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| STATE OF SOUTH CAROLINA<br>COUNTY OF HORRY | IN THE COURT OF COMMON PLEAS<br>FOR THE FIFTEENTH JUDICIAL CIRCUIT |
| Eugene Hardy, #238491<br>Applicant,<br><br>v.<br><br>State of South Carolina,<br>Respondent. | Case No.: 2019-CP-26-0140<br><br>**ORDER OF DISMISSAL** |



This matter comes before this Court by way of Applicant's post-conviction relief application, filed on January 10, 2019. Respondent made its Return on April 12, 2019, requesting an evidentiary hearing be convened. The evidentiary hearing was held on November 15, 2019, at Horry County Courthouse. Applicant was present at the hearing and represented by Carla F. Grabert-Lowenstein, Esquire. Assistant Attorney General Jacob A. Isenberg of the South Carolina Attorney General's Office represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Eric Fox, Esquire, also testified. After a thorough review of all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof in establishing he is entitled to post-conviction relief and hereby denies and dismisses this application with prejudice. Specific findings of fact and conclusions of law are set forth below.

**Procedural History**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In January 2017, the Horry County Grand Jury indicted Applicant for possession with intent to distribute cocaine (2017-GS-26-00310). J. Eric Fox, Esquire represented Applicant. Assistant Solicitors David Caraker and George H. Martin prosecuted the case. On September 13, 2017, Applicant proceeded to trial

before the Honorable Steven John, circuit court judge, and a jury. Applicant was found guilty as indicted and Judge John sentenced Applicant to fifteen years' imprisonment.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Joanna K. Delany, Esquire, who filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), based upon the following issue:

> Did the judge err in denying Appellant's motion to suppress cocaine found as the result of a traffic stop effected to serve outstanding arrest warrants when no traffic violation was committed and no criminal activity was suspected?

The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Hardy*, Op. No. 2018-UP-445 (S.C. Ct. App. filed Dec. 5, 2018). The Remittitur was issued on December 31, 2018.

**Summary of Relevant Facts**

Agent Freddy Curry, of the Surfside Beach Police Department, testified he had three warrants for Applicant's arrest for distribution of crack cocaine, obtained the day of Applicant's arrest. (Trial Tr. 31, 38, 81). Curry said he knew where Applicant was employed and decided to wait outside the business for Applicant to leave work. (Trial Tr. 81). Curry asked Deputy Andy Cooper of the Horry County Sheriff's Office to use a marked patrol car "to conduct a traffic stop on [Applicant's] vehicle when he left work and was away from everyone", and when Curry saw Applicant leaving work, he instructed Cooper to pull Applicant over. (Trial Tr. 31-32, 81-82). Curry testified pre-trial that after Cooper pulled Applicant over, "I pulled up behind the traffic stop, behind the police car. We instructed Officer Cooper to ask him to step out of the car and walk him to the back where we could talk to him." (Trial Tr. 32).

Curry explained his reasoning for the pre-textual stop: "We had a deputy sheriff in a marked unit and uniform to pull him over to arrest him on the warrants and try to further our

investigation going on at that time." (Trial Tr. 81-82). Curry wanted to get Applicant "where no one would pay us any attention and we would have an opportunity to talk with him." (Trial Tr. 31, 82). Curry did not place Applicant under arrest when Applicant was brought to Curry's unmarked vehicle. (Trial Tr. 39). After Cooper walked Applicant back behind the patrol car, Curry identified himself and "asked [Applicant] to step in my vehicle where we could talk," "explained I have three warrants for your arrest," and "spoke to him about other people involved in this investigation." (Trial Tr. 82-83). Curry explained that he took the pre-textual stop approach due to safety concerns:

> If you walk up to someone based on our protocol, one we do not make traffic stops on the vehicles. They are unmarked, undercover vehicles. Plus, it was going to draw a lot more attention if blue lights come on in an undercover vehicle behind someone, and in [the] past we've had people run from the vehicles, et cetera. This is the safest way to do it for the public and everyone involved.
>
> (Trial Tr. 38).

After speaking with Applicant, Curry informed him that he was going to be arrested and told him to step out of the car. (Trial Tr. 83). As Applicant opened the door to step out, Curry saw Applicant take off his shoe and remove a plastic bag Applicant then threw on the ground and unsuccessfully tried to push into a lump of dirt. (Trial Tr. 83). Curry arrested Applicant. (Trial Tr. 83-84). After reading Applicant his *Miranda* rights and placing him into the passenger seat of the car, Curry asked Applicant "why in the world would you carry that to work with you?" (Trial Tr. 84-86). Applicant responded it was what he had left over from bike week. (Trial Tr. 86). The bag was taken to DEU headquarter and tested positive for cocaine. (Trial Tr. 88, 127).

**Current Action Before this Court**

In his current PCR application, Applicant alleges he is unlawfully held in custody on the following ground:

1. "Ineffective [Assistance] of Counsel"
    a. "Attorney failed to [subpoena] key witness court."

In an attachment to the application, Applicant additionally alleges he is being held unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that:
    a. "Counsel failed to pre-trial case matters that could have resulted in charges dismissed/dropped against the Applicant, whereas, motion to dismiss indictment based on false testimony given to the grand jury, *sub jud.* The grand jury was never at once disclosed with the true probable cause founded, and true bill the indictment under extrinsic fraud upon the court under oath, etc.; 5th, 6th & 14th Amend."
    b. "Counsel failed to pre-trial initial subject matters of change of custody of the evidence (drug substances), whereas, the alleged evidence described was never secured and the accountability range was not recorded by the police offices as pursuant to established laws, etc.; 5th, 6th and 4th Amend."
    c. "Counsel failed to file motion to suppress evidence based upon an illegal search and seizure of Applicant's vehicle; 4th, 5th 14th Amend."
    d. "Counsel failed to file motion to dismiss case charges based on the fruit of the poisonous tree doctrine, in re see no traffic violations committed versus Applicant at job and the officers, etc., had opportunities to arrest the Applicant before driving a car from, and the arrest warrants pending per the officers story, ie al., etc. 5th 6th 14th amend."
    e. "Counsel failed to do pre-trial investigations and make the trial court aware of the case factual that the evidentiary conclusions was established from the bringer of charges component, the officer testified that the Applicant was the subject after his job ended for the day and this conclusion was evidence from the very first moment the officers had Applicant in eye sights, etc.: 5th 6th 14th Amend."
    f. "Counsel failed to subpoena Deputy Cooper to testify at trial, when the testimony of the deputy would have made the outcome of the trial different, Officer Cooper could have testified to the sole reasons why the traffic stop was done, and the intent of the violations committed against Applicant's constitutional rights, etc. 5th and 14th Amend."
    g. "Counsel failed to examine key witnesses to establish a competent defense for the Applicant during trial, pursuant to the Applicant's right to fair trial, the Trial Counsel was placed on notice by the Applicant when he informed the trial to have Officer Cooper to testify at trial and proffer factual testimony to the jury to have the jury to determine the evidentiary regarding the traffic stop, as the deputy referred to the time of the incident as a traffic stop. See 6th, and 14th Amend."

2. Ineffective assistance of appellate counsel, in that:
    a. "Appellate counsel J.K. Delany of the Indigent Defense was ineffective assistance for not doing researches of the Applicant's trial transcript, etc., the Applicant show the Court that exhibits of the record is nonexistence to transcript, see the following: Juror's Note, p. 183, (Court's Exhibits), chain of custody, p. 116, (Defendant's Exhibits), and pack of drugs exhibits, p. 67., 126, (State's exhibits), etc., the Appellate Counsel accepted the transcripts as record and did not examine it nor researched the transcript before it became a final and completed record from the court reporter, whereas, the crux information that the State failed to place on records was the evidence of pending arrest warrants, regardless of them existing, the Appeal Counsel failed to preserve the Applicant's rights to contest the record subjects of the adversary component, Counsel showed their essential erroneous practices done by the S.C. Appellate Defense Division. See 6th and 14th Amend."
    b. "Appellant Counsel was ineffective for filing an Anders Brief in Applicant's Appeal, while presenting a frivolous and non-merited law question to the Court, the Counsel should have presented the question as such: Did the Trial Court erred, and thereby violated the Appellant's rights under the State Constitution Art. I, § 10 and the Fourth and Fourteenth Amendments of U.S. Const., by failing to suppress the fruit of the poisonous tree of an illegal search that was a made incident to the Appellant's arrest where said search was arbitrary, capricious and without probable cause and thereby deprived the Appellant of his rights to be free from an illegal search as is guaranteed by both the State and Federal Constitutions? See 5th and 14th Amend."

Concerning relief, Applicant requested "a new trial."

At the PCR hearing, Applicant waived his appellate-related applications and proceeded forward on the following allegations:

1. Counsel was ineffective for:
    a. failing to request a preliminary hearing;
    b. failure to investigate the case;
    c. failure to submit evidence in support of a suppression motion or otherwise challenge the stop;
    d. failure to call the arresting officer as a witness;
    e. failure to challenge the warrants;
    f. failure to review and share discovery with Applicant; and
    g. failure to develop a valid trial strategy.

All other allegations raised in his initial application and amendments are deemed waived

and abandoned and, accordingly, will not be addressed in this order.

## Summary of Testimony Presented

### *Eric Fox Testimony*

Counsel testified that he represented Applicant in his trial court proceedings and in multiple prior cases as well. (PCR Tr. 7, 14). Counsel stated they had a good rapport, though Applicant was demanding about receiving frequent updates on his case. (PCR Tr. 14).

Counsel stated he generally receives a case assignment and the pertinent paperwork about three weeks after the initial arrest, because before the case is received, there is usually a bond hearing where the defendant is informed of his right to a preliminary hearing and the magistrate transmits the warrant to the clerk and public defender's office. (PCR Tr. 15-16). Counsel stated that defendants must request a hearing within ten days of receiving notice of their right to a preliminary hearing before the right is waived and the case is generally not received by the public defender's office until after that period has lapsed. (PCR Tr. 7-8, 16). Counsel stated that the preliminary hearing request is generally left to the defendant because of the timing, but if a defendant requests a hearing, they will represent them. (PCR Tr. 8, 16). Here, Counsel stated he never requested a preliminary hearing because the time period in which he could do so had already lapsed. (PCR Tr. 8). Counsel testified that there are times when you can request a preliminary hearing after the deadline, but he did not in this case. (PCR Tr. 28). Counsel agreed that sometimes preliminary hearings are used as a basic discovery tool, because officers may offer helpful testimony at them and sometimes a case can be dismissed based on what is revealed at the hearing, though the solicitor can issue a direct indictment in that case. (PCR Tr. 8).

Counsel stated that the day someone in his office is appointed to a case, a file is opened, a representation letter sent, and a *Brady* discovery request is sent to the solicitor's office. (PCR Tr.

16-17). Counsel stated that the discovery received in response to the request generally consists of incident reports, officer statements, and summaries. (PCR Tr. 17).

Counsel stated that there are always videos in the drug cases involving confidential informants because the police always put a body camera on the informant. (PCR Tr. 17-18). To protect the identity of the informant, Counsel stated the Solicitor's Office will not let defense attorneys show the footage to their clients during plea negotiations, but permit attorneys to go to the Solicitor's Office to view it. (PCR Tr. 18). Counsel stated that the Solicitor's Office sent still shots from the video featuring Applicant. (PCR Tr. 18). Counsel stated he went to the office to view three videos. (PCR Tr. 18). Counsel stated he usually views videos about six months before trial, so he has enough time to discuss the contents with his clients. (PCR Tr. 18-19).

Counsel confirmed that he thought the stop was a "ruse", based upon Applicant's three outstanding warrants based upon confidential informant buys. (PCR Tr. 9-10). Counsel stated that the solicitor's office pursued these warrants throughout the trial proceedings, but Applicant never went to trial on those charges. (PCR Tr. 9). Counsel stated he never took steps to challenge those warrants because he received them in discovery and the charges on these warrants were not being actively pursued. (PCR Tr. 10). Counsel stated he could not remember why the warrants were not challenged or what defects existed, but said he was more focused on the evidence and discovery when forming a trial strategy. (PCR Tr. 10). Counsel conceded that if the warrants were defective and Counsel challenged them and ended up getting them suppressed or quashed, the case could have potentially gone away. (PCR Tr. 10).

Counsel testified that the informant was equipped with a camera during the drug buys. (PCR Tr. 11). Counsel stated that with the first buy, Applicant had a twenty dollar bill in his mouth and he took something from the informant's hands and then handed over the money.

(PCR Tr. 11). Counsel stated Applicant could be identified in the video and, though it was not clear what was handed over, it looked like a drug transaction. (PCR Tr. 11, 19).

Counsel stated that on one of the videos, the informant could not be identified, the camera did not use any identifying language nor properly focus on Applicant, but it sounded like a drug transaction occurred. (PCR Tr. 11). Counsel stated it looked like the same informant and Applicant, but the video quality was shaky and blurry. (PCR Tr. 19). Counsel stated he did not think the State would prosecute this case because of the poor video quality. (PCR Tr. 12).

Counsel stated another video clearly featured Applicant and the same informant as before. (PCR Tr. 19). Counsel stated Applicant pulled next to the informant and obviously participated in a drug sale. (PCR Tr. 19). Counsel testified that in his video notes he wrote "this is the money shot." (PCR Tr. 19).

Counsel stated that a dash camera was used during the stop and, though he requested the corresponding video, the Solicitor told him it did not exist. (PCR Tr. 12). Counsel stated the officers who stopped him claimed they found drugs on his person, but no video corroborating this existed. (PCR Tr. 19-20). Counsel agreed that the video was important to tell whose version of the story was accurate, regarding whether the drugs fell out of his shoe or if Applicant reached for them. (PCR Tr. 12-13). Counsel stated that his office filed a motion for discovery that encompassed the materials requested and did not submit a supplemental request because the videos were covered in the original motion. (PCR Tr. 13).

Based upon a collective assessment of the videos, Counsel stated he tried to talk Applicant into taking the plea deal because chances of Applicant being found not guilty in all of the cases, including the case pursued and the three cases leverage against him, were slim. (PCR Tr. 19, 21). Counsel stated that, at one point, the State was talking about trying one of the sales

and that, instead, the plea offer they gave was to one ten year sentence. (PCR Tr. 20). Counsel also stated that they left the offer open right before trial because they were trying to avoid calling the informant to testify at trial and thereby revealing his or her identity. (PCR Tr. 20). Counsel stated that the desire not to reveal the informant's identity was why the State moved forward on the traffic stop case instead of the other warrants. (PCR Tr. 20). Counsel testified that he thought Applicant refused to plead because he was willing to take his chances if it meant having a chance of not going to prison. (PCR Tr. 21-22). Counsel also stated that Applicant was asked to be an informant or provide information to the Horry County Drug Enforcement Unit but declined to do so. (PCR Tr. 21-22).

Counsel stated he felt the State had a strong case and it would be easy to prosecute. (PCR Tr. 27). Counsel conceded that the stop was a potential issue for the State, but that issue was not a given because the warrants against Applicant rendered the stop valid. (PCR Tr. 10, 26). Counsel said he relayed this to Applicant before trial. (PCR Tr. 26).

Regarding Applicant's decision to testify, Counsel stated that he and Applicant talked about it at length and identified the issues he would testify regarding, the prior records that would probably be entered into evidence, and how this evidence would be used to impeach him. (PCR Tr. 23). Counsel testified that he did not remember exactly when Applicant decided to testify or if he officially told Counsel that he would, but the decision itself was discussed at length. (PCR Tr. 23-24). Counsel stated that he did not remember if Applicant wanted to wait and see, if he decided to testify, or if a plan was in place for him to testify leading into the pretrial hearing. (PCR Tr. 24). Counsel stated he prepared for both Applicant deciding to testifying and not to testify because he has had clients change their minds about testifying in the middle of trial. (PCR Tr. 25). Counsel stated he was unsure whether he presented both strategies

to Applicant, but did tell him that if he decided not to testify, the defense did not have other witnesses. (PCR Tr. 25). Counsel testified that he told Applicant the defense would be dedicated to attacking the State's case, and maybe that would be enough. (PCR Tr. 25). Alternatively, Counsel stated that he told Applicant if he testified there were issues concerning his credibility, but it would allow him to inform the jury of his side of the story. (PCR Tr. 25).

Counsel said he tried to case to the best of his ability with what he determined was the best trial strategy available. (PCR Tr. 27). Counsel stated that the trial strategy was to try to undermine police credibility, testifying that he told Applicant that unless they directly contradicted the officer's credibility, who is someone that the jury is inclined to believe, they would lose at trial. (PCR Tr. 23). Counsel stated he told Applicant that there was not any direct evidence contradicting the officer's statements. (PCR Tr. 27). Counsel stated he told Applicant that the trial would be a credibility contest where Applicant's word would be against the officer's. (PCR Tr. 23). After trial, Counsel stated he did not think he left anything out left something unexplored. (PCR Tr. 28).

***Eugene Hardy Testimony***

Applicant stated he asked Counsel to request a preliminary hearing, but Counsel did not. (PCR Tr. 32). Applicant stated he thought the three warrants should be challenged because they were why he was stopped in the case he was ultimately convicted of. (PCR Tr. 32). Applicant stated that he and Counsel discussed the warrants used as an excuse for the stop and Counsel showed Applicant the photographs used to procure the warrants. (PCR Tr. 37). Further, Applicant stated when he tried talking to Counsel about the three pending warrants, Counsel's response was that the solicitor did not want to convict him under them. (PCR Tr. 35). Applicant stated he thought Counsel should have tried to suppress the warrants. (PCR Tr. 36).

Applicant stated that when he got out of the car, cocaine fell out of his shoe, but the officer said Applicant took his shoe off and threw the cocaine on the ground. (PCR Tr. 42). Applicant stated he took cocaine with him to work in his vehicle and, when stopped, put it down his pants. (PCR Tr. 43-44). Applicant stated he told the officer he had cocaine left over but never said he was selling. (PCR Tr. 44). Applicant stated it was in multiple bags because "sometimes, I guess, that's how some people give it to you." (PCR Tr. 44). Applicant stated he discussed the drugs seized with Counsel and that the at trial they said they found 1.5 grams; but in the paperwork they said they found 3.17. (PCR Tr. 34). Applicant testified that he thought there was an issue regarding improper handling of narcotics because of the discrepancy and Counsel, at trial; stated the drugs were tampered with. (PCR Tr. 34-35).

Applicant stated he thought the stop was fabricated to pursue another claim against him and that he discussed this concern with Counsel. (PCR Tr. 35). Applicant stated Counsel never said they were not pursuing the charges to protect the informant, but was told he could face the informant if he proceeded to trial. (PCR Tr. 39). Applicant stated Counsel told him that the solicitor could take him to trial on multiple cases and that the plea offer was probably better than the sentence he would receive if he went to trial. (PCR Tr. 38). Counsel stated he would do his best representing him, and Applicant told Counsel everything that he wanted him to do, including interviewing witnesses and identifying the stop issue. (PCR Tr. 33). Applicant stated he thought calling the officer to testify would have made a difference, so Applicant could face his accuser and the officer could tell his side of the story. (PCR Tr. 33, 36-37).

Applicant said Counsel told him the person in the videos looked like him and could be used against him, but did not show Applicant any videos nor tell him that the video was used to secure an arrest warrant. (PCR Tr. 37-38). Applicant stated he decided to proceed to trial because

he did not know if there was video evidence and Counsel said he would represent him well. (PCR Tr. 39-40). Applicant also stated he was upset videos were shown at trial. (PCR Tr. 45).

Applicant stated Counsel told him it would be best not to testify because the State would bring up his criminal history to impeach him. (PCR Tr. 41-42). Applicant stated he did not testify at trial because he felt ill prepared. (PCR Tr. 40). Applicant stated Counsel never told him that by not testifying he would not have a chance of having his side of the story presented. (PCR Tr. 40-41). However, he stated that the judge told him this twice at trial. (PCR Tr. 41).

**Findings of Fact and Conclusions of Law**

This Court has reviewed the pleadings, records submitted by the parties, and applicable law. Before this Court are Applicant's Horry County Clerk of Court Records, Applicant's South Carolina Department of Correction Records, the trial transcript, Applicant's direct appeals records, and the PCR action records. Pursuant to South Carolina Code Annotated, Sections 17-27-70 and -80, this Court dismisses the application based upon the following findings:

***Ineffective Assistance of Counsel***

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington.*

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense

counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. See *also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

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. *Strickland*, 466 U.S. at 696. 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. *Id.* at 696-97.

***Waiver of Preliminary Hearing***

Applicant's allegation that Counsel was ineffective for waiving Applicant's right to a preliminary hearing. In South Carolina, there is no constitutionally protected right to a preliminary hearing. *State v. Keenan*, 278 S.C. 361, 296 S.E.2d 676 (1982). Additionally, a preliminary hearing is not held if the defendant is indicted by a grand jury or waives presentment before the preliminary hearing occurs. Rule 2(b) SCRCrimP. Further, a preliminary hearing can be waived through "[p]lea negotiations and silence before the trial court regarding the desire for a preliminary hearing when entering a guilty plea. *O'Neil v. State*, 277 S.C. 230, 231, 285 S.E.2d 352, 353 (1981) (citing *Bonnettee v. State*, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981)).

This Court finds that this allegation is without merit. First, as per *Keenan* there is no constitutionally protected right to a preliminary hearing. *Keenan*, 278 S.C. 361, 296 S.E.2d 676. Additionally, Applicant proceeded to trial without notifying the trial judge about his desire for a hearing and, thus, was waived. Also, based upon Counsel's credible testimony, Applicant was presumably told about the hearing at his bond hearing and waived this right was waived when he failed to timely request one. Counsel was not appointed until the deadline had lapsed and, thus, is not responsible for the option's foreclosure. Further, Applicant officially waived his right by proceeding to trial without bringing this matter to the judge's attention and cannot reassert this right now. Thus, Applicant's allegation on this ground lacks merit and must be denied.

*Failure to Investigate*

Applicant's allegation that Counsel was ineffective for failure to investigate is without merit. *Strickland* makes clear that counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. When highlighting failure to investigate as a ground for a larger ineffective assistance of counsel claim, judicial determination of this claim's validity is evaluated for "reasonableness [under] all the circumstances" with "a heavy measure of deference to counsel's judgments" applied. *Id.* That said, counsel is required to, at minimum, "interview potential witnesses and make an independent investigation of the facts and circumstances of the case", *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (quoting *Troedel v. Wainwright*, 667 F.Supp. 1456, 1461 (S.D.Fla.1986), *aff'd*, 828 F.2d 670 (11th Cir.1987)), including aggressively re-examining all the government's forensic evidence and conducting analyses of all other available forensic evidence." *Id.* (quoting *American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases, reprinted in* 31 Hofstra L.Rev. 913, 1015 (2003) (emphasis added)). Further, to demonstrate prejudice, Applicant was required to present the evidence or witnesses he alleges Counsel did not properly investigate. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

This Court finds Counsel reasonably investigated the evidence and, thus, was not deficient. Specifically, Counsel was not deficient for failing to procure and review videos. Counsel credibly testified he went over to the office to view three separate videos. (PCR Tr. 18). Counsel stated he viewed the videos about six months in advance of trial, so he had sufficient enough time to relay the contents to Applicant. (PCR Tr. 18-19). Counsel stated his notes reflected that he requested the dash camera, but was told the video did not exist. (PCR Tr. 12).

Counsel stated he spoke with the Solicitor about that video specifically. (PCR Tr. 13). Counsel stated he did not file a supplemental discovery request regarding the drug report because he thought it was covered in the original motion. (PCR Tr. 13). These facts, in their totality, indicate that Counsel requested the materials, viewed all materials, relayed the information, when appropriate, to Applicant, and followed up on materials when appropriate. Though he never obtained a sought after video, he made clear that the reason why he did not obtain it was because he was told it did not exist. Thus, this Court finds Counsel conducted a reasonable investigation and, thus, was not deficient in this regard.

Applicant failed to show what would have been discovered, if anything, if Counsel investigated the case further. Thus, prejudice has not been established. Applicant fails on both prongs of the *Strickland* analysis concerning this allegation and, thus, his claim of failure to investigate must be rejected.

***Failure to Review Discovery with Applicant***

This Court finds Applicant's allegation that Counsel was ineffective for inadequately reviewing discovery with Applicant is without merit. Counsel stated that, to protect the identity of the informant, the Solicitor's Office will not let defense attorneys show the footage to their clients during plea negotiations, but permitted Counsel to go to the Solicitor's Office to view it. (PCR Tr. 18). Counsel stated he viewed the videos about six months in advance of trial and he had sufficient enough time to relay the contents to Applicant. (PCR Tr. 18-19). Applicant stated that Counsel told Applicant about the videos, but they were never shown to Applicant. (PCR Tr. 31, 37). Applicant stated that Counsel told him the person in the video looked like him and they could be used against him, but did not tell him that the video was used to secure an arrest warrant and that the two had a correlation. (PCR Tr. 37-38). Applicant stated that he and Counsel went

over the warrants that were used as an excuse for the stop and Counsel showed Applicant the photographs associated with the warrants and that were used to get the warrants signed by a judge. (PCR Tr. 37).

This Court finds Applicant reviewed discovery with Counsel and was fully aware of the evidence against him. Though he was not shown a video because of confidentiality reasons, the video was discussed with him and Applicant never told Counsel he did not understand something. Counsel obtained the discovery and relayed the contents to Applicant. Additionally, besides voicing general discontentedness, Applicant has made no showing concerning how extra time reviewing discovery would have impacted his decision to plead or the trajectory of the case at trial. Applicant has not met his burden of proof as to either deficiency or prejudice, and accordingly, this claim is dismissed and relief denied on this issue.

***Failure to Submit Motion to Suppress Evidence and File Motion to Dismiss***

Applicant's allegations that Counsel was ineffective for failing to submit evidence in support of motion to suppress and failing to submit a motion to dismiss on the stop issue are without merit. "Where trial counsel articulates a valid reason for employing a certain trial strategy, counsel will not be deemed ineffective." *McKnight v. State*, 378 S.C. 33, 43, 661 S.E.2d 354, 359 (2008) (citing *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)). To prove prejudice, Applicant must show that there is a reasonable probability that, but for Counsel's deficiency, the result of the proceedings would have been different. *Franklin v. Catoe*, 346 S.C. 563, 571, 552 S.E.2d 718, 723 (2001) (citing *Johnson v. State*, 325 S.C.182, 480 S.E.2d 733 (1997)). Further, to demonstrate prejudice, Applicant was required to present the evidence or witnesses he alleges Counsel did not properly investigate. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

Here, Counsel was not deficient because the decision not to file a motion to suppress regarding the stop was a valid trial strategy. Though both Counsel and Applicant thought the stop was questionable and might have been a potential issue in the case, the officer stated the stop was because of the three outstanding warrant Applicant had against him, which was a valid reason to stop Applicant. (PCR Tr. 9-10, 32). In fact, a motion to suppress hearing was held immediately before trial where the Judge concluded that the stop was valid and denied Counsel's motion. (Trial Tr. 51-52). Counsel stated his focus was on the discovery and evidence as opposed to the stop, but did investigate this issue and filed a motion to suppress on this issue itself. (Trial Tr. 51; PCR Tr. 9-10). Thus, failure to further pursue this issue which was raised in a motion hearing, and rejected by the Court was not deficient. Counsel seemingly understood that the stop, though questionable, was legally proper and did not want to expend extra time creating an argument he seemingly knew would not swing in the defense's favor was tactical. Additionally, Applicant made no showing what the extra evidence would have consisted of or the impact it would have had on the judge's decision on the motion hearing and how that decision would impact the trial. Thus, Applicant has failed to show deficiency or prejudice and, consequently, this argument is rejected as without merit.

***Failure to Examine Key Witnesses***

Applicant stated that Counsel was ineffective for failing to call the police officer as a witness at trial. At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. *Ard. v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing or their testimony must otherwise be presented, consistent with the rules of evidence. *Glover v. State*, 318 S.C. 496, 498-

99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. *Clark v. State*, 315S.C. 385, 434 S.E.2d 266 (1993). "In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Further, prejudice will generally be found if the testimony was significant and favorable enough to the Applicant so that the trial proceedings results may have been different because of the testimony. *See e.g. Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may corroborated with the defendant or bolstered his credibility so that the findings at trial could have been favorable to the defendant); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. *See e.g. Smith v. State*, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); *Edwards v. State*, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); *Glover*, 318 S.C. 496, 498, 458 S.E.2d 538, 540

(1995) (finding that counsel was in deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

Counsel was not deficient for failing to call the arresting officer to the stand at trial. This Court finds that the officer, if called to testify, most likely would have presented testimony, credibility in the jury's eyes; detrimental to Applicant. The testimony given likely would have been favorable to the State and, given Counsel's experience, it is a safe assumption that Counsel understood this and, consequently, decided not to call the officer as a result. Thus, Counsel likely decided not to call the officer as a part of a strategic trial strategy and, thus, was not deficient for not calling the arresting officer to testify.

Additionally, Applicant did not call the officer to the stand at the PCR hearing to testify to what he would have said if called at trial. Thus, prejudice was not shown because Applicant did not present the testimony so the court could determine if the testimony was so significant and favorable that the trial proceedings results may have been different because of the testimony.

***Failure to Develop and Assert a Defense or Trial Strategy***

Applicant's allegations that Counsel was ineffective for failing to develop a valid trial strategy and assert a valid defense are without merit. Whether failure to assert a defense constitutes deficient performance ultimately hinges on whether failure to explore the decision was a strategic decision. *Strickland,* 466 U.S. at 680. If there is only one line of defense, counsel must conduct a "reasonably substantial investigation" into that line of defense. *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1252). That said, if there are several lines of defense, counsel may still be effective even if every single line is not explored. *Id.* "[W]hen counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines

of defense that he has chosen not to employ at trial." *Id.* at 681 *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1255). Further, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

Regarding failure to alert Applicant of a defense, Counsel will not be found ineffective if there was inadequate evidence to support the defense, if the defense did not exist at the time of trial, or another avenue of defense existed. *See McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (stating that failure to state an entrapment defense was not ineffective when the applicant denied any wrongdoing); *Arnette v. State*, 306 S.C. 556, 413 S.E.2d 803 (1992) (stating that failing to inform of a defense was not ineffective when there was no evidence at trial that supported the defense); *Robinson v. State*, 308 S.C. 361, 417 S.E.2d 361, 417 S.E.2d 88 (1992) (stating that Counsel was not ineffective when failing to state a defense not recognized by the Court until six years later and was just recently acknowledged by the scientific community).

Applicant's complaints concerning his alleged lack of understanding the impact his decision not to testify would have are baseless. Counsel credibly testified he told Applicant that there was not any direct evidence contradicting the officer's statements, he informed Applicant that if he decided not to testify, the defense would not have any other witnesses to present. (PCR Tr. 25). Counsel credibly testified he discussed Applicant's decision to testify at length, informed him of the consequences of both decisions, prepared for both scenarios leading up to trial, and told him that absent his testimony, the defense would not have much of a case to present. (PCR Tr. 23-25). Because of Counsel's testimony, that there were no other witnesses presented at the PCR hearing or called at trial, and that Applicant did not mention potential witnesses at any point during the trial or PCR process, this Court finds Applicant's testimony that he supposedly did not

know his side of the story would not be presented absent his personal testimony unlikely. (PCR Tr. 40-41). Instead, Applicant presumably decided not to plead because he would likely be impeached if he took the stand, given his criminal history. (PCR Tr. 41-42).

Thus, this Court finds that the decision not to testify was ultimately left to Applicant, with guidance from Counsel. Any advice from Counsel concerning Applicant's decision not to testify was reasonable, because Applicant likely would have been impeached, given his criminal history. Additionally, because Applicant likely would have been found incredible by the jury and, thus, convicted, leaving the proceeding's results unchanged. Applicant has not met his burden of showing deficiency or prejudice and, as such, relief is denied on this basis.

Counsel was not ineffective for failing to challenge the warrants. Beyond voicing discontentedness about the warrants being used as an excuse for stopping Applicant in the relevant incident, Applicant failed to show why the warrants should have been challenged. (PCR Tr. 32, 36). Counsel stated he could not remember why the warrants were not challenged or what defects existed in them, but said he was more focused on the evidence and discovery the State claimed to have against Applicant. (PCR Tr. 10). This Court has not been presented with a valid reason why the warrants should have been challenged and, thus, Counsel is not deficient for allegedly failing to challenge warrants without a reason for doing so. Additionally, because Applicant made no showing how the trial proceedings would have gone differently if the warrants were challenged, prejudice cannot be found here.

Additionally, unlike what Applicant alleged, Counsel was not ineffective for failing to point out the discrepancy in drug amounts between what was stated in the paperwork and in the transcript, because the amount stated at trial in front of the jury was less than one half of what was stated in the paperwork. (PCR Tr. 34-35, 44). Counsel's decision not to point that out was

valid, because pointing out the amount originally listed was over double what was stated at trial would presumably hurt their case and run counter to what is otherwise a valid trial strategy. Additionally, failure to point this discrepancy out would not have changed the results of the proceeding and, thus, Applicant was not prejudiced.

**Conclusion**

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notifies 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. 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. 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 his own behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That the PCR application must be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of South Carolina Department of Corrections.

**AND IT IS SO ORDERED** this 10 day of [illegible], 2020.

GEORGE M. McFADDIN, JR.
Presiding Judge
Fifteenth Judicial Circuit

[illegible], South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

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EUGENE HARDY, #238491,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by emailing one copy to opposing counsel to the email address as listed in the AIS:

**Carla F. Grabert-Lowenstein, Esquire**
cfgllaw@sccoast.net

This 26th Day of August, 2020.

/s Chelsey F. Marto
Chelsey F. Marto
ATTORNEY FOR RESPONDENT