

Rodney D. Davis

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Charleston, SC 29401

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E-Mail: Davis@LowcountryLawOffice.com

October 19, 2018

The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

OCT 23 2018

S.C. SUPREME COURT

RE: Elliott Judon v. State of South Carolina, Case No.: 2017-CP-10-5398

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post Conviction Relief (PCR) case. Also enclosed are the following:

- (1) Proof of service of the Notice of Appeal on the respondent;
- (2) The Order of Dismissal &
- (3) A Request for Representation on Appeal.

The Applicant-Appellant was represented by me as an indigent pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR cases. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support thereof are signed by me as attorney for Applicant-Appellant. If you need anything further, do not hesitate to contact me. Thank you for your time and attention to this matter.

Sincerely,

Rodney D. Davis

South Carolina Bar #: 12396

101 Meeting Street, 5th Floor

Charleston, SC 29401

(843) 882-5065

Davis@LowcountryLawOffice.com

CC: Megan Harrigan Jameson
Assistant Attorney General

Paula Murdoch
Appellate Division, SCCID

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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OCT 23 2018

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Deadra L. Jefferson, Circuit Court Judge

Case No.: 2017-CP-10-5398

Elliott Judon,

Appellant,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Elliott Judon appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable Deadra L. Jefferson on July 24-25, 2018. Applicant's attorney received a copy of the Order of Dismissal on or about October 12, 2018.

October 19, 2018



Rodney D. Davis

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Attorney for Appellant

Other Counsel of Record:

Megan Harrigan Jameson, Senior Assistant Deputy Attorney General

Office of the Attorney General, State of South Carolina

P.O. Box 11549

Columbia, SC 29211-1549

Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

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October 19, 2018



Rodney D. Davis
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Attorney for Appellant

Other Counsel of Record:
Megan Harrigan Jameson, Senior Assistant Deputy Attorney General
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P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

FILED
2018 OCT 19 PM 3:42
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

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OCT 23 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No.: 2017-CP-10-5398

FILED
2018 OCT 19 PM 3:42
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Elliott Judon,

Appellant,

v.

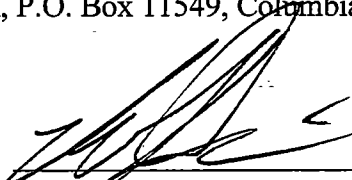
State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy of it to the address of record, Megan Harrigan Jameson, P.O. Box 11549, Columbia, South Carolina 29211-1549, on 10/19, 2018.

10/19, 2018



Rodney D. Davis
101 Meeting Street, 5th Floor
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(843) 882-5065
Davis@LowcountryLawOffice.com
Attorney for Appellant

Other Counsel of Record:
Megan Harrigan Jameson, Senior Assistant Deputy Attorney General
Office of the Attorney General, State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

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OCT 23 2018

S.C. SUPREME COURT

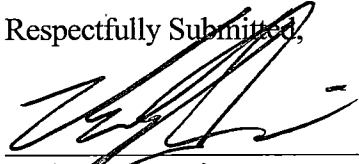
STATE OF SOUTH CAROLINA) IN THE SUPREME COURT OF SOUTH CAROLINA
)
 COUNTY OF CHARLESTON)
) Case No.: 2017-CP-10-5398
)
 ELLIOTT JUDON)
 Applicant.)
)
 -versus-) REQUEST FOR REPRESENTATION ON APPEAL
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;
2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;
3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;
4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;
5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting his appeal to the South Carolina Court of Appeals.

Respectfully Submitted,




Rodney D. Davis
 South Carolina Bar #: 12396

10/19, 2018
 Charleston, South Carolina.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

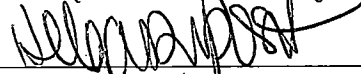
VERIFICATION

PERSONALLY appeared before me, Rodney D. Davis, being first duly sworn,
deposes and says that he has read the foregoing *Request for Representation on Appeal* on
behalf of Elliott Judon and the same is true of his knowledge except those matters alleged on
information and belief, and as to those matters, he believes them to be true.



Rodney D. Davis
South Carolina Bar #: 12396

SWORN to and subscribed to me
this 19th day of October, 2018.



Notary Public for South Carolina
My Commission expires 11/17/20

cc
AG
AS
BS
SOL

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Elliott Judon, SCDC #263761,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2017-CP-10-5398

ORDER OF DISMISSAL

FILED
2018 OCT -3 PM 12:32
CLERK OF COURT

Presiding Judge: Hon. Deadra L. Jefferson
Applicant's Attorney: Rodney Davis, Esquire
Respondent's Attorney: Megan H. Jameson, Esq.
Trial Counsel: Luke J. Malloy, III, Esq.
Melisa Gay, Esq.
Date of Hearing: July 24, 2018
July 25, 2018
Court Reporter: Joyce Rueger

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed on October 20, 2017 by Elliott Judon (Applicant). The Respondent made its Return on or about January 22, 2018. An evidentiary hearing into the matter was convened on July 24, 2018 and July 25, 2018 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Rodney D. Davis, Esquire. Megan H. Jameson, Esquire of the South Carolina Attorney General's Office was present on behalf of the State of South Carolina. Luke J. Malloy, III, Esq. and Melisa Gay, Esq. were also present at the hearing. Testimony was taken from the Applicant, his initial attorney, Luke J. Malloy, III, and his trial counsel Melisa Gay. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his burden of proof and denies the application with prejudice.

PROCEDURAL HISTORY

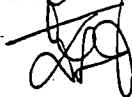
The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant was indicted at the December 2013 term of the Charleston Grand Jury for Trafficking in Cocaine Base, 10 grams or more but less than 28 grams – Third Offense.¹ The Applicant was originally represented by Luke J. Malloy, III, Esquire of the Charleston County Public Defender's Office, but later retained private counsel, Melisa Gay, Esquire, for trial.

The Applicant proceeded to jury trial before the Honorable Kristi L. Harrington on March 13, 2015, following the denial of Applicant's Motion to Dismiss² and Motion to Suppress the drug evidence located during the search and Applicant's subsequent statements to law enforcement. The Applicant was present at trial and represented by Melisa Gay, Esquire. Lauren Mulkey Frierson, Esquire and E. Culver Kidd, Esquire of the Ninth Circuit Solicitor's Office prosecuted the case on behalf of the State of South Carolina. The jury found the Applicant guilty of Trafficking of Cocaine Base on March 18, 2015. Judge Harrington sentenced the Applicant to imprisonment for life without possibility of parole pursuant to § 17-25-45.³

¹ Trafficking in Cocaine Base – Third Offense is a serious, violent felony punishable by a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars. S.C. CODE ANN. § 44-53-375(a)(1)(C) (2005).

² Defendant's Motion to Dismiss was based on a purported Brady v. Maryland (372 U.S. 83) (1963)) violation.

³ S.C. Code Ann. § 17-25-45 states that a "a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has (1) one or more prior convictions for a most serious offense, or a federal or out-of-state conviction that would be classified as most serious under this section; or (2) two or more prior convictions for a serious offense; or a federal or out-of-state conviction for an offense that would be classified a serious offense under this section." The Applicant had two "serious" convictions at the time of trial: a 1999 conviction for Distribution of Cocaine in the Proximity of a School and a 2005 conviction for Possession with Intent to Distribute Cocaine Base – Second Offense, and was thus eligible for a life without parole sentence. (Transcript of Trial: 186: 15-20, State v. Elliott Judon, March 16, 2015).

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The Applicant thereafter filed a timely Notice of Appeal. Attorney LaNelle Durant of the Office of Appellate Defense filed a brief on behalf of the Applicant, alleging that the trial court erred in denying the Motion to Dismiss based on the lack of video of the traffic stop. Applicant also alleged that the trial court erred in denying his Motion to Suppress his statement and the drug evidence. However, the South Carolina Court of Appeals affirmed the Applicant's conviction and sentence by unpublished opinion filed on July 26, 2017. The Court of Appeals concluded that the trial court properly denied the Applicant's Motion to Dismiss. The Court of Appeals also upheld the propriety of the trial court's denial of the Motion to Suppress, and further noted that this issue was not preserved for appellate review because counsel failed to object when the evidence was admitted during trial. State v. Elliott Judon, Jr., 2017-UP-308 (Ct. App. filed July 26, 2017). The Remittitur was issued on August 11, 2017.

SUMMARY OF FACTS AT TRIAL

Officer John Stott, Jr. of the North Charleston Police Department was on patrol in the Dorchester Waylyn Terrace neighborhood on August 13, 2013 when he observed a vehicle with extremely tinted windows. (Transcript of Trial: 69:18-25, State v. Elliott Judon, March 13, 2015). Officer Stott testified that he did not observe any validation stickers on the vehicle, which are required for any window that has after-market film. (Id. at 74: 5-14). Officer Stott also believed the vehicle was a rental base the following factors: (1) the car was a new model; (2) the car was clean; (3) the car was well-maintained; and (4) the car did not bear outward symbols of personal ownership (i.e. decals, stickers, plate border). (Id. at 75: 8-12). Officer Stott testified that it was unusual for a rental vehicle to have window tint (Id. at 75:13-18). He later explained, "the rental car . . . having window tint on it, that's an indicator in and of itself . . . of criminal activity (Id. at

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264: 9-10; 75: 13-18) as “[m]ajor rental companies do not put any window tint on their vehicles.” (Id. at 264: 15-16). Window tint “would be something done by the lessee.” (Id. at 386: 6-8).

Given these observations, Officer Stott’s partner, Officer Kirk, initiated blue lights to effect a traffic stop on the vehicle. (Id. at 75: 21-24). However, the operator of the vehicle, Elliott Judon, did not immediately pull over to the shoulder of the highway (Id. at 75:25 – 76:4). Officer Stott testified at trial that there was an opportunity for the Applicant to turn off the main road, but he proceeded past this turn, and then pulled over to the right shoulder. (Id. at 373: 25 – 374:5).

Officer Stott then approached the vehicle and requested that Mr. Judon roll down his window so he could ask for license, registration, and proof of insurance. Id. In response, Mr. Judon provided a rental agreement kept in the glove box of the car. (Id. at 257: 1-4). During this interaction, Officer Stott noticed that Mr. Judon’s zipper was down and that his belt was open and undone. (Id. at 76: 374).

Meanwhile, Officer Kirk was utilizing a tint meter to determine whether the tint of the vehicle was, in fact, unlawful. (Id. at 406: 1 -35). Officer Kirk confirmed that the window tint was only 18%, which is darker than the legal limit of 27%. (Id. at 410: 5-16). Upon this determination, Officer Stott asked Mr. Judon to exit the vehicle and he willingly complied with this request. (Id. at 77: 22-24). Mr. Judon appeared to be trying to conceal or cover up his pants as he stepped out of the vehicle. (Id. at 262: 25 – 263:4) When Officer Stott asked Mr. Judon about his unzipped pants, Mr. Judon said he had just used the bathroom. (Id. at 258: 6-9). At that point, Officer Stott asked Mr. Judon for consent to search the vehicle which Mr. Judon provided (Id. at 79:9 – 80:21). Officer Stott estimated that he asked Mr. Judon for consent a couple of minutes after the initial traffic stop. (Id. at 258: 10-15).

During the ensuing search of the vehicle, Officer Stott located a digital scale with a white powder-like substance that field-tested positive for cocaine. Officer Stott also found crumbs of crack cocaine and a field utility knife with cocaine residue on it. (Id. at 259: 25 – 260:7). The majority of this drug evidence was in the center console, but crumbs were also scattered in the coin tray and the driver's seat. Id. A knife covered in residue was also located in the coin tray. (Id. at 376: 17-18). Officer Stott noted that Mr. Judon did not seem overly concerned about the search of his vehicle, suggesting that Mr. Judon was far more concerned about what was hidden in his pants. (Id. at 263:5-11).

Upon locating this evidence in the vehicle, Officer Stott placed Mr. Judon under arrest and gave him his Miranda rights. (Id. at 379: 18 – 25). Mr. Judon indicated that he understood his rights and wished to speak with Officer Stott and answer additional questions. (Id. at 88: 16-18). Officer Stott then proceeded to ask Mr. Judon if there were drugs in his underwear (Id. at 261: 7-13). Although he initially denied possession of drugs, Mr. Judon ultimately admitted that he had drugs in his crotch area. (Id. at 380:16-381:16). Officer Stott then donned plastic gloves and removed a plastic bag containing approximately 10.1 grams of crack cocaine from the inside of the Applicant's boxer shorts (Id. at 381:22 – 382:1). Officer Stott estimated that the entire traffic stop, from the initiation of blue lights to arrest, took about ten minutes. (Id. at 397:5-7).

ALLEGATIONS

In his application for post-conviction relief, the Applicant alleges that he is being held in custody unlawfully based on the following allegations of ineffective assistance of trial counsel:

1. Counsel failed to investigate the facts of the case.
2. Counsel failed to challenge his prior convictions.

3. Counsel failed to contemporaneously object to the admission of the drug evidence and statements during trial.

Though he did not formally amend his application, Applicant informed this Court and Respondent that he intended to proceed on the additional grounds for relief at the evidentiary hearing:

4. Counsel failed to advise Applicant of the elements of the offense.
5. Counsel failed to timely secure the video of his traffic stop.
6. Counsel failed to properly advise the Applicant of the plea offers and whether to accept them.

Applicant was permitted to proceed on these six allegations at the evidentiary hearing. Additional evidence or testimony regarding other allegations was not presented by the Applicant and is, therefore, waived.

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 and arguments presented at the Post-Conviction Relief hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, closely pass upon his or her credibility, and weigh his or her testimony accordingly. The Court has detailed its relevant findings of facts and conclusions of law, as required by S.C. Code Ann. § 17-27-80 (1985), below.

The Applicant seeks relief from his conviction on the basis that he received ineffective assistance of counsel at his criminal trial in violation of the Sixth Amendment. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984). 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, 466 U.S. at 686, 104 S. Ct. at 2064; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court must apply a two-pronged test. Strickland, 466 U.S. 668, 104 S. Ct. at 2064. First, the applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690, 104 S. Ct. at 2064). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2064). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Once the Applicant has established deficient performance by counsel, he must then establish that counsel’s 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.” Id. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

After careful review of the entire record, including the testimony presented at the evidentiary hearing, and in consideration of the above standard, this Court finds that the Applicant

has failed to meet his burden of proof and, and has, thus failed to establish ineffective assistance of counsel. The Court will address each of the specific allegations made by the Applicant as follows.

I. Failure to Properly Investigate the Facts of the Case

The Applicant asserts that counsel was ineffective for failing to properly investigate the facts of his case. This Court finds this allegation is clearly refuted by the record as the record shows that trial counsel thoroughly investigated the case, including the facts surrounding the Applicant's initial detention and subsequent search of his vehicle. Counsel also made significant efforts to ascertain whether there was a police "dash cam" video of the traffic stop and to obtain this video, if possible. Applicant's initial attorney, Luke Malloy, credibly testified that he was unable to locate or obtain any video evidence of the incident and that he conveyed this information to the Applicant on or about May 2, 2014. Further, trial counsel, Melisa Gay, credibly testified that the Applicant was aware that there was no "dash cam" video of the traffic when she undertook representation of the case. This Court thus finds that counsel thoroughly investigated the facts and circumstances giving rise to these charges. Applicant has therefore failed to establish any deficiency of counsel.

Additionally, this Court finds that the Applicant has failed to establish any prejudice as a result of this purported deficiency. Indeed, the Applicant was unable to establish what, if any, additional investigation should have been performed as well as what benefit such investigation would have yielded. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported

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only by mere speculation as to the result.”). This allegation must therefore be denied and dismissed with prejudice.

II. Failure to Challenge Prior Convictions

Applicant further asserts that counsel was ineffective for failing to challenge the introduction of his criminal record during sentencing for enhancement purposes. At the time of trial, Applicant had a criminal record consisting of two prior “serious” convictions: (1) a 1999 conviction for Distribution of Cocaine in the Proximity of a School and; (2) a 2005 conviction for Possession with Intent to Distribute Cocaine Base - Second Offense. (Transcript of Trial at 186: 15-20, State v. Elliott Judon, March 16, 2015). In light of these prior offenses, the State served Applicant with notice of its intent to seek life without parole pursuant to S.C. Code Ann. § 17-25-45⁴ on February 17, 2015. Trial counsel testified that the Notice was proper at both the sentencing and again at the evidentiary hearing. (Id. at 543: 9-14). Counsel also testified that she would have researched and raised any issues with the "LWOP" Notice at trial. Moreover, Applicant conceded that he had two qualifying "serious" convictions at the evidentiary hearing, but did not set forth any additional testimony regarding the alleged deficiency of the Life without Parole Notice. The Applicant has, thus, failed to offer the requisite evidence establishing that the Notice was improper, and that he was prejudiced as a result. This allegation is therefore without merit and must be denied and dismissed with prejudice.

⁴ S.C. Code Ann. § 17-25-45 states that a "a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has (1) one or more prior convictions for a most serious offense; or a federal or out-of-state conviction that would be classified as most serious under this section; or (2) two or more prior convictions for a serious offense; or a federal or out-of-state conviction for an offense that would be classified a serious offense under this section."

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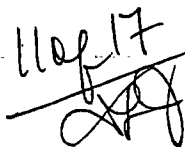
III. Failure to Contemporaneously Object to Introduction of Evidence at Trial

The Applicant further asserts that trial counsel was ineffective for failing to contemporaneously object when the drug evidence and statements were introduced at trial, thereby leaving the issues unpreserved for appellate review. In support of this allegation, Applicant cites to the unpublished appellate opinion from the Court of Appeals wherein the Court dismissed the issues pertaining to the denial of Applicant's Motion to Suppress by the trial court based on a lack of preservation. Specifically, the Court of Appeals stated "[a]s to whether the trial court erred in denying Judon's motion to suppress his statements and motion to suppress the drugs: State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal."); State v. Atieh, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) ("A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."); State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (holding defendant's statement that he had no objection to the admission of a video into evidence "amounted to a waiver of any issue [he] had with the [evidence]"). See State v. Elliott Judon, Jr., 2017-UP-308 (Ct. App. filed July 26, 2017). Trial counsel does not refute and it is uncontested that she did not object however, this Court finds that the Applicant cannot establish any prejudice to him as a result of counsel's failure to contemporaneously object to the introduction of the statements and drug evidence at trial. After all, the Applicant must establish both deficiency and prejudice to prevail on an application for Post-Conviction Relief. The inquiry does not end simply because the Applicant establishes a deficiency by counsel. See Milledge v. State, 422 S.C. 366, 374, 811 S.E.2d

796, 800–01 (2018). This Court must also determine whether there is any prejudice to the Applicant as a result of counsel's deficiency.

In determining whether a PCR applicant has established prejudice, the PCR court does not act as a finder of fact and substitute its judgment for that of the trial court. Rather, in instances like the case before us, the PCR court must view the trial court's ruling through the same lens that would be applied on appeal, which requires giving appropriate deference to the trial court's findings. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459–60 (2002). The Court must therefore consider whether the appellate court would have reversed Applicant's convictions based on trial court error and granted him a new trial. See Milledge, 422 S.C. at 374, 811 S.E.2d at 800–01. In a case of this nature, the proper inquiry for determining prejudice is whether the search conducted by law enforcement was lawful under the Fourth Amendment as this issue would have controlled the outcome on direct appeal. See id. at 375, 811 S.E.2d at 801. In other words, the Court must consider whether there is evidence in the record to support the trial court's finding that the officer has reasonable suspicion. Id. at 380, 811 S.E.2d at 804. Having done so in this case, the Court finds there is ample evidence in the record to support the trial court's findings regarding the denial of the Applicant's Motion to Suppress the drug evidence and statements.

First, as to the admission of the drug evidence, this Court finds that the trial court properly denied Applicant's Motion to Suppress. A traffic stop of a vehicle, along with the detention of individuals during the stop, constitutes a seizure under the Fourth Amendment. State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002). However, the decision to stop the vehicle is reasonable per se where probable cause exists to believe that a traffic violation has occurred. State v. Adams, 377 S.C. 334, 338, 659 S.E.2d 272, 274 (Ct. App. 2008) (citing Whren v. United

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States, 517 U.S. 806, 810 (1996)). “When a vehicle has been lawfully detained for a traffic violation, a police officer may order the driver to get out of the vehicle without violating the Fourth Amendment’s prescription of unreasonable searches and seizures.” Adams, 377 S.C. at 338, 659 S.E.2d at 274-75 (citing Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977)). Moreover, “the constitutional immunity from unreasonable searches and seizures may be waived by valid consent.” Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999) (citing Katz v. United States, 389 U.S. 347 (1967)). Consent is determined from the totality of circumstances by the trial court, and the trial court’s ruling must be affirmed if supported by any evidence. State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000).

There is sufficient evidence in the record in this case to support the trial court’s finding that the traffic stop case was proper. The record is clear that the officers had articulable probable cause for the stop based on the unlawful tint of the vehicle. Officers also acted properly in asking Applicant to exit his vehicle, and asking for his consent to search the vehicle. The evidence of record also indicates that the consent to search was voluntary. The stop and ensuing search were therefore valid under the Fourth Amendment. The Defendant’s Motion to Suppress was properly denied by the trial court.

The trial court was also correct in its decision to deny the Applicant’s Motion to Suppress the Applicant’s statements to law enforcement. In accordance with the Fifth Amendment’s protection against self-incrimination, “[t]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards. . . .” Miranda v. Arizona, 384 U.S. 436, 444 (1966). Before the accused is subjected to custodial interrogation, he or she must be informed of the right

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to remain silent; any statement made may be used as evidence against him or her; the right to the presence of an attorney; and if he or she cannot afford an attorney, that one will be appointed prior to questioning. State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App.1996). However, volunteered exculpatory or inculpatory statements arising from custodial interrogation are not barred by the Fifth Amendment. Id. “Where there is conflicting evidence as to whether a defendant’s statement is voluntary, the trial court must inquire whether under the totality of the circumstances the suspect’s will was overborne.” State v. Carmack, 388 S.C. 190, 199, 694 S.E.2d 224, 228 (Ct. App. 2010). “Our courts have recognized that the appropriate factors to consider in the totality of circumstances analysis include: background, experience, conduct of the accused, age, length of custody, police misrepresentations, isolation of a minor from his or her parent, threats of violence, and promises of leniency.” State v. Dye, 384 S.C. 42, 47, 681 S.E.2d 23, 26 (Ct. App. 2009) (citations omitted).

The trial court properly weighed the testimony presented by the officers at trial and the Applicant in this case and determined that the officers properly read Applicant his Miranda rights and that Applicant voluntarily made statements after being read those rights. (Transcript of Trial at 379: 21- 380:1, State v. Elliott Judon, March 17, 2015). As there is evidence in the record to support these rulings, this Court must find that the trial court properly denied Applicant’s Motion to Suppress and that the subsequent admission of these statements was proper. This allegation is denied and dismissed with prejudice.

IV. Failure to Advise Applicant of the Elements of the Offense

Applicant also asserts that counsel was ineffective for failing to advise him of the elements of the crime. Applicant testified that he did not know the elements of Trafficking in Cocaine Base

until the State cited them in closing argument. Applicant maintains that he would have pled guilty to the offense if he had known that State only had to establish that he was in possession of the statutory amount of cocaine base in order to obtain a conviction. In contrast, attorneys Luke Malloy and Melisa Gay testified that they reviewed the elements of the offense with Applicant prior to trial. This Court finds the testimony of counsel credible and concludes that Applicant was properly advised of the elements of the offense. This allegation is therefore without merit and must be denied and dismissed with prejudice.

V. Failure to Timely Secure Video of Traffic Stop

Applicant asserts that his initial attorney, Luke Malloy, was ineffective for failing to timely secure the video of his traffic stop from law enforcement.⁵ Applicant testified he asked Mr. Malloy to procure the "dash cam" video of the traffic stop in December 2013, within the 180-day retention period, and that Mr. Malloy refused to acquire the videotape. Applicant further testified that he ultimately relieved Mr. Malloy due to his refusal to secure the tape and hired Melisa Gay instead. According to Applicant, Ms. Gay was not retained until the 180-day retention period had expired, and she was thus unable to acquire the videotape despite diligent efforts on her part. However, Mr. Malloy testified that the Applicant did not ask him to secure the "dash cam" video until after the 180-day retention period had expired, on May 2, 2014 during a guilty plea preparation meeting. Mr. Malloy testified that he nevertheless tried to get a copy of the tape, but was ultimately unsuccessful because it was no longer available. Counsel further testified that it was his general practice to fully investigate his cases. Counsel also testified that he served full discovery and Rule 5 materials on the State and in response no videos were included. Counsel on redirect testified that

⁵ These allegations are solely against Attorney Luke Malloy pursuant to Applicant's testimony at the evidentiary hearing.

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in 2013 not all North Charleston police vehicles were equipped with recording devices and he was unaware of the retention policy at that time. Mr. Malloy informed Applicant of his efforts, and advised him that the State did not need the "dash cam" video in order to prove their case. Counsel acknowledges that if a dash cam video existed it could have been useful in a suppression hearing. Counsel testified that a motion to preserve evidence is rarely utilized and it is more likely that a supplemental discovery request would have been served on the State. This Court finds Mr. Malloy's testimony to be credible and finds that he was not deficient in his representation since he tried to obtain a copy of the video tape as soon as Applicant requested he do so.

Furthermore, this Court finds that Applicant cannot establish any prejudice as a result of purported deficiency. All the participants in the original traffic stop testified during the pre-trial motions hearing as to their version of events. Based on this testimony, the trial court properly denied the Motion to Dismiss and Motion to Suppress. Since the Applicant has failed to establish both deficiency of counsel or any resulting prejudice, this allegation must be denied and dismissed.

VI. Failure to Properly Advise Applicant of Plea Offers

Lastly, Applicant asserts that trial counsel was ineffective for failing to properly advise him of plea offers from the State. The record clearly refutes this allegation. Initially Luke Malloy, Applicant's first counsel, fully advised Applicant of the State's offers. Luke Malloy testified and this court finds credible that he fully advised Applicant of the original offers which were refused by the Applicant on the record on March 10, 2014. Subsequently, trial counsel advised Applicant that it was in his best interest to accept the State's plea offer of twenty years, and even told the court she had concerns about Applicant's competency based on his decision to turn down the plea offer. (Transcript of Trial: 189:1-190:4; 342:15-23, State v. Elliott Judon, March 16, 2015).

Moreover, the trial court advised the Applicant of the twenty-year offer on numerous occasions, and even told the Applicant that if he turned down this offer and was convicted, the only possible sentence the Court could impose was life without the possibility of parole. (Id. at 184:20 – 188:6; 191:12-19; 337: 24-338:7; 342: 2-13). Ms. Gay reiterated that she advised the Applicant of the plea offer and the consequences of rejecting that offer at the evidentiary hearing, but that it is her practice to allow her clients to make the ultimate decision. Accordingly, this Court finds that trial counsel properly advised Applicant of plea offers from the State and the consequences of rejecting those offer. In turn, this allegation must be denied and dismissed with prejudice.

CONCLUSION

In light of the foregoing, this Court finds and concludes that the Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. The Application is therefore denied and dismissed with prejudice.

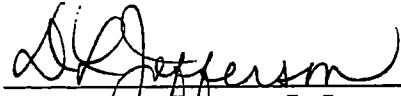
The Court advises the Applicant that he must file and serve a notice of appeal within thirty days from the receipt of this Order if he wants to secure the appropriate appellate review. See Rule 203, SCACR. The Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief; however, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf pursuant to Rule 71.1(g), SCRCP. See Austin v. State, 305 S.C. 453 (1991). The Applicant is hereby directed to South Carolina Appellate Court Rule 243 for the appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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[Signature]

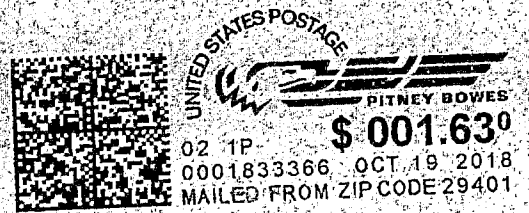
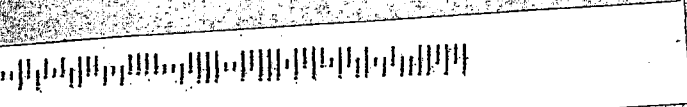
1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 24 day of October, 2018.



HON. DEADRA L. JEFFERSON
Presiding Judge
Ninth Judicial Circuit

Charleston, South Carolina



D. Davis
eting Street, 5th Floor
ton, SC 29401

The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211