

March 28, 2019

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

RECEIVED

APR 01 2019

S.C. SUPREME COURT

Re: Tykeem Kalami May vs. State of South Carolina  
C/A No: 2017-CP-38-01599

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. May 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: Benjamin Limbaugh, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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

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2017-CP-38-01599

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RECEIVED

APR 01 2019

S.C. SUPREME COURT

Tykeem Kalami May, # 361073,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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NOTICE OF APPEAL

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Tykeem Kalami May, # 361073, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed December 12, 2018, and served on counsel by letter dated March 26, 2019, issued by the Honorable D. Craig Brown, Presiding Judge, First Judicial Circuit.



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ATTORNEY FOR PETITIONER

March 28, 2019

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STATE OF SOUTH CAROLINA  
In The Supreme Court

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APR 01 2019

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

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S.C. SUPREME COURT

2017-CP-38-01599

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Tykeem Kalami May, # 361073,

Appellant,

v.

STATE OF SOUTH CAROLINA,

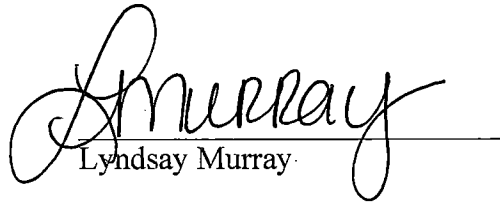
Respondent.

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CERTIFICATE OF SERVICE

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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, Christian Saville, 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.

  
Lyndsay Murray

March 28, 2019

STATE OF SOUTH CAROLINA )  
COUNTY OF ORANGEBURG )  
Tykeem Kalami May, #361073 )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
IN THE FIRST JUDICIAL CIRCUIT

2017-CP-38-1599

ORDER OF DISMISSAL

FILED FOR RECORD  
WINNIE B. CLARK  
2018 DEC 12 AM 11:28  
ORANGEBURG, SC

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on November 30, 2017. An evidentiary hearing into the matter was convened on October 3, 2018, at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by Jonathan D. Waller, Esquire. Respondent was represented by Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office.

Before this Court were the records of the Orangeburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the record on appeal, Applicant's appellate records, the State's return, and Applicant's PCR application. Based on these records and the testimony presented, the Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Orangeburg County Clerk of Court's orders of commitment. In February 2014, the Orangeburg County Grand Jury indicted Applicant for armed robbery (2014-GS-38-0189) and possession of a weapon during the commission of a violent crime (2014-GS-38-0190). Breen R. Stevens, Esquire ("Trial Counsel"), represented Applicant at trial. Harrison Bell, Esquire, and Ashley Cornwell, Esquire, prosecuted the case. On August 11, 2014, Applicant proceeded to a

jury trial before the Honorable Deadra L. Jefferson. The jury found Applicant guilty as indicted. On August 15, 2014, Judge Jefferson sentenced Applicant to confinement for fifteen years for armed robbery and five years for possession of a weapon during the commission of a violent crime, to be served concurrently.

Applicant filed a notice of appeal. An appeal was perfected on his behalf by Appellate Defender David Alexander. In the appeal, Applicant argued the trial court erred in denying his Batson challenge regarding the use of peremptory strikes against black males. The South Carolina Court of Appeals affirmed Applicant's conviction on April 5, 2017. State v. May, Op. No. 2017-UP-138 (Ct. App. 2017). The remittitur was issued April 24, 2017.

## II. ALLEGATIONS

At the PCR hearing, Applicant enumerated his allegations as follows:

### 1. Ineffective Assistance of Trial Counsel

- a. "Trial Counsel failed to conscientiously discharge his professional responsibilities while handling the trial of my case."
- b. "Trial Counsel failed to act as my diligent conscientious advocate by failing to present any type of strategic defense during the trial. There were key material witnesses and physical evidence available that would have exonerated the Applicant."
- c. "Trial Counsel did not have my best interest in mind and failed to conduct any pretrial investigation to prepare for the trial of my case."
- d. "Trial Counsel failed to serve my cause in good faith and he never attempted or intended to offer any type of defense for the jury's consideration."
- e. "Trial Counsel, knowing I was illiterate regarding the complexities of the law, never ascertained whether or not I actually understood or comprehended all the issues and aspects of my case."
- f. "Trial Counsel failed to explain to me the advantages or disadvantages of offering forth a defense versus not doing so. He failed to discuss trial strategy of available defenses."
- g. "Trial Counsel did not subject the prosecution's case-in-chief to any adverse forensic testing and failed to oppose the prosecution's case with any adverse defense litigation."

### III. SUMMARY OF TESTIMONY PRESENTED

Trial Counsel testified at the PCR hearing, and Applicant testified on his own behalf.

#### *Applicant*

Applicant testified Trial Counsel "blew him off" until the day of trial. He also testified he first met with Trial Counsel roughly two or three months after the arrest. Applicant felt Trial Counsel did not have his best interests in mind from the beginning. Nevertheless, Applicant acknowledged this contradicts his statement to the trial judge when he was initially moving to have Trial Counsel relieved that Trial Counsel had "been a very good lawyer from the beginning," but faltered. Tr. p. 17, l. 12.

Regarding trial strategy, Applicant testified Trial Counsel told him it looked like a case of mistaken identity, acted like everything was going to be alright, and this made Applicant feel as though Trial Counsel did not look into anything. According to Applicant, Trial Counsel wanted to preserve last argument, but introduced evidence at trial which forfeited his opportunity for last argument.

Applicant recalled he met with Trial Counsel's investigator perhaps twice. Applicant testified he gave the name of two character witnesses to Trial Counsel who should have been called at trial, and had also just started a second job he wanted Trial Counsel to present evidence of at trial in order to show he did not have the motive to rob the store. Applicant recalled he was being paid "under the table" at this job. Applicant conceded the character witnesses in question were not present at the PCR hearing. Applicant testified Trial Counsel never investigated or tried to obtain a receipt from Walmart from Applicant's cash purchase of a receipt for phone minutes the afternoon of the robbery to show Applicant could not have been at The Keg.

Applicant alleged Trial Counsel did not make a Rule 5 motion, but as he recalled, the State had footage of a person "wearing a shawl or something" with some kind of assault rifle

robbing The Keg store. Applicant testified he did eventually get discovery and they did go through it.

Regarding the search warrant, Applicant recalled he wanted to challenge hearsay contained in the search warrant as he alleged it was based on another officer's words. Applicant noted there was no testing done of the shoes, rifle, or other evidence found pursuant to the search warrant.

#### *Trial Counsel*

Trial Counsel testified he met with Applicant many times in preparation for trial. Trial Counsel described Applicant's case as a very strong case for the State. The evidence against Applicant included video footage of an individual who looked very much like Applicant with distinctive high-arching eyebrows robbing an Orangeburg store "The Keg" wearing red sunglasses, a red shawl-like cloth covering his face, and black and white Nike shoes. Furthermore, Trial Counsel described the distinctive SKS-style rifle with wooden accents and black strap as seen on the surveillance footage. Trial Counsel recalled the SKS-style rifle with black strap, and black and white Nike shoes were found in a closet with Applicant's belongings in Applicant's girlfriend's house during the execution of the search warrant. Moreover, the police also found identical red sunglasses in the home. Trial Counsel recalled it seemed the red shawl was being used to cover a window in the home at the time the search warrant was executed, but the shawl was not presented at trial. Trial Counsel testified the individual in the surveillance footage also walked with a distinctive gait similar to Applicant. Trial Counsel recalled the footage also showed the perpetrator leaving in a white Dodge Caliber with tinted windows and a square sticker on the rear windshield, identifiable as the car police later stopped which was registered to Applicant's girlfriend. In light of the substantial evidence against

Applicant, Trial Counsel urged him to take a plea deal for a recommended ten years, and even had this placed on the record. Tr. p. 6.

Trial Counsel explained he entered photos into evidence at a time Applicant, despite Trial Counsel's wishes, had indicated he wished to testify, so he was not concerned with foregoing last argument at that time. Trial Counsel testified he had to comb through the pictures from the surveillance footage to find a picture that did not show the dreadlocks. Trial Counsel explained he did not want Applicant to testify because they had practiced and Applicant's demeanor would not have been favorable. In fact, Trial Counsel described Applicant's skin turning a reddish color when angered during questioning, and this made Applicant look all the more similar to the surveillance footage. Trial Counsel was also concerned with the jury recognizing the similarities between Applicant's distinctive walk and that of the individual in the surveillance footage if Applicant took the stand. Despite the understanding Applicant was going to testify at the time Trial Counsel entered the photos into evidence, Applicant later decided he did not want to testify.

Trial Counsel recalled following up and speaking with the purported alibi witnesses provided by Applicant as well as the character witnesses. Trial Counsel explained some could not be found for lack of identifying information and some would not have been helpful. As Trial Counsel recalled, one witness's name provided by Applicant actually informed Trial Counsel that Applicant was trying to get him to say certain things.

Trial Counsel recounted his attempts to find evidence of Applicant's second job and was told by Applicant his new employer's name was "Hawk." Trial Counsel was unable to find any information legitimizing the security company Applicant purported to work with, and he was also unable to locate "Hawk." Regarding Applicant's other employment records, Trial Counsel did investigate the Dollar General where Applicant had been employed, but the pay

documentation would have shown Applicant was only a part-time employee. Trial Counsel did not want to introduce a part-time pay statement for a relatively modest amount of money in an attempt to show Applicant did not have motive to rob a store. Furthermore, Applicant was not working the day of the incident.

Trial Counsel testified Applicant also went to Walmart with his girlfriend the afternoon of the incident, and Applicant wanted Trial Counsel to present a receipt for phone minutes Applicant purchased from the Walmart to show he was at Walmart as an alibi. Trial Counsel explained he attempted to obtain the receipt, but Walmart did not keep their receipts that long and he was never able to find a record of the purchase. Furthermore, Applicant paid in cash for the phone minutes, and Applicant was at Walmart *after* the time of the incident. Trial Counsel explained even if he were able to obtain the receipt, he would not want to introduce a receipt from after the incident purporting to show Applicant bought phone minutes with a substantial amount of cash after an alleged robbery.

Trial Counsel testified he did challenge the validity of the search warrant on multiple grounds including lack of probable cause. Pretrial, Trial Counsel argued the warrant affidavit contained overbroad descriptions of the suspect and automobile and cited Franks v. Delaware, 438 U.S. 154, (1978). Moreover, Trial Counsel moved to suppress on the basis law enforcement failed to timely file the search warrant as required by S.C. Code § 17-13-140. Nevertheless, as Trial Counsel explained, his motions were denied, and the statutory issue has been held to be a ministerial rule.

Regarding his closing argument, Trial Counsel testified he tailored his closing argument to coincide with the trial judge's jury charge on reasonable doubt. Accordingly, Trial Counsel prepared a visual aid to map out what he saw to be the arguable inconsistencies in the State's

case and pointing to reasonable doubts.

Trial Counsel recalled thoroughly explaining to Applicant the elements and nature of Applicant's charges as well as the State's evidence against him. In fact, Trial Counsel had provided Applicant with a packet of information prepared by Trial Counsel explaining the elements of his charges as well as how the State's substantial evidence coincided with his charges. Trial Counsel testified Applicant did not seem to have difficulty understanding their conversations.

#### IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged 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 (1985).

The proper measure of performance is whether the 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 (1985). 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.

#### V. 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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witness 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).

First, after observing the witnesses and closely passing on their credibility, this Court finds Trial Counsel's testimony to be credible and persuasive. By contrast, this Court finds Applicant's testimony to be self-serving and not credible.

#### INEFFECTIVE ASSISTANCE OF COUNSEL

This Court finds Applicant has failed to prove he is entitled to post-conviction relief on any of his allegations of ineffective assistance of counsel. This Court finds Applicant has failed to satisfy his burden of proof as Trial Counsel was neither deficient, nor was Applicant prejudiced by any alleged deficiencies.

***Allegation A: Trial Counsel failed to conscientiously discharge his professional responsibilities while handling the trial of my case."***

Applicant alleges Trial Counsel was ineffective for conscientiously discharge his professional responsibilities while handling Applicant's case. This Court finds this allegation to be meritless. In fact, this Court finds Trial Counsel's representation was far and above the reasonable prevailing norms despite the towering amount of evidence against Applicant. This Court finds Trial Counsel credibly testified he met with Applicant many times prior to trial,

reviewed the evidence with Applicant, procured Applicant a favorable plea deal which Applicant rejected against the advice of counsel, and investigated all leads provided to him. Despite a substantial amount of evidence against Applicant in this case and Applicant's decision against the advice of counsel to proceed to trial, Trial Counsel vigorously challenged the State's case. Trial Counsel thoroughly challenged the search warrant in this case to include arguments from lack of probable cause to law enforcement's failure to timely file the search warrant return. Trial Counsel credibly testified he investigated the witnesses provided by Applicant and followed up with the witnesses he was able to locate. Trial Counsel credibly testified he attempted to locate the receipt from Walmart but was unable to as Walmart did not keep the receipt long enough and, regardless, the receipt would have been harmful to the defense because it showed Applicant made a substantial purchase of phone minutes with cash shortly after the time of the robbery.

Trial Counsel also prepared an informative packet explaining the elements and nature of Applicant's charges, Applicant's plea offer, the evidence against Applicant and how it coincided with the allegations, as well as the issues concerning various possible witnesses. Clearly, Trial Counsel went above and beyond the reasonable professional norm in his representation of Applicant to include his investigation, his communication to Applicant, and his strategic decisions made at trial. See Cherry, 300 S.C. at 117 (Under the first prong of Strickland, attorney performance is measured by its "reasonableness under professional norms.")

The testimony and record reflects Trial Counsel rendered outstanding representation guided by legitimate trial strategy. Applicant has provided no credible evidence to satisfy his burden of proving Trial Counsel was deficient in discharging his professional responsibilities. Furthermore, Applicant has failed to present any evidence that, but for, Trial Counsel's performance, there is any reasonable probability the outcome of the proceedings would have

been different. Accordingly, this allegation is dismissed with prejudice.

***Allegation B: Trial Counsel failed to act as my diligent conscientious advocate by failing to present any type of strategic defense during the trial. There were key material witnesses and physical evidence available that would have exonerated the Applicant.***

Applicant alleges Trial Counsel was ineffective for failing present any type of strategic defense at trial as there were key material witnesses and physical evidence that would have exonerated Applicant. This Court finds this allegation to be meritless.

Applicant's allegation that Trial Counsel failed to present any type of strategic defense is refuted by the record as well as testimony at the PCR hearing. Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). Here, Trial Counsel credibly testified he attempted to attack perceived inconsistencies in the State's case and argue that these inconsistencies give rise to reasonable doubt for which the jury should find Applicant not guilty. This is evidenced by the visual aid Trial Counsel prepared and used during his closing argument which diagramed arguable inconsistencies in the State's case and pointed to reasonable doubt. Trial Counsel repeatedly asserted, "Inconsistencies are reasonable doubts," during his closing argument. Tr. p. 502, l. 1 – p. 521, l. 19. Trial Counsel testified he tailored his closing argument to suit the trial judge's charge on reasonable doubt. This Court therefore finds Trial Counsel did present a strategic defense in this case, and his trial strategy was reasonable. Therefore, Applicant has failed to satisfy his burden of proving Trial Counsel was deficient in presenting a defense. Moreover, as Trial Counsel did pursue a reasonable defense strategy in challenging the imposing amount of circumstantial evidence against Applicant, Applicant has failed to satisfy his burden of proving that but for Trial Counsel's performance in this regard, the result of the proceedings would have been different. Accordingly, this allegation is dismissed

with prejudice.

As to witnesses, at the evidentiary hearing, Applicant alleged Trial Counsel failed to properly investigate various alibi and character witnesses. This Court finds this allegation to be meritless as Trial Counsel credibly testified he followed up on all leads provided to him by Applicant. Furthermore, Trial Counsel credibly testified the leads were either not helpful or unable to be located due to insufficient information. For example, Trial Counsel recounted one specific purported witness who was not going to be helpful and even admitted to Trial Counsel that Applicant had told him to say untruthful things to protect Applicant. Furthermore, Trial Counsel credibly testified he was unable to locate an individual identified only as "Hawk" who Applicant purported to work for while being paid under the table. Trial Counsel recalled looking into whether the purported company was registered in the state of South Carolina and having no success finding this individual or other evidence of Applicant working for such a company. Applicant has provided no competent evidence to support his assertion Trial Counsel failed to investigate potential relevant witnesses of any kind in this case, and has therefore failed to satisfy his burden of proving Trial Counsel was deficient as to this allegation.

Furthermore, in order to show prejudice from the alleged failure to call a witness, the Applicant must provide competent evidence of the testimony the alleged alibi witness would have provided. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992). In this case, Applicant conceded he had no alibi or character witnesses present to testify at his PCR hearing. Applicant provided no competent evidence as to what these witnesses would have said at trial. Moreover, this Court finds Trial Counsel's testimony credible that the witnesses he was able to reach would not have been helpful to Applicant's defense. Therefore, Applicant has also

failed to satisfy his burden of proving prejudice as to this allegation. Accordingly, this allegation is dismissed with prejudice.

Applicant likewise alleges Trial Counsel failed to present material physical evidence at trial. At the PCR hearing, Applicant testified he asked Trial Counsel to obtain a receipt from Walmart from the day of the incident to serve as an alibi. Trial Counsel credibly testified that by the time he was appointed to this case and able to meet with Applicant, the receipt would have no longer been in the system. Notwithstanding, this Court also finds Trial Counsel's testimony credible that he did attempt to obtain the receipt but Walmart was unable to produce it. This Court therefore finds Applicant has failed to prove deficiency as to this allegation as Trial Counsel made adequate and reasonable attempts to investigate this evidence. Notwithstanding, this receipt would not have been helpful to Applicant's defense. Applicant paid cash for phone minutes at a nearby Walmart in the time shortly after he allegedly robbed the store. Surveillance footage from the Walmart revealed Applicant was at Walmart in the time following the robbery. The receipt would not have shown it was impossible for Applicant to have been at The Keg during the robbery. Furthermore, this Court agrees with Trial Counsel's assertion it would have been harmful to the defense to show the jury a cash receipt for phone minutes purchased shortly after Applicant was alleged to have robbed The Keg of a sum of cash. Therefore, Applicant has also failed to establish prejudice from Trial Counsel's inability to obtain the receipt. This allegation is accordingly dismissed with prejudice.

This Court also finds Trial Counsel was not deficient for not presenting evidence of Applicant's employment at Dollar General. Trial Counsel credibly testified he spoke with the staff at Dollar General and found pay statements but they would only reflect Applicant worked there part-time and, in his opinion, the amount of pay was not enough to convince a jury

Applicant had no motive to rob The Keg. Furthermore, the records indicated Applicant was not working the day of the robbery. For these reasons, Applicant has failed to establish deficiency as to this allegation as Trial Counsel adequately investigated the issue. Furthermore, Applicant has failed to prove prejudice therefrom as the information obtained by Trial Counsel would not have been helpful at trial. Accordingly, this allegation is also dismissed with prejudice.

***Allegation C: Trial Counsel did not have my best interest in mind and failed to conduct any pretrial investigation to prepare for the trial of my case.***

Applicant alleges Trial Counsel did not have his best interest in mind and failed to conduct any pretrial investigation in preparation of his trial. This Court finds this allegation to be meritless. As noted above, Trial Counsel credibly testified to following up with all relevant witnesses provided to him and speaking with those who could be reached. Trial Counsel made reasonable efforts to obtain more information about Applicant's purported second employment yet was unsuccessful due to lack of provided information and only having the name "Hawk" to research for Applicant's alleged boss. Trial Counsel credibly recounted his efforts to obtain the Walmart receipt from Applicant's purchase the day of the incident. Trial Counsel also spoke with Applicant's employers at the Dollar General. Trial Counsel combed through surveillance pictures to find a picture which looked the least like Applicant to enter as evidence and also investigated the differences in timestamps on the various surveillance cameras. This Court finds Trial Counsel investigated this case in an exemplary manner and Applicant has offered no competent evidence of deficiency in this regard.

Notwithstanding, Applicant has failed to satisfy his burden of proving prejudice from Trial Counsel's alleged failure to investigate. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417

(1998). Here, Applicant has provided no credible evidence of what further investigation on the part of Trial Counsel would have discovered. To the contrary, this Court finds Trial Counsel's testimony credible that even if he had been able to obtain the receipt from Walmart, it would have been harmful to the defense. Moreover, Trial Counsel credibly testified various witnesses provided by Applicant would not have testified favorably. For these reasons, Applicant has also failed to prove prejudice from this allegation, and the allegation is dismissed with prejudice.

***Allegation D: Trial Counsel failed to serve my cause in good faith and he never attempted or intended to offer any type of defense for the jury's consideration.***

Applicant alleges Trial Counsel failed to serve his cause in good faith and never attempted or intended to offer any type of defense for the jury's consideration. This Court finds this allegation to be meritless and decisively refuted by the record as well as testimony at the PCR hearing. As mentioned above in this Order, Trial Counsel pursued the reasonable enumerated trial strategy of pointing the jury to inconsistencies in the State's case and arguing these inconsistencies create reasonable doubts and therefore the jury should not convict Applicant. Trial Counsel created a visual aid and argued this principle *at length* in his arguments to the jury. This Court also notes Trial Counsel's testimony revealed an exhaustive investigation into both the evidence and legal issues involved in Applicant's case. There is absolutely no evidence in the record or presented at the PCR hearing to support the allegation Trial Counsel did not represent Applicant in good faith. To the contrary, Trial Counsel rendered strategic and exemplary representation of Applicant at every stage of this trial. Accordingly, this Court finds Applicant has failed to meet his burden of proving Trial Counsel was deficient regarding this allegation.

Moreover, this was a case involving a *substantial* amount of circumstantial evidence of Applicant's guilt. This included surveillance footage of an individual who looks and walks strikingly similar to Applicant. Furthermore, the perpetrator left in a white Dodge with tinted windows which appeared to be the white Dodge registered to Applicant's girlfriend, which Applicant was pulled over approximately six days following the incident. Also, the distinctive SKS rifle with wooden accessories and a black strap was found in a closet with Applicant's belongings in Applicant's girlfriend's home. This, of course, is in conjunction with the distinctive red sunglasses shown in the surveillance footage which were also found in the home. Especially considered in light of this significant amount of evidence against Applicant, Applicant cannot satisfy his burden of proving that, but for any error on the part of Trial Counsel in offering a defense, the result of the proceedings would have been different. Therefore, this allegation is dismissed with prejudice.

***Allegation E: Trial Counsel, knowing I was illiterate regarding the complexities of the law, never ascertained whether or not I actually understood or comprehended all the issues and aspects of my case.***

Applicant also alleges Trial Counsel never ascertained whether he understood the issues and aspects of his case. This Court also finds this allegation to be meritless. Trial Counsel credibly testified he explained the elements and nature of the charges to Applicant. This is corroborated by the fact Trial Counsel also provided a packet to Applicant which thoroughly explained the elements of his charges, the evidence against him, the witnesses involved in the case, and how the evidence related to the elements of his offenses. Trial Counsel credibly testified Applicant seemed to understand their discussions and was involved in this trial. This Court also observes Applicant actually told the trial judge Trial Counsel had fully explained the

elements of armed robbery as well as the potential penalties with him. Tr. p. 17, ll. 5-16. Therefore, this Court finds the assertion that Applicant did not understand the elements of the charges against him or the issues involved in his case to be not credible. This Court finds the record and testimony demonstrates Trial Counsel was not deficient in this regard as Applicant was well-apprised of the elements of his charges and evidence against him and was able actively participate in his trial. Furthermore, because Applicant did understand the issues involved in this case and was well-apprised of them, Applicant cannot establish prejudice from Trial Counsel's alleged failures to ascertain whether he fully understood them. Accordingly, this allegation is dismissed with prejudice.

***Allegation F: Trial Counsel failed to explain to me the advantages of disadvantages of offering forth a defense versus not doing so. He failed to discuss trial strategy of available defenses.***

Applicant alleges Trial Counsel failed to explain the advantages and disadvantages of offering a defense as opposed to not doing so and likewise failed to discuss available defenses. This Court finds this allegation to be meritless. Trial Counsel credibly testified he thoroughly reviewed the evidence against Applicant as well as potential defenses such as misidentification with Applicant. Trial Counsel testified they discussed potential alibi defenses, but the purported alibi witnesses who were able to be located would not have provided favorable testimony. They also discussed attempting to show Applicant had no motive to commit the robbery because of his two jobs, but Trial Counsel thoroughly investigated this avenue and was only able to find documentation from Applicant's part-time job at Dollar General which would not have been helpful to the defense as it did not show a substantial amount of pay or that Applicant was working the day of the robbery.

Trial Counsel also credibly testified to his preparation of Applicant in case Applicant wanted to testify. It was Trial Counsel's opinion, after viewing Applicant's demeanor when asked questions which would likely be posed at trial, it was in Applicant's best interest not to testify. Trial Counsel explained Applicant became angry at the questioning, Applicant's skin turned a "reddish" hue strikingly similar to that in the surveillance footage, and Applicant also had a very similar gait to that of the individual in the surveillance footage. All these things led to Trial Counsel's advice for Applicant not to testify, but the decision was left to Applicant. Tr. p. 539, l. 14. Applicant was also read a thorough colloquy explaining his right to testify and the risks involved. Tr. p. 488, l. 1.

Furthermore, Trial Counsel discussed the strategy of having last argument with Applicant. In fact, Trial Counsel testified he entered evidence in this case which forfeited last argument only when Applicant had indicated he wanted to testify. It was only later that Applicant decided not to testify after all. At the PCR hearing, Applicant recalled Trial Counsel explaining that he valued having the last argument. Trial Counsel's discussion of last argument is corroborated by the trial judge's colloquy with Trial Counsel, "You told me earlier one of your strategies was last argument; I assume you've talked about the change in strategy?" Both Trial Counsel and Applicant told the trial judge they had indeed discussed the change in strategy. Tr. p. 495, l. 5.

Therefore, the record refutes Applicant's allegation as Trial Counsel clearly discussed and explored defenses at length with Applicant and also adequately represented Applicant regarding Applicant's decision whether to present a defense. This Court finds no probative evidence Trial Counsel was deficient regarding his explanations to Applicant. Furthermore, Applicant who initially wanted to testify against the advice of counsel but changed his mind after

Trial Counsel had entered evidence, has failed to establish how the proceedings would have been any different had he been advised differently. Accordingly, this allegation is dismissed with prejudice.

***Allegation G: Trial Counsel did not subject the prosecution's case-in-chief to any adverse forensic testing and failed to oppose the prosecution's case with any adverse defense litigation.***

Applicant finally alleges Trial Counsel did not subject the State's case to "adverse forensic testing" or "adverse defense litigation." This Court finds this allegation to be meritless. Applicant has provided no evidence as to how it would be unreasonable for Trial Counsel not to subject the State's evidence to forensic testing when the physical evidence was found in his girlfriend's home and in a closet in that home where Applicant's belongings were located. It follows that Applicant's DNA would very likely be found on the materials and therefore it would not be beneficial to prove this through forensic testing. Furthermore, Applicant has failed to prove prejudice from this allegation because he offered no evidence as to what the forensic testing would have revealed and it is reasonable to conclude the forensic testing would have simply confirmed his contact with evidence such as the SKS rifle with black strap and wooden accents found in the closet with his belongings and matching the SKS rifle with black strap and wooden accents shown in the surveillance footage of the robbery. Furthermore, Trial Counsel was actually able to raise the fact there was no DNA evidence in this case in his argument about reasonable doubt to the jury. Tr. p. 232, ll. 1-3.

Likewise, this Court finds Applicant has failed to prove Trial Counsel was deficient for failing to "oppose the prosecution's case with any adverse defense litigation." The record reveals abundant and reasonable challenges to the State's case from Trial Counsel. Trial Counsel moved to suppress the search warrant which led to the physical evidence in this case and argued at

length on the grounds of lack of probable cause, insufficiency of the affidavit, unreliability of information in the affidavit, and even made the procedural argument that the search warrant return was filed late. Tr. pp. 140-149. Nevertheless, the trial judge ruled there was clearly probable cause to support the search warrant and the statutory rule was ministerial. Tr. p. 160, l. 1. Thereafter, Trial Counsel vigorously attacked what he perceived to be inconsistencies in the State's case and argued these should lead the jury to conclude there existed reasonable doubt. Trial Counsel also argued there was no true identification of Applicant, and Applicant had two jobs at the time. The record reveals Trial Counsel challenged the admission of the video recording of the traffic stop where Applicant was pulled over with his girlfriend in the white Dodge matching automobile from the surveillance footage. Tr. p. 310, l. 16. Trial Counsel also cross-examine the State's witnesses at length on issues from the inconsistent time-stamps between the surveillance cameras, and the quality of the investigation. Trial Counsel also moved for a directed verdict following the State's presentation of its case but was understandably denied. Tr. p. 481. Trial Counsel also argued against the admission of Applicant's voluntary statement at a Jackson v. Denno hearing. Tr. p. 530.

Clearly, Trial Counsel was not deficient in his challenges to the State's case and the tremendous amount of circumstantial evidence of Applicant's guilt for armed robbery and possession of a weapon during the commission of a violent crime. Applicant has failed to present any evidence of deficiency in this regard, and likewise has failed to provide any evidence as to how different performance from Trial Counsel in pursuing his defense would have changed the outcome of the proceedings. Accordingly, this allegation is dismissed with prejudice.

[Conclusion and signature on following page]

## VI. CONCLUSION

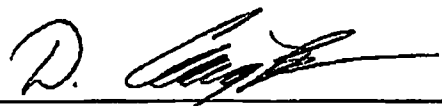
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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 the application for Post-Conviction Relief is denied and dismissed with prejudice in regard to all allegations; and
2. Applicant must be remanded to the custody of Respondent.

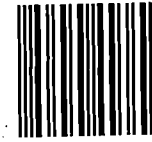
AND IT IS SO ORDERED this 6 day of Dec., 2018.

  
\_\_\_\_\_  
D. CRAIG BROWN  
Presiding Judge  
First Judicial Circuit

Flance, South Carolina



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