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May 21, 2018

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

Re: Dominique J. Shumate v. State of South Carolina
Case No: 2016-CP-23-3653

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

Rodney Richey

RWR/
enclosures

cc: DeShawn Mitchell, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

HONORABLE LETITIA H. VERDIN

2016-CP-23-3653

DOMINIQUE J. SHUMATE, SCDC# 319438,

APPELLANT,

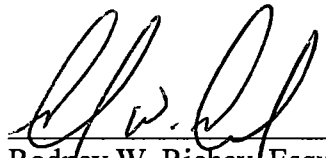
against

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Dominique J. Shumate appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Letitia H. Verdin, Circuit Judge on October 23, 2017 an Order issued on May 15, 2018 and filed on May 17, 2018. The Appellant received notice of the judgment on May 21, 2018.



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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

HONORABLE LETITIA H. VERDIN

2016-CP-23-3653

DOMINIQUE J. SHUMATE, SCDC# 319438,

APPELLANT,

against

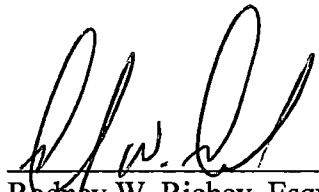
STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on May 21, 2018, addressed to their attorney of record, DeShawn Mitchell, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: May 21, 2018



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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Dominique J. Shumate, #319438 Applicant, v. State of South Carolina, Respondent.	2016-CP-23-03653 **ORDER OF DISMISSAL** ENTERED COMPUTER

This matter comes before the Court by way of an application for post-conviction relief filed on June 16, 2016 by Dominique J. Shumate (Applicant). Respondent made its Return on or about January 12, 2017. An evidentiary hearing into the matter was convened on October 23, 2017, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by Rodney W. Richey, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's Trial Counsel Susannah C. Ross, Esquire also testified. This Court had before it a copy of the records of the Greenville County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's trial, the PCR application, Respondent's Return, Applicant's records from the Department of Corrections and Applicant's appellate records. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. Applicant was indicted by the February 2012 term of the Greenville County Grand Jury for one (1) count of trafficking cocaine

base (crack cocaine) (2011-GS-23-1733), one (1) count of possession of a weapon during the commission of a violent crime (2011-GS-23-1733), one (1) count of possession of a controlled substance with intent to distribute (2011-GS-23-1734), one (1) count of distribution of a cocaine base (crack cocaine) (2011-GS-23-1735), and one (1) count of possession of cocaine with intent to distribute (2011-GS-23-1736). Susannah Ross, Esquire represented him. On May 25, 2012, Applicant proceeded to a jury trial and was found guilty as indicted for all charges. The Honorable C. Victor Pyle, Jr. sentenced Applicant to confinement for fifteen (15) years for trafficking cocaine base (crack cocaine), five (5) years for possession of a weapon during the commission of a violent crime, one (1) year for possession of a controlled substance with intent to distribute, five (5) years for distribution of a cocaine base (crack cocaine), and two (2) years for possession of cocaine with intent to distribute. The sentences were set to run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected by Katherine H. Hudgins, Esquire. The South Carolina Court of Appeals affirmed Applicant's convictions. State v. Shumate, Op. No. 2014-UP-410 (filed on November 19, 2014). Applicant subsequently filed a petition for writ of certiorari in the South Carolina Supreme Court on November 19, 2014. The petition was denied on June 17, 2015. The Remittitur was issued on July 22, 2015.

FACTUAL HISTORY

At trial, the State called four officers from the Greenville County Sheriff's Office to describe the investigation and circumstances that led to Applicant's arrest. Deputy Jacob Walters testified about a November of 2010 drug investigation initiated as the result of a "crime stoppers" tip. (R. pp. 25-26.) Based on the tip, the Sheriff's Office began surveillance of a particular trailer park. (R. p. 27.) They observed heavy traffic in and out of the trailer park, including in and out of the trailer on Lot #7. (R. p. 27.) The officers stopped several of the

vehicles leaving the trailer park for traffic infractions, which led to the discovery of drugs. (R. p. 28.) Deputy Walters used certain individuals from the stops as confidential informants ("CIs"), who returned to the trailer park to make controlled drug purchases for the police. (R. p. 28.)

On November 10, 2010, a CI was sent to Lot #7, and as a result, the police obtained a search warrant for the trailer on that lot. (R. p. 30.) Deputy Walters served the search warrant on the Lot #7 trailer but did not participate in the search. (R. p. 31.) On cross-examination Deputy Walters acknowledged Jerry Drummond Jr., rented the trailer. (R. pp. 42-43.)

Deputy Patrick Swift testified he participated in the execution of the search warrant on Lot #7 by first deploying a noise distraction at the back of the trailer. (R. p. 46.) Thereafter, Deputy Swift entered the front door of the trailer with the search team and conducted the search. (R. pp. 46-49.) According to Deputy Swift, the front door of the trailer had been barricaded from the inside with a 2x4; therefore, it took numerous blows from the breaching ram to get through the door. (R. pp. 46-49.) Deputy Swift went down a hallway where he encountered Applicant in the bathroom, standing over the toilet with the toilet running, as if he had just flushed something. (R. p. 49.) He handcuffed Applicant, took Applicant outside the trailer, and returned to the bathroom, where he noticed a Uno playing card floating in the toilet. (R. p. 49; R. p. 52.)

Deputy Swift described the plan for searching the residence, the role of the "scribe" to log all evidence discovered, and the actual search that was conducted room by room. (R. pp. 54-63.) In the kitchen, on top of the cabinets, the officers found a container holding two Uno™ cards and eight pieces of a rock-like substance, which field tested positive for cocaine base. (R. p. 55.) In the living room they discovered $172 in cash. (R. p. 57.) In one bedroom they found a cell phone on the floor and a coat that had a plastic bag containing a white rock-like substance in the pocket, which also field tested positive for cocaine base. (R. pp. 57-60.) The officers found

two digital scales in the trailer – one in a small room in the hallway and one in the kitchen. (R. p. 60-62; R. p. 113.) Deputy Swift testified they did not discover any drug paraphernalia, like crack pipes or rolling papers, that indicated drug use. (R. pp. 64-65.) On cross-examination Deputy Swift acknowledged no drugs were found around or near Applicant and Burnside, and they were not near the scales or the coat when they were arrested. (R. p. 72; R. p. 74.)

Deputy Brandon Brown, an expert in street-level narcotic sales, participated in the entry of the trailer and Applicant's arrest but did not participate in the actual search. (R. pp. 89-90; R. p. 93.) Deputy Brown described the barricade on the front door and the difficulty they had entering the residence. (R. pp. 90-91.) He then offered an opinion that based on a variety of factors he believed the trailer was used primarily for the distribution of narcotics. (R. p. 96.) The factors he used to form his opinion included the following: 1) various amounts of cocaine base, cocaine, and prescription pills discovered in the house; 2) plastic bags, a razor blade, and other items suggesting packaging for sale; 3) the barricade on the front door; and 4) security cameras pointing down the front steps. (R. p. 96-101.) Deputy Brown testified it was not typical for narcotics dealers to leave drugs and money unattended in a house with buyers. (R. pp. 100-101.) On cross-examination Deputy Brown noted that Applicant and Burnside had access to everything inside the trailer because they were barricaded inside the trailer with all of the items. (R. p. 103.)

Deputy Justin Lanford participated in the search and served as the scribe. (R. p. 107.) He found a Glock 40 caliber handgun on the kitchen counter, which was readily accessible, various pills in the kitchen cabinets, and a bag of cocaine in an oven mitt above the stove. (R. pp. 109-111.) Deputy Lanford described field testing the microwave, which tested positive for cocaine base. (R. p. 111.) According to Deputy Lanford, the search team did not find any kind of paraphernalia to indicate personal drug use. (R. p. 118.)

The State then called Drummond to the stand. (R. p. 120.) According to Drummond, he and Applicant were "like cousins," and he had known Applicant his whole life. (R. p. 122.) Drummond said he did not really "live" in the trailer because it was more like a bachelor pad. (R. p. 123.) In fact, no one really lived in the trailer. (R. p. 123.) The water bill was in Drummond's name, and he rented the trailer from his landlord, Billy Rhodes. (R. pp. 123-124.) Additionally, Drummond testified that although Applicant did not live in the trailer, he visited two to three times a week. (R. pp. 124-125.) Drummond explained that he, Applicant, Burnside, and a few others would chip in and pay the bills for the trailer because "everybody came and chilled." (R. pp. 125-126.) Notably, Drummond said he was incarcerated on November 3, 2010; therefore, he was not at the trailer when the CI went to the trailer or when the search warrant was executed. (R. p. 126.) According to Drummond, the security cameras were installed after he moved out of the trailer, and he did not leave any money or anything of value in the trailer. (R. p. 129.)

Thereafter, the State called chemist James Armstrong and forensic investigator David Gambell, both of the Greenville County Department of Public Safety, to describe the process of testing and weighing the various drugs and prescription pills. (R. p. 136; R. p. 151.) They described the process used for testing for fingerprints on the gun, microwave, and the plastic bag. Finally, Investigator Steven Perron testified regarding the cash confiscated from the trailer and later returned to Applicant and Burnside. (R. p. 157; R. pp. 159-160.)

At the conclusion of the State's case, Applicant moved for a directed verdict. (R. p. 163.) The trial judge denied Applicant's motion for a directed verdict and stated: "I think that's an issue for the jury." (R. p. 163.) Neither Applicant nor Burnside testified or offered evidence in defense.

ALLEGATIONS

1. "Jurisdiction"
    a. "The "courts" clearly erred and lacked subject matter jurisdiction of a defaulted arrest warrant and probably cause to search and illegally fiction of controlled buy and sell." (sic)
2. "Illegal search and seizure"
    a. "Which was executed by Greenville County Sheriff's Office and severally operative deputies and master officers without proper return by Magistrate Judge whom issued warrant." (sic)
3. "Reliability of Confidential Informant"
    a. "Confidential informants was never present at present time of presentment of sworn affidavit with magistrate to determine reliability nor did the confidential informant (CI) testify under Oath that he actually purchased drugs from LOT #7 or applicant Shumate, no marked currencies, monies, recovered from controlled buy recovered from applicant Shumate, no evidence points to the applicant Shumate." (sic)
4. "Affidavit not properly returned"
    a. "The affidavit for warrant was not properly returned, no signed by issuance magistrate..."
5. "Direct Verdict"
    a. Trial Court erred in not issuing Direct Verdict"
6. "Suppression of Evidence"
    a. "Trial Court erred in not suppressing evidence of illegal search and seizure and denying counsel motion to suppress. Trial Court prejudice the applicant by stating that the suppression would be better suite and save for appeal. When suppression, dismissal and nolle prosequi was available and better suited for circumstantial evidence that did not meet the means to apply to the applicant being in a place that was not own, lease, nor rent place in question for illegal search warrant." (sic)
7. "Burden of Proof"
    a. "The State did not meet its Burden of Proof. Many and various inconsistencies in testimonies by state witnesses, conjectures applied, illegal warrants, no evidences to connect the dots for actual nor constructive possessions, nor possessions with intent to distribute, trafficking, nor ownership of any evidences collected in a trailer the applicant did not own, lease, nor rent. Only visited. That was supported by states witness whom rented and leased the allege place in question for illegal arrest warrant and issuance and return. No positive identificative arresting officer testimony of controlled buy from the applicant..." (sic)
8. "Did counsel render itself ineffective and failed below the reasonable standards of reasonableness" (sic)
    a. "Counsel at Trail did not Motion Dismissal for Want of Probably Cause Violation of Due Process and Equal Protection of Laws in not insuring that their client was equally protected by laws in place Due Process and Fundamental Fairness. Not allowing the State to exploit the illegal arrest

prosecution without viable returns and arrest and conviction with lack of actual and constructive possessions, neither trafficking or intent to distribute. Allowing the illegal conviction to subject their client to multiple ran sentences concurrently ran without evidence to have proven beyond a reasonable doubt that the applicant participated of committed any of the crimes he stands convicted of presently." (sic)

9. "Violations of Separations of Power"
    a. "Art. I. Sec 8 of S.C. Const containing the Separations of power Doctrine forbids Solicitors/Prosecutors to "control the court rooms." To include what magistrate would sign return for favorable issuance and judge shop for a magistrate who would bend the rule to get a illegal arrest warrant. Oppose to issuing magistrate for proper return who issued original warrant...In allowing State Attorneys, Officers of Court, and arresting officer to determine who would be best suited to process a illegal search and seizure." (sic)
10. "Trafficking and Manufacturing and Actual and Constructive Possession"
    a. "There is clearly no evidence to point to neither of these allegations charges to apply to the applicant. Mere visitation and presence to a bachelor pads of frequent visitation to entertain women, not owned, leases, nor rented by applicant does not constitute actual, nor constructive possession. Nor was a overzealous sheriff's department of various task force have the rights to target, profile a drug area and not have correct address and valid date for probable cause to professional present to issuing magistrate and return to issuing magistrate..." (sic)
11. "Was Counsel Ineffective by Not Renewing Motions Oppose to Mere Objections at Close of Evidence to Preserve the Record"
    a. "Counsel trial experience and continued training required Counsel to preserve the record issues effecting appeal process. Counsel was also required to protect the clients best interest and prevent client from being prejudice upon trial judges decision causing grave miscarriage of justice. When in open court he denied motions misinstructed jurors that this or that issue will be raised on appeal. Which mislead jurors that the defendant is pre convicted so that a matter is not important at trial instance prior to production of evidences, closure of trial, closing arguments, prejudiced the applicant."

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Applicant's Testimony

Applicant testified he was convicted in Greenville County of trafficking drugs, possession of a firearm, possession of cocaine, possession of pills, and a marijuana charge. He testified he only wanted to challenge the trafficking charge as he was okay with the other

convictions. He testified he only wanted the PCR court to grant relief on this charge. Applicant testified on the day of his trial starting he was being transported from the county jail and the trial started before he got to the courtroom. He testified pre-trial motions had already started when he arrived but the selection of the jury had not occurred yet. Applicant testified Trial Counsel should have waited for him to come in before the trial started. He also testified Trial Counsel should have let the jury know his Fourth Amendment rights had been violated. Applicant testified concerning the facts of the case that he was violated and he was just in the house when the drug bust occurred by the police. Applicant testified he was using the bathroom when police kicked the door in. He testified the house that was busted was a bachelor pad where people go in and out and nobody had a key. Applicant testified the front door was always locked and people would just hang out smoke, drink, and bring women over. He testified he did not pay any bills there or have anything in his name. Applicant testified Trial Counsel should have brought up Brady [1] and Due Process. Applicant testified he had a plea offer, but it wasn't his plea offer. He testified the state was asking for him to testify against his co-defendant and he could not do that because the both of them were in the same predicament. Applicant testified the both of them were just in the wrong place at the wrong time. He testified Trial Counsel tried to get him to cooperate but he did not want to do that and had he did he would have received substantially less time. Applicant testified Trial Counsel tried to get him to accept the plea offer on multiple occasions and that was all they really talked about. He testified Trial Counsel told him he was looking at twenty-five years in prison and that he ultimately received a fifteen year sentence.

On cross-examination, Applicant testified he met with Trial Counsel five times altogether. He testified he received a plea offer that he signed at first but he learned he would have to testify and then he told Trial Counsel he could not go through with the plea. He testified

[1] Brady v. Maryland, 373 U.S. 83 (1963)

Trial Counsel did not review the evidence in the case with him and they really only ever talked about plea deals. Applicant testified Trial Counsel discussed the possible sentences he would face if he was convicted.

Trial Counsel's Testimony

Trial Counsel testified she represented Applicant on his charges. She testified originally Applicant received a plea offer of six years' incarceration and his co-defendant was offered ten. She testified the state at one point reduced the offer to four years. Trial Counsel testified Applicant was in the courthouse at one point with his child and he just walked down the hall and refused to accept the plea. She testified Applicant had signed up to plead guilty and she was calling after him begging him to take the four-year plea. Trial Counsel testified she did not recall Applicant having to testify against his co-defendant as a condition of his plea deal but that could have been the case. She testified those terms were not on the plea offer letter she received from the state. Trial Counsel testified she went over the discovery with Applicant as she always does with clients. She testified they had a number of meetings where they discussed the discovery. Trial Counsel testified she met with Applicant six or seven times during her representation. She testified she believed she had sufficient time to talk to Applicant. Trial Counsel testified she did not believe Applicant's chances at trial were very good. She testified the case involved drugs being manufactured in the kitchen of a house and drug like rocks found on Uno cards. Trial Counsel testified Applicant was found after the officers did the storm entry in the bathroom with Uno cards floating in the toilet and it was running as it had been flushed. She testified she did not feel like they had a very strong chance at trial. Trial Counsel testified her best argument, she felt, was to argue possession. She testified she thought it was a bad policy to try to argue there was no evidence in this case, so she went with the argument that the amount of drugs constituted

possession not trafficking. Trial Counsel testified there were Uno cards found in the kitchen or above the microwave and these Uno cards had pieces of drugs on top of them. She testified there were also Uno cards floating in the toilet. Trial Counsel testified Applicant signed up to plea and her failing in the case was not being able to convince Applicant to plead guilty because there was serious overwhelming evidence.

On cross-examination, Trial Counsel testified she had practiced law for twenty-one years and all of that time had been dedicated to criminal law. She testified she was appointed to represent Applicant and the facts where that police had a confidential informant buy drugs at this trailer. She testified police went and got a search warrant. Trial Counsel testified she felt like the search warrant was bad because the description was unclear as there were two trailers at that site. She testified she thought the search warrant was leading to the other trailer and made a motion regarding the search warrant. Trial Counsel testified she went out to the trailer park and took photographs. She testified police did get the warrant and went inside and found Applicant and his co-defendant. Trial Counsel testified Applicant was in the bathroom with the flushing toilet. She testified she met with Applicant numerous times in which during those meetings they discussed the discovery, his charges and the potential sentences he was facing. She testified Applicant never indicated to her he did not understand any of those things. Trial Counsel testified in terms of investigation, she went to the trailer park where the incident happened and went inside walked around and took pictures. She testified she believed this information went to the veracity of the search warrant. Trial Counsel testified given the facts of the case she did not know of any other witnesses she needed to call. She testified she made various motions to suppress the evidence in the case and also the affidavit for the search warrant. She testified she made appropriate directed verdict motions at the close of the state's case and at the end of the trial. Trial Counsel testified

she had a trial outline that she changed for around for each trial and that she did make a motion for a judgment notwithstanding the verdict at the end of the trial. She testified it was sort of an old argument that she had on her outline and the opinion of the Court of Appeals is that argument cannot be made in a criminal case. Trial Counsel testified she disagreed because she thought if it was right in a civil case, it should be allowed in a criminal case as well just to reconsider. She testified it was probably unnecessary for her to make that motion, but that she did not think it was ineffective for her to do so. Trial Counsel testified she discussed with Applicant his right to testify and he ultimately chose not to do so.

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 hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief 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). 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 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. 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. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Applicant proceeded on the following allegations at the evidentiary hearing:

Fourth Amendment Violation

Applicant alleged his Fourth Amendment rights were violated. The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. The South Carolina Constitution provides similar protection against unreasonable searches and seizures and unreasonable invasions of privacy. S.C. Const. art. I, § 10. A search warrant may issue only upon a finding of probable cause. State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495 (2009). In South Carolina, an affiant seeking to obtain a search warrant must present a sworn affidavit to a judge presenting grounds sufficient to establish probable cause in order to justify the issuance of the warrant. State v. Bellamy, 336

S.C. 140, 143, 519 S.E.2d 347, 348-49 (1999); see S.C. Code Ann. § 17-13-140 ("A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant."); see also Illinois v. Gates, 462 U.S. 213, 238 (1983) (identifying probable cause as "a fair probability that contraband or evidence of a crime will be found"). Trial Counsel testified she felt like the search warrant was bad because the description was unclear as there were two trailers at that site. She testified she thought the search warrant was leading to the other trailer and made a motion regarding the search warrant. Trial Counsel also testified she made various motions to suppress the evidence in the case and also the affidavit for the search warrant. After a review of the record, this Court finds Trial Counsel was not ineffective. This Court finds while ultimately unsuccessful, Trial Counsel made appropriate motions and diligently sought to protect Applicant's constitutional rights and suppress the search warrant for lack of probable cause and its alleged non-compliance with South Carolina statutory language. (Trial Tr. pg. 8-15). 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 her 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 allegation is denied and dismissed.

Applicant's absence at start of trial

Applicant also alleged Trial Counsel was ineffective for starting his trial without him present. Applicant testified the day of his trial starting he was being transported from the county

jail and the trial started before he got to the courtroom. He testified pre-trial motions had already started when he arrived but the selection of the jury had not occurred yet. Applicant testified Trial Counsel should have waited for him to come in before the trial started. After a review of the record, this Court finds Trial Counsel was not ineffective and Applicant suffered no prejudice. Prior to beginning the pre-trial motions, Trial Counsel informed the trial judge her client had not finished dressing but pre-trial motions commenced. The record reflects Applicant was present when jury selection begin however. (Trial Tr. pg. 16). "A criminal defendant has the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." State v. Shuler, 344 S.C. 604, 624, 545 S.E.2d 805, 815 (2001) (citations omitted). "A defendant's exclusion, or absence, will be reviewed in light of the whole record." Shuler, 344 S.C. at 624, 545 S.E.2d at 815. This Court finds that Applicant has failed to show Trial Counsel's alleged deficient performance prejudiced him such that there was a reasonable probability that but for Trial Counsel's unprofessional errors the result of his proceeding would have been different. Here as previously noted by this Court, Trial Counsel made appropriate motions and diligently sought to protect Applicant's constitutional rights and suppress the search warrant for lack of probable cause and its alleged non-compliance with South Carolina statutory language. Further, this Court finds Applicant's brief absence did not undermine the fairness of his trial. 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 her 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 allegation is denied and dismissed.

Due Process Violation

Applicant presented testimony in a cursory fashion concerning a due process violation. However, Applicant failed to set forth with specificity the grounds upon which these constitutional violations were based or present any evidence of a specific violation. After a review of the record, this Court finds this allegation is without merit. Accordingly, this allegation is denied and dismissed with prejudice.

Brady Violation

Applicant presented testimony in a cursory fashion concerning a Brady violation. Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Under this requirement, "favorable" evidence includes both exculpatory evidence and impeachment evidence. State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998). "Determining whether evidence withheld by the state is 'material' under Brady turns on whether the cumulative effect of the withheld evidence results in a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." State v. Hill, 368 S.C. 649, 661, 630 S.E.2d 274, 280–81 (2006). Put another way, to establish a Brady violation, the aggrieved party must show "that the favorable evidence could reasonably be taken to put the whole case in such a different light as to

undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 434 (1995). This Court finds, as to Applicant's Brady allegation, Applicant failed to present evidence the State committed such a violation. The allegation is denied and dismissed.

Plea Offer

Applicant presented testimony in a cursory fashion concerning a plea offer. Applicant testified he had a plea offer, but it wasn't his plea offer. Applicant testified he signed the plea deal at first but he then learned he would have to testify against his co-defendant. He testified he told Trial Counsel he could not go through with the plea. He testified Trial Counsel tried to get him to cooperate but he did not want to do that and had he did he would have received substantially less time. Trial Counsel testified originally Applicant received a plea offer for six years' incarceration and his co-defendant was offered ten. She testified the state at one point reduced the offer to four years. Trial Counsel testified Applicant was in the courthouse at one point with his child and he just walked down the hall and refused to accept the plea. She testified Applicant had signed up to plead guilty and she was calling after him begging to take the four-year plea. Trial Counsel testified she did not recall Applicant having to testify against his co-defendant as a condition of his plea deal but that could have been the case. She testified those terms were not on the plea offer letter she received from the state. This Court finds Applicant expressly rejected the plea offer extended to him. Further, this Court finds Trial Counsel was not ineffective in regard to this allegation as Applicant testified he turned down the plea offer. According, this allegation is denied and dismissed with prejudice.

CONCLUSION

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

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. Reefer to Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;

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 15 day of May, 2018.

LETITIA H. VERDIN
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

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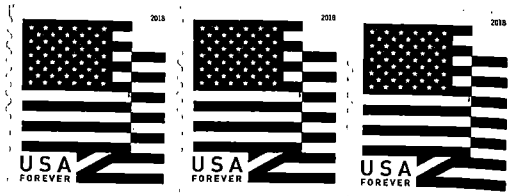

The Honorable Daniel E. Shearouse
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