

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

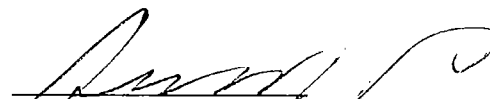
2019-CP-23-0484

Carl Stanley Aiken, ..... Appellant,  
v.  
The State, ..... Respondent.

NOTICE OF APPEAL

Carl Stanley Aiken appeals the Honorable Edward W. Miller's Order of Dismissal filed January 27, 2020.

This 27 day of April, 2020.

  
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S.C. SUPREME COURT



## **II. PROCEDURAL HISTORY**

Applicant is **not** presently confined in the South Carolina Department of Corrections. During its May 2016 term, the Greenville County Grand Jury indicted Applicant for exploitation of a vulnerable adult (2015-GS-23-3451). The Greenville County Grand Jury subsequently indicted Applicant for unlawful practice of a regulated profession (2016-GS-23-06461A) and obtaining goods under false pretenses (2016-GS-23-06460A) during its July 2016 term. These charges stem from Applicant's receipt of payments from an elderly victim for handiwork that was never performed.

On April 3, 2017, the State called Applicant's case to a jury trial for exploitation of a vulnerable adult and obtaining goods under false pretenses before the Honorable R. Lawton McIntosh. Dorothy Manigault, Esquire represented Applicant and Assistant Solicitors Jonathan Gregory and Jenna Hendricks prosecuted the case.

### **A. Summary of Evidence Adduced at Trial**

Applicant began performing handiwork for the victim, Raymond Poore (Victim), in 2008. Then on December 1, 2012 through February 23, 2013, Applicant allegedly performed more extensive home repairs on Victim's house, such as installing gutters, exterior painting, etc. Applicant received payment from Victim by check. Applicant received thirteen checks from Victim over three months, which totaled \$14,250. However, only \$6,950 worth of the checks contained legible memos, such as "house repair."

Victim's first cousin, Terry Ford, had power of attorney over Victim beginning in 2012 when Victim was diagnosed with dementia. (Trial Tr. 126-127). Ford testified that in March of 2013, Victim's condition reached a point where Ford hired someone to stay with Victim during the day. Ford testified she helped Victim pay his bills and balance his checkbook after she was

given power of attorney, which included the three-month period where Applicant was doing work on Victim's house. (Trial Tr. 81-82).

When Ford noticed several checks for large amounts written to Applicant, Ford called Applicant to ask him about the work being done. (Trial Tr. 83). Ford testified that what Applicant told her "just was not matching up to what was being done around the house." (Trial Tr. 83). Ford saw Applicant once or twice at Victim's house, but could not tell what he was doing at the time. (Trial Tr. 84). Ford testified she noticed a few small spots were painted outside the house, but not enough that was worth what Applicant was being paid. (Trial Tr. 84-85). Ford asked Applicant to provide her with receipts for the supplies he purchased, but Applicant never provided them. (Trial Tr. 86-87). Ford then took Victim to the bank and then the Sheriff's Department. (Trial Tr. 88). The investigator Ford spoke with asked Ford to have a licensed contractor take a look at the property and make an estimate as to the value of the work performed versus what had been paid. (Trial Tr. 157). Ford then contacted a license contractor, Jerry Brown, who went to Victim's house to evaluate the work Applicant had allegedly done. (Trial Tr. 88).

Brown testified Ford was a friend of his who asked him to "come over and look at a job and see what was done and what wasn't done." (Trial Tr. 145). When they arrived at the house, Brown testified Applicant called Ford. (Trial Tr. 145). Brown testified he spoke with Applicant briefly about receipts, but Applicant did not provide any information. (Trial Tr. 145). Regarding the painting, Brown testified that only the only part of the home that appeared to be painted was a spot in the front approximately two by six feet and on the front column of the house. (Trial Tr. 146). Brown testified that the trim around the windows, the front door, and the rest of the columns were not touched. (Trial Tr. 146). Brown also testified that new gutters were not

installed, and that no work had been done to the foundation. (Trial Tr. 146). Brown testified he did not check the roof while he was there. (Trial Tr. 147). Brown testified that the only tree work that was done was a limb about three inches around was cut down. (Trial Tr. 147).

Ford's granddaughter, Elizabeth Eudy, who also spent a substantial amount of time with Victim, testified that the "house looked the same as it did when [she] was little." (Trial Tr. 102). Eudy testified that the house looked "run-down," and needed to be sanded and re-painted. (Trial Tr. 102). Victim's neighbor, Dennis Larson, also testified. (Trial Tr. 107). Larson testified that Ford asked him to start looking after Victim two days a week starting in December 2012. (Trial Tr. 108). Larson testified he routinely took Victim to lunch because Victim could no longer drive. (Trial Tr. 109-110). The first time Larson went to Victim's house was in March of 2013, after Applicant had allegedly completed all the work. (Trial Tr. 111). Larson testified that the exterior paint was dirty, and guessed it had not been repainted for seven or eight years. (Trial Tr. 111). Larson testified he had never seen Applicant at Victim's house. (Trial Tr. 111).

#### **B. Applicant's Trial Testimony**

Applicant testified he met the victim, Raymond Poore (Victim), around 2008 when Applicant was performing handiwork on a house in Powdersville. (Trial Tr. 193). Victim and his wife approached Applicant, and asked Applicant if he would be interested in doing some work on their house. (Trial Tr. 193). Applicant testified he did some basic work for Victim later that year, such as cleaning out the gutters and trimming trees in the front yard. (Trial Tr. 193). In November of 2012, after Victim's wife passed away, Victim told Applicant he needed more extensive work done on his house, such as painting the exterior. Applicant testified that at that time, Victim was acting normal and driving around town just as he had back in 2008. (Trial Tr. 193).

Before Applicant began working, the two sat down to figure out pricing and go over exactly what Victim wanted done. Applicant testified that Victim gave him the first check, for \$1,250, to “get started” buying the paint and whatever else he needed. (Trial Tr. 216). Applicant testified that after he finished pressure washing the house to prepare for painting, he told Victim he would need payment as he went along. (Trial Tr. 215). Applicant testified he removed Victim’s storm windows, cleaned and re-glazed them, replaced and painted the fascia boards, and painted all the windows. (Trial Tr. 195–196). The solicitor then went over the checks, and Applicant specified the work he did in exchange for each check. Applicant testified that all the “work was completed when [Victim] gave [him] the last check around February 23<sup>rd</sup>.” (Trial Tr. 203).

Applicant testified he never spoke with Ford or Brown. (Trial Tr. 202). Applicant testified he never saw anyone between November of 2012 and February 2013 at Victim’s house taking care of him. (Trial Tr. 203). Applicant testified that Victim never told him about any medical problems. (Trial Tr. 204).

### **C. Verdict & Subsequent Proceedings**

On April 4, 2017, the jury returned verdicts on both indictments, finding Applicant guilty of obtaining goods under false pretenses and not guilty of exploitation of a vulnerable adult. Judge McIntosh sentenced Applicant to ten years’ imprisonment suspended upon the service of four years’ imprisonment followed by five years’ probation. Judge McIntosh also ordered Applicant to pay \$14,250.00 in restitution to the victim.

Ms. Manigault filed a timely notice of appeal on Applicant’s behalf. Appellate Defender Robert M. Pachak perfected Applicant’s appeal by filing an *Anders*<sup>1</sup> brief with the Court of

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<sup>1</sup> *Anders v. California*, 386 U.S. 738 (1967).

Appeals. Applicant then filed a *pro se* brief.<sup>2</sup> On September 1, 2018, the Court of Appeals dismissed Applicant's appeal. *State v. Aiken*, Op. No. 2018-UP-375. (S.C. Ct. App. filed June 13, 2018). The case was remitted back to the circuit court on October 26, 2018. Applicant timely commenced this PCR action on February 1, 2019.

On April 17, 2019, the Court convened an evidentiary hearing at the Greenville County Courthouse before the Honorable Alex Kinlaw, Jr. Applicant was not present; however, Susannah Ross, Esquire, was present on Applicant's behalf. Assistant Attorney General Samuel L. Key represented the State. Judge Kinlaw dismissed the application on the State's motion for failure to prosecute, but gave Applicant thirty days to respond with a sufficient reason as to why the dismissal should not become final. Applicant, through PCR counsel, filed a timely 59(e) motion, indicating that Applicant did not receive notification of the hearing through no fault of his own. The State consented to Applicant's request to rescind the order. Judge Kinlaw issued an order vacating the order of dismissal on July 31, 2019.

### **III. ISSUES BEFORE THIS COURT**

In his original PCR application, Applicant alleged he was being held in custody unlawfully due to ineffective assistance of counsel. Specifically, Applicant alleged ineffective assistance of trial counsel based on:

1. Failure to move to quash his indictments, including an argument that Applicant was on trial for two indictments for the same crime/course of conduct
2. Applicant "failed to get a fair trial" because he was not able to confront his victim who did not appear at his trial

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<sup>2</sup> While Applicant's direct appeal was pending, Applicant filed a PCR application (2017-CP-23-05234). The Honorable Perry H. Gravely issued an order dismissing the application without prejudice, with leave for Applicant to refile for post-conviction relief when his direct appeal concluded.

Pursuant to Rule 71.1, SCRPC, Applicant, through PCR counsel, amended his application to include the following claims:

1. Ineffective assistance of trial counsel for:
  - a. "Failing to argue in her motions for directed verdict and a new trial on the charge of obtaining goods under false pretenses that 'A promise to do something in the future cannot constitute the basis of a prosecution for obtaining goods under false pretenses.' See State v. McCutcheon, 284 S.C. 524, 525, 327 S.E.2d 372 (Ct.App.1985) & State v. Dickinson, 528 S.E.2d 675, 339 S.C. 194 (S.C. App., 2000);"
  - b. "Failing to request a jury instruction that 'A promise to do something in the future cannot constitute the basis of a prosecution for obtaining goods under false pretenses.' See State v. McCutcheon, 284 S.C. 524, 525, 327 S.E.2d 372 (Ct. App. 1985) & State v. Dickinson, 528 S.E.2d 675, 339 S.C. 194 (S.C. App. 2000);"
  - c. "Failing to argue for a verdict form requiring a finding on the value of the property when the State offered no evidence of the terms of any agreement between the alleged victim and the Applicant relying only on circumstantial evidence of an agreement based on the notations of the memo lined of the checks. While thirteen checks totaling \$14,125 were cashed by the Applicant, only \$6950 worth of checks contained legible memos. See transcript pp. 186 & pp. 58-62."
2. "Applicant also alleges ineffective assistance of appellate counsel for failing to brief argument that the trial court erred in denying the directed verdict motion and motion for a new trial on the charge of obtaining good under false pretenses because the ruling was based on an error of law. The court denied the motions stating, 'That evidence was, he agreed to do work that wasn't performed...' (Transcript p. 294, 1. 7). That is an error of law because 'A promise to do something in the future cannot constitute the basis of a prosecution for obtaining goods under false pretenses.' See State v. McCutcheon, 284 S.C. 524, 525, 327 S.E.2d 372 (Ct. App.

1985) & State v. Dickinson, 528 S.E.2d 675, 339 S.C. 194 (S.C. App. 2000);”

3. “Finally, Applicant also argues Due Process violations due violations of his rights to a fair trial guaranteed by the Fifth and Fourteenth Amendment of the Constitution of the United States & Art. I Sec. 3, 10, & 14 of the South Carolina Constitution.”

At the outset of the evidentiary hearing, PCR counsel expressly withdrew all allegations pled in the original PCR application. To the extent the allegations set forth in Applicant’s original application can be construed as separate grounds for relief from the grounds stated at the PCR hearing, this Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

#### **IV. STANDARD OF REVIEW**

An applicant may seek PCR upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed them by the Sixth and Fourteenth Amendments to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984); *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013); *see generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a PCR action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRPC; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); *State v. Pendergrass*, 270 S.C. 1, 4, 239 S.E.2d 750, 751 (1977). The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel’s performance was deficient; and second, that the deficient performance prejudiced the applicant. *Id.* 668; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is “necessarily linked to the practice and expectations of the legal community.” *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S. Ct. 1473, 1482, 176 L. Ed. 2d 284 (2010). In order to prove deficient performance, the applicant must show counsel’s representation fell below an objective standard of “reasonableness under prevailing professional norms.” *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation

within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

*Strickland*, however, “does not guarantee perfect representation[—]only a ‘reasonably competent attorney.’” *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (quoting *Strickland*, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel’s conduct “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686. Just as there is “no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.” *Harrington*, 562 U.S. at 110.

Accordingly, “[j]udicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Strickland*, 466 U.S. at 689; see also *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. *Id.*

The second, or “prejudice” prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691–92. In order to prove prejudice, an applicant must demonstrate counsel’s deficient performance prejudiced the applicant such that

“there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Thus, it is not enough “to show the errors had some conceivable effect” on the outcome of the proceeding—counsel’s errors must be “so serious as to *deprive the defendant of a fair trial.*” *Id.* at 687 (emphasis added). Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

The performance and prejudice standards, however, “do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Strickland*, at 696. Moreover, “there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.” *Id.* at 697. The court “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

#### **V. FINDINGS OF FACT & CONCLUSIONS OF LAW**

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in this action incorporated by way of the State’s return, this Court proceeds to the claims raised in

the amended application and finds each to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

- 1. Ineffective assistance of trial counsel for failing to argue in the motions for a directed verdict and failing to request a jury instruction that, “A promise to do something in the future cannot constitute the basis of a prosecution for obtaining goods under false pretenses.”**

In the amended application, Applicant first alleges Trial Counsel was ineffective for failing to argue in the motions for a directed verdict and new trial, and failing to request a jury instruction that, “A promise to do something in the future cannot constitute the basis of a prosecution for obtaining goods under false pretenses.” Applicant cites *State v. McCutcheon*, 284 S.C. 524, 525, 327 S.E.2d 372 (Ct. App. 1985), and *State v. Dickinson*, 528 S.E.2d 675, 339 S.C. 194 (S.C. App. 2000), in support of his argument.

This Court disagrees, and finds Counsel was not deficient based on Counsel’s testimony that she based her trial strategy on the theory that Applicant performed all the work for the money received. This strategy is consistent with Applicant’s testimony at trial that all of the work was completed by the time Applicant received the last check from Victim. (Trial Tr. 203). Thus, no “future promise” existed.

A reviewing court “must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed at the time of counsel’s conduct.” *Strickland*, 466 U.S. at 690. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. Thus, an applicant making a claim of ineffective assistance “must identify the acts or omissions of

counsel that are alleged *not* to have been the result of reasonable professional judgment.” *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then “determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Id.*

The *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; *see also Harrington*, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one. *Harrington*, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” *not* whether it deviated from best practices or most common custom. *Id.* (quoting *Strickland*, 466 U.S. at 690) (emphasis added).

Trial Counsel testified that she moved for a directed verdict on the basis that the state had not proven the elements of the charged crimes. Trial Counsel challenged the existence of an agreement because the State did not solicit testimony from anyone with direct knowledge of an agreement between Victim and Applicant. (Trial Tr. 181). The State admitted that it was relying on exclusively circumstantial evidence of the agreement. (Trial Tr. 186–187). The trial court took the matter under advisement, but ended up denying Counsel’s directed verdict motion.

At the PCR hearing, Trial Counsel testified that she did not argue nor did she request a jury instruction that a promise to do something in the future cannot be the basis of false

pretenses. As discussed above, Trial Counsel's strategy was not based on the theory that Applicant made any promise regarding future work. Trial Counsel's theory was that Applicant completed the work as he went along, and thus no false pretenses existed.

Applicant testified that Victim would have corroborated his version of events at trial, which he told Trial Counsel. Applicant further testified that he believed Victim as diagnosed with dementia after Applicant had completed the work for him. Applicant testified, as he did at trial, that Victim never indicated that he had dementia or any other mental health issue. When Victim did not appear at trial, Trial Counsel testified that, although she had anticipated Victim testifying, she did not believe Victim's testimony would have been particularly helpful to Applicant given his dementia. Trial Counsel believed the jury would have found the Victim not credible. However, Trial Counsel nonetheless argued during her directed verdict motion that Applicant was denied his right to confront his accuser. (Trial Tr. 181). The trial court denied this motion, finding that the confrontation clause was not implicated because the State never attempted to introduce testimony from Victim. (Trial Tr. 182).

Trial Counsel testified that part of her trial strategy was challenging the State's lack of direct evidence regarding any agreement between Applicant and the victim. At the PCR hearing, Trial Counsel pointed out that she argued that the State's witnesses had no direct knowledge of any agreement. (Trial Tr. 181). Trial Counsel testified she informed Applicant of his right to remain silent, but Applicant was adamant about testifying. Applicant recalled testifying at trial, but did not remember testifying as to the work he did for each check. However, after seeing the transcript, Applicant admitted he testified to the best of his knowledge the purpose of each check, including the checks with blank memo lines. Applicant admitted that the work was complete when Victim gave him the last check.

Thus, because asking for a directed verdict, new trial, or jury instruction based on the “future promise” argument would have been inconsistent with Counsel’s articulated defense theory, this Court finds Applicant’s trial counsel was not deficient on this basis, nor was it prejudicial to Applicant’s defense. Accordingly, Applicant’s ineffective assistance claim pertaining to Trial Counsel’s failure to argue or request a jury instruct that, “a promise to do something in the future cannot constitute the basis of a prosecution for obtaining goods under false pretenses,” is **DENIED**.

**2. Failing to argue for a verdict form requiring a finding on the value of the property when the State offered no evidence of the terms of any agreement between the alleged victim and the Applicant relying only on circumstantial evidence of an agreement based on the notations of the memo line of the checks.**

Applicant’s allegation Counsel was ineffective for failing to request a verdict form is similarly without merit because the amount of money Applicant received from the victim was never disputed by either party. In fact, requesting a verdict form on the total amount would have been inconsistent with the defense theory—that Applicant performed all the work for the money received. Trial Counsel testified her strategy was to challenge the “false pretenses” element, not the amount money received. Trial Counsel further testified that Applicant was adamant about testifying. As discussed above, Applicant went through each of the thirteen checks at trial, and testified to the specific work he completed in exchange for each check. A verdict form challenging the amount Applicant received would therefore have had little effect on the jury’s verdict. Thus, this Court finds Applicant failed to show any deficiency on the part of Trial Counsel or any resulting prejudice. Accordingly, Applicant’s ineffective assistance claim pertaining to Trial Counsel’s failure to request a verdict form on the value of the property is **DENIED**.

**3. Ineffective assistance of appellate counsel for failing to brief argument that the trial court erred in denying the directed verdict motion and motion for a new trial on the charge of obtaining good under false pretenses because the ruling was based on an error of law.**

As an initial matter, this Court finds the State correctly pointed out Applicant alleged both trial counsel was ineffective in failing to preserve these issues and appellate counsel was ineffective in failing to raise them. It cannot be both ways, as appellate counsel cannot be deficient for failing to raise an unpreserved issue. *Legge v. State*, 349 S.C. 222, 562 S.E.2d 618 (2002). In order for an issue to properly be preserved for appellate review, the issue must be: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912–913 (Ct. App. 2004). South Carolina’s issue preservation requirements are designed “to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

A defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). In analyzing a claim of ineffective assistance of appellate counsel, the reviewing court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel. *See generally Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). Specifically, when an applicant contends appellate counsel rendered ineffective assistance for failing to argue a specific issue on appeal, he must show failure to raise that issue was objectively unreasonable and that, but for this failure, there is a reasonable probability he would have prevailed on appeal. *Id.* at 616, 524 S.E.2d at 836; *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

In the *Anders* brief filed on Applicant's behalf, Appellate Counsel raised the following issue: whether the trial court erred in failing to grant a directed verdict to the charge of obtaining goods under false pretenses because the State failed to present any evidence beyond a reasonable doubt concerning what false pretenses were made." Applicant specifically alleges Appellate Counsel should have instead briefed the issue of trial court error "in denying the directed verdict motion and motion for a new trial . . . because the ruling was based on an error of law."<sup>3</sup> However, as discussed above, Trial Counsel never raised the "future promise" issue at trial because her trial strategy was based on showing the jury that Applicant had in fact performed the work for the money he received. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised and ruled upon by the trial judge."). Trial Counsel's articulated trial strategy is consistent with Applicant's testimony at trial, which was that he "had completed all the work" by the time the victim gave him the last check, further refuting the idea of any existing future promise. (Trial Tr. 203).

Appellate Counsel was therefore precluded from raising this issue on appeal because the issue was never raised by Trial Counsel nor ruled upon by the trial court. *State v. Jordan*, 255 S.C. 86, 177 S.E.2d 464 (1970) (explaining that issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review). This Court notes that even if Trial Counsel had raised the issue in the motion for a new trial, it would not have been preserved

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<sup>3</sup> To the extent Applicant alleges Appellate Counsel should have filed a merits brief, the *Strickland* standard similarly applies. See *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (finding that *Strickland* is the proper standard for evaluating claim that appellate counsel was ineffective in neglecting to file a merits brief). Thus, an applicant must first show appellate counsel was objectively unreasonable . . . in failing to find arguable issues to appeal—that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them." *Id.* The applicant must then show a reasonable probability that, "but for his counsel's unreasonable failure to file a merits brief, he would have prepared on appeal." *Id.*

for appellate review. *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding that an issue first raised in a post-trial motion is not preserved for appellate review).

Aside from the lack of preservation, this Court finds Appellate Counsel was not ineffective for failing to raise this issue. As discussed above, Trial Counsel testified at the PCR hearing that her trial strategy was based on showing that Applicant had completed the work, not that he promised to do work at some point in the future. Moreover, because Applicant failed to present any testimony from Appellate Counsel on this issue, this Court further finds Applicant cannot overcome the presumption the decision was based on strategy. *See Anderson*, 354 S.C. 431, 581 S.E.2d 834 (noting that a PCR applicant has the burden of proving appellate counsel's performance was deficient)). Applicant has therefore failed to show either deficiency or prejudice on the part of Appellate Counsel. Accordingly, Applicant's ineffective assistance claim pertaining to appellate counsel is **DENIED**.

#### **VI. ALL OTHER ALLEGATIONS**

As to any and all allegations raised in the application or at the hearing in this matter and not specifically addressed in this order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

#### **VII. CONCLUSION**

Based on the evidence presented at the PCR hearing and a thorough review of the record, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's

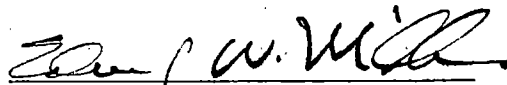
representation. Therefore, based on the foregoing, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

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), SCRCP, 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.

**IT IS THEREFORE ORDERED:**

1. The Court denies relief and dismisses the action with prejudice.

AND IT IS SO ORDERED this 21 day of January, 2020.

  
THE HONORABLE EDWARD W. MILLER  
Presiding Circuit Court Judge  
Thirteenth Judicial Circuit

Greenville, South Carolina

