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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COUF

APPEAL FROM SPARTANBURG COUNTY

COURT OF COMMON PLEAS

R. FERRELL COTHRAN, JR CIRCUIT JUDGE

CASE NO: 2014-CP-42-0384

JAMES TINSLEY ..... APPELLANT

VS.

STATE OF SOUTH CAROLINA .... RESPONDENT

NOTICE OF APPEAL

JAMES TINSLEY appeals the final order of the Honorable R. Ferrell Cothran, JR filed October 20, 2017. Appellant received written NOTICE OF the entry OF this order on November 6, 2017.

This case involved a post-conviction attack and the lower court Judge Failed to make Findings of Fact and conclusions OF law as to all OF Appellants issues. Appellant Filed a Motion to Alter or Amend the PCR order to allow the PCR Judge

to address the issues overlooked in his previous order. The PCR Court nevertheless refused to address these issues in his Final order. For this Reason, Applicant contends that this requires an automatic reversal of his conviction since the lower Court deprived applicant of a Fair opportunity to redress his issues and applicants objections in the Moton to alter or amend constitutes a preservation of the issues. Pruitt v. State,

Respectfully submitted,

November 6, 2017

James D. Tinsley
10045. Welcome Road
Greenville, SC 29611
(864) 603-443

Certificate of Service

I, James Tinsley hereby certify that I did serve a true and correct

copy of the foregoing to the following this 7th day of November, 2017 by placing same in the U.S. Mail with proper postage affixed thereto:

Spartanburg County Clerk of Court
P.O. Box 3483
Spartanburg, SC 29304

Office of Attorney General
P.O. Box 11549
Columbia, S.C. 29211

Clerk of Supreme Court
P.O. Box 11330
Columbia, SC 29211

s/ James D. Tinsley
James Tinsley

2014CP-384

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS IN THE SEVENTH JUDICIAL CIRCUIT
James Tinsley, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2014-CP-42-0384 **ORDER DENYING APPLICANT'S MOTION TO ALTER OR AMEND**

This matter comes before the Court by way of an Application for post-conviction relief filed January 30, 2014. Respondent made its Return on September 8, 2014. The Court convened an evidentiary hearing into the matter on January 13, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and was represented by Leah B. Moody, Esquire. Respondent was represented by Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office. At the hearing, Applicant moved to relieve his PCR counsel, and the Court granted the motion. Respondent moved for summary dismissal of Applicant's PCR application. By written order filed September 12, 2016, the Court issued an order summarily dismissing the PCR application. On September 22, 2016, Applicant filed a "Motion to Alter or Amend" pursuant to Rule 59(e), SCRCP. Thereafter, Respondent made its return to the motion, requesting the motion be denied.

Based upon careful reconsideration of the record in this case, including the submissions of the parties, this Court has discovered no findings of fact or conclusions of law that have been overlooked or misapprehended, and this Court is not persuaded to alter or amend its judgment. Further, pursuant to Rule 59(f), SCRCP, this Court further finds oral argument would not aid in the reconsideration of the original judgment. The Order of Dismissal issued by this Court

contains the required findings of fact and conclusions of law as required by subsection 17-27-70(c) and section 17-27-80 of the South Carolina Code of Laws, and Rule 52(a) of the South Carolina Rules of Civil Procedure.

IT IS THEREFORE ORDERED that Applicant's motion is hereby **DENIED AND DISMISSED.**

AND IT IS SO ORDERED this 23 day of May, 2017.

R. FERRELL COTHRAN, JR.
Presiding Judge
Seventh Judicial Circuit

Manning, South Carolina

ALAN WILSON
ATTORNEY GENERAL

May 25, 2017

The Honorable M. Hope Blackley
Clerk of Court, Spartanburg County
PO Box 3483
Spartanburg, SC 29304-3483

Re: **James Tinsley v. State of South Carolina**
2014-CP-42-0384

Dear Ms. Blackley:

Enclosed please find the original **Order Denying Applicant's Motion to Alter or Amend**, signed by the Honorable F. Ferrell Cothran, Jr., in the above-captioned case, for filing in your office. Please serve order on all parties involved.

Sincerely,

Brianna Arnone
Legal Assistant to
Valerie Garcia Giovanoli
Assistant Attorney General

/bea
Enclosure(s)

Spartanburg Count

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

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

M. Hope Blackley
Clerk of Court

Gail Moffitt
Assistant Clerk of Court

Affidavit

This is an affidavit to attest the_Order Denying Motion to Alter or Amend.
In case James Tinsley vs. State. The documents were received On May 30, 2017.. At the time the documents were received And were mistakenly not clocked. It was brought to the attention of Affiant on October 20, 2017 and the documents were Then clocked. The correction has been made by Connie Seay on October 20, 2017. "See affidavit" is handwritten under the Clock date, as suggested by Court Administration pursuant to Rule 60 (a) Clerical Mistakes.

Sworn before me this

20 day of October ,2017

Maribel Manning
Notary Public of South Carolina

Connie J. Seay
Affiant

My Commission Expires 4-14-2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
James Tinsley, Jr.,	)	Case No.: 2014-CP-42-0384
Applicant,	)	
	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an Application for post-conviction relief, filed February 7, 2014. Respondent filed its Return on September 8, 2014. A hearing was convened into the matter on January 13, 2016. Applicant was present and was represented by Leah Moody, Esquire. Respondent was represented by Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office. At the hearing, Applicant moved to relieve Leah Moody as PCR counsel. The Court granted the motion.

At the same hearing, Applicant asked the Court to grant summary judgment in his favor, stating that he did not believe a hearing was necessary. Respondent moved to dismiss all matters except Applicant's allegation that his waiver of counsel was involuntary. Respondent argued that the claim of involuntary waiver of counsel was the only claim Applicant had raised that was potentially meritorious, but submitted the Court could determine based from the record alone that Applicant's waiver of counsel was knowing and voluntary.

The Court had before it a copy of the Order relieving counsel filed March 3, 2009, the transcript of the hearing before the Honorable J. Derham Cole on April 13, 2010, the trial transcript, Applicant's appellate records, the records of the Spartanburg County Clerk of Court

regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the pleadings, and Applicant's Motion for Summary Judgment.

I. PROCEDURAL HISTORY

Applicant is not currently incarcerated. He was indicted at the October 2007 term of the Spartanburg County Grand Jury for receiving stolen goods (2007-GS-42-5031). Applicant proceeded pro se, with Andrea D. Price, Esquire, as stand-by counsel. On November 10, 2010, Applicant proceeded to trial before the Honorable Roger L. Couch and a jury. The jury found Applicant guilty as indicted. Judge Couch sentenced Applicant to imprisonment for a term of ten years, suspended upon the service of three years to five years of probation. Judge Couch ordered the sentence to be served consecutively with Applicant's July 31, 2008, convictions in Oconee County.

A timely notice of appeal was filed by Applicant on his own behalf and an appeal was perfected by the Office of Appellate Defense. The South Carolina Court of Appeals affirmed his conviction and sentence. State v. Tinsley, Op. No. 2012-UP-639 (filed Dec. 5, 2012). Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, which was denied on January 8, 2014. The Remittitur was returned on February 25, 2014.

II. ALLEGATIONS

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

1. Trial court error, in that;
   a. "Applicant was denied a fair trial when the trial judge failed to direct the verdict where the evidence did not establish that the 'stolen goods' were received or possessed on or about the exact date of the indictment,"
   b. "Applicant was denied a fair trial when the trial judge refused to direct the verdict where the evidence required the jury to stack inferences upon inference and the court lacked venue,"

c. "Applicant was denied due process of law and a fair trial when the trial judge failed to charge the jury on the law and to inform them that they must find Applicant not guilty if they determine that he stole the camper himself,"
d. "Applicant was sentenced inappropriately when he was required to pay restitution in excess of the proven damages,"
e. "Applicant did not knowingly and intelligently waive his right to counsel,"
f. "Applicant was denied a fair trial and his right to confront witnesses against him when the trial judge prevented the Applicant from questioning a State witness, Ben Lindler, concerning his dishonest conduct where the testimony would have went to the witness's credibility,"
g. "Applicant was denied a fair trial when the court refused to exclude a conversation with Detective Beck where the statement was given under duress, coercion, and threat of extended detainment and where the conversation was not related to the offense in question,"
h. "Applicant was denied a fair trial where the judge refused to charge the jury that when dealing with circumstantial evidence that points equally to guilty and innocence, such evidence must point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis,"

2. Denial of due process, in that;
   a. "Applicant was denied his due process rights when he was convicted based upon evidence that pointed equally to guilt and innocence on the indicted offense,"
   b. "Applicant was denied due process, equal protection of the law and a fair opportunity to defend against the State's accusations, when his recalcitrant standby counsel refused to assist Applicant in trial preparation, and in developing his substantive case,"
      i. On pages 3(o)-3(v) of the attachment to his application, Applicant details the manner in which he feels stand-by counsel was ineffective. Applicant references a hearing before Judge Couch in February 2009 in which Judge Couch granted Applicant's motion to relieve counsel and appointing Price as standby counsel.[1]
   c. "Applicant was denied a fast and speedy trial,"
3. Ineffective assistance of appellate counsel, in that;
   a. "Applicant was denied effective assistance of appellate counsel where counsel failed to raise all meritorious issues that could have been raised on appeal."

[1] Respondent informed the Court that the transcript of this hearing is not available because the tape had already been destroyed. The Court notes that the hearing was held February 2009 and the PCR application was filed five years later in February 2014.

In the motion for summary judgment that Applicant presented to this Court on the date of his hearing, Applicant moved for summary judgment in this action, arguing "there are no material facts in dispute and [Applicant] is entitled to relief in his favor." The grounds asserted in the motion are as follows:

1. Ineffective assistance of appellate counsel, in that;
    a. Counsel failed to raise the following issues on appeal:
        i. "That the trial judge erred in failing to charge the jury with all the elements of the crime, or otherwise instruct the jury on the distinctions between larceny and receiving stolen goods, and that if they determine that Applicant stole the camper himself, they must find Applicant not guilty."
        ii. "That the trial judge erred in refusing to allow Applicant to question State's witnesses Ben Lindler, concerning his taking money from a safe at Advanced Auto, blaming a Mexican for robbing him and then pointing a finger at Applicant while suggesting himself to be the victim."
        iii. "The trial judge erred by refusing to direct verdict as to venue, or otherwise instruct the jury that a dispute existed as to venue and that they must make that decision and if they find that camper was received or possessed in Greenville County, they must find Applicant not guilty. This failure allowed the jury to stack inference upon inference and required them to speculate to find guilt."
        iv. "The trial judge erred in failing to exclude testimony of Detective Beck concerning an investigation and conversation that was related to another case."
        v. "That Applicant was denied his Sixth Amendment Rights to a Fast and Speedy trial."
        vi. "Applicant was denied his Sixth Amendment Right to Counsel because he did not knowingly, intelligently or voluntarily waive his right to counsel."
2. Applicant was denied his Sixth Amendment right to Counsel where he did not Knowingly, Intelligently, or Voluntarily waive his right to counsel.
3. Applicant was denied due process of law, in that
    a. By not being provided with the resources necessary to conduct pretrial legal research or trial preparations.
    b. Applicant was denied due process of law when the State failed to disclose things of value offered to Ben Lindler in exchange for his testimony against Applicant and when the prosecution failed to correct false testimony he knew or should have known was false when it occurred.
    c. Evidence not previously heard requires the reversal of the

conviction in the interest of justice, where the state relied upon false testimony and false impressions to establish the elements of the offense or that went to the truthfulness and credibility of the State's witness.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to section 17-27-70 of the South Carolina Code of Laws, this Court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, and admissions . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. S.C. Code Ann. § 17-27-70.

This Court has reviewed the entire record and has considered the arguments of the parties. This Court finds that Applicant's application for post-conviction relief must be denied and dismissed Pursuant to section 17-27-70 because there is no genuine issue as to any material fact and Respondent is entitled to judgment as a matter of law.

Summary judgment is proper where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). In determining whether summary judgment is appropriate, this Court must view "the evidence and its reasonable inferences . . . in the light most favorable to the nonmoving party." Baughman, 306 S.C. at 115–16, 410 S.E.2d at545–46 (citing SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990)). This Court must then apply the following standard set out in Rule 56(c):

> The plain language of Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof.

Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115–16, 410 S.E.2d 537, 545–46 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986)). In a PCR action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)).

A. Invalid Waiver of Right to Counsel

It is well-established that a defendant may waive the right to counsel and proceed *pro se.* Dearybury v. State, 367 S.C. 34, 39, 625 S.E.2d 212, 215 (2006) (*citing* Faretta v. California, 422 U.S. 806 (1975)). Although a defendant's decision to represent himself may be to his own detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law." Id. The proper inquiry is whether the record demonstrates that Applicant "made an informed choice to proceed *pro se*, with 'eyes open,'" in ruling on whether he made a knowing and voluntary waiver of counsel. Watts v. State, 347 S.C. 399, 402-03, 556 S.E.2d 368, 370 (2001).

Absent a specific inquiry by the trial court into the hazards of proceeding *pro se*, reviewing courts must examine the record to determine whether a defendant had sufficient background or was apprised of his rights by some other source. Gardner v. State, 351 S.C. 407, 412, 570 S.E.2d 184, 185 (2002). When determining if an accused has a sufficient background to understand the dangers of self-representation, the courts consider factors including: (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether the accused knew the nature of the charge(s) and of the possible penalties; (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; (5) whether the accused was attempting to delay or manipulate the proceedings; (6) whether the

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court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether the accused knew of legal challenges he could raise in defense to the charges against him; (9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment. Gardner, 351 S.C. at 412-13, 570 S.E.2d at 186-87.

Here, Applicant was represented by counsel for a significant amount of time before trial and was appointed standby counsel in 2009. Applicant repeatedly expressed both his desire to represent himself and his understanding of the risks and dangers of self-representation. Applicant stated to the trial judge that "[f]rom the very beginning I've maintained that I've wanted to waive my right to an attorney[.]" Tr. I p. 83. Applicant made several motions and objections throughout the course of the trial. Applicant made multiple pretrial motions including the following: (1) a motion to suppress based on illegal search and seizure of the camper in violation of the Fourth Amendment, (2) a motion to dismiss the charges based on a due process violation because he did not receive a fair opportunity to defend against the State's accusations due to standby counsel's lack of assistance with legal research or interviewing witnesses; (3) a motion to dismiss the charges against him based on the alleged denial of his right to a speedy trial; (4) a motion to exclude any evidence of Applicant's prior bad acts; (5) a motion to exclude prior convictions; (6) and a motion to dismiss based on improper venue. The trial judge observed during the pretrial motions that Applicant had submitted a "legal brief that was very effective and well-researched." Tr. I. p. 86. The trial judge also observed: "it stretches your credibility with me to tell me that you haven't had an opportunity to consider the case or do research and you're about to present me with motions in limine and things of that nature. So, it appears to me you've had an opportunity

to look into your case." Tr. I p. 90. Applicant and the trial judge also had the following exchange:

> THE COURT: Yes, for a gentleman that had no access to the legal system. . .
>
> . . .
>
> you're pretty astute.
>
> MR. TINSLEY: [My cousin] was a federal judge down in Atlanta, Georgia. And so, I spent a lot of my life studying the law and stuff, but it's mostly civil stuff. But I have a pretty good memory about how some things work.
>
> THE COURT: Again, my, my observation is that you're pretty astute with what you've presented to the Court, and I'll just make that observation again and stand by my previous ruling on that issue.

Tr. I p. 122, lines 4-19.

> In addition, in his opening statement to the jury, Applicant stated:
>
> My decision to represent myself is based upon 20 years of experience. I spent a good portion of my life in civil rights litigation, and because of these experiences, over the years, I've learned a thing or two about the law. Although my background is been civil law rather than criminal law, when you get right down to it, it really is all just common sense.
>
> . . .
>
> "When I became older, and I started studying the law, I began to realize that what attorneys were trying to say meant everything. They were simply trying to explain the elements that constitute a crime. Now, they don't always do a very good job of this, and hence the reason I want to represent myself.

Tr. I pp. 166-167.

Applicant also requested several jury instructions and made a motion for a directed verdict. Though Applicant argued that he was not given an opportunity to do legal research to come up with legal challenges he could raise in defense of the charges against him, he did make a motion to suppress the camper on the grounds that there was an illegal search and seizure, and sought to discredit State's witnesses' credibility at trial. Applicant was also previously involved in a criminal trial. Specifically, he was convicted after representing himself on similar charges in

Oconee County. Judge Couch noted that in that case, "[o]bviously, . . . there [had been] a finding by that court that [Applicant] had knowingly and intelligently waived [his] right to counsel and exercised [his] right to proceed *pro se*." Tr. II p. 5, lines 8-22.

This Court finds that, in applying the Gardner factors to Applicant's case, the record clearly demonstrates that Applicant made the decision to proceed without counsel with eyes open, and Applicant has produced no evidence in support of his allegation that his decision to waive his right to counsel was not knowing and voluntary. Applicant's various statements to the court and the jury throughout the proceedings before and during trial, as well as Applicant's performance at trial indicates that he had a sophisticated knowledge of the workings of the legal system at the time of his trial and was fully aware of the dangers and advantages of waiving his right to counsel and proceeding *pro se*. This Court notes that Applicant tried to have Dayne Phillips removed as his appellate counsel and then made multiple *pro se* motions to relieve PCR counsel in this action, which this Court ultimately granted. In viewing the pleadings and record in the light most favorable to Applicant, this Court finds there is no genuine issue of material fact as to whether Applicant knowingly and voluntarily waived his right to counsel and Respondent is entitled to judgment as a matter of law. This allegation is therefore denied and dismissed.

B. <u>Ineffective Assistance of Standby Counsel</u>

Applicant alleges he was "denied due process, equal protection of the law and a fair opportunity to defend against the State's accusations, when his recalcitrant standby counsel refused to assist Applicant in trial preparation, and in developing his substantive case."

Viewing the evidence in the light most favorable to Applicant, this Court finds Respondent is entitled to judgment as a matter of law and therefore this allegation must be denied and dismissed. Applicant was not entitled to standby counsel. Because "the matter of

hybrid representation is left to the discretion of the trial judge, then, by implication, there is no Sixth Amendment right to hybrid representation." State v. Stucky, 333 S.C. 56, 57, 508 S.E.2d 564, 564 (1998). "The Sixth Amendment does not require a court to grant advisory counsel to a criminal defendant who chooses to exercise his right to self-representation by proceeding *pro se*." United States v. Lawrence, 161 F.3d 250, 253 (4th Cir. 1998) (citing United States v. SIngleont, 107 F.3d 1091, 1110 (4th Cir. 1997); McKaskie v. Wiggins, 465 U.S. 168, 183 (1984)). See also United States v. Mikolajczyk, 137 F.3d 237, 246 (5th Cir. 1998) (holding since defendant "had no right to standby counsel, it seems unlikely that standby counsel's failure to assist could be a violation of his Sixth Amendment rights"); United States v. Bova, 350 F.3d 224, 226 (1st Cir. 2003) (noting defendant had no right to both "represent himself *and* to enjoy the benefit for standby appointed counsel"). Likewise, "there is no right under the South Carolina Constitution to hybrid representation. Stucky, 333 S.C. at 57, 508 S.E.2d at 564 (citing Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989)). Further, "[p]lacing reasonable limits on the advice to be given by standby counsel that the court was under no obligation to provide in the first instance does not constitute an abuse of discretion." Lawrence, 161 F.3d at 253.

On pages 3(o)-3(v) of the attachment to his application, Applicant details the manner in which he feels standby counsel was ineffective. Applicant refers to a hearing before Judge Couch in February 2009 in which Judge Couch granted Applicant's motion to relieve counsel and appointed Price as standby counsel. A later hearing was held before the Honorable J. Derham Cole on April 13, 2010. At that hearing, Applicant acknowledged he was representing himself therefore did not have an attorney who represented him and could not dictate the manner in which standby counsel assisted Applicant in pre-trial preparation. The following exchanges took place between Judge Cole and Applicant: Applicant affirmed that he was representing himself,

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that it was his request to do so, and that nothing had changed in that regard. April 2010 Tr. 5:19-25. Judge Cole also clarified to Applicant at the hearing that "Ms. Price is what's referred to . . . as standby counsel" and that "she's here while this trial is in progress or whatever to answer questions if you have. But she's not representing you. She doesn't work for you." Applicant agreed and stated that he understood. Applicant stated that he thought it was standby counsel's job to "subpoena witnesses and things of that nature." Judge Cole further clarified that "Ms. Price is not doing that. She doesn't work for you." Applicant replied: "I agree. That's fine. I agree I don't have the right to dictate which method is provided to me. If the Court will [subpoena witnesses], that's fine with me."

Applicant made a valid waiver of his right to counsel and was therefore not entitled to hybrid representation. It is clear Applicant understood that standby counsel was not representing him. Viewing the evidence in the light most favorable to Applicant, this Court finds Respondent is entitled to judgment as a matter of law with respect to this allegation. Accordingly, this allegation is denied and dismissed.

C. Ineffective Assistance of Appellate Counsel

Applicant alleges he was denied effective assistance of appellate counsel in that appellate counsel failed to raise all meritorious issues that could have been raised on appeal. A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Applicant must show (1) that appellate counsel's performance was deficient; and (2) that he was prejudiced by the deficient performance. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (citing

Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997)). Further, 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).

To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. (citing Evitts, 469 U.S. 387, 105 S.Ct. 830 (1999)). Counsel is not required to raise every non-frivolous claim, but instead may select among them to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259 (2009). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754, 103 S.Ct. 3308 (1983)). See also Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985) (finding the failure to appeal all trial errors is not ineffective assistance where strategic decision to exclude issues on appeal is based on reasonable professional judgment).

When a claim of ineffective assistance of appellate counsel is based on failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id. If the issue is not preserved for appeal, appellate counsel cannot be ineffective for not raising that issue on appeal. See State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991) (holding

where an objection and the ground therefore is not stated in the record, there is no basis for appellate review).

Here, the issue Appellate Counsel raised on appeal was whether the trial court erred in finding the warrantless seizure of the stolen camper was proper and in allowing the stolen camper's owner to testify regarding the stolen camper's VIN number. Applicant asserts that appellate counsel should have also raised the claims he asserts above in 1(b),(c),(f)-(h) and 2(a),(c). However, many of these arguments were either waived by Applicant at trial or were otherwise not properly preserved for appeal. Specifically, Applicant's allegation that appellate counsel was ineffective for failing to argue that the Court erred in refusing to allow Applicant to question Lindler about giving a false police report. Tr. I p. 286. At trial, Applicant told the judge that he wanted to question Lindler about robbing his own store and then giving a false statement to police in which he stated that "a Mexican robbed him." Tr. I p. 280. The State argued that Lindler was not convicted of giving a false statement to police and the statement would not be admissible. The trial judge ruled that he could ask Lindler if he gave a false statement to police and what his motivation was for doing so, but he could not ask him the specifics of it. Tr. I p. 286. Applicant then asked Lindler if he made a false statement and what his motivation for doing so was. Therefore, appellate counsel had no basis to appeal this issue.

Applicant states in his application on page "3(mm)" that he wanted to represent himself on appeal and he attempted to raise some of the issues "contained herein" for appellate review. However, Applicant's request to proceed *pro se* was denied, and Dayne C. Phillips was appointed to represent him. Applicant goes on to state that he sent Phillips "several letters requesting that he brief the issues Applicant had prepared." See PCR Application page "3(mm)." Applicant has made no allegation that appellate counsel did not receive this correspondence. The only

reasonable conclusion to be drawn from the record is that Appellate Counsel was aware of these arguments, yet chose to proceed with only the argument pertaining to the search. If the appellate courts had found that the trial judge erred in admitting the evidence of the VIN number, Applicant's conviction would have likely been reversed. See Mapp v. Ohio, 367 U.S. 643 (1961) (holding evidence seized in violation of the Fourth Amendment must be excluded from trial).

Accordingly, because this Court must presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment, Strickland, 466 U.S. 668, this Court finds that appellate counsel chose to assert the claim he found to be most meritorious. Furthermore, though he argues that appellate counsel could have made other arguments, Applicant has presented no showing of how they would have affected the outcome of his appeal. Therefore, this Court finds that appellate counsel raised the issue that had the greatest chance of being successful on appeal.

This Court finds, in viewing the record in the light most favorable to Applicant, there is no genuine issue of material fact with regard to Applicant's allegation that appellate counsel failed to raise issues on appeal, and it is therefore denied and dismissed.

D. Trial Court Error

Applicant alleges multiple errors at the trial court level in the claims set forth in his original PCR application in paragraphs 1(a)-(h) and 2(a)-(c). This Court finds that Applicant explicitly abandoned each of the issues set forth in 1(a)-(c),(f),(g) at trial. Regardless, all of these claims as well as claims in paragraphs 1(d),(h) are direct appeal issues. S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A PCR 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).

Applicant represented himself at trial. He could have raised these issues at trial. His failure to do so has waived these allegations as grounds for relief. Therefore, viewing the facts in the light most favorable to Applicant, this Court finds there is no genuine issue of material fact and Respondent is entitled to Judgment as a matter of law.

Applicant's allegation that the judge failed to appropriately charge the jury is without merit. Further, this is a direct appeal issue that Applicant waived by not objecting at trial. See Simmons, 264 S.C. 417, 215 S.E.2d 883; Ashley, 260 S.C. 436, 196 S.E.2d 501. This Court notes the trial judge appropriately charged the jury on the elements of receiving or possessing stolen goods. Tr. II p. 127, lines 7-22. Applicant's main complaint at trial was that judge refused to charge the jury on the doctrine of recent possession because it would go against Applicant. Tr. II p. 75, lines 11-15. Applicant then agreed that he could leave that out. Tr. II p. 77. Applicant asked that the trial judge charge the jury using the specific language in Horne, which the trial judge agreed to do, (Tr. p. 70), but then determined that pursuant to State v. Grippon it would not charge the reasonable hypothesis charge that Applicant requested. (Tr. II p. 79). Applicant also requested a mere presence instruction, which the trial judge agreed to charge. Regardless, Applicant did not object to the jury charges after the trial judge specifically asked him if he had any objections to the final jury instruction. Tr. II p. 130, lines 6-20; Tr. II p. 132, lines 8-9. Accordingly, this Court finds there is no genuine issue of material fact as to this issue and the State is entitled to judgment as a matter of law.

Applicant also alleges the trial judge erred in refusing to allow him to cross-examine the State's witness, Ben Lindler, concerning Applicant's contention that Lindler had burglarized Applicant's home. Applicant specifically asked the court to allow him to question the witness on that matter. Trial Tr. I p. 256, line 24–p. 294, line 16. The parties then engaged in lengthy

discussion with the trial judge and the trial judge ruled that he was not going to allow him to question Lindler about the alleged burglary because Lindler was not convicted. However, the trial judge did permit Applicant to question Lindler concerning whether they had disputes in the past to show bias or prejudice on Lindler's part pursuant to Rule 608(c), SCRE. Trial Tr. I, pp. 230–50. The trial judge allowed him considerable latitude and even overruled the State's objection, but ultimately stopped him from going into the specifics of the accusation. Accordingly, this Court finds there is no genuine issue of material fact as to this issue and the State is entitled to judgment as a matter of law.

Applicant also alleges that the trial judge erred in refusing to suppress his statement to Detective Beck because the statement was involuntary and not relevant. This is also a direct appeal issue that could have been raised either at trial or on appeal. In fact, Applicant did raise the issue at trial, and a hearing was held on the voluntariness of the statement. Applicant and Beck both testified. The State argued that Applicant refused to sign the statement and did not confess. The judge denied Applicant's motion to suppress. This issue was not raised in Applicant's direct appeal. Therefore, Applicant has waived this allegation. See S.C. Code Ann. § 17-27-20(b) (1985); Ashley, 260 S.C. 436, 196 S.E.2d 501 (holding a PCR application cannot assert any issues that could have been raised at trial or on direct appeal). Accordingly, this Court finds there is no genuine issue of material fact as to this issue and the State is entitled to judgment as a matter of law.

E. Due Process

Applicant alleges he was denied due process on the grounds that he was denied his Sixth Amendment right to a fast and speedy trial. "[A] speedy trial does not mean an immediate one; it does not imply undue haste, for the State, too, is entitled to a reasonable time in which to prepare

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its case; it simply means a trial without unreasonable and unnecessary delay." State v. Langford, 400 S.C. 421, 441, 735 S.E.2d 471, 481-82 (2012), (citing Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966)). "Accordingly, the determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense." State v. Evans, 386 S.C. 418, 423, 688 S.E.2d 583, 586 (Ct. App. 2009) (quoting State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007)). A reviewing court should consider the following factors when determining whether a defendant has been deprived of his right to a speedy trial: (1) length of the delay; (2) reason for the delay; (3) defendant's assertion of the right; and (4) prejudice to the defendant. Id. at 423, 688 S.E.2d at 586. Delays occasioned by the defendant, . . . weigh against him. This is not only in accord with the reality that delay may be a defense tactic, but it is also a recognition that a defendant should not be able to procure a dismissal of the charges against him due to delays he caused. State v. Langford, 400 S.C. 421, 443, 735 S.E.2d 471, 483 (citing Vermont v. Brillon, 556 U.S. 81 (2009)) (citations omitted). Further, a court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion. State v. Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (citing See State v. Edwards, 374 S.C. 543, 571, 649 S.E.2d 112, 126 (Ct.App.2007)). Here, Applicant was indicted in 2007. Applicant made multiple motions to relieve counsel before he went to trial, thereby contributing to the delay. Applicant made no showing that he suffered prejudice by the delay. Regardless, this allegation is a direct appeal issue which Applicant waived by not raising in his direct appeal. Accordingly, this Court finds that viewing the facts in the light most favorable to Applicant, there is no genuine issue of material fact as to this issue and the State is entitled to judgment as a matter of law.

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In his motion for summary judgment, Applicant alleges he was also "denied due process of law when the State failed to disclose things of value offered to Ben Lindler in exchange for his testimony against Applicant and when the prosecution failed to correct false testimony he knew or should have known was false when it occurred." However, Applicant has failed to provide specific facts as to what Lindler was offered or what false testimony Lindler provided and has produced no evidence that Lindler gave false testimony or received any kind of deal or leniency from the State. At trial Applicant asked Lindler if he had any deals with the police and Lindler replied that he had "no deals. No pats on the backs, no easy rides, nothing." Tr. I p. 287. Applicant has made no showing whatsoever that Lindler provided false testimony. Therefore, this Court finds there is no genuine issue of any material fact with respect to this allegation. Therefore, it is denied and dismissed.

Applicant also alleged he was denied due process of law by not being provided with the resources necessary to conduct pretrial legal research or trial preparations. The trial judge noted how prepared Applicant was when he made his pretrial motions. Applicant cited multiple rules and laws throughout his trial and made many motions and objections. This Court finds the record clearly shows there is no genuine issue of material fact with respect to this allegation and it is therefore denied and dismissed.

Applicant lastly alleges that he was denied due process of law because "[e]vidence not previously heard requires the reversal of the conviction in the interest of justice, where the State relied upon false testimony and false impressions to establish the elements of the offense or that went to the truthfulness and credibility of the State's witness." However, Applicant has failed to allege any specific facts or produce any evidence in support of this allegation. Accordingly, in

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viewing all facts in the light most favorable to Applicant, this Court finds Respondent is entitled to judgment as a matter of law and this allegation is therefore denied and dismissed.

CONCLUSION

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

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 1 day of Sept., 2016.

R. Ferrell Cothran

R. FERRELL COTHRAN, JR.
Presiding Judge
Seventh Judicial Circuit

Manning, South Carolina

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CLERK OF COURT

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M. Hope Blackley
Clerk of Court

September 12, 2016

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

James Lindsey, Jr.
Applicant

VS

State
Respondent

IN THE COURT OF COMMON PLEAS

7TH JUDICIAL CIRCUIT

CASE # 2016CP42 384

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Order of Dismissal
In this action dated 9-1 2016 on 9-12-16

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

Ashley Haworth
Alicia Oliver
James Lindsey

9-12-16
(Date)

(Signature)

James Tinsley
100 S. Welcome Road
Greenville, SC 29611

Clerk of Supreme Court
P.O. Box 11330
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