ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

November 20, 2017

RECEIVED
NOV 22 2017
S.C. SUPREME COURT

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

Re: Daniel Lopez v. State
2016-CP-23-1299

Dear Mr. Shearouse:

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

Sincerely,

Susannah Ross
Attorney at Law

enclosure

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

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

RECEIVED
NOV 22 2017
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry W. Gravely, Circuit Court Judge

2016-CP-23-1299

Daniel Lopez, ... Appellant,
v.
The State, ... Respondent.

NOTICE OF APPEAL

Daniel Lopez appeals the Honorable Perry W. Gravely's Order of Dismissal filed October 6 and Order denying applicant's Motion to Alter or Amend filed November 8, 2017.

This 20 day of November 2017.

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

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

STATE OF SOUTH CAROLINA	)	
	)	**IN THE SUPREME COURT**
COUNTY OF GREENVILLE	)	
	)	
DANIEL LOPEZ,	)	
APPELLANT,	)	
	)	
	)	
VS.	)	**CERTIFICATE OF SERVICE**
	)	**BY MAIL**
	)	
	)	
THE STATE OF SOUTH CAROLINA,	)	
RESPONDANT.	)	
	)	

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

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

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

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

Attorney for Defendant

This 20 **day of** November, **2017**

RECEIVED
NOV 22 2017
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS OF THE THIRTEENTH JUDICIAL CIRCUIT
Daniel Lopez, #355282, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2016-CP-23-01299 **ORDER OF DISMISSAL**

FILED-CLERK OF COURT
PAUL B. WICKENSIMER
GREENVILLE CO., S.C.
2017 OCT -6 PM 3:52

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed February 29, 2016. Respondent made its Return on August 16, 2016. An evidentiary hearing into the matter was convened on April 18, 2017, at the Greenville County Courthouse before the Honorable Perry H. Gravely. Susannah H. Ross, Esquire, represented Applicant. Ruston Neely, Esquire of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Applicant testified on his own behalf. The following people also testified: Applicant's trial counsel, Christopher Scalzo, Esquire, Assistant Solicitor Joyce Monts, and Officer Chris Hines.

At the hearing, this Court had before it a copy of the records of the Greenville County Clerk of Court, records from the South Carolina Department of Corrections, the application, the State's Return, appellate record and the trial transcript.

PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. Applicant was indicted by the March 2005 term of the Greenville County Grand Jury for one (1) count of Possession of a Firearm with an Obliterated Serial Number (2005-GS-23-

CC Susannah

01956) and one (1) count of Trafficking Cocaine (2005-GS-23-01957). Christopher Scalzo, Esquire, represented him. On October 12-13, 2009, Applicant's proceeded to a jury trial pursuant to which he was found guilty as indicted on all charges. Applicant's trial was held in his absence. The Honorable C. Victor Pyle, Jr. sentenced Applicant to confinement for five (5) years for the count of Possession of a Firearm with an Obliterated Serial Number and twenty-five (25) years for the count of Trafficking Cocaine. The sentences were set to run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to Anders v California 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Lopez, Op. No. 2015-UP-216 (filed on April 29, 2015). The Remittitur was issued on July 30, 2015.

FACTUAL HISTORY

In a pre-trial hearing on Applicant's motion to suppress, Deputy Hines testified regarding the facts leading up to Applicant's arrest. (See R. p. 14-42). Initially, Deputy Hines testified that he had been working for the Greenville County Sheriff's Department for twelve years; that he was assigned to the traffic division as a K-9 officer; and that he had received training on "highway drug investigation" in addition to other types of training. (R. p. 14). He further testified that he and his drug dog, Angie, had been properly certified at the time of Applicant's traffic stop. (R. p. 14-15). At approximately 2:30 pm on January 21, 2005, Deputy Hines was patrolling Interstate 85 in Greenville County. (R. p. 15). He noticed a man later identified as Applicant using a pay phone at the Breakers gas station. (R. p. 15). A white Dodge Intrepid was parked at the pay phone. (R. p. 15). A few minutes later, as Deputy Hines was sitting in his vehicle on the side of the road, the white Dodge Intrepid passed him going northbound on I-85 at a high rate of speed. (R. p. 15). Deputy Hines followed and attempted to overtake the vehicle, and at that point he was

able to measure Applicant's speed by radar and he determined that Applicant was going 72 miles per hour in a 60 mile-per-hour zone. (R. p. 15-16). As he approached Applicant's car, Applicant made an abrupt exit off the interstate onto White Horse Road. (R. p. 15-16). Deputy Hines pulled him over just after he had passed the exit which would have allowed him to turn around and proceed southbound on I-85. (R. p. 16-17; p. 26-27).

After informing Applicant that speeding was the reason for the traffic stop, Deputy Hines observed a cell phone sitting in the passenger seat. (R. p. 17). The cell phone appeared to be on. (R. p. 17). Deputy Hines then saw another cell phone sitting in the back of the car. (R. p. 17). Deputy Hines found it odd that Applicant had two cell phones in his vehicle, one of which was on, yet he chose to use a pay phone a few minutes before. (R. p. 17). While asking for and obtaining Applicant's license and other paperwork, Deputy Hines engaged in casual conversation with Applicant about where he was going and coming from. (R. p. 18). Applicant claimed to have been visiting his son in North Carolina and said he was heading home to Georgia. (R. p. 18). However, Deputy Hines observed that, before he was stopped, Applicant was actually traveling toward North Carolina rather than away from it. (R. p. 18). When Deputy Hines reviewed Applicant's license and paperwork, he noticed that Applicant provided a Louisiana driver's license listing a Kenner, Louisiana, address, a car registration listing a Gainesville, Georgia, address, and insurance paperwork listing a Tucker, Georgia, address. (R. p. 18-19). Applicant verbally provided a fourth address in Lawrenceville, Georgia and indicated that was where he was currently living. (R. p. 18-19). Deputy Hines testified that, based upon his training, the fact that Applicant provided four different addresses raised a "red flag." (R. p. 19, lines 8-11). He noted that three of Applicant's addresses were "in and around the Atlanta metro area" and that Atlanta is a known source for drugs used in drug trafficking. (R. p. 22, lines 14-19). Deputy Hines also

testified that the highway on which Applicant was traveling, I-85, is a "main pipeline for drug trafficking." (R. p. 22, lines 1-10).

After Deputy Hines informed Applicant he was only going to issue a warning citation for the speeding violation, Applicant maintained the same level of nervousness, which Deputy Hines found unusual. (R. p. 23, lines 3-11). He engaged in "nervous chatter" with Deputy Hines and tried to insinuate that he had an affiliation with law enforcement because he worked for Gwinnett County as a "bouncer" and "he told on people." (R. p. 19). Deputy Hines took this as Applicant trying to "befriend" him, and found it suspicious that Applicant was claiming to work for Gwinnett County as a "bouncer" since most law enforcement agencies do not employ persons as "bouncers." (R. p. 19, lines 17-25; p. 21, lines 6-9). Deputy Hines also noticed that Applicant had taped a Gwinnett County Police Department patch to his dashboard near the vehicle identification number. (R. p. 21, lines 4-6). Subsequently, Applicant reiterated his claim that he was going home to Georgia, but then asserted he was stopping to get something to eat first. (R. p. 20). Interestingly, when asked where he was going to get something to eat, he indicated he was heading to the McDonald's off of exit 44, which was odd because Applicant had just been using the pay phone at exit 40, and there was a McDonald's at that exit. (R. p. 21, lines 10-14; p. 25-26).

When Deputy Hines tried to confirm exactly where Applicant was coming from in North Carolina, Applicant began to stutter and was unable to provide the name of the army fort where his son was supposedly stationed. (R. p. 20). At that point Applicant began to "ad lib" a story and mentioned that his baby's mother lived in North Carolina and that the baby was sick. (R. p. 20). When Deputy Hines asked him how old his son was, Applicant changed his story and said the son was his friend's son. (R. p. 20). Then he changed again and stated his friend had a daughter. (R. p. 20). Deputy Hines was confused and tried to make sense of what Applicant was saying, but

Applicant then said he had a daughter who was six who lived in California. (R. p. 20). Deputy Hines stated that Applicant's story was "kind of all over the place" and Applicant was "stumbling upon his words" and avoiding making eye contact with Deputy Hines. (R. p. 20-21). Deputy Hines also stated that Applicant appeared to be fabricating a story, "lie after lie after lie," and that most people he encountered in traffic stops did not fabricate stories. (R. p. 39-40). Hines indicated it would have been obvious to a reasonable person that Applicant was "making stuff up" because he didn't want the officer to know where he was going and coming from. (R. p. 99, lines 11-23).

Additionally, in Deputy Hines' experience, Applicant's level of nervousness was greater than that of most people, and he testified that Applicant, unlike most people, did not become less nervous after he was told he was only getting a warning. (R. p. 23; p. 39, lines 4-20). He stated that Applicant "kept on avoiding eye contact" with him. (R. p. 21, lines 2-3). He further testified that Applicant's conduct during the traffic stop was not consistent with "95 plus" percent of the hundreds of people that the police stop monthly in the vicinity. (R. p. 108, lines 8-21).

As Deputy Hines was finishing writing the warning ticket, he asked routine questions about whether there were any dangerous items in Applicant's vehicle. (R. p. 70, lines 12-20). When he asked Applicant if there were any guns in the car, Applicant looked down, broke eye contact, and said no. (R. p. 70, lines 12-14). When he asked if there was any marijuana or cocaine in the car, Applicant's "face kind of tensed up" but he said no. (R. p. 70, lines 14-16). When he asked Applicant about bomb or terrorist devices, Applicant "eased up," laughed, and said no. (R. p. 70, lines 17-20).

At that point in time, Deputy Hines, based upon his extensive experience and training, suspected drug activity and believed he had sufficient reasonable and articulable suspicion to

detain Applicant and his vehicle long enough to allow his drug detection dog to perform a sniff around Applicant's vehicle. (R. p. 21, line 15 – p. 23, line 21; p. 37, lines 2-6; p. 42, lines 4-22; p. 108-109). After handing Applicant the warning ticket along with his other paperwork and confirming that Applicant had no questions regarding the warning ticket, Deputy Hines asked Applicant if he could search his vehicle. (R. p. 31-32). Applicant shrugged his shoulders and indicated he was ready to go ahead and leave. (R. p. 33). Deputy Hines told Applicant he was free to leave but that he was going to hold the car so that he could perform a drug sniff using his dog. (R. p. 33-34). At that point Applicant agreed that the dog could perform a sniff around the outside of his car. (R. p. 36, lines 38-39). Deputy Hines had already called for backup sometime during the midst of the traffic stop, and Deputy McBee arrived around the time Hines was requesting consent to search. (R. p. 32-36; p. 126-27). Only a few minutes had elapsed since Applicant was first stopped.[1] (See R. p. 15, lines 5-17; p. 62, lines 7-22; see State's Exhibit # 7, DVD). Deputy McBee stood with Applicant in the concrete median while Deputy Hines and his dog performed the sniff. (R. p. 127-28).

While Deputy Hines walked the dog around Applicant's car, Applicant watched, "almost entranced" by what was going on with his vehicle to the point that he was almost oblivious to Deputy McBee's presence and the conversation they were having. (R. p. 127-29). The drug dog exhibited an "aggressive alert" to the left rear door seam and to the right rear tire well area. (R. p. 72-73). The alerts caused Deputy Hines to believe that drugs were contained somewhere in the rear part of Applicant's vehicle. (R. p. 73-74). His subsequent search of the car revealed a nine

[1] Although Deputy Hines' video of the traffic stop had been lost or misplaced after he transferred out of the traffic division (see R. p. 84-85), the video from the patrol car of Deputy McBee, the backup officer, was introduced at trial. (See R. p. 132-33; State's Exhibit # 7, DVD). Deputy McBee's video reflects that he pulled up to the traffic stop at 2:44 pm. (See State's Exhibit # 7, DVD).

millimeter handgun with an obliterated serial number in the center console and a cognac box filled with over 500 grams of cocaine in the trunk.[2] (R. p. 74-78).

ALLEGATIONS

In his application, Applicant alleged that he is being held unlawfully for the following reasons:

1. Ineffective assistance of trial counsel;
2. Ineffective assistance of appellate counsel;
3. Due Process violation.

On October 20, 2016 Applicant filed an "Amended Application" making the following allegations:

1. Ineffective assistance of trial counsel for the failure to communicate with client, advise of plea offer, investigate, effectively argue and preserve search and seizure issues as well as Applicant's right to be present at trial, confront his accusers, be fully informed of the nature of the charges against him, and representation by informed counsel; and
2. Due Process violations in that the Solicitor failed to produce Brady information and allowed destruction of evidence which amounted to an Unconstitutional breakdown in the adversarial process.

On December 2, 2016 Applicant filed an "Application Addendum" making the following allegations:

1. Ineffective assistance of trial counsel in the failure to investigate, keep Applicant informed of plea negotiations, failure to make adequate objections and arguments to preserve the record for direct appeal, and failure to inform the Applicant of the full nature of the allegation against him.
2. Due Process violations stemming from prosecutors failure to produce and/or possible destruction of in-car video of stop and initial call of the stop, Brady violations in failure to procure and produce exculpatory material, and trying Applicant in his absence years after a bench warrant was issued without actual notice or assuring a knowing and voluntary

[2] Applicant was Mirandized and he indicated he wanted to cooperate and help the officers apprehend the person who was supposed to receive the drugs in Greenville County. (R. p. 78-84). Applicant's cooperation that afternoon led to the arrest of his co-defendant, Octavius Nelson. (R. p. 84). Afterwards, Applicant provided a voluntary statement at the police station wherein he admitted he was delivering drugs to Greenville for a dealer out of Dekalb County, Georgia, nicknamed "Candela." (R. p. 171-72). The statement indicated Applicant was supposed to hand the drugs over to a contact person, receive $10,500 in exchange for the drugs, and return to Georgia and turn over the money to "Candela." (R. p. 172; p. 220, lines 14-20).

waiver.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Applicant's Testimony

Applicant testified he was not at his trial and he was not notified of the term of court in which his trial was to take place. He testified he had appeared before but never received any bonds cards before. He testified he talked to trial counsel when he would appear for court dates. Applicant testified trial counsel gave him a plea offer and told him he was facing ten years. He testified trial counsel never mentioned the maximum for the charges he was facing and he was not aware he was facing twenty-five years. Applicant testified he was arrested in 2005. Applicant testified he never reviewed a video of the traffic stop leading to his arrest and he only learned of it after he was sentenced. He testified had he known of his court date he would have been there. Applicant testified he worked with law enforcement and they were going to help him out with his case. He testified when he did not hear anything about the case for a while, he thought his case was dismissed. Applicant testified he was not able to discuss trial strategy with trial counsel.

Counsel's Testimony

Counsel testified he never got a chance to review the video of the traffic stop of Applicant prior to trial. He testified the trial was four years after the initial arrest of Applicant. Counsel testified he filed the standard discovery motions in this case. After having watched the video at the evidentiary hearing, Counsel testified having the video at trial would have been very beneficial to Applicant in that it gave an objective view of the Applicant and showed the drug dog's search of Applicant's vehicle during the stop. He testified he did not move for a speedy trial. Counsel testified had he received the video he would have shown it to Applicant prior to trial. Counsel also testified Applicant did not show up for trial and he tried to contact him by sending a letter to the

address he had for Applicant. Counsel testified he cross examined the officer who was featured in the video during the traffic stop of Applicant but the cross examination would have been more effective had he been in possession of the video. Counsel testified he remembered having a conversion with Applicant and the solicitor about Applicant pleading guilty to something less than trafficking, which carried mandatory minimum of twenty-five years. He testified he was in negotiation with the solicitor but there was no formalized written offer. Counsel testified Applicant would come from Georgia when he appeared for court dates and he had Applicant's Georgia addresses.

Assistant Solicitor's Testimony

Assistant Solicitor Monts testified she was the solicitor for Applicant's case. She testified she had discussions with Counsel about whether Applicant would cooperate and testify against his co-defendant. She testified she remembered discussing a plea offer of ten years. She testified she did not remember the exact time she discovered there was a missing video of the traffic stop. Solicitor Monts testified she did not have the video from Officer Hines and she talked to him about where it was because it was mentioned in his report. She testified Officer Hines told her he switched units and could not find the video after switching units. She testified she never saw the video prior to trial and she let Counsel know there was a missing video. She further testified had she been in possession of the video she would have turned it over to Counsel. Solicitor Monts testified her office sent Applicant bond cards to four addresses belonging to Applicant to let him know he had a trial coming up.

Officer's Testimony

Officer Hines testified he had been employed by the Greenville County Sheriff's Office for twenty years. Officer Hines testified he placed the video of the traffic stop in a locked storage cabinet at the center command office. He testified every officer had their own shelf and only the

supervisor had a key to those cabinets. He testified he was assigned to the traffic division during the time of arrest but left the division in 2006. He testified sometime in between the arrest and trial he was asked to look for the video and he did but was unable to locate it. He testified after he transferred out of the division, there was a supervisor change and stuff got moved around which included cabinets. He testified during the move someone boxed up his stuff.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearings. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; 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." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption 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. 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, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel. Applicant also failed to prove he was prejudiced by the alleged deficiencies. Below are this Court's specific finding regarding each of Applicant's allegations of ineffective assistance of counsel and due process violation:

First, after a review of the appellate record, this Court notes the Court of Appeals upheld the finding by the Trial Court that Applicant had been notified of and waived his right to be present at trial. No evidence presented at this hearing was sufficient to convince this Court that Applicant's trial counsel could have proceeded differently at trial, or that his performance was deficient. Applicant also failed to prove he was prejudiced by the alleged deficiency. Therefore, this Court denies this as a basis for granting the PCR.

Second, Applicant raised the issue of whether the officer who performed the stop exceeded the bounds of the law by extending the stop for use of drug dog on Applicant's vehicle. On Appeal, the Applicant raised the violation of his 4th Amendment rights and the Court of Appeals denied any violation. In reviewing this matter from the standard applicable to a PCR, this Court

finds that the Officer's actions did not violate the "reasonable extension" test that has been recognized by South Carolina courts or any other relevant federal case and that this issue does not support a basis for granting the Applicant's PCR.

Third, the Applicant asserts that the State abused discovery by failing to produce the dash-cam video during initial discovery or during the trial, and that the video was only disclosed when pursued more diligently by PCR counsel. Applicant asserts that video would have afforded the Applicant a better argument that the officer did not have articulable suspicion or extend the stop. In reviewing the video and comparing with the officer's testimony, there does not appear to be any material contradictions. Although the trial attorney may have had more information to cross-examine the arresting officer, the Applicant failed to show that he was prejudiced and that the outcome would have been different. The Applicant further asserts that the failure to produce the video before trial constitutes abuse of discovery. The Court finds that the explanation provided by the arresting officer appears valid. In the Court's view, the video neither provides any additional material information nor materially contradicts the officer's testimony. Therefore, the Court finds that there is neither prejudice to the Applicant nor was discovery abused.

Lastly, the Applicant raised the issue of ineffective assistance of appellate counsel. Applicant did not present any evidence on this allegation at the PCR hearing. Accordingly, this Court finds Applicant failed to prove Appellate Counsel was deficient or that Applicant was prejudiced by Appellate Counsel's performance. Accordingly, this Court denies and dismisses this allegation.

Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or

omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegations are denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his plea and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from 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, Applicant must serve and file a notice of appeal on his own behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and

2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 5th day of Oct, 2017.

THE HONORABLE PERRY W. GRAVELY
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO. 2016-CP-23-12993
COUNTY OF GREENVILLE	)	
	)	
DANIEL LOPEZ,	)	
APPLICANT,	)	
	)	MOTION TO ALTER OR AMEND
	)	THE JUDGMENT
VS.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	

FILED-CLERK OF COURT
PAUL B. WICKENSIMER
GREENVILLE, SC
2017 OCT 18 AM 10:32

COMES NOW the Applicant and hereby moves pursuant to Rule 59(e), SCRCP, to alter or amend the judgment of this Court filed on October 6, 2017, and received by mail on October 16, 2017. The Applicant takes issue with the findings of fact and conclusions of law set fourth resulting in the denial of post-conviction relief in his case. He argues each allegation set fourth amounted to undue prejudice. He further argues that if each allegation did not amount to ineffective assistance of counsel standing alone, the cumulative effect of counsel's performance was deficient and prejudiced him to the degree that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 386 S.E.2d 624, 625 (1989).

Ineffective Assistance of Counsel- Trial in Absence

The Order of Dismissal does not fairly address the Applicant's argument of ineffective assistance of trial counsel for failure to effectively argue against a trial *in abstentia.* It states the Court of Appeals ruled that the Applicant was notified and waived

his right to be present and no sufficient evidence was presented that trial counsel could have proceeded differently at trial. (Order p. 11). The Applicant's argument was that the trial attorney was ineffective for failing to argue against a trial in absence by moving to dismiss for lack of speedy trial pointing out that the arrest was January 25, 2005; the client's last court appearance was November 27, 2006; a bench warrant was issued June 6, 2008, and the case was first called to trial October 12, 2009 nearly five years after his arrest and the signing of his "notice document" at the time of his release on bond indicating that he must appear at the next term of court. Trial counsel then should have argued that after the nearly five year delay resulting in the loss of the video tape and three years delay from the last contact with his client amounted to a denial of due process.

Counsel should have argued against a trial in absence because that would be a violation of his clients 5th, 6th and 14th Amendment rights protected under the United States Constitution and Art. I § 3 and 14 of the South Carolina Constitution because his absence was not knowing and voluntary and would deny his client effective assistance of counsel because he could not communicate with counsel or assist with his defense . *See Brady v. U.S.*, 397 U.S. 742, 748 (1970) ("Waivers of Constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences" & SC Const Art. I, § 14 ("The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both.")) & *See Ellis v. State,* 267S.C. 257, 261,

227 S.E.2d 304, 306 (1976) ("The deliberate absence of a defendant **who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time** indicates nothing less than an intention to obstruct the orderly process of justice.") & *See also State v. Wrapp* Appellate Case No. 2015-000909 (August 16, 2017). The Appellate Court addressed trial counsel's preserved argument that his client was not given proper notice because he was not issued a subpoena. (R. p.6-10)

Ineffective Assistance of Counsel- Discovery Issues

Prior to Mr. Lopez's PCR hearing, Applicant's counsel subpoenaed the Assistant Solicitor, Joyce Monts, requesting Deputy Hines' dash-cam video. The video was missing at trial and testimony regarding the missing tape is throughout the trial record and Deputy Hines and Ms. Monts testified at the PCR hearing. (R. p. 42, l.6, pp.144-145). At the PCR hearing trial counsel stated that he filed discovery but did not move to compel the production of the missing dash-cam video or do a pre-trial motion asserting a Brady or Rule 5 violation. *See State v. Anderson*, 754 S.E.2d 905, 909 (Ct. App. 2014) ("[A]n individual asserting a Brady violation must demonstrate the evidence was (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) suppressed by the State; and (4) material to the accused's guilt or innocence, or was impeaching." (citing Kyles v. Whitley, 514 U.S. 419, 419 (1995). The transcript contained no argument by trial counsel that Mr. Lopez was denied due process by the loss of the video. *See State v. Cheeseboro*, 552 S.E.2d 300, 307 (2001).("To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the

evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means."). While the trial and PCR testimony did not support a finding that the State destroyed evidence in bad faith, the dash-cam evidence was exculpatory and impeaching. Its timely production would likely have changed the outcome of the trial.

Ineffective Assistance of Counsel- Search and Seizure

The Order of Dismissal does not fairly address the Applicant's argument of ineffective assistance of trial counsel for failing to effectively argue the 4th Amendment issues at trial. Trial counsel viewed the dash-cam video at the PCR hearing and testified it would have greatly assisted him in his defense. In the video, Lopez does not appear to be "excessively nervous, with an inability to calm down, even after being told he was only receiving a warning." *St. v. Lopez,* Unpublished Op. No. 2015-UP-216. On the video, the stop begins at 14:22:56. Six minutes later Officer Hines had Mr. Lopez out on the street questioning him and tells Mr. Lopez he plans to issue a warning. Before doing so he checks the vin number opening the driver's door and looking in the car, he then asks about marijuana, cocaine, or guns in car as he's hands the warning to Mr. Lopez at 14:27:57. Lopez did not appear excessively nervous, unable to maintain eye contact, or stumbling over his words in the video during this period. (1/21/05 Hines video). At 14:30:00 after Officer Hines handed the warning to Mr. Lopez, he asks if he can search the car. The video shows Mr. Lopez, holding the completed warning ticket, saying that he wants to leave. Officer Hines then states at 14:30:40, "You can leave but I'm going to detain your car and let my dog run your car." The video does not show an "aggressive alert" by the drug dog. (R. p. 132-33, video 14:32:50) Most of the testimony Officer

Hines offered at trial as his basis for a reasonable and articulable suspicion of criminal activity is undermined by viewing the dash-cam video. The Court of Appeals' ruling relied only on the officer's testimony without the benefit of a full and fair cross examination, denied because as trial counsel testified, he did not have the dash-cam video or his client's assistance. The prejudice of this is that it denied due process resulting in an unfair trial. The drugs were not suppressed when they would likely have been had the judge and trial attorney had the benefit of the video. (R. p. 49-50) *See State v. Pichardo* 623 S.E. 2d 840, (2005). Furthermore, the case would likely have been reversed on appeal for a full and fair suppression hearing had the court of appeals had the benefit of the video. *See Rodriguez v. U.S.,* 135 S.Ct. 1609 (2015) .

Ineffective Assistance of Counsel- Failure to Preserve Record

The Order of Dismissal fails to outline the Applicant's arguments of ineffective assistance of counsel for failure to preserve the record. Trial counsel admitted he did not request a jury charge that when evidence is destroyed or lost by a party the jury may infer that evidence which is destroyed or lost would have been adverse to that party. *See State v. Reeves*, 777 S.E.2d 213 (2015). Trial counsel failed to take exception to the jury instruction requesting a verdict that speaks the truth which misstates the burden in a criminal case. (R. p. 476 & 478). During trial deliberations, the jury asks why "Pled Guilty" is stamped on the co-defendant Nelson's trafficking indictment. (R. p. 487). At that point the judge declared a mistrial for that indictment and goes on to charge the jury to disregard any language on the indictment so as not to prejudice the defendant. (R. p. 489). That instruction was immediately followed by a hand-of one charge and a

constructive possession charge stating that possession may be inferred by the circumstances. (R. p. 490). At this point trial counsel failed to take exception to the charges or request a mistrial on behalf of his client. Lopez's case was prejudiced by the co-defendant's indictment being stamped with "Pled Guilty". This prejudice was compounded by a hand-of-one and permissive inference possession charge. Mr. Lopez was prejudiced because his case was not declared a mistrial when the jury was exposed to highly prejudicial inadmissible evidence which denied him a fair trial.

Ineffective Assistance of Appellate Counsel

There is evidence in the PCR record that Trial counsel objected to the State's argument during closing that anyone in chain of drug production was guilty of trafficking and requested a clarifying charge that trafficking is a possession based offense and the State must prove the charged drug weight was knowingly possessed by the accused. (R. p. 465 & 478-479). The Applicant would allege that appellate failed to brief this winning issue.

For the foregoing reasons, the Applicant requests this Court to alter or amend its Order of Dismissal.

Respectfully submitted,

Susannah Ross
Attorney for the Applicant
333 E. Coffee Street,
Greenville, SC 29601
(864) 242-0029

Greenville, South Carolina
This 18 day of October, 2017.

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Daniel Lopez, # 355282, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2016-CP-23-1299 **ORDER** ENTERED COMPUTER

FILED-CLERK OF COURT
PAUL B. MCKENZIE
GREENVILLE
2017 NOV -8 PM 3:54

This matter comes before the Court upon Applicant's Motion to Alter or Amend the Judgment or Order of Dismissal filed October 6, 2017, denying the Applicant's Petition for Post-Conviction Relief. The Court has determined that a hearing on this Motion would be necessary and addressed the issues as follows:

1. Ineffective Assistance of Counsel-Trial in Absence

The grounds of this claim relates to the trial attorney's failure to argue dismissal of the underlying charge on several grounds including the violation of the Applicant's 6th Amendment right to a speedy trial. First, the Court finds that this issue was adequately addressed in the Order dated October 6, 2017. As a further note, specifically regarding the speedy trial issue, the Court finds that the Applicant would not necessarily have been able to avail himself of the right to a speedy trial at that point in time. It is common practice for Defense counsel not to move for a speedy trial as a strategic matter. The South Carolina Supreme Court adopted four factors in analyzing the violation of a defendant's right to a speedy trial. Concerning the third factor, the South Carolina Supreme Court stated:

> The third factor—assertion of the right—recognizes that while a criminal defendant has no responsibility to bring himself to trial, the extent to which he

> exercises his right to a speedy trial is significant. Barker v. Wingo, 407 U.S. 514, 527–28, 92 S.Ct. 2182 (1972). This consideration prevents a criminal defendant from strategically acquiescing in a delay which works to his advantage, then asking the case be dismissed at the last moment once it is called for trial. Accordingly, "the defendant's failure to assert the right, although not conclusive, makes it more difficult to show that the right was violated." State v. Pittman, 373 S.C. 527, 550, 647 S.E.2d 144, 155 (2008).

State v. Reaves, 414 S.C. 118, 131, 777 S.E.2d 213, 219 (2015).

In State v. Lopez, Op. No. 2015-UP-216 (filed on April 15, 2015) the appeal by this applicant in the underlying matter, the Court of Appeals found that the Applicant's due process had not been violated in the matter proceeding to trial in his absence.

2. Ineffective Assistance of Counsel-Discovery Issues

The Applicant argues in his Motion that trial counsel failed to move to compel production of the missing dash-cam video or assert a Brady or Rule 5 violation. The testimony at the PCR trial from the arresting officer indicated that the video was not produced because he had changed departments and his videos had been boxed up without his knowledge. For the failure to produce evidence in discovery to be a violation of a defendant's constitutional rights, there must be a showing of "bad faith" by the prosecution or law enforcement. See State v. Reaves, 777 S.E.2d 214 (2015). As addressed in the Order of October 6, 2017, the Court found that there was no prejudice of abuse in the failure to produce the video in question.

3. Ineffective Assistance of Counsel- Search and Seizure

The Court finds that this was adequately addressed in the Order of October 6, 2017.

4. Ineffective Assistance of Counsel-Failure to Preserve Record

In reviewing the Applicant's file, it does not appear that this was specifically set out in the original Petition or subsequent amendments to the Petition for PCR and therefore, is not properly before this Court.

5. Ineffective Assistance of Appellate Counsel

As stated in the Order of October 6, 2017, the Court determined that no evidence or argument was presented on this matter at the evidentiary hearing on April 18, 2017 and therefore, appropriately addressed in the Order.

Conclusion

After careful consideration, the Court denies Applicant's Motion to Alter or Amend the Judgment and would affirm its previous Order with the clarifications or amendments as set forth herein.

It is so Ordered.

THE HONORABLE PERRY W. GRAVELY
Presiding Judge
Thirteenth Judicial Circuit

November 3, 2017

Greenville, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2016CP2301299

FILED-CLERK OF COURT
PAUL B. WICKENSIMER
GREENVILLE
2017 NOV -8 PM 3:51

Daniel Lopez *vs.* South Carolina State Of

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.

☐ **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: _____

☐ **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; ☐ Statement of Judgment by the Court:

NOTICE

This is an Order in this case and has been filed in the Clerk of Court's Office.

Dated at Greenville, South Carolina, this .

Court Reporter:

_____

PRESIDING JUDGE -

Susannah Conyers Ross 330 East Coffee St.
Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

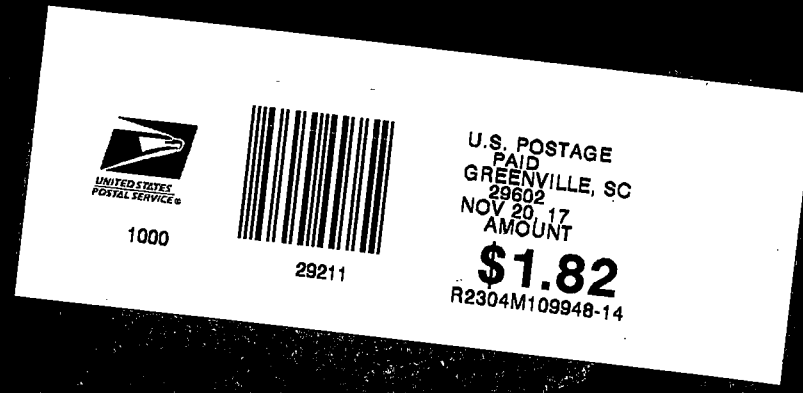
DeShawn Herman Mitchell PO Box 11549
Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

_____

Paul B. Wickensimer Greenville County Clerk Of Court

SUSANNAH ROSS ESQ.
330 East Coffee St.
Greenville SC 29601



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

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S.C. SUPREME COURT