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S.C. SUPREME COURT

November 9, 2018

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

Re: Edward Maurice Dunn, Jr. vs. State of South Carolina
C/A No: 2015-CP-40-01657

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Dunn in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,

Jonathan D. Waller

Cc: Lindsey A. McCallister, South Carolina Office of Attorney General

Enclosures

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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
D. Craig Brown, Circuit Court Judge

2015-CP-40-01657

RECEIVED

NOV 13 2018

S.C. SUPREME COURT

Edward Maurice Dunn, Jr., #351031,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Edward Maurice Dunn, Jr., #351031, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed October 15, 2018, issued by the Honorable D. Craig Brown, Presiding Judge, Fifth Judicial Circuit.

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November 9, 2018

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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
D. Craig Brown, Circuit Court Judge

2015-CP-40-01657

Edward Maurice Dunn, Jr., #351031,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Lindsey A. McCallister, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to her office located at P.O. Box 11549, Columbia, SC 29211.

M. David Scott

November 9, 2018

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Edward Maurice Dunn, Jr., #351031, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2015-CP-40-01657 **ORDER OF DISMISSAL**

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed March 17, 2015, by Edward Maurice Dunn, Jr. (Applicant). The State (Respondent) made its Return on July 8, 2015, requesting an evidentiary hearing be held. An evidentiary hearing was convened on July 11, 2016, at the Richland County Courthouse. Applicant was present at the hearing and was represented by Jonathan Waller, Esquire. Respondent was represented by Assistant Attorney General Jessica Kinard of the South Carolina Attorney General's Office.

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted by the Richland County grand jury for assault with intent to commit criminal sexual conduct (CSC) in the first degree (2011-GS-40-3518), armed robbery (2011-GS-40-3525), kidnapping (2011-GS-40-3526), and burglary in the first degree (2011-GS-40-3527). He was represented by Victor Li and Deon O'Neil, Esquires. On May 21-24, 2012, Applicant proceeded to trial by jury pursuant to which he was acquitted of assault with intent to commit first-degree CSC but was found guilty of the remaining charges. He was

sentenced by the Honorable G. Thomas Cooper, Jr., to three concurrent terms of thirty (30) years' imprisonment for armed robbery, kidnapping, and first-degree burglary.

Applicant filed a timely notice of appeal, and Appellate Defender David Alexander, of the South Carolina Commission on Indigent Defense, Office of Appellate Defense, perfected an appeal on Applicant's behalf. On appeal, Applicant raised the following issue: "Whether the trial court erred in refusing to suppress all evidence flowing from the retention and subsequent usage of Applicant's DNA profile, which was taken when he was a juvenile and maintained in a database not authorized by state law, exceeded the scope of the contractual consent given by Applicant, and was otherwise illegal under state law?" Following briefing, the South Carolina Court of Appeals issued an unpublished opinion affirming Applicant's conviction and sentence. *State v. Dunn*, Op. No. 2014-UP-249 (S.C. Ct. App. filed June 25, 2014). The Remittitur was issued on July 11, 2014.

In his application for post-conviction relief, Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance Counsel, in that;

   a. Counsel "was ineffective for failing to argue that the State DNA Database act made the Sheriff's database illegal and keeping my DNA in the database violated my statutory and constitutional rights,"
   b. Counsel "also failed to preserve [the DNA argument] for appeal as was found by the Court of Appeals",
   c. Counsel "was ineffective for failing to bring an plea negotiation that was discussed . . . to my attention",

2. Due Process Violation, in that;

a. "[M]y [M]iranda rights were not read to me until after being under the inquisition by Ivg. Maulden"

At the evidentiary hearing, Applicant did not make additional claims and proceeded to present testimony in regard to some of the claims set forth in the application.

STATEMENT OF FACTS SET FORTH AT TRIAL

Sometime between 2 a.m. and 3 a.m. on May 28, 2011, seventy-four year old Indira Lonsdale (Victim) was in her sitting room drinking coffee and listening to music when a male intruder entered her home, came from behind, grabbed her by the shoulders, and ordered her to do what he said or he would kill her. The man led Victim to her bedroom, removed the sash from her bathrobe, which was the only article of clothing she was wearing, used the sash to tie her hands behind her back, and told her to bend over the bed. Victim could see a gun in the man's hand. The man then unzipped his pants, put his penis between Victim's legs and, without penetrating her, thrust several times until he ejaculated. Next he made Victim put a pair of her own underwear over her head before leading her to the bathroom. The man gave her a washcloth and told her: "wash yourself good." Victim wiped the ejaculate from her vaginal area, after which the man rinsed the washcloth in the sink and told her to wash again. She wiped herself again and left the used washrag in the sink. The intruder then led Victim to her bedroom and made her lay face down on the floor while he went through her dresser drawers looking for money. In fear that she would be shot if the intruder was not able to find any money, she told him she had $120 in her wallet and told him where to find it. He then asked Victim for her car keys and left the house. Victim got up, ran to the phone, and called 9-1-1. When she was later interviewed by the police, Victim described the intruder as a young, small built, black male with

a northern accent and curly hair that hung over the side of his face. (Tr.p.199, line 12-p.213, line 19; p.229, line 5-p.230, line 25).

The Richland County Sheriff's Department collected the washcloth from Victim's sink and developed a DNA profile from seminal fluid detected and extracted from the cloth. (Tr.p.289, line 12-p.293, line 18; p.336, line 5-p.338, line 21; p.344, line 3-p.346, line 14). Applicant's DNA profile was already on file with the Sheriff's Department as a result of his providing a sample in September of 2010, in an unrelated matter. (Tr.p.311, line 1-p.313, line 15). Although the washcloth contained a mixture of DNA, the major contributor of that DNA was matched within a reasonable degree of scientific certainty to be seminal fluid from Applicant. Indeed, the frequency of seeing the contributor's profile in the African-American population was approximately one in 140 quintillion. (Tr.p.346, line 12-p.347, line 14; p.363, line 13-p.364, line 16). Based on the DNA match, warrants were obtained for Applicant's arrest.

After Applicant was arrested he was told his DNA was found on the washcloth discovered in Victim's house. Applicant then gave an oral statement admitting his participation in the burglary but denying participation in the attempted sexual assault. He gave an alternative explanation for the presence of his semen on the washcloth. (Tr.p.382, line 19-p.394, line 21). Applicant subsequently gave a written statement repeating his explanation. In those statements he claimed he was outside serving as a lookout while a co-defendant named "Shorty" was inside committing the burglary. Applicant said after about fifteen or twenty minutes he walked into the house and discovered Shorty in Victim's bed: "fucking her from the back." Applicant said: "I got a little excited, so I started to jack off. I used the towel to clean up. I saw it on the ground. I went back outside by the gate and kept watching." (Tr.p.395, line 13-p.406, line 21; States

Exhibits Nos. 1 and 2). Applicant gave a similar story in a telephone call to his mother from the jail. (Tr.p.419, line 11-p.420, line 10).

Motion to Suppress

Prior to trial, Applicant made a motion "to suppress the DNA profile that was used for comparison in this case." He articulated two grounds. First Applicant claimed he did not voluntarily consent to giving the DNA sample. Second he claimed even if the consent was voluntary, the use of the DNA sample in the subsequent criminal investigation was outside the scope of his consent. Applicant argued that since the DNA match should be suppressed, all other evidence obtained as a result of that match would be fruit of the poisonous tree, and should also be suppressed. He handed up a written motion in support of the argument which was marked as Court's Exhibit No. 2. (Tr.p.24, line 8-p.25, line 6). The State responded by providing the trial court with a copy of *State v. McCord*, 349 S.C. 477, 562 S.E.2d 689 (Ct. App. 2002). (Tr.p.25, lines 9-18).

In the written motion Applicant first asserted "that under the totality of circumstances his consent was not voluntary." He argued his decision to give the DNA was "coerced and involuntary" because he was 16 years old and, even though he was accompanied by his parents, felt coerced to comply with law enforcement and signed the consent form because he was under arrest and not free to leave. Next Applicant asserted "that law enforcement exceeded the scope of any alleged consent by retaining his DNA in their in house database." Relying on *State v. Forrester*[1] and *State v. Mattison*,[2] Applicant argued he never consented to having his DNA stored in the Richland County in house crime lab, did not know the lab even existed, and that his consent was only given for the September 20, 2011, burglary being investigated at the time he

[1] 343 S.C. 637, 541 S.E.2d 837 (2001).

[2] 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

gave the DNA sample. Finally, Applicant asserted "all evidence derived from the illegal retention and comparison of his DNA profile should be excluded as fruit of the poisonous tree." He argued that since the only probable cause for his arrest came from the DNA match obtained through "the illegally retained DNA profile," all written and recorded statements to law enforcement following the arrest should also be suppressed. Applicant never argued the issue of his consent should be analyzed under contract principles and never mentioned the word "contract" in his written motion. He also did not argue the Richland County database itself was illegal. (Court's Exhibit No. 2).

Suppression Hearing

The trial court conducted a suppression hearing on Applicant's motion. The State called Deputy John Carwell of the Richland County Sheriff's Department to the stand. Carwell testified he worked in the burglary unit in September of 2010 and was in charge of a particular burglary that brought him into contact with Applicant. On September 21, 2010, the day after that burglary, he obtained a "petition" for Applicant and had Applicant brought to headquarters.[3] Carwell read a DNA consent form to Applicant, after which Applicant signed the form and provided a swab from his mouth as a DNA sample. Carwell testified he did not make any promises to Applicant about what would happen if he provided the DNA sample and did not threaten or coerce him into giving consent. Carwell did not give Applicant any kind of qualifications about how the DNA sample would be used, kept, or maintained, or what it would be compared against. He testified Applicant understood what was being asked of him in providing the DNA sample and did not appear to be under the influence of any drugs or alcohol. (Tr.p.84, line 19-p.89, line 17).

[3] Although Carwell did not elaborate on this testimony, this Court presumes he was referring to a juvenile delinquency petition alleging Applicant had participated in a non-violent second degree burglary in 2010, an event which is reflected on his juvenile legal history. (Court's Exhibit No. 9).

On cross-examination Carwell acknowledged he asked Applicant to give a sample of his DNA to compare it against DNA from the scene of a particular burglary and never mentioned it would be put in the Richland County DNA database. Carwell recognized Applicant was 16 years old when he gave consent but explained that regardless of the age of a suspect there was no requirement or internal policy to get parents involved before seeking consent for a DNA sample. He further explained that when a crime victim provides a DNA sample, his or her profile is not stored in the Richland County DNA lab.[4] (Tr.p.91, line 1-p.94, line 11). On re-direct, Carwell testified he made no promises about what the Sheriff's Department would do with Applicant's DNA profile after the conclusion of the investigation or that they would destroy the DNA profile if it did not match anything in the 2010 burglary investigation. (Tr.p.95, lines 3-23). Indeed, on re-cross Carwell testified the point of seeking Applicant's DNA was to compare it to items from the 2010 burglary AND to enter it into the database. (Tr.p.96, lines 1-7).

Next, Applicant testified on his own behalf. He said that when he gave the DNA sample in 2010, Carwell never told him they were going to put his DNA profile in the DNA lab in Richland County, or that they were going to store his DNA. Applicant testified if they had told him they were going to store his DNA, he would not have given the sample. In regard to the current case, he testified that if the police had not told him they had a DNA match, he would not have given statements to Investigator Mauldin. (Tr.p.97, lines 2-25). On cross-examination, Applicant confirmed the solicitor's suspicion that if he wasn't told the police had a DNA match,

[4] This testimony is in contradiction to the claim made in Applicant's brief on Appeal that Richland County retains DNA profiles of crime victims in the main database. (Brief of Applicant, p.12, n.2). Although a profile of a victim's DNA is developed by the lab for elimination purposes, and a copy of that profile is retained by the lab, there was no evidence a victim's DNA profile is kept in the criminal database used for future investigations.

he would have simply claimed he was never at Victim's house.[5] He then acknowledged his signature on the DNA form and admitted the form said nothing about the sample being used only for the 2010 case or about the sample being destroyed after the initial comparison. (Tr.p.98, line 5-p.99, line 17).

The trial court then heard arguments from Applicant and the State. Applicant argued his situation could be distinguished from *McCord* because the consent form in *McCord* included additional language that does not appear on the Richland County consent form. He further argued the State self-limited the scope of any consent he might have given by telling him they wanted his DNA for a particular reason. The State responded that the Richland County consent form was sufficiently broad and similar to the form in *McCord* to demonstrate consent. The trial judge questioned whether a sixteen year old is capable of giving consent and the State noted age was simply a factor like any other factor that must be considered in making the determination. The State argued Applicant had no reasonable expectation of privacy in the DNA profile once it had been given for a legitimate purpose. The State further argued that even if consent was not valid for some reason, Applicant's statements should not be suppressed because the police would have inevitably discovered he was involved in the crimes though other means. (Tr.p.101, line 7-p.110, line 17). The following morning the trial court heard additional arguments from Applicant and the State, further explaining their respective positions. Ultimately, the trial court denied Applicant's motion to suppress and ruled the DNA results were admissible. (Tr.p.116, line 18-p.127, line 21).

[5] This comment demonstrates Applicant's willingness to offer self-serving testimony and shows his lack of credibility. This Court finds it lends support to the trial court concluding Applicant's consent was voluntary under the totality of the circumstances.

Trial

At trial, Investigator Carwell described the Richland County Sheriff's Department's "Consent to Search for D.N.A. Evidence" form which was signed by Applicant before he provided a DNA sample in 2010. He testified Applicant gave voluntary consent and then provided a swab from his mouth. The signed form was admitted into evidence subject to Applicant's previous objection. (Tr.p.311, line 1-p.313, line 20).

Forensic scientist John Barron with the Richland County DNA lab identified the buccal swab given by Applicant and testified he extracted DNA from that swab. The swab was admitted into evidence over Applicant's objection. (Tr.p.325, line 3-p.332, line 24). Forensic scientist Gray Amick with the Richland County DNA lab identified the washcloth from the Victim's house and testified he extracted DNA from seminal fluid on that cloth. Applicant renewed his previous objection to the results of that testing; however, the objection was overruled and Amick testified the fluid was a DNA match to Applicant. (Tr.p.333, line 16-p.347, line 14).

Investigator Josh Mauldin described Applicant's arrest and the various statements he provided in regard to the crimes. Without articulating specific grounds, Applicant renewed his previous objections to each statement and his objections were overruled. (Tr.p.392, lines 7-11; p.396, lines 21-25; p.401, lines 16-23; p.419, line 24-p.420, line 10). After the State rested and again after the defense rested Applicant renewed all of his previous motions and objections. (Tr.p.442, lines 15-17; p.455, lines 16-24).

Appeal

As noted above, on appeal Applicant raised the following issue: "Whether the trial court erred in refusing to suppress all evidence flowing from the retention and subsequent usage of

Applicant's DNA profile, which was taken when he was a juvenile and maintained in a database not authorized by state law, exceeded the scope of the contractual consent given by Applicant, and was otherwise illegal under state law?" Following briefing, the South Carolina Court of Appeals issued an unpublished opinion affirming Applicant's conviction and sentence. *State v. Dunn*, Op. No. 2014-UP-249 (S.C. Ct. App. filed June 25, 2014). The authority cited suggests the Court of Appeals concluded Applicant voluntarily consented to the police taking a DNA sample and did not limit the scope of that consent. In a footnote, the Court of Appeals also held: Applicant's remaining arguments, "that (1) the contract for taking his DNA was voided and illegal, (2) he never ratified the contract as an adult, and (3) the Richland County Sheriff's Department's DNA database was illegal," were not preserved for appellate review.

EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf and then presented the testimony of defense attorney Deon O'Neil (hereinafter "Counsel"). This Court also had before it a copy of Applicant's trial transcript, the records of the Richland County Clerk of Court, Applicant's appellate records, Applicant's records from the South Carolina Department of Corrections, and the pleadings.

Applicant's Testimony

During the evidentiary hearing, Applicant testified that when he was sixteen years old, prior to the incident which led to the convictions which are the subject of this case, he talked to law enforcement after being apprehended as a suspect in some burglaries. He testified the officers asked for consent to take his fingerprints to compare to fingerprints they had found on items stolen in the burglary, and that in response he voluntarily gave both his fingerprints and a

DNA sample. Applicant testified he was not actually charged with those burglaries. (PCR Tr.p.5-p.7).

Next, Applicant testified about the current charges, explaining that after his arrest he was not given a bond and remained locked-up the whole time before trial. He complained that Counsel did not meet with him for the first time until three months after his arrest. Applicant testified that at the first meeting he told Counsel what happened during the incident, giving his side of the story, and he asked Counsel's advice on the best thing to do to plead his innocence. He said he asked Counsel to find out if the solicitor wanted to negotiate a bargain, but also made clear he was willing to go to trial to plead his innocence. Applicant claimed Counsel did not explain his constitutional rights, such as the right to a jury trial and the right to remain silent, either at that first meeting or at any time before trial. He acknowledged he gave two statements to the police and made a recorded telephone call to his mother from jail, but claimed Counsel did not discuss any of those statements with him at their first meeting. Applicant claimed they only discussed his side of the story and possible plea bargains they might make with the solicitor. (PCR Tr.p.7-p.11).

Applicant testified that the second time Counsel came to see him they began preparing for trial and discussed a possible motion to suppress. He explained the solicitor was not interested in a plea bargain because she felt like she had a good case. Applicant testified he and Counsel discussed the DNA issue and the fact that the State had a DNA match from the crime scene. He testified Counsel told him they would argue: (1) the way the police obtained the original DNA sample from the prior burglary was illegal, and (2) the police putting the sample into the Richland County DNA database was illegal. Applicant testified the only other thing he remembered discussing with Counsel was his motion for discovery. Applicant noted Mr. Li was

also appointed to represent him, but he did not meet Mr. Li for the first time until the trial started. He acknowledged that once the trial started he was able to talk to both Counsel and Mr. Li during the proceedings. (PCR Tr.p.11-p.13).

Applicant concluded his testimony by insisting he only met with Counsel twice before trial and that they never discussed a strategy for trial. He again acknowledged they talked about trying to exclude the DNA evidence and specifically planned to argue the DNA sample from when he was sixteen years old was taken without valid consent, but did not talk about an overall strategy for trial. Applicant then complained that he had to go to trial in front of Judge Cooper instead the "woman judge" he was first told would be hearing his case. He testified he believed Counsel was ineffective and could have done a better job. (PCR Tr.p.13-p.18). On cross-examination Applicant admitted Counsel obtained discovery from the State and reviewed it with him, including his statements, statements from his codefendant, and the DNA evidence. He testified he and Counsel spent a lot of time discussing the motion to suppress the DNA evidence. (PCR Tr.p.18-p.21).

Counsel's Testimony

After testifying on his own behalf, Applicant elicited testimony from Counsel. Counsel testified he was appointed Applicant's case in June of 2011 when it conflicted out of the public defender's office, and he first met Applicant in early July. He testified Applicant's mother and father were very involved in the case and he communicated with his father via email in June. Counsel testified he received discovery from the Solicitor in August of 2011 and went to the jail to go over it with Applicant. He testified he attempted to negotiate a plea offer from the State over the ensuing months but the solicitor would not make an offer, either as a sentencing recommendation or a reduction in the charge, so he prepared for trial. Counsel testified he

advised Applicant that Judge Lee was on the calendar for April 17, 2012, and where his only options were pleading straight-up or going to trial, he thought she would be a favorable judge for Applicant. (PCR Tr.p.22-p.24).

Counsel then described the State's theory of the case and the evidence supporting that theory, as well as Applicant's version of events. He noted the police had identified Applicant from a DNA match of semen at the crime scene to the sample they already had in the Richland County DNA database. Counsel testified his strategy in dealing with the DNA evidence was primarily to seek to suppress the evidence by arguing the State had exceeded the scope of the consent given by Applicant in regard to the prior burglary investigation. He testified he focused on the scope of consent but did not attempt to argue Applicant was not able to give consent at all at the age of sixteen and did not subsequently ratify the contract for consent when he turned eighteen. Counsel also testified he did not make a broad argument as to the legality of the DNA database itself. He noted the Court ruled against suppression at the pretrial hearing, but testified he believes he objected during trial each time the DNA evidence was used. (PCR Tr.p.24-p.29).

On cross-examination by the State, Counsel explained he had been practicing criminal law for four-and-a-half years when he represented Applicant. He described the thorough discussions he had with Applicant about the evidence, the crimes, possible sentences, the Applicant's constitutional rights, whether Applicant should take the stand in his own defense, and the State's burden of proof. Counsel testified they discussed Applicant's partially incriminatory statement to the police and the recording of his inculpatory telephone call to his mother. He testified he filed a written motion to suppress the phone call as well as a written motion to suppress the DNA evidence. Counsel testified he also renewed his *Brady* motion at the start of trial and requested a *Jackson v. Denno* hearing. He testified he intentionally focused

his motion to suppress the DNA evidence on whether law enforcement had illegally retained the DNA sample rather than whether it was illegally obtained and believes he argued for suppression to the best of his ability. (PCR Tr.p.p.29-p.37). On redirect, Counsel clarified that he argued not just for suppression of the DNA evidence itself, but that everything that followed from the DNA match should have been suppressed as fruit of the poisonous tree. (PCR Tr.p.37-p.38).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety, including a transcript of the post-conviction relief hearing itself. It also notes it heard the testimony at that hearing first hand. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption 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. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden of proof in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

Failure to Argue the Sheriff's Department's DNA Database was Illegal

Applicant contends Counsel was ineffective for failing to argue that the State DNA Database Act made the Sheriff's Department's DNA database illegal, and for failing to argue that keeping his DNA in that illegal database violated his statutory and constitutional rights. He further contends he was prejudiced by Counsel's ineffectiveness because, by failing to make this argument to the trial court, Counsel failed to preserve it for possible appellate review. This Court disagrees and finds that where a challenge to the legality of the local DNA database could not have reasonably resulted in suppression of the evidence at trial, Counsel was not ineffective for failing to make the argument, and Applicant suffered no prejudice, either at trial or on appeal.

In his direct appeal, Applicant argued the trial court erred in refusing to suppress all evidence flowing from the retention and subsequent use of his DNA profile because his DNA

was taken when he was juvenile and maintained in a database not authorized by state law, and because this use exceeded the scope of his "contractual consent." His argument hinged on the premise that the taking and use of his DNA should be analyzed under contract principles rather than under a standard Fourth Amendment exclusionary rule analysis. Applicant argued: (1) the sheriff had no "contractual right" to keep his DNA past the time necessary to test it in connection with the 2010 burglary because the "contract" to provide a DNA sample was limited solely to the sheriff's investigation of that burglary; (2) the "contract" is voidable because he made it prior to turning eighteen and never ratified it after reaching the age of majority; and (3) the "contract" is void *ab initio* as an illegal contract because the sheriff has no authority to maintain its own DNA database where the sole repository of citizens' DNA profiles is maintained by the State Law Enforcement Division (SLED) pursuant to the State DNA Database Act.

In response, the State argued that Applicant's argument was not preserved for appellate review because it was not specifically raised to and ruled upon by the trial court. State v. Brown, 402 S.C. 119, 125 n.2, 740 S.E.2d 493, 496 n.2 (2013) (describing the four basic requirements for preserving issues at trial for appellate review, including the requirement that the issue must have been raised to and ruled upon by the trial court); State v. Policao, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) ("The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal."); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). In part, the Court of Appeals agreed. In regard to Applicant's contract law claims and his claim that the Sheriff's Department's DNA database was illegal, the Court of Appeals found they were not preserved for review. *State v. Dunn*, Op. No. 2014-UP-249 (S.C. Ct. App. filed June 25, 2015).

Based on that finding, Applicant now argues Counsel was ineffective for failing to raise the alleged illegality of the local DNA database to the trial court, because by failing to do so he did not preserve it for review. However, this Court finds Counsel could not be ineffective in this regard because, even if Applicant's challenge to the legality of the Sheriff's DNA database was adequately preserved for review, it is without merit. Applicant's underlying premise is flawed. A motion to suppress evidence on grounds it was taken without consent, or that its use exceeded the scope of the consent that was given, falls squarely within the ambit of the Fourth Amendment and its prohibition against unreasonable searches and seizures, not contract law or a statutory challenge to a DNA database. Thus, the trial court properly considered Appellant's motion to suppress under a traditional Fourth Amendment analysis, and appropriately applied that analysis before deciding to admit the DNA evidence. The Court of Appeals affirmed the trial court's decision in this regard.

Only a finding that evidence has been obtained in violation of the Fourth Amendment would result in suppression of that evidence in a criminal trial. *See Davis v. United States,* 564 U.S. 229, 236-38 (2011) (noting the Fourth Amendment itself provides no remedy for a violation of the warrant requirement but recognizing the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment). Here, where the argument Applicant says Counsel should have raised fails to raise a valid Fourth Amendment challenge, he would not have been entitled to suppression of the DNA evidence regardless of the legality of the Sheriff's Department's DNA database. Thus, this Court finds Counsel was not deficient and Applicant suffered no prejudice from Counsel's

failure to raise this argument to the trial court. Accordingly, this allegation must be denied and dismissed with prejudice.

Failure to convey plea negotiations

Applicant alleges Counsel was ineffective for failing to bring plea negotiations with the State to his attention. However, Counsel cannot be ineffective because the negotiations did not result in a plea offer. In order to prevail on a claim counsel was ineffective for failing to convey a plea *offer*, the applicant must show: (1) plea counsel's failure to communicate the State's initial plea offer constituted deficient performance and (2) the applicant was prejudiced by the deficient performance, in other words there was a reasonable probability that but for this deficient performance, the applicant would have accepted the original plea offer. *Davie v. State*, 381 S.C. 601, 675 S.E. 416 (2009) (emphasis added). However, where plea negotiations were not fruitful, and as a result there was no plea offer to convey, trial counsel cannot be ineffective for failing to convey every aspect of the underlying negotiations. Similarly, a defendant cannot suffer prejudice from the trial counsel's actions in this regard.

Here, Applicant testified he asked Counsel to find out if the solicitor wanted to negotiate a plea bargain, but made clear he was willing to go to trial to plead his innocence. He admitted Counsel discussed possible plea bargains they would attempt to make with the solicitor. (PCR Tr.p.7-p.11). Applicant further testified he understood that the solicitor was not interested in a plea bargain because she felt like she had a good case for trial. (PCR Tr.p.11-p.13). Counsel confirmed Applicant's understanding by explaining he attempted to negotiate a plea offer from the State but the solicitor would not make an offer, either as a sentencing recommendation or a reduction in the charge, so instead he prepared for trial. Counsel advised Applicant his only two options were pleading straight-up or going to trial. (PCR Tr.p.22-p.24). This Court finds

Counsel's testimony with regards to this allegation very credible, and largely consistent with Applicant's testimony. Counsel diligently attempted to negotiate a plea offer from the State but was unsuccessful. He conveyed this information to Applicant and there simply was no plea offer to convey. Because Counsel did indeed convey his inability to obtain a plea offer from the State, this Court finds Applicant has failed to establish any deficiency on the part of Counsel for failing to convey specific plea negotiations. Furthermore, there is no reasonable probability anything Counsel could have done differently would have affected Applicant's decision to go to trial. Applicant offered no testimony to the contrary. For this reasons, this Court also finds Applicant has failed to establish any resulting prejudice from Counsel's alleged deficiency. This Court finds this allegation must be denied and dismissed with prejudice.

Failure to adequately challenge statements to police

In his application, Applicant complained: "[M]y [M]iranda rights were not read to me until after being under the inquisition by Ivg. Maulden." It appears this is a claim that Counsel was ineffective for failing to adequately challenge the admissibility of his statements to the police, and this Court hereby construes it as such. However, Applicant did not present any evidence on this allegation at the PCR hearing. Accordingly, this Court finds Applicant utterly failed to carry his burden of proof in support of this allegation and it must be denied and dismissed.

Additionally, this Court finds the trial transcript refutes any suggestion Counsel was ineffective for failing to adequately challenge the admissibility of his statements. "There is a strong presumption counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Here, the trial court conducted a thorough pretrial *Jackson v. Denno*

hearing before ruling it would admit Applicant's statements to the police. Counsel listened to the testimony of Investigator Mauldin offered by the State and then cross-examined Mauldin on the circumstances surrounding the statements given by Applicant, including the adequacy of the *Miranda* warning given to Applicant before he made those statements. (Tr.p.27-55). Counsel then called Applicant to testify on his own behalf so he could offer his conflicting version of those circumstances. (Tr.p.56-p.68). At the conclusion of the testimony, Counsel argued various grounds for exclusion, including the discrepancies between Mauldin's version and Applicant's version of the *Miranda* warning issue. (Tr.p.68-p.79). Ultimately, despite Counsel's efforts, the trial court ruled Applicant was properly advised of his rights pursuant to *Miranda* and that his statements were admissible. (Tr.p.79-p.84). Based on the foregoing, this Court finds Applicant has failed to establish any deficiency on the part of Counsel, either through direct evidence at the PCR hearing or evidence from trial. In addition, Applicant has presented no evidence which would establish any prejudice on the part of Applicant. In particular, Applicant has wholly failed to provide this Court with any reason as to how Counsel could have additionally challenged the admissibility of his statements, or how any such challenges would have affected the outcome at trial. Accordingly, this allegation must be denied and dismissed with prejudice.

CONCLUSION

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

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED this 9 day of Oct, 2018.

D. CRAIG BROWN
Presiding Judge
Fifth Judicial Circuit

Florence, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

Edward Maurice Dunn, Jr. #351031) CASE NO.
☐ Plaintiff) 2015-CP-40-01657

v.) MOTION AND ORDER INFORMATION FORM AND COVER SHEET

State Of South Carolina)
☒ Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
Jonathan Waller, Bar No. 76290	J. Benjamin Aplin, Bar No. 8729
Address:	Address:
1116 Blanding Street Suite 2B	P.O. Box 11549
Columbia, SC 29201	Columbia, SC 29211
phone: (803) 520-7278 fax:	phone: (803)734-3727 fax: (803) 734-4113
e-mail: other:	e-mail: other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

J. Ben Aplin
Signature of Attorney for ☐Plaintiff / ☒Defendant — October 4, 2018 Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

ALAN WILSON
ATTORNEY GENERAL

October 12, 2018

The Honorable Jeanette W. McBride
Richland County Clerk of Court
Post Office Box 2766
Columbia, South Carolina 29202-2766

Re: Edward Maurice Dunn, Jr. v. State of South Carolina
2015-CP-40-01657

Dear Ms. McBride:

Enclosed for filing please find the original Order of Dismissal, in the above-captioned case for filing in your office. Please serve a filed copy on all parties.

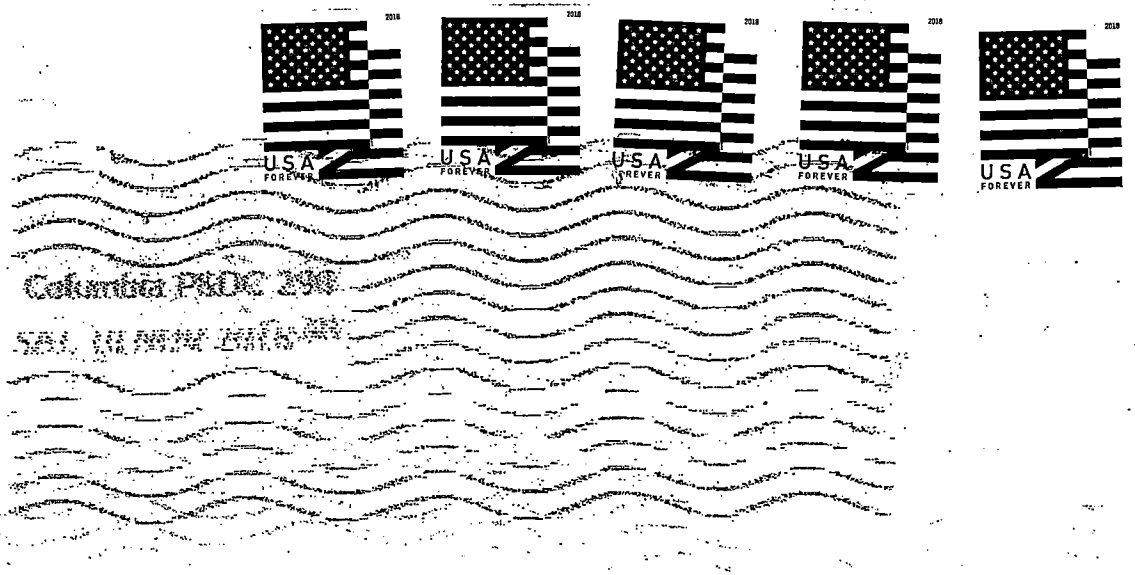
Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General

JBA/tb
Enclosures

cc: Jonathan Waller, Esquire

Columbia, SC 29201



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