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September 27, 2017

HAND DELIVERED:

RECEIVED
SEP 27 2017
S.C. SUPREME COURT

Mr. Daniel E. Shearouse
Clerk of South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

RE: Derrick Velasquez xs. State of South Carolina

Dear Daniel:

Enclosed for filing in the referenced matter is our Notice of Appeal and Proof of Service in the referenced matter.

Please call if any further information is needed,

Sincerely,

H Wayne Floyd

Wayne Floyd

WF/rtb
enclosure

THE STATE OF SOUTH CAROLINA

In The Supreme Court

RECEIVED

SEP 27 2017

S.C. SUPREME COURT

APPEAL FROM NEWBERRY COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No: 2016-CP-36-154

Derrick Velasquez, #36500 .....Appellant

v.

State of South Carolina .....Respondent

NOTICE OF APPEAL

Derrick Velasquez appeals the Judgement of the Honorable G. Thomas Cooper filed August 31, 2017. Appellant received written notice of entry of this Judgement on September 5, 2017.

H. Wayne Floyd
P.O. Box 3972
1611 Augusta Road
West Columbia, SC 29169
Attorney for Appellant

Other Counsel of Record:
Justin James Hunter
Assistant Attorney General
Office of the Attorney General
State of South Carolina
1000 Assembly Street
Columbia, SC 29211
Attorney for Respondent

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM NEWBERRY COUNTY

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G. Thomas Cooper, Circuit Court Judge

Case No: 2016-CP-36-154

Derrick Velasquez, #36500 .....Appellant

v.

State of South Carolina .....Respondent

PROOF OF SERVICE

I CERTIFY THAT I HAVE SERVED THE Notice of Appeal to Attorney for Respondent by hand delivery on September 27, 2017, to Assistant Attorney General, Justin James Hunter, 1000 Assembly Street, Columbia, South Carolina 29211.

H. Wayne Floyd
P.O. Box 3972
1611 Augusta Road
West Columbia, SC 29169
Attorney for Appellant

STATE OF SOUTH CAROLINA COUNTY OF NEWBERRY	)	IN THE COURT OF COMMON PLEAS FOR THE EIGHTH JUDICIAL CIRCUIT
Derrick Velasquez, SCDC # 365000 Applicant	)	Case No.: 2016-CP-36-154
v.	)	**ORDER OF DISMISSAL**
State of South Carolina Respondent	)	

RECEIVED
SEP 27 2017
S.C. SUPREME COURT
FILED
NEWBERRY COUNTY
2017 AUG 31 AM 11:
ELIZABETH P. FOLK
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed March 7, 2016. An evidentiary hearing into the matter was convened on June 6, 2017, at the Laurens County Courthouse in Laurens, South Carolina. Applicant was present at the hearing and represented by Wayne Floyd, 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, Charles Verner, Esquire, also testified. This Court had before it a copy of Applicant's records from the Newberry County Clerk of Court; Applicant's records from the South Carolina Department of Corrections; the trial transcript, which included the record of the Motion for a Continuance, jury selection, suppression hearing, and Applicant's Guilty Plea; 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 Newberry County Clerk of Court. Applicant was indicted at the June 2015 term of the Newberry County Grand Jury for trafficking in crack cocaine (10 g. or more, but less than 28 g.) (2015-GS-36-270) and trafficking in crack cocaine (400 g. or more)

(2015-GS-36-269). Applicant was represented by Charles Verner, Esquire. On August 3, 2015, Applicant began a trial before the Honorable Eugene C. Griffith, Jr. The State was represented by Deputy Solicitor Dale Scott, Esquire, and Assistant Solicitor Taylor Daniel, Esquire.

At the beginning of the proceedings, Applicant moved for a continuance. (Tr. p. 4-12). One of the grounds for the motion was on the basis of the fact that the case was relatively new. Id. Another was that they felt that the data regarding the traffic stop was insufficient. Id. The Court held that the insufficiency of the data was a legal matter that should not be a basis for a continuance. Id at 8. The Court denied the motion as to the other grounds but ultimately held that the Court would go forward with jury selection and move forward with the suppression motion, and then evaluate the case from there. Id at 12.

Applicant's suppression motions were denied. (Tr. p. 155.) The Court also again denied the request for a continuance, even on the grounds that Applicant wanted to hire a new lawyer. (Tr. p. 155-156.)

On August 4, 2015, Applicant pled guilty to trafficking in crack cocaine (10 g. or more, but less than 28 g.) and to trafficking in cocaine (28 g. or more, but less than 100 g.) as a lesser included offense of trafficking in cocaine (400 g. or more). Applicant was sentenced pursuant to a recommendation to imprisonment for fifteen years on each charge to run concurrently.

Applicant filed a notice of appeal, which was served on opposing counsel on August 17, 2015. Applicant's counsel filed a Motion to Allow Late Filing, stating that he was made aware on August 17, 2015 that Applicant desired an appeal. On September 2, 2015, the South Carolina Court of Appeals issued an order stating that it cannot extend the time for service of the notice of appeal, denying Applicant's motion and dismissing the appeal. The remittitur was sent September 18, 2015.

II. Facts of the Case from the Guilty Plea

On May 1, 2015, the Applicant, a non-resident of South Carolina, trafficked powder and crack cocaine and possessed marijuana in this State in defiance of the laws created to protect the citizens of South Carolina from the evils of these dangerous substances. (Tr. p. 160-161.) The Applicant was riding in a car which was stopped at a traffic checkpoint in Newberry, S.C. (Tr. p. 161.) During the stop, officers lawfully searched Applicant and discovered crack cocaine in the Applicant's front right pocket. Id. Officers subsequently also lawfully discovered a brick shaped package containing over 400 grams of powder cocaine in a backpack. Id.

III. Applicant's Guilty Plea Statements

Applicant admitted to these facts at the guilty plea. (Tr. p. 161). At the plea, Applicant stated at the plea the following as part of his mitigation:

> "Well, Your Honor, I take full responsibility for this and I made those decisions. It was very turbulent times and I felt like I had nothing to lose at the time. I committed a wrongful act, I knew there was consequences and penalties. When I look in the mirror I ask myself, I can't think of any reason of why I was going to do what I was going to do. So, it didn't work out and the only reason I put up such a fight in the beginning is because, I thought I had a shot at this. And I wanted to, to expose me to more time but my decision was based on, I would rather do 7 years, I didn't want to do 7 years and think I could have won. I gave it all I could, you know."

(Tr. p. 167).

IV. Applicant's PCR Filings

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

1. Ineffective Assistance of Counsel.
2. Due Process Violations.
3. Denied equal protection under the law.

Applicant alleges that Counsel provided ineffective assistance of counsel in the following ways:

1. Counsel failed to obtain the field drug test kit analysis, otherwise known as the Scott's Reagent Test.
2. Counsel failed to obtain a continuance.
3. Counsel failed to investigate, plan, and prepare a defense strategy.
4. Counsel failed to challenge legally insufficient empirical data.

Applicant alleges that he was denied Due Process in the following manner:

1. There was woefully insufficient evidence submitted by the Newberry Sheriff's Office.
2. Incomplete Discovery Submitted by the Solicitor.
3. Only given one hour to prepare a motion to suppress by the Judge.

Applicant claimed that he was denied Equal Protection under the Law because his case was called for trial more quickly than others similarly situated were.

At the hearing, Applicant also alleged that Counsel was ineffective for:

1. Failing to file an appeal.
2. Having a conflict with his co-defendant.

V. Summary of Hearing Testimony

A. Applicant's Testimony

At the hearing, Applicant testified that he discussed the conflict issue with Counsel, Charles Verner. Applicant also testified that he never got the drug results for the marijuana test. Applicant testified that he pled based on Counsel's assertion that if he lost the suppression

hearing, then he'd lose at trial and be subject to a significant sentence and because Counsel asserted that Applicant would likely lose at trial.

Applicant testified that Counsel said he would file an appeal. Applicant testified that Applicant thought Counsel said he had thirty days to appeal. Applicant testified that he wanted to hire another attorney. Applicant testified that he had prior felony charges.

B. Counsel's Testimony

Counsel, Charles Verner, testified that he had the case for three months and that he had enough time to prepare this case. Counsel testified that this was a quick case, but that the facts were simple.

Counsel testified that he did originally assign the co-defendant's case to himself and assigned Applicant's case to Joseph St. Pierre, Esquire. Counsel then explained that he met with the co-defendant to understand the nature of the charges and after meeting with the co-defendant, realized that the Applicant was more culpable. Counsel explained that the meeting with the Applicant was only to understand the nature of the charges in the case. Counsel testified that shortly after that meeting, he assigned Applicant to himself and assigned the co-defendant to Mr. St. Pierre.

Counsel testified that he met with Applicant numerous times and that Applicant was a high-intensity client in terms of the amount of attention that Applicant desired. Counsel testified that he turned over his entire case file to Applicant's girlfriend at request of Applicant after the plea. Counsel testified that he could not recall showing Applicant the results of the drug tests. Counsel testified that he specifically challenged both the legality of the traffic checkpoint and the search of Applicant. Counsel testified that he did move for a continuance and that that request was denied.

Counsel testified that he would have challenged the State's position regarding Applicant's prior drug convictions had Applicant gone to trial. Counsel testified that he would have objected had the State not provided certified copies of the prior convictions. Counsel testified that Applicant's own statements corroborated the RAP sheets.

Counsel also testified that regardless of Applicant's prior convictions, Applicant would have been facing at least twenty-five years on the powder cocaine due to the weight of the powder cocaine. Counsel testified that by pleading to a lesser weight, even as a second offense, Applicant received the benefit of being able to be sentenced to 15 years. Counsel testified that at the suppression hearing, law enforcement testified that there was a smell of marijuana in the vehicle in which Applicant was riding.

Counsel testified that Applicant never asked him for an appeal, but that Applicant's girlfriend contacted him with Applicant's request to appeal. Counsel testified that he filed a Notice of Appeal the same day and moved for permission to file outside of time as well. Counsel noted the timeline in the appeal. Counsel testified that he was not contacted until August 17, 2015, when the ten day deadline was August 10, 2015.

Counsel testified that the only appealable issue was the suppression motion and that he did not believe it to be a strong appeal. Counsel testified that he did have the results of the chemical analysis of the seized drugs. Counsel testified that he felt certain that Applicant would be convicted at trial.

VI. Applicable Law

A. Law regarding claims of 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 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)).

Additionally, in claims of ineffective assistance of counsel due to a conflict of interest, "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). This Court has further stated that a conflict of interest occurs when "a defense attorney places himself in a situation inherently conducive to divided loyalties." Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); see also *Burger v. Kemp*, 483 U.S. 776, 783 (1987)). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450

(2005). A defendant need not demonstrate prejudice if there is an actual conflict of interest." Id., 364 S.C. at 153, 612 S.E.2d at 450.

B. Law regarding claims of Due Process Violations and violations of the Right of Equal Protection

The South Carolina Supreme Court has held that "Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." Simmons v. State, 264 S.C. 417, 423 (1975). See also Drayton v. Evatt, 312 S.C. 4, 8 (1993). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973).

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 transcript of the motions and plea proceedings, 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. This Court finds Applicant's testimony to be lacking credibility. These credibility findings have been applied to the Court's findings and conclusions set forth below.

A. The claim of Ineffective Assistance of Counsel

EC A 9

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, 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 range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). 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 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)).

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 finds that Applicant has failed to prove that Counsel was ineffective for failing to obtain the results of the field drug test kit. Applicant provided no evidence as to what probative value it would have provided that was not otherwise provided, and failed to show any way in which Applicant was prejudiced. Counsel testified that he would have challenged the drug evidence at trial and that he would objected to the introduction of the drugs as evidence without the State producing testimony from South Carolina Law Enforcement Division analyst. This Court is aware that the regular practice in the criminal courts in this state is to present the ultimate laboratory tests, which are of a higher quality and are required for criminal prosecution, and not to present the field drug test kit results. Counsel was not deficient in relying upon the lab results.

This Court also finds that Counsel was not ineffective for failing to obtain the field drug test kit for purposes of the suppression motion. This Court finds that Counsel had a copy of the laboratory analysis of the drugs which confirmed their makeup. Additionally, this Court finds that Officer Pete Johnson testified that Applicant himself identified the marijuana as being marijuana. (Tr. p. 90.) This Court finds that Applicant has failed to show the relevance of the field test kit or how it would have affected his decision to go to trial.

This Court finds that Applicant has failed to prove that Counsel was ineffective for failing to obtain a continuance. Counsel did request a continuance on the grounds that the case was relatively new, that Applicant wished to hire a different lawyer, and that the discovery provided was insufficient as to the empirical data provided regarding the checkpoint. (Tr. p.4-12, 155-156.). The Trial Court ruled against the request. Id. This decision was within the discretion of the Trial Court and Counsel could not control it. State v. Meggett, 398 S.C. 516, 523 (Ct. App. 2012). Since Counsel made the requested motion to the Court, the Applicant has failed to prove deficiency.

Applicant has failed to prove that Counsel was ineffective for failing to investigate, plan, and prepare a defense strategy. This Court finds that Counsel reviewed all the available evidence, identified what he felt was the strategically best decision, and acted accordingly. Specifically, Counsel reasonably realized that the evidence of Defendant's guilt was overwhelming. Except for the pre-trial legal challenges, which were brought in good faith and which were rejected by the trial court, regarding the traffic safety checkpoint and the search of Applicant, there was no factual defense. Neither deficient performance nor prejudice was shown under the two prong test of Hill. Hill v. Lockhart, 474 U.S. 52 (1985).

Applicant has failed to prove that Counsel was ineffective for failing to challenge the traffic checkpoint as having legally insufficient empirical data to justify the checkpoint. The trial transcript reveals that Counsel did challenge the checkpoint for having legally insufficient empirical data and the Trial Court ruled against Applicant. (Tr. 145-150.) The factual claim is without merit and must be dismissed.

Applicant has failed to prove that Counsel was ineffective in failing to file a notice of appeal from the guilty plea. The record of the plea reflects that the plea court advised Applicant

that Applicant had "a limited number of days in which to file a notice of appeal," "if I have done something procedurally wrong. (Tr. p. 165.) The Applicant testified that he thought he had 30 days to appeal from the August 4, 2015 plea and sentence. When Counsel was notified on or about August 17, 2015 of the Applicant's desire to appeal for the first time, he immediately filed the Notice of Appeal. Importantly, Counsel further noted that he was aware of no appealable issue preserved for review although Applicant's motion to suppress the search of his person and property were raised and ruled upon by the sentencing judge the day before Applicant's plea. As this Court is aware, there are no conditional guilty pleas in South Carolina and this plea was plainly unconditional. See State v. Rice, 401 S.C. 330 (2013). See also Rivers v. Strickland, 264 S.C. 121 (1975).

As set forth, the standards of Roe did not require Counsel to consult in a different manner after the plea.

> "We instead hold that counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known. See *id.*, at 690, 104 S.Ct. 2052 (focusing on the totality of the circumstances). Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights. Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal."

Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000)(citing to Strickland v. Washington, 466 U.S. 668 (1984)).

The Applicant has failed to show, under Roe v Flores-Ortega, that Counsel had a duty to inquire of whether the Applicant wanted to appeal his guilty plea or sentence. 528 U.S. 470 (2000). As Counsel stated in his belated Notice, no appealable issues were raised in the plea. The record reflects the plea, subsequent to the denial of the suppression hearings, was fully and voluntarily entered on admission of guilt. Further, the sentence given was within the terms of the plea negotiations. (Tr. p. 167-168). No objection was made to the sentence.

Counsel's actions were reasonable when until August 17, 2015, he had no understanding of the Applicant's desire to appeal, and then, on instruction, he immediately appealed, albeit out of the ten day period. Under the circumstances, the Court cannot find Counsel deficient when the record reveals nothing to have demonstrated to Counsel an interest, of Applicant, in appealing prior to the ten day deadline where the plea resulted in an unobjected sentence within the terms of the negotiation. Applicant failed to meet his burden of proof that Counsel's actions were unreasonable.

Applicant has failed to prove that Applicant was ineffective for having an ethical conflict in the representation of Applicant's co-defendant. Counsel's testimony indicates that he did not "actively represent" Applicant's co-defendant, rather he was still in the process of evaluating the case and the conflicts in the case in order to determine his representation and did not fully enter into representation of Applicant's co-defendant. Langford v. State, 310 S.C. 357 (1993). The Applicant has failed to prove an actual conflict of interest that adversely affected his representation prior to the plea.

B. The claims that the Defendant's Rights to Due Process and to Equal Protection under the Law were violated

Applicant's claims that his rights to Due Process under the Law were violated because:

1. There was woefully insufficient evidence submitted by the Newberry Sheriff's Office.

2. Incomplete Discovery Submitted by the Solicitor.

3. Only given one hour to prepare a motion to suppress by the Judge.

Applicant claims that he was denied Equal Protection under the Law because his case was called for trial more quickly than others similarly situated were.

This Court finds that these claims of violations of the Applicant's rights to Due Process and Equal Protection are matters that could have been raised at trial and on appeal. However, Applicant waived his rights to raise these claims when he pled guilty. See Rivers v. Strickland, 264, S.C. 121 (1975). See also State v. Rice, 401 S.C. 330 (2013).

The South Carolina Supreme Court has held that "Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." Simmons v. State, 264 S.C. 417, 423 (1975). See also Drayton v. Evatt, 312 S.C. 4, 8 (1993). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). As Applicant could have previously raised these claims as part of the trial or appellate process, they are ineligible to be addressed as part of the Post-Conviction Review proceedings.

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). Additionally, Applicant's

claims as to being denied his rights to Due Process and Equal Protection under the Law are not allowed under the South Carolina Uniform Post-Conviction Procedures Act when they could have been asserted on appeal. Simmons v. State, 264 S.C. 417, 423 (1975). 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.**

At: Aiken, South Carolina

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

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP3600154

Derrick Eugene Velasquez		**State Of South Carolina**	

PLAINTIFF(S) **DEFENDANT(S)**

Submitted by: **Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

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

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

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

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

ORDER INFORMATION

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

Order of Dismissal

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

S/ G. Thomas Cooper, Jr. 08/24/2017

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on **August 31, 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **September 1, 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

H. Wayne Floyd PO Box 3972 West Columbia, SC 29171-3972

Justin James Hunter PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Elizabeth P. Folk (SD)

Court Reporter

Elizabeth P. Folk - Clerk of Court

Court Reporter:

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

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

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