

Vol. II of II
RECEIVED
APR 29 2019
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

ELLIOTT JUDON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001880

APPENDIX

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
TRIAL TRANSCRIPT DATED MARCH 13-18, 2015.....	1
APPLICATION FOR POST-CONVICTION RELIEF FILED OCTOBER 20, 2017	555
RETURN.....	562
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED JULY 24, 2018	567
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED JULY 25, 2018	646
ORDER OF DISMISSAL FILED OCTOBER 3, 2018.....	685
INDICTMENT	702

State vs. Elliott Judon, Jr.
Closing Argument by Ms. Gay
March 18, 2015

1 okay, well, there's the police car with the camera in
2 it, and here's my client talking to one of the
3 officers while someone else, without his permission,
4 is going to ramble around in his car to find things.
5 And that person came back and handcuffed him -- didn't
6 say, oh, you know, let's talk about this -- handcuffed
7 him and told him that pursuant to this arrest what
8 they were going to do, that he was going to be strip-
9 searched at the jail so he had better cough it up.

10 And at that -- it was only at that point based
11 on what, you know, his thought of what a strip search
12 at the jail was going to be that he agreed to say,
13 yeah, okay, and whatever.

14 And he was very cooperative. They kept saying
15 he was very cooperative. Yes, he was very cooperative
16 because he was, at that point, handcuffed and going to
17 jail for something that they found without his consent
18 in his car.

19 And, you know, there's a few things that -- the
20 most important stuff in this case. The evidence
21 custodian: the evidence custodian came and testified
22 that she took those drugs from one place to the other,
23 and that she's an evidence custodian having to do with
24 drugs.

25 You know what she didn't testify to? I was

State vs. Elliott Judon, Jr.
Closing Argument by Ms. Gay
March 18, 2015

1 informed, or anybody in my office was informed, that
2 there was a video -- that there was like a video
3 picture of this incident for August 26, 2013, that was
4 relevant to this arrest and had all of this stuff that
5 happened on the roadway in the server, in the North
6 Charleston computer mainframe, and it should be burned
7 as a CD to be preserved as evidence in this case. The
8 evidence custodian never said that she was told to
9 burn a CD. She was never told that as part of the
10 evidence they have in this case, a CD that was burned.

11 And do you know what the officer said, which was
12 the next most important stuff in this case? Well, we
13 know that he says that he did not tell anybody in
14 Evidence to burn a CD and make it as evidence in this
15 case. We know that. Because things are important in
16 cases. Evidence is important. The absence of
17 evidence is important. The omission of something
18 significant, that would have been helpful to figure
19 out this fact pattern is significant. The only person
20 who had any control over making that video that we all
21 could be looking at today, to see what really
22 happened, were these officers. And these officers
23 never asked them to burn this video.

24 And one thing that the State is probably going
25 to say is that, we don't have any idea if it was

State vs. Elliott Judon, Jr.
Closing Argument by Ms. Gay
March 18, 2015

1 really there. Working camera in a marked patrol car
2 that, procedurally, the camera turns on when the blue
3 lights come on. There was information from the
4 officer that he was aware that a working camera sends
5 something up to a server and to -- I'm just telling
6 you, because I'm telling you, that as we go through
7 this and there is discussion about how, but there's no
8 real fact of whether or not that was really working.
9 Well, wouldn't it have been the time to find out if
10 there was, in fact, a video of this, the day of the
11 arrest or shortly thereafter, as the North Charleston
12 regulation tells them that they're supposed to?

13 The North Charleston regulation officer
14 testified that he was aware that if information on the
15 video may be helpful, it will be preserved, it will be
16 turned over to evidence. And he testified that he was
17 aware of that. So discretionary -- this is actually
18 what came out of his mouth. He said, if it was
19 something of value, I would have watched it. And then
20 he said, I don't think it was necessary.

21 That's why we're here, that Officer Stott, that
22 the video camera, the picture, the movie, the stills
23 that could have been taken from it, the audio, all the
24 things that we want as American citizens, to be able
25 to see what happens so, you know, it's not just he-

State vs. Elliott Judon, Jr.
Closing Argument by Ms. Gay
March 18, 2015

1 said, she-said, all that stuff that we could have had
2 in this case was not something of value to him. It
3 was not necessary in this case.

4 And the solicitor is going to stand up and say a
5 couple of things. Well, it's his choice. Well, it
6 was not necessary or valuable because this was a
7 consent search and they know that he agreed. Okay.
8 Is that -- we're here three days later after a trial.
9 Was it not something of value? Did it not become
10 necessary to have this DVD video of what happened at
11 this arrest so that we could figure out what really
12 went on here?

13 And, you know, one of the things that Ms. Mulkey
14 asked, which was just amazing to me, is she said, so,
15 Officer, that wasn't the law, that was just a
16 regulation from North Charleston, it wasn't the law
17 that said that you had to turn the video in -- the in-
18 car video over to evidence in this case. And he
19 agreed: you're right, it wasn't the law.

20 Well, shouldn't it be at this point? You know,
21 you and I, this courtroom, we're not making law today
22 because we can't get the legislature to pass things
23 certain ways. But we're making principle. And we're
24 making justice. And that's what my client said, he
25 wanted justice. He stood up here and he testified

State vs. Elliott Judon, Jr.
Closing Argument by Ms. Gay
March 18, 2015

1 that he had some drugs on him that he ended up giving
2 up to them voluntarily because he wanted justice
3 because he didn't think his arrest was fair.

4 And, you know, the solicitor can stand up and
5 say you don't have a right to open the veil and see
6 the Wizard of Oz, you don't have a right to question
7 this officer because he said that it was consent and
8 because he said it was consent, his discretion, his
9 consent, his everything, North Charleston's
10 everything.

11 My client had rights. He is a man that is
12 innocent and he has sat here for three days asking you
13 people to question what happened here, asking you
14 people to say is it fair what happened here, is it
15 fair that we do not have that video, is it fair that
16 he was pulled out of his car and that -- whether or
17 not, you know, they zipped his pants down or whatever.

18 He was put in front of a marked police car with
19 a working camera in it, a car that's video would have
20 been uploaded to the North Charleston City Police
21 Department, a camera, video, that all it took was a
22 call from the officer to say, hey, this was a traffic
23 stop that, you know, I found a bunch of drugs, this is
24 important to this guy, this will be important to his
25 case, this will be important to his constitutional

State vs. Elliott Judon, Jr.
Closing Argument by Ms. Gay
March 18, 2015

1 rights, we need this video, can you burn it.

2 You know what it takes? What? How much does it
3 cost to get a stack of little printable CD -- or DVDs?
4 Nothing. Nothing. It would have cost nothing to say,
5 oh, well, we printed it. Then it would be sitting
6 right here, right here next to the cell phones, next
7 to all this stuff. It would be here and we would know
8 whether or not it was consent, and we would know
9 whether or not they did what my client said or whether
10 they did what the officer said. But we don't know
11 that. We don't know that.

12 And, you know, in this court you give the
13 benefit of the doubt to the defendant because the
14 State has the burden of proof and the State has to be
15 the one to make that veil of innocence be taken off.
16 The State has to prove it beyond a reasonable doubt
17 that everything in this case was hunky-dory and
18 everything in this case was constitutional. They have
19 to prove that. And after I do all this, and I pour --

20 MR. KIDD: Objection, Your Honor.

21 MS. GAY: -- my heart and soul out --

22 THE COURT: What is your basis?

23 MR. KIDD: Improper statement of the law.

24 THE COURT: Ladies and gentlemen, please
25 remember that I will instruct you on the law that is

State vs. Elliott Judon, Jr.
Closing Argument by Ms. Gay
March 18, 2015

1 applicable to this case.

2 Ms. Gay?

3 MS. GAY: Thank you, Your Honor.

4 After I finish, what they're going to do is
5 they're going to get up and they are going to tell you
6 that you don't get to decide that, that it's a done
7 deal. But that's not what you're sitting here for.
8 What you're sitting here for is to decide what's fair.
9 What you're sitting here for is to decide in your
10 minds. You're the fact-finders, you're the ones who
11 get to decide the weight and importance of what has
12 been said in this courtroom. You get to decide. You
13 get to decide. And I believe that you will find, as
14 we know, that he should be found not guilty.

15 THE COURT: Mr. Kidd?

16 MR. KIDD: Thank you, Your Honor. May it please
17 the Court.

18

19

20

21

22

23

- - -

24

- - -

25

- - -

State vs. Elliott Judon, Jr.
Closing Argument by Mr. Kidd
March 18, 2015

CLOSING ARGUMENT

1
2 MR. KIDD: Ladies and gentlemen, you know, we
3 all have sort of differing opinions about the drug
4 laws of the state and this country. And I would
5 imagine if we all sat down around a table in another
6 forum, we would probably have a variety of different
7 positions on it amongst us all. You would probably
8 even be surprised about what some of the opinions
9 about our drugs laws are on this side of the
10 courtroom. But why we're here, our roles are not to
11 decide whether or not the laws on the books are
12 appropriate or not. We do not make law in this
13 courtroom. Our legislature makes laws. We uphold
14 them. We enforce them. That's what you take in your
15 oath to do.

16 The question of whether or not you liked the
17 search or not, or whether or not you think there
18 should be a video or not, those are issues of law
19 which the judge rules on. You're here to determine,
20 as a fact-finder, that whether or not the defendant
21 met the elements of the offense. And I hate to
22 oversimplify it like that. That's exactly what it is.
23 That's what a jury's role is in every criminal trial.
24 You look at the elements of the crime and did his
25 conduct fit those elements. That's what we do.

State vs. Elliott Judon, Jr.
Closing Argument by Mr. Kidd
March 18, 2015

1 That's what you, as a jury, do.

2 And it's not always easy to uphold that oath.

3 You're not always going to feel good about it. You
4 heard from Mr. Judon. He seems like a perfectly nice
5 guy. He's a drug dealer, but that doesn't make him an
6 evil person. You know, you're going to have feelings
7 of sympathy. It's not always going to feel good.

8 You're not going to feel warm and fuzzy when you give
9 a verdict that affects someone's life. Let me be
10 clear. I mean, that's his life. This is a serious
11 day for him and for all of us here. But feeling
12 sympathy, and holding him accountable for what he did,
13 you can do both of those things. He made his choices.

14 You know, you all have different jobs, whether
15 it's nurses, truck drivers, IT, human resources, and
16 you get up every day and you go to work. You know, I
17 grab my briefcase. I put on my suit. You might put
18 on your scrubs. You go to work every day. That's
19 something we all have in common. That's one of the
20 things I like about this process, especially on the
21 first day in jury qualification when we're downstairs
22 and you see that cross-section of our community,
23 everyone stands up and tells us what they do.

24 Well, Mr. Judon gets up and he doesn't have a
25 tool belt or a hammer or a hard hat. He's got scales,

State vs. Elliott Judon, Jr.
Closing Argument by Mr. Kidd
March 18, 2015

1 he's got drugs, he's got phones. These are the tools
2 of his trade as a drug dealer. And he makes that
3 choice every day. And we're just asking you to hold
4 him accountable for it.

5 And you just use your common sense. I mean, you
6 listened to the facts that -- the testimony that came
7 out from the officers on the stand. You know, they're
8 controlling the Whalen subdivision because there was a
9 shooting, you know, a couple of days before. See a
10 car with dark tint. They pull it over. There's a
11 delay in the stop so, you know, their curiosity is
12 peaked when someone doesn't pull over right away. And
13 he rolls down the window and his pants are undone and
14 so, you know, as an officer who's been trained you're
15 thinking, all right, delayed stop, pants are undone,
16 he's hiding something.

17 So they get him out of the car and they ask him
18 for consent to search. So why do you think he gives
19 consent to search the car? Because the drugs are in
20 his pants. He's not worried about anything they find
21 in the car. He's hoping they search the car and maybe
22 they find the scale, but it's not enough to arrest
23 him, is what he's thinking. So let them search the
24 car and I'll be on my way.

25 But, no, that wasn't the case. They found the

State vs. Elliott Judon, Jr.
Closing Argument by Mr. Kidd
March 18, 2015

1 scale and the residue and the knife and they were
2 going to arrest him for possession and then he decided
3 to give it up. Common sense. It makes perfect,
4 logical sense.

5 But, ladies and gentlemen, don't believe the
6 officers. Don't believe a word that they say.
7 Believe every word that came out of Mr. Judon's mouth,
8 if you would like. It does not matter. He told you
9 the drugs were his. He told you he gave them to the
10 officer. The SLED analyst, and his report which
11 you'll have back there, says it's cocaine base, crack
12 cocaine, and it weighs 10.1 grams. That's all you
13 need.

14 Just like I went over those elements with you.
15 Proved he was in possession. He admitted it. We
16 proved it's cocaine base, and we've proved it's over
17 ten grams. The elements have been met, so he's guilty
18 of trafficking cocaine base, ten to twenty-eight
19 grams. Like I said, it doesn't make him a terrible
20 person. It makes him a drug dealer, but it doesn't --
21 you know, he has people that love him. He has family.

22 And, you know, it's always a defendant's tactic
23 to look over here -- almost like a slight of hand.
24 You know, it's like everything is right here but don't
25 look at that, look over here, look at something that

State vs. Elliott Judon, Jr.
Closing Argument by Mr. Kidd
March 18, 2015

1 doesn't exist, that's not here. I mean, sure, would
2 it be great to have a video? Yeah, it would be.
3 Okay? But it's not there, and it doesn't matter. The
4 issue of the search, the existence of the video, is
5 questions of law that the judge has answered.

6 If the law wants to change -- if you want the
7 law to change, contact your local representatives,
8 because laws change all the time. And we're not here
9 to legislate. We're here to enforce the laws as they
10 are. I'm not asking you to condemn this man. I'm
11 asking you to hold him accountable. Hold him
12 accountable for what he did.

13 You know, it's not that your jobs are
14 oversimplified here on a normal basis. This is sort
15 of a rare occasion in a case like this where there's
16 really not that much in dispute for you to determine.
17 I mean, I've never been involved in a trial like this,
18 I will admit. And so your role is diminished
19 somewhat. But you still have a role. And despite the
20 fact that the issues which you're determining aren't
21 necessarily disputed, you still have that role and you
22 still have that oath and you're still obligated to
23 uphold it.

24 And what we ask you to do is to put all of the
25 law, all the laws the judge charges you, follow your

State vs. Elliott Judon, Jr.
Closing Argument by Mr. Kidd
March 18, 2015

1 oath, and to hold him accountable for what he did.
2 Nothing more, nothing less. And if you do that, and
3 if you use your common sense, you're going to find him
4 guilty of trafficking cocaine. And I ask you to do
5 that. Thank you.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

- - -

24

- - -

25

- - -

State vs. Elliott Judon, Jr.
Charge of The Court
March 18, 2015

CHARGE OF THE COURT

THE COURT: Ladies and gentlemen, we have reached the stage of the trial where I will instruct you on the law applicable to this case.

I typically do not send back written instructions, so please listen very carefully.

As I indicated, Madam Foreperson, you are responsible for writing the verdict.

I remind you that during this trial, you and I have had certain duties to perform. As the trial judge, it is my responsibility to preside over the trial of this case. I have the duty to rule on the admissibility of the evidence that has been offered throughout this trial.

You are to consider only the evidence before you. If there was any testimony ordered stricken from the record, you must disregard that testimony. You are to consider only the testimony that you heard from the witness stand, as well as the exhibits that have been made part of the record in this case.

I have the additional duty to charge you the law applicable to this case. As the presiding judge, I am the sole judge of the law in this case. It is your duty as jurors to accept the law and apply the law exactly as I state it to you now. If you already have any idea as to what the law is or what the law ought to be and it does

State vs. Elliott Judon, Jr.
Charge of The Court
March 18, 2015

1 not agree with what I now tell you the law is, you must
2 abandon your own idea because you are sworn to accept the
3 law and apply the law exactly as I state it to you now.

4 In every case tried in this Court before a jury,
5 the jury becomes the sole and exclusive judges of the
6 facts. As I indicated to you earlier, a trial judge may
7 not make any comment about the facts in this case. You,
8 the jury, are the sole judges of the facts in this case.
9 You are not to infer from anything that I have said or
10 done throughout the progress of this case that I have any
11 opinion about the facts in this case. The law does not
12 allow me to have an opinion about the facts in this case.

13 The indictment in this case charges Mr. Judon
14 with one count of trafficking cocaine base ten to twenty-
15 eight grams. I remind you the fact that Mr. Judon was
16 arrested, charged, and indicted in this case is not
17 evidence and cannot be considered by you as evidence of
18 guilt, nor does it create any presumption or inference of
19 guilt. An indictment is simply the formal written
20 instrument which contains the charge made against the
21 defendant. It is the formal document by which this case
22 is brought into court. Mr. Judon has pled not guilty to
23 this indictment. A person charged with committing a
24 criminal offense in South Carolina is never required to
25 prove himself innocent.

State vs. Elliott Judon, Jr.
Charge of The Court
March 18, 2015

1 I charge you it is an important rule of law that
2 the defendant in a criminal trial, no matter what the
3 seriousness of the charge may be, will always be presumed
4 to be innocent of the crime for which the defendant was
5 indicted unless guilt has been proven by evidence
6 satisfying you of that guilt beyond a reasonable doubt.
7 The presumption does not end when you begin your
8 deliberations but it accompanies the defendant throughout
9 the trial until you reach a verdict of guilt, based upon
10 evidence satisfying you of the standard of guilt beyond a
11 reasonable doubt. This presumption of innocence is not
12 mere legal theory. It is not just a legal phrase. It is
13 a substantial right to which ever defendant is entitled
14 unless you, the jury, are satisfied from the evidence of
15 the defendant's guilt beyond a reasonable doubt.

16 The State has the burden of proving Mr. Judon
17 guilty beyond a reasonable doubt. Some of you may have
18 served as jurors before in civil cases where you were told
19 it was only necessary to prove that a fact is more likely
20 true than not true, such as a greater weight or
21 preponderance of the evidence.

22 Proof beyond a reasonable doubt is proof that
23 leaves you firmly convinced of the defendant's guilt.
24 There are very few things in this world that we do know
25 with absolute certainty and in criminal cases, the law

State vs. Elliott Judon, Jr.
Charge of The Court
March 18, 2015

1 does not require the burden of proof that overcomes every
2 possible doubt. If based upon your consideration of the
3 evidence you are firmly convinced that Mr. Judon is guilty
4 of the crime charged, you must find him guilty. If, on
5 the other hand, you think there is a real possibility that
6 Mr. Judon is not guilty, you must give him the benefit of
7 the doubt and find him not guilty.

8 There are two types of evidence that are
9 generally presented throughout a trial: direct evidence
10 and circumstantial evidence. Direct evidence directly
11 proves the existence of a fact and does not require
12 deduction. Circumstantial evidence is proof of a chain of
13 facts and circumstances indicating the existence of a
14 fact. Crimes may be proven by circumstantial evidence.
15 The law makes no distinction between the weight or value
16 to be given either direct or circumstantial evidence.
17 However, to the extent the State relies on circumstantial
18 evidence, all of the circumstances must be consistent with
19 each other and, when taken together, point conclusively to
20 the guilt of Mr. Judon beyond a reasonable doubt. If
21 these circumstances merely portray his behavior as
22 suspicious, the proof has failed. The State has a burden
23 of proving him guilty beyond a reasonable doubt. This
24 burden rests with the State regardless of whether the
25 State relies on direct evidence, circumstantial evidence,

State vs. Elliott Judon, Jr.
Charge of The Court
March 18, 2015

1 or a combination of the two.

2 Necessarily, you must determine the credibility
3 of witnesses who have testified in this case. Credibility
4 simply means believability. It becomes your duty as
5 jurors to analyze the facts and determine which evidence
6 convinces you of its truth. In determining the
7 believability of the witnesses who have testified in this
8 case, you may believe one witness over several witnesses,
9 or several witnesses over one witness. You may believe a
10 part of the testimony of one witness and reject the
11 remaining part of the testimony of that same witness. You
12 may believe the testimony of a witness in its entirety or
13 reject the testimony of a witness in its entirety. You
14 may consider whether the witness has exhibited to you any
15 interest, bias, prejudice, or other motive in this case,
16 and you may also consider the manner and appearance of a
17 witness while he or she was on the witness stand.

18 You have heard evidence that the defendant was
19 convicted of a crime other than the one for which the
20 defendant is now on trial. This evidence may be
21 considered by you, if you conclude it is true, only in
22 deciding whether the defendant's testimony is believable
23 and for no other purpose. You must not consider the
24 defendant's prior record as any evidence of the
25 defendant's guilt of the charge we are trying today.

State vs. Elliott Judon, Jr.
Charge of The Court
March 18, 2015

1 The rules of evidence ordinarily do not permit
2 witnesses to testify to opinions or to conclusions. An
3 exception to this rule exists for witnesses we call expert
4 witnesses. A witness who by education or experience has
5 become expert in some art, science, profession, or calling
6 may state an opinion as to relevant and material matter in
7 which the witness claims to be an expert and may also
8 state the reasons for that opinion. You should consider
9 any expert opinion received in evidence in this case and
10 like any other evidence, give it the weight you think it
11 deserves. If you decide that the opinion of an expert
12 witness is not based on sufficient education and
13 experience, or if you conclude the reasons given in
14 support of the opinion are not sound, or that the opinion
15 is outweighed by other evidence, you may disregard the
16 opinion entirely. You should give no greater weight to
17 that of an expert witness' testimony than that of other
18 witnesses simply because the witness is an expert.
19 Further, you are not required to accept an expert's
20 opinion, even though it is not contradicted.

21 A statement alleged to have been made by
22 Mr. Judon outside of the testimony given in court has been
23 admitted into evidence. While the Court has determined
24 that the statement is admissible, I instruct you that you
25 make the ultimate decision of whether or not Mr. Judon

State vs. Elliott Judon, Jr.
Charge of The Court
March 18, 2015

1 made the statement. If he did make the statement, you
2 must determine whether the statement was made by the
3 defendant voluntarily and of his own free will. This
4 means the statement was not caused by pressure, force,
5 fear, threats, coercion, or intimidation, or by hope or a
6 promise of leniency or reward of any kind.

7 In determining whether the statement was
8 voluntary, you should consider both the characteristics of
9 the defendant and the details of the questioning. Some of
10 the factors that you must consider are the age of the
11 defendant, the defendant's education or lack thereof, the
12 defendant's mental ability or capacity, the defendant's
13 IQ, the defendant's background and environment, the place
14 and length of detention, the nature of the detention and
15 questioning, the advice or lack thereof to the defendant
16 of his constitutional rights including, but not limited
17 to, the right to remain silent, that any statement can be
18 used against him in a court of law, the right to have a
19 lawyer present and that if he could not afford a lawyer, a
20 lawyer would be appointed to represent him without any
21 cost, and that he could stop making a statement at any
22 time. You must carefully consider all of the surrounding
23 circumstances before you give any weight to an alleged
24 statement. The State has a burden of proving beyond a
25 reasonable doubt that the alleged statement was voluntary.

State vs. Elliott Judon, Jr.
Charge of The Court
March 18, 2015

1 If you determine it was, you may give the statement any
2 further consideration that you deem proper. You must
3 decide what weight, if any, should be given to that
4 statement. If you determine the alleged statement was not
5 the free and voluntary statement of Mr. Judon, you should
6 not consider the statement at all.

7 In order to establish criminal liability,
8 criminal intent is required. For example, the mental
9 state required to be proven by the State for a particular
10 crime might be purpose, intent, knowledge, recklessness,
11 or criminal negligence. Criminal intent must be proven by
12 the State beyond a reasonable doubt. Criminal intent is
13 always a matter to be determined by the jury from the
14 circumstances surrounding the situation. Because there is
15 no way to prove intent to a mathematical certainty, the
16 law says that criminal intent may be inferred from the
17 circumstances shown to have existed. This is how you make
18 a determination of whether or not the element requiring
19 intent was present. It is not necessary to establish
20 intent by direct and positive evidence, but intent may be
21 established by inference in the same way as any other
22 fact: by taking into consideration the acts of the
23 parties, and all facts and circumstances of this case.
24 Criminal intent is a mental state. It is a conscious
25 wrongdoing. It is up to you, the jury, to determine what

State vs. Elliott Judon, Jr.
Charge of The Court
March 18, 2015

1 the defendant intended to do based upon these
2 circumstances shown to have existed.

3 Mr. Judon is charged with trafficking in cocaine
4 base. The State must prove beyond a reasonable doubt that
5 Mr. Judon knowingly sold, manufactured, cultivated,
6 delivered, purchased, brought into this state, provided
7 financial assistance, or otherwise aided, abetted,
8 attempted, or conspired to sell, manufacture, cultivate,
9 deliver, purchase, or bring into this state, was knowingly
10 in actual or constructive possession, knowingly attempted
11 to become in actual or constructive possession, of cocaine
12 base. The State must also prove beyond a reasonable doubt
13 that the amount of the cocaine base was ten grams or more
14 but less than twenty-eight grams. To prove possession,
15 the State must prove beyond a reasonable doubt that
16 Mr. Judon had both the power and the intent to control the
17 disposition or the use of the cocaine base. Possession
18 may be actual or constructive. Actual possession means
19 that the cocaine base was in the actual physical custody
20 of the defendant. Constructive possession means that the
21 defendant had dominion and control, or the right to
22 exercise dominion and control, over either the cocaine
23 base itself or the property on which the cocaine base was
24 found.

25 Mere presence at the scene where drugs were

State vs. Elliott Judon, Jr.
Charge of The Court
March 18, 2015

1 found is not enough to prove possession. The defendant's
2 knowledge and possession may be inferred when a substance
3 is found on the property under the defendant's control.
4 However, this inference is simply an evidentiary fact to
5 be taken into consideration by you, along with other
6 evidence in this case, and to be given the weight you
7 decide it should have. To deliver means to actually
8 constructively or attempt to transfer the drug.

9 Ladies and gentlemen, I am now going to go over
10 the verdict form with you. There is no significance in
11 the way that things appear on the verdict form, it's
12 simply something has to go on the paper first. In the
13 Court of General Sessions for the Ninth Judicial Circuit,
14 2013-GS-10-7257, County of Charleston, State of South
15 Carolina versus Elliott Judon, Jr., we, the jury, find the
16 defendant, Elliott Judon, Jr., not guilty, or we, the
17 jury, find the defendant, Elliott Judon, Jr., guilty, of
18 trafficking cocaine base ten to twenty-eight grams.

19 Madam Foreperson, once you have reached a
20 unanimous verdict, meaning all twelve of you have agreed,
21 you will sign the verdict form and date it, indicating
22 that you have reached a unanimous decision.

23 To my alternate, you have completed your service
24 to this case at this time, but we're going to keep you
25 separate for just a few moments to make sure that the

State vs. Elliott Judon, Jr.
Charge of The Court
March 18, 2015

1 first twelve have begun their deliberations.

2 Ladies and gentlemen, this is the last time that
3 I will say this to you. Do not begin your deliberations.
4 Do not discuss this case amongst yourselves. We will be
5 gathering the evidence and the verdict form. The bailiffs
6 will alert you when you may then begin your deliberations.

7 Please rise for the jury.

8 [Whereupon, the jury exits the courtroom at
9 10:32 a.m.]

10 THE COURT: Thank you. Be seated.

11 Any objection, corrections to the charge as
12 read? From the State?

13 MR. KIDD: No, ma'am.

14 THE COURT: From the defendant?

15 MS. GAY: No, ma'am.

16

17

18

19

20

21

22

23

24

25

- - -

- - -

- - -

State vs. Elliott Judon, Jr.
Renewal of Motions by Ms. Gay
March 18, 2015

RENEWAL OF MOTIONS

MS. GAY: Your Honor, I think I need to renew my motions --

THE COURT: Please bring Mr. Judon back. We weren't done. Sorry.

Ms. Gay?

MS. GAY: At this time I would like to renew my motions that I've made in this trial, Your Honor: my motion for a directed verdict; my motion to have a continuance so that I can have my client psychologically evaluated for competency. I do think that my client, based on even his testimony, his choice to testify against my wishes or my advice, that he has some kind of delusion that he's living under about the outcome or the reality of this proceeding, Your Honor; as well as my motion to dismiss, which I still believe should have been granted, of course. And all of the subsequent motions, including the motion to suppress the statements and the evidence that was found. And I would renew all those motions at this time.

THE COURT: Any response? Any further argument, Ms. Mulkey?

MS. MULKEY: No. We would just renew our previous arguments and ask that you deny the motion.

State vs. Elliott Judon, Jr.
Renewal of Motions by Ms. Gay
March 18, 2015

1 THE COURT: All right. Based upon everything
2 that I have heard, there's no reason for me to change
3 my original ruling, and I stand by the rulings as
4 made.

5 Anything further, Ms. Gay?

6 MS. GAY: No, ma'am.

7 THE COURT: We will be at ease.

8 [Whereupon, a recess is taken from 10:35 a.m. to
9 10:49 a.m.]

10 [Whereupon, the evidence goes to the jury at
11 10:35 a.m.]

12 [Whereupon, Court's Exhibit Number 2 is marked
13 by the court reporter]

14 THE COURT: We have a note, Court's Exhibit
15 Number 2: do we consider illegal search; what are we
16 supposed to be focusing on; what are we supposed to be
17 disregarding.

18 MR. KIDD: Your Honor, which kind of comes back
19 to why I asked for the charge in U.S. v. Steele. I
20 think it's appropriate for them to be told that the
21 search is not proper consideration for them in their
22 deliberations and that they are only to consider their
23 own --

24 THE COURT: Ms. Gay?

25 MS. GAY: I think the jury is allowed to

State vs. Elliott Judon, Jr.
Renewal of Motions by Ms. Gay
March 18, 2015

1 consider any fact it has in this case. And I realize
2 that you made the decision that it was admissible.
3 But once it becomes -- once what they found in the
4 search --

5 THE COURT: I don't want to be arguing. I want
6 to know what you want me to present to the jury.

7 Mr. Kidd?

8 MR. KIDD: Right.

9 THE COURT: I don't know how to answer this
10 question easily.

11 MR. KIDD: Right.

12 And it can be sticky and basically commenting on
13 -- I agree the jury has a right to jury nullification.
14 But they're not -- it's not proper for them to be
15 charged on their right to jury nullification. And I
16 think the statement of law that I requested is a
17 correct statement of the law which would instruct them
18 that --

19 I would request the instruction that the search,
20 the existence of the video, those two issues are
21 matters of law which are not appropriate for the jury
22 to consider in their deliberations and that their
23 deliberations should be confined to the facts and the
24 elements of the crime of trafficking crack cocaine.

25 THE COURT: Ms. Gay, you said you had done some

State vs. Elliott Judon, Jr.
Renewal of Motions by Ms. Gay
March 18, 2015

1 research. Do you need anymore time to research that
2 case?

3 MS. GAY: I might be. But what -- because I
4 didn't think it was necessary at that point.

5 But the omission of evidence, which in this case
6 is the omission of a video, is definitely a fact to be
7 considered by the jury. There is absolutely no way to
8 tell this jury that they can't -- they don't --
9 they're not allowed to consider the fact that there is
10 no video. That's an omission fact.

11 With regard to the search, it's really the
12 seizing of the things, the evidence in question that
13 we have. If we answer it as this is the evidence we
14 have, this is the evidence that you're supposed to
15 consider, and/or the admission of evidence that they
16 can consider. Because if we go you cannot consider
17 the fact that this may have been either legally or
18 illegally seized, then you're telling this jury not to
19 think and you're taking the -- you know, the jury --
20 the consideration of facts. And there's a word. I've
21 got to pull it up on my cell phone. It invades the
22 province of the jury's fact-finding role and job if we
23 tell them that they can't consider the facts in this
24 case.

25 Now, you have -- you've legally made the --

State vs. Elliott Judon, Jr.
Renewal of Motions by Ms. Gay
March 18, 2015

1 you've made a legal decision that they're admissible
2 or not admissible, based on the search, but you can't
3 -- I would argue that we can't tell the jury how to
4 weigh the search as it affected the rest of the case.
5 Because I think that's what they're asking is is that
6 -- you know, can we, on our own, decide we didn't like
7 this search. And I believe that they definitely can
8 decide they didn't like this search. I believe that's
9 a fact that they can consider.

10 We argued to you we wanted to keep the evidence
11 out based on the illegality of the search. You found
12 that the search was legal to put the facts and the
13 evidence in front of them. But how they choose to
14 view those facts or evidence is within their province
15 and they -- as fact-finders in this case.

16 MR. KIDD: And, Judge, my response would be what
17 you're asking them to do is making a decision on a
18 matter of law and --

19 MS. GAY: No.

20 MR. KIDD: -- that's not appropriate.

21 THE COURT: All right. I'll let you know what
22 my decision is. Thank you.

23 MR. KIDD: Thank you, Your Honor.

24 [Whereupon, a recess is taken from 10:53 a.m. to
25 11:09 a.m.]

State vs. Elliott Judon, Jr.
Renewal of Motions by Ms. Gay
March 18, 2015

1 THE COURT: Thank you. Be seated.

2 MS. GAY: Judge Harrington, is it possible for
3 me to just take a minute and explain to my client
4 what's happening right now?

5 THE COURT: One minute. Thank you.

6 MS. GAY: Okay.

7 [Whereupon, Ms. Gay and Mr. Judon confer]

8 MS. GAY: Judge Harrington?

9 THE COURT: Yes?

10 MS. GAY: I would like to just put on the record
11 that I do have State v. Leon [phonetic] and I do
12 believe that that would be something --

13 THE COURT: Again, Ms. Gay, I'm trying to keep
14 the record clean and I have yet --

15 MS. GAY: You've already told me you're going to
16 rule --

17 THE COURT: I understand. But I have the jury
18 out. All right? And your client wasn't present. We
19 have to do this in an orderly fashion, please.

20 MS. GAY: So after you do it, can I put that on
21 the record?

22 THE COURT: Ms. Mulkey, we had an in-chambers
23 conference with regard to what the State -- what the
24 Court plans to do on Court's -- the note for Court's
25 2. My plan is to read the legality of a search and

State vs. Elliott Judon, Jr.
Renewal of Motions by Ms. Gay
March 18, 2015

1 seizure is a question of fact -- of law and fact which
2 is only proper for the Court to decide, and then give
3 the general what their role as jurors and that they --
4 that I am the only judge of the law and the only law
5 that they may consider.

6 Any objection?

7 MS. MULKEY: No objection from the State, Your
8 Honor.

9 THE COURT: Any objection, Ms. Gay?

10 MS. GAY: Yes, ma'am. I object because I
11 believe that that is too broad to tell -- it closes
12 the window of opportunity for the jury to be able to
13 be their own fact-finders in this case about all the
14 facts, including how this arrest went down.

15 I consider the admissibility of the evidence
16 different than their consideration of testimony and
17 evidence presented in the trial. Yes, the evidence is
18 in evidence and they can review it, and you've allowed
19 that, but how the officer has testified, or what they
20 see or don't see in this case, should be -- they
21 should be told that they are entitled to view that in
22 any way that they wish, as the ultimate fact-finders.

23 State v. Leon verifies that they are the
24 ultimate fact-finders. There were some other cases
25 that I pulled that also said that, you know, you don't

State vs. Elliott Judon, Jr.
Renewal of Motions by Ms. Gay
March 18, 2015

1 take this away from the jury, this is the jury's --
2 the jury gets to figure it out.

3 THE COURT: Do you have that citation?

4 MS. GAY: Ma'am?

5 THE COURT: Do you have the citation from Leon?

6 MS. GAY: I'll get it to you, Your Honor. I
7 don't.

8 THE COURT: So that's a no? All right.

9 MS. GAY: It should be coming right now.

10 THE COURT: Thank you. Let's bring in the jury.

11 [Whereupon, the jury enters the courtroom at
12 11:11 a.m.]

13 The BAILIFF: All jurors are present, Your
14 Honor.

15 THE COURT: Thank you. Please be seated.

16

17

18

19

20

21

22

23

24

25

- - -

- - -

- - -

State vs. Elliott Judon, Jr.
Re-charge of the Court
March 18, 2015

RE-CHARGE OF THE JURY

THE COURT: Ladies and gentlemen, I have received your note, which has been marked as Court's Exhibit Number 2. So if I refer to that as Court's 2, that's what that means.

Ladies and gentlemen, as I indicated to you from the very beginning, you are the judges of the facts in this case and the same law that makes you the judges of the facts makes me the judge of the law. The law as given by this Court is the only law that you may consider. You must accept it and follow it, even though you may disagree with it. I cannot tell you what the facts are, and you cannot disagree with me about what the law is or what the law should be. Your job is to take the law as I give it to you, apply it to the facts as you find them from the testimony of the witnesses and any other evidence that has been introduced. After doing that, you will render your verdict, a true and just verdict, under the solemn oath that you have taken as jurors.

The legality of a search and seizure is a question of law in fact which is only proper for the Court to decide.

I instruct you to go back and continue your deliberations.

Please rise for the jury.

State vs. Elliott Judon, Jr.
Re-charge of the Court
March 18, 2015

1 [Whereupon, the jury exits the courtroom at
2 11:13 a.m.]

3 THE COURT: Thank you. Please be seated.

4 Any objection to the information as read? From
5 the State?

6 MS. MULKEY: No, Your Honor.

7 THE COURT: From the defendant?

8 MS. GAY: Well, I do object. Leon is 468 U.S.
9 897, Your Honor. It's a 1984 case.

10 THE COURT: One more time. 468?

11 MS. GAY: 468 U.S. 897. It's about jury
12 nullification and the jury's ability to decide what
13 they want.

14 THE COURT: Thank you. We'll be at ease. I
15 think they want lunch, so y'all may go back to your
16 respective offices. We'll e-mail you, call you, if we
17 have any questions or concerns.

18 [Whereupon, a recess is taken from 11:13 a.m. to
19 1:09 p.m.]

20 THE COURT: We have a verdict. Anything before
21 we bring in the jury? From the State?

22 MS. MULKEY: No, Your Honor.

23 THE COURT: From the defendant?

24 MS. GAY: All the same stuff that we'll get to
25 in a minute.

State vs. Elliott Judon, Jr.
Verdict
March 18, 2015

VERDICT

THE COURT: All right. Let's bring in the jury.

THE BAILIFF: Yes, Your Honor.

[Whereupon, the jury enters the courtroom at
1:12 p.m.]

THE BAILIFF: All jurors present, Your Honor.

THE COURT: Thank you. Please be seated.

I understand you have reached a verdict.

Please be seated.

I understand you have reached a verdict. If you
will fold the verdict form and hand it to the bailiff.

I need to make sure that it is in order.

[Whereupon, the foreperson proffers documents to
the bailiff. The bailiff proffers documents to the
Court]

[Whereupon, the Court reviews documents]

THE CLERK OF COURT: Please have the defendant
stand.

[Whereupon, Mr. Judon complies]

THE CLERK OF COURT: The verdict form in the
matter of The State of South Carolina versus Elliott
Judon, Jr., we, the jury, find the defendant, Elliott
Judon, Jr., guilty of trafficking cocaine base ten
grams to twenty-eight grams. Signed by the foreperson
of the jury on March 18, 2015.

State vs. Elliott Judon, Jr.
Verdict
March 18, 2015

1 Ladies and gentlemen, of the jury, if this was
2 your verdict, please raise your right hand.

3 [Whereupon, jurors comply]

4 THE CLERK OF COURT: Thank you.

5 Please let the record reflect that all twelve
6 jurors raised their right hand.

7 THE COURT: Thank you.

8 THE COURT: Anything further requested of the
9 jury from the defendant?

10 MS. GAY: Yes, ma'am. We would ask you to
11 please poll the jury.

State vs. Elliott Judon, Jr.
Polling of the Jury
March 18, 2015

POLLING OF THE JURY

1
2 THE COURT: Using the juror numbers, please poll
3 the jury.

4 THE CLERK OF COURT: Ladies and gentlemen, what
5 we are going to do now is called polling the jury.
6 When I call your juror number, if you will please
7 raise your hand, I'll identify you, you can put your
8 hand down. I'll then ask you two questions: was that
9 your verdict, and is that still your verdict. Please
10 answer verbally in reply to each of those questions.

11 Juror number 80, was that your verdict?

12 JUROR NUMBER 80: Yes.

13 THE CLERK OF COURT: Is it still your verdict?

14 JUROR NUMBER 80: Yes.

15 THE CLERK OF COURT: Thank you. Juror number
16 36, was that your verdict?

17 JUROR NUMBER 36: Yes.

18 THE CLERK OF COURT: Is that still your verdict?

19 JUROR NUMBER 36: Yes.

20 THE CLERK OF COURT: Thank you. Juror 66, was
21 that your verdict?

22 JUROR NUMBER 66: Yes.

23 THE CLERK OF COURT: Is that still your verdict?

24 JUROR NUMBER 66: Yes.

25 THE CLERK OF COURT: Thank you. Juror number

State vs. Elliott Judon, Jr.
Polling of the Jury
March 18, 2015

1 89, was that your verdict?

2 JUROR NUMBER 89: Yes.

3 THE CLERK OF COURT: Is that still your verdict?

4 JUROR NUMBER 89: Yes.

5 THE CLERK OF COURT: Thank you. Juror number

6 117, was that your verdict?

7 JUROR NUMBER 117: Yes.

8 THE CLERK OF COURT: Is that still your verdict?

9 JUROR NUMBER 117: Yes.

10 THE CLERK OF COURT: Thank you. Juror 130, was
11 that your verdict?

12 JUROR NUMBER 130: Yes.

13 THE CLERK OF COURT: Is that still your verdict?

14 JUROR NUMBER 130: Yes.

15 THE CLERK OF COURT: Thank you. Juror 270, was
16 that your verdict?

17 JUROR NUMBER 270: Yes.

18 THE CLERK OF COURT: Is that still your verdict?

19 JUROR NUMBER 270: Yes.

20 THE CLERK OF COURT: Juror 274, was that your
21 verdict?

22 JUROR NUMBER 274: Yes.

23 THE CLERK OF COURT: Is that still your verdict?

24 JUROR NUMBER 274: Yes.

25 THE CLERK OF COURT: Thank you. Juror 301, was

State vs. Elliott Judon, Jr.
Polling of the Jury
March 18, 2015

1 that your verdict?

2 JUROR NUMBER 301: Yes.

3 THE CLERK OF COURT: Is that still your verdict?

4 JUROR NUMBER 301: Yes.

5 THE CLERK OF COURT: Thank you. Juror 317, was
6 that your verdict?

7 JUROR NUMBER 317: Yes.

8 THE CLERK OF COURT: Is that still your verdict?

9 JUROR NUMBER 317: Yes.

10 THE CLERK OF COURT: Thank you. Juror 352, was
11 that your verdict?

12 JUROR NUMBER 352: Yes.

13 THE CLERK OF COURT: Is that still your verdict?

14 JUROR NUMBER 352: Yes.

15 THE CLERK OF COURT: Thank you. Juror 366, was
16 that your verdict?

17 JUROR NUMBER 366: Yes.

18 THE CLERK OF COURT: Is that still your verdict?

19 JUROR NUMBER 366: Yes.

20 THE CLERK OF COURT: If there is any juror whose
21 number I did not call, please raise your hand.

22 [Whereupon, there is no response]

23 THE CLERK OF COURT: Your Honor, the jury has
24 been polled and the verdict stands.

25 THE COURT: Thank you.

State vs. Elliott Judon, Jr.
Polling of the Jury
March 18, 2015

1 Anything further, Ms. Gay?
2 MS. GAY: No, Your Honor. Not at this time.
3 THE COURT: You may have a seat. Thank you.
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

- - -
- - -
- - -

State vs. Elliott Judon, Jr.
Sentencing
March 18, 2015

SENTENCING

1
2 THE COURT: Is the State prepared for
3 sentencing, or do you need a few moments to prepare
4 your sentencing sheet?

5 MS. MULKEY: We have it ready, Your Honor.

6 THE COURT: Ladies and gentlemen, I am now going
7 to impose sentence. Is there any member of the jury
8 panel who does not wish to stay at this time?

9 [Whereupon, there is no response]

10 THE COURT: All right. Thank you.

11 MS. GAY: Your Honor, should I do my motions
12 after sentencing or before?

13 THE COURT: You can do them post-sentencing.

14 You don't have to sign the sentencing sheet, but
15 do you just wish to review it?

16 MS. MULKEY: May I approach, Your Honor?

17 THE COURT: You may.

18 [Whereupon, Ms. Mulkey proffers documents to the
19 Court]

20 THE COURT: All right. Thank you.

21 Ms. Mulkey, I have sat through the trial. Is
22 there anything else I need to know?

23 MS. MULKEY: Nothing else at this time from the
24 State, Your Honor, unless you're ready for the
25 defendant's record or if you care to hear that.

MIA PERRON, CVR-CM-M

-541-

State vs. Elliott Judon, Jr.
Sentencing
March 18, 2015

1 THE COURT: I want your presentation, please.

2 MS. MULKEY: Your Honor, the defendant's record
3 includes a 1997 possession of crack; 1998 driving
4 under suspension, driving under the influence, three
5 convictions for possession of stolen motor vehicle,
6 unlawful possession of a pistol, soliciting for
7 prostitution, and a possession of crack second; in
8 1999 there's a distribution of crack, failure to stop
9 for a blue light, possession of crack, and assault of
10 a high and aggravated nature; in 2003, convictions for
11 interference of officers and driving under suspension;
12 2004, resisting arrest, driving under suspension;
13 2005, distribution of crack second, driving under
14 suspension, possession of a stolen motor vehicle, a
15 false claim for insurance payment, possession of crack
16 second, and possession with intent to distribute crack
17 second; in 2011, a driving under suspension; and in
18 2013, a reckless driving, Your Honor.

19 THE COURT: And --

20 MS. MULKEY: There is -- I'm sorry, Your Honor.
21 There is also another pending charge for
22 trafficking cocaine base third.

23 THE COURT: When did that offense occur?

24 MS. MULKEY: That was on May 22nd, 2014. After
25 this offense.

State vs. Elliott Judon, Jr.
Sentencing
March 18, 2015

1 THE COURT: While he was out on bond?

2 MS. MULKEY: Yes, Your Honor.

3 THE COURT: And the State has served notice of
4 life without the possibility of parole; is that
5 correct?

6 MS. MULKEY: Yes, Your Honor.

7 THE COURT: When did you file that?

8 MS. MULKEY: The Court's indulgence, Your Honor.

9 THE COURT: Ms. Gay, you agree that you have
10 been properly served --

11 MS. GAY: Yes, we have been --

12 THE COURT: -- with that notice?

13 MS. GAY: -- properly served with life without
14 parole.

15 THE COURT: All right. Thank you.

16 MS. MULKEY: Your Honor, that was filed on
17 February 18th of this year, served on the defendant
18 February 17th.

19 THE COURT: All right. Thank you. Anything
20 further?

21 MS. MULKEY: Nothing from the State, Your Honor.

22 THE COURT: Ms. Gay, I will be happy to hear
23 from you, your client, your client's mother who has
24 been present throughout the trial, or anyone else.

25 MS. GAY: Well, Your Honor, my client, as he

State vs. Elliott Judon, Jr.
Sentencing
March 18, 2015

1 told you, he's in his thirties. He has a job. He has
2 got two children. He's been a member of this
3 community throughout his entire life.

4 He had he believed valid reason for why he
5 should have this trial, Your Honor, and he understood
6 all along what the possible exposure was but wanted it
7 to be fair and justice.

8 And his mother is here who can tell you, Your
9 Honor, that she will be his mother and -- throughout
10 all time.

11 THE COURT: Does she wish to address the Court?

12 MS. GAY: Would you like to say anything? You
13 know what the sentence is going to be, but would you
14 like to say anything?

15 THE COURT: Ma'am, I need you to state your full
16 name for the record and please spell your last name.

17 MS. JUDON: My name is Lucinda Judon. Judon is
18 J-U-D-O-N.

19 THE COURT: Yes, ma'am: I'll be happy to hear
20 from you.

21 MS. JUDON: I feel as though that justice wasn't
22 done but I feel as though that Elliott tried to do the
23 right thing in the system and the system closed all
24 the doors in his face. And he have a family to take
25 care of. But I'm not saying that Elliott wasn't

State vs. Elliott Judon, Jr.
Sentencing
March 18, 2015

1 guilty, but there was also a guilty charge in both
2 cases. But I just let the Lord handle the rest of it.
3 I thank you.

4 THE COURT: Thank you, Ms. Judon.

5 MS. GAY: The one thing I would like to say,
6 Your Honor -- I know Mr. Judon may want to represent
7 you -- to discuss with you, also. Mr. Judon has a
8 significant drug problem. He has tried to find
9 programs that would be something he could participate
10 in and we took those programs and those alternatives
11 to the solicitor and asked for consideration, and we
12 got a life without parole notice.

13 You know, his drug -- he's never killed anybody.
14 All the things that happened in his life have to do
15 with drugs. And, you know, based on our law,
16 obviously he was eligible for life without parole and
17 he's now going to get it.

18 But he was somebody who was -- he's been in
19 prison before. And he has -- knows that the prison
20 system doesn't have anything to offer addicts. They
21 don't have any assistance that they can really give.

22 He asked you at one point in this trial, Your
23 Honor, that when you're sentencing him to please put
24 whatever you can in place that he may be able to
25 participate in because he considered himself a person

State vs. Elliott Judon, Jr.
Sentencing
March 18, 2015

1 with a drug problem. And when he came into this case,
2 he worked with his defense attorneys and tried very
3 hard to find some kind of alternative that -- and that
4 didn't happen and that wasn't possible for him. And
5 throughout this whole case, he's never understood why
6 -- you know, who gets to choose who gets treatment and
7 who doesn't.

8 And he understands the life notice. We've been
9 over that. He understood the facts of this trial. He
10 went to trial. He's been convicted. There are being
11 -- some legal matters that are going to be addressed
12 in the future.

13 And I know he would like to address you, as
14 well, Your Honor.

15 THE COURT: Mr. Judon, has your attorney advised
16 you of your right to appeal this conviction?

17 MR. JUDON: [Indicates affirmatively]

18 MS. GAY: You have to speak --

19 THE COURT: You or your attorney must do so
20 within ten days. Do you understand that, sir?

21 MR. JUDON: Yes.

22 THE COURT: Is that a yes?

23 MR. JUDON: Yes.

24 THE COURT: All right. Thank you. I'll be
25 happy to hear from you.

State vs. Elliott Judon, Jr.
Sentencing
March 18, 2015

1 MR. JUDON: Your Honor, just like my mother said
2 -- I lost a twin brother due to -- due to doing drugs.

3 MS. GAY: Your Honor, his brother died in prison
4 through something that happened in the prison system.

5 MS. GAY: Do you want to just leave it at that?
6 Do you want to say more or do you want to just --

7 [Whereupon, Ms. Gay and Mr. Judon confer]

8 MR. JUDON: I tried to do my best, Your Honor.
9 I'm not a violent person. As you can see, my record
10 reflects of drugs. I tried to ask for help and I was
11 turned down.

12 I got a nine-year-old son, I've got a daughter,
13 that really needs me to help them. As you can see in
14 today's society, a lot of young black people -- I
15 won't say black -- a lot of kids have no guidance.
16 And I ask one of the guards in the jail what is wrong
17 with y'all with all these killings and things and he
18 said, you know what, they have no guidance.

19 And I let a lot of people down. And I would
20 like to make an impact on a lot of young people who
21 don't have anything to do. But as I can see, I guess
22 my life is --

23 The burden that I put on my family --
24 That's all, Your Honor. That's it.

25 THE COURT: Anything further, Ms. Gay?

State vs. Elliott Judon, Jr.
Sentencing
March 18, 2015

1 MS. GAY: No, ma'am.

2 THE COURT: Mr. Judon, this is not the first
3 time that you have stood in front of a circuit judge
4 and been sentenced on a particular drug crime. And
5 the fact that you were rearrested within several
6 months after this particular trafficking charge
7 indicates to me that you do not -- that you do not
8 take this seriously, that your intention is to
9 continue to use drugs.

10 There is absolutely no reason that you could not
11 have received drug treatment either while you were
12 incarcerated or while you were out. There is
13 absolutely no reason. There are plenty of programs
14 that are free to the public that you could have
15 availed yourself.

16 What I think that you are doing, you don't feel
17 that justice is done, you don't like the outcome. And
18 when you make choices and consistently have been
19 making choices since you were seventeen years old, as
20 you told the jury, that -- and then you wonder what
21 has happened to you.

22 You have created this situation for yourself,
23 Mr. Judon. Ms. Gay didn't create it for you, the
24 State didn't create it for you, the jury didn't create
25 it for you. You did. You had a nine-year-old and a

State vs. Elliott Judon, Jr.
Sentencing
March 18, 2015

1 ten-year-old when you were riding around with
2 trafficking quantity crack cocaine in May and in
3 August of last year. What kind of role model is that
4 for your children? What kind of guidance is that,
5 Mr. Judon?

6 You say that your life is over. I hope that you
7 take the time that you have remaining in the
8 department of corrections so that you can have some
9 guidance with the people in the department of
10 corrections. Your life isn't over. It's just
11 changed. It's just changed, Mr. Judon. I wish you
12 the best.

13 It's the order of the Court on 2013-GS-10-7257
14 that you be committed to the State Department of
15 Corrections for a term of life without the possibility
16 of parole.

17 Good luck to you, sir.

18 Ladies and gentlemen, that completes your
19 service to this case. If you will please return to
20 your jury room, I'll be in there in just a few moments
21 to thank you for your service to this case.

22 Please rise for the jury.

23 [Whereupon, the jury exits the courtroom at
24 1:27 p.m.]

25 THE COURT: We will need Mr. Judon back for the

State vs. Elliott Judon, Jr.
Sentencing
March 18, 2015

1 post-trial motions.

2 Thank you. You may be seated.

3 [Off the record momentarily]

4 MS. GAY: We can sit?

5 THE COURT: I'm sorry?

6 MS. GAY: We can be seated?

7 THE COURT: You can be seated. We're just
8 waiting --

9 [Whereupon, Mr. Judon enters the courtroom]

10 THE COURT: This is his third offense; right?
11 Trafficking third?

12 MS. MULKEY: Yes, Your Honor.

13 THE COURT: I just want to make sure the
14 sentencing sheet is correct..

15

16

17

18

19

20

21

22

23

24

25

- - -

- - -

- - -

State vs. Elliott Judon, Jr.
Post-Trial Motions
March 18, 2015

POST-TRIAL MOTIONS

THE COURT: Ms. Gay, I'll be happy to hear from you regarding any post-trial motions.

MS. GAY: Your Honor, I would renew all my motions, primarily the motion to dismiss which I think would have been dispositive of this situation because I do believe that there was failure to preserve evidence that were important in this case, and I believe that we met the test of United States vs. Youngblood, Arizona vs. Youngblood, and South Carolina law. Also, based on my motion to suppress, under Tindle and Sullivan and all the rest of the things, under the motion to suppress statements under Jackson v. Denno and Sullivan and all -- the fact that I had believed that Mr. Judon needed to be psychologically evaluated for competency before this trial started, during his time for this trial, even now, for that matter, because I believe that he somehow thought that there was some possibilities in his own head that were delusional that -- about the possibilities of what would happen in this case and how the case would go forth, and any other motions and/or objections and such that I made, I would make a motion for a new trial on behalf of my client.

THE COURT: Thank you. Anything from the State?

State vs. Elliott Judon, Jr.
Post-Trial Motions
March 18, 2015

1 MS. MULKEY: Other than resubmitting our
2 arguments previously, no, Your Honor.

3 THE COURT: Mr. Judon, you may have a seat.

4 THE COURT: Ms. Gay, I just -- there has been
5 nothing that I have heard that would make me
6 reconsider again. I know you were preserving them for
7 the record. But Mr. Judon has, throughout this trial,
8 been more than appropriate.. My observation of him
9 throughout this trial is that he has been competent.
10 He has been able to assist you more than effectively
11 throughout this case. I think the consistent theme
12 that I hear from Mr. Judon is he just doesn't like
13 what he got. And that's not the basis for a new
14 trial, it's not the basis for a competency evaluation,
15 it's just he doesn't like what he got. And he has
16 found himself in this position because of the choices
17 that he made. And I think it's even more tragic that
18 he's lost family members in prison. He, of all people
19 in this courtroom, should have known what the outcome
20 could be and have done everything within his power to
21 not do those things.

22 Ms. Gay, I've known you a long time. I've never
23 seen you represent anybody with more zeal and
24 intelligence and articulate nature than you have
25 throughout this trial. You've done your research

State vs. Elliott Judon, Jr.
Post-Trial Motions
March 18, 2015

1 above and beyond. So Mr. Judon has received justice
2 in this case. He just doesn't like the outcome. And
3 so I appreciate your steadfastness staying with Mr.
4 Judon. I know at times it was not easy for you to
5 communicate with him just because he doesn't -- he
6 knew that -- I think he knew, ultimately, this was
7 going to be where he was and he just didn't want to
8 face that reality. You have zealously represented him
9 throughout this past week and in pretrial motions, so
10 thank you for your professional courtesy and for your
11 contribution to this case.

12 So all your motions stand to -- with my original
13 rulings.

14 Ms. Mulkey, Mr. Kidd, thank you again for your
15 courtesy and professionalism and attempting to work
16 with Mr. Judon at the very last minute, against office
17 policy, as I understand it, to re-offer the offer.
18 It's unfortunate that we find ourselves here in this
19 situation, but I think that based upon Mr. Judon's
20 record and the way the law is written, this is what
21 has -- this is the outcome. So thank you.

22 MS. MULKEY: Thank you.

23 THE COURT: Thank you, Officer Stott.

24 MR. KIDD: Thank you, Your Honor.

25 [JURY TRIAL CONCLUDES AT 1:32 P.M.]

State vs. Elliott Judon, Jr.
Certificate of Court Reporter

C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

I, the undersigned Mia Perron, Circuit Court Reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the jury trial held before the Honorable Kristi L. Harrington, on March 18, 2015.

I do further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Dated this 18th day of October, 2015.



Mia Perron, CVR-CM-M
Circuit Court Reporter
9th Judicial Circuit

MIA PERRON, CVR-CM-M

-554-

FORM 5

STATE OF SOUTH CAROLINA

County of CHARLESTONELLIOTT JUDON, JR.

Full name and prison number (if any) of Applicant

#263761

v.

State of South Carolina

2017-CP-10-5398
IN THE COURT OF COMMON PLEASAPPLICATION FOR
POST-CONVICTION RELIEF2017 OCT 20 AM 8:54
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution 910 W. Sackety Highway, Bishopville, South Carolina 29010
2. Name and location of Court which imposed sentence Charleston County Court of General Sessions, Charleston, South Carolina
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2013-95-10-07257, Trafficking in Cocaine
 - (b) Base

- (f) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 (a) March 18, 2015; Life Without Parole
 (b) _____
 (c) _____
6. Check whether a finding of guilty was made:
 (a) after a plea of guilty _____
 (b) after a plea of not guilty ☒ _____
 (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes, I did.
8. If you answered "yes" to (7), list:
 (a) the name of each Court to which you appealed:
 i. South Carolina Court of Appeals
 ii. _____
 (b) the result in each such Court to which you appealed:
 i. Affirmed
 ii. _____
 (c) the date of each such result:
 i. July 26, 2017
 ii. _____
 (d) if known, citations of any written opinion or orders entered pursuant to such results:
 i. 2017-UP-00508
 ii. _____
 9. If you answered "no" to (7), state your reasons for not so appealing:
 (a) N/A

- (b) _____
 (g) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 (a) Denial of Effective Assistance of Counsel
 (b) _____
 (g) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
 (a) Failure to Investigate the facts of the case
 (b) Failure to challenge prior conviction
 (g) Failed to object to the admission of crack cocaine
12. Prior to this application have you filed with respect to this conviction:
 (a) any petition in a State Court under South Carolina Law? No.
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.
 (d) any other petitions, motions or applications in this or any other Court? No.
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
 (a) the specific nature thereof:
 i. N/A
 ii. _____
 iii. _____
 iv. _____
 v. _____
 (b) the name and location of the Court in which each was filed:
 i. N/A
 ii. _____
 iii. _____
 iv. _____
 v. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No, they have not.

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

iv. _____

(b) the proceedings in which each ground was raised:

i. N/A

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) (10)(A), first Collateral Attack
 (b) _____
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? N/A
 (b) your trial, if any? Yes, I were.
 (c) your sentencing? Yes, I were.
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes, I were.
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

N/A

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Melisa W. Gay, Post Office Box 2144, Mt. Pleasant, South Carolina 29405
 ii. Lanette Carter Tokant, Post Office Box 11589, Columbia, South Carolina 29211
 iii. _____

(b) the proceedings at which each such attorney represented you:

i. Trial and Sentencing
 ii. South Carolina Court of Appeals
 iii. _____

19. State clearly the relief you seek in filing this application:

Based on the above, Sentence VACATED
Conviction REVERSE and REMANDED for a
New Trial.

20. Are you now under sentence from any other court that you have not challenged?

No, I am Not.

STATE OF SOUTH CAROLINA)

County of CHARLESTON)

VERIFICATION

I, ELTON JORDAN, JR, #263761, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me at this time for vacating, setting aside or correcting the convictions and sentence attacked in this application; and that the matters and allegations therein set forth are true and correct.

[Signature]

SWORN to and subscribed before me this 17
 day of Oct. 2017

[Signature] (L.S.)
 Notary Public

My Commission Expires: 3/3/2024

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, ELLIOTT JORDAN, JR., #2603761, hereby apply for leave to proceed in this action without prepayment of fees or costs or security thereof. In support of my application I declare under penalty of perjury that the following facts are true:

- (a) I am the applicant in this action and I believe I am entitled to redress.
- (b) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Elliott Jordan
Applicant

SWORN or affirmed to and subscribed before me this

17 day of Oct 2017

Lee Corr., Inst.,
990 Wisacky Highway
Bishopville, SC 29010-1775

Debra Easton
Notary Public

My Commission Expires: 3/3/2024

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Elliott Judon, Jr., #263761,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

2017-CP-10-5398

RETURN

Respondent, making its Return to the application for post-conviction relief filed on October 20, 2017, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Applicant was indicted at the December 2013 term of the Charleston County Grand Jury for trafficking in cocaine base (2013-GS-10-07257). On March 18, 2015, Applicant proceeded to trial before the Honorable Judge Kristi L. Harrington and a jury. Melisa Gay, Esquire, represented Applicant. Lauren B. Mulkey, Esquire and Culver Kidd, Esquire, prosecuted the case. Applicant was found guilty as indicted, and Judge Harrington sentenced him to life without parole.

Applicant filed a timely notice of appeal. The South Carolina Court of Appeals dismissed Applicant's appeal on June 1, 2017. State v. Judon, Appellate Case No. 2015-000728 (S.C. Ct. App. filed July 26, 2017). The remittitur was returned on August 11, 2017.

II.

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

1. "Denial of Effective Assistance of Counsel."
 - a. "Failure to investigate the facts of the case."
 - b. "Failure to challenge prior conviction."
 - c. "Failed to object to admission of crack cocaine."

Attached and incorporated herein are the records of the Charleston County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, and the application for post-conviction relief. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent submits Applicant's allegations of ineffective assistance of trial counsel are without merit. In a post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove 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). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing

Strickland, 466 U.S. at 690). 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 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.

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the State requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Additionally, Applicant must specify any claims he intends to raise at the post-conviction relief evidentiary hearing. Any claims not specifically laid out in this post-conviction relief application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests

that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

V.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VI.

WHEREFORE, the State requests that an evidentiary hearing be held on the claims of ineffective assistance of trial counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

RASHEEDA CLEVELAND
Assistant Attorney General

By: Rasheeda Cleveland
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

January 22nd, 2018

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ELLIOTT JUDON, #263761)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent,)

IN THE COURT OF COMMON PLEAS

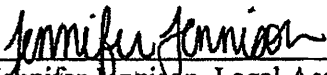
2017-CP-10-5398

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Rodney Duane Davis, Esquire
 Lowcountry Law Office
 4000 Faber Place Drive, Suite 300
 Charleston, SC 29405

DATED this the 22nd day of January, 2018.


 Jennifer Jennison, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	DOCKET NO. 2017-CP-10-5398
	)	
	)	
ELLIOTT JUDON	)	
	)	
Applicant	)	
	)	
vs.	)	
	)	
STATE OF SOUTH CAROLINA	)	
	)	
Respondent	)	
	)	
	)	
	)	
	)	TRANSCRIPT OF RECORD

July 24, 2018
Charleston, South Carolina

Volume 1 (of 2)

B E F O R E:

THE HONORABLE DEADRA L. JEFFERSON, JUDGE

A P P E A R A N C E S:

RODNEY D. DAVIS, ESQ.
Attorney for the Applicant

MEGAN HARRIGAN JAMESON, ESQ.
Attorney for the State

JOYCE C. RUEGER, CVR-M
Circuit Court Reporter

INDEX TO PROCEEDINGS	PAGE
PROCEEDINGS	3
POST CONVICTION RELIEF APPLICATION	
ELLIOTT JUDON	
Direct Examination by Mr. Davis	7
Cross-Examination by Ms. Jameson	27
Redirect Examination by Mr. Davis	40
MELISSA GAY	
Direct Examination by Mr. Davis	53
Cross-Examination by Ms. Jameson	63
CERTIFICATE OF THE COURT REPORTER	78

INDEX TO EXHIBITS
No Exhibits were introduced

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 24, 2018

1 PROCEEDINGS

2 [Whereupon, an off the record bench conference is
3 held]

4 THE COURT: So then we will proceed with Elliott
5 Judon. Is the State ready to proceed?

6 MS. JAMESON: Yes, Your Honor.

7 THE COURT: Is the defense ready -- I mean is the
8 applicant ready to proceed? I'm so used to the State and
9 the defense. I apologize, Mr. Davis.

10 MR. DAVIS: That's all right, Your Honor.

11 THE COURT: Is the applicant ready to proceed?

12 MR. DAVIS: He is present and we are, Your Honor.

13 THE COURT: And as I understand it this was a
14 trial, correct?

15 MS. JAMESON: Yes, Your Honor.

16 THE COURT: All right. Call your first witness,
17 Mr. Davis.

18 MR. DAVIS: And Your Honor just for the record
19 before we begin Mr. Judon is present. I've spoken with
20 him on more than one occasion. In my discussions ---

21 THE COURT: --- and actually -- and I apologize
22 because I meant to cover this. Y'all requested a
23 continuance. Sir, we had some pretrial discussions in
24 your absence. More in the nature of scheduling and
25 trying to locate a file; nothing really substantive but

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 24, 2018

1 in a nutshell I asked your lawyer to tell me why he would
2 have wanted a continuance. And I had the State tell me
3 why they would have opposed the continuance. And what I
4 told them in a nutshell was the beauty of non-jury is
5 that we don't have to do it all one time and I saw no
6 need in delaying your case; that we could go ahead and
7 get as much done as possible today.

8 Mr. Davis made me aware that Mr. Malloy was
9 potentially a witness instead of Ms. Durant who has been
10 released from her subpoena, and that Mr. Malloy is now no
11 longer employed with the Public Defender's office but all
12 of his records remain with the Public Defender's office.
13 He now works at a firm in North Charleston. He's in
14 route and we've instructed him -- we're trying our best
15 to get the file from the storage facility in Hanahan so
16 that he can review it.

17 If it does not get here today we may have to
18 reconvene the hearing if necessary. But the Public
19 Defender also maintains what could best be characterized
20 as an index of all of their notes on their computer
21 system. And that may be enough for Mr. Malloy to be able
22 to refresh his memory to testify. So I have instructed
23 him, and he should probably be almost at the courthouse
24 by now, and I have instructed him to go straight over to
25 the Public Defender's office and to look at that index to

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 24, 2018

1 see if we even need to get the file. Is that accurate

2 Ms. Jameson what I've recited for the record?

3 MS. JAMESON: Yes, Your Honor.

4 THE COURT: Is that accurate Mr. Davis?

5 MR. DAVIS: Yes, Your Honor.

6 THE COURT: Okay. Call your first witness.

7 MR. DAVIS: Your Honor, just before I call him. We

8 have discussed previously including today this was a

9 trial on trafficking charges. He was noticed and

10 convicted and then sentenced to life without possibility

11 of parole. I always go over risks and benefits of PCRs

12 but in this case he got the life without parole. So he

13 understands that and wishes to go forward. And so with

14 that Your Honor ---

15 THE COURT: --- were there any -- well, I guess

16 even if other charges were dismissed it really wouldn't

17 matter if they...

18 MR. DAVIS: That's right ---

19 THE COURT: --- I'm sorry; I'm sort of talking to

20 myself. I apologize. I was sort of going through the

21 analysis in my head. I'm sorry.

22 MR. DAVIS: That's all right, Your Honor. So we

23 would call Mr. Judon to the stand.

24 THE COURT: Sir, if you would stand for me and

25 raise your right hand to be sworn,

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 24, 2018

1 [Whereupon, Mr. Judon complies]
2 [Whereupon, the witness is duly sworn by the Court]
3 THE COURT: You can put your right hand down, sir.
4 Tell us your full name for the record.
5 THE WITNESS: Elliott Jerome Judon, Jr.
6 THE COURT: And is that Jerome with a G or a J?
7 THE WITNESS: A J.
8 THE COURT: You can take your seat, sir.
9 [Whereupon, Mr. Judon is seated]
10 THE COURT: I just need you to speak very loudly
11 and clearly for me and speak toward the court reporter so
12 she can take down all of your responses. You may
13 proceed, Mr. Davis.
14 MR. DAVIS: Thank you very much, Your Honor.
15 THE COURT: You're welcome.
16
17
18
19
20
21
22
23
24
25

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 ELLIOTT JUDON,
2 Having been first duly sworn,
3 Was examined and testified as follows:
4 DIRECT EXAMINATION
5 BY MR. DAVIS:
6 Q. Mr. Judon, can you tell the Court where you were
7 born and raised?
8 A. I was born in Charleston, South Carolina and raised
9 in North Charleston, South Carolina.
10 Q. And can you tell the Court your educational
11 background?
12 A. I went through tenth grade at North Charleston High
13 School. I got my GED in 2007.
14 Q. Did you attend any college classes or any vocational
15 classes?
16 A. I attended Barber College classes. I got my
17 barber's license and became a licensed barber.
18 Q. And at the time of this trial were you dealing with
19 any emotional or mental health issues?
20 A. Kind of emotional. My Dad passed about three months
21 prior to me going to trial. A couple of years before
22 that I lost a brother so I was kind of going through kind
23 of emotional things at the time.
24 Q. But has there ever been any clinical diagnosis of
25 anything?

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 A. No, sir.

2 Q. Were you on any medications at the time of the
3 trial?

4 A. Only blood pressure medicine, sir.

5 Q. And would that be the same answer for today's
6 purposes?

7 A. Yes, sir.

8 Q. The only medication you're on is for high blood
9 pressure, right?

10 A. Correct.

11 Q. Okay. Now finally just a little more background;
12 married or single and are you a father?

13 A. Yes, I am married. I was married since 2013. I
14 have two kids. I have one son that is 12 and I have a
15 daughter that is 13.

16 Q. Now we are here about a conviction for trafficking
17 that occurred in March of 2015, is that right?

18 A. That's correct.

19 Q. It was a single charge of trafficking drugs,
20 correct?

21 A. Correct.

22 Q. For the record can you tell the Judge who your
23 original attorney was?

24 A. My original attorney was Luke Malloy from the Public
25 Defender's office.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 Q. And approximately how long were you represented by
2 Mr. Malloy if you recall?

3 A. I was represented by Mr. Malloy for about maybe a
4 year.

5 Q. And at some point did another attorney take over
6 representation?

7 A. Yes, sir.

8 Q. And who was that?

9 A. It was Melissa Gay.

10 Q. And can you tell the Court how it came that she took
11 over your case?

12 A. Well, Malloy I was going to a hearing on December
13 15th the year of 2013, and Mr. Malloy was my prison
14 attorney and I requested a continuance due to the fact
15 that I wanted a videotape of the traffic stop.

16 And Mr. Malloy indicated to me that the videotape
17 was not necessary and that's when I decided to hire a
18 private attorney.

19 Q. And so you and or your family hired Ms. Gay to
20 represent you from that time forward?

21 A. Yes, sir.

22 Q. And did she in fact represent you all the way
23 through your trial?

24 A. Yes, sir.

25 Q. In speaking about Ms. Gay and her representation of

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 you can you tell the Court approximately how many times
2 that she met with you prior to going to trial?

3 A. Prior to going to trial I saw Ms. Gay approximately
4 four times.

5 Q. And can you tell the Court during these four
6 meetings with Ms. Gay approximately how long did the
7 meetings last?

8 A. Maybe about 30 minutes; 30 minutes tops.

9 Q. And so the Court will understand did you make bond
10 or did you remain in jail post arrest up until your
11 trial?

12 A. I remained in jail.

13 Q. So these meetings would have been at the Charleston
14 County courthouse -- I'm sorry Charleston County
15 Detention Center?

16 A. Yes, sir.

17 Q. Were there any meetings other than at trial with Ms.
18 Gay at the courthouse?

19 A. No, sir.

20 Q. In these four meetings with Ms. Gay, I have a direct
21 question, did she ever discuss with you the elements of
22 the charge trafficking?

23 A. No, sir.

24 Q. At some point prior to your conviction did you learn
25 what the elements of trafficking were?

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 A. Yes, sir. When the Solicitor was making his closing
2 arguments I remember the Solicitor saying that there were
3 only three elements to prove trafficking cocaine.

4 One of the elements were that the drugs had to have
5 been found on the person in possession, the second
6 element was that they had to have been tested as drugs,
7 and the third element was supposed to weigh trafficking
8 amount.

9 I was thinking that I would have to have been found
10 guilty of all the elements of bringing into the State,
11 dispense, manufacturing. I didn't know only three
12 elements that you needed to prove trafficking cocaine.

13 Q. During these four meetings with Ms. Gay was there
14 ever a discussion of the burden of proof or the
15 requirement that the State would have to meet to convict
16 you at trial?

17 A. No, sir.

18 Q. Was there ever a discussion with Ms. Gay during
19 these meetings about the phrase beyond a reasonable
20 doubt?

21 A. No, sir.

22 Q. Was there ever any discussion about whether you
23 would testify or not at your trial?

24 A. Yes, sir.

25 Q. And can you tell the Court what that discussion was

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 about?

2 A. About me testifying?

3 Q. Yes, sir.

4 A. If I was going to take the stand and testify -- if I
5 was going to take the stand to testify that due to a
6 couple of prior convictions the State would try to use
7 that to impeach my creditability.

8 Q. Other than your prior record being used against you
9 if you didn't testify was there any preparation of the
10 types of questions that she would ask you if you wanted
11 to testify.

12 A. No, sir.

13 Q. Was there any discussion about the types of
14 questions the State might ask you on cross-examination if
15 you testified?

16 A. No, sir.

17 Q. What, if any, advice did she give to you about
18 whether you should testify or not?

19 A. She really didn't speak on that issue about advice.
20 We had a lot of disagreements going back and forth about
21 the videotape. So our main focus was basically on that.
22 Trial came up pretty fast so we really didn't have time
23 to discuss that.

24 Q. During these four meetings with Ms. Gay did she ever
25 discuss potential sentences?

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 A. No, sir.

2 Q. Did she ever share with you the notice of the
3 State's intent to seek life without parole?

4 A. No, sir.

5 Q. What did you believe you were facing at trial?

6 A. During trial the Solicitor came to me with 20 or 20
7 years to life so I thought I was facing 20 years to life.
8 I didn't know that life would have been my last or been
9 my only option.

10 I would have definitely taken the 20 years if I had
11 known if I lost at trial that life would have been life
12 and not 20 to life instead of life.

13 Q. Let's break that down a little bit. At one point,
14 was this before trial or at trial, that the State made an
15 offer to you?

16 A. The State came to me during trial with the 20 year
17 offer. I was kind of confused about when they came to me
18 with the 20 years. So I needed more time really to
19 discuss with Ms. Gay, with her my attorney, was I facing
20 20 to life or actually life.

21 Q. And what -- tell the Court some more about the
22 discussion you had with Ms. Gay about that offer.

23 A. Well, it was still going back and forth. She told
24 me that I was facing 20 to life if I was to get
25 convicted. So in my mind I was thinking that if I take

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 the 20 years would my rights be given up or would I have
2 the chance to appeal the decision that we were going to
3 trial with.

4 Q. So on that offer that you understood to be somewhere
5 between 20 years and life did you accept or reject that
6 offer?

7 A. I rejected the 20 year offer.

8 Q. Let me back up for a second. Had there ever been an
9 offer prior to that?

10 A. Prior to trial I think Ms. Gay sent me some emails
11 that the Solicitor offered a 10 year -- a 10 to 12 year
12 plea. I didn't want to turn the plea down. I was more
13 mentally focused on the videotape so I turned the 10 to
14 20 year plea down.

15 Q. Now when you were discussing the 10 to 12 year offer
16 with Ms. Gay did she give advice or did she have an
17 opinion whether you should take that or go to trial?

18 A. She told me that I had a conference hearing and I
19 explained to the Judge the situation about the videotape.
20 For some apparent reason Ms. Gay came back to see me at
21 the county jail and said that she was getting the charges
22 dismissed and you have a lawsuit against North Charleston
23 Police Department and she would do the lawsuit also. So
24 that's why I didn't take the 10 to 12 year.

25 Q. And how far ahead of trial was that discussion do

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 you recall?

2 A. The 20 year plea was after ---

3 Q. --- I'm sorry, let me interrupt you, the 10 to 12
4 year plea that you were just talking about.

5 A. That was before trial.

6 Q. Do you remember how long before trial it was?

7 A. I went to trial in March. I think they sent that
8 offer somewhere around January.

9 Q. Mr. Judon, forgive me and let me go back to one
10 thing. I asked you about discussing with you testifying
11 at trial. Did she ever talk to you about your right to
12 not testify?

13 A. I can't recall.

14 Q. During these four meetings with Ms. Gay can you tell
15 the Judge what discussions you would have had about the
16 theory at trial? What was your defense theory?

17 A. Basically we didn't have a defense theory. I guess
18 we were under the impression that the charges were going
19 to get dismissed.

20 And once the charges didn't get dismissed that kind
21 of threw things for a loop and trial was like in two
22 days. So we were kind of like unexpected that.

23 Q. Let's break that down a little bit. Why is it that
24 you expected that the charges would be dismissed and you
25 would not have to go to trial?

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 A. Because I was questioning the videotape from the
2 traffic stop. And for some apparent reason the officers
3 didn't preserve the videotape into evidence so that
4 videotape would have been part of my defense.

5 Q. And what comments did Ms. Gay make to you about law
6 enforcement's failure to preserve that video?

7 A. Ms. Gay said that under their policy and their
8 procedure the officer had to turn the videotape in.

9 Q. And since that hadn't happened what did she
10 indicate, if anything, that that would -- that she could
11 do with that information?

12 A. She said she can get the charges dismissed and I
13 would have a lawsuit on North Charleston Police
14 Department.

15 Q. Given that conversation did she ever discuss in any
16 of the meetings how a trial actually takes place in State
17 Court in South Carolina?

18 A. No, sir.

19 Q. Did she ever explain about picking a jury and how
20 that was done?

21 A. No, sir.

22 Q. Did she ever talk about possible verdicts of the
23 jury?

24 A. No, sir.

25 Q. Did she ever talk to you about the fact that a

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 verdict of the jury had to be unanimous; all 12?
2 A. No, sir.
3 Q. Was there however discussions about pretrial motions
4 or pretrial hearings? Did y'all talk about that?
5 A. Yes sir, after the motion was dismissed.
6 Q. Okay, let's back up. The Motion to Dismiss; can you
7 tell Judge Jefferson what conversations you and Ms. Gay
8 had about her Motion to Dismiss?
9 A. She was just saying she was filing a motion to get
10 the charges dismissed and that I had a lawsuit on North
11 Charleston Police Department. If I wanted her to do that
12 lawsuit I could hire her also.
13 Q. Now you were present for the entirety of your trial
14 including pretrial motions?
15 A. Yes, sir.
16 Q. Do you recall the arguments she made pretrial to try
17 to suppress or try to dismiss the case because of the
18 failure to preserve evidence?
19 A. Yes, sir.
20 Q. Those arguments that she made pretrial were you
21 aware of her argument prior to that date or was that the
22 first time you heard it?
23 A. I can't recall, sir.
24 Q. We know you focused on some evidence that was not
25 retained and turned over but let me ask you the opposite.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 Did Ms. Gay share with you what evidence she did receive
2 from law enforcement?

3 A. No, sir.

4 Q. She never sent you a packet what we would call Rule
5 5 or discovery?

6 A. I can't remember, sir. I don't recall.

7 Q. Okay. One final question on that. Do you recall
8 receiving a packet from her of reports and statements and
9 that kind of thing at all?

10 A. Like towards trial part, yes sir.

11 Q. Do you recall her ever coming to the jail to review
12 any of those documents with you or was it simply for you
13 to review on your own?

14 A. For me to review on my own.

15 Q. What was Ms. Gay's advice, if any, about whether you
16 should entertain one of the offers or go to trial?

17 A. Ms. Gay at the end of trial I recall her telling me
18 that you should have took the 10 years.

19 Q. And so prior to trial was she indicating that she
20 would go to trial or accept one of the offers or no
21 advice at all?

22 A. No advice at all.

23 Q. To finish up about the issues on the offers the
24 first offer as I understand it was a 10 to 12 year offer
25 a few months before trial.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 A. Correct.

2 Q. You rejected that offer, is that right?

3 A. Yes, sir.

4 Q. After your attorney indicated that she would get the
5 charges dismissed ---

6 MS. JAMESON: --- objection.

7 THE COURT: Basis?

8 MS. JAMESON: Leading.

9 THE COURT: Sustained. Rephrase.

10 Q. [Mr. Davis] And why was it that you rejected that
11 first offer of 10 to 12 years?

12 A. She told me that she can get the charges dismissed
13 and that I had a lawsuit on North Charleston Police
14 Department.

15 Q. Now the second offer did it come at the beginning of
16 trial or during the trial?

17 A. It came like at the Suppression hearing so like at
18 the beginning of trial.

19 Q. Okay. And what was your understanding of that
20 offer?

21 A. A 20 year offer.

22 Q. Now did you understand that would be 20 years day
23 for day or 20 years with some percentage or 20 years to
24 life?

25 A. Twenty years to life.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

- 1 Q. You rejected that offer, correct?
- 2 A. Yes, sir.
- 3 Q. And then after that did you win or lose the pretrial
- 4 hearing to dismiss?
- 5 A. I lost the pretrial.
- 6 Q. At that moment you've rejected the 20 to life offer,
- 7 you've lost the Motion to Dismiss, did you think you had
- 8 any other option other than continue with the trial?
- 9 A. No, sir. I thought I had to win all the way to
- 10 preserve my rights.
- 11 Q. After trial was there an appeal filed on your case?
- 12 A. Yes, sir.
- 13 Q. Were you aware of the issues raised on appeal?
- 14 A. Yes, sir.
- 15 Q. Were there any issues raised on appeal that were --
- 16 that the Court ruled were not preserved?
- 17 A. Yes, sir.
- 18 Q. And do you recall what those issues were?
- 19 A. Yes, sir.
- 20 Q. Can you tell the Judge what those were?
- 21 A. Those were the 4th Amendment violation issues and
- 22 Motion to Suppress statements.
- 23 Q. And is that an additional complaint you have about
- 24 Ms. Gay's trial efforts?
- 25 A. Yes, sir.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 MR. DAVIS: And Your Honor, it's more of a legal
2 argument. Obviously I believe part of the record is the
3 final brief of the Appellate which raise the arguments
4 and the order of the Court denying that. I believe
5 that's already part of the record so I'll move on to
6 other questions.

7 Q. [Mr. Davis] We're going to get back to the major
8 issue that has been a problem all along and it's this
9 recording.

10 You had a complaint about Ms. Gay in dealing with
11 obtaining the videotape. Could you tell the Judge what
12 your complaint is on that issue?

13 A. About her trying to retain the videotape?

14 Q. Yes.

15 A. We tried to retain the videotape but it was past the
16 180 day mark that North Charleston Police Department
17 procedure had, so the videotape was already recorded
18 over.

19 Q. As to Ms. Gay what, if any, other things would you
20 have had her do on that issue that she did not do?

21 A. As to the videotape?

22 Q. Yes.

23 A. To try --

24 THE COURT REPORTER: I'm sorry; repeat your answer
25 sir.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 A. Nothing else about trying to retain the videotape.

2 Q. [Mr. Davis] On that issue do you have any complaints
3 about Mr. Malloy who was your original attorney on the
4 issue of the videotape?

5 A. Yes, sir.

6 Q. Can you tell Judge Jefferson what those complaints
7 are?

8 A. I went -- Malloy, Mr. Malloy had me in Court the
9 month of December, the year of 2013. At that time the
10 videotape was still at the North Charleston City Hall.
11 So Mr. Malloy could have requested the videotape, which I
12 asked him to do.

13 He told me that I didn't need the videotape. And I
14 told Mr. Malloy that was part of my defense. It would
15 prove that I did not give the officer consent to search
16 the vehicle.

17 Q. For the record do you recall the date you were
18 arrested?

19 A. August 13 --

20 THE COURT REPORTER: 20?

21 A. August 13th of 2013.

22 Q. [Mr. Davis] Mr. Judon, had you known that the charge
23 of trafficking only had three elements and that's all the
24 State had to prove to convict you if you had known that
25 before trial would you have gone to trial or accepted one

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 of the plea offers?

2 A. I would definitely have accepted one of the offers.

3 Q. If it had been explained to you fully that the State
4 based on your prior record had sought to seek mandatory
5 life sentence after a trial conviction would you have
6 gone to trial or accepted one of the plea offers?

7 A. Accepted one of the plea offers.

8 Q. If it had been explained to you that the Judge would
9 decide whether to dismiss a case or not so that it's not
10 a guarantee on the first offer of 10 to 12 years in
11 January of 2015, would you have gone to trial and risked
12 that or would you have accepted that offer?

13 A. I would have accepted the offer.

14 Q. If it had been explained to you at the beginning of
15 trial that the offer of 20 years was 20 years at 85
16 percent as opposed to 20 to life would you have gone on
17 with the trial or accepted the offer?

18 A. I would have accepted the offer.

19 Q. At the end of the pretrial hearing where your charge
20 was not dismissed if you were told that you were not
21 required to continue on with the trial but negotiations
22 could continue about an offer would you have continued
23 with the trial or tried to work out a deal?

24 A. I would have tried to work out a deal.

25 MR. DAVIS: Your Honor, if I could just have one

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 moment.

2 [Whereupon, Mr. Davis reviews documents]

3 MR. DAVIS: Your Honor, I think the only thing of
4 clean up if I need to cite in the record I would ask for
5 a moment to be able to do that. But I would just without
6 having to question my client I think it's clear in the
7 record of the trial that there were not contemporaneous
8 objections as to the final two issues raised on appeal as
9 they were dismissed as not being preserved. I would just
10 indicate those for the record. I don't believe I need
11 testimony from my client on that. And with that I have
12 no other questions. Thank you, Your Honor.

13 THE COURT: They were not made on what issues and
14 at what page in the transcript?

15 MR. DAVIS: I'm sorry, Your Honor?

16 THE COURT: What issues and what page in the
17 transcript?

18 MR. DAVIS: If you would give me a moment, Your
19 Honor?

20 [Whereupon, Mr. Davis reviews documents]

21 MR. DAVIS: I can do the first one quickly and
22 easily Your Honor, the appeal ---

23 THE COURT: --- I know what the appeal is. I need
24 to know what page number in the transcript that you
25 indicate that the objection was not made. I need to read

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 it in its context; not from that opinion.

2 MR. DAVIS: Okay. If I may the two allegations
3 that we are -- if I may put that on the record, that we
4 claim were not objected to contemporaneously are issues
5 two and three in the appeal which are the Court erred in
6 denying the Motion to Suppress the drugs when the police
7 officers continued detention that that violated the 4th
8 Amendment in search and seizure. I'm paraphrasing
9 obviously; it's on page one of the...

10 THE COURT: I need to know in the transcript where
11 you indicate she failed to make a contemporaneous
12 objection.

13 MR. DAVIS: And Your Honor I'm just trying to
14 preserve what the two issues were not objected to. And
15 the second one erred in denying his Motion to Suppress
16 statement that he had drugs on his person in violation of
17 Miranda. Now, thank you Your Honor if you'll give me a
18 moment I'll get you the pages.

19 [Whereupon, Mr. Davis reviews documents]

20 MR. DAVIS: Your Honor, this may take a moment. I
21 apologize; I thought I had it marked. Forgive me.

22 [Whereupon, Mr. Davis continues reviewing documents]

23 MR. DAVIS: Your Honor, I'm going to be a moment; I
24 apologize.

25 THE COURT: Pardon me? I didn't hear you.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 24, 2018

1 MR. DAVIS: I apologize. I'm going to be a moment.
2 I'll be happy to look for it while the State is cross-
3 examining if that would be all right. I thought I had it
4 marked; I apologize.

5 THE COURT: Okay. You may proceed with cross-
6 examination.

7 MS. JAMESON: Thank you, Your Honor.

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Cross-Examination by Ms. Jameson
July 24, 2018

1 CROSS-EXAMINATION

2 BY MS. JAMESON:

3 Q. Mr. Judon, you testified as to three different dates
4 for when this arrest occurred. First you said it was
5 March 15 -- or two different dates, and then you said it
6 was April 13th, 2013. When was your arrest?

7 A. I can't recall the exact date, ma'am. It was
8 inbetween April -- I mean August 12 and maybe August 20
9 if I'm not mistaken.

10 Q. So you think your arrest was between August 12th to
11 August 20th, of 2013?

12 A. Correct.

13 Q. You have two prior drug convictions, correct?

14 A. Correct.

15 Q. A 1999 conviction for distribution of cocaine within
16 proximity to a school?

17 A. Correct.

18 Q. Did you plead guilty to that charge or did you
19 proceed to trial?

20 A. I pled guilty.

21 Q. And then you also had a 2005 conviction for
22 possession with intent to distribute crack cocaine second
23 offense, correct?

24 A. Correct.

25 Q. Was that a plea or a trial?

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Cross-Examination by Ms. Jameson
July 24, 2018

1 A. That was a plea.

2 Q. In those prior cases you were represented by
3 counsel?

4 A. Yes, ma'am.

5 Q. Did your attorneys -- are those the only two times
6 you've had experience with the criminal justice system?

7 A. Yes, ma'am.

8 Q. So you haven't had any other charges other than
9 those two?

10 A. No, ma'am. I had some charges back in 1995, maybe
11 1996 a probation violation.

12 Q. Probation violations for what?

13 A. Unlawful carrying of a pistol and grand larceny of a
14 motor vehicle.

15 Q. And you had all these prior charges you're telling
16 the Court today that you didn't know the State had a
17 burden of proof?

18 A. Yes, ma'am. I'd never been to trial.

19 Q. And that was never explained by either your attorney
20 in '99 or 2005 or all of your charges in 2007 ---

21 MR. DAVIS: --- objection, Your Honor, relevance as
22 to this case.

23 THE COURT: Overruled. It goes to his underlying
24 knowledge of the system and his voracity. You may answer
25 the question, sir. Do you need it repeated?

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Cross-Examination by Ms. Jameson
July 24, 2018

1 THE WITNESS: Yes ma'am, could you please repeat
2 it.

3 THE COURT: Please repeat the question.

4 Q. [Ms. Jameson] With any of you prior attorneys for
5 your numerous charges did your attorneys ever discuss the
6 State's burden of proof and what the State would be
7 required to prove at trial?

8 A. No, ma'am. All of those prior charges were just
9 pleas.

10 Q. So in all of those pleas none of your prior
11 attorneys ever advised you about your rights?

12 A. Never, ever; no ma'am.

13 Q. And when you pled guilty in 1999 and 2005 the Court
14 never advised you about those rights?

15 A. A right to plead and a right to go to trial but not
16 the elements of the charges.

17 Q. So you were advised about your right to go to trial
18 at some point in the past and the State's burden of
19 proof?

20 A. Yes, ma'am.

21 Q. And you testified that you weren't served with the
22 State's notice to seek life without parole, correct?

23 A. I didn't testify to that.

24 Q. So you were personally served with the LWOP notice
25 from the State?

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Cross-Examination by Ms. Jameson
July 24, 2018

1 A. Yes, ma'am.

2 Q. What was your understanding when you were served
3 with that?

4 A. My understanding of the notice was to seek meaning
5 that it could have been a possibility that I could get
6 life; not mandatory that if I lost it was a guaranteed
7 mandatory life.

8 Q. But Judge Harrington told you numerous times before
9 your jury was sworn that the only option would be life
10 didn't she?

11 A. I can't recall. I was kind of confused with that
12 when she told me that. If you look at page 338 of the
13 transcript 12 to 14 I was just so confused. She was very
14 impatient with me. She didn't really -- I didn't really
15 understand anything she was saying.

16 Q. So you're telling the Court that Judge Harrington
17 was impatient with you regarding plea offers?

18 A. Correct.

19 Q. Do you recall her indicating that she had asked the
20 State to leave the offer open after pretrial had started
21 in the hopes that you would -- to give you more time to
22 consider this plea offer? You don't recall that?

23 A. I recall her saying something like that so I was
24 trying to get a better understanding with my attorney if
25 I took that offer would I still have the right to appeal

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Cross-Examination by Ms. Jameson
July 24, 2018

1 the decision. So I was still kind of confused.
2 Q. So your confusion wasn't that you were going to get
3 a life sentence. Your confusion was whether if you
4 accepted a plea offer these issues would still be
5 preserved for appellate review?
6 A. I was confused about the whole life situation.
7 Q. So your testimony to the Court today is that you
8 thought that upon conviction you could have gotten
9 anything from a sentence of 20 years up to life?
10 A. Yes, ma'am.
11 MS. JAMESON: Your Honor, may I approach with the
12 transcript?
13 THE COURT: You may.
14 [Whereupon, the witness is shown document]
15 Q. [Ms. Jameson] I'm showing you page 185. If you
16 will, read the highlighted portion to yourself please,
17 Mr. Judon.
18 A. Do you want me to read it out loud?
19 Q. [Ms. Jameson] No, just read ---
20 THE COURT: --- no sir, it's to refresh your
21 memory. You just need to review it to yourself.
22 [Whereupon, the witness reviews document]
23 A. Yes, ma'am.
24 Q. [Ms. Jameson] So Judge Harrington made it pretty
25 clear to you that if you were convicted your only

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Cross-Examination by Ms. Jameson
July 24, 2018

1 sentence would be a life sentence, correct?
2 A. Yes, ma'am. But my lawyer was telling me something
3 different.
4 Q. What was your lawyer telling you right then?
5 A. I could receive 20 to life.
6 Q. I believe you testified that you and Ms. Gay did
7 discuss your right to testify, correct?
8 A. Correct.
9 Q. And you discussed the State would try to impeach you
10 with your prior convictions, correct?
11 A. Correct.
12 Q. So you discussed this impeachment but you never
13 discussed the elements of the offense?
14 A. No, ma'am.
15 Q. Or the State's burden of proof?
16 A. Yes, we never discussed the State's burden of proof.
17 If we would have discussed the State's burden of proof I
18 would have definitely pled guilty because I definitely --
19 those three elements was definitely easy to prove so it
20 really wasn't no sense in going to trial.
21 Q. And you admitted that over 10 grams of crack was in
22 your boxers and was yours during the pretrial
23 suppression, right?
24 A. Correct.
25 Q. But your argument was your initial stop with your

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Cross-Examination by Ms. Jameson
July 24, 2018

1 car was improper because your window tint really was
2 valid, correct?
3 A. My window tint was valid.
4 Q. And that's the argument you told Judge Harrington
5 during the pretrial is that if the stop wasn't valid it
6 wasn't a proper stop; law enforcement didn't have any
7 reason to stop you.
8 A. No, ma'am. I argued that I didn't give consent to
9 search the vehicle. That was my valid argument.
10 Q. And you testified to that during pretrial, correct?
11 A. Correct.
12 Q. And Judge Harrington found you to not be credible
13 and found the officers to be credible, correct?
14 A. I believe so.
15 Q. You testified that the trial came up pretty fast and
16 I think that was when you were saying maybe that's why
17 Ms. Gay didn't go over these things with you?
18 A. Yes, ma'am.
19 Q. But your trial was nearly three years after your
20 arrest, right?
21 A. Correct.
22 Q. And you testified before that Luke Malloy had
23 represented you for a year, correct?
24 A. Correct.
25 Q. So Ms. Gay was representing you for two years before

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Cross-Examination by Ms. Jameson
July 24, 2018

1 your trial; a few months shy of two years, correct?
2 A. Ms. Gay became my lawyer in I want to say February
3 14, 2014.
4 Q. And your testimony is she only met with you four
5 times?
6 A. Correct.
7 Q. And I was a little confused. You testified at first
8 that those meetings were all at the courthouse but then
9 you testified later that she met with you at the jail.
10 So where did she meet with you?
11 A. All the times she met with me was at the jailhouse.
12 Q. Did you ever meet at the courthouse as well?
13 A. When it was the trial during that Suppression
14 hearing and the Motion to Dismiss.
15 Q. And you testified that Ms. Gay never advised you of
16 your right not to testify. She only advised you that you
17 could testify, right?
18 A. Correct.
19 Q. But Judge Harrington reviewed all of that with you
20 on the record, correct?
21 A. Yes, ma'am.
22 Q. And Judge Harrington told you you had a right to
23 remain silent and you didn't need to take the stand in
24 your defense, correct?
25 A. Correct.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Cross-Examination by Ms. Jameson
July 24, 2018

- 1 Q. And you told Judge Harrington you understood that.
2 A. Correct.
3 Q. So you did understand you didn't have to take the
4 stand, right?
5 A. Correct. I wanted to take the stand to let the jury
6 hear my side of the story. That's why I took the stand.
7 Q. So you really don't have an allegation that Ms. Gay
8 was improper in advising you to take the stand or not
9 take the stand because you voluntarily elected to put on
10 a defense and take the stand, correct?
11 A. That's correct.
12 Q. I believe you said that after you lost your pretrial
13 Suppression Motion you thought you had to go forward to
14 protect your rights, correct?
15 A. That's correct.
16 Q. And that included your right to have these issues
17 reviewed by our Appellate Court, correct?
18 A. That's correct.
19 Q. So were you advised if you pled guilty you would be
20 waiving all of those issues?
21 A. From my recollection from previous people telling me
22 that if I pled guilty I would be waiving those rights.
23 That's why I continued on with the trial.
24 Q. So that's what you meant when you said your only
25 choice was to go forward to protect your rights?

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Cross-Examination by Ms. Jameson
July 24, 2018

1 A. That's correct.

2 Q. You understood you could accept the State's plea
3 offer but then those issues more likely than not would
4 have been waived for appellate review, correct?

5 A. Could you repeat that question, ma'am?

6 Q. So you understood that you could enter a guilty plea
7 but you would be waiving those appellate issues. So if
8 you wanted to preserve those issues and have them looked
9 at by our Appellate Court you needed to proceed to trial.

10 A. I didn't know that.

11 Q. You just said that people had told you that you
12 waived those issues. So what do you mean; what people
13 and what did they tell you?

14 A. Jailhouse lawyers.

15 Q. How many jailhouse lawyers were advising you while
16 you were represented by Ms. Gay?

17 A. About three of them.

18 Q. Were you listening to their advice or Ms. Gay's
19 advice?

20 A. Well, I was taking advice from both ends of the
21 party because those guys have experience too in a trial,
22 in the criminal justice system.

23 And by reading a couple of case laws I was reading
24 that at the Suppression hearing you could enter into a
25 guilty plea and still preserve those rights for the

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Cross-Examination by Ms. Jameson
July 24, 2018

1 Appellate Court.

2 Q. So you were reading case law, had advice of Mr.
3 Malloy and then Ms. Gay and three jailhouse lawyers and
4 you're telling this Court today that you didn't
5 understand what the burden of proof was and your right to
6 go to trial?

7 A. No, ma'am. I thought the State would have to prove
8 all the elements in the indictment; manufacturing,
9 dispense, bring into the State. So I was under the
10 impression that I didn't bring anything into the State, I
11 didn't manufacture anything.

12 But I definitely did have the drugs in my
13 possession. So I wouldn't take the chance of going to
14 trial knowing that those elements were just so easy to
15 prove.

16 Q. And you testified that by the time you had retained
17 Ms. Gay that videotape had already been destroyed, right?

18 A. That's correct.

19 Q. And one of your allegations is that she failed to
20 investigate your case including getting the video, right?

21 A. No, ma'am. Malloy failed to get the video.

22 Q. The lawyer failed to get the videotape.

23 A. Luke Malloy.

24 Q. Luke Malloy, okay. And you agree that Ms. Gay
25 subpoenaed records from numerous agencies in North

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Cross-Examination by Ms. Jameson
July 24, 2018

1 Charleston trying to find this video?
2 A. Correct. She did a good job on that.
3 Q. So you think Ms. Gay did a good job regarding your
4 Motion to Dismiss?
5 A. Correct.
6 Q. And you're not making any allegations about that
7 today?
8 A. No, ma'am.
9 Q. And that issue was preserved for appellate review,
10 correct?
11 A. That issue was, yes ma'am.
12 MS. JAMESON: Moment's indulgence, Your Honor.
13 [Whereupon, Ms. Jameson reviews documents]
14 Q. [Ms. Jameson] And I believe you testified that you
15 didn't understand that that 20 year offer was at 85
16 percent, correct?
17 A. No, ma'am.
18 Q. You were never told that by the Court?
19 A. No, ma'am. She didn't get to that part -- she
20 didn't get that far.
21 MS. JAMESON: Your Honor, may I approach?
22 THE COURT: You may.
23 [Whereupon, the witness is shown document]
24 Q. [Ms. Jameson] If you look at the bottom of 184 and
25 the top of 185 and read that to yourself please.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Cross-Examination by Ms. Jameson
July 24, 2018

1 [Whereupon, the witness reviews document]
2 Q. So Judge Harrington did get that far, she did tell
3 you about the 85 percent, correct?
4 A. Correct, by the record, you're right.
5 Q. Are you disputing the record? You don't think this
6 is an accurate reflection of what happened at your trial?
7 A. To be honest my mind was somewhere else. I was not
8 in the right state of mind. So a lot of things she could
9 have said on the record that I can't recall. She may
10 have and I just didn't remember it.
11 Q. You wanted to have these issues reviewed on appeal,
12 correct?
13 A. That's correct.
14 Q. And that's why you proceeded forward to trial to
15 protect your rights, correct?
16 A. That's absolutely correct.
17 MS. JAMESON: No further questions, Your Honor.
18 THE COURT: Any redirect for the witness?
19 MR. DAVIS: Yes, Your Honor. Your Honor, it's in
20 the packet that was received by the Attorney General;
21 their return.
22 THE COURT: What are you referring to?
23 MR. DAVIS: I'm referring to the indictment --
24 MS. JAMESON: Yes, Your Honor, that's in your
25 packet.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Redirect Examination by Mr. Davis
July 24, 2018

1 REDIRECT EXAMINATION

2 BY MR. DAVIS:

3 Q. Mr. Judon, I'm showing you the front and back of the
4 indictment in your case.

5 [Whereupon, the witness is shown document]

6 Q. Did you have a chance to review this before trial?

7 A. Yes, sir.

8 Q. And you have on the face of it where it has the true
9 bill on it. But look over on the other side, is there
10 language on the affidavit side for lack of a better way
11 of describing it, is there language there that you
12 referenced earlier?

13 A. Yes, sir.

14 Q. And can you tell the Judge what is important to you
15 from that language?

16 A. All the elements in there.

17 Q. And when you say all the elements what do you mean?

18 A. [Reading] The defendant, Elliott Jerome Judon
19 knowingly did sell, manufacture, deliver, dispense or
20 bring to the state, did provide financial assistance or
21 otherwise aid in their intent.

22 Q. And was it your understanding that every one of
23 those had to have been met prior to going to trial?

24 A. That's correct.

25 Q. And when was it you realized there is really only

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Redirect Examination by Mr. Davis
July 24, 2018

1 basically three elements to trafficking in cocaine base?

2 A. During the closing arguments when the Solicitor made
3 them.

4 Q. I do want to go over one issue where the Attorney
5 General was asking you about some things the Judge had
6 told you. She was asking you if you refute the record as
7 not accurate. Do you recall everything that was said
8 during your entire trial and pretrial?

9 A. No, sir. I can't recall every single thing that
10 happened.

11 Q. To be clear do you doubt that what she showed you
12 earlier was accurate?

13 A. I don't doubt it was accurate.

14 Q. Finally, when you were talking to as you termed it
15 three jailhouse lawyers what was your relationship with
16 whatever attorney was actually representing you.

17 A. One of them was Malloy and the other one was Ms.
18 Lisa Gay.

19 Q. So Mr. Malloy what was your relationship with him
20 when he represented you; good, bad, or otherwise?

21 A. He was fair.

22 Q. At some point you hired someone to replace him,
23 correct?

24 A. That's absolutely correct.

25 Q. And was that based on job performance or some other

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Redirect Examination by Mr. Davis
July 24, 2018

1 reason?

2 A. Job performance.

3 Q. We are now at a PCR and what attorney are you
4 primarily focusing your complaints against?

5 A. Actually both of them.

6 Q. Okay. But you do have complaints today against Ms.
7 Gay?

8 A. That's correct.

9 MR. DAVIS: That's the only questions I have, Your
10 Honor.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 24, 2018

1 THE COURT: Call your next witness.
2 MR. DAVIS: Your Honor -- I have page numbers and
3 line numbers.
4 THE COURT: Perfect.
5 MR. DAVIS: Your Honor, on page 264 -- and Judge
6 forgive me; I have two different sets of numbers on the
7 transcript I got. The ones I'm referring to at the top
8 inside the numbers. And so if you have top inside
9 numbers I'll refer to those. I think those are the
10 original transcript numbers.
11 THE COURT: I don't use that when I'm writing an
12 order, though. I use the page numbers that are on the
13 bottom.
14 MR. DAVIS: All right.
15 THE COURT: Because the ones on the bottom are the
16 originals from trial.
17 MR. DAVIS: If you will give me a second I will...
18 THE COURT: All right.
19 [Whereupon, Mr. Davis reviews documents]
20 MR. DAVIS: On page 373, lines 9 through 14 would
21 be the reference to the window tint from the stop. There
22 is no objection contemporaneously made there.
23 THE COURT: Are you saying that that would not be a
24 legitimate reason to stop somebody for a traffic stop?
25 MR. DAVIS: Your Honor, it could be.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 24, 2018

1 THE COURT: It is a legitimate reason to stop
2 somebody even if it is subterfuge and the Supreme Court
3 has been very clear about that. If somebody has violated
4 an ordinance or a law you can stop them even if your
5 intent is not for that reason. So if you tail light is
6 out, your brake light is out; your tint is too dark
7 that's a legitimate traffic stop.

8 MR. DAVIS: And on page 375 starting at line 14 it
9 would run to page 376 line 9 that is testimony about
10 removing my client from his car and the beginning of the
11 detention which would be grounds for one of the appellate
12 issues they ---

13 THE COURT: --- but wasn't that the reason --
14 wasn't that what she argued in the Suppression?

15 MR. DAVIS: Pretrial but not objecting ---

16 THE COURT: --- I don't think you have to object
17 every time. When you hear a Motion to Suppress that's
18 not in limine; that's final. Once you hear a Motion to
19 Suppress drugs that's not the same as -- I think you
20 could take exception to it but I don't think failing to
21 do it waives -- I don't know I'd have to do some research
22 but once you're had a full blown hearing on a Motion to
23 Suppress, and I've looked at the appellate opinion and I
24 don't read it the way you did. And I need to read it
25 again because it's a little convoluted with a bunch of

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 24, 2018

1 string sites and I don't think it's saying that she
2 didn't preserve it.

3 MR. DAVIS: For purposes of our argument ---

4 THE COURT: --- but I'm going to read the opinion
5 again but I don't think that's what they are saying.

6 MR. DAVIS: Yes, ma'am.

7 THE COURT: If she had a full blown hearing on a
8 Motion to Suppress, that issue is preserved. It's been
9 heard, it's been ruled upon.

10 MR. DAVIS: And in the instance that the Court of
11 Appeals ruled it wasn't that's why we're ---

12 THE COURT: --- I don't think that's what that
13 opinion says but I'm going to read it again when I can
14 give it my full attention.

15 MR. DAVIS: Thank you, Your Honor. On page 377
16 beginning at line 8 through 25 is the first two exhibits,
17 which is a digital scale and a utility knife. So now
18 we're starting to admit evidence based on ---

19 THE COURT: --- but all of that was argued in the
20 Suppression ---

21 MR. DAVIS: --- correct, Your Honor, correct. On
22 page 378 line 8 through 12 it ultimately is moved in
23 without objection, which line 12 is without objection.

24 THE COURT: I don't -- which items?

25 MR. DAVIS: Those two. The...

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 24, 2018

1 THE COURT: The scale and the utility knife?

2 MR. DAVIS: Yes, Your Honor. And Your Honor after
3 break I'll give you one other location; I apologize. The
4 last one for now is page 379 starting at line 21 going
5 over to 381 ending on line 3 that deals with -- the
6 beginning of that site starts with the Miranda rights so
7 it would be the Miranda warnings and the statements given
8 thereafter.

9 THE COURT: But that was -- was there a Jackson v
10 Denno? I believe there was. It was within the Motion to
11 Suppress, right.

12 MR. DAVIS: I apologize.

13 THE COURT: That's okay. It was within the Motion
14 to Suppress, correct?

15 MR. DAVIS: Yes. And again we're arguing there was
16 not a contemporaneous objection that was made, Your
17 Honor. And then when we take a break I'll get you the
18 spot where the drugs are ultimately admitted. And I
19 would argue there is not an objection there. But I know
20 we need to take a quick break and I do too, so thank you
21 Your Honor.

22 THE COURT: I prefer you go ahead -- do you have
23 the page?

24 MR. DAVIS: I don't, Your Honor.

25 THE COURT: When you find that I need that as well.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 24, 2018

1 MR. DAVIS: Yes, ma'am. I apologize, Your Honor ---
2 THE COURT: --- we'll take a brief comfort break
3 for my court reporter.
4 MR. DAVIS: Thank you, Your Honor.
5 THE COURT: You're welcome.
6 [Whereupon, court is in recess from 2:30 p.m. until
7 2:43 p.m.]
8 THE COURT: Call your next witness.
9 MR. DAVIS: Your Honor, may we approach on
10 scheduling?
11 THE COURT: Sure.
12 [Whereupon, an off the record bench conference is
13 held]
14 THE COURT: All right, call your next witness.
15 MR. DAVIS: Thank you, Your Honor. And Your Honor,
16 thank you so much for the time ---
17 THE COURT: --- not a problem ---
18 MR. DAVIS: --- I apologize on the notations; I
19 should have had them ready. The final is the admission
20 obviously ultimately of the drugs that were seized.
21 Transcript page 432, line 8 is where Ms. Mulkey attempts
22 to admit that and Ms. Gay on line 15 without objection
23 Your Honor. And that's the actual drugs ---
24 THE COURT: --- let me ask you a quick question and
25 maybe it's me being overly simplistic but once you have a

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 24, 2018

1 Suppression hearing and the Court has already determined
2 that the drugs are admissible what is the point of
3 objecting to it because they're going to come in anyway.

4 How is that -- so if you hear the motion -- when the
5 Court hears the motion -- when the appeal of the Motion
6 to Suppress is heard, which has been preserved, if the
7 Court rules that the drugs were inadmissible how is your
8 client harmed by her not objecting? You get a new trial.
9 I guess I'm trying to figure out in the grand scheme of
10 things what difference does it make?

11 MR. DAVIS: Your Honor, I wish I had a cite off the
12 top of my head of cases that have been overruled for
13 failing to preserve a contemporaneous objection ---

14 THE COURT: --- that's different. That's about
15 issue preservation when you haven't ever raised it
16 before. The Supreme Court has said you don't have to
17 keep a running objection to things once you've already
18 heard it pretrial. A Motion to Suppress is not a motion
19 in limine; two different things.

20 MR. DAVIS: I understand, Your Honor. I have a
21 case right now returned to me and the Public Defender's
22 office that was won on that very ground; pretrial motion
23 not objected to during trial. The State's argument in
24 their appellate brief was it was not preserved because he
25 did not renew the objection.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 24, 2018

1 THE COURT: Well, that might ---

2 MR. DAVIS: --- so we're finding direct ---

3 THE COURT: --- but I don't see. I guess I'm just
4 trying to figure out where the prejudice prong is met
5 though. And I'm sort of getting ahead of myself.

6 Because she had a Motion to Suppress; that was preserved
7 and the Court upheld the lower Court's ruling on not
8 suppressing the drugs if there was no basis to suppress
9 it. It's sort of a circular argument.

10 MR. DAVIS: It will come back to your re-review of
11 the Court of Appeals ruling. But our argument is they
12 ruled and it was not preserved ---

13 THE COURT: --- I understand that part but it
14 really doesn't matter in the grand scheme of things.
15 They said that the suppression was validly denied so how
16 is he prejudiced? It was going to come in anyway and the
17 Court upheld the lack of suppressing it. So it's a
18 superfluous objection. Yes, she didn't make it to
19 preserve it but what basis is she going to have to object
20 to it when the Court has already ruled the drugs could
21 come in?

22 MR. DAVIS: That the ruling that came in should not
23 have -- that there should be ---

24 THE COURT: --- unless there was some other basis
25 like a lack of chain, lack of something else. But I'm

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 24, 2018

1 sure they preserved the chain when they're seeking to
2 admit it. Here's what I'm saying. You had a Motion to
3 Suppress. The Court said the Motion to Suppress was
4 appropriate, that the denial of it was appropriate. So
5 how is he prejudiced by her not later objecting to it
6 when it is tied to the actual Motion to Suppress? The
7 suppression was not waived.

8 MR. DAVIS: And that's where -- our argument is
9 contrary to that argument.

10 THE COURT: I'll have to look it up and see. I
11 might be wrong; it's possible.

12 MR. DAVIS: The argument would be that the Court
13 did not rule that it was admissible and proper to deny
14 that it was not preserved so therefore ---

15 THE COURT: --- the Court of Appeals said that the
16 Motion to Suppress was appropriate to deny it. As I read
17 the opinion unless I missed something.

18 MR. DAVIS: Fair enough, Your Honor ---

19 THE COURT: --- and when there is a whole lot of
20 precedent on it you know they never publish it. That's
21 why we only get published opinions when we get reversed.
22 We get affirmed like 50 times and they never publish it.
23 It's so well settled it has no precedential value.

24 MR. DAVIS: We'll certainly rely on your review of
25 the record, Your Honor on that issue.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 24, 2018

1 THE COURT: I'm just struggling with whether it
2 really makes a difference in the grand scheme of things.

3 MR. DAVIS: I understand, Your Honor.

4 THE COURT: All right, yes ma'am?

5 MS. JAMESON: Would you like me to respond to Mr.
6 Davis' argument or save it for argument at the end?

7 THE COURT: Why don't you go ahead while it is fresh
8 in my mind and go ahead and respond and then I'll let him
9 argue again at the conclusion and then you can rebut
10 anything then.

11 MS. JAMESON: So the State's position would be even
12 if the Court of Appeals were to have found that the issue
13 was not preserved or was waived by Ms. Gay's failure to
14 object to the drug evidence coming in or the statements
15 coming in that's not automatic granting of a post
16 conviction relief. That might be a deficiency but you'd
17 still have to look at the prejudice prong.

18 And the standard isn't that the Court would have
19 reviewed it, it's that he would have been successful and
20 been entitled to a new trial based on McHam and McMillan
21 that came out earlier ---

22 THE COURT: --- we're kind of saying the same
23 things. You're just saying it a little bit more
24 articulately than me.

25 MS. JAMESON: No ---

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 24, 2018

1 THE COURT: --- no you are. You're being a whole
2 lot more articulate than I am. Go ahead; I'm listening.

3 MS. JAMESON: And so our position would be even if
4 this Court were to find her deficient for not saying I
5 object when the drug evidence came in it really doesn't
6 matter because she didn't abandon the issue.

7 There was a full-fledged hearing in front of Judge
8 Harrington and all of that was hashed out and that was a
9 proper ruling and it wouldn't have been successful on
10 appeal so he wouldn't be entitled to post conviction
11 relief on those grounds.

12 THE COURT: Okay. Call your next witness.
13
14
15
16
17
18
19
20
21
22
23
24
25

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Direct Examination by Mr. Davis
July 24, 2018

1 MR. DAVIS: Your Honor, we would call Ms. Gay to
2 the stand.

3 THE COURT: Please come to the stand and be sworn.
4 [Whereupon, Ms. Gay comes forward]
5 [Whereupon, the witness is duly sworn by the Clerk
6 of Court]

7 CLERK OF COURT: State your first and last name and
8 spell your last name loudly and clearly into the
9 microphone.

10 THE WITNESS: My name is Melissa Gay, G-A-Y.

11 THE COURT: You may proceed.

12 MR. DAVIS: Thank you, Your Honor.

13 - - - - -

14 MELISSA GAY,

15 Having been first duly sworn,

16 Was examined and testified as follows:

17 DIRECT EXAMINATION

18 BY MR. DAVIS:

19 Q. Will you tell the Court when it was you were
20 retained to represent Mr. Judon?

21 A. Not the exact date. First of all I don't have my
22 file. My file is in Columbia. I had notified the
23 Attorney General that if anybody wanted to see my file
24 they had to subpoena the file. I don't know if that ever
25 occurred. So I don't have any of the documents with me;

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Direct Examination by Mr. Davis
July 24, 2018

1 all I have is my memory. Routinely if I get hired I send
2 in a notice of appearance that is filed with the Court so
3 whenever that was filed would have been when I got hired.

4 Q. Is it fair that early on in your representation an
5 issue about a videotape recording became critical?

6 A. Yes.

7 Q. Can you tell the Court what efforts you made to
8 obtain that videotape?

9 A. If I recall that's the only thing that was
10 significantly important with the case. So my efforts to
11 obtain anything about the video would have started
12 immediately.

13 Mr. Judon already knew a good bit of information
14 about what happened to the -- I'm almost positive that we
15 already knew the tape had been -- the concept of the tape
16 had been forwarded by the arresting officer and that
17 there was no ability at the time that I got retained to
18 try to produce a written, you know like a hard copy of
19 it. I think I already knew that when I first got
20 involved.

21 Q. Do you recall whether the life without parole notice
22 was served before or after you were retained?

23 A. I think after.

24 Q. And did you advise Mr. Judon about the problem with
25 the law enforcement not retaining or preserving evidence

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Direct Examination by Mr. Davis
July 24, 2018

1 that was critical to his case?

2 A. Yes.

3 Q. What was your opinion about the lack of law
4 enforcement to retain that as it related to the outcome
5 of this case?

6 A. My entire Motion to Dismiss and my Motion to
7 Suppress is based on either the destruction of evidence
8 or the inability for them to retain the evidence.

9 So it was my belief that there had been a
10 constitutional violation in the officer not doing what he
11 needed to do to preserve it because I had been able --
12 after I got involved I subpoenaed information about the
13 car itself, the camera in the car because the officer who
14 arrested, if I can remember correctly, the officer who
15 arrested him this was like his car had recently been sent
16 for some repairs or like maintenance issues.

17 And I was able to get the maintenance records to
18 indicate that the car was in fine working order which
19 would mean that the camera in the car would have been in
20 fine working order.

21 And I was able to determine that this particular
22 group of people, this mechanic or whatever the place, did
23 keep records on cars and I was able to find out that some
24 cars didn't have working cameras and that there was a
25 record of that; that there was a way to find out if the

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Direct Examination by Mr. Davis
July 24, 2018

1 cameras were working or not. And that's how come I
2 pursued the line of the subpoena and information because
3 I wanted to know what the status of the camera in the car
4 that was used in his arrest was.

5 Q. Based on your research of the failure to maintain or
6 the destruction of the evidence if you had been
7 successful what's the appropriate outcome of your
8 pretrial motions?

9 A. Mr. Judon's argument was that he had not consented
10 to the search and that the search was an illegal -- well,
11 the seizure was illegal and the search was illegal
12 because he believed that he had, that they had stopped
13 him and that they had immediately yanked him out of the
14 car and not waited for any type of consent and proceeded
15 to search his car in an unconstitutional manner.

16 So if I had been able to have the in car camera I
17 would have been able to, and my client's position would
18 have been, that they lied as a part of their -- in their
19 documents about the arrest and their testimony.

20 And it would have been an item that I could have
21 used to impeach the officer's testimony about how the
22 actual arrest occurred and the search occurred.

23 Q. If -- do you believe the State could have gone
24 forward if you had suppressed the items seized from the
25 search?

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Direct Examination by Mr. Davis
July 24, 2018

1 A. No.

2 Q. Do you believe the State could have gone forward --
3 well, what was your request for ruling on the motion
4 dealing with the law enforcement not preserving the
5 video?

6 A. Well, initially I argued which is in the transcript
7 for a Motion to Dismiss because in my legal look when I
8 was looking through the legal case law for some issues it
9 appeared to me that the law was clear that if there had
10 been an intentional destruction of evidence that the
11 charge could be dismissed based on bad behavior from the
12 police.

13 And so I made the Motion to Dismiss to say hey, you
14 intentionally -- I mean from the testimony of the officer
15 in this case was horrible. It was pretty apparent that
16 the officer believed he could do anything he wanted.

17 He specifically testified that it was the officer's
18 subjective opinion how and when and if they decided to
19 preserve important potentially exculpatory evidence in a
20 lot of defendant's cases; not just Mr. Judon's. So I
21 mean I thought that that was horrible.

22 So I made the Motion to Dismiss because I argued
23 that based -- the laws says that if the destruction is
24 intentional it can be shown that the case should be
25 dismissed. And then I made the Motion to Suppress as

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Direct Examination by Mr. Davis
July 24, 2018

1 sort of an extension of that once we lost the Motion to
2 Dismiss that it should still be suppressed because it's a
3 violation of his constitutional 4th Amendment rights.

4 And that included the statement that he made as a
5 part of his arrest that went into the Jackson v Denno
6 that any statements that he had made were in response to
7 being -- he was detained obviously and it was in response
8 to being asked by the law enforcement for things, that he
9 should have been advised that he had a right to remain
10 silent under Miranda.

11 So it was a pretty complicated set of stuff there in
12 the beginning. That's why two-thirds of the file and
13 maybe even more is all about the motion hearings and then
14 by the time we lost those the rest of it was like they
15 had an officer, we stopped him, we found this in his I
16 think pants or something and from there it was over. The
17 whole record was about the Motion to Dismiss and the
18 Suppression motions.

19 Q. And you would have talked to Mr. Judon about the
20 game plan to try to win this at pretrial.

21 A. A whole bunch.

22 Q. And you would have reviewed with him the case law
23 that supported the fact that it was intentional destroyed
24 or intentionally not preserved that could result in a
25 dismissal?

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Direct Examination by Mr. Davis
July 24, 2018

1 A. Yes.

2 Q. So when you were discussing with him the first offer
3 of 10 to 12 years was offered in early January you
4 advised him not to accept the offer ---

5 MS. JAMESON: --- objection.

6 THE COURT: Basis?

7 MS. JAMESON: Leading.

8 THE COURT: Sustained. Leading.

9 Q. [Mr. Davis] What was your advice to him about that
10 first offer?

11 THE COURT: First of all it assumes facts that are
12 not in evidence. You need to ask her a direct question
13 and establish if, in fact, she is aware that such an
14 offer was made and go from there and make the record
15 clear.

16 Q. [Mr. Davis] Prior to trial were there any offers
17 made by the State to you for Mr. Judon?

18 A. Yes.

19 Q. Was there an offer in early 2015?

20 A. I would really need my file to remember dates and
21 things but I do recall that there was an offer that
22 involved prison time.

23 And in our discussion we discussed a lot of the
24 stuff that was potentially available to him in terms of
25 legal arguments. And it was my understanding that Mr.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Direct Examination by Mr. Davis
July 24, 2018

1 Judon did not want to plead so something that would put
2 him in prison.

3 Q. Do you recall whether you advised him to accept or
4 reject the offer?

5 A. It was my understanding that Mr. Judon did not want
6 to accept an offer that would put him in prison. I've
7 been doing this for a long time. I don't tell people
8 what to do. I do what they tell me to do once they
9 decide.

10 Q. Do recall any offer made by the State near or at the
11 beginning of the trial?

12 A. Yes. I think what he testified to was that the
13 offer of 20 years came after we lost the Suppression
14 hearing. And it was my understanding that he did not
15 want that offer. He did not want to plead guilty.

16 Q. And your understanding of that offer was what offer
17 for sentencing?

18 A. I really don't have an independent recollection but
19 his testimony seems consistent that it would have been 20
20 years. It was not good; I remember that.

21 Q. Do you recall any advice that you gave at that time
22 to that offer?

23 A. We had lost our motions; our Motion to Dismiss and
24 our Suppression motion. I felt as if I had done the best
25 job I could in preserving those issues. As a practice I

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Direct Examination by Mr. Davis
July 24, 2018

1 don't tell people what to do. I'm sure I told him that I
2 felt like we'd done everything we could to get the record
3 to be something that could be reviewed on appeal.

4 And I had really, really hoped that he would get
5 some relief on appeal. And by then we had the LWOP
6 notice. I don't -- refresh my recollection, who is the
7 prosecutor that tried the case with me?

8 THE COURT: Ms. Mulkey.

9 A. Yes, Lauren. Well, that life notice was handed to
10 us just like a few days I think even; it would have had
11 to be within 10 days but it was a very short period of
12 time. He rejected the final plea offer that we had
13 before the trial.

14 And then we did one of these stand up in Court and
15 discuss when you're going to go to trial and such. And
16 she said I'm going to serve him a life notice and it was
17 really quick. So in her mind to offer him 20 years
18 because -- as opposed to life was a gift but it was
19 pretty awful.

20 Q. [Mr. Davis] But despite that reduction in the offer
21 to 20 years your opinion was you had preserved the record
22 for appeal?

23 A. Yes.

24 Q. Do you have the transcript with you? I'll be happy
25 to be more efficient than I was earlier but I'll ask it

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Direct Examination by Mr. Davis
July 24, 2018

1 this way if you recall. Have you reviewed that prior to
2 testimony today?

3 A. I have it, yes.

4 Q. As to the length of the stop and reading Miranda
5 leading to a statement by Mr. Judon do you recall whether
6 you made a contemporaneous objection to any of that or
7 not?

8 A. It was part of my motion hearing. Whether I made a
9 contemporaneous objection at the time that they went to
10 admit his statement in front of the jury I did not.

11 Q. And then as to the admission of the drugs that were
12 seized did you make any contemporaneous objection to that
13 when it was being admitted?

14 A. No. And I would say that I obviously didn't have my
15 head on straight that day. I did not. I would normally
16 do that in a trial but I did not in this case.

17 MR. DAVIS: May I have just a moment, Your Honor?

18 [Whereupon, Mr. Davis confers with his client]

19 MR. DAVIS: Thank you, Your Honor. Thank you Ms.
20 Gay. No other questions.

21 THE COURT: Any questions for the witness?

22 MS. JAMESON: Yes, Your Honor. May it please the
23 court?

24 THE COURT: Yes, ma'am.

25

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Cross-Examination by Ms. Jameson
July 24, 2018

1 CROSS-EXAMINATION

2 BY MS. JAMESON:

3 Q. Ms. Gay, you testified that the Assistant Solicitor
4 served the LWOP notice and that trial was pretty quick
5 after that.

6 A. If I recall correctly, yes. I don't have the dates
7 in front of me so if you know what date it was filed and
8 what day the case -- I mean...

9 Q. If there was ---

10 THE COURT: --- LWOP notice was filed on 2/18 of
11 '15 and it was served on the defendant on 2/17/15 and
12 that's at page 543 of the transcript if that helps y'all.

13 Q. [Ms. Jameson] If it was about a month does that
14 sound correct?

15 A. Yes. That would be quick to me.

16 Q. So it wasn't days or a week?

17 A. Well, it has to be within a certain period of time
18 like you have to give it 10 days or something. You know
19 you have to serve it. You can't serve it and call the
20 case the next day. There has to be a period of time.

21 But when you're preparing for a trial even three or
22 four weeks beforehand is pretty quick. It didn't sit
23 around for a year before we went to trial is I guess what
24 I'm saying.

25 Q. And you testified at the beginning of the

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Cross-Examination by Ms. Jameson
July 24, 2018

1 Suppression there was a 20 year offer you thought,
2 correct?

3 A. No, I think that was after we lost those hearings,
4 those motions.

5 Q. Do you recall whether it was the same offer that was
6 kept open by the State until ---

7 A. --- no, it was a different offer. It was worse.

8 MS. JAMESON: A moment's indulgence, Your Honor.

9 Q. [Ms. Jameson] Do you recall what the offer was at
10 the beginning?

11 A. I don't have my file so I don't really know. I do
12 know that it involved active jail time and Mr. Judon at
13 that time was not interested in going to prison. He
14 didn't want to plead to something that was going to put
15 him in jail.

16 I mean I was talking to her about trying to figure
17 out some kind of plea offer that would involve not a jail
18 sentence and that wasn't something that we could work
19 out. So I don't remember the exact numbers, how much
20 jail time it was but it was a jail time offer.

21 Q. And it was always a jail time offer, correct?

22 A. Yes.

23 Q. If the record reflects it was a continuous 20
24 throughout the entire trial, pretrial and after the
25 Suppression was denied do you have any independent reason

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Cross-Examination by Ms. Jameson
July 24, 2018

1 to believe that's not correct?

2 A. No, I don't remember and I don't have my file in
3 front of me. There was some discussion by Mr. Judon that
4 he had been sent some emails; I don't have them in front
5 of me.

6 But that was a common practice for me if I got
7 something with an offer I would print the email and send
8 it to the defendant. So I may have sent Mr. Judon
9 something that was emailed to me from her.

10 Q. And your recollection is he never wanted to do
11 prison time; no active sentence?

12 A. Not the amount of prison time that they wanted him
13 to. And if I recall it was that he didn't want to go to
14 prison at all. But even as we were trying to see what
15 could be the outcome it was just way too much time that
16 they were talking about in any type of offer.

17 Q. Well, what amount of time -- I guess I'm going to
18 need some clarification because you testified before that
19 he didn't want to do any prison time. So what level
20 would he have accepted based on your conversations with
21 him of prison time?

22 A. I don't remember. I think that he had been to
23 prison before if I recall. I don't know; I would be
24 making it up at this point. But often times when you're
25 trying to figure out how much, what would be an

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Cross-Examination by Ms. Jameson
July 24, 2018

1 acceptable plea offer if somebody is going to get home
2 pretty soon -- and this case was pretty old by the time I
3 got involved. And so let's use the number five.

4 If the sentence is five years and somebody has been
5 sitting around for a long time they kind of get out
6 relatively soon. So I would imagine that our discussion
7 was what would be a way for him to get out in a soon
8 manner.

9 Q. I think you testified before you don't ever tell
10 your clients what to do so you didn't ever tell him to
11 accept or reject an offer.

12 A. No, I would never tell a client that.

13 Q. By the time you got the case had Mr. Malloy already
14 received discovery materials from the State?

15 A. I'm sure he had, yes. It's been a long time so yes.

16 Q. And did you get a copy of his file and all the
17 discovery materials?

18 A. No. I don't usually get a copy of their files. I
19 just start over and get the Solicitor to send me stuff,
20 the paperwork and the evidence directly.

21 Q. And did you receive those materials from the State?

22 A. Yes.

23 Q. Did you review those with Mr. Judon?

24 A. Yes.

25 Q. And the reason for the search was an illegal tint of

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Cross-Examination by Ms. Jameson
July 24, 2018

1 a window, correct?

2 A. It was a traffic stop.

3 Q. Based on an illegal window tint?

4 A. I believe that's what they said, yes.

5 Q. And two law enforcement officers testified at the

6 pretrial Motion to Suppress, correct?

7 A. Okay.

8 Q. Have you looked at the transcript at all?

9 A. Some of it, yes. I just don't remember all of it.

10 Q. Do you recall officers, both officers stating that

11 when they approached the car your client's pants were

12 down and unbuttoned and his belt was undone?

13 A. Yes.

14 Q. And he refuted that at the pretrial Suppression and

15 during -- before the jury, correct?

16 A. I remember them testifying to that but I think he

17 said that that was wrong.

18 Q. Yes, he refuted that. He said his pants were up and

19 that an officer had actually unzipped his pants on the

20 side of the road?

21 A. Right.

22 Q. And officers testified that within three minutes he

23 gave consent to search the vehicle, correct?

24 A. They did testify that he gave consent and he said

25 that wasn't true.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Cross-Examination by Ms. Jameson
July 24, 2018

1 Q. And Judge Harrington heard all of that testimony
2 from Mr. Judon and the officers correct?

3 A. Yes.

4 Q. And she specifically made a finding that Mr. Judon
5 was not credible.

6 A. She made a ruling on my motions. So obviously she
7 chose to believe the officer's version of the facts as
8 opposed to his.

9 Q. And officers found a digital scale with crack
10 residue on it, correct?

11 A. It's in the testimony, yes.

12 Q. And a utility knife that had crack cocaine residue
13 in the key or cup holder area?

14 A. Yes.

15 Q. And also found small pieces of crack.

16 A. Yes.

17 Q. And at that point Mr. Judon was told he was under
18 arrest for possession of cocaine base, correct?

19 A. Yes.

20 Q. And he was advised that he would be strip searched
21 when he got to the county detention center, right?

22 A. If it's in the testimony; I don't remember that
23 exactly. But the problem was that there is a lot of case
24 law that says that if a person is stopped for a violation
25 of like tint, some type of traffic violation, there is a

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Cross-Examination by Ms. Jameson
July 24, 2018

1 whole bunch of law that says that you shouldn't go
2 forward and do searches and things like that. There are
3 a line of cases that talk about how a traffic stop should
4 be a traffic stop.

5 So based on what he was saying that he didn't
6 consent, that his pants were not down, that he -- that
7 there wasn't any visible contraband when the police
8 officers originally stopped him that they should not have
9 gone forward and done all the things that they did.

10 Mainly -- I mean there is some case law that even
11 says that if a person consents that a consent can be non-
12 consensual I guess or it could be viewed as a coercive
13 search and not a consensual search even if the person
14 does consent.

15 So there was a lot of case law to support the fact
16 that if he said that there was not consent and that the
17 officer's really just yanked him out of the car, pulled
18 his pants down, went into his console area without you
19 know dug around to find things that were incriminating
20 that that would have been a stretch and an illegal
21 search.

22 Q. And you -- that was your theory at the Motion to
23 Suppress, correct?

24 A. Yes.

25 Q. And you presented your client?

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Cross-Examination by Ms. Jameson
July 24, 2018

1 A. Yes.

2 Q. And that you argued that and the testimony at the
3 Suppression hearing to Judge Harrington, correct?

4 A. Yes.

5 Q. And she denied that motion.

6 A. Yes.

7 Q. Do you recall what two offenses gave rise to the
8 enhancement for the LWOP notice?

9 A. Not specifically. You and I have had a conversation
10 before today about this hearing and you asked me the
11 question and I said that I didn't have his file so I
12 didn't know from what I had, you know I didn't have a
13 copy of his rap sheet.

14 But I was aware from talking to Lauren that he did
15 have two prior enhanceable convictions and that the LWOP
16 notice would have been I guess appropriate or valid based
17 on what I had been talking about.

18 I think that my problem or concern with the LWOP
19 notice was that the first conviction was really old and
20 that unfortunately for instance in a motion about prior
21 convictions if he were to testify in front of the jury
22 which prior convictions could they bring up.

23 There is sort of this within 10 years and you don't
24 bring it up after that. But in terms of an enhancement
25 under the statute I don't think they have the same window

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Cross-Examination by Ms. Jameson
July 24, 2018

1 that closes after a certain period of time. I think it
2 kind of like goes further back. But his original
3 conviction was really old.

4 Q. Did you do any investigation into those two prior
5 convictions to see if they were serious or most serious
6 offenses and properly used for enhancement pursuant to
7 17-25-45?

8 A. Maybe at the time, possibly. I didn't think there
9 was a problem with the notice.

10 Q. And if there was you would have investigated it.

11 A. Yes.

12 Q. You filed numerous pretrial motions in this case,
13 right?

14 A. Yes.

15 Q. The Motion to Dismiss based on the lack of the
16 videotape that you said officers had unconstitutionally
17 destroyed essentially by not preserving it?

18 A. Yes.

19 Q. And you had a hearing on that motion?

20 A. Yes.

21 Q. And you also filed a written motion to determine the
22 admissibility of the statements?

23 A. Yes.

24 Q. And you had a Jackson v Denno hearing before Judge
25 Harrington on that?

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Cross-Examination by Ms. Jameson
July 24, 2018

1 A. Yes.

2 Q. And you also had a Motion to Suppress the drugs?

3 A. Yes.

4 Q. Based on all those grounds that we've previously
5 discussed and that was heard and denied by Judge
6 Harrington?

7 A. Yes, ma'am.

8 Q. Do you recall whether you filed any other pretrial
9 motions; perhaps a motion to exclude testimony of prior
10 bad acts?

11 A. I have a packet of motions that I file at that time
12 for every case. It would be a Motion to Sequester, a
13 Motion about prior bad acts, a Motion about statements, a
14 motion about -- in this case it was a Motion to Suppress.

15 I'm trying to think of any of the rest of them; I
16 don't have them in front of me. But there was just an
17 assortment of written motions that I always do in a case.
18 So yes, I would have done that motion and filed it. It
19 would have been a piece of paper.

20 Q. But it was more than just a piece of paper. At the
21 hearing you cited case law, correct?

22 A. Say that again.

23 Q. You said you filed a piece of paper. At the hearing
24 to Judge Harrington you cited case law. You testified
25 that you ---

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Cross-Examination by Ms. Jameson
July 24, 2018

1 A. --- about the statement?

2 Q. About the Motion to Suppress and ---

3 A. --- oh, yes ---

4 Q. --- it was more than just filing the motions. You

5 did your due diligence and research and presented the

6 argument to the Court?

7 A. Yes. I mean I had a full-blown like we said 400

8 pages of the transcript I had done the motions in this

9 case. I think we did the motions on a Friday afternoon

10 or a Friday and then started the trial on a Monday. I

11 mean there was a whole lot of stuff we did with the

12 motions.

13 Q. You started them on Friday, yes. Did you review the

14 elements of trafficking with Mr. Judon?

15 A. Yes. I mean in the sense that trafficking is -- a

16 lot of what trafficking is is weight issue. I mean it's

17 the same thing as a lot of the other drug stuff but it's

18 a matter of how much weight is involved. And in this

19 case there was a weight sufficient to be a trafficking

20 weight.

21 Q. In your ---

22 A. --- trafficking also include a broader factual

23 scenarios than like a PWID or possession. It is a larger

24 offense in terms of conduct and I know that and have

25 talked to my clients about that throughout the years.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Cross-Examination by Ms. Jameson
July 24, 2018

1 But it primarily has to do with weight.
2 Q. Did you explain that to Mr. Judon?
3 A. We would have discussed it.
4 Q. And his constitutional rights to a jury trial?
5 A. Yes.
6 Q. And the State's burden of proof?
7 A. Yes.
8 MS. JAMESON: Moment's indulgence, Your Honor.
9 [Whereupon, Ms. Jameson reviews documents]
10 MS. JAMESON: No further questions, Your Honor.
11 THE COURT: Any redirect of the witness?
12 [Whereupon, Mr. Davis reviews documents]
13 MR. DAVIS: No, ma'am.
14 THE COURT: Any objection to Ms. Gay being excused
15 from the State?
16 MS. JAMESON: No, Your Honor.
17 THE COURT: From the applicant?
18 MR. DAVIS: No, Your Honor.
19 THE COURT: Ma'am, you're excused.
20 THE WITNESS: Thank you.
21 [Whereupon, the witness is excused and exits the
22 witness stand]
23
24
25

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Melissa Gay-Cross-Examination by Ms. Jameson
July 24, 2018

1

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 24, 2018

1 MR. DAVIS: Your Honor, that would be the
2 applicant's presentation.

3 THE COURT: Does the State have any witnesses?

4 MS. JAMESON: Yes. The State would ask the record
5 to be left open to allow Mr. Malloy an opportunity to
6 review his file and testify.

7 THE COURT: What I'm thinking is based on what --
8 has he indicated to you when they might have the file
9 here? Check your phone for me right quick and see.

10 [Whereupon, Mr. Davis complies]

11 MR. DAVIS: Your Honor, this may be really good
12 news. May I step out and use the phone?

13 THE COURT: Sure.

14 [Off the record momentarily]

15 [Whereupon, an off the record bench conference is
16 held]

17 MS. JAMESON: Your Honor, Ms. Miller [phonetic] at
18 SCDC went ahead and put in a request to the institution
19 and she asked that I send her an email in writing so I'm
20 going to send her an email real quick.

21 THE COURT: And then they can do what they need to
22 do and ---

23 MS. JAMESON: --- yes. He can be brought back to
24 the institution tonight and then brought back again
25 tomorrow morning.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 24, 2018

1 THE COURT: Perfect, works for me. I'm thinking
2 on that limited issue that shouldn't take us more than 20
3 minutes.

4 MS. JAMESON: It should be quick, yes Your Honor.

5 [Whereupon, case is in recess until 9:30 tomorrow
6 morning]

7 *****END OF TRANSCRIPT OF RECORD*****
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

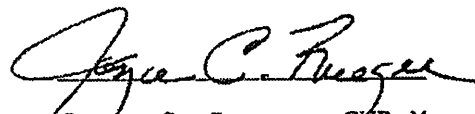
Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 24, 2018

C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Charleston County, South Carolina on the 24th day of July, 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

November 19, 2018



Joyce C. Rueger, CVR-M

Court Reporter

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 24, 2018

C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Charleston County, South Carolina on the 24th day of July, 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

November 19, 2018



Joyce C. Rueger, CVR-M

Court Reporter

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	DOCKET NO. 2017-CP-10-5398
	)	
	)	
ELLIOTT JUDON	)	
	)	
Applicant	)	
	)	
vs.	)	
	)	
STATE OF SOUTH CAROLINA	)	
	)	
Respondent	)	
	)	
	)	
	)	
	)	TRANSCRIPT OF RECORD

July 25, 2018
Charleston, South Carolina

Volume 2 (of 2)

B E F O R E:

THE HONORABLE DEADRA L. JEFFERSON, JUDGE

A P P E A R A N C E S:

RODNEY D. DAVIS, ESQ.
Attorney for the Applicant

MEGAN HARRIGAN JAMESON, ESQ.
Attorney for the State

JOYCE C. RUEGER, CVR-M
Circuit Court Reporter

INDEX TO PROCEEDINGS	
	PAGE
PROCEEDINGS	81
POST CONVICTION RELIEF APPLICATION	
LUKE MALLOY	
Direct Examination by Ms. Jameson	82
Cross-Examination by Mr. Davis	88
Redirect Examination by Ms. Jameson	93
ELLIOTT JUDON	
Direct Examination by Mr. Davis	96
CLOSING ARGUMENTS	
Remarks by Mr. Davis	100
Remarks by Ms. Jameson	111
CERTIFICATE OF THE COURT REPORTER	116

INDEX TO EXHIBITS
No Exhibits were introduced

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 25, 2018

1 PROCEEDINGS

2 THE COURT: We're resuming Judon. And as I recall
3 we recessed on yesterday so that Mr. Malloy could have an
4 opportunity to review his file. And is Mr. Malloy
5 present?

6 MR. MALLOY: Yes, Your Honor.

7 THE COURT: Good morning, Mr. Malloy. Have you had
8 adequate time to review the file?

9 MR. MALLOY: I have.

10 THE COURT: Perfect. I forget who was calling him;
11 Mr. Davis or was the State calling him.

12 MS. JAMESON: The State was. We'd call Luke Malloy
13 to the stand.

14 THE COURT: Mr. Malloy, if you would come to the
15 stand to be sworn.

16 [Whereupon, Mr. Malloy comes forward]

17 [Whereupon, the witness is duly sworn by the Clerk
18 of Court]

19 [Whereupon, the witness is duly sworn by the Court]

20 THE COURT: State your full name for the record and
21 spell your last name for the court reporter.

22 THE WITNESS: Luke Malloy, last name M-A-L-L-O-Y.

23 THE COURT: You may proceed.
24
25

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Luke Malloy-Direct Examination by Ms. Jameson
July 25, 2018

1 LUKE MALLOY,
2 Having been first duly sworn,
3 Was examined and testified as follows:
4 DIRECT EXAMINATION
5 BY MS. JAMESON:
6 Q. Mr. Malloy, you represented Mr. Judon, correct?
7 A. I did.
8 Q. In what capacity did you represent him? Where were
9 you employed then?
10 A. I represented him while I was employed at the Public
11 Defender's office.
12 Q. Do you recall when you were appointed to represent
13 him?
14 A. Yes. I was appointed to represent him originally on
15 September 13, 2012.
16 Q. Had you ever represented Mr. Judon before?
17 A. That was when I was initially appointed to represent
18 him; that was the date.
19 Q. Oh, the September 2012 was on a different charge?
20 A. That's correct.
21 Q. What charges were those?
22 A. There was a failure to stop for a blue light as well
23 as several drug charges.
24 Q. Several drug charges different than the trafficking
25 third that he picked up on August 22, 2013?

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Luke Malloy-Direct Examination by Ms. Jameson
July 25, 2018

1 A. Correct.

2 Q. What happened with those charges, the failure to
3 stop for a blue light?

4 A. The failure to stop for a blue light that went to a
5 jury trial and it was a not guilty verdict.

6 Q. The other drug charges what happened with those?

7 A. They were dismissed.

8 Q. When were you appointed on the charges we are here
9 for today, the trafficking?

10 A. I would have been appointed shortly after his
11 arrest. I don't believe I ever closed my file previously
12 but several days after his arrest on this charge.

13 Q. At any course of your representation of him either
14 on these charges or the failure to stop for a blue light
15 or the other drug charges did you explain his
16 constitutional rights to a jury trial?

17 A. I did.

18 Q. The State's burden of proof and it was the State's
19 burden to prove beyond a reasonable doubt?

20 A. Yes.

21 Q. Did you discuss with him his right to testify?

22 A. I did.

23 Q. The right to remain silent?

24 A. I did.

25 Q. And what was the result of that jury trial for

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Luke Malloy-Direct Examination by Ms. Jameson
July 25, 2018

1 failure to stop for a blue light?

2 A. It was not guilty.

3 Q. When you were appointed to these charges a few days
4 after the arrest in August of 2013 did you explain the
5 elements of trafficking cocaine to him?

6 A. I did explain the elements to him.

7 Q. Did you explain that it was weight-based that he met
8 that over 10 gram threshold it qualified as trafficking?

9 A. I did.

10 Q. Did he appear to understand these conversations?

11 A. I believe he did.

12 Q. Did you explain to him -- he had been served with
13 LWOP notice when you represented him, correct?

14 A. He was not.

15 Q. Was that a concern for you?

16 A. I can't remember it specifically if I discussed that
17 possibility with him because the LWOP that wasn't brought
18 up while I had the case by the State.

19 Q. Were there any offers while you represented him for
20 this charge?

21 A. There was.

22 Q. What were the offers?

23 A. There was an offer to plead to possession with
24 intent to distribute cocaine base second. And I believe
25 he had an option of either doing a straight up plea or a

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Luke Malloy-Direct Examination by Ms. Jameson
July 25, 2018

1 negotiated 10 years.
2 Q. Did you convey this offer to him?
3 A. I did.
4 Q. Did you explain it to him?
5 A. I did.
6 Q. What was -- what happened after these discussions?
7 Did he accept the offer or turn it down?
8 A. He chose not to accept the offer.
9 Q. Did you get any other offers while you were
10 representing him?
11 A. Not that I recall.
12 Q. You testified at a pretrial hearing in this case in
13 2015, correct?
14 A. I did.
15 Q. When -- in your discussions with Mr. Judon did he
16 ever ask you to get the videotape from the dash cam
17 cruiser?
18 A. There was a time when we discussed that.
19 Specifically in my file I noted a conversation on May
20 2nd, 2014 when we discussed in preparation for a plea
21 date that he was scheduled for we discussed the offer.
22 And I note in my file that he had asked about a dash cam
23 video and I advised him that there was no video.
24 Q. Did you investigate whether there was a dash cam
25 video?

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Luke Malloy-Direct Examination by Ms. Jameson
July 25, 2018

1 A. I would always try to sort out discovery issues as
2 best I could prior to a plea. But I'm not able to find
3 in my file anywhere where I specifically requested dash
4 cam video in this case. I just show that I did inform
5 him on May 2nd, 2014 that there was no video.

6 Q. Are you aware of at the time North Charleston's
7 retention policies, how long they retained dash cam
8 videos?

9 A. I don't believe I was aware at the time. I think I
10 was made aware because of this case.

11 Q. And when he requested the video in May of '14 it was
12 after that 180 days of retention?

13 A. I believe so.

14 Q. Did you get discovery materials in this case when
15 you were representing him?

16 A. I did.

17 Q. Do you recall what those materials were?

18 A. Yes. There were reports from the officers. There
19 were lab results from when they tested and weighed the
20 drugs. There was a copy of Mr. Judon's prior criminal
21 history but there were no videos in the Rule 5 that was
22 turned over to me.

23 Q. Did you review the discovery with him?

24 A. I did.

25 MS. JAMESON: Moment's indulgence.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Luke Malloy-Direct Examination by Ms. Jameson
July 25, 2018

1 [Whereupon, Ms. Jameson reviews documents]
2 Q. [Ms. Jameson] Do you recall during that May 2014
3 discussion about the video ever telling him that you
4 weren't going to make any efforts to get the video or
5 that it wasn't important?
6 A. I think I may have told him that it wasn't something
7 the State needed to prove its case.
8 Q. Both officers were still employed by North
9 Charleston and came to testify at that Motion to Dismiss
10 hearing, right?
11 A. They did.
12 MS. JAMESON: No further questions, Your Honor.
13 THE COURT: Any questions for the witness?
14 MR. DAVIS: Yes. Could I have one moment, Your
15 Honor?
16 THE COURT: Yes, sir.
17 [Whereupon, Mr. Davis confers with his client]
18
19
20
21
22
23
24
25

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Luke Malloy-Cross-Examination by Mr. Davis
July 25, 2018

1 CROSS-EXAMINATION

2 BY MR. DAVIS:

3 Q. Mr. Malloy, you were able to look through your
4 actual paper file as well as the online case management
5 system for any notes?

6 A. I was.

7 Q. And based on that review you were able to
8 specifically tell us there was a discussion on May 2nd,
9 2014 about the video with Mr. Judon?

10 A. Yes.

11 Q. Can you tell us what date you went over the elements
12 with him?

13 A. I met with him on three occasions. I have in my
14 notes on those times we discussed the case and the offer
15 that was presented. It would have been on either one of
16 those dates.

17 Q. But you don't specifically have a note to that like
18 you do a note about the discussion of the video?

19 A. No, I don't.

20 Q. Mr. Judon was arrested for this charge on August 27,
21 2013. You were already representing him at the time, is
22 that right?

23 A. That's correct.

24 Q. And so this case would have been assigned to you
25 within days after that, right?

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Luke Malloy-Cross-Examination by Mr. Davis
July 25, 2018

1 A. That's correct.

2 Q. Is it fair to say that from early on Mr. Judon was
3 focused on obtaining the video of his stop?

4 A. I can't say that that was something that was brought
5 up to me initially early on during my representation of
6 him for this charge.

7 Q. Is it your testimony that he only referenced that to
8 you one time during the May 2nd, 2014 meeting?

9 A. That is the only documentation I have of him
10 referencing that.

11 Q. Do you recall any other times he commented on the
12 video to you?

13 A. I don't recall.

14 Q. And you testified a moment ago that you obtained
15 Rule 5, reports, drug analysis, prior record but no
16 video, correct?

17 A. That's correct.

18 Q. That would have been in response to the State's kind
19 of boiler plate Public Defender Rule 5 request, right?

20 A. That's correct.

21 Q. You did not file a specific Brady request in this
22 case?

23 A. I did not file anything with the Court. Again, I
24 would typically try to sort out discovery issues as well
25 as I could prior to a plea, but I don't have a specific

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Luke Malloy-Cross-Examination by Mr. Davis
July 25, 2018

1 email with the Solicitor requesting that video or any
2 documentation in my file specifically saying a date where
3 I made a specific discovery request.

4 Q. And you mention that so at the time that you were
5 representing Mr. Judon on this charge Ms. Julie Cardillo
6 was the prosecuting attorney at the time, right?

7 A. That's correct.

8 Q. And you don't have, in review of your file you don't
9 have any email or notes in your file that you contacted
10 her directly about the video?

11 A. I do not.

12 Q. Final thing on that issue, also there was no motion
13 filed to preserve evidence that law enforcement would
14 have had; you didn't file that motion?

15 A. I did not.

16 Q. You indicate you did review what you received from
17 the State in response to Rule 5 with Mr. Judon. Do you
18 have a specific date when that was done?

19 A. It would have been one of the three meetings that I
20 have listed in my notes. Of the three I can't say when I
21 would have, if I had actually provided him a copy of the
22 discovery at that time.

23 Q. Do you recall that after a Court appearance in which
24 Mr. Judon in open court raised the issue about the video
25 that soon thereafter he hired Ms. Gay to represent him on

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Luke Malloy-Cross-Examination by Mr. Davis
July 25, 2018

1 this charge?

2 A. I don't specifically recall the issue being raised
3 in Court. But he did hire Lisa Gay after he rejected the
4 offer that was presented to me by the Solicitor.

5 Q. And on that -- again, that was a reduction to
6 possession with intent to distribute cocaine base second
7 either straight up or the negotiated 10 years?

8 A. That's correct.

9 Q. And do you know when you took that offer to him?

10 A. I'm showing that he -- there was a rejection on the
11 record on March the 10th, 2014. I'm showing that I did
12 meet with him on February 2nd, 2014 and we would have
13 discussed it at that time if not before.

14 And I believe he was rescheduled for subsequent
15 pleas after that March 10th date when the case
16 transferred from Ms. Cardillo to Ms. Mulkey now Frierson.

17 Q. In your discussions with him about the video and not
18 having it I think your comment was the video was not
19 needed to prove the case. That's what you would have
20 told him?

21 A. That's what I would have told him. I probably would
22 have mentioned it would have been relevant for
23 Suppression. But in terms of the elements of the case,
24 in terms of the State proving the elements it would not
25 have been necessary in order for them to prove their

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Luke Malloy-Cross-Examination by Mr. Davis
July 25, 2018

1 case.

2 Q. But as you just stated if the video existed and
3 contradicted an officer's testimony then it could be
4 grounds for you to file a Motion to Suppress evidence
5 seized, is that fair?

6 A. Yes. It would have been useful impeachment.

7 [Whereupon, Mr. Davis confers with his client]

8 MR. DAVIS: Thank you, Your Honor. No further
9 questions. Thank you, Mr. Malloy.

10 THE COURT: Any redirect?

11 MS. JAMESON: Yes briefly, Your Honor.

12 THE COURT: You may proceed.

13

14

15

16

17

18

19

20

21

22

23

24

25

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Luke Malloy-Redirect Examination by Ms. Jameson
July 25, 2018

1 REDIRECT EXAMINATION

2 BY MS. JAMESON:

3 Q. Mr. Malloy, you testified you don't have a specific
4 note in your file as to when you reviewed the elements of
5 trafficking with Mr. Judon, right?

6 A. That's correct.

7 Q. Is it a standard part of your practice to review the
8 elements and defenses with your client?

9 A. It is.

10 Q. Do you have any reason to believe you didn't here?

11 A. I do not.

12 Q. Regarding the dash cam video at this point of the
13 traffic stop in 2013 not all the North Charleston -- do
14 you know whether all the North Charleston cruisers had
15 cameras in them in your experience as a public defender?

16 A. My experience was that I was not aware of any
17 standard policies regarding which times there would be
18 video activated or how long it would be available. I was
19 not aware of North Charleston's policy regarding...

20 I remember hearing different answers to those
21 questions during my time at the Public Defender's office
22 from different agencies. I can't remember a specific
23 policy that I was aware of that North Charleston had.

24 Q. Based on your review of the discovery that you were
25 provided did this appear to be a standard traffic stop?

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Luke Malloy-Redirect Examination by Ms. Jameson
July 25, 2018

1 A. It appeared to be the type of traffic stop that we
2 saw occurs often.

3 Q. Do you usually file a Motion to preserve evidence in
4 every traffic stop case?

5 A. No, not specifically with the Court but it's
6 something that I would make supplemental requests of the
7 Solicitor but usually informally via email or just
8 requesting additional discovery or if there was
9 additional evidence that was not included in their
10 initial Rule 5 packet.

11 Q. And your recollection is that Mr. Judon did not
12 bring this to your attention and indicate he wanted the
13 video until May of '14.

14 A. I don't have any recollection of it coming up before
15 then.

16 Q. And at that point it was after the 180 days of
17 retention.

18 A. I believe so.

19 MS. JAMESON: No further questions.

20 THE COURT: Any objection to the witness being
21 excused from the applicant?

22 MR. DAVIS: No, Your Honor.

23 THE COURT: From the State?

24 MS. JAMESON: No, Your Honor.

25 THE COURT: You're excused, Mr. Malloy. Have a

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Luke Malloy-Redirect Examination by Ms. Jameson
July 25, 2018

1 good day.

2 THE WITNESS: Thank you, Your Honor.

3 THE COURT: Does the State have any further
4 witnesses?

5 MS. JAMESON: No, Your Honor.

6 THE COURT: Any rebuttal testimony from the
7 applicant?

8 MR. DAVIS: One moment, Your Honor.

9 [Whereupon, Mr. Davis confers with his client]

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 25, 2018

1 MR. DAVIS: Your Honor yes, we would call Mr. Judon
2 briefly.

3 THE COURT: Sir, if you would stand to be sworn and
4 raise your right hand.

5 [Whereupon, Mr. Judon complies]

6 [Whereupon, the witness is duly sworn by the Court]

7 THE COURT: You can put your right hand down and
8 take your seat and state your full name for the record.

9 THE WITNESS: Elliott Jerome Judon, Jr.

10 THE COURT: You may proceed -- oh, if you would,
11 spell your last name for the court reporter please.

12 THE WITNESS: Judon, last name is J-U-D-O-N.

13 THE COURT: You may proceed, Mr. Davis.

14 MR. DAVIS: Thank you, Your Honor.

15 THE COURT: You're welcome.

16 - - - - -

17 ELLIOTT JUDON,

18 Having been first duly sworn,

19 Was examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. DAVIS:

22 Q. Mr. Judon, during the time that Mr. Malloy
23 represented you how many times did you request of him and
24 discuss with him the issue of videotape of your traffic
25 stop?

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 25, 2018

1 A. I mentioned it twice.

2 Q. And do recall his response to your request for the
3 video?

4 A. His first response in December of 2013 he stated
5 that I didn't need that videotape.

6 Q. And what about the second discussion?

7 A. He told me -- the second time he told me the same
8 thing.

9 Q. Did he ever give you any indication that he actively
10 sought out the video?

11 A. He did not.

12 Q. Do you recall the date in which you were brought to
13 Court and ultimately decided you needed to hire another
14 attorney? Do you remember when that was?

15 A. Absolutely. It was December of '13, 2013 because it
16 was right close to Christmas time.

17 Q. And could you explain that a little further to Judge
18 Jefferson what happened when you were brought over to the
19 courthouse?

20 A. I got a letter in the mail stating that I had Court
21 that day. I came down and met with Mr. Malloy. I think
22 it was a 15 year offer on the table and that's when I
23 mentioned the videotape; I needed the videotape for my
24 defense. That's when he said we didn't need the
25 videotape.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 25, 2018

1 Q. And to be clear was that something you discussed in
2 open Court where a Judge would have heard or was that
3 just some discussion you would have had with Mr. Malloy?

4 A. It was in a private room. I can remember Mr. Malloy
5 and I think he bring, I think he bring an assistant with
6 him, I think it was Lori Proctor, and she was informing
7 me to take the plea also.

8 Q. And can you remind the Court you said you came down
9 to meet him. Had you bonded out on this charge or were
10 you still incarcerated?

11 A. I bonded out.

12 Q. And so the record is clear on that date in December
13 of 2013 were you rejecting that offer or were you wanting
14 more time to get the video?

15 A. I wanted more time to get the video because I know
16 it was a certain amount of time that the video would have
17 been preserved.

18 Q. But you in fact never entered the courtroom and
19 never accepted that plea?

20 A. No, sir.

21 Q. After that meeting with Mr. Malloy what did you do
22 as far as representation in your case, in this case?

23 A. After that I went to -- I tried to get the videotape
24 through City Hall, the City of North Charleston. They
25 told me I needed an attorney so that's when I hired

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Elliott Judon-Direct Examination by Mr. Davis
July 25, 2018

1 Melissa Gay.

2 Q. Would that have been still in 2013 or after the
3 beginning of the year?

4 A. That was like in somewhere like in March of '14.

5 [Whereupon, Mr. Davis reviews documents]

6 MR. DAVIS: Thank you, Your Honor, no other
7 questions.

8 MS. JAMESON: No questions, Your Honor.

9 MR. DAVIS: And no other rebuttal, Your Honor.

10 THE COURT: All right, do I need to have argument
11 or what do y'all need from me at this point? I guess I'm
12 asking do you want to make any closing arguments.

13

14

15

16

17

18

19

20

21

22

23

24

25

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Closing Argument-Remarks by Mr. Davis
July 25, 2018

1 CLOSING ARGUMENT

2 MR. DAVIS: Judge, I will briefly. I know you take
3 close notes and we had most of the testimony yesterday.
4 The gist of our arguments primarily focused on Ms. Gay
5 but we do argue that both attorneys failed to investigate
6 or move forward to preserve the evidence from the initial
7 stop.

8 We do argue that Mr. Judon was not affirmatively
9 informed of the elements that would have had to have been
10 proved for a trafficking case. He read from the
11 indictment that's in the record. That's what he
12 understood that they had to prove each of those rather
13 than simply possession, type of drug, and weight.

14 We argue that following the pretrial, extensive
15 pretrial hearing that was unsuccessful it is his
16 testimony he believed he had no other option other than
17 to finish the trial. Had he understood that there was an
18 option to still negotiate and attempt a plea, of which
19 there had been two prior offers and he ---

20 THE COURT: --- let me interrupt you. What
21 evidence is there in the record that he would have been
22 able to negotiate after Suppression?

23 MR. DAVIS: Judge Harrington asked the State to
24 hold the offer open.

25 THE COURT: At what page of the transcript is that?

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Closing Argument-Remarks by Mr. Davis
July 25, 2018

1 MR. DAVIS: Give me a moment, Your Honor.

2 THE COURT: It seems like I remember making a
3 notation of that but I can't remember if that was after
4 and that's why I stopped you.

5 MR. DAVIS: It's going to take a moment I do
6 remember Ms. Gay's testimony perhaps from the State when
7 Ms. Gay testified. If you will give me a moment, Your
8 Honor?

9 [Whereupon, Mr. Davis reviews documents]

10 THE COURT: But did they say they were going to do
11 it? It's at page 185.

12 MS. JAMESON: 338 I believe the Court gives him
13 another opportunity at 338 through 347 there is
14 discussion about the offer still being open despite the
15 Suppression Motion.

16 THE COURT: Okay. You may continue, Mr. Davis.

17 MR. DAVIS: Thank you. And that had the difficulty
18 at trial versus the offer being fully explained he
19 testified he would have taken either offer had he known
20 that the likelihood of success from the pretrial was not
21 likely he would have taken either option. But he was
22 under the belief from Ms. Gay that it was likely they
23 would succeed. And then finally Your Honor we have noted
24 the times in the record that we argue contemporaneous
25 objections were not made as to not preserve issues on

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Closing Argument-Remarks by Mr. Davis
July 25, 2018

1 appeal that we argue could and would have been
2 successful. So for all those reasons, Your Honor we
3 would ---

4 THE COURT: --- tell me how it would have been
5 successful when the suppression was granted. What basis
6 would there have been for the evidence not to come in?
7 And a Motion to Suppress is not a motion in limine. It's
8 a final ruling because the State can appeal it if it's
9 denied -- I mean if it is granted.

10 MR. DAVIS: I understand ---

11 THE COURT: --- so once the Court denied the Motion
12 to Suppress I cannot find or discern anything in the
13 record that would indicate she was going to change her
14 mind. And I'll be frank with you unless something
15 happens 380 degrees different from what I heard in a
16 Suppression Motion I'm not reversing myself once I've
17 taken the time to hear a suppression.

18 Once I've ruled on it that's the ruling. And so I'm
19 trying to figure out what would the objection to the
20 evidence coming in in the grand scheme of things what
21 difference would it make because in the appeal they do
22 address the Suppression and they affirm the Court in
23 denying the Suppression.

24 MR. DAVIS: And Judge, I just ---

25 THE COURT: --- so the issue is not doing it. The

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Closing Argument-Remarks by Mr. Davis
July 25, 2018

1 issue is not -- you don't become deficient in your
2 performance just not doing it. It had to have had some
3 appreciable difference in the outcome of the trial. And
4 I just can't discern that there would have been. She
5 denied the Motion to Suppress. It was fully argued for a
6 long time. All the evidence was heard and so I'm just
7 trying to figure out how does that make the performance
8 defective in any way because the Court affirmed the
9 Suppression?

10 MR. DAVIS: And respectfully I disagree. You've
11 ruled that I'm wrong so that's fine. Like you said the
12 order is a string of sites but ---

13 THE COURT: --- they affirmed the Suppression in
14 that order. I don't -- unless I misread something and
15 I'll read it again.

16 [Whereupon, the court reviews documents]

17 THE COURT: Oh, I see what you're referring to. My
18 reference is to the first part of the opinion where the
19 Motion to Dismiss is denied where it is all predicated on
20 the Motion to Suppress. So I'm trying to -- because
21 everything that the Motion to Dismiss is predicated on is
22 what was argued in the Motion to Suppress. And the Court
23 affirmed the denial of the Motion to Dismiss. So in my
24 estimation they were saying there wasn't no problem with
25 the stop. There wasn't no problem -- because the entire

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Closing Argument-Remarks by Mr. Davis
July 25, 2018

1 complexity of her argument on the Motion to Suppress is
2 encompassed in the Motion to Dismiss. In fact, it's
3 almost stated verbatim in this opinion.

4 MR. DAVIS: I would disagree, Your Honor. I would
5 argue the Motion to Dismiss was not preserved. The
6 evidence to suppress was the lengthy stop which was not
7 supported by probable cause so ---

8 THE COURT: --- well, I've read the record and I
9 don't think it was a lengthy stop and I don't think it
10 was...

11 MR. DAVIS: That's our argument, Your Honor ---

12 THE COURT: --- so I agree with her in that regard.
13 I've read the evidence that was induced for the
14 Suppression. And looking at it from -- there has to be
15 some prejudice. I have to be convinced that somehow the
16 trial would have turned out differently or that he would
17 have prevailed on his appeal. And there is a lengthy
18 record regarding the Motion to Suppress and she found who
19 she found to be credible.

20 It is unlikely almost impossible that an Appellate
21 Court is going to substitute it's judgment for the trial
22 Court that heard it. Based on the testimony it was not
23 an unduly lengthy stay. It was a traffic stop. Now
24 people get upset because police use subterfuge to stop
25 them. The law says they can do that. And I can't find

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Closing Argument-Remarks by Mr. Davis
July 25, 2018

1 any support based on the testimony and Judge Harrington's
2 ruling regarding the Motion to Suppress that somehow his
3 constitutional rights were abridged in that stop. But
4 let's just say for arguments sake that the other part of
5 the Motion to Suppress wasn't preserved when she didn't
6 object to the admissibility of the drugs.

7 She still argued all of that in her Motion to
8 Suppress before -- as a matter of fact the arguments
9 mirror one another because, in fact, her Motion to
10 Dismiss is predicated on all of her grounds in the Motion
11 to Suppress. And the Court found that there was not an
12 error in her judgment in denying it. And frankly from
13 reading the record I agree with that. So I'm trying to
14 figure out how that makes a difference in the trial or
15 the appeal.

16 MR. DAVIS: Two answers. One, I would say again I
17 understand the logic ---

18 THE COURT: --- it's unlikely Judge Harrington was
19 going to change her mind and suddenly suppress drugs in
20 the middle of a trial once she heard a lengthy
21 Suppression Motion. And I don't mean just Judge
22 Harrington, any Judge. If you take the time to hear a
23 Motion to Suppress you've dotted every I, you've crossed
24 every T, you've heard every argument it becomes
25 perfunctory at that point making a Motion to Exclude it

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Closing Argument-Remarks by Mr. Davis
July 25, 2018

1 because you're just going to say overruled, noted.

2 MR. DAVIS: But that's why at the time of the
3 admitting of the evidence you make a contemporaneous
4 objection to preserve it. That was not done here on two
5 separate issues we ---

6 THE COURT: --- I understand that but the point is
7 this. Failing to make the objection was not the basis
8 for a PCR. I have to know what the result was that
9 prejudiced him and I'm at a loss as to how it prejudiced
10 him.

11 MR. DAVIS: We ---

12 THE COURT: --- now if the Motion to Dismiss was
13 predicated on something other than the Motion to Suppress
14 I might think differently. But it's basically verbatim
15 the same argument that was made during Suppression. And
16 that's what she predicated her Motion to Dismiss on. She
17 argued it strenuously. She argued it very specifically
18 and it was denied.

19 And the Court of Appeals said that decision was
20 correct. And I don't recall at least in my review of
21 this that Cert has been granted. And this was a while
22 ago. When was this opinion issued; in '17. Well, it's
23 possible. Did anybody apply for Cert? It's an
24 unpublished opinion.

25 MR. DAVIS: No, Your Honor. And that's one of the

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Closing Argument-Remarks by Mr. Davis
July 25, 2018

1 issues with appellate counsel doing it. She did not. I
2 questioned her as to why and I have no reason at all ---

3 THE COURT: --- because she may have found there
4 was no basis for it because she may have had the same
5 analysis that I'm entertaining right now, which is in the
6 grand scheme of things what difference would it make?
7 And would the Supreme Court have granted Cert anyway.

8 MR. DAVIS: Right. So if you don't find that we've
9 passed the second prong on prejudice the other argument I
10 would make Your Honor though, is that -- so one outcome
11 that could have been different would have been the Court
12 of Appeals or the Supreme Court could have ruled in his
13 favor. The other outcome could have been that it would
14 have affected his decision to take the plea and we have
15 that alternative ---

16 THE COURT: --- I'm not convinced of that.

17 MR. DAVIS: That's ---

18 THE COURT: --- but I need to know what the
19 prejudice would be because just failing to make an
20 objection I think the law recognizes that lawyers are not
21 infallible, that we're human; we make mistakes. Frankly
22 if I didn't ever make mistakes the upper level Courts as
23 I always joke wouldn't have anything to do. I keep them
24 in business; me and my other colleagues. So if we never
25 made mistakes -- we're human beings; we're not perfect.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Closing Argument-Remarks by Mr. Davis
July 25, 2018

1 We make mistakes and our system provides for that.
2 That's why we have a system of review because we make
3 mistakes. We drop the ball sometimes; we miss things.
4 But just missing something in and of itself doesn't mean
5 you were deficient in your performance.

6 There has to be some prong of prejudice that is met,
7 which means looking at the totality of all of this how
8 would it really have turned out differently? And where
9 you have a Judge who has granted a Suppression I can't
10 recall in 17 years I've never reversed myself once I've
11 made a decision about a Suppression. Now does that mean
12 it may never happen? I don't know. Sometimes people
13 testify differently in Court than they testify in camera.
14 Sometimes they bring other witnesses.

15 But generally in my experience it makes their case
16 stronger, not weaker. And I haven't read anything in the
17 record that would have precipitated I mean the ship
18 totally turning around and reversing itself. So while
19 she may have not made the objection, which is a human
20 error. It happens; lots of lawyers do it.

21 But the issue is whether there was some prejudice to
22 him in failing to do that. And then you go to the next
23 hurdle, which is would he have been able to prevail on an
24 appeal on that issue? And looking at the record in its
25 totality I'm just not convinced of that because it was a

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Closing Argument-Remarks by Mr. Davis
July 25, 2018

1 long hearing. It was very thorough in its nature. The
2 arguments were thorough from both sides and the Court
3 made very specific findings regarding the suppression of
4 the evidence. So when you leap ahead in time you look at
5 the fact of even if it were perfected would it have been
6 reversed and I'm just not -- because the entirety like I
7 said of the Motion to Dismiss argument is predicated on
8 the Suppression.

9 And when you look at it the way they cite it they
10 say as to whether the trial Court erred in denying his
11 Motion to Dismiss it says they cite Brady, holding the
12 suppression of evidence favorable to a defendant violates
13 due process where the evidence is material either to
14 guilt or to punishment irrespective of the good faith or
15 bad faith of prosecution.

16 I would assume that is referring to the video and
17 the spoliation as we would say in the law of the video or
18 it being destroyed. It's a whole bunch of string cites
19 about bad faith and exculpatory and probably relating
20 more so to the tapes than anything else.

21 And as to whether the Motion to Suppress that it
22 wasn't preserved because there was not a rule -- which is
23 interesting to me because I never viewed a Suppression as
24 a motion in limine. Well, I guess it's not final until
25 the trial is over because if he's not convicted it's a

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Closing Argument-Remarks by Mr. Davis
July 25, 2018

1 moot issue. And if he is convicted then it's preserved
2 to be a challenge.

3 [Whereupon, the Court reviews documents]

4 THE COURT: So the issue becomes what prejudice was
5 there suffered as a result of failing to do that and is
6 there any likelihood the Suppression would have been
7 reversed.

8 MR. DAVIS: And we argue had it been preserved
9 there is case law that it could and would have been ---

10 THE COURT: --- based on what? The Suppression in
11 this case would have been reversed?

12 MR. DAVIS: Yes.

13 THE COURT: Anything further?

14 MR. DAVIS: No, Your Honor. Thank you.

15 THE COURT: I'll be glad to hear from you Ms.
16 Jameson.

17

18

19

20

21

22

23

24

25

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Closing Argument-Remarks by Ms. Jameson
July 25, 2018

1 CLOSING ARGUMENT

2 MS. JAMESON: Yes, Your Honor. Regarding the issue
3 of the failure to investigate the videotape Mr. Malloy
4 creditably testified that Mr. Judon did not ask for the
5 tape until May of '14. At that time the videotape would
6 no longer have been in existence if it ever was in
7 existence.

8 Also, there can't be any prejudice regarding Mr.
9 Malloy's representation because he presented his version
10 of the facts that would have been shown on the videotape
11 if it had been favorable to him at the Suppression
12 hearing. The Court of Appeals in the unpublished opinion
13 also already noted that it was not material to guilt or
14 innocence so we would ask you to deny as to Mr. Malloy.

15 As to Ms. Gay once she was retained she immediately
16 started her investigation. She subpoenaed multiple
17 different entities, worked tirelessly, fully investigated
18 this so there is no merit to the claim that Ms. Gay was
19 ineffective in regards to this allegation.

20 Regarding the allegation of failure to advise of the
21 elements that is directly refuted by both attorneys.
22 Both Ms. Gay and Mr. Malloy testified they advised him of
23 the elements of the offense and he appeared to understand
24 that. Regarding the allegation that he was misadvised
25 about the option to go forward that is directly refuted

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Closing Argument-Remarks by Ms. Jameson
July 25, 2018

1 by the record. Judge Harrington thoroughly reviews with
2 Mr. Judon that he could take the plea offer from the
3 State even after the Suppression was denied. And going
4 to the next allegation that he didn't understand the only
5 sentence would be life. Again, Ms. Gay testified she
6 discussed that with him.

7 But Judge Harrington thoroughly on the record
8 multiple times makes it very clear to him that if you
9 were convicted by the jury and you've already admitted
10 that the drugs were found in your pants you're going to
11 get a life sentence. That's the only option. And the
12 State had generously left this 20 year open.

13 So all those allegations the State would say don't
14 have any merit. Credible testimony from Ms. Gay and Mr.
15 Malloy refute them. And we'd ask you to make a
16 creditability finding that Mr. Judon is not credible.
17 His story on when he was arrested changed. What offers
18 were provided to him changed. His testimony has been
19 inconsistent here in Court today and yesterday.

20 Regarding the failure to preserve for appellate
21 review applicant can't show there is any prejudice here.
22 Case law in South Carolina is very clear as Your Honor
23 was just noting. It's more than just establishing
24 deficiency for failure to object and preserve for
25 appellate review. You have to establish that you would

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing-Closing Argument-Remarks by Ms. Jameson
July 25, 2018

1 have been successful on appeal. McHam and McMillan,
2 McMillan is a recent State Supreme Court case from
3 earlier this year both make that very clear. You need to
4 show you would have been successful on appeal; not merely
5 that it would have been addressed by the Court of Appeals
6 or the Supreme Court. And here Judge Harrington's
7 thorough ruling would have been affirmed on appeal.

8 This was a valid stop and once he was pulled over
9 his pants were unzipped and down. He was asked by the
10 officers to get out of the car and within three minutes
11 he consented to the search where it yielded a digital
12 scale with crack residue on it, a knife with crack
13 residue on it and small pieces of crack.

14 At the time he was told he was under arrest for
15 possession of cocaine and informed he would be strip
16 searched and then consented. I know he testified
17 differently at the Suppression hearing but Judge
18 Harrington made credibility findings specifically finding
19 that he was not credible and the officers were credible.

20 And there is no reasonable likelihood that the
21 Suppression would have been reversed and he would have
22 been afforded a new trial on appeal. So we would ask you
23 to deny his application in full.

24 THE COURT: Anything further, Mr. Davis?

25 MR. DAVIS: No, Your Honor.

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 25, 2018

1 THE COURT: I'm going to take the matter under
2 advisement because I want to review certain portions of
3 the transcript again now in light of the testimony. I
4 just want to make sure that my recollections are
5 accurate. I tell you it's a funny thing when you read
6 things to yourself versus reading out loud. And Mr.
7 Davis is correct. They did not rule on the Suppression
8 and it seems that the Motion to Dismiss at least the part
9 they addressed deals more with the video. So I apologize
10 for any misapprehension on my part regarding that.

11 But also the State is correct that the failure just
12 to make the objection in and of itself does not amount to
13 performance that fell below the objective standard.
14 There has to be some -- the prejudice prong has to be met
15 and I'm really not completely convinced of that. But in
16 the interim, again I want to review everything again
17 before I make my ruling.

18 But in the interim I would ask the State to go ahead
19 and prepare to provide me with an order. And it dawned
20 on me last night Ms. Jameson, actually it dawned on me
21 earlier this week, I'm going to be in the transition of
22 Clerks if you all could sort of get me orders sooner than
23 later like maybe I know it might be asking a lot to get
24 it to me like as quick as possible because my Clerk is
25 going to transition out. I'd really like to get

Elliott Judon v State of South Carolina
Post-Conviction Relief Hearing
July 25, 2018

1 everything done the first week, latest the second week of
2 August before she leaves me instead of my new Clerk
3 having to relearn stuff she hasn't heard and reinvent the
4 wheel. So, if you could, get those orders to me as
5 quickly as possible so I could -- and I'll tell Ms.
6 Oppenheimer that too when she comes. I think she's
7 coming today, or is it tomorrow?

8 MS. JAMESON: Tomorrow, Your Honor.

9 THE COURT: I'll let her know tomorrow regarding
10 that so we can try to -- so there won't be a delay in us
11 getting stuff out and a delay to the applicants in the
12 event they want to file their appeals. I just want to
13 look at some things a little bit more and then I'll issue
14 my ruling.

15 And you know the form order I do y'all will get a
16 copy of that once I make a decision. But any order that
17 you submit if you could make any findings of fact and
18 conclusions of law supported by the record I would
19 appreciate it.

20 MS. JAMESON: Thank you, Your Honor.

21 THE COURT: Thank y'all.

22 MR. DAVIS: Thank you, Your Honor.

23 MR. DAVIS: You're welcome.

24 *****END OF TRANSCRIPT OF RECORD*****
25

Elliott Judon v State of South Carolina
Certificate of the Court Reporter
July 25, 2018

C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, and complete Transcript of
Record of the proceedings had and evidence introduced in
the trial of the captioned case, relative to appeal, in
the Court of Common Pleas for Charleston County, South
Carolina on the 25th day of July, 2018.

I do further certify that I am neither of kin,
counsel, nor interest to any party hereto.

November 19, 2018



Joyce C. Rueger, CVR-M

Court Reporter

Elliott Judon v State of South Carolina
Certificate of the Court Reporter
July 25, 2018

C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, and complete Transcript of
Record of the proceedings had and evidence introduced in
the trial of the captioned case, relative to appeal, in
the Court of Common Pleas for Charleston County, South
Carolina on the 25th day of July, 2018.

I do further certify that I am neither of kin,
counsel, nor interest to any party hereto.

November 19, 2018



Joyce C. Rueger, CVR-M

Court Reporter

cc
AG
AS
BS
SOL

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Elliott Judon, SCDC #263761,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2017-CP-10-5398

ORDER OF DISMISSAL

Presiding Judge:
Applicant's Attorney:
Respondent's Attorney:
Trial Counsel:

Date of Hearing:

Court Reporter:

Hon. Deadra L. Jefferson
Rodney Davis, Esquire
Megan H. Jameson, Esq.
Luke J. Malloy, III, Esq.
Melisa Gay, Esq.
July 24, 2018
July 25, 2018
Joyce Rueger

FILED
2018 OCT -3 PM 12:32
JULIE J. JEFFERSON
CLERK OF COURT

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

PROCEDURAL HISTORY

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

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

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

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

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

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

SUMMARY OF FACTS AT TRIAL

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

30417


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

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

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

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

4 of 17
[Signature]

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

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

ALLEGATIONS

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

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

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

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686, 104 S. Ct. at 2064; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

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

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

7 of 17


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

I. Failure to Properly Investigate the Facts of the Case

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

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

8/17
XRO

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

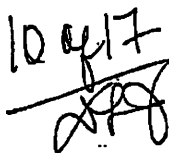
II. Failure to Challenge Prior Convictions

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

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

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

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

10 of 17


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

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

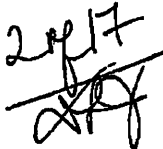
First, as to the admission of the drug evidence, this Court finds that the trial court properly denied Applicant's Motion to Suppress. A traffic stop of a vehicle, along with the detention of individuals during the stop, constitutes a seizure under the Fourth Amendment. State v. Maybank, 352 S.C. 310,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

11/02/17


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

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

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

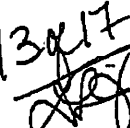
12 of 17


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

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

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

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

13 of 17


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

V. Failure to Timely Secure Video of Traffic Stop

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

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

14 Feb 17
[Signature]

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

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

VI. Failure to Properly Advise Applicant of Plea Offers

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

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

CONCLUSION

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

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

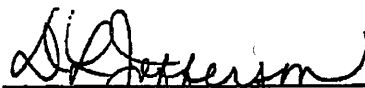
IT IS THEREFORE ORDERED:

16 of 17

10/17
2/19

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

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



HON. DEADRA L. JEFFERSON
Presiding Judge
Ninth Judicial Circuit

Charleston, South Carolina

17 of 17


JPG20130806473

WITNESSES

North Charleston Police Department

AGENCY CASE NUMBER

2013029354

ARREST WARRANT NUMBER

2013A1010204714

DATE OF ARREST

August 27, 2013

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

DEC 10 2013

VERDICT

Guilty

CASHES CRIMINAL 3/18/15

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2013GS1007257

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

December Term 2013

THE STATE

vs.

ELLIOTT JEROME JUDON JR

DOB: [REDACTED]

B/M

Indictment for

Trafficking in Cocaine Base

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

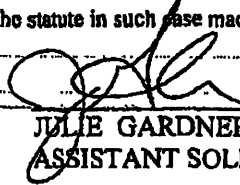
INDICTMENT

At a Court of General Sessions, convened on December 9, 2013 the Grand Jurors of Charleston County present upon their oath:

Trafficking in Cocaine Base

That in Charleston County, South Carolina, on or about August 26, 2013, the Defendant, ELLIOTT JEROME JUDON JR, knowingly did sell, manufacture, deliver, purchase, or bring into this State; or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State; or did possess or attempt to possess a controlled substance or a controlled substance analogue, to wit: cocaine base, in excess of 10 grams; in violation of 44-53-375 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


JULIE GARDNER CARDILLO
ASSISTANT SOLICITOR