

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

D. Craig Brown., Circuit Court Judge

Case No. 2019-CP-21-580

Justin Jamal Lewis, SCDC # 362322, Appellant

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant Justin Jamal Lewis hereby appeals from the Order of the Honorable D. Craig Brown., presiding Judge for the 12th Judicial Circuit, filed June 19, 2020, and received by counsel for the Applicant on June 29, 2020, in the matter of Justin Jamal Lewis v. State of South Carolina, Case No. 2019-CP-21-580.

July 12, 2020



Overture E. Walker
Attorney for Applicant
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JUL 16 2020
S.C. SUPREME COURT

Other Counsel of Record:
Assistant Attorney General, Lindsey A. McCallister
Office of the Attorney General
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Columbia, South Carolina 29211

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF FLORENCE
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2019CP2100580

Justin Jamal Lewis		South Carolina State Of	
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRCPC; Rule 41(a), SCRCPC (Vol. Nonsuit);
 Rule 43(k), SCRCPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRCPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

FILED
 JUN 19 AM 10:19
 CLERK OF COURT C.P. & G.S.
 FLORENCE COUNTY, SC

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

6/19/2020

Date

For Clerk of Court Office Use Only

This judgment was entered on **June 19, 2020**, and a copy mailed first class or placed in the appropriate attorney's box on **June 19, 2020**, to attorneys of record or to parties (when appearing pro se) as follows:

CERTIFIED: A TRUE COPY
 OF THE COURT C.P. & G.S.
 FLORENCE COUNTY, S.C.

Overture E. Walker 1527 Blanding Street Columbia, SC
29201

Samuel Leonard Key Rembert C. Dennis Building PO Box
100549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P. O'Hara

Court Reporter

Doris Poulos O'Hara - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
 COUNTY OF FLORENCE)
)
 Justin Jamal Lewis, #362322,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent,)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE TWELFTH JUDICIAL CIRCUIT

C.A. No. 2019-CP-21-580

ORDER OF DISMISSAL

2020 JUN 19 AM 9:26
 DORIS POULOS O'HARA
 CCCP & GS
 FLORENCE COUNTY, SC

FILED

This matter is before the Court by way of an application for post-conviction relief (PCR) commenced by Justin Jamal Lewis (Applicant) on February 28, 2019, and amended October 10, 2019. The State made its Amended Return and Motion to Dismiss on December 13, 2019, seeking dismissal of the action on the basis Applicant was not entitled to post-conviction relief as a matter of law because he represented himself at trial. A hearing convened on December 16, 2019, at the Florence County Courthouse before the undersigned. Because the State's amended return was filed shortly before the hearing, the Court heard brief arguments on the issue of summary dismissal, then directed the parties to submit briefs. After review of the pleadings, the arguments and briefs of the parties, and the relevant case law, this Court grants the State's motion and dismisses the action with prejudice for the reasons set forth below.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. Applicant was indicted at the June 2017 term of the Florence County Grand Jury for distributing heroin (2017-GS-21-00764). Applicant proceeded *pro se* at trial with Wallace H. Jordan, Jr., Esquire (Jordan) as standby

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 Doris Poulos O'Hara
 CLERK OF COURT C.P. & G.S.
 FLORENCE COUNTY, S.C.

counsel. Deputy Solicitor Todd S. Tucker prosecuted the case.

Applicant's case proceeded to a bench trial September 4-5, 2018, before the Honorable Thomas A. Russo. Applicant was convicted as indicted. Judge Russo sentenced Applicant to fifteen years' imprisonment for distribution of narcotics-second offense pursuant to section 44-53-370(b)(1) of the South Carolina Code. However, after realizing Applicant's offense was considered a first offense, Judge Russo immediately amended the original sentencing sheet to reflect Applicant's offense as a first offense, maintaining the fifteen year sentence.

Applicant moved for sentencing reconsideration on September 21, 2018, and he was present for a hearing on his motion on October, 3, 2018. Judge Russo continued that hearing to allow Applicant more time to prepare. The Clerk's file contains a letter, not specifically addressed to anyone, filed October 29, 2018, indicating Applicant wished to appeal his conviction and sentence; however, this letter was sent prior to the judgment in Applicant's case becoming final. Thereafter, on December 7, 2018, Applicant was again transported to court for a motions hearing, but Judge Russo continued the hearing because Applicant was not prepared to proceed.

Judge Russo then elected to consider Applicant's motion for reconsideration based upon Applicant's written submissions. Finally, on December 17, 2018, Judge Russo granted Applicant's motion for reconsideration stating, "Although the Court's original imposition of Fifteen (15) years imprisonment was legally valid and within the sentencing range, the Court has decided to give some consideration to the fact that [Applicant] should have been sentenced under a lesser range." Judge Russo amended Applicant's sentence from fifteen years' imprisonment to twelve years' imprisonment. Applicant did not appeal his conviction or sentence.

Applicant commenced this PCR action on February 28, 2019.

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II. ALLEGATIONS

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

1. Ineffective assistance of counsel:
 - a. Failure to investigate and challenge admissibility of evidence pretrial;
 - b. Failure to provide/review the discovery with Applicant; and
 - c. Failure to file an appeal.
2. Evidence of material fact not previously heard or presented requiring vacation of conviction:
 - a. Evidence withheld from Applicant damaging defense.
3. Conviction and sentence subject to collateral attack:
 - a. Applicant was denied appeal rights and due process rights were violated.

Through counsel, Applicant amended his application on or around October 10, 2019, to include the following allegations:

1. Applicant asserts ineffective assistance of trial/plea counsel on the grounds that counsel failed to adequately investigate the criminal charges for which Applicant was convicted;
2. Applicant asserts ineffective assistance of trial/plea counsel on the grounds that counsel failed to file pretrial motions challenging the admissibility of evidence;
3. Applicant asserts ineffective assistance of trial/plea counsel on the grounds that counsel failed to call or communicate with material witnesses who would have been favorable to Applicant.
4. Applicant asserts ineffective assistance of trial/plea counsel on the grounds that counsel failed to request or procure a copy of the chemical analysis report for establishing the physical evidence and sworn affidavits/statements from witnesses in the chain of custody for purposes of establishing the same pursuant to Rule 6...;
5. Applicant asserts ineffective assistance of trial/plea counsel on the grounds that counsel failed to timely request a preliminary hearing;
6. Applicant asserts ineffective assistance of trial/plea counsel on the grounds that counsel failed to advise him of his right to appeal and/or provide him with the necessary information for filing a Notice of Appeal;
7. Applicant asserts ineffective assistance of trial/plea counsel on the grounds that counsel failed to file a Notice of Appeal.

III. SUMMARY OF FACTS ADDUCED AT TRIAL

At the outset of Applicant's trial, Applicant moved to relieve his counsel. Tr. p. 5. Applicant informed the trial court he always wished to proceed to trial on his charge, but he could never get in touch with Jordan. Applicant also stated he had been unable to see the video the State

would present at trial. Tr. pp. 5-10. Jordan stated his relationship with Applicant was strained, but refuted Applicant's contention he never attempted to communicate with Applicant. Tr. p. 10. Further, Jordan stated he was prepared for trial and explained why he had been unable to show Applicant the video. Tr. pp. 11-13, 24. Ultimately, Applicant got tired of waiting to see the video and left. Tr. pp. 12-13.

After hearing Applicant's reasons for wanting to relieve counsel, Judge Russo ruled Jordan would represent Applicant. Tr. pp. 10-33. However, Applicant then indicated he wished to proceed *pro se*, and the trial court conducted a colloquy regarding the dangers of self-representation with Applicant. Tr. pp. pp. 33-34, 40-48. Judge Russo also inquired whether Applicant wanted a jury or a bench trial. Tr. pp. 33-50. Applicant elected a bench trial. Tr. p. 52. The trial court ultimately allowed Applicant to proceed *pro se*, with Jordan as standby counsel. Tr. p. 48.

Investigator Jason Pate, a narcotics officer, testified at trial that he and Investigator Rollins Rhodes set up a controlled drug buy targeting Applicant. Tr. pp.66-67. The investigators utilized David Daniels as a confidential informant to conduct the controlled buy. Tr. p. 67. Daniels was picked up but never arrested for conspiracy to distribute drugs. Tr. pp. 78; 81-82. Daniels testified he worked as a confidential informant for money, not to work off any charges. Tr. p. 82.

Daniels informed the investigators he could purchase heroin from Applicant. Tr. pp. 70, 73, 83-84. Daniels knew Applicant through another heroin dealer. Tr. p. 107. Daniels' car was searched prior to the buy to ensure there were no illegal drugs in the car. Tr. pp. 68, 84. Thereafter, the investigators installed audio and video recording equipment in Daniels' car. Tr. pp. 69, 84. After the video and audio recording devices were placed in the car, Daniels was given seventy-five dollars for the buy. Tr. pp. 69, 85. Thereafter, Daniels went to a store, purchased gas, and then met with Applicant. Tr. pp. 69, 86. Daniels testified he did not purchase anything illegal

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while getting gas. Tr. pp. 91. Daniels called Applicant to make sure the buy was still on. Tr. p. 86. Daniels asked Applicant if he had some “mud,” which is a street name for heroin. Tr. p. 87.

Daniels then went to the gas station, got gas, and immediately went to pick up Applicant. Tr. p. 88. When Daniels arrived at Applicant’s location, Applicant got into the car. Tr. p. 88. Thereafter, Daniels drove his car around the block and purchased heroin from Applicant. Tr. 89-pp. 90. During the car ride, Applicant asked Daniels if Daniels knew of anyone interested in purchasing Lortab. Tr. pp. 90, 115. After the transaction, Daniels drove back to the corner where he picked up Applicant, and Applicant exited the car. Tr. p. 90.

Daniels then immediately went to meet the investigators at a predetermined location. Tr. pp. 70, 92. Once at the location, Daniels gave the investigators a zip lock bag containing six bindles of a substance which later tested positive for heroin. Tr. pp. 71, 92. Daniels told the investigators he purchased the heroin from Applicant. Tr. p. 72. After giving the drugs to the investigators, the investigators searched Daniels and his car again. Tr. p. 92. The audio and video recordings corroborated Daniels’ version of events. During cross-examination of Daniels about the video, Applicant admitted to being in the video. Tr. p. 108. The recordings, the bindles of the heroin, and the SLED analysis were admitted into evidence without objection. Tr. pp. 59, 192.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the pleadings, reviewed the relevant case law, and considered the legal arguments presented by both parties. After a thorough review of the case records and the arguments presented, this Court finds summary dismissal is appropriate because, for the reasons explained below, Applicant is not entitled to post-conviction relief on the basis of ineffective assistance of counsel, even for pretrial conduct, where Applicant represented himself at trial. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina

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Code section 17-27-80.

Applicant's allegations are that his counsel was constitutionally ineffective for failing to properly investigate his case before trial; failing to file pretrial motions challenging the admissibility of evidence; failing to call or communicate with material witnesses who would have been favorable to Applicant; failing to request or procure a copy of the chemical analysis report for establishing the physical evidence and sworn affidavits or statements from witnesses in the chain of custody for purposes of establishing the same; failing to timely request a preliminary hearing; failing to advise him of his right to appeal and/or provide him with the necessary information for filing a Notice of Appeal; and failing to file a Notice of Appeal.

However, South Carolina Code section 17-27-70(c) authorizes this Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings. . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." See also Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) ("The. . . presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). This Court finds Applicant knowingly and voluntarily waived his right to representation and appeared *pro se* at trial,¹ and therefore, the allegations in the both the original and amended applications should be dismissed with prejudice for failure to state a claim upon which relief can be granted. Rule 12(b), SCRPC; Rule 56, SCRPC.

¹ Applicant does not dispute that he voluntarily represented himself at trial, and he has not raised a claim that his waiver of counsel was unknowing or involuntary. See Faretta v. California, 422 U.S. 806 (1975) (holding criminal defendants have a right to refuse counsel and represent themselves in a criminal proceeding). He argues only that he should be allowed to proceed to an evidentiary hearing on allegations of pre-trial ineffective assistance of counsel by Jordan.

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This Court has reviewed the trial record and finds it clearly establishes Applicant had a full understanding of the consequences of waiving his right to representation and proceeding *pro se* at trial. For a knowing and intelligent waiver to occur, the defendant must be “(1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation.” Osbey v. State, 425 S.C. 615, 619, 825 S.E.2d 48, 50 (2019). Before the start of the bench trial, Judge Russo repeatedly advised Applicant of his right to counsel, as well as warning Applicant about the dangers of representing himself. Tr. pp. 33-34, 40-48. Applicant knowingly and voluntarily waived his right to representation and elected to proceed at trial *pro se*, with Jordan acting only as standby counsel. Tr. pp. 47-48.

There is “no constitutional right to hybrid representation,” where the defendant “share[s] the duties of conducting [his] defense with a lawyer.” United States v. Schmidt, 105 F.3d 82, 90 (2d Cir. 1997) (citing McKaskle v. Wiggins, 465 U.S. 168, 183 (1984) (“Faretta does not require a trial judge to permit ‘hybrid’ representation of the type Wiggins was actually allowed.”)). Without a constitutional right to standby counsel, a defendant generally cannot prove standby counsel was ineffective. United States v. Cochrane, 985 F.2d 1027, 1029 n. 1 (9th Cir. 1993) (rejecting ineffective assistance of standby counsel argument in this context without foreclosing argument in future); United States v. Windsor, 981 F.2d 943, 947 (7th Cir. 1992) (explaining the “court knows of no constitutional right to effective assistance of standby counsel”); United States v. Morrison, 153 F.3d 34, 55 (2d Cir. 1998) (holding “without a constitutional right to standby counsel, a defendant is not entitled to relief for ineffectiveness of standby counsel”). Cf. United States v. Cohen, 888 F.3d 667, 680 (4th Cir. 2018) (recognizing that a defendant has no right to the appointment of a standby counsel after he chooses to proceed *pro se*). Further, the Court finds Applicant is expressly barred from raising ineffective assistance claims about his own conduct in

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trial. Faretta, 422 U.S. at 834 n.46 (“Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel.”). Neither may he raise an allegation regarding Jordan’s pretrial conduct because Applicant assumed responsibility for correcting any pretrial errors when he elected to represent himself. See Cook v. Ryan, 688 F.3d 598 (9th Cir. 2012) (holding a *pro se* defendant could not complain of quality of defense by arguing ineffective assistance of counsel even if pretrial counsel erred because the defendant had the opportunity to correct those errors).

In this case, Applicant argues he should be allowed to proceed on his claims of pretrial ineffective assistance because if Jordan had conducted a more thorough investigation and preparation, Applicant would have felt more comfortable proceeding with Jordan as counsel or he would have been better able to defend himself. In this case, however, Applicant explicitly told Judge Russo he was not asking for a continuance. Tr. pp. 43, 45. Therefore, the Court finds he cannot complain now of counsel’s alleged lack of pretrial investigation, failure to review discovery, or trial preparation. The Court finds Applicant assumed responsibility for those tasks when he elected to represent himself. If Applicant needed more time to ensure he had received and reviewed all evidence and properly prepared his defense, he should have requested a continuance, for which he was given an opportunity to do so. In any event, the evidence that Applicant complains needed to be more thoroughly investigated – the video of transaction and the SLED analysis – were both admitted at trial without any objection from Applicant. Tr. pp. 59, 192. Moreover, Applicant went on to admit he is the man in the video, and never raised any argument the video was incorrect or altered in some way or that the evidence should not be admitted for any other reason. Tr. pp. 59, 192.

Applicant's only argument is that the video did not sufficiently show the transaction in order to support his conviction, but that is an issue for the factfinder to decide, and it is not properly raised in PCR. Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). PCR relief is only proper when the application collaterally attacks the validity of the conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). "In a direct appeal, the focus generally is upon the propriety of rulings made by the circuit court in response to a party's motions or objections. In PCR, the focus usually is upon alleged errors made by trial or plea counsel. Therefore, when asserting the erroneous admission of evidence, a violation of a constitutional right, or other errors in a proceeding, the applicant generally must frame the issue as one of ineffective assistance of counsel." Id. at 363-64, 527 S.E.2d at 747. A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993).

Accordingly, this Court finds the record conclusively refutes Applicant's allegations, and the Court further finds he is not entitled to relief on the basis of ineffective assistance of counsel where he voluntarily waived his right to counsel and proceeded *pro se*. The trial court engaged in a detailed and thorough colloquy with Applicant during which he indicated he understood his constitutional right to counsel and wished to waive it in order to represent himself. Moreover, Applicant never requested a continuance in order to have more time to prepare his case. Thus, this Court finds Applicant is barred as a matter of law, by the authorities cited above, from raising any claims of ineffective assistance – even issues relating to pretrial matters – in a PCR action.

Therefore, this Court grants Respondent's motion for summary dismissal of this application, as it fails to state a genuine issue of material fact upon which relief could be granted and fails to state any claim cognizable in a PCR action according to the uncontested facts of the

case. S.C. Code Ann. § 17-27-70; Rule 12(b)(6), SCRCP; Rule 56, SCRCP.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Respondent's motion for summary dismissal should be granted, and this application for post-conviction relief must be dismissed with prejudice. Additionally, this Court grants PCR counsel's motion to be relieved.

Applicant must file and serve a notice of appeal within thirty days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Further, Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, he must serve and file a notice of appeal. Applicant is directed to Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

IT IS THEREFORE ORDERED:

1. Respondent's motion to dismiss the action is granted and Application for Post-Conviction Relief is dismissed with prejudice;
2. Counsel for Applicant is relieved; and
3. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.

6-11, 2020

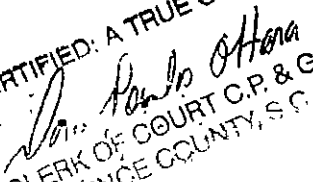


 D. CRAIG BROWN
 Presiding Circuit Court Judge
 Twelfth Judicial Circuit

2020 JUN 19 AM 9:26
 DORIS POULOS O'HARA
 C.C.P. & G.S.
 FLORENCE COUNTY, S.C.

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 FLORENCE COUNTY, S.C.