THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Case No.: 2015-CP-32-02236

Benjamin J. Newman, 352829,.....Petitioner,

vs.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Benjamin J. Newman, Petitioner, appeals the Order of Dismissal issued by the Honorable J. Cordell Maddox, Jr. on March 30, 2018, which was filed on April 6, 2018. Petitioner also appeals the Order Denying Applicant Benjamin Newman's Motion to Reconsider issued by the Honorable J. Cordell Maddox, Jr. on May 17, 2018, which was filed on May 21, 2018. Undersigned counsel received a copy of the Order on May 25, 2018.

Respectfully submitted,

Tricia A. Blanchette
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June 20, 2018

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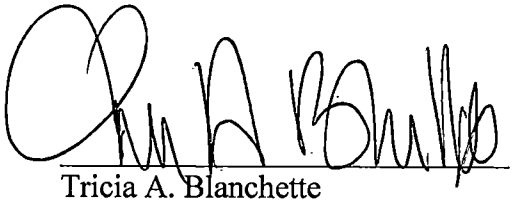
CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney at Law, hereby certify that I hand delivered this 20th day of June 2018 a Notice of Appeal Kelly Oppenheimer, of the Attorney General's Office, at:

Office of the Attorney General
Att: Kelly Oppenheimer, Assistant Attorney General
1000 Assembly Street, 5th Floor
Columbia, SC 29201



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June 20 2018

ORIGINAL

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Benjamin J. Newman, # 352829, Applicant, v. State of South Carolina, Respondent.	)	C.A. No. 2015-CP-32-02236 **ORDER OF DISMISSAL**

FILED
2018 APR -6 AM 11:03
LISA H. COMER
CLERK OF COURT
LEXINGTON SC

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Benjamin Newman (Applicant) on July 22, 2016. The Court convened for an evidentiary hearing into the matter on Friday, December 15, 2017, at the Lexington County Courthouse in Lexington, South Carolina. Applicant was present at the hearing and represented by retained counsel Tricia A. Blanchette, Esquire. Assistant Attorney General Caroline Scrantom appeared on behalf of Respondent.

I. PROCEDURAL HISTORY

A. The Underlying Prosecution

Applicant Benjamin Newman is presently in the custody of the South Carolina Department of Corrections and confined at the Lieber Correctional Institution. The Lexington County Grand Jury indicted Applicant during its August 2011 term for Trafficking Marijuana (10 pounds or more, but less than 100 pounds) and Trafficking Cocaine (400 grams or more) (2011-GS-32-02259, -02261).

Robert T. Williams, Esquire, represented Applicant, who proceeded to trial on October 15, 2012, before the Honorable Alexander S. Macaulay. Rick Hubbard, now Eleventh Circuit

Solicitor, prosecuted the case on behalf of the State. Trial proceeded after a full suppression hearing.

The basic facts of the case as presented at trial established that on June 5, 2011, the Lexington County Multi-Agency Narcotics Enforcement Team (NET) arranged a drug exchange with Applicant, a suspected drug dealer. A confidential informant established arrangements for the exchange, which was conducted between an undercover NET agent and Applicant, who provided twenty-seven ounces of cocaine in exchange for fifty pounds of marijuana. Immediately following the exchange, a SWAT team used a flash-bang and entered. The CI and the undercover agent got down on the floor, and Applicant ran out the back door and was soon thereafter apprehended on the property. After the flash-bang, agents located the cocaine from the exchange in an open bookbag on the floor at the location of the exchange.

The jury found Applicant guilty of both charges. Judge Macaulay sentenced Applicant to imprisonment for ten years for Trafficking Marijuana and 25 years for Trafficking Cocaine. He issued the sentences to be served concurrently with credit for 38 days' time served.

Counsel Williams timely filed notice of appeal Applicant's behalf. In addition to Counsel Williams, Benjamin A. Stitley, Esquire, represented Applicant on appeal, filing a brief which raised the following issues:

I. Did the trial court err when it denied the Appellant's motion to suppress the drug evidence obtained as a result of an unlawful search?

II. Did the trial court err when it failed to grant the Appellant's motions for directed verdict?

By and through the Attorney General's Office, the State made its brief in response, arguing against both issues on the merits, and additionally arguing the second issue raised was not preserved for appellate review.

The South Carolina Court of Appeals affirmed Applicant's convictions without oral argument. *State v. Newman*, 2014-UP-034 (S.C. Ct. App. filed Jan. 29, 2014). At that point Applicant and Counsel Williams consented to the substitution of Tara Dawn Shurling, Esquire, as counsel, and she petitioned the Court of Appeals for Rehearing on Applicant's behalf. The State made a Return, and the Court of Appeals denied the Petition.

Counsel Shurling then petitioned the South Carolina Supreme Court for a writ of certiorari on both issues. The State made a Return. Certiorari was denied on November 11, 2014. *State v. Newman*, 2014-001449 (S.C. Sup. Ct. cert. denied November 7, 2014). The Court of Appeals issued the Remittitur on November 18, 2014.

B. The Instant PCR Action

Applicant presented the following initial claims for PCR, supporting each claim with additional facts in his application and supporting memorandum:

1. Ineffective Assistance of Counsel
    a. Trial counsel failed to move to dismiss his indictment upon the basis that it was not true-billed;
    b. Trial counsel failed to pursue all available defenses related to alleged misconduct on the part of the prosecuting agencies;

2. Outrageous Government and Prosecutorial Misconduct
    a. "Outrageous government conduct and prosecutorial misconduct" stemming from the Court's decision to instruct the jury on the defense of entrapment;
    b. Applicant was actually innocent of the crimes convicted because he did not have possession of the drugs.

3. Lack of True Billed Grand Jury Indictment

The State made a Return to this application on or about October 13, 2017.

Applicant secured Tricia A. Blanchette, Esquire, as counsel. Upon motion by Counsel Blanchette, limited discovery was ordered by the Honorable Edward W. Miller on September 7, 2016, to include: (1) a copy of the SLED file; (2) a list of items produced to trial counsel by the

Solicitor's Office pursuant to Rule 5, SCRCrimPro; (3) an opportunity for counsel Blanchette and any private investigators or potential experts to review the evidence maintained by SLED in the underlying criminal action; and (4) a copy of the trial exhibits maintained by the Lexington County Clerk.

In accord with Rule 71.1, SCRCP, Counsel Blanchette served an amended application on November 13, 2017. The application including the following claims which were pursued at the evidentiary hearing before the undersigned:

1. Trial counsel rendered ineffective assistance for failing to move to suppress and/or object to the drug evidence due to change in appearance. Trial counsel rendered further ineffective assistance when he agreed to the destruction of the evidence post trial. Transcript p. 436.

2. Trial counsel rendered ineffective assistance in the handling of the entrapment defense.

3. Trial counsel rendered ineffective assistance for failing to require the State to identify the specific portion of the trafficking statute on which the trial was proceeding and failing to attack the conspiracy portion of the statute.

4. Trial counsel rendered ineffective assistance for failing to investigate and utilize necessary witnesses for the defense and for failing to further cross-examine state witnesses during pre-trial and trial, which resulted in the denial of pre-trial motions and a guilty verdict.

5. Alternatively, newly discovered evidence if witnesses and testimony was not discoverable at the time of trial.

6. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the evidentiary hearing, this Court had before it the *pro se* and amended PCR applications and the State's Return, which included as attachments the Lexington County Clerk of Court records pertaining to Applicant's indictments and sentencing, Applicant's South Carolina Department of Corrections records, the transcript of Applicant's trial and sentencing,

and Applicant's appellate records including the briefs considered by the Court of Appeals.

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 records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court denies the application and, in doing so, makes the following findings based upon all of the probative evidence presented.

A. Standard of Review

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case." *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984) (seminal case developing the ineffective assistance of counsel standard)). In regards to the first prong, "[t]he proper measure of attorney performance remains reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. at 688, 104 S.Ct. at 2065. The second prong requires a showing that counsel's deficient performance 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 v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

At all times during the proceeding, the Applicant maintains the burden of establishing that he is entitled to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Moreover, the proceeding is coupled with "a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in

the case." *Morris v. State*, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011).

Therefore, Applicant must demonstrate 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.'" *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 441(1985) (quoting *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064). A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069.

B. The Merits of the Allegations

This Court thus proceeds with its consideration of claims one through five in the amended application and finds all other claims have been waived and abandoned as they were not addressed at the evidentiary hearing. S.C. Code Ann. § 17-27-90. When the evidentiary hearing convened, Counsel Blanchette clarified that the claims going forward at the hearing would be those pursued within the amended PCR application. No motions were made to amend that pleading to conform with the testimony and evidence presented, nor did the testimony presented establish a basis for additional allegations not raised in the amended application.

At the evidentiary hearing, Applicant called as witnesses on his behalf (1) confidential

informant Joshua Ainsworth, (2) private investigator Pete Skidmore, and (3) his trial counsel Robert (Theo) Williams, Esquire. Applicant then testified on his own behalf.

As a matter of general impression, this Court finds trial counsel, who has been practicing criminal law in Lexington for 41 years, to have provided credible and persuasive testimony on all matters. Trial counsel established that knew Applicant because he had previously represented him on other charges, though Applicant had no prior convictions. The State later established that his earlier representation pertained to prior drug charges, which Applicant denied from the witness stand.

This Court finds not credible Applicant's testimony and assertions. This Court additionally finds Ainsworth's testimony and assertions not credible. This Court additionally finds private investigator Skidmore did not offer any material testimony in furtherance of the claims pursued at the hearing, as he had no personal knowledge of the investigation pertaining to the buy/bust for which Applicant was tried and convicted. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Also as a matter of first impression, this Court finds applicable the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in his representation of Applicant at all stages of Applicant's trial. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland, supra*). "[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis in original). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they

were made. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Any post-conviction relief court must be wary of second-guessing trial counsel's tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Proceeding on claims one through five raised in the amended application, this Court finds each without merit:

1. Trial Counsel's Alleged Failure to Move to Suppress and/or Object to Drug Evidence Due to Change in Appearance

Applicant's first PCR allegation claims that trial counsel rendered ineffective assistance for failing to move to suppress and/or object to the drug evidence due to change in appearance. As the basis for his change of appearance claim, Applicant testified at the evidentiary hearing that the drugs the State presented at trial appeared in a solid piece, but that the drugs photographed at the scene were in clumped and/or powdered form. Applicant also testified that he asked his trial counsel if he could hire a drug analyst to independently test the drugs, which did not occur.

This Court notes that claim four from the amended application overlaps with this first allegation. Claim four alleges in part that trial counsel's cross-examination of the State's witnesses during pre-trial motions was deficient. To this end, this Court intends its findings in this portion of its Order to encompass all ineffective assistance allegations raised within the amended application and pertaining to the pre-trial motions argued in this case.

The record demonstrates that trial counsel indeed conducted a full suppression hearing challenging the admission of the drugs under the Fourth Amendment. (Trial Tr. Volume I, pp. 1-141). Trial counsel also pursued the outcome of the suppression motion on appeal. *State v. Newman*, 2014-UP-034 (S.C. Ct. App. filed Jan. 29, 2014). At PCR, trial counsel ultimately testified that the cocaine was located in an open bookbag. His bases for suppression, however, fell among the acts of law enforcement who testified at the suppression hearing. At PCR, trial counsel testified that when he made the motion he had no additional witnesses to call other than the agents involved. There were no other fact witnesses who could further this basis. Likewise, trial counsel testified that it was not a good idea to put Applicant on the stand in furtherance of suppression.

Trial counsel instead conducted a suppression hearing in which he elicited testimony from officers in an attempt to establish that (1) law enforcement searched for and seized the cocaine prior to a search warrant's appearance on the premises, and (2) that the cocaine was not discovered in plain view as alleged by the agents. Trial counsel elicited testimony from the agents in an attempt to establish that agents acted without a warrant when they were looking for the cocaine, which was not left in the same place they saw it prior to the flash-bang. (Trial Tr., pp. 1-50, 79-140). At trial, agents established the chain of custody for the drugs used in the buy/bust. (Trial Tr. pp. 257-64, 304-10). This Court notes that, in addition to questioning the NET agents during the suppression hearing, trial counsel duly cross-examined the State's chain of custody witness Candy Kyzer in line with the strategic decisions discussed at a later point in this Court's Order. (Trial Tr. pp. 310-15). While trial counsel challenged the whereabouts of the drugs throughout trial, neither the record nor Applicant's presentation at PCR establishes that the appearance of the cocaine changed as Applicant has alleged. (*See* Trial Tr. pp. 94-100). The

record does not otherwise corroborate any change in appearance of the drug evidence. (*See* Trial Tr. pp. 250-53).

Based upon the foregoing, this Court finds that trial counsel exercised reasonable professional judgment in moving to suppress the drug evidence based upon the timing of the search warrant in relation to the location of the drugs seized, and in foregoing the hiring of an independent drug analyst to test them. *Ard v. Catoe*, 372 S.C. at 331, 642 S.E.2d at 596; *Lounds v. State,* 380 S.C. at 462, 670 S.E.2d at 650. Trial counsel did not deliver deficient performance as it was objectively reasonable to challenge the admission of the drug evidence in the manner represented at trial. *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052. The fact that trial counsel was unsuccessful does not render his performance deficient. *Bell v. Evatt*, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel); *see Edwards v. State*, 392 S.C. 449, 457, 710 S.E.2d 60, 64 (2011) ("we must be wary of second-guessing trial counsel's tactics").

Additionally, this Court finds that trial counsel's performance in regards to the introduction of the drug evidence did not prejudice Petitioner. Trial counsel's own PCR testimony wholly established that the cocaine introduced at trial was in fact located in plain view, in an open bookbag on the floor at the place where the exchange occurred. The trial record corroborates the plain view discovery of the cocaine in the bookbag. And, at both the suppression hearing and at trial, the agents identified that State's Exhibits 5, 6 and 7 were the drugs exchanged during the buy/bust and seized from the residence. While trial counsel cross-examined State's witnesses regarding the chain of custody, nothing in the record established a change in appearances. As an additional consideration, Applicant has presented no credible evidence to support any theory that he lacked the intent required by S.C. Code Ann. § 44-53-370,

such that he could prevail on any claim that he reasonably mistook the 50 pounds of marijuana and 28 ounces of cocaine subject to the exchange for some other, legal, substance. *See State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998) (mistake of fact will preclude a conviction when it negates the existence of the mental element of the offense) ("a trial court is not required to give an instruction on mistake of fact unless and until the defendant introduces some evidence, direct or circumstantial, of a reasonable basis for having made the mistake"). Therefore, there is no reasonable probability of a different result had trial counsel premised his suppression motion upon a change of appearance, or objected to the introduction of the drugs on that basis. *Cherry v. State*, 300 S.C. at 117-18, 386 S.E.2d at 625 (citing *Strickland*). Despite Applicant's assertions to the contrary, sufficient evidence existed for the State submit the drug evidence against Applicant.

Citing trial transcript page 436, Applicant further alleges in his application that trial counsel rendered ineffective assistance when he agreed to the destruction of the evidence post trial. Trial counsel testified that such destruction was a general practice. Trial counsel testified that the physical drugs were not crucial in the presentation of the case. This Court finds no basis in the record upon which Applicant can prevail upon this claim under the *Strickland* standard. This Court finds it is of no consequence to Applicant's defense that trial counsel consented to the destruction of the physical evidence after the completion of his trial. As trial counsel's testimony established, it is not practicable for the Clerk of Court to maintain the physical drug evidence entered as an exhibit at trial. Moreover, no prejudice flows from the post-trial destruction of the physical drug evidence in this case. The record is not devoid of the type, appearance, and amount of drugs lending to Applicant's conviction. Photographs of that evidence were maintained as part of the trial record, as was the SLED analyst's report denoting its chemical makeup. These

considerations were made part of the record wherein trial counsel consented to the drug's destruction.

For the foregoing reasons, Applicant's request for relief by way of this allegation is **DENIED.**

2. Trial Counsel's Alleged Deficient Performance in Pre-Trial Investigation and in his Presentation of a Defense at Trial

This Court addresses claims two and four from the amended application in tandem as they pertain to the extent of the defense prepared and put forth by trial counsel. In claim two, Applicant alleges deficient performance in the presentation of an entrapment defense. In claim four, Applicant alleges trial counsel failed to investigate and utilize necessary witnesses for the defense and to cross-examine the State's witnesses in a manner deserving of an acquittal. As this Court has already addressed claims pertaining specifically to the pre-trial motions, this Court now turns to counsel's performance at trial.

Testimony Taken at the PCR Hearing

In furtherance of these allegations, Applicant testified that he retained trial counsel because he was the only lawyer Applicant had ever known. Applicant testified he felt that trial counsel did not adequately prepare for trial and that he believed he could have assisted trial counsel with his preparations. Applicant also testified that trial counsel did not discuss the trafficking statute with him. Applicant testified that he recalled discussing with trial counsel whether the confidential informant (CI) Joshua Ainsworth was a potential witness. Applicant testified he wanted trial counsel to locate Ainsworth as well as everyone else who might help with his case. As for the buy/bust itself, Applicant testified that there was no physical exchange of drugs at the scene.

Applicant presented the CI, Joshua Ainsworth, as a witness at PCR. Ainsworth did not testify at trial. At PCR, Ainsworth testified that when Lexington agents approached him about acting as a CI, Ainsworth responded that he did not want to work with them. Ainsworth testified that the next day two agents met him and said they would charge him with trafficking and conspiracy if he did not act as a CI. According to Ainsworth, his contact with agents began a few weeks prior to the buy/bust with Applicant. Ainsworth said he was tasked by agents with initiating communication with Applicant and arranging a swap wherein Agent Carver would ride along with Ainsworth to Applicant's location and exchange 50 pounds of marijuana for cocaine. Ainsworth testified that the agents changed the date of the agreed upon exchange and then, days or weeks after it concluded, paid him $1000 to leave South Carolina and go to Georgia. As for the exchange of drugs, Ainsworth testified at PCR that he did not witness it, but he also testified that the cocaine never came out of the bookbag he brought to the deal.

Ainsworth further testified that he was in the custody of the Department of Corrections at the time of Applicant's trial. He stated he was brought to the Solicitor's office during the course of the trial. He stated he would have been willing to testify for the defense but Applicant's counsel never contacted him. Ainsworth also established during his testimony that he had known Applicant and Applicant's family for some time prior to the buy/bust. Ainsworth also had a number of prior fraud charges in other jurisdictions and was in and out of custody before, during and after Applicant's trial.

Applicant next called as a witness at PCR private investigator Pete Skidmore, who testified that Applicant retained him to assist in preparation for this evidentiary hearing. Skidmore testified he met with Ainsworth three times prior to the hearing. Skidmore also

testified he had no role in the investigation leading to Applicant's trial and conviction. He was not retained for assistance pre-trial.

Contradicting Applicant, trial counsel's own PCR testimony established that he investigated the facts of Applicant's case and strategized accordingly in preparation for his client's defense. Trial counsel established that he consulted with Applicant about the facts of his case. Trial counsel also established a familiarity with Applicant, having previously represented him on prior drug charges, and testifying that he knew Applicant's friends. Trial counsel testified that Applicant did not want to plead guilty. Trial counsel stated that he read the investigative reports and discovery provided as part of this case and discussed it with his client.

Through trial counsel, Applicant introduced as its Exhibit 6 an incident report by Detective Ellis, who did not testify at trial. Applicant also introduced as his Exhibit 5 trial counsel's witness list furnished at the start of trial. It lists Applicant, Spencer Sexton, and Lexington bail bondsman David Crawford, Jr. as potential trial witnesses, but they did not testify at trial. Trial Counsel testified that Applicant could not provide information on any potential witnesses who could have aided in his defense at trial. Counsel testified that nobody that he spoke with in investigation and preparation for trial would have been beneficial to Applicant's defense.

Addressing Ainsworth, trial counsel testified he was aware that Ainsworth and Applicant had a friendship. He spoke with Applicant about Ainsworth, but testified he did not speak with Ainsworth directly because, despite a friendship with Applicant, Ainsworth acted as the CI who established the buy/bust. In trial counsel's view, Ainsworth could not provide any exculpatory information because he set the course of inculpatory events in motion. Trial counsel also testified that while he was unaware that Ainsworth was incarcerated at the time of trial, Ainsworth was

not testify against Applicant. He did not recall whether the Solicitor's Office wanted Merritt to testify against Newman. Through trial counsel, Applicant introduced as his Exhibits 1 and 2 conflict waivers executed by both Merritt and Applicant. They were executed months apart and before Applicant's trial. Applicant introduced as his Exhibit 3 an email to trial counsel from the Solicitor's Office indicating he would call Applicant or Merritt to trial during one particular term of court and stating the prosecution was interested in seeing if Merritt would cooperate against Applicant. Over Respondent's objection, Applicant also introduced an affidavit of Dana Merritt as his Exhibit 4. The affidavit acknowledged that trial counsel represented Applicant and Merritt but does not otherwise establish the existence of an actual conflict and in fact states that Merritt did not believe any conflict existed. Merritt did not testify either at PCR or at trial.

At Trial

Aside from cross-examination of the State's witnesses and the pre-trial motions already addressed by this Court, Applicant presented no witnesses or entered any exhibits as evidence at trial. During his closing argument, trial counsel belittled the State's case and asked the jury consider reasonable doubt, entrapment, and mere presence. He argued for the jury to infer from the evidence presented that law enforcement lured Applicant into the deal because (1) law enforcement failed to have a working video recording of the crime, (2) the State failed to call the CI to testify at trial even though he was the person who established the drug deal, (3) no testimony established which law enforcement officer searched the CI's car for reliability during the buy/bust, (4) the State did not introduce the bookbag testified to as containing the drugs so that the jury could see if the drugs seized could in fact fit inside the bookbag for transport, nor (5) did they establish the weight of the marijuana before the buy/bust, and (6) the State did not call all of the officers and agents present at the house where the buy/bust occurred. (Tr. pp. 404-

14). Trial counsel drew out a basis for each of these points in his cross-examination of the State's witnesses in front of the jury.

The *Strickland* Standard Applied

This Court finds that Applicant has not met his burden of demonstrating either deficient performance or prejudice in regards to trial counsel's preparation for and performance during trial. Trial counsel credibly testified to making a series of valid strategic decisions. *Lounds v. State*, 380 S.C. at 462, 670 S.E.2d at 650 ("when counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel"). As previously stated, any post-conviction relief court must be wary of second-guessing trial counsel's tactics. *Whitehead v. State*, 308 S.C. at 122, 417 S.E.2d at 531. Only when they are objectively unreasonably do they warrant a finding of deficient performance. *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065; *Smith v. State*, 386 S.C. at 567, 689 S.E.2d at 632.

This Court finds Applicant failed to meet his burden proving trial counsel was ineffective for failing to interview and investigate potential defense witnesses. This Court finds that trial counsel conducted an appropriate investigation into the facts of his client's case. "A criminal defense attorney has a duty to perform a reasonable investigation." *Lounds v. State*, 380 S.C. at 460, 670 S.E.2d at 649. "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. at 331, 642 S.E.2d at 597. Counsel's testimony credibly established that his client was forthcoming with what had occurred and that no one whom he spoke had exculpatory information to aid in his client's defense. The State's case demonstrates that Applicant was caught in a buy/bust scenario in which it would be Applicant's word against law enforcement,

who recorded audio evidence of the exchange. Applicant did not provide his trial counsel with leads as to any viable defense witnesses. Nor, as established above, was there another valid basis upon which to challenge the State's evidence other than through the motions litigated by trial counsel.

This Court further finds that trial counsel reasonably decided to forego interviewing Ainsworth and calling him as a witness because Ainsworth was the CI who set his client up. When valid, counsel's choice of tactics will not be deemed ineffective assistance. *Whitehead v. State,* 308 S.C. 1 19, 417 S.E.2d 530 (1992); *see also Dempsey v. State*, 363 S.C. 365. 610 S.E.2d 812 (2005); *McLaughlin v. State*, 352 S.C. 476, 575 S.E.2d 841 (2003). Trial counsel credibly testified that he hoped to force the State to call Ainsworth so that he could cross-examine him. As trial counsel testified to, Ainsworth's role as a CI in this case, and the demonstrated difficulty in locating him, makes him an unreliable and incredible witness for the defense. Ainsworth's presentation fails to persuade the Court that had he testified on Applicant's behalf at trial, that he could have offered exculpatory information.

This Court finds of note that Applicant provided no testimony from any additional witnesses. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at PCR. *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992). An applicant's mere speculation as to what a witness's testimony would have been cannot, by itself, satisfy his burden of showing prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993); *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995). An applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness's failure to testify at trial. *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998). Specifically as to one

Dana Merritt, this Court finds that Applicant has failed to meet his burden. Dana Merritt did not testify at PCR and thus, this Court is unable to conclusively establish who this person was and what he could have offered Applicant's defense.

As to trial counsel's alleged failure to and ineffective assistance in presenting an entrapment defense, this Court finds trial counsel did not render deficient performance. "[T]he entrapment defense consists of two elements: (1) government inducement, and (2) lack of predisposition" on the part of the defendant. *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). "One pleading entrapment has the burden of showing that he was induced, tricked or incited to commit a crime, which he would not otherwise have committed." *State v. Johnson*, 295 S.C. 215, 217, 367 S.E.2d 700, 701 (1988). Trial counsel succeeded in garnering his client the benefit of a jury instruction on this affirmative defense. (Trial Tr. p. 385). In this case, trial counsel was tasked with advocating to a Lexington County jury that local law enforcement did not act in good faith at all stages of the buy/bust. This Court finds that trial counsel challenged the State's presentation of evidence at all stages of the trial, cross-examining the State's witnesses in an attempt to poke holes not only in the veracity of their actions as government agents, but in the quality of the recovery and maintenance of the marijuana and cocaine seized pursuant to the buy/bust. (Trial Tr. pp. 202-20, 268-85, 298-303, 310-14, 329, 333-43, 352-57).

As to prejudice, this Court finds that Applicant has failed to demonstrate a "reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Ard v. Catoe*, 372 S.C. at 331, 642 S.E.2d at 596 (quoting *Strickland v. Washington*, 466 U.S. at 695, 104 S.Ct. 2052). The State clearly established at trial that Applicant was not only present at, but was willing to and did in fact orchestrate the exchange of a large amount of

hard to locate. Trial counsel did inquire with Ainsworth's bondsman and learned that the bondsman himself was in fact looking for him. Trial counsel also testified that by downplaying Ainsworth's involvement during trial, he might force the State to call Ainsworth as their own witness. Trial counsel testified that he considered Ainsworth unreliable.

On the subject of an entrapment defense, trial counsel established that he was familiar with the elements of that defense, but testified that he was not sure he could prove it given the evidence in this case. He did not discuss the defense of entrapment in his opening statement; however, trial counsel tried Applicants' case in a manner which garnered that jury instruction. Trial counsel testified that he recalled the jury asking for a reinstruction on entrapment during deliberations, indicating to him that he tried the case in a way in which the jury could have found the defense applied. Trial counsel also testified that his understanding of the facts of the case was that Applicant, not the agents, changed the date of the deal.

Regarding potential alternative defenses, trial counsel testified that it would not have assisted Applicant's defense to argue that the exchange of drugs did not occur. Trial counsel stated the jury would not buy that defense. He testified that, based upon his experience with Lexington County juries, it would not look favorable to present a defense premised upon a firm accusation of misconduct on the part of law enforcement. Trial counsel testified that he attempted throughout trial and at closing to cast doubt upon law enforcement's actions and, in closing, worked to elude to improper acts on the part of the agents involved in the buy/bust. Trial counsel testified he aimed to challenge the chain of custody and handling of the evidence.

Post-conviction counsel Blanchette inquired about a third party, Dana Merritt, with each Ainsworth and trial counsel. About Merritt, Ainsworth testified that he knew him through Applicant. Trial counsel testified that he previously represented Merritt and that Merritt would

marijuana for cocaine. Unbeknownst to Applicant at the time, he was managing the deal with law enforcement, albeit with the assistance of Joshua Ainsworth. Testimony produced throughout the course of the PCR hearing in this case fails to persuade the undersigned that had counsel called witnesses in Applicant's defense or chosen to pursue an alternative defensive strategy that a jury would have returned with a verdict of not guilty. Additionally, this Court finds that there is no reasonable likelihood that had Ainsworth testified on behalf of the defense that the outcome of the trial would have been different. As trial counsel indicated, Ainsworth set the incident in motion.

For all the foregoing reasons, Applicant's request for relief by way of this allegation is **DENIED.**

3. Trial Counsel's Alleged Failure to Identify the Portion of the Trafficking Statute the State Proceeded Upon in Prosecuting Applicant, and Alleged Failure to Attack the Conspiracy Portion of that Statute

In regards to this allegation, trial counsel credibly testified at PCR that the indictments in this case sufficiently gave notice of the crimes charged. Trial counsel recognized, as does this Court, that our trafficking statute contains "or" language, meaning that the State need only prove the alleged committed one of several actions. S.C. Code Ann. § 44-53-370; *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.").

Applicant was indicted for Trafficking Marijuana (10 pounds or more, but less than 100 pounds) and Trafficking Cocaine (400 grams or more) (2011-GS-32-02259, -02261). The indictments made part of this record by way of attachment to the State's Return reflect the exact language of the trafficking statutes with which Applicant was charged. S.C. Code Ann. §§ 44-53-370(e)(1)(a)(1) and (e)(2)(e). The prohibited actions are for the accused himself to knowingly

innocence." *McCoy v. State*, 401 S.C. 363, 371, 737 S.E.2d 623, 627 (2013); *Jamison v. State*, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014) (refusing to apply "traditional five-part test" for newly discovered evidence to PCR proceeding occurring after a guilty plea). That test is met when the applicant shows that the alleged newly discovered evidence "(1) would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching." *Clark v. State*, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993).

The totality of the evidence presented at Applicant's PCR hearing was discoverable and available to counsel at the time of trial. For the reasons discussed above, trial counsel made a valid strategic decision to forego calling Ainsworth as a witness. Moreover, this Court finds that no credible testimony presented at the evidentiary hearing was material to Applicant's guilt or innocence. Applicant was not prejudiced by the defense presented at trial given the nature of the buy/bust prosecution and the wealth of evidence against Applicant. As a result of the foregoing, Applicant's request for relief by way of this allegation is **DENIED.**

III. CONCLUSION

Upon consideration of the testimony presented at the evidentiary hearing, a review of the pertinent portions of the file made part of this record by way of attachment to the State's Return, and the applicable case law, the undersigned finds that Applicant has failed to meet his burden of establishing any constitutional deprivation which would warrant relief. Even if Applicant had put forth sufficient evidence that trial counsel's performance was in some way unreasonable under prevailing professional norms, which this Court finds he did not, Applicant has failed to present any evidence that would tend to establish that he was prejudiced by some act or omission of

sell, manufacture, cultivate, deliver, purchase, or bring into this State a substance defined by the statute. S.C. Code Ann. § 44-53-370(e). The statute also prohibit a person from providing financial assistance or otherwise aiding, abetting, attempting, or conspiring to do one of the aforementioned actions. *Id.* Finally, the statute prohibits one from knowingly being in, or attempting to be in, actual or constructive possession of the defined substances. *Id.*

Given counsel's testimony on this point and the wording of the trafficking statute, this Court finds no *Strickland* error or prejudice flowing from the failure to specifically identify the portion of the trafficking statute under which Applicant was prosecuted. Likewise, this Court finds no merit to the allegation that trial counsel failed to attack the conspiracy portion of the statute, as that portion is not dispositive of Applicant's guilt or innocence. The facts established at trial demonstrate that Applicant was either in, or attempted to be in, actual or constructive possession of both the cocaine and marijuana as a result of the buy/bust. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

4. Alternative claim of Newly Discovered Evidence

To the extent Applicant raises an alternative claim of newly discovered evidence, Applicant has not met his burden. The PCR Act allows an applicant to file an application for relief "[i]f the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence." S.C. Code Ann. § 17–27–45(C) (2014) (allowing applications to be filed within one year of the date of actual discovery of the facts or from the date when the facts "could have been ascertained by the exercise of reasonable diligence"); *see also* S.C. Code Ann. § 17–27–20(A)(4). In a PCR proceeding following a jury trial, "[t]he standard test governing newly discovered evidence is properly applied when relief is sought based on evidence discovered post-trial that is material to the accused's guilt or

counsel, or that had counsel not acted in the manner complained of, that there is a reasonable likelihood that the outcome of Applicant's trial would have differed.

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.

This Court additionally notes Applicant must file and serve a notice of appeal within 30 days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. 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.

AND IT IS SO ORDERED this 30 **day of** March **, 2018.**

J. CORDELL MADDOX, JR.
PRESIDING JUDGE

Anderson, South Carolina

FILED

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON 2018 MAY 21 AM 11:48 Civil Action No.: 2015-CP-32-02236

LISA M. COMER
CLERK OF COURT
LEXINGTON SC

Benjamin J. Newman,

Plaintiff,

vs.

State of South Carolina,

Defendants.

ORDER DENYING APPLICANT BENJAMIN NEWMAN'S MOTION TO RECONSIDER

This matter comes before the Court on Applicant Benjamin Newman's Motion to Reconsider pursuant to Rule 59(a) & (e), South Carolina Rules of Civil Procedure. This Motion for Reconsideration is hereby denied.

The Honorable J. Cordell Maddox, Jr.
South Carolina Circuit Court Judge

This 17th day of Mar 2018