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REPLY TO THE CHARLESTON OFFICE

146 Fairchild Street, Suite 130
Charleston, SC 29492

March 12, 2019

VIA U.S. MAIL
The Honorable Daniel E. Shearhouse
Clerk of South Carolina Supreme Court
Supreme Court Building
Post Office Box 11330
Columbia, SC 29211

Re: *Charles Myers v. State of South Carolina*
Civil Action No.: 2016-CP-10-0797

Dear Mr. Shearhouse:

Enclosed for filing, please find an original and two copies of Appellant's Notice of Appeal of the denial of his application for Post-Conviction Relief, and a Proof of Service regarding same. If you find everything in order, please file the original and return the clocked-in copies in the enclosed self-addressed envelope.

Please note, I was appointed to this and case and have copied the Office of Appellate Defense on this who will handle the appeal. Please call if you have any questions.

With kindest regards, I am

Sincerely,

Christopher L. Murphy, Esq.
For the Firm

CLM/jh

Enclosures
cc (w/ encls.): Mr. Charles Myers
Kelly Oppenheimer, Senior Asst. AG
Office of Appellate Defense
The Honorable Deadre L. Jefferson
The Honorable Julie J. Armstrong, Clerk, 9th Jud. Cir.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Deadre L. Jefferson, Circuit Court Judge

Case No.: 2017-CP-10-3033

Charles Myers, #294203 ..... Appellant

v.

State of South Carolina ..... Respondent

NOTICE OF APPEAL

Appellant appeals the Court's denial of his application for post-conviction relief. Attached is the order from the court dated February 12, 2019 and received February 27, 2019.

March 12, 2019

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Deadre L. Jefferson, Circuit Court Judge

Case No.: 2017-CP-10-3033

Charles Myers, #294203 ..... Appellant

v.

State of South Carolina ..... Respondent

PROOF OF SERVICE

I certify that I have served APPELLANT'S NOTICE OF APPEAL by delivering a copy via U.S. Mail First-Class postage prepaid on the 12th day of March, 2019, on the following:

Kelly Oppenheimer
Senior Assistant Attorney General
SC Office of the Attorney General
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Columbia, SC 29201

The Honorable Deadre L. Jefferson
Circuit Court Judge
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Charleston, SC 29401

The Honorable Julie J. Armstrong
Clerk of Court, Ninth Judicial Circuit
100 Broad Street, Suite 106
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Mr. Charles Myers, #294203
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Jodi Hanahan

DC
AC
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GS
SOL

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Charles T. Myers, #294203, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2017-CP-10-3033 **ORDER OF DISMISSAL**

FILED
2019 FEB 14 PM 1:07
JULIE J. ARMSTRONG
CLERK OF COURT

Presiding Judge:	Honorable Deadra L. Jefferson
Applicant's Attorney:	Christopher L. Murphy, Esquire
Respondent's Attorney:	Kelly Oppenheimer, Esquire
Trial Counsel:	Benjamin C. Lewis, Esquire
Date of Hearing:	July 26, 2018
Court Reporter:	Joyce C. Rueger

This matter comes before the Court by way of an application for post-conviction relief and an amendment thereto, both filed June 13, 2017, by Charles T. Myers (Applicant). The State (Respondent) made its Return on September 19, 2017, requesting an evidentiary hearing be held. An evidentiary hearing was convened on July 26, 2018, at the Charleston County Courthouse. Applicant was present at the hearing and was represented by Christopher L. Murphy, Esquire. Assistant Attorney General Kelly Oppenheimer of the South Carolina Attorney General's Office represented the Respondent. Testimony was taken from the Applicant and his trial counsel, Benjamin C. Lewis, Esquire. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this Application with prejudice.

PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its June 2013 term, the Charleston County Grand Jury indicted Applicant for Trafficking Cocaine, twenty-eight to one hundred grams, third offense[1] (2013–GS–10–03396), Possession with Intent to Distribute (PWID) Marijuana, first offense[2] (2013–GS–10–03397), and Possession of a Firearm during the Commission of a Violent Crime[3] (2013–GS–10–03398). Assistant Public Defender Benjamin C. Lewis, of the Ninth Circuit Public Defender's Office, represented Applicant on these charges. On October 6-8, 2014, Applicant proceeded to a jury trial before the Honorable R. Knox McMahon. Following deliberations, the jury convicted Applicant as indicted for trafficking cocaine and possession with intent to distribute marijuana. The jury acquitted Applicant of the weapons charge. Judge McMahon sentenced him to the minimum mandatory term of imprisonment of twenty-five (25) years and a fine of fifty thousand dollars ($50,000.00) for trafficking cocaine and five years for PWID marijuana. The sentences were to run concurrently.

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[1] "Any person who knowingly sells ... or who is knowingly in actual or constructive possession ... of ten grams or more of cocaine or any mixtures containing cocaine .... is guilty of a felony which is known as "trafficking in cocaine." S.C. CODE ANN. § 44-53-370 (2002). Trafficking 28-100 grams of cocaine is punishable by a mandatory minimum of twenty-five (25) years and maximum of thirty (30) years, none of which sentence may be suspended, nor probation granted, and a fine of fifty thousand dollars ($50,000). See § 44-53-370 (e)(2)(a)(3) (2002).

[2] PWID marijuana, as a first offense, is a felony punishable by imprisonment of not more than five (5) years or a fine of five thousand dollars ($5,000), or both. See S.C. CODE ANN. § 44-53-70(b)(2) (2002); S.C. CODE ANN. § 44-53-190 (2002).

[3] Possession of a Firearm During the Commission of a Violent Crime is a felony punishable by a mandatory minimum five (5) years' imprisonment in addition to the sentence imposed for the principal crime. See S.C. CODE ANN. § 16-23-490(A) (2003). Drug trafficking is defined as a violent crime. S.C. CODE ANN. § 16-1-60 (2003 & Supp. 2013).

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Applicant filed a timely notice of appeal, and Appellate Defender LaNelle Cantey DuRant, 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 issues:

1. Did the trial court err in denying [Applicant's] motion for a directed verdict when the state did not present substantial circumstantial evidence that the drugs belonged to [Applicant] and the evidence only raised a mere suspicion of [Applicant's] guilt when there were no eyewitnesses, and no forensic evidence connection [Applicant] to the drugs? [and]
2. Did the trial court err in charging the jury on the hand of one is the hand of all when [Applicant] was the only person arrested and charged?

Following briefing, the South Carolina Court of Appeals issued an unpublished opinion affirming Applicant's conviction and sentence. State v. Myers, No. 2016-UP-321 (Ct. App. filed June 22, 2016). The Remittitur was issued on July 15, 2016.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel:
    a. "Trial counsel failed to make appropriate legal argument in support of directed verdict motion. counsel's failure to make appropriate motion may changed [sic] the outcome of the Applicant's trial and deprived him of the opportunity to have this issue properly addressed on its merits on direct appeal."

At the evidentiary hearing, the Applicant proceeded forward on the claims in his original application, as well as allegations his trial counsel was ineffective (1) for failing to convey a plea offer and (2) for misinforming Applicant regarding his right to testify.

STATEMENT OF FACTS ADDUCED AT TRIAL

On October 26, 2012, Detective Tireka Cerone of the City of North Charleston Police Department executed a search warrant at the home of Shirley and Crystal Nelson based on an anonymous tip Applicant was selling drugs from that house. (Transcript of Record at 94:19 – 23, State v. Charles Myers, October 6-8, 2014); Id. at 97: 8–13. The information Detective Cerone received from the tipster indicated Applicant was also selling drugs around the neighborhood in his vehicle and would return to the home. (Id. at 97:8–13). Based on the tip, Detective Cerone verified Applicant's identity through the DMV and began conducting drive-bys to check for the vehicles the tipster described. (Id. at 99:18–25). Detective Cerone surveilled the residence for two months, observing Applicant entering and exiting the residence, getting into a vehicle, leaving, and returning within a few minutes. (Id. at 100: 6–10). She believed his behavior was consistent with him living at the residence (entering like he lived there; coming and going without having to knock) and consistent with illegal drug activity (different vehicles stopping by and people getting out and returning quickly to their vehicles; Applicant making hand-to-hand transactions from his vehicle). (Id. at 100:12 – 103:5). Based on what police found during the search, Applicant was arrested and charged with Trafficking in Cocaine, more than twenty-eight grams but less than one hundred grams, Possession with Intent to Distribute (PWID) Marijuana, and Possession of a Weapon During the Commission of a Violent Crime.

Pretrial, Applicant argued the search warrant was invalid because it lacked probable cause and as a result, the evidence discovered in the search should be suppressed. (Id. at 155:5 – 159:6). The trial court denied the motion, finding sufficient probable cause existed for the search warrant. (Id. at 166:24-25 – 170:20). Later during trial, Applicant successfully argued to suppress a confession he gave the police. (Id. at 286: 5–8).

Crystal Nelson, Applicant's girlfriend, testified she lived with her mother, Shirley Nelson, and that Applicant stayed overnight on a regular basis (Id. at 301:1 – 303:25). She testified she and Applicant had dated on and off for thirteen (13) to fourteen (14) years and that he kept personal items in her bedroom, helped out around the house, gave her money toward bills and groceries, and came and went even when she was not there. (Id. at 302:7 – 305:13). She testified the police found the drugs in a box under the bed in the bedroom she shared with Applicant. (Id. at 305:15 – 306:25) She denied the drugs were hers and admitted Applicant was the only other person who shared the bedroom with her. (Id. at 306:1-25). The police also found a firearm in the same box where they located the drugs. (Id. at 307:6-19). Crystal testified the gun was hers and she had last seen it the night before the search when she placed it in a box under the bed to keep it away from her nephews, and she stated that nothing else was in the box when she placed the gun there. (Id. at 307:17 – 309:25). She confirmed Applicant slept there the night before the search. (Id. 304:13-17). She admitted it would have been possible for Applicant to access the box without her knowledge. (Id. at 309:24 – 310:10). She repeated only she and Applicant shared that bedroom and testified that no one else had access to it. (Id. at 311:13-22). She testified Applicant knew she had a gun, had access to it, had handled it previously, and had helped her put bullets in it. (Id. at 319:25 – 320:9).

Detective Cerone testified when she arrived to execute the search warrant, Applicant was in the passenger seat of a car in the driveway of the residence, while Crystal was in the driver's seat. (Id. at 325:16-18). She searched the car and found marijuana in the glove box, baggies in the center console, a digital scale under the passenger seat, and some marijuana on the passenger seat itself. (Id. at 326:11-15). She opined, based on her training and experience, the items found in the car indicated Applicant was selling drugs from the vehicle. (Id. at 329:10-20). She testified two

bedrooms were in the house: bedroom 1 belonging to Crystal and Applicant, and bedroom 2 belonging to Shirley Nelson. (Id. at 330:15 – 332:25). In bedroom 1, she found male and female clothing and some mail belonging to Applicant, and she also found the box containing the gun and drugs in that bedroom. (Id. at 331:6 – 332:13). Detective Cerone testified she found thirty-four grams of cocaine and 200 grams of marijuana in the box, which were amounts consistent with dealing drugs rather than personal use. (Id. at 343:20 – 346:3).

Shirley Nelson testified Applicant was her daughter Crystal's boyfriend and stayed in Crystal's room when he slept at the house. (Id. at 409:1-12). When questioned about what the police found in Crystal's room and listed on the search warrant return, she stated, "Crack cocaine and reefer, something like that. I was very shocked. I didn't even know." (Id. at 416:15-19). Shirley testified she did not put any drugs in Crystal's room. (Id. at 420:2-11). She also indicated she knew Crystal had a gun but did not know where she hid it. (Id. at 420:12-20).

After the State rested, Applicant moved for a directed verdict, vigorously arguing only a mere suspicion existed that Applicant had dominion and control over the gun and drugs. (Id. at 428:18 – 429:11. The State argued substantial circumstantial evidence had been presented that reasonably tended to prove Applicant's guilt. (Id. at 429:17-23). The trial judge denied the motion. (Id. at 430:9-10). He pointed out that the other adults in the house denied the drugs belonged to them, specifically noting Crystal only claimed ownership of the gun, not the drugs, and she testified no drugs were in the pink box when she placed her gun in it. (Id. at 430:16-25). He noted the jury could believe her or not on that issue. (Id. at 430:25 – 431:2). He further pointed out Shirley Nelson only claimed ownership of the pipe found in her bedroom and testified although she knew her daughter had a gun, she did not know where her daughter kept it. (Id. at 431:10-19).

He ruled when viewed in the light most favorable to the State, sufficient circumstantial evidence existed to support each charge. (Id. at 432:13-17).

The trial judge then announced because Applicant had requested a charge on mere presence, he would also charge the "hand of one is the hand of all[4]." (Id. at 432:18-25). Applicant's counsel interjected, stating he did not think any evidence in the record suggested Applicant worked with anyone or was involved in any conspiracy. (Id. at 433:15-22). Counsel further argued the charge was not applicable because Crystal was never charged. (Id. at 433:23 – 434:5). The trial court pointed out because Applicant was sleeping in the same bed with Crystal, under which the box was found containing her weapon and the drugs, combined with the fact Crystal denied the drugs were hers, sufficient evidence existed to justify the "hand of one is the hand of all" charge. (Id. at 434:6-15).

The trial court charged the jury as follows regarding constructive possession and the "hand of one is the hand of all":

> The State must prove beyond a reasonable doubt that the Defendant possessed marijuana with the intent to distribute. To prove possession, the State must prove beyond a reasonable doubt that the Defendant had both the power and the intent to control the disposition or use of the marijuana.
>
> Possession may be either actual or constructive, just as it could be with trafficking in cocaine. Constructive possession means that the Defendant had dominion and control or the right to exercise dominion and control over either the marijuana itself or cocaine itself, or the property on which the marijuana or cocaine was found.
>
> Mere presence at the scene where drugs are found is not enough to prove possession. The Defendant's knowledge and possession may be inferred when a substance is found on the

[4] In South Carolina, "Under "the hand of one is the hand of all" theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Ward, 374, S.C. 606, 614, 649 S.E.2d 145, 149 (Ct. App. 2007) (citing State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999).

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> property under the Defendant's control; however, this inference is simply an evidentiary fact to be taken into consideration by you, along with the other evidence in the case, and to be given the weight and value you decide it should have. Two or more persons may have joint possession of a drug.
>
> If a crime is committed by two or more people who are acting together in committing the crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable and natural consequence of the acts done in carrying out the common plan and purpose.

(Id. at 484:5 – 485:5); (Id. at 487:12-20).

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf and presented the testimony of trial counsel, Benjamin C. Lewis, Esquire (hereinafter "Counsel"). This Court also had before it a copy of Applicant's trial transcript, the records of the Charleston County Clerk of Court, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

Applicant first testified on his own behalf. Applicant testified Counsel represented him on his charges. He testified during this representation, Counsel only met with him two (2) or three (3) times and that those meetings took place at the detention center. Applicant testified the meetings would not last long because he and Counsel would get into arguments. He further testified that even though their communications had been volatile they had "made up." He elaborated one of the arguments centered around the search warrant in his case, with which he took issue. Applicant further elaborated there were two (2) search warrants, and each appeared to have a different signature. He also testified when law enforcement executed the search warrant, Counsel did not represent him.

Applicant also testified he took issue with Counsel never moving for a lower bond, even

though he asked him to do so. He testified he attempted to file for a bond reduction himself. Applicant testified he tried to get Trial Counsel removed from his case. He testified his charges should have been dismissed because the police broke the law when they got a search warrant to search his trash after a trash pull. Applicant testified he did not believe the police had probable cause to do this.

He also testified his girlfriend's sister was a witness he wanted to testify on his behalf, and he gave her name to Counsel. He elaborated, however, she did not appear at trial, and Counsel told him she was unwilling to come testify for him. He further testified his girlfriend and her mother testified against him at trial.

Applicant testified there was mail in his name at the home where the gun and drugs were found. He further testified during law enforcement's search after the trash pull, items were found, including a scale and baggies which tested positive for cocaine.

Applicant testified the State made a plea offer of ten (10) to twelve (12) years to him prior to trial. He testified once trial started, the court granted his motion for suppression, and the State then offered a plea deal of ten (10) years. Applicant testified Ashley D. Pennington, Esquire, Counsel's boss, discussed the ten year plea deal with him. He elaborated Mr. Pennington wanted him to take the plea deal, but he did not want to accept it. He testified he rejected the offers of his own free will. He further elaborated he would not take the plea offers the State extended but would have possibly taken an offer if the State offered him less than ten (10) years.

Applicant further testified he recalled the directed verdict motion made by Counsel after the State rested.

He testified he recalled the trial court talking to him about testifying in his own defense. Applicant testified Counsel recommended to him that he should not take the stand because of his

prior record. He testified it was Counsel's decision that he not take the stand. He elaborated he told the court it was his decision not to testify at his trial. He further elaborated he had a long criminal history, and those charges could have been raised if he testified. Applicant explained Counsel discussed this possibility with him.

Applicant testified he wanted to testify at his trial because the drugs that were found were not his, and he believed if he had testified at his trial the outcome would have been different.

He testified his case was appealed and he talked to his appellate lawyer during this time. Applicant testified he understood Counsel did not represent him on appeal.

Following Applicant's testimony, Counsel testified. Counsel testified Applicant's case was a frustrating case for him because Applicant was facing a trafficking charge that was his third offense which exposed him to the twenty-five (25) year mandatory minimum. . He testified he started representing Applicant on February 23, 2012, and that he could not remember if he filed for a bond modification. Counsel testified he was appointed to represent Applicant and reviewed the discovery with Applicant. He testified he met with Applicant approximately sixteen (16) times prior to trial. Counsel testified during those meetings he discussed the trash pull, and they discussed the evidence in the case. He elaborated Applicant did not believe law enforcement should have been able to conduct a trash pull and search his trash. Counsel testified he informed Applicant he had no expectation of privacy once he put his trash on the curb. Counsel further testified that when executing the search warrant on the home the police found a gun and a bag of cocaine. He testified Applicant's girlfriend claimed ownership of the gun but not the drugs. Trial Counsel testified evidence was found at the home establishing that Applicant lived there.

He further testified he discussed the search warrant issues with Applicant, and he had his investigator talk to the magistrate judge who signed the search warrant to confirm the signature on

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it was, indeed, his.

He also testified he explained all of the plea offers to Applicant. Specifically, Counsel testified the State initially offered Applicant a plea deal for twelve (12) years at a sixty-five percent rate. He further testified the State also made offers of nine (9) years and seven (7) years which later became a final pre-trial plea deal of fifteen (15) years at a sixty-five percent rate. Counsel testified after Applicant proceeded to trial and after the suppression was granted, the State made an offer of ten (10) years, but Applicant said he did not want to plead guilty. He testified after the State made the plea offers, he sent a lawyer from his office to present to Applicant the calculations for his release if he took any of the offers. He testified he was not present when his boss, Mr. Pennington, discussed the new plea offer with Applicant after his trial started; however, he was sure he told Applicant about the ten (10) year plea offer. Counsel elaborated sometimes Mr. Pennington would assist him on cases. Counsel further testified the solicitor told him he could not go any lower than five (5) years, but Applicant continued to decline any plea offers. Counsel testified he believed a plea was in Applicant's best interest, and he shared this opinion with Applicant.

Counsel further testified he did not call the sister of Applicant's girlfriend because she refused to talk to him. Counsel elaborated he did not believe Applicant's girlfriend's sister would have provided good information at trial because she did not want to speak with him before trial. He further testified Applicant told him the sister was on the porch of the home when the police came to search. Counsel testified he moved to suppress a statement given by Applicant and was successful in having it suppressed, which surprised him.

He testified he made a directed verdict motion and believed there was substance in the motion for it to be granted. Counsel explained other than the mere presence by the Applicant, he

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did not believe there was any other evidence in the case. Counsel further elaborated he made a directed verdict motion and argued in closing that there was little to no evidence in this case against Applicant. He testified the information about the lack of evidence in the case was raised on appeal. He further testified he believed he made appropriate motions at appropriate times during trial. Counsel testified he discussed Applicant's right to testify with him. He further testified he was not merely concerned with Applicant's criminal record if he testified but also his confession, which had been suppressed pre-trial. More specifically, had Applicant testified, Counsel stated he feared the door would be opened for this already-suppressed confession coming in on cross-examination.

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 fact and conclusions of law below, as required by S.C. CODE ANN. § 17–27–80 (2003).

The Applicant seeks relief from his conviction on the basis that he received ineffective assistance of counsel at his 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). In an action for post-conviction relief, the Applicant bears the burden of proving the allegations in his or her application by a preponderance of the evidence. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of

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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 v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

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 judgement." 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. Second, counsel's deficient performance must have prejudiced their 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, the Court finds that Applicant

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has failed to carry his burden of proof and has not established any ineffectiveness of counsel. This Court finds that the Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 5, 239 S.E.2d 750, 752 (1977); Strickland, 466 U.S. at 687–88, 104 S. Ct. 2052, 2064–65; Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687–88, 104 S. Ct. at 2064–65, Turner v. Bass, 753 F.2d 342, 348 (4th Cir. 1985), *rev'd on other grounds*, Turner v. Murray, 106 S. Ct. 1683 (1986); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977)). The Court will address each of the specific allegations made by the Applicant as follows.

I. Counsel's alleged failure to properly argue the directed verdict motion

Applicant contends Counsel was ineffective for failing to properly argue his directed verdict motion. Applicant contends Counsel's failure to properly argue this motion hindered his ability to prevail on appeal.

This Court finds Applicant has wholly failed to establish Counsel was deficient. In his motion for a directed verdict, Counsel argued there was only a mere suspicion from which the jury could conclude the drugs and gun were Applicant's and there was just as much evidence to establish the drugs and gun belonged to Applicant's girlfriend. Specifically, he argued:

> [T]here has to be more than just a mere suspicion that Charles is the person responsible for the drugs, gun -- or cocaine, gun, and marijuana found in the home.
>
> At this stage, that's before the Court is that several adults had access to it. Two of them have testified and said they didn't put it there, but to call any attention to the fact that Charles hasn't testified would be basically calling into question his right to remain silent.
>
> At this point, there is as much evidence in the record that Crystal had control and dominion over the gun and drugs as Charles did. And, given

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that, we're moving for a directed verdict at this point because there's no other evidence that could lead to his guilt.

(Tr. at 108:20 – 109:11).

Applicant fails to articulate what more he wanted Counsel to argue during his directed verdict motion. Counsel articulated the evidence merely raised a suspicion as to Applicant's guilt and strenuously argued this point. Based on the foregoing, this Court finds Applicant has wholly failed to establish Counsel was deficient.

Similarly, this Court finds Applicant has wholly failed to establish any resulting prejudice from this alleged deficiency. When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Larmand, 415 S.C. 23, 30, 780 S.E.2d 892, 895 (2015) (citing Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)). The trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. State v. Hernandez, 382 S.C. 620, 625-26, 677 S.E.2d 603, 605-06 (2009). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Ladner, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007).

"Possession of drugs may be inferred from the circumstances and may be imputed to anyone who has the power and intent to control the disposition and use of the drugs." State v. Brown, 319 S.C. 400, 404, 462 S.E.2d 828, 830 (Ct. App. 1995). Possession may be actual or constructive. State v. Mollison, 319 S.C. 41, 459 S.E.2d 88 (Ct. App. 1995). Constructive possession can be inferred when the drugs are in the joint control of a defendant and another person. State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981). Mere presence is insufficient to establish possession. Mollison, 319 S.C. at 45, 459 S.E.2d at 91. It has been held that knowledge of the presence of drugs is evidence of intent to control its disposition and use. Brown, 319 S.C. at 404, 462 S.E.2d at 830. Knowledge can be shown circumstantially through evidence of the

defendant's conduct, acts, or declarations from which an inference could be drawn that he knew of the existence of the drugs. State v. Gore, 318 S.C. 157, 163, 456 S.E.2d 419, 422 (Ct. App. 1995); Mollison, 319 S.C. at 45, 459 S.E.2d at 91.

"Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared." Hudson, 277 S.C. at 202, 284 S.E.2d at 775. Constructive possession is proven by showing the accused has dominion and control, *or the right to exercise dominion and control*, over the contraband. Id. at 202, 284 S.E.2d at 774-75 (emphasis added). Acts, declarations, or conduct of the accused may create an inference that the accused knew of the existence of the contraband. Mollison, 319 S.C. at 45, 459 S.E.2d at 91. "The proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control." State v. Adams, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987). "Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." State v. Muhammed, 338 S.C. 22, 26-27, 524 S.E.2d 637, 639 (Ct. App. 1999) (citing Hudson, 277 S.C. at 203, 284 S.E.2d at 775). See also United States v. Poore, 594 F.2d 39, 43 (4th Cir. 1979) (finding because Appellant resided with a woman in her apartment for a period of time and the shotgun was discovered in that apartment, the jury could properly have concluded Poore was in constructive possession of the shotgun).

Here, the drugs were found in the house that was occupied by three (3) adults and specifically found under the bed Applicant slept in. (Tr. at 306:1-25). Evidence existed that the drugs were under the dominion and control of Applicant due to his living in the bedroom where they were found. (Id. at 311:13-22). Applicant was not merely present or an unwary guest at the

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residence where the drugs and gun were found. Rather, he stayed there on a regular basis with his girlfriend of thirteen (13) to fourteen (14) years. (Id. at 302:7 – 305:13). He received mail there, had been dating Crystal for thirteen (13) to fourteen (14) years (during which time he stayed regularly at the house), paid bills, and came and went on his own. (Id.) Evidence further showed Applicant slept there the night before the search. (Id. at 304:13-17). The fact that he lived in the house, in the particular bedroom where the contraband was found, gives rise to the inference of knowledge and possession which was sufficient to carry the case to the jury. The trial judge accurately assessed the evidence and determined it sufficient to allow Applicant's guilt to be fairly and logically deduced by the jury, when taken in a light most favorable to the State. Based on the foregoing, it is unlikely Applicant would have prevailed on this issue on appeal, even if Counsel had argued his motion for a directed verdict more thoroughly. Accordingly, this allegation must be denied and dismissed with prejudice.

II. Counsel's alleged failure to convey a plea offer

Applicant alleges Counsel was ineffective for failing to convey a plea offer from the State. 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, 608, 675 S.E. 416, 419 (2009).

Here, Counsel testified he conveyed all plea offers from the State to Applicant and advised Applicant he believed a plea was in his best interest. The State offered multiple pleas, however, Applicant rejected every single offer of his own volition. Applicant admitted he would not have

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taken any of the offers which were presented to him. Because Counsel did indeed convey the State's offers to Applicant, this Court finds Applicant has failed to establish any deficiency on the part of Counsel.

Moreover, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. Counsel testified after discussing the plea offers with Applicant and advising him to take each offer, Applicant adamantly rejected them. In fact, Applicant indicated at the evidentiary hearing he would not have accepted any of the offers the State made, but rather would have considered taking an offer if the State came back with a lower sentence. No such offer existed; therefore, there is no indication Applicant would have accepted any of these offers. Applicant testified he would have taken a ten (10) year offer just to get it over with but considering the totality of this record this is not a credible assertion. Accordingly, Applicant has wholly failed to establish despite Counsel's alleged deficiencies, he would have accepted any of the plea offers. This Court finds this allegation must be denied and dismissed with prejudice.

III. Counsel's alleged failure to advise Applicant of his right to testify

Applicant alleges Counsel failed to advise him of his right to testify. A criminal defendant has a constitutional right to testify on his own behalf. Rock v. Arkansas, 483 U.S. 44, 49 (1987). The decision on whether or not the defendant will testify ultimately rests with the defendant alone. Jones v. Barnes, 463 U.S. 745, 751 (1983). When a defendant chooses not to testify, "an on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right." Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994) (citing Myers v. State, 248 S.C. 359, 151 S.E.2d 665 (1966)). Here, the trial court fully advised Applicant of his right to testify at trial. (See Tr. at 435:16 – 440:13). Furthermore, the record clearly indicates Applicant made a knowing and intelligent choice, of his

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own free will and volition, not to testify after having been fully advised of his rights and the ramifications of testifying or, in the alternative, not testifying. (Id. at 440:9-13). Applicant chose not to testify. (Id. at 439:24-25). Moreover, Counsel testified he discussed Applicant's right to testify with him and expressed his concerns if Applicant did decide to testify, namely his prior record and opening the door for his confession to become admissible. Accordingly, this Court finds Applicant has failed to show any deficiency or resulting prejudice with respect to Counsel's alleged failure to adequately advise of Applicant regarding his right to testify. 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 (30) 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.

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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 12th day of Feb., 2019.

DL Jefferson

HON. DEADRA L. JEFFERSON
Presiding Judge
Ninth Judicial Circuit

Charleston, South Carolina

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