

LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW

October 8, 2019

RECEIVED

OCT 11 2019

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

S.C. SUPREME COURT

RE: Sylvester Johnson, SCDC# 292997, vs. State of South Carolina
Appeal of Case No. 2018-CP-28-0147


Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal and asking their office to open a file on his behalf, as I was **appointed** to represent Mr. Johnson on his PCR.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,



Kristy Goldberg

CC: Samuel L. Key
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Sylvester Johnson, # 292997
Kirkland Correctional Institution
4344 Broad River Road
Columbia, SC 29210

Kershaw County Clerk of Court
ATTN: Lynn Lyons
Post Office Box 1557
Camden, South Carolina 29021 - 8557

Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

OCT 11 2019

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Kristi F. Curtis, Circuit Court Judge

Case No. 2018-CP-28-0147

Sylvester Johnson, SCDC# 292997, Appellant

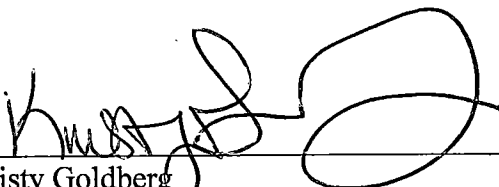
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant Sylvester Johnson hereby appeals from the Order of the Kristi F. Curtis, presiding Judge for the 5th Judicial Circuit, filed September 9, 2019 and received by counsel for the Applicant on September 13, 2019.

October 8, 2019



Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
Phone (803) 667-6633
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Other Counsel of Record:

Assistant Attorney General, Samuel L. Key
Office of the Attorney General
Post Office Box 11549
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

RECEIVED

OCT 11 2019

S.C. SUPREME COURT

Case No. 2018-CP-28-0147

Sylvester Johnson, SCDC# 292997, Appellant

v.

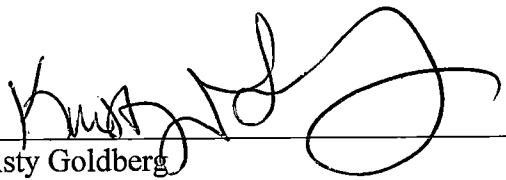
State of South Carolina, Respondent.

PROOF OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes
and states:

She is the counsel of record for Applicant;
Service by mail is proper in this instance; and
She has served the NOTICE OF APPEAL on the following party on October 8, 2019 by
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Samuel L. Key
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211



Kristy Goldberg
Attorney for Plaintiff

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Other Counsel of Record:
Assistant Attorney General, Samuel L. Key
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Columbia, South Carolina 29211

STATE OF SOUTH CAROLINA)
 COUNTY OF KERSHAW)
)
)
 Sylvester Johnson, # 292997,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

2018-CP-28-0147

ORDER OF DISMISSAL

FILED FOR RECORD
 2019 SEP -9 AM 9:02
 JANET C. HASTY
 CLERK OF COURT
 KERSHAW COUNTY, S.C.

The matter before the Court is an action for post-conviction relief (PCR). Sylvester Johnson (Applicant) commenced this PCR action February 16, 2018. The State made its return on April 24, 2018, requesting an evidentiary hearing. Applicant amended his PCR application on February 7, 2019. The Court held an evidentiary hearing February 20, 2019, at the Richland County Courthouse before the undersigned. Applicant was present and represented by Kristy G. Goldberg, Esquire. Assistant Attorney General Samuel L. Key represented the State.

At the PCR hearing, Applicant testified on his own behalf. Ronald W. Moak (Counsel), also testified at the hearing. After hearing the testimony presented and reviewing the entire record before the Court, for the reasons discussed below, the Court finds Applicant's allegations are without merit and concludes counsel was not ineffective. Therefore, the Court denies relief and dismisses the action with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Kershaw County Clerk of Court. During its December 2016 term of court, the Kershaw County Grand Jury indicted Applicant for trafficking cocaine, ten to twenty-eight

ATTEST True, Correct & Certified
 Copy of Original on File in this
 Court
Janet C. Hasty
 Clerk of Court Kershaw County

grams—third offense (2016-GS-28-1143), and simple possession of marijuana—second offense (2016-GS-28-1144). Applicant was represented by Ronald W. Moak, Esquire. Assistant Solicitors Brett A. Perry and Jennifer H. McKellar, both of the Fifth Circuit Solicitor’s Office, prosecuted the case.

Applicant’s case proceeded to a jury trial on June 26–27, 2017, before the Honorable G. Thomas Cooper. Before the jury could be sworn, however, Applicant’s Trial Counsel moved for a continuance because the Solicitor told the jury panel that Applicant’s trafficking charge was a third or subsequent offense. The State conceded its error, and Judge Cooper continued the case until the next General Sessions term of Court. Thereafter, Applicant’s case was called for a jury trial on July 17–19, 2017, before the Honorable Clifton Newman. Applicant was convicted of simple possession of marijuana, but the jury could not reach a verdict on Applicant’s trafficking charge. Judge Newman declared a mistrial on the trafficking charge, and sentenced Applicant to one year imprisonment on the marijuana conviction.

On August 9, 2017, Applicant pleaded guilty to the lesser included offense of trafficking cocaine, ten to twenty eights grams—second offense, before the Honorable Clifton Newman. Applicant pleaded guilty with a negotiated sentence of fourteen years’ imprisonment. Judge Newman accepted Applicant’s guilty plea and sentenced him pursuant to the negotiated fourteen years’ imprisonment. Applicant did not appeal.

Applicant timely commenced this PCR action on February 16, 2018.

FACTS

Applicant’s charges stem from a traffic stop and resulting ticket for driving under suspension. Law enforcement officers saw Applicant sitting in the driver’s seat of a vehicle parked at a residence. The officers knew Applicant’s driver’s license was suspended. When Applicant drove

the car away from the residence, the officers followed him and ultimately initiated a traffic stop. Applicant quickly pulled into a nearby driveway, drove under the carport, and exited the vehicle. Officers testified Applicant was nervous and sweating profusely. Applicant consented to a search of the vehicle, and officers found a small amount of marijuana in the bottom of a cigarette case in the center console. The owner of the home where Applicant parked told law enforcement he did not know Applicant and did not know why he was there. Officers observed a green Crown Royal bag about 10 or 11 feet from the carport on the other side of a chain link fence. The bag contained a digital scale and 62 individual bags of cocaine. The officers testified that when confronted with the Crown Royal bag, Applicant stated "You got me," and "It's not as much cocaine as you think."

ISSUES RAISED

In his original PCR application, Applicant alleged he is being held in custody unlawfully based on the following claims:

1. "no search warrant illegal search and procedure; agents never had consent to search where drugs were found, I wasn't around them or wasn't no DNA taking"
2. "[i]neffective counsel; counsel never let me know nothing about what was going on"
3. "conflict of interest false testimonies by agents."

Applicant amended his PCR application, through PCR counsel, on February 7, 2019, as follows:

1. Trial counsel was ineffective for failing to resolve the Applicant's related Driving under Suspension case in magistrate's court prior to his General Sessions trial;
2. Trial counsel was ineffective for failing to move to suppress drugs due to an improper search;
3. Trial counsel was ineffective for repeatedly giving the Applicant bad advice and expectations that were not followed through;
4. Trial counsel was ineffective for failing to adequately argue issues regarding his indictment;
5. Trial counsel was ineffective for failing to ensure that the [twelve] year plea offer was still available;
6. Trial counsel was ineffective for improperly and unreasonably coercing and pressuring the Applicant to plead guilty to the cocaine charge;
7. Trial counsel was ineffective for failing to file a notice of appeal after his conviction by a jury on the marijuana charge; and
8. Trial counsel was ineffective for failing to file a notice of appeal after his guilty plea

to the cocaine charge.

At the outset of the evidentiary hearing, PCR counsel indicated Applicant would proceed only on the allegations set forth in the amended PCR application. Therefore, this Court finds all other allegations raised in Applicant's original application are waived and abandoned, and those allegations shall be denied and dismissed with prejudice.

PCR TESTIMONY

Applicant's Testimony

Applicant testified he has completed his sentence on the marijuana charge; however, he still wished to pursue his allegations of ineffective assistance of counsel regarding his marijuana conviction. Applicant stated he was convicted on his marijuana charge, but pleaded guilty to the trafficking charge. Applicant retained Counsel to represent him on both charges.

Applicant recalled he was originally charged for trafficking cocaine—third offense, but the charge was dropped to a second offense as part of the plea negotiations. Applicant stated he understood a third offense carries a mandatory minimum of twenty-five years, and if granted PCR, the State could still prosecute him for a third offense. Applicant stated he still wished to go forward with his application as to both charges.

Applicant recalled being arrested on June 24, 2016, and bonding out the next day. Applicant stated he hired Counsel based on Counsel's reputation. Applicant called Counsel, paid him, and went forward with the case. Applicant recalled Counsel calling the case a "dropsy" case or "drop" case after Applicant told him about the case. Applicant understood Counsel's reference to mean the State did not have anything on him, and Counsel would work it out. Applicant recalled the State offering a plea deal of six years, which he rejected. Applicant stated Counsel told him he had to go to court the day following the plea offer. However, Applicant stated he did not show up to court

because he thought he only had to show up for court if he wanted to take the State's offer. Applicant stated he got a text-message from Counsel the next day telling Applicant a bench warrant had been issued for him due his failure to appear in court. Applicant stated he contacted a bondsman and went to the courthouse a few weeks later to try to resolve his bench warrant; however, he was taken into custody. Applicant stated he did not talk to Counsel in the meantime.

Applicant testified the only time he met Counsel was when he went to pay. Applicant stated he did not have much communication with Counsel, and Counsel did not go over discovery or review materials with Applicant. Applicant stated he was arrested on the bench warrant, at which time Counsel came to see him and relayed the State's offer of fifteen years.

Applicant stated he was taken into custody because of the bench warrant in May 2017, and he has been in custody ever since. Applicant stated Counsel came to visit him at the detention center twice. First, Counsel came and told him of the State's fifteen year offer. Applicant stated he rejected the offer and wanted to go to trial. Applicant testified Counsel did not explain anything to him. Applicant recalled pre-trial hearings in June 2017 in front of Judge Cooper, then proceeding to trial, but the case was a declared mistrial. Applicant went back to the county jail but got called back to court a few days later when the State made an eleven year plea offer. Counsel was present when Applicant was called back to court, and Counsel relayed the State's eleven year offer. Applicant stated he asked Counsel about his related driving under suspension (DUS) charge, but Counsel ignored Applicant and walked out of the courtroom. Applicant stated he retained Counsel on the DUS charge as well, and that charge was the cause of all the other cases. Applicant felt his DUS case should have been handled before the other charges. Applicant stated he asked Counsel about this issue prior to the day he was offered eleven years, but the only response Counsel gave was to not worry about the small things.

Applicant recalled Judge Cooper saying he would lift the bench warrant unless the State was prepared to go to trial the next term of court. Applicant testified he was tried the next term on his trafficking and possession charges. Applicant recalled the disposition of his trial as a hung jury on the trafficking charge, but a guilty verdict on possession of marijuana for which he received a one year sentence. Applicant stated after the hung jury, Counsel said the jury's vote was eleven to one, but did not know which side was eleven or one. Applicant felt as though his trial was one-sided, Counsel did not represent him well, and Counsel was only concerned with getting him to plead guilty. Applicant recalled Counsel moving pre-trial to suppress the drugs, but he felt Counsel did not put up enough of a fight.

Applicant recalled an issue dealing with the indictments. Applicant stated one indictment said ten to twenty-eight grams—third offense, and the other side said twenty-eight to 100 grams—second offense. While Applicant was sitting in court, the State crossed out part of the indictment and Applicant did not understand what was going on. Applicant stated Counsel was aware of what occurred and Counsel disagreed with how the State handled the situation, but the State did it anyway. Applicant stated he did not inform the court about the disagreement, and Counsel just wanted him to sign the paper.

Applicant felt as though Counsel did not ask the right questions at trial, and Counsel was not answering questions Applicant was giving to him during trial. Applicant recalled the trial was about which drugs were his and which were not. Applicant stated he did not talk to Counsel after the hung jury. Applicant did not feel the hung jury was successful because the State was still able to take him back to trial on the trafficking charge. Applicant thought he was brought back from SCDC for trial on his DUS charge; however, he was brought for a new trial on the trafficking charge. Applicant stated Counsel did not come to the detention center or SCDC to see him, and Applicant did not see

Counsel again until the next trial on August 9, 2017. Applicant stated he received a letter at his home with the court date on the DUS charge for August 9, and he did not know he was going to court for his trafficking charge that day. Applicant stated SCDC signed him over to Kershaw County, then brought him back to court on August 9.

Applicant testified that the day of his trial in August, Counsel told him to plead guilty. Applicant stated he did not want to plead guilty because he had already gone through two trials. Applicant claimed he was under duress, and he did not feel confident going forward with another trial with Counsel representing him. Applicant felt at the time of the plea that he should not go through another trial because Counsel was not confident in the strength of their case, despite the previous hung jury. Applicant stated the Solicitor made an offer for twelve years, but on the next day a different Solicitor was in court and insisted the plea was for fourteen years. Applicant stated he realized if convicted at trial, the shortest sentence he could get was twenty-five years.

Applicant recalled being under oath at his plea hearing. Applicant admitted he told the plea court the drugs were his, but stated he only pleaded guilty to get it over with and planned to come back to court to get his plea overturned. Applicant thought if he took the fourteen year offer, he could return to court to resolve it later. Applicant admitted he already had a full trial once on his trafficking charge, but decided not to go forward on a second full trial because he was not convinced Counsel was ready to try the case again.

Applicant recalled pleading to a lesser offense than originally charged in exchanged for fourteen years' imprisonment. However, Applicant felt he did not have a meaningful choice. He felt he had to choose between facing thirty years at trial with an unprepared lawyer, or accepting a fourteen year sentence with the hope of one day getting back to his family.

Applicant testified he asked Counsel for advice on whether he should appeal his marijuana conviction. Applicant stated Counsel brushed him off and said it was only a one-year sentence. Applicant stated he did not know what the right thing to do was and did not ask Counsel to appeal his marijuana conviction. Applicant stated he did not ask Counsel to file an appeal after his guilty plea on the cocaine charges. Applicant believes Counsel should have filed an appeal on both because he was unlawfully convicted and coerced into pleading guilty.

Applicant believed Counsel could have done a lot better, and should have filed the appeals. Applicant stated he never went to magistrate's court, but the DUS charge was dismissed one day without him being there, and he does not know what happened. Applicant received documents from the court saying the charges were dismissed in October 2017. Applicant believes that because the DUS was dismissed, then the drug charges resulting from the traffic stop should not stand.

Counsel's testimony

Counsel briefly recalled the facts surrounding Applicant's case. Applicant was pulled over by a narcotics officer while Applicant was driving his girlfriend's car. The narcotics unit was watching Applicant's cousin's house and saw Applicant's girlfriend's car pull away from the house and initiated a traffic stop. Counsel felt the State's case was problematic and felt the officers were exaggerating some facts to make the case look better. From where the officers were watching the house, there was a large tree obstructing their view. Counsel was skeptical of the officers' claim that they could see through the windows of the car to see who was driving because of the window tint. Counsel felt the officers really stopped the car because they knew Applicant did not have a license and usually drove that car, but the officers would not have been able to actually see him driving the car before the stop. Counsel recalled having a preliminary hearing on this issue. The officers claimed to have seen Applicant driving the car. When stopped, Applicant pulled into a driveway and

was charged with DUS. The officers searched the car and found a cigarette box with marijuana in the bottom. They also found cocaine in the yard of the home over fence. The officers claimed Applicant admitted the drugs were his and said, "you got me" but there was no video or audio of the statement.

Counsel testified the State's initial plea offer was six years, which Applicant rejected. Applicant failed to appear in court a short time later and a bench warrant was issued for his arrest. Counsel testified he went to Applicant's house and tried to find him but was unsuccessful.

Counsel testified he went over to Applicant's house to review the discovery with Applicant. Counsel stated that prior to the preliminary hearing, Applicant's case did look like a "drop case," or a case that was easily winnable for the defense, because there was nothing tying Applicant to the drugs found in the yard. The case was set for trial in June, and Counsel made pre-trial motions for the suppression of the drug evidence. Judge Cooper denied the motions.

Counsel recalled the case was continued in June because the Solicitor read the indictment in the presence of the jury and stated the charge was a third offense. Counsel objected, and Judge Cooper granted the motion for a continuance. The case was set for trial again the next month in front of Judge Clifton Newman. Counsel recalled the law enforcement officers testifying in the second trial and stated he cross examined them on all of the relevant issues, particularly their testimony regarding Applicant's statement, "you got me." Counsel recalled attacking the witnesses' credibility and questioning them on why no *Miranda* warnings were given. Counsel recalled the second trial resulted in a hung jury, with ten jurors voting to convict.

Counsel stated Applicant always wanted a trial on his driving under suspension charge before the General Sessions trial. Counsel recalled talking to Applicant about it several times. Counsel stated it would have been poor judgment to go to trial on the DUS charge because that was the

probable cause for the traffic stop, and a conviction for DUS would cause problems for their defense on the drug charges. Counsel explained this to Applicant, who seemed to understand and back off from asking about the DUS charge.

Counsel stated if the case had gone to trial a second time there would have been issues he could raise. Specifically, Counsel anticipated making a spoliation argument because the jurors in the first trial damaged the cigarette box. Counsel was unsure if he would prevail on that argument because it was neither the State's fault nor the Defendant's fault that the evidence was damaged. Counsel recalled being in the holding cell with Applicant prior to the start of the second trial when the solicitor kept coming in making plea offers. Ultimately, Applicant took the State's offer for twelve years. However, the next day, the solicitor who made the 12-year offer was not present in court. A different solicitor appeared for the State and represented that the offer was for fourteen years. Counsel recalled whispering to Applicant, "[I]f this isn't cool, tell me and we'll go to trial." However, Applicant ultimately accepted the State's offer of fourteen years. Counsel testified he could have moved to withdraw the plea or moved to enforce the State's twelve year offer, but Applicant did not give him any indication he wanted Counsel to move as such.

Counsel explained to Applicant that his admission of guilt during the plea phase would make it hard to file an appeal on his behalf. Counsel told Applicant he could file for PCR if he wanted. Applicant never asked Counsel to appeal the marijuana possession conviction or the guilty plea. Counsel stated the DUS was dismissed by the officers after Applicant's guilty plea on the General Sessions charges.

Counsel testified he was prepared for trial in August and would have proceeded the same way as in the previous trial. The only new issue was the damaged cigarette box. Counsel said he advised Applicant to plead because the plea offer was a lot lower than the mandatory twenty-five year

minimum on the original charge. Counsel explained to Applicant the hung jury in his first trial was divided ten to two, with ten voting to convict. Counsel told Applicant it was a lot easier for the State to pick up two votes versus them picking up ten votes. Counsel recalled speaking to Applicant for about one to two hours after the mistrial.

Counsel testified it was Applicant's decision to plead guilty. Applicant kept asking Counsel to decide for him, but Counsel refused. Counsel explained the charges and exposure to Applicant several times. Counsel recalled times during trial that they got in trouble for being too loud, and talking too much to each other.

When asked about issues with the indictment, Counsel stated it was brought up and Judge Cooper dealt with it. Counsel believes the Judge just conformed the indictment to the evidence. The issue was brought to the court's attention and the court dealt with it.

Counsel recalled moving to challenge the voluntariness of Applicant's statement, as well as the probable cause for the traffic stop and search. However, the court ruled against the defense on all three issues. Counsel explained that if the DUS trial went forward before the General Sessions trial, he did not believe Applicant's defense was particularly strong, and there was an above average chance of losing the DUS trial. If Applicant was convicted of DUS in magistrate's court prior to the drug trial, the prosecution could just admit a copy of that conviction, and the defense would not be able to contest the probable cause for the traffic stop. Counsel testified he explained this reasoning to Applicant at least four or five times.

Counsel was aware of Applicant's desire to have the DUS charge tried first, but he felt that *State v. Tindall*¹ would allow the prosecution of the drug charge to proceed if the State could show

¹ 388 S.C. 518, 698 S.E.2d 203 (2010).

probable cause for the stop. Generally, Counsel believed the State would have still been able to prosecute the drug charges even if Applicant had been acquitted on the DUS charge.

When asked why he did not argue about search warrant / homeowner consent, Counsel stated the drugs were not within Applicant's arm's reach. The drugs were on someone else's property, where Applicant did not live. Counsel stated two things tied Applicant to the drugs—the box top found in the car and Applicant's alleged statement to police that "you got me." The drugs were found in the yard adjacent to Applicant's car, close to where Applicant was standing. Counsel stated the homeowner was outside, but was not sure if the officers talked to him. However, no one said the homeowner objected to the officers retrieving the drugs from his yard. Counsel talked to the homeowner, but homeowner said he did not want to be involved and was uncooperative.

Counsel stated he never moved for the cigarette box, which was torn by the previous jury, to be suppressed because the August jury was never sworn in. Counsel stated he was talking to the State about what to do about the cigarette box, and Counsel made Applicant aware of the issue by telling him they would have to see how the court decided to deal with the tab torn from the cigarette box. Counsel admitted he could have addressed the issue with the court before Applicant's decision to plead or go to trial.

DISCUSSION

The issue before the Court is whether Applicant's conviction and subsequent guilty plea were the result of ineffective assistance of counsel. To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v.*

Washington, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). “The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases.” *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel was not deficient and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. There is a strong presumption trial counsel’s decisions are based on tactical strategy rather than neglect. *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). To prove prejudice, the applicant must show “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.

The test for determining the validity of a guilty plea is “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). “[A] defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived.” *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). To prove prejudice, the applicant must show a reasonable probability he would not have pleaded guilty and would have insisted on going to trial absent plea counsel’s alleged deficiency. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Applicant alleges his conviction and guilty plea were both due to ineffective assistance of counsel. The Court Disagrees. As discussed below, the Court finds Counsel’s representation was reasonable under prevailing professional norms, and Applicant has failed to show prejudice resulted from Counsel’s alleged deficiencies. Therefore, the Court denies relief and dismisses this PCR action with prejudice.

Was Counsel ineffective for failing to resolve Applicant's DUS case prior to his drug trial?

Applicant alleges Counsel was ineffective for failing to resolve his DUS case prior to dealing with the drug charges. The Court disagrees.

“[W]here counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Counsel testified he was aware of Applicant's desire to have his DUS charge resolved before the drug charges, however he did not believe this was their best strategy. Applicant did have a suspended license, so their only argument was that Officers could not actually see who was driving prior to initiating the traffic stop. Counsel was not confident in their chances of winning the DUS case in Magistrate's Court. If they lost the DUS case prior to the drug trial, Counsel felt it would weaken his jury argument in the drug case that the officers manufactured the probable cause as a pretext to initiate an unlawful traffic stop. Counsel testified he explained this reasoning to Applicant at least four or five times.

Counsel further testified he explained to Applicant that even if he successfully defended the DUS charge, the prosecution could still proceed if the State could show the officers had a reasonable suspicion of a more serious crime, based on *State v. Tindall*, 388 S.C. 518, 698 S.E.2d 203 (2010), Counsel explained to Applicant the State could likely show the officers had a reasonable suspicion to stop the vehicle because they saw the car leaving from a known drug dealer's house. Generally, Counsel believed the State would have still been able to prosecute the drug charges even if Applicant was acquitted on the DUS charge.

The Court finds Counsel's strategy to deal with the drug charges first sound and reasonable. *See Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531 (“[W]here counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.”). Therefore, the Court finds Counsel was not ineffective for dealing with the drug charges before dealing with the DUS charge based on Counsel's credible testimony and well-reasoned strategy. Accordingly, this allegation is denied and dismissed with prejudice.

Was Counsel ineffective for failing to move to suppress the drugs due to an improper search?

Applicant alleges Counsel was ineffective for failing to move to suppress the drugs due to an improper search. The Court disagrees.

“[W]here counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531.

Counsel moved to suppress the admission of the drugs pre-trial in Applicant's June 2017 trial, prior to the motion for a continuance. Judge Cooper denied the motions. When the case was put on the trial roster for the next term of court, Counsel made another pre-trial motion for suppression of the drug evidence in front of Judge Clifton Newman. [“So, basically, we're asking for a Jackson v. Denno, whether or not he actually freely and voluntarily made a statement. And, also, to move to suppress the fruits of the search based upon a bad stop.” Tr. at 5]. After hearing the pre-trial testimony of the arresting officers, Counsel again moved for suppression, stating “I just, again, ask to suppress the statement. He said he wasn't Mirandized, and I also ask to suppress the evidence because I don't think there was probable cause for the stop.” [Tr. at 48] Judge Newman denied the motion to suppress. [Tr. at 49].

The Court finds Applicant has failed to show that Counsel was ineffective. Counsel moved pre-trial both before Judge Cooper and Judge Newman for suppression of the drug evidence. He also cross-examined the officers regarding the search and seizure of the drugs. In fact, the jury could not reach a verdict on Applicant's trafficking charge, which is some indication that jurors may have been swayed by Counsel's cross-examination and argument regarding the search and seizure of the drugs. Counsel moved for suppression of the drugs, articulated a reasonable trial strategy in attacking the search and seizure of the drugs, and was able to argue to the jury that the traffic stop was unlawful; therefore, Counsel was not ineffective.

Was Counsel Ineffective rendering Applicant's guilty plea unknowing and involuntary?

Because Applicant ultimately pleaded guilty to the trafficking charge, the only relevant inquiry as to that charge is whether Counsel's performance rendered Applicant's plea unknowing and involuntary.

The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Alford*, 400 U.S. at 31.

Applicant alleges his guilty plea was unknowing and involuntary due to ineffective assistance of counsel for: (a) repeatedly giving Applicant bad advice and expectations that were not followed through; (b) failing to ensure that the twelve year plea offer was still available; and (c) improperly and unreasonably coercing and pressuring Applicant to plead guilty to the trafficking charge. This Court disagrees and finds the plea colloquy is dispositive as to these issues. The Court finds the combined record from the plea hearing and the evidentiary hearing establishes Applicant pleaded

guilty freely and voluntarily.

“[A] defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived.” *Pittman*, 337 S.C. at 599, 524 S.E.2d at 621. To prove prejudice, the applicant must show a reasonable probability he would not have pleaded guilty and would have insisted on going to trial absent plea counsel’s alleged deficiency. *Hill*, 474 U.S. at 59. “[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced.” *Reed v. Becka*, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991). A defendant’s knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and “may be accomplished by colloquy between the court and defendant, between the court and defendant’s counsel, or both.” *Roddy v. State*, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984).

The plea transcript reflects Applicant entered his plea knowingly and voluntarily, engaged in an intelligent and coherent colloquy with the plea court, and gave appropriate responses to the court’s questions. At the beginning of the plea hearing, Applicant informed the court he was not under the influence of any substance which would affect his ability to understand what he was doing. The plea court explained Applicant’s right to remain silent, his right to a jury trial, and his right to

confront the State's witnesses and to present a defense on his own behalf. The plea court further explained that the State bore the burden of proving him guilty beyond a reasonable doubt. Applicant indicated he understood those rights and wished to give them up in order to plead guilty. Applicant clearly knew the rights he was waiving by pleading guilty, as he had already been tried on the trafficking charge before he decided to plead guilty. Applicant informed the plea court of his displeasure with the State's plea offer, but ultimately decided to accept the State's offer because it took away the mandatory minimum twenty-five year sentence. (Plea Tr. 5–11).

The Court finds Applicant knowingly and voluntarily pleaded guilty to the lesser included offense of trafficking cocaine, ten to twenty eights grams—second offense, with a negotiated sentence of fourteen years' imprisonment. Therefore, Counsel was not ineffective and Applicant's allegations of ineffective assistance of counsel rendering his guilty plea unknowing and involuntary (Allegations c, e, and f in his amended application) are denied and dismissed with prejudice.

Was Counsel ineffective for failing to challenge the sufficiency of the indictment?

Applicant was arrested for "Trafficking in cocaine, 10g or more, but less than 28g – 3rd or Sub. Offense." The body of the warrant states that Applicant "did commit the offense of Trafficking Cocaine, 10-28grams, 3rd offense, in that the defendant did have in his possession, approximately 23 grams of powder cocaine." The indictment, however is for "TRAFFICKING COCAINE (28 – 100 GRAMS) 3RD OFFENSE & SUBSEQUENT." The body of the indictment alleged that Applicant was in "possession of a quantity of Cocaine in an amount of more than twenty-eight (28) grams, but less than one-hundred (100) grams . . . [and such being defendant's second or subsequent offense], and being in violation of section 44-53-370(e)(2)(b)." At some point prior to the case being called in front of Judge Cooper on June 27, 2017, the indictment was amended to conform with the arrest warrant. The "28 – 100 GRAMS" was struck through both in the heading and within the body of the

indictment and changed to 10 -28 grams. The body of the indictment was also amended to conform to the arrest warrant and the heading of the Indictment, in that “second or subsequent” was changed to “third or subsequent.”

There is nothing in the record to show exactly when this amendment took place, except that when the case was called for trial on June 27, 2017, the Solicitor called the case and recited the charge as “trafficking cocaine, 10 to 28 grams, third or subsequent offense.” [Cooper Tr. at 41]. On July 17, 2017, the case was again called for trial before the Honorable Clifton Newman. The Solicitor recited the charge as “trafficking cocaine 10 to 28 grams.” [Tr. at 55]. Judge Newman then received the indictment from the solicitor and stated, “This case comes into court as a result of an indictment . . . charging Mr. Johnson with the offense of trafficking in cocaine 10 grams or more, but less than 28 grams.” [Tr. at 55]

When asked about the amendment of the indictment, Counsel testified it was addressed in front of Judge Cooper. Counsel believed the Judge just conformed the indictment to the evidence. According to Counsel, the issue was brought to the court’s attention and the court “dealt with it.”

The South Carolina Supreme Court has held that an amendment to an indictment is improper if it increases the penalty. Hopkins v. State, 317 S.C. 7, 451 S.E.2d 389 (1994). However, an indictment may be amended to a lesser included offense. State v. Gosnell, 341 S.C. 627, 535 S.E.2d 453 (2000)(“we conclude that ‘Conspiracy to traffic in cocaine in the amount of 400 grams or more’ can include conspiracy to traffic in lesser amounts.”) The indictment was amended at some point prior to the jury being sworn to conform to the arrest warrant and to indicate the lower level offense of trafficking in 10 to 28 grams. While the body of the indictment was changed from “second or subsequent” to “third or subsequent,” the heading of the indictment correctly stated “3RD OFFENSE OR SUBSEQUENT” in the original. The amendment of the indictment was appropriate, and thus

the court finds no prejudice to Applicant in Counsel not challenging the sufficiency of the Indictment on the record.

Was Counsel ineffective for failing to file a notice of appeal for Applicant's conviction or guilty plea?

Finally, Applicant alleges Counsel was ineffective for failing to appeal Applicant's possession conviction and trafficking plea. The Court disagrees.

Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either: (1) that a rational defendant would want to appeal; or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

Here, from Applicant's own testimony at the PCR hearing, he was aware he could appeal his conviction and guilty plea; however, he could not decide what to do, so he did not request Counsel to file an appeal of either. Counsel testified he explained to Applicant that the admissions he made during the guilty plea limited his grounds for appeal. Counsel told Applicant he could file for PCR if he wanted. Applicant never asked Counsel to file an appeal on the marijuana conviction or the guilty plea.

This Court finds based upon the testimony from the PCR hearing, Applicant was aware of his right to appeal both his conviction and his guilty plea. Applicant admitted he never asked Counsel to appeal either, even though he knew he needed to request Counsel to do so if that is how he wanted to proceed. The Court finds Counsel was not deficient because Applicant never asked him to file an appeal after Counsel advised him of his right to appeal. *See Roe*, 528 U.S. at 479 ("If counsel has consulted with the defendant [about an appeal], the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the

defendant's express instructions with respect to an appeal.""). Applicant never asked Counsel to file an appeal; therefore, Counsel was not deficient in failing to do so. Accordingly these allegations are denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. The Court finds Counsel's representation was neither deficient nor prejudicial. Counsel articulated a reasonable strategy for handling the drug charges prior to the DUS charge. Further, Applicant has failed to show any deficiency on the part of Counsel regarding moving to suppress the drugs pre-trial when Counsel moved before both judges for suppression of the evidence. The Court finds Applicant knew the meaning and consequences of pleading guilty to the charge against him and was fully aware of the meaning of the negotiated sentence. The Court further finds Applicant voluntarily pleaded guilty. His voluntariness is evinced by the plea transcript and testimony given at the PCR hearing. Further, Counsel was not ineffective for failing to file an appeal of Applicant's possession conviction or trafficking plea because Applicant knowingly waived his right to such appeals.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

THEREFORE:

1. The Court denies relief and dismisses the action with prejudice; and
2. Applicant shall be remanded to the custody of the State.

AND IT IS SO ORDERED.

Kristi F. Curtis

KRISTI F. CURTIS
Presiding Judge
Fifth Judicial Circuit

Columbia

_____, South Carolina

Aug 30, 2019.



OF
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