel failed to investigate and determine if there was a valid multi-jurisdictional agreement in place.
- g. Counsel did not challenge the sufficiency of the indictment. See e.g. Padgett v. State, 324 SC 22 (1997).

2. After-Discovered Evidence: Officer Byrd was subsequently indicted for Misconduct in Office. Applicant alleges that Officer Byrd's now lack of credibility affects

Applicant's case as Byrd was the one who signed the search warrant on the Applicant's home.

V. Hearing Testimony

A. Applicant's Testimony

At the June 7, 2017 hearing, Applicant testified on his own behalf. Applicant's testimony included the following assertions. Applicant testified that there was no marijuana found in the house during the September 18, 2013 search. Applicant testified that because no marijuana was found and because the search of the house was based on the smell of marijuana emanating from the home, that he was entitled to a Franks v. Delaware hearing. 438 U.S. 154 (1976).

Applicant also testified that the underlying warrant for his arrest, which was the basis of law enforcement's presence at 324 Morton Road, Greenwood, SC, should have been challenged. Applicant testified that because the warrant was based on a sale of drugs (the Drug Sale) by Applicant that occurred in Abbeville County, the Greenwood County Drug Enforcement Unit had no jurisdiction over that sale. Additionally, Applicant alleged that Greenwood County and Abbeville County did not have a valid multi-jurisdictional agreement between them and thus the Greenwood County Drug Enforcement Unit had no jurisdiction over anything that occurred in Abbeville County.

Applicant also testified that the particular officer who smelled the marijuana, Officer Byrd, was later indicted for misconduct in office and that he should get a new trial because of this.

B. Counsel's Testimony

Counsel, Thomas Austin, testified at the hearing. Counsel's testimony included the following assertions. Counsel testified that he had represented Applicant several times over the

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years and had managed to find loopholes in other cases. Counsel testified that this case was different, because Ms. Brooks, Applicant's girlfriend, had been arrested and Applicant wanted to take responsibility for the drugs. Counsel testified that Applicant told him to do whatever was necessary to get Ms. Brooks out of trouble.

Counsel testified that Applicant was not arrested until after Applicant's voluntary confession given without threats or coercion before the arrest, which was a factor in the defense of Applicant.

Counsel testified that the Greenwood County Drug Enforcement Unit is a joint task force between Greenwood City and County. Counsel testified that he checked with the Solicitor's office to see if there was a reciprocity agreement between Greenwood County and Abbeville County. Counsel testified that he confirmed that there was a valid reciprocity agreement in place at the time of the Drug Sale.

Counsel further testified that Applicant had met an informant in Greenwood County and then crossed over the county line to Abbeville County to complete the Drug Sale transaction.

Counsel testified that beyond that, the Greenwood County Drug Enforcement Unit had had an Abbeville County Magistrate sign the arrest warrant for the Drug Sale transaction.

Counsel testified that although Ms. Brooks was Applicant's girlfriend, at the time Counsel had been made aware that Ms. Brooks would testify against Applicant at trial.

Counsel testified that based on his experience, he believed that had Applicant and Ms. Brooks proceeded to trial, one or both of them would have been convicted and it probably would have been Ms. Brooks.

Counsel testified that he obtained the assistance of Rauch Wise, Esquire to review the possibility of getting the drug evidence from the Search suppressed.



Counsel testified that he did not challenge the training of the drug dog involved in the Search because although the drug dog did not alert to the smell of marijuana emanating from the home, it did alert on the drugs found in the home and because Applicant had then given a full confession as to the drugs from the Search

Counsel testified that he did talk with Applicant about challenging the basis for the Search and the validity of the warrant. Counsel testified that he had never fully trusted Officer Byrd of the Greenwood County Drug Enforcement Unit, but that he had no proof of bad conduct by Office Byrd at that time. Counsel testified that he discussed Officer Byrd's credibility with Applicant. Counsel testified that he is aware that Officer Byrd was indicted in 2015, but the misconduct in the indictments does not go back to the time period of the Sale, the Search, or Applicant's plea.

Counsel testified that his representation of Applicant began with the understanding that the most important thing was to protect Ms. Brooks. Counsel also testified that he went over all the defenses with Applicant, that they addressed the validity of the Arrest Warrant from the Sale, that they addressed the validity of the Search Warrant at the Search, and they discussed the voluntary confession given by Applicant. Counsel also testified that Applicant weighed the benefit of having other charges against him dismissed, including the charges arising out of Abbeville. Additionally, Counsel testified that Applicant saw the benefit of Federal matters being dismissed. Counsel testified that by pleading, Applicant avoided the possibility of being exposed to a sentence of Life Without Parole based on the severity and nature of all the charges he was facing.

VI. Applicable Law

A. Applicable Law as to Ineffective Assistance of Counsel



In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

The United States Supreme Court held that the Strickland v. Washington standard applies in guilty pleas. Hill v. Lockhart, 474 U.S. 52 (1985). The Court further held that for guilty pleas, in order to show the prejudice requirement in the second prong of Strickland, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59. The test for the prejudice

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inquiry of the Court is dependent upon the particular facts of each claim of ineffective assistance of counsel. Claims of failing to investigate or discover evidence are subject to an analysis by the Court as to the probability that “discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.” Id. But the prejudice analysis changes “where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the “prejudice” inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.” Id. This is an inquiry that the trial court must make regarding the evidence presented before it as “these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the “idiosyncrasies of the particular decisionmaker.”” Id. at 59-60 (quoting Strickland v. Washington, 466 U.S. 668, 695 (1984)).

B. Applicable Law as to Newly Discovered Evidence after a Guilty Plea.

The South Carolina Supreme Court set forth the two-factor test for determining the existence of newly discovered evidence after a guilty plea in Jamison v. State. 410 S.C. 456 (2014). The first factor requires Applicant to show that “the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea.” Id. at 470. The second factor requires Applicant to demonstrate that “the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the “interest of justice” requires the applicant's guilty plea to be vacated.” Id. The Court goes on to say that “In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the



waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.”

VII. Findings of Facts 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 Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

A. Ineffective Assistance of Counsel

This Court finds that Counsel demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler v. State, 286 S.C. 441, 334 S.E.2d 813. An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the

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range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). This Court finds that Applicant has failed to prove that Counsel was ineffective. This Court also finds that Counsel properly relied on Applicant's statement that he wished to TAKE responsibility for the drugs found during the Search in order to minimize any responsibility Ms. Brooks may have for them. The United States Supreme Court has held that "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984)

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1. *Findings and Conclusions as to Claim that Counsel was ineffective for not moving to suppress the confessions and arrest based on State v. Boswell, 391 SC 592 (2011) as the officers were without jurisdiction.*

This Court finds that Counsel was not ineffective for failing to move to suppress the confessions and arrest based on State v. Boswell, 391 S.C. 592 (2011). Applicant's reliance on Boswell misapprehends his current predicament. Although Applicant contends that any mistakes by law enforcement arising out of the investigation into the Drug Sale and in the issuance and subsequent reliance by law enforcement upon the arrest warrant based upon the Drug Sale should require that the results of the subsequent Search be suppressed, this Court finds that the smell of marijuana emanating from the residence was an independent basis for the Search. See State v. Cox, 287 S.C. 260, 263, 335 S.E.2d 809, 811 (Ct. App. 1985), *aff'd in part, rev'd in part*, 290 S.C. 489, 351 S.E.2d 570 (1986). See also Wong Sun v. United States, 371 U.S. 471 (1963); and

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Nix v. Williams, 467 U.S. 431 (1984). As such, this Court finds that Counsel was not ineffective for failing to move to suppress the confessions and arrest.

This Court further finds that the Officers had jurisdiction to work in Abbeville County. Unlike in Boswell, where there was no valid agreement between law enforcement agencies, this Court, based on Counsel's testimony, finds that there was a valid multi-jurisdictional agreement for the Greenwood County Drug Enforcement Unit agents to work in Abbeville County. 391 S.C. 592 (2011). As such, this Court finds that under §23-20-50 of the South Carolina Code of Laws, the agents had jurisdiction over the Drug Sale in Abbeville County. This Court finds that the Arrest Warrant obtained from the Drug Sale was properly obtained. This Court finds that Counsel was not ineffective for failing to challenge the Warrant and subsequent Search and resulting confession on these grounds.

2. *Findings and Conclusions as to Claim that Counsel was ineffective for failing to conduct a Franks v. Delaware, 438 US 154 (1978) hearing regarding the search warrant affidavit.*

This Court finds that Counsel did not provide ineffective assistance of counsel as to this claim. This Court finds that Counsel discussed the possibility of pursuing a Franks hearing with the Applicant and that the Applicant made the choice to take the benefit of the plea bargain. This Court finds that the Applicant faced overwhelming evidence of his guilt due to Applicant's confession, the existence of the drugs in his bedroom, and the fact that Ms. Brooks was prepared to testify against him. This Court finds that Applicant made the decision to plead guilty based on the benefit it provided Ms. Brooks, the dismissal of other charges Applicant was facing, and the fact that a potential sentence of Life Without Parole was no longer on the table.

Further, this Court finds that even if Counsel had not discussed pursuing a Franks v. Delaware hearing with Applicant, Applicant would not have reasonably chosen to pursue such a

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course of action had he been informed as to that possibility, as the Applicant could not have met his burden under the Franks v. Delaware standard. 438 U.S. 154, 155-156 (1978). Franks requires that a defendant must first make a substantial preliminary showing that a statement made in the underlying affidavit for a search warrant is false, and that that statement was necessary for the issuing court to find probable cause for the issuance of the warrant. Id. The second requirement is that after meeting the first test, a defendant must then show at a hearing by a preponderance of the evidence, that the statement is false. Id. This Court finds that the Applicant failed to demonstrate that the statement by the officer was false, as the fact that no marijuana was found during the Search does not prove that the officer could not have smelled marijuana emanating from the home, as the officers may have not found the marijuana, or the officer may have smelled freshly smoked marijuana. This Court finds that Applicant failed to demonstrate that the reasonable probability of success at a Franks v. Delaware hearing. 438 U.S. 154, 155-156 (1978). This Court therefore concludes that even had Counsel not informed Applicant about his right to a Franks v. Delaware hearing, Applicant would not have requested one. Id.

3. *Findings and Conclusions as to Claim that Counsel failed to inform the Applicant that he could move pre-trial to try to have the evidence suppressed that was seized from the home.*

This Court finds that Counsel did not provide ineffective assistance of counsel as to this claim. This Court finds that Counsel discussed the possibility of moving to suppress the evidence seized at the home with the Applicant. This Court finds that the Applicant made the choice to take the benefit of the plea bargain. This Court finds that the Applicant faced overwhelming evidence of his guilt due to Applicant's confession, the existence of the drugs in his bedroom, and the fact that Ms. Brooks was prepared to testify against him. This Court finds that Applicant

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made the decision to plead guilty based on the benefit it provided Ms. Brooks, the dismissal of other charges Applicant was facing, and the fact that a potential sentence of Life Without Parole was no longer on the table.

4. *Findings and Conclusions as to Claim that Counsel did not inform the Applicant that he could move to suppress the search warrant and move to quash the indictment.*

This Court finds that Counsel did not provide ineffective assistance of counsel as to this claim. This Court finds that Counsel discussed the possibility of moving to suppress the evidence seized at the Search and then moving to have the underlying charges dismissed with the Applicant. This Court finds as a fact that the Applicant made the choice to take the benefit of the plea bargain rather than risk losing at a suppression hearing. This Court finds that the Applicant faced overwhelming evidence of his guilt due to Applicant's confession, the existence of the drugs in his bedroom, and the fact that Ms. Brooks was prepared to testify against him. This Court finds that Applicant made the decision to plead guilty based on the benefit it provided Ms. Brooks, the dismissal of other charges Applicant was facing, and the fact that a potential sentence of Life Without Parole was no longer on the table.

5. *Findings and Conclusion as to Claim that Counsel did not inform the Applicant that he could challenge probable cause for trafficking cocaine.*

This Court finds that Applicant's testimony was insufficient to support this claim that Counsel failed to inform Applicant could challenge the probable cause for trafficking cocaine. This Court finds that even had Applicant moved to have his charges dismissed at a preliminary hearing, there was enough evidence to establish probable cause that Applicant trafficked cocaine. Under §44-53-370(e) of the South Carolina Code of Laws, a person in South Carolina who is in actual or constructive possession of ten grams or more of cocaine is guilty of trafficking in

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that the Applicant has shown no evidence that the weight of the cocaine base was other than what the Applicant admitted to at the time of the plea. As such, this Court finds there was probable cause for the Applicant to be tried for trafficking crack cocaine. This Court finds that although Applicant provided insufficient evidence to show that Counsel failed to inform Applicant that Applicant could challenge the probable cause for the charge against Applicant, this Court finds that probable cause existed for the charge against Applicant and that Applicant could not have reasonably chosen to challenge that evidence instead of taking the benefit of the plea bargain.

6. *Findings and Conclusions as to Claim that Counsel failed to investigate and determine if there was a valid multi-jurisdictional agreement in place.*

This Court finds that Applicant failed to show that Counsel was ineffective for failing to investigate if there was a valid multi-jurisdictional agreement in place. This Court, based on Counsel's testimony, finds that Counsel did investigate and confirm that there was a valid multi-jurisdictional agreement in place at the time of the Sale. As the alleged failure to investigate did not occur, Applicant could not have suffered any prejudice based upon that allegation.

Further, this Court finds that even had Applicant shown that Counsel failed to investigate the validity of the multi-jurisdictional agreement, any deficiencies arising out the issuance of the arrest warrant for the Drug Sale are ultimately immaterial, as the warrant for the Search was based on the Greenwood County Drug Enforcement Unit's agent's smelling marijuana at the location of the Search. See State v. Cox, 287 S.C. 260, 263, 335 S.E.2d 809, 811 (Ct. App. 1985), aff'd in part, rev'd in part, 290 S.C. 489, 351 S.E.2d 570 (1986). See also Wong Sun v. United States, 371 U.S. 471 (1963); and Nix v. Williams, 467 U.S. 431 (1984).



cocaine, and if the amount is between twenty eight grams and one hundred grams, the sentence range they face is from seven to twenty eight years. This Court finds that there was probable cause in this case that Applicant trafficked cocaine, as Applicant admitted through a voluntary confession that the drugs found at the Search were his, and the location of the Search was in South Carolina. This Court further finds that the Applicant has shown no evidence that the weight of the cocaine was other than what the Applicant admitted to at the time of the plea. As such, this Court finds there was probable cause for the Applicant to be tried for trafficking cocaine. This Court finds that although Applicant provided insufficient evidence to show that Counsel failed to inform Applicant that Applicant could challenge the probable cause for the charge against Applicant, this Court finds that probable cause existed for the charge against Applicant and that Applicant could not have reasonably chosen to challenge that evidence instead of taking the benefit of the plea bargain.

This Court finds that Applicant's testimony was insufficient to support a claim that Counsel failed to inform Applicant could challenge the probable cause for trafficking "crack cocaine." This Court finds that even had Applicant moved to have his charges dismissed at a preliminary hearing, there was enough evidence to establish probable cause that Applicant trafficked crack cocaine. Under §44-53-375(C) of the South Carolina Code of Laws, a person in South Carolina who is in actual or constructive possession of ten grams or more of crack cocaine is guilty of "trafficking in methamphetamine or cocaine base", and if the amount is between twenty eight grams and one hundred grams, the sentence range they face is from seven to twenty eight years. This Court finds that there was probable cause in this case that Applicant trafficked crack cocaine, as Applicant admitted through a voluntary confession that the drugs found at the Search were his, and the location of the Search was in South Carolina. This Court further finds

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7. *Findings and Conclusions as to Claim that Counsel did not challenge the sufficiency of the indictment. (Padgett v. State. 324 SC 22 (1997) claim).*

This Court finds that Applicant has failed show that Counsel was ineffective for failing to challenge the sufficiency of the indictment. This Court finds that Applicant failed to give sufficient evidence that the indictments against him were in fact insufficient. The test for determining the sufficiency of the indictment in South Carolina is a two part test. State v. Gentry, 363 S.C. 93, 102-103 (2005). The first prong of the test is that “the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon.” Id. The second prong of the test is “whether it apprises the defendant of the elements of the offense that is intended to be charged.” Id. at 103. This Court finds that Applicant failed to show that the indictment did not state the offense with sufficient certainty and particularity that the Court would be unable to know what judgment to pronounce and that Applicant did not know what he was called upon to answer and whether he could plead an acquittal or conviction upon the offense. This Court further finds that Applicant failed to show that the indictment failed to apprise the Applicant of the elements of the offense with which he was charged.

This Court also finds that Padgett v. State is not controlling in this matter, as the issue in Padgett was that the defendant’s attorney had failed to challenge an indictment where the facts in the case did not support the indictment. 363 S.C. 93 (2005). In this case, the underlying facts of the offense support both indictments upon which Applicant pled.

B. Newly Discovered Evidence

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This Court finds that Applicant is correct that Officer Robbie Byrd and certain other Officers from the Greenwood County Drug Enforcement Unit have been indicted for crimes involving moral turpitude since Applicant committed his crimes and pled to them. The Applicant, however, has failed to show that there is any newly discovered evidence. In order to satisfy the second prong of the test laid out in Jamison v. State, Applicant would have to show that the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the “interest of justice” requires the applicant's guilty plea to be vacated.” 410 S.C. 456 (2014). The information presented by Applicant does not go to Applicant’s guilt or innocence. Rather, it is only applicable for the purposes of impeaching certain officers who have been indicted since Applicant’s plea for conduct that occurred after Applicant’s plea. Nothing about the newly discovered evidence contradicts Applicant’s admission to his guilt at the time of his plea. Additionally, nothing about the newly discovered evidence contradicts Applicant’s voluntary statement confessing to the crime, given by Applicant prior to arrest. As such, Applicant’s claim for relief on the basis of newly discovered evidence in his case is hereby denied.

VIII. Conclusion

Based on the foregoing facts, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Applicant failed to demonstrate that Counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Further, Applicant failed to establish the existence of newly discovered evidence that is of sufficient weight and quality that the interests of justice would require that Applicant’s conviction be vacated. Jamison v. State,

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410 S.C. 456 (2014). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
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 24 day of August, 2017.



G. Thomas Cooper, Jr.
Presiding Judge
Eighth Judicial Circuit

Camden, South Carolina



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