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March 09, 2020

Via US Mail
Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: ***Notice of Intent to Appeal from Patrick Dean Lowrance vs. State of South Carolina C.A. No.: 2018-CP-23-2514***

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable Edward W. Miller's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law

R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

cc: Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2018-CP-23-2514

Patrick Dean Lowrance,..... Appellant,

v.

State of South Carolina ..... Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable Edward W. Miller's Order of Dismissal dismissing Appellant's application for post-conviction relief. On February 14, 2020, the Honorable Edward W. Miller signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on March 2, 2020. A copy of the Honorable Edward W. Miller's Order of Dismissal is attached.

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Attorney for Patrick Dean Lowrance

Greenville, South Carolina
March 09, 2020

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
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Edward W. Miller, Circuit Court Judge

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Patrick Dean Lowrance,..... Appellant,

v.

State of South Carolina ..... Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this March 09, 2020, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Taylor Smith, Esq.
Assistant Attorney General
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March 09, 2020

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Patrick Dean Lowrance, #353834, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2018-CP-23-2514 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed by Patrick Dean Lowrance (Applicant) on April 23, 2018. The State (Respondent) made its return on September 7, 2018. An evidentiary hearing was convened before the undersigned at the Greenville County Courthouse on October 21, 2019. Applicant was present and was represented by R. Mills Ariail, Jr., Esquire. Respondent was represented by Assistant Attorney General Taylor Z. Smith of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf. Respondent called as witnesses Brian P. Johnson, Esquire, John V. S. Crangle, Esquire, and David S. Jones, Esquire. Following a thorough review of the record in its entirety and the testimony and evidence presented at the PCR hearing, this Court finds Applicant has failed to meet his requisite burden of proof and denies his application for post-conviction relief.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. During its March of 2012

term, the Greenville County Grand Jury indicted Applicant for two counts of attempted murder (2012-GS-23-1424; -1425), possession of a stolen motor vehicle (2012-GS-23-1422), the possession of a weapon commission of a violent crime (2012-GS-23-1426), and failure to stop for blue lights (2012-GS-23-1423). Applicant was represented by Brian P. Johnson, Esquire. Assistant Solicitor Lucas C. Marchant of the Thirteenth Circuit Solicitor's Office prosecuted the cases. On October 8, 2012, through October 11, 2012, Applicant proceeded to a jury trial with the Honorable Steven H. John, presiding. At the conclusion of that trial, the jury convicted Applicant of possession of a stolen vehicle, but was unable to reach a unanimous verdict as to the remaining offenses. Judge John declared a mistrial as to the indictments for attempted murder, possession of a weapon during the commission of a violent crime, and failure to stop for blue lights. Judge John sentenced Applicant to a suspended sentence of imprisonment for three years, one year of probation, with credit for time served, ordered Applicant undergo random drug and alcohol testing and complete seventy-five hours of public service employment or maintain full-time employment.

Johnson filed a timely notice of appeal on Applicant's behalf. Appellate Defender Robert M. Pachak of the South Carolina Commission on Indigent Defense – Division of Appellate Defense perfected Applicant's appeal, arguing Judge John erred in denying Applicant's motion for a directed verdict as to possession of a stolen vehicle due to the insufficiency of the evidence the vehicle was stolen. The South Carolina Court of Appeals affirmed in an unpublished opinion, citing. State v. Lowrance, Op. No. 2014-UP-439 (S.C. Ct. App. filed December 3, 2014) (per curiam) (citing State v. Lane, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013) (holding an appellate court must find the trial court properly submitted the case to the jury if there is any

direct evidence or substantial circumstantial evidence that reasonably tends to prove the defendant's guilty). The Remittitur was issued on December 19, 2014.

On January 7, 2013, the State called Applicant to trial again for the indictments for which Judge John had declared a mistrial. Johnson again represented applicant, as did John V. S. Crangle, Esquire. Applicant was tried by a jury with the Honorable Letitia H. Verdin presiding. At the conclusion of that second trial, the jury convicted Applicant as indicted on all counts. Judge Verdin sentenced Applicant to concurrent terms of imprisonment for twenty-eight years for the two attempted murders, five years for possession of a weapon during the commission of a violent crime, and three years for failure to stop for a blue light.

Johnson again filed a timely notice of appeal on Applicant's behalf. David S. Jones, Esquire,[1] perfected Applicant's appeal, arguing Judge Verdin erred in finding a law enforcement witness's identification of Petitioner was of sufficient reliability so as to be presented to the jury. The South Carolina Court of appeals affirmed Applicant's convictions in an unpublished opinion, finding the issue had not been preserved for appellate review. State v. Lowrance, Op. No. 2017-UP-154 (S.C. Ct. App. filed April 12, 2017) (per curiam). The Remittitur was issued on April 27, 2017.

[1] Jones has since become an Assistant Attorney General at the South Carolina Attorney General's Office.

CURRENT PROCEEDING

On April 23, 2018, Applicant, filed an application for post-conviction relief, in which he alleged that he was being held in custody unlawfully based on the following grounds:

1. Ineffective assistance of trial counsel;
    a. Failure to prepare and investigate for trial;
    b. Failure to preserve issues for appeal;
    c. Failure to conduct an independent investigation and properly review evidence with Applicant before trial; and
2. Ineffective assistance of appellate counsel;
    a. Failure to raise meritorious issues on appeal.

Respondent filed a return on September 11, 2019, requesting that an evidentiary hearing be held regarding Applicant's allegations. At the start of the evidentiary hearing before this Court on October 21, 2019, Respondent requested that Applicant specify for the record the grounds upon which he would move forward. Applicant specified that he would move forward upon the following claims only: (1) that trial counsel was constitutionally ineffective for failing to review discovery with Applicant, (2) failing to move to change the venue, (3) failing to object to the trial court's jury instruction on accomplice liability, and (4) failure to preserve issues for appellate review. Although the application for post-conviction relief claimed that Applicant had been afforded the ineffective assistance of appellate counsel and Jones was present as a witness, Applicant affirmed that he did not have any complaints against Jones and wanted to waive any claim against his appellate counsel. This Court finds that Applicant affirmatively waived any claims regarding the ineffective assistance of appellate counsel. This Court further finds that any allegations other than these specifically identified by Applicant at the start of his hearing have been waived and they will not be addressed herein.

Testimony at PCR Hearing

Applicant first testified at the PCR hearing on his own behalf. He testified Johnson and Crangle had been appointed to represent him in his second trial, although he did not know why two attorneys had been appointed. He dealt with Johnson mostly and talked with Crangle on two occasions. He testified he was arrested in October of 2011 and was never released on bond. He testified his second trial took place approximately thirty days after his first. He testified he met with Johnson and discussed the discovery in the case, with Johnson leaving the discovery with Applicant. He testified he was aware of the evidence the State had against him. He did not believe Johnson's review of discovery with him was thoroughly done, however. He testified he was able to ask Johnson and Crangle questions during their meetings, and testified he had a good understanding of the State's evidence against him. He testified he asked his attorneys to question two individuals with the nicknames of "Meat" (Meat) and "Tee" (Tee), whom he testified were his companions when he left the Comfort Inn. He testified he told Johnson and Crangle how to contact these two people, but that no one ever went to that location to talk to Meat and Tee. he testified he also wanted his attorneys to talk to other witnesses who were at the Comfort Inn. He testified he could not remember whether he asked his defense attorneys to request that Judge Verdin conduct a hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972). He testified he was never offered a plea deal and that he would have accepted it had one been offered. He testified he wanted a change of venue but that his attorneys told him that the venue could not be changed. He testified the trial court gave a jury instruction on the "hand of one, hand of all" because the State had argued it during his closing argument. He testified he would not have mentioned Meat and Tee during his testimony at trial if he had known at the time that the trial court would instruct the jury on accomplice liability as a consequence. He testified he did not know his testimony could

be used against him at trial. He believed that his attorneys should have objected to the State's reference during trial to Applicant's having received discovery. On cross-examination, Applicant testified he could not provide any information to this Court about Meat and Tee other than their nicknames. He testified he wanted the PCR court to know that he was completely innocent.

He testified he has been practicing law since November of 2012, being licensed and sworn in as a member of the South Carolina Bar approximately two months before Applicant's second trial. He testified he was Johnson's second chair during Applicant's second trial. He testified he was present for Applicant's first trial; however, his role was that of a law clerk as he was not yet a licensed attorney at that time. He testified his first meeting with Applicant was on the first day of Applicant's initial trial. He did not see Applicant again until Applicant's second trial. He testified Johnson had an investigator working for him in preparation for trial. He testified Applicant was offered a global plea deal from the State before the first trial in which Applicant would be required to plead guilty in exchange for a recommendation from the State that Applicant be sentenced to imprisonment for twenty-five years, but that Applicant rejected that offer. He testified Applicant did not want to enter plea negotiations after the conclusion of his first trial because Applicant was confident that he would be acquitted at the second trial since the first trial had resulted in four mistrials, and testified Crangle and Johnson likewise were excited at the results from the first trial. He testified the State did not make any additional plea offers after Applicant rejected that initial plea offer. He testified Applicant told them before the second trial of a potential witness named Irby who was at the Comfort Inn. Crangle testified he met this witness who told him she saw one man get into a car at the Comfort Inn and drive away. He testified this witness's statement contradicted Applicant's testimony from his first trial about the events that supposedly happened at the Comfort Inn. He testified Applicant told him to find a

police sketch of the man who had supposedly been involved in the shooting, which Applicant claimed to him to have seen in the media. He testified he tried unsuccessfully tried to find such a police sketch, going so far as to inquire about it with the Greenville County Sheriff's Department, the Thirteenth Circuit Solicitor's Office, and the South Carolina Law Enforcement Division. He testified he did not object to the Solicitor's comment during closing argument that Applicant had received discovery because he did not feel he was authorized to do so since he was second chair at trial, deferring to Johnson. He testified he believes the second trial resulted in convictions because the State had been able to uncover a new witness to testify Applicant was alone when he left the Comfort Inn and because the State was able to prepare for Applicant's testimony about Meat and Tee since the solicitor had heard Applicant's testimony at the first trial.

He testified did not know whether Applicant was aware of accomplice liability. He testified he was never involved in any discussions about a change of venue.

Johnson testified as a witness at the PCR hearing. He testified he has been practicing law since 2006, and is now in private practice, although he was working as a public defender at the time of Applicant's two trials. He did not remember the specific number of meetings he had had with Applicant, and quit keeping track of them after the first trial began. He remembered there being about ninety days between the two trials. He testified Applicant told him that two individuals named Meat and Tee were the ones who had shot at the police officers, but that Applicant admitted to being in the car during the car chase and to being at the apartment complex where the shooting occurred He testified he was not able to locate Meat or Tee, although he searched for them in local arrest records, the public index, and Applicant's discovery. He testified he believed Meat to be a nickname for "Demetrius" and Tee to be a

nickname for "Terrence", but his search of those names was similarly unfruitful. He testified he tried to get more information from Applicant about the two men whom Applicant claimed were the shooters, but Applicant did not know anything about the two other than their nicknames, and Applicant was unaware of their legal names. He testified he and his investigator could have done more to find the two men and question them if they had had more information from Applicant to go on. He testified he did a "good fact, bad fact" analysis with Applicant, and explained the evidence in the case that supported Applicant's story and the evidence that pointed towards Applicant's guilt. He testified he did not object to the State's comment in closing argument that Applicant had received discovery because he did not think the comment was objectionable or harmed Applicant's defense. He testified he believes in hindsight that he should have objected to the comment since Applicant was convicted because he would have wanted Applicant to have every chance at an acquittal at trial. When asked to explain the damaging evidence the State had against Applicant, he testified police found Applicant's fingerprints in the car that led officers on a chase and were found on the pistol recovered from under Applicant's bed, Applicant's blood was found at the scene of the shooting at the apartment complex, and the officers at the scene of the shooting did not see multiple parties enter or exit the complex as Applicant claimed.

On cross-examination, Johnson testified he believed he had preserved his objection to a law enforcement witness's identification of Applicant, and testified the identification was harmful to Applicant's defense. He testified he told Applicant that the State would be more prepared to counter Applicant's defense during the second trial as the solicitor had been present for Applicant's surprise testimony about Meat and Tee during the first trial. He testified it was Applicant's decision to testify in the second trial and he and Crangle tried to prepare Applicant to testify. He testified the State did not offer any plea deals other than a recommendation for a

twenty-five-year sentence. He testified his investigator and Crangle looked into the new witness from the Comfort Inn, which was found in between the two trials. He testified the new witness was obviously called at trial to contradict Applicant's testimony that Meat and Tee were in the car. He testified he does not think he and Applicant discussed accomplice liability, and that he was surprised that Judge Verdin allowed the jury instruction on "hand of one, hand of all." He testified he hoped the instruction's impact would be lessened if it caused the jury to doubt that Applicant was the actual shooter, contrary to the State's assertion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to scrutinize their credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "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, 466 U.S. at 686.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. at 668. First, 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). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "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 Petitioner 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.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 668. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the

wide range of professional competent assistance" required of a criminal defense attorney. Id. at 690.

Based on this standard set forth above, and the reasoning below, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel. The allegations are addressed fully below:

Trial Counsel was constitutionally ineffective for failing to review discovery with Applicant.

Applicant argues that Johnson and Crangle were constitutionally ineffective because they failed to review discovery with him. A defense attorney has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland, at 691. Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). A defense attorney's "[f]ailure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). An applicant alleging that his attorney failed to prepare for the case must show how additional preparation would have resulted in a different outcome. Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged

conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014).

The testimony of both Johnson and Crangle indicated that they had investigated and prepared for both of Applicant's trials. Although it is not this Court's task to evaluate the performance of counsel during Applicant's initial trial, the reality that Applicant's second trial, which was called a few months after the initial trial, concerned offenses that had been tried in the initial trial gives this Court justification to take notice of the cumulative nature of the investigation done by counsel for the two trials. Johnson's testimony at the PCR hearing indicated he had searched for the two men whom Applicant blamed for the crimes, analyzed the value of distinct pieces of evidence in the prosecution's case, discussed with Applicant the evidence harmful and helpful to his defense, and worked with Applicant to prepare for his testimony at trial. Crangle testified at the hearing that he had met with a witness before trial in order to gauge whether the witness would provide testimony at trial harmful or helpful to the defense.

Applicant testified at the PCR hearing that he met with Johnson and discussed the discovery in the case, with Johnson leaving the discovery with Applicant. He testified he was aware of the evidence the State had against him. He did not believe Johnson's review of discovery with him was thoroughly done, however. He testified he was able to ask Johnson and Crangle questions during their meetings, and testified he had a good understanding of the State's evidence against him.

This Court finds counsel adequately reviewed the evidence and discovery with Applicant, and adequately prepared for trial. The testimony from the two attorneys demonstrates that they conducted a thorough investigation in the matter, review the evidence with Applicant, and made

Applicant aware of the strengths and weaknesses of his defense. Applicant himself admits that Johnson reviewed discovery with him, but argues that the Johnson's efforts here were not adequate. Applicant, though, has failed to present any evidence indicating that he would have gained any benefit from additional discovery review with his attorneys and has failed to show any prejudice he has suffered from not having even more time spent in trial preparation. The South Carolina Supreme Court has found a similarly unsupported allegation of inadequate discovery review wanting. See Jackson v. State, 329 S.C. 345, 353, 495 S.E.2d 768, 772 (1998) (finding the PCR court erred in finding counsel ineffective for failing to "adequately and sufficiently meet with the Applicant and permit the Applicant to fully participate in the defense" because Jackson failed to present any evidence of benefit he would have accrued had counsel done more preparation and failed to establish that any lack of preparation on the part of counsel prejudiced him) (citations omitted). This Court finds Applicant has failed to demonstrate Johnson and Crangle were constitutionally ineffective for failing to review discovery with Applicant because he has failed to show any deficiency in the performance of counsel and any resulting prejudice. This allegation is denied and dismissed with prejudice.

Trial counsel were constitutionally ineffective for failing to move to change the venue of Applicant's trial.

Applicant argues his attorneys were constitutionally ineffective for failing to move for a change of venue. This Court finds Applicant has not presented any evidence that supports his allegation; on the contrary, Applicant testified only that he wanted a change of venue and that his attorneys said it could not be done.

In State v. Patterson, 324 S.C. 5, 12-14, 482 S.E.2d 760, 763-64 (1997), the South Carolina Supreme Court considered whether a trial court had abused its discretion in denying a

defendant's motion to change the venue, and held the court had not done so, agreeing with the trial court that the public's passions were not so strong so as to justify a believe that the voir dire responses of the jurors were not trustworthy. In Patterson, the defendant was a young, black male being tried in Lexington County for the murder and armed robbery of a sixty-five-year-old, white man. Id. at 11-12, 482 S.E.2d at 763. Patterson argued he was entitled to a change of venue because jurors in Lexington County had a racial bias against black defendants and he would suffer prejudice at trial due to unfavorable pre-trial publicity from a newspaper article that ran statewide on the morning of the opening day of Patterson's jury selection. Id. at 12-14, 482 S.E.2d at 763-64. In analyzing Patterson's argument, our Supreme Court noted Patterson had not presented any evidence about the details of the cases, juries, or aggravating and mitigating circumstances involved in the cases he used to support his claim of the racial bias of jurors in Lexington County and the trial court had questioned potential jurors sufficiently to uncover those with prior knowledge about the case or bias against Patterson. Id.

Similarly, Applicant has failed to present evidence that would support the argument that he was entitled to a change of venue. Applicant has not shown that there was any negative pre-trial publicity that could have influenced his jurors. Applicant's mere wish to be tried elsewhere has fallen far short of the burden required to show that his defense attorneys should have sought such a change. Furthermore, Applicant has made no attempt to show how counsels' failure to move for a change of venue caused him to suffer any prejudice at trial. Even if Applicant did request that Johnson and Crangle seek a change of venue, he has not shown any reason that they would have been obligated to move for a change upon his request.

This Court finds Applicant has failed to demonstrate Johnson and Crangle were constitutionally ineffective for failing to move for a change of venue because he has failed to

show any deficiency in the performance of his attorneys and any resulting prejudice. This allegation is denied and dismissed with prejudice.

Trial Counsel was constitutionally ineffective for to object to the trial court's instruction the jury on accomplice liability.

Applicant argues his trial counsel should have objected to the trial court's instructing the jury on accomplice liability when the instruction was not warranted based upon the evidence presented at trial. During the charge conference, the State requested a jury instruction on accomplice liability because Applicant's testimony was that he was merely present at the scene of the shooting. Tran. 622. Johnson disagreed with the request, arguing that there had not been any testimony at trial that Applicant participated in the crimes with another. Tran. 622, 625-27. The trial court overruled Applicant's objection to the instruction, and informed the parties that it would charge the jury on accomplice liability. Tran. 627. Before closing arguments began and the trial court charged the jury, Johnson against objected to the inclusion of an instruction on accomplice liability. Tran. 628. The trial court charged the jury as follows:

> If a crime is committed by two or more people who were acting together in committing a crime, the act of – the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the acts done in carrying out the common plan and purpose. If two or more people were acting together, assisting each other in committing the offense, the act of one is the act of all or as it sometimes is said, the hand of one is the hand of all. Prior knowledge that a crime is going to be committed without ore is not sufficient to make a person guilty of that crime. Mere knowledge that another person is going to commit a crime, even if the defendant is present when the crime is committed is not sufficient to convict the defendant as a principle.
>
> Guilt is a principle that is shown by actual or constructive presence at the scene as a result of prior arrangement. Therefore, a finding of a prior arranged plan or common scheme is necessary for a finding of guilty as a principle. The State must prove beyond a reasonable doubt by competent evidence the theory of the hand of one is the hand of all. A principle in a crime is one who either actually commits the crime or who is present aiding, abetting or assisting in the committing of a

> crime – of a crime. When a person does an act in the presence of and with the assistance of another, the act is done by both. Where two or more acting with a common plan or intent are present at the commission of a crime, it does not matter who actually commits the crime. All are guilty. The hand of one is the hand of all. Present at the commission of a crime needs to be sufficiently near to aid and abet and assist in the commission of a crime. However, mere presence at the scene of a crime is not sufficient to convict one as a principle on the theory of aiding and abetting. Intent is also a necessary element for there must have been a common design or intent to commit the crime and the crime must have been committed pursuant thereto with the person aiding and abetting by some overt act.
>
> . . .
>
> The burden is on the [S]tate to prove every element of the crime charged. If you find, after reviewing all the evidence, that the State has proved the defendant was only present at the scene of the crime and that they have not proved beyond a reasonable doubt any other participation of the crime, then you must find the defendant not guilty.

Tr. 682-84.

After the jury was charged, the trial court asked if there were any additional objections to its instructions, and Johnson answered in the negative. Tran. 691.

Applicant has failed to demonstrate that Johnson's failure to further argue the jury instruction was improper after the jury was charged caused him to suffer prejudice. When an issue was unpreserved for appellate review, a PCR court must examine whether the applicant suffered prejudice from the lack of preservation by analyzing the merits of the issue and considering whether the applicant has established that the outcome would have been different had the issue been preserved. See Milledge v. State, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018) (instructing that the PCR court is to evaluate prejudice when considering an applicant's claim that counsel failed to preserve an issue for appellate review by viewing "the trial court's ruling through the same lens that would be applied on appeal . . . ") (citation omitted); see also McHam v. State, 404 S.C. 465, 474-82, 746 S.E.2d 41, 46-50 (2013) (holding the PCR court

erred in finding counsel was not deficient in failing to preserve an issue for appellate review but agreeing with the PCR court that McHam failed to establish prejudiced because the Fourth Amendment claim failed on the merits), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). When an appellate court is reviewing a trial court's jury instructions for error, it must consider the instructions as a whole "in light of the evidence and issues presented at trial." Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011) (citation omitted).

When one is determining whether an accomplice liability charge is warranted, "the question is whether there is any evidence that another co-conspirator was the shooter and [Applicant] was acting with him when the" crime occurs. Id. at 237, 712 S.E.2d at 439 (citing State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000)). The theory of "hand of one, hand of all" provides that:

> [O]ne who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.

Barber v. State, 393 S.C. 232, 236-37, 712 S.E.2d 436, 439 (2011) (citing State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010)).

Here, the trial court gave an accurate instruction to the jury on accomplice liability. See State v. Condrey, 349 S.C. 184, 195, 562 S.E.2d 320, 325 (S.C. Ct. App. 2002) (finding the trial court eliminated the danger of juror confusion by cautioning jury that a defendant's mere presence at a crime scene did not prove guilt). The trial court's instruction was warranted based upon the evidence presented at trial. Applicant testified at trial that he was with "Meat" and "Tee" when the shooting at the police officers began, having been with them earlier at the Comfort Inn and in the Yukon. Tran. 564, 568-72, 575. He testified he was standing in a breezeway at the Berkeley

Pointe apartment complex with Meat and Tee, that Meat was holding a pistol, and that Meat began firing in the officers' direction. Tran. 575-78. He testified Meat asked him to take the gun since police had seen Meat's face but had not seen Applicant's, and acknowledged he took the weapon with him when he left the scene. Tran. 581-82. While being cross-examined by Johnson, a law enforcement witness testified a witness at the scene of the shooting said he had observed two black males leaving the apartment complex quickly, one of whom had long, braided hair. Tran. 534.

The State did not argue that Applicant was guilty under a theory of accomplice liability; rather, the State argued that Applicant was the shooter and that there were no other participants. The State argued Applicant was the only person in the Yukon. Tran. 652-53. The State pointed out that the police dog did not discover multiple tracks leaving away from the scene of the shooting at the apartment complex. Tran. 654. The State noted the police could not hear anyone arguing at the apartment complex, despite Applicant's testimony that he and Meat and Tee were arguing with one another in the open air. Tran. 657. The State pointed out that the police testified they saw only one person in the breezeway during the shooting. Tran. 657. The State specifically argued that Meat and Tee do not exist, and that Applicant made them up in order to shift the blame for his crimes to someone else. Tran. 658-59. In conclusion, the State argued that the evidence established that Applicant "[was] the one [who] shot at Office Lane and Officer Cobb. He's the one [who] ran from Officer Cruell." Tran. 672. In contrast, Johnson argued that Meat and Tee were responsible for the crimes, and that Applicant was merely present. Johnson argued Applicant was a passenger in the Yukon, with someone else driving. Tran. 631. Johnson argued a law enforcement witness had misidentified Applicant as the man walking through the hotel lobby before the car chase began. Tran. 632-33. Johnson argued the police were not able to testify to

the number of people in the breezeway of the apartment complex during the shooting. Tran. 633-34. Johnson argued Applicant's testimony about Meat and Tee was corroborated by the fact that he was not found to have been in possession of the keys to his room at Comfort Inn, which indicated that one of his companions had them. Tran. 636-37. Johnson argued he believed Meat and Tee did exist, even though the State argued that they did not. Tran. 641.

Applicant has failed to show that there is a reasonable likelihood that the outcome of trial would have been different had Johnson preserved his objection to the trial court's instruction on accomplice liability. This Court finds the instruction was proper; even if it was not proper, when viewed in connection with the instructions as a whole and in light of the arguments made by the parties at trial, which did not allege Applicant acted in concert with Meat or Tee or someone else in leading police on a chase and firing at them with a firearm. The State's theory was that Applicant was the sole perpetrator of the crimes, and Johnson's argument was that Meat and Tee were responsible, not Applicant.

This Court finds that neither Johnson nor Crangle was constitutionally ineffective for failing to preserve for appellate review the trial court's jury instruction on accomplice liability because Applicant has failed to demonstrate that there is a reasonable likelihood that Applicant would have prevailed on the merits had either done so. This allegation is denied and dismissed with prejudice.

Trial Counsel was constitutionally ineffective for failing to preserve issues for appellate review.

Applicant argues his defense attorneys were constitutionally ineffective for failing to preserve for appellate review the objection to the trial court's finding a law enforcement witness's identification of Applicant was of sufficient reliability so as to be presented to the jury.

During Applicant's first trial, which resulted in a mistrial, the first trial court conducted a hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972), in order to ascertain whether it was proper for a law enforcement witness to make an in-court identification of Applicant. The State, Johnson, and the court questioned the witness in camera. The court found the in-court identification was proper and denied Johnson's motion to suppress. At the start of Applicant's second trial, Johnson attempted to renew his objections from Applicant's first trial, which resulted in a mistrial. The second trial court indicated it believed it was bound by the evidentiary rulings made by the presiding judge in the first trial. Johnson did not move to suppress during the witness's in-court identification of Applicant in the second trial, request a Biggers hearing, or otherwise object to the identification. When Applicant argued on appeal afterwards that the trial court erred in allowing the in-court identification, the South Carolina Court of Appeals found the issue had not been preserved for appellate review. State v. Lowrance, Op. No. 2017-UP-154 (S.C. Ct. App. filed April 12, 2017) (per curiam) (citing State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (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].")).

When an issue was unpreserved for appellate review, a PCR court must examine whether the applicant suffered prejudice from the lack of preservation by analyzing the merits of the issue and considering whether the applicant has established that the outcome would have been different had the issue been preserved. See Milledge., at 380, 811 S.E.2d at 804; see also McHam, at 474-82, 746 S.E.2d at 46-50. An out-of-court identification of the defendant violates due process and must be suppressed when the identification procedure used by police was impermissibly suggestive and conducive to a substantial likelihood of misidentification. State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012); State v. Dukes, 404 S.C. 553, 557-58,

745 S.E.2d 137, 139 (Ct. App. 2013). A witness's subsequent in-court identification is inadmissible "if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (emphasis added). Trial courts employ a two-pronged inquiry to determine whether due process requires suppression of an out-of-court eyewitness identification. Liverman, 398 S.C. at 138, 727 S.E.2d at 426. First, the court must determine whether the identification resulted from "unnecessarily suggestive" police procedures. Biggers, 409 U.S. at 198-99; Liverman, 398 S.C. at 138, 727 S.E.2d at 426; Traylor, 360 S.C. at 81, 600 S.E.2d at 526. If the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there and the court does not need to consider the second prong. Id. at 557-58, 745 S.E.2d at 139. The defendant bears the burden of proving the identification procedure was impermissibly suggestive. Id. at 561, 745 S.E.2d at 141 ("Our supreme court has never placed the burden of disproving suggestiveness on the State. The Fourth Circuit, whose decisions regarding federal constitutional law are binding on us, has held the defendant bears the burden of proving the identification procedure was impermissibly suggestive.").

If the court finds, however, that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless "so reliable that no substantial likelihood of misidentification existed." Liverman, 398 S.C. at 138, 727 S.E.2d at 426. The inquiry must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification. State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007); Singleton, 395 S.C. at 13-14, 716 S.E.2d at 335-36. When determining the likelihood of misidentification, courts must evaluate the totality of the circumstances using the following factors: (1) the witness's opportunity to view the perpetrator

at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Turner, 373 S.C. at 127, 644 S.E.2d at 697; Singleton, 395 S.C. at 13-14, 716 S.E.2d at 335-36.

A procedure cannot be suggestive where it was not "made under suggestive circumstances arranged by law enforcement." Liverman, 398 S.C. at 134, 727 S.E.2d at 423 (emphasis added). At trial, the identifying witness was a law enforcement officer who decided of her own accord to look up Applicant's photograph. Tran. 119-20. Her testimony was that no one presented her with the photograph or asked her to make the identification. Instead, she remembered the person she saw in the hotel lobby before the police chase began and sought out a photograph of the individual who was later arrested to see if he was that person she had seen. Tran. 119-21. There was nothing suggestive about this process because it was not arranged by law enforcement. The South Carolina Supreme Court has affirmed a trial court's finding that an identification procedure was not unduly suggestive precisely because it was not the result of "an act by the police of a suggestive manner." Dukes, 404 S.C. at 562, 745 S.E.2d at 142. In Dukes, the officer suggested the witness look at photographs in a "photo book" to see if he could identify the person who shot the victim. Id. at 556, 745 S.E.2d at 138. However, when the officer got up from the table to get the book, the witness saw other photographs in a file the officer left on the table and identified the defendant from one of the photographs in the officer's file. Id. The Supreme Court focused on the witness's testimony that the officer "did not present the photos to [the witness] or instruct him to choose one." Id. The trial court concluded the identification procedure was not impermissibly suggestive because: "It does not appear, even taking into consideration the report of the investigator, that there was any corrupting effect, that there was

any intentional act, that there was any deliberate act, there was any act by the police of a suggestive manner." Dukes, 404 S.C. at 562-63, 745 S.E.2d at 142. Here, there likewise was not an act by the police of a suggestive manner. Since there was evidence to support the first trial court's decision, that court did not abuse its discretion in ruling the procedure was not impermissibly suggestive. Dukes, 404 S.C. at 563, 745 S.E.2d at 142.

This Court need not consider the second prong of Biggers. Id. Nevertheless, this Court finds there was also sufficient evidence to support a conclusion that the out-of-court identification was reliable under the totality of the circumstances. The witness testified she observed Applicant for approximately one minute in a well-lit hotel lobby and "immediately recognized" him when she looked at his photo. Tran. 105-08, 121. The witness had a good opportunity to view Applicant as he passed her. Her attention was likely heightened because she was investigating a possible stolen vehicle. Tran. 97. The witness gave a partially accurate description of the person, identifying him by both gender and race. Although she said he looked to be around forty years of age, she also said he might have been younger. Tran. 106. Finally, the identification was made only one day after the crime. Under the totality of the circumstances, Officer the witness's out-of-court and in-court identifications were both reliable. Therefore, the second trial court properly admitted the identification testimony.

Even if the witness's identification of Applicant was improper, this Court finds Applicant has failed to demonstrate that there is a reasonable likelihood that the outcome of his trial would have been different had the identification testimony not been heard by the jury. The witness's identification placed Applicant at the Comfort Inn before the police chase began, but Applicant admitted at trial through his own testimony that he was at the hotel before the chase, in the Yukon during the case, and at the apartment complex at which the police were subjected to

gunfire. The other evidence against Applicant was significant. Police found Applicant's wallet, social security card at the scene of the shooting at the apartment complex, found Applicant's driver's license in a room registered to "Dean Lowrance" at the Comfort Inn, discovered Applicant was suffering from a gunshot wound when they arrested him after the shooting, found Applicant's fingerprints on a box of cartridges in the Yukon, found Applicant's DNA on the weapon used in the shooting, and found Applicant's blood at the scene of the shooting and on the sweatshirt Applicant was wearing at the time. In light of all this, it is not likely that the witness's identification of Applicant was the man she saw in a hotel lobby before the car chase began had any appreciable effect on the jury's verdict, particularly when Applicant admitted to being at the hotel.

This Court finds neither Johnson nor Crangle was constitutionally ineffective for failing object to the law enforcement witness's identification of Applicant as the man who she saw in the hotel lobby. Applicant has failed to demonstrate that either attorney should have objected to the testimony as it was proper identification testimony. Applicant has failed to demonstrate that the objection would have been successful and that there is a reasonable likelihood that the outcome of his trial would have been different had his attorneys objected. This Court finds that, even if Applicant's attorneys had properly objected and preserved the issue for appellate review, Applicant would not have been successful on appeal. This allegation is denied and dismissed with prejudice.

CONCLUSION

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

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that, if the applicant wishes to seek appellate review and is represented by post-conviction relief counsel, that counsel must serve and file a notice of appeal on the applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief is dismissed with prejudice; and

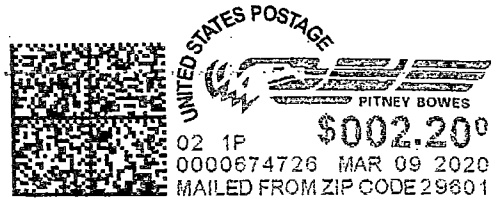
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 14th day of February, 2020.

EDWARD W. MILLER
Presiding Judge

Greenville, South Carolina.

Copy mailed to
Attorney General / Mills Aviad
on 2 / 18 / 2020



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