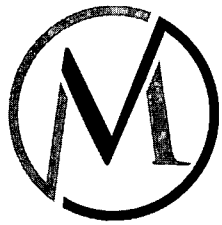

MAC | VANCE ATTORNEYS, LLC

RECEIVED
MAY 31 2018
S.C. SUPREME COURT

May 29, 2018

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

RE: **Dominique Agurs, #313102 v. State of South Carolina**
2016-CP-46-3745

Dear Mr. Shearouse:

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

Best regards,

Ashley A. McMahan
Attorney at Law

AAM/qpk

Enclosures

cc: Dominique Agurs
Megan H. Jameson, Sr. Asst. Dep. Attorney General
York County Clerk of Court
Office of Appellate Offense

P.O. BOX 5501 · WEST COLUMBIA, SC 29171
TEL 803-219-1110 · FAX 803-500-9140 · WWW.MACVANCE.COM

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable W. Mark Hayes, II, Circuit Court Judge

Case No. 2016-CP-46-3745

Dominique Agurs, #313102, ... Petitioner,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant, Dominique Agurs, appeals the order of the Honorable W. Mark Hayes, II, dated April 20th, 2018, and filed May 17, 2018.

5/29, 2018

ASHLEY A. MCMAHAN, ESQUIRE
MAC | VANCE ATTORNEYS, LLC
PO Box 5501
West Columbia, SC 29171
803-219-1110
ashley@macvance.com
SC Bar No. 71676
ATTORNEY FOR APPLICANT

Opposing Counsel:
Megan H. Jameson, Sr. Asst. Dep. Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAY 31 2018
S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
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The Honorable W. Mark Hayes, II, Circuit Court Judge

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Dominique Agurs, #313102, ...Petitioner,

v.

State of South Carolina, ...Respondent.

PROOF OF SERVICE

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

Megan H. Jamieson, Sr. Assistant Deputy Attorney General
Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

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

May 29, 2018

QUINDA P. KERSHAW
PARALEGAL
MAC | VANCE ATTORNEYS, LLC
PO Box 5501
West Columbia, SC 29171
803-219-1110

STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS OF THE SIXTEENTH JUDICIAL CIRCUIT
Dominique Agurs, S.C.D.C. No. 313102, Applicant, v. State of South Carolina, Respondent.	2016-CP-46-3745 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed January 6, 2017. An evidentiary hearing into the matter was convened on January 29, 2018, at the Moss Justice Center in York, South Carolina. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Michael Matthews, Esquire, also testified.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the York County Clerk of Court. Applicant was indicted at the December 2013 term of the York County Grand Jury for distribution of crack cocaine (2013-GS-46-4248). Michael Matthews, Esquire, represented him. Assistant Solicitor Matthew Shelton, Esquire, represented the State. On April 22, 2014, Applicant proceeded to a trial before the Honorable John C. Hayes, III, after which he was found guilty. Applicant was sentenced to imprisonment for a term of life without parole.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by briefing by Appellate Defender John Strom, Esquire. Mr. Strom raised the following issues on

appeal:

1. Did the trial court abuse its discretion by refusing to grant a mistrial where the lead investigator improperly placed Appellant's character and prior arrests at issue by making a comment on direct examination that he "had dealt with [Appellant] before" while assigned to the Street Crimes Unit?

2. Did the trial court abuse its discretion in admitting Appellant's "mug-shot" photograph into evidence when the State failed to establish that the photograph was necessary to identify Appellant and the "mug-shot" was introduced only to draw attention to the circumstances under which it was taken and to suggest that Appellant had a criminal record; thus making it unfairly prejudicial?

3. Did the trial court commit reversible error in refusing to grant a mistrial after members of the jury prematurely deliberated before closing arguments as an unsigned note inquired to the judge about photographs presented at trial that were critical to Appellant's defense, and the trial court posited highly suggestive leading questions to the foreman and alternate juror which failed to adequately determine whether premature deliberations took place or negatively impacted Appellant's right to a fair trial?

4. Did the trial court abuse its discretion in refusing to grant a new trial where the cumulative effect of the errors was so prejudicial as to deprive Appellant of a fair trial?

The South Carolina Court of Appeals affirmed Applicant's convictions by an unpublished opinion. State v. Dominique Agurs, Op. No 2015-UP-562 (Ct. App. filed Dec. 23, 2015). The remittitur was sent February 10, 2016.

PCR Application

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

1. Prosecutorial Misconduct
    a. "knowing use of inadmissible evidence of prior bad acts"
    b. "Brady—prosecution failed to disclose favorable evidence material to guilt or punishment (to be amended by counsel), CI records, policy, etc."
2. Judicial Misconduct
    a. Failure to "disclose Masonic ties to witnesses and jurors"
    b. "Failure to enforce constitutional, statutory law, rules of evidence,

including manifest necessity mistrial motions of prior bad acts evidence"

3. Ineffective assistance of trial counsel
    a. "Failed to object to disproportionate racial composition of both the grand jury and petit jury venire (lack of blacks in the venire)"
    b. "Failed to articulate the hand making the sale of .08 grams of crack was that of a Caucasian and Applicant is African-American, this evidence is fatal to the State's case"
    c. "Failed to object to numerous instances of prosecutor asking insanely leading questions (ex. Pg. 85) (to search of vehicle)"
    d. "Failed to recross when (@ pg 54, l. 1) he could not tell who searched truck, then after leading questions he stated Ervin searched vehicle (pg 85), Counsel could have effectively impeached the witness but failed to do so, and exemplified the reasoning the witnesses were ad lib testimony"
    e. "Trial counsel failed to request a curative instruction, use of 'street crimes unit' contact solicitor's to make an 'evidentiary showing' of prior bad acts, the essence of the prosecutorial misconduct, video and mugshot as cumulative error, not properly preserved"
    f. "Failed to object to blatant hearsay testimony as to search of vehicle that went to the truth of the matter asserted in light of the fact there was 'no hand to hand' video of this alleged sale, and CI had ample opportunity to hide a .8 gram of crack on his person as he was not stripped search"
    g. "Failed to cross examine under State v. Jones that CI had ample to highlight Michael Tumblin history in judicial system to have knowledge to make pleas, deals, etc., paid .8 of pebble of crack could have been to bolster his credibility as CI. SCRE 608(C) this was a crucial area of C.X. of state only witness"
    h. Failure to articulate .8 gram pebble to impose natural life is an 8th Amendment cruel and unusual punishment violation
    i. "Failed to argue extreme judicial bias when all objections to expose obvious plot to try Applicant on priors/false dated video were brushed aside..."
4. Ineffective assistance of appellate counsel
    a. "failure to raise several winning issues"
5. "Juror misconduct, juror failed to disclose Masonic lodge affiliation with state witness, judge, and solicitor"

At the PCR hearing, Applicant moved to withdraw his allegation of judicial misconduct for failure to disclose Masonic ties to witnesses and jurors. Applicant also moved to withdraw his allegation that Counsel failed to object to the racial composition of the grand jury.

II. APPLICABLE LAW

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

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

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

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject

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

Prosecutorial Misconduct and Ineffective Assistance of Counsel – Time Stamp on Video

Applicant alleged the State committed prosecutorial misconduct by presenting the jury with a 2007 video when the police said the incident happened in 2013. He also alleged the CI (Michael Tumblin) saw this video before the controlled buy. Applicant also alleged his counsel was ineffective in this regard because, although he addressed it at trial, he should have done more. Counsel testified he investigated the issue concerning the CI buy video having the incorrect time stamp, and was told it was an IT issue with the police department. He testified he talked to members of the Public Defender's Office, who confirmed they had also had this same issue with videos from the police department. Counsel testified he moved to redact and suppress the video.

This Court finds Applicant has failed to meet his burden of proving actual prosecutorial misconduct or that Counsel was ineffective for failing to properly address the instances of alleged prosecutorial misconduct. It is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). The record reflects the CI buy video time stamp showed January 16, 2007, and the date of the actual buy was March 5, 2013. This Court would express its concern with this issue, but finds the issue was properly addressed by Counsel during the trial. Counsel cross-examined Tumblin about this discrepancy, and Tumblin testified the date on the video was not the date of the events depicted in the video and that the incorrect date was possibly caused by resetting the camera. Tumblin testified the

actual date of the incident was March 5, 2013. Tr. 116. Counsel also cross-examined Investigator Leland Harrleson about the incorrect time stamp, who testified he knew before the video was recorded that the time stamp would be incorrect and their office chose not to reset it. Tr. 214-215. This Court finds Applicant has failed to prove prosecutorial misconduct as it relates to the time stamp on the video. This Court finds the date of the video was a factual question for the jury and the State did not commit misconduct where they represented the video's contents were accurate and the time stamp was a known camera error. Accordingly, Applicant has failed to prove prosecutorial misconduct in this regard.

This Court finds Applicant has failed to prove Counsel's actions were deficient in this regard. This Court finds the error was addressed by the State's witnesses and Counsel properly cross-examined them about the actual date of the incident and attacked the discrepancy between the two dates. Furthermore, this Court finds Applicant has failed to show that the result of his trial would have been different had Counsel done more with the video issue. Accordingly, Applicant has failed to prove ineffective assistance of counsel in this regard.

Prosecutorial Misconduct and Ineffective Assistance of Counsel – Prior bad act evidence

Applicant alleged the State committed prosecutorial misconduct for introducing prior bad act evidence. He also alleged Counsel was ineffective for failing to request a curative instruction on the elicited testimony. The issue involves a comment made by Investigator Harrleson on direct examination, where he stated he was able to identify Applicant because he "had dealt with [Applicant] before when [Harrleson] was on the Street Crimes Unit with the City of Rock Hill." Tr. p. 190, ll. 5-6. Counsel objected and moved for a mistrial based on the court's prior ruling that prohibited discussing details of Tumblin's or officer's prior knowledge of Applicant. The trial judge declined to grant the mistrial and declined to give a curative instruction, stating the

instruction would only call more attention to the comment. Tr. p. 192. Counsel agreed that a curative instruction would call more attention to the comment but again asked for a mistrial. Tr. pp. 192-193. Applicant appealed this issue to Court of Appeals. After briefing, the Court of Appeals affirmed Applicant's convictions, citing cases stating "[A] vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes." See State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003).

This Court finds Counsel was not ineffective and the State did not commit prosecutorial misconduct concerning the comment made by Investigator Harrleson that he had dealt with Applicant before as part of the street crimes unit. This Court finds Applicant has failed to show the State committed actual prosecutorial misconduct when its witness provided concerning and possibly unexpected testimony. Understanding the case law cited by the Court of Appeals in Applicant's case, this Court finds the State did not commit misconduct. Furthermore, Applicant has failed to prove Counsel's actions were deficient in this regard. Although this Court may have ruled differently on the mistrial motion, this does not give rise to an error by Counsel, as he appropriately objected and moved for a mistrial. The Court of Appeals affirmed the trial judge's decision in refusing to grant a mistrial on this ground. As Counsel was not deficient and no misconduct occurred, Applicant has failed to show that the outcome of his trial would have been different had Counsel acted differently in this regard. Accordingly, these allegations must be dismissed.

Brady[1] Violation

Applicant alleged the State committed a Brady violation by failing to disclose favorable evidence including the CI's records. Brady requires the State to disclose evidence in its

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

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). A Brady claim is based upon the requirement of due process. 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). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing U.S. v. Bagley, 473 U.S. 667 (1985)).

Applicant has failed to show that a Brady violation occurred and that the State failed to disclose favorable evidence. Counsel testified he made the proper discovery motions and received all discovery, including the photo lineup, except the information on the Confidential Informant. He testified he eventually saw the CI buy video. This Court finds Applicant has failed to show exculpatory evidence was withheld by the State. During the pretrial motions, Counsel informed the State he had received information about Tumblin's past criminal history and confirmed with the assistant solicitor that all discovery had been shared. Tr. p. 7. This Court finds Applicant has failed to meet his burden of proving an actual Brady violation occurred, and this allegation must be dismissed.

Ineffective Assistance of Counsel – Batson[2] Issue

Applicant alleged Counsel was ineffective because only two African Americans were seated on the jury, and Counsel should have made the proper motion to address this issue. At the PCR hearing, Counsel testified no Batson violation occurred because the State used all of its strikes on white jurors. Counsel testified he did not see an issue with regard to the number of

[2] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

minorities on the jury.

In Batson, the Supreme Court held the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prevents the prosecution from striking potential jurors on the basis of race State v. Cochran, 369 S.C. 308, 313, 631 S.E.2d 294, 297 (Ct. App. 2006). "Thus, during jury selection, either the defendant or the State may oppose the peremptory challenge of a juror who is a member of a cognizable racial group." Id. "Once a peremptory challenge is opposed, the trial court must, upon request, conduct a Batson hearing." Id. This Court finds Counsel was not ineffective for failing to make a Batson motion. It is clear no Batson violation occurred where the State only struck white jurors and Applicant is African-American. As no Batson violation occurred, Counsel was not ineffective. Accordingly this allegation must be dismissed.

Ineffective Assistance of Counsel – Race of Hand Selling Crack

Applicant alleged Counsel was ineffective for failing to articulate the hand making the sale of crack shown in the video was that of a Caucasian and Applicant is African-American. At the PCR hearing, Applicant testified Counsel used this discrepancy as a defense because the State only had a picture of the drugs in question. Counsel testified the video showed no evidence of a third party. He testified the video showed a straightforward depiction of drug distribution and was more focused on Applicant and not the center console area. He testified he discussed the video and the transaction with Applicant.

The record reflects Counsel cross-examined Investigator Harrleson on this issue. Counsel entered a photograph from the buy video into evidence that shows a person's hand. Tr. 219. Counsel elicited testimony from Harrleson where Harrleson admitted the hand appeared to be of a white or Caucasian person. Tr. 219. Harrleson then testified, "Seeing this different picture now,

it appears to me that this picture was taken inside the...vehicle that was used with the confidential informant instead of the vehicle where the buy actually took place." Tr. p. 219, ll. 19-23.

This Court finds Counsel's actions were not deficient, as he entered the photograph in question in evidence, questioned Harrleson about the photograph, and elicited testimony that the photo appeared to show a white or Caucasian hand. This Court finds Applicant has failed to show Counsel's actions were unreasonable and he has failed to show what more Counsel should have done concerning the photograph. Applicant has failed to show that the outcome of his trial would have been different had Counsel employed a different strategy, and this Court will not speculate whether a "better" cross-examination would have helped Applicant. See Skeen v. State, 325 S.C. 210, 216-17, 481 S.E.2d 129, 133 (1997). Accordingly, this allegation must be dismissed.

Ineffective Assistance of Counsel – Leading Questions

Applicant alleged Counsel was ineffective for failing to object to leading questions from the assistant solicitor. Applicant specifically points to Page 85 of the trial transcript during the assistant solicitor's questions to Sergeant Jim Lubben concerning the search of the CI. The testimony in question reads as follows:

> Q. To your knowledge, did [Officer Ervin] search the truck prior to going out?
>
> A. Yes, she did.
>
> Q. And you testified a moment ago you do not remember if Tumblin was wearing a coat. If he had been wearing a coat, would you have searched it?
>
> A. Yes, sir. That's just part of the clothing we take-take off the coat and we go through the pockets and everything, just like their clothing.
>
> Q. And the same thing with any layers?
>
> A. Yes.
>
> Q. And your testimony is you didn't find anything?

A. That is correct.

Tr. p. 85, ll. 2-14.

This Court finds Applicant has failed to meet his burden of proving Counsel was ineffective for failing to object to the State's questions. In context, the questions are follow-up questions from testimony elicited by the witness during Counsel's cross-examination. This Court finds the questions were not so egregious as to warrant an objection from Counsel, and seemed to follow up on or reiterate prior testimony. This Court further finds it is unlikely an objection would have been sustained and, more importantly, that a sustained objection to these questions would have changed the outcome of the case. Applicant has failed to prove Counsel's actions fell below professional norms and that prejudice resulted. Accordingly, this allegation must be dismissed.

Ineffective Assistance of Counsel – Failure to Re-Cross Sergeant Lubben

Applicant alleged Counsel was ineffective for failing to re-cross Sergeant Lubben during his questioning about the search of the vehicle used by the CI during the buy. During Counsel's cross-examination, Sergeant Lubben stated he did not know who searched the CI's vehicle prior to the buy. Tr. pp. 83-84. He testified it is his office's usual procedure to search the car but he does not have a record of who actually searched it. Tr. p. 84. On re-direct, Lubben testified Officer Tanya Ervin was in control of the car the whole time and searched it prior to the buy. Tr. p. 85. Applicant alleged Counsel should have re-cross-examined Lubben and impeached him on the discrepancy in his testimony.

This Court finds Applicant has failed to prove Counsel was deficient in his cross-examination of Sergeant Lubben. Cross-examination is a matter of trial strategy, and as such, this Court must presume that Counsel "rendered adequate assistance and made all significant

decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S.at 689. The record reflects Counsel cross-examined Lubben about who searched the car, and his answers constitute a question of credibility and fact for the jury to decide. Any inconsistent testimony was an issue of credibility to be resolved by the finder of fact. See e.g., State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 830 (2001) (witness's credibility an issue for the jury's consideration). Any discrepancy in Lubben's testimony would go to the jury's judge of his credibility, and it is unlikely further re-cross-examination would have resulted in different testimony than that elicited on cross and redirect examination. This Court can only speculate whether a re-cross examination would have helped Applicant. See Skeen, 325 S.C. 210. Applicant has failed to meet his burden of proving that Counsel's performance was deficient and that he was prejudiced by his performance. Accordingly, this allegation must be dismissed.

Ineffective Assistance of Counsel – Hearsay Testimony

Applicant alleged Counsel was ineffective for failing to object to hearsay testimony as to the search of the vehicle. He alleged this was highlighted by the fact that there was no hand to hand video of the sale and Tumblin had ample opportunity to hide a 0.8 gram pebble of crack on his person as he was not strip searched.

Applicant has failed to point out specifically which testimony amounted to objectionable hearsay. The record reflects Sergeant Lubben testified he searched Tumblin right before the buy, searching through his pockets, waistband, clothes, shoes, socks, groin area, shirt, and all parts of

Tumblin's body. See Tr. p. 73, ll. 6-24. Sergeant Lubben testified in general the CI's vehicle is provided by the officers and searched before a buy. Tr. p. 77. He further testified Officer Harrleson was the case agent and searched Tumblin after the buy was made. Tr. p. 78. Sergeant Lubben testified on cross-examination his office does not do strip searches, but all parts of the CI are searched and the office cannot perform a body cavity search. Tr. p. 79.

Regarding the vehicle, Sergeant Lubben testified he did not personally search the vehicle and could not testify as to who did search the vehicle without looking at the case report. Tr. pp. 83-84. He later testified Officer Tanya Ervin searched the vehicle prior to the buy. Tr. p. 85.

Tumblin testified he was searched before the buy by Officer Harrleson. Tr. p. 98; 111-112. Officer Tanya Ervin testified her responsibility in the case was to search the vehicle before and after the drug buy. Tr. pp. 127-130.

After reviewing the record, this Court cannot find objectionable hearsay testimony regarding the search of the vehicle or Tumblin that would change the outcome of Applicant's case. This Court finds Counsel's actions were not deficient in this regard. This Court further finds Applicant has failed to prove that he was prejudiced by Counsel's actions as he has failed to show Counsel should have objected to testimony and the objection would have changed the outcome of the case. As Applicant has failed to meet his burden, this allegation must be dismissed.

Ineffective Assistance of Counsel – Failure to cross-examine the CI as to his history in the judicial system

Applicant alleged Counsel was ineffective for failing to cross-examine Tumblin concerning his history in the judicial system. He alleged this testimony would highlight Tumblin's knowledge to make pleas and deals with the State.

On direct examination, the assistant solicitor went through Tumblin's criminal history

which included obtaining prescription drugs by fraud in 2014 for which he received jail time; seven counts of drug distribution in 2004; four counts of drug distribution in 2004 for which he received jail time; grand larceny in 2005, 2007, and 2009 for which he received jail time; shoplifting in 2012 and 2013; and traffic offenses in 2013. Tr. pp. 86-89. Tumblin also admitted he used crack for several years. Tr. p. 89. He admitted to meeting with Drug Enforcement officers to work as a confidential informant and work off his traffic charges. Tr. p. 90. He testified he knew someone from whom he could buy crack cocaine. Tr. p. 93.

During Counsel's cross-examination of Tumblin, he elicited testimony reaffirming Applicant's lengthy criminal history he explained on direct examination. Tr. p. 109. He elicited testimony that Tumblin was hoping the officers would help him with his criminal charges if he worked as a CI. Tr. p. 110. Counsel testified at the PCR hearing that he went through all of Tumblin's crimes that he is allowed to use for impeachment.

This Court finds Applicant has failed to meet his burden of proving Counsel's actions were ineffective in this regard. This Court finds Tumblin's lengthy criminal history was well-established to the jury. This Court finds Applicant has failed to show how additional impeachment would have changed the outcome of Applicant's case. The Supreme Court has held "[t]he exclusion of impeaching evidence is not prejudicial where it has no meaningful impact on a witness's credibility." State v. Gunn, 313 S.C. 124, 137, 437 S.E.2d 75, 82 (1993). This Court finds Tumblin's credibility was thoroughly impeached with his lengthy criminal history and admission to being a drug addict. This Court finds any additional questions by Counsel about Tumblin's criminal history would have been cumulative and would not have impeached his credibility any further. Furthermore, this Court finds Counsel's cross-examination was not deficient and this Court will not speculate whether a "better" cross-examination would have

helped Applicant. See Skeen v. State, 325 S.C. 210, 216-17, 481 S.E.2d 129, 133 (1997). As Applicant has failed to meet his burden of proving Counsel was ineffective in this regard, this allegation must be dismissed.

Ineffective Assistance of Counsel – Failure to argue Applicant's sentence amounted to cruel and unusual punishment

Applicant alleged Counsel was ineffective for failing to argue Applicant's sentence of life without the possibility of parole (LWOP) amounted to cruel and unusual punishment in violation of the 8th Amendment of the United States Constitution. At the PCR hearing, Counsel testified he explained to Applicant the trial judge would have no discretion on sentencing if he was found guilty because the State served notice of LWOP.

This Court finds Applicant has failed to meet his burden of proving Counsel was ineffective. This Court finds the decision to seek a LWOP sentence lies in the discretion of the Solicitor and not with the conduct of trial counsel. The lower court record and the testimony at the PCR hearing indicate LWOP notice was served in an effort to get Applicant to enter a guilty plea. Nevertheless, the trial court addressed the constitutionality of the LWOP sentence at the time of sentencing. Counsel argued against a LWOP sentence, making the exact argument Applicant now alleges Counsel should have made, arguing in part,

> I would respectfully request under, for the record, under the Eighth Amendment for cruel and unusual punishment, I would request Your Honor to consider the possibility that the statute that has been presented, 17-25-45 which says that a person must be sentenced to a term of life in prison without the possibility of parole be deemed subject to unconstitutionality under the U.S. Constitution Eighth Amendment.

Tr. p. 306. Counsel continued his argument and introduced case law, stressing that a sentence of LWOP would be akin to a death sentence and is cruel and unusual considering Applicant's charge would usually carry a sentence of ten to thirty years. Tr. p. 307. This Court finds Counsel's actions were not deficient because he made a lengthy argument that the sentence

constituted an 8th Amendment violation. Furthermore, this Court finds Applicant has failed to show the outcome would have been different had Counsel employed a different argument, as the State was legally allowed to seek the LWOP sentence. Accordingly, this allegation must be dismissed.

Ineffective Assistance of Counsel and Judicial Misconduct – Judicial Bias

Applicant alleged Counsel was ineffective for failing to argue judicial bias when all objections to expose an obvious plot to try Applicant based on prior bad acts and a falsely dated video were brushed aside by the trial judge. Applicant also alleged judicial misconduct due to the trial judge's failure to enforce constitutional and statutory law and failure to grant a mistrial based on prior bad act evidence.

This Court finds Applicant has failed to meet his burden of proving Counsel was ineffective. This Court finds Counsel properly made a mistrial motion based on prior bad act evidence, preserving the issue which was ultimately upheld by the Court of Appeals. As this issue was reviewed by the appellate court and upheld, it is clear there was no judicial bias and no reason for Counsel to object further. This Court finds Applicant has failed to meet his burden of showing actual judicial misconduct that would require Counsel to object and warrant a new trial. This Court further finds the issue of the wrongly dated video was addressed by Counsel and the trial court. As Applicant has failed to meet his burden of proving judicial misconduct or that Counsel was ineffective for failing to argue judicial bias, these allegations must be dismissed.

Ineffective Assistance of Appellate Counsel

Applicant alleged his appellate counsel, Appellate Defender John Strom ("Appellate Counsel"), was ineffective for failing to address meritorious issues on appeal including the State's use of leading questions and the suppression issue dealing with the incorrect time stamp

on the CI buy video. He also alleged Appellate Counsel should have raised the issues that the actual hand to hand transaction was not shown on video, Tumblin bumped into two people on the way to conduct the buy, and the white hand shown in the video was not that of Applicant.

At the PCR hearing, Appellate Counsel testified he was appointed as appellate counsel after the trial and received the full defense file. He testified he spoke with Applicant prior to writing his brief. He testified he reviewed the record to spot potential appellate issues. He testified he chose four issues: the prior bad acts brought out by the State, the admission of Applicant's mug shot, the jurors premature deliberation, and cumulative error. Appellate Counsel testified his appeal was unsuccessful as the Court of Appeals found no abuse of discretion. He further testified he did not recall any potential issues that were preserved, and would have no reason not to raise a meritorious issue.

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990), citing Jones v. Barnes, 463 U.S. 745 (1983). Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not deficient

performance. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985). "To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal." United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct. at 764).

This Court finds Applicant has failed to meet his burden of proving Appellate Counsel was ineffective. The potential early deliberation issue by the jury does give this Court pause, but it was properly addressed by Appellate Counsel and the trial court and ruled upon by the Court of Appeals. This Court finds Appellate Counsel is an experienced appellate attorney who described his usual practice of spotting potentially meritorious issues to raise on appeal. This Court finds Applicant has failed to prove the issues of leading questions, the buy video, and the white hand would have been meritorious on appeal. As Applicant has failed to meet his burden of proving Appellate Counsel was deficient, or that he was prejudiced as a result of Appellate Counsel's actions, this allegation must be dismissed.

IV. CONCLUSION

Based on the foregoing facts, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Applicant failed to demonstrate that Counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate

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

IT IS THEREFORE ORDERED THAT:

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

2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 20th day of April, 2018.

J. MARK HAYES, II
Presiding Judge
Sixteenth Judicial Circuit

York, South Carolina

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