

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Post Conviction Relief

S.C. SUPREME COURT

Debra R. McCaslin, Circuit Court Judge

Lower Court Case No.: 2018-CP-32-03115

Kendrick Lamont Mims #367042,..... Petitioner

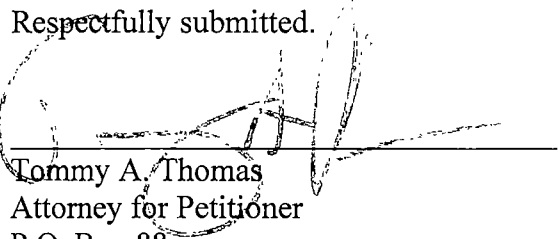
vs.

State of South Carolina,Respondent.

NOTICE OF APPEAL

The Appellant, Kendrick Lamont Mims, appeals the Order of Dismissal, signed by The Honorable Debra R. McCaslin on January 28, 2021 and filed on January 28, 2021. Appellant received written notice of entry of this order on January 28, 2021.

Respectfully submitted.



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February 18, 2021

and represented by Tommy Thomas, Esquire. Assistant Attorney General Lillian L. Meadows represented the State. Applicant presented testimony on his own behalf at the hearing, as did his girlfriend, Misty Davis. The State presented testimony from Applicant's trial counsel, Robert T. Williams, Sr., Esquire (Counsel Williams), and Benjamin A. Stitely, Esquire (Counsel Stitely).

In addition to the pleadings in this action, this Court had before it a copy of the Lexington County Clerk of Court records regarding the subject conviction; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript; and the records of the current PCR action.

After hearing the testimony at the PCR hearing and a full review of the record, this Court finds Applicant's allegations of ineffective assistance of counsel are without merit. Therefore, for the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. During its May 2013 term, the Lexington County Grand Jury indicted Applicant for trafficking cocaine, 400 grams or more (2013-GS-32-01463). On February 10–11, 2016, Applicant proceeded to a jury trial before the Honorable R. Knox McMahon. Robert T. Williams, Sr., Esquire (Counsel Williams), represented Applicant.² Assistant Solicitors Gill Bell and Casey Rankin of the Eleventh Circuit Solicitor's Office prosecuted the case.

² Benjamin Stitely, Esquire (Counsel Stitely), is Counsel Williams' law partner and represented Applicant at one of his pretrial hearings.

A. Summary of Evidence Adduced at Trial

Corporal Antley was stationed on Interstate 20 monitoring traffic for speeding violations. (Tr. 44–46; R. 21–23). Corporal Antley activated his radar at a Ford F-150 pickup he saw traveling faster than the rest of traffic and saw the vehicle travelling 93 miles per hour in a 60 mile per hour section of highway. (Tr. 51; R. 28). After the vehicle pulled over, Corporal Antley noticed lots of movement from the two occupants. (Tr. 53; R. 30). Applicant was a passenger in the vehicle. (Tr. 53; R. 33).

Applicant admitted consuming a beer, and Corporal Antley seized and poured out an open container of beer. (Tr. 56–57; R. 33–34). After performing a field sobriety test on the driver, Corporal Antley spoke with Applicant, asking him to exit the vehicle. (Tr. 62–63; R. 39–40). When he exited, it appeared Applicant was “holding his hands down around his pants” and “trying to hold something up in his pants.” (Tr. 65; R. 42). Corporal Antley performed a pat down of Applicant and found a hard object inside his pants that Corporal Antley believed could have been a weapon. (Tr. 69; R. 46). Corporal Antley asked what Applicant had in his pants and then tried to get Applicant to his knees while watching his hands. (Tr. 69–70; R. 46–47). Applicant refused to comply. (Tr. 70–71; R. 47–48). Instead of complying, Applicant broke free and began to run. (Tr. 72–73; R. 49–50).

Corporal Antley pursued Applicant, who was still trying to hold on to whatever it was in his pants. (Tr. 74; R. 51). Corporal Antley deployed his taser, but it was not effective in stopping Applicant. (Tr. 76–77; R. 53–54). As he attempted to pursue Applicant over a fence, Corporal Antley again deployed his taser, but again it failed to stop Applicant. (Tr. 78–79; R. 55–56).

Corporal Antley caught up to Applicant, who appeared tired from running. (Tr. 81; R. 58). Applicant put his hands toward his groin area, pulled up to remove something, and then is seen by

Corporal Antley placing a bag on the ground. (Tr. 83; R. 60). After placing the bag on the ground, he immediately covered it with some leaves. Applicant then walked toward Corporal Antley and ultimately surrendered. (Tr. 83; R. 60).

B. Verdict & Subsequent Proceedings

On February 11, 2018, the jury convicted Applicant as indicted. Judge McMahon sentenced Applicant to twenty-five years' imprisonment and imposed a fine of \$200,000.

Applicant filed a timely notice of appeal. Appellate Defender Taylor Gilliam perfected Applicant's appeal by filing a brief with the Court of Appeals on the following issue:

“Did the trial judge err in qualifying a sheriff as an expert witness in cocaine and cocaine valuation when the testimony did not assist the jury in understanding the evidence or determining a fact in issue and when the testimony's probative value was substantially outweighed by the danger of unfair prejudice?”

Following briefing, the Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion on October 18, 2017. *State v. Mims*, Op. No. 2017-UP-389 (S.C. Ct. App. filed October 18, 2017). The case was remitted back to the circuit court on November 28, 2017. Applicant timely commenced this PCR action on September 11, 2018.

II. ISSUES BEFORE THIS COURT

In his original application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following reasons:

1. Ineffective Assistance of Counsel

Pursuant to Rule 71.1, SCRCP, Applicant, through PCR counsel, amended his first amended application to include the follow allegations:

1. Applicant was offered a plea for five (5) years. He indicated to his Trial Attorney that he did not want to go to trial and that he wanted to take this offer. That Trial Counsel was ineffective in

his failure to convey the Applicant's acceptance of this plea to the prosecution. That the Applicant is informed and believes that at a later date this plea offer was withdrawn and that as a result, he was prejudiced by the actions of counsel.

2. That the Applicant appeared in Court for what he believed to be a roll call. That Defense Counsel was not present at this appearance. Ben Stitely, Esq. appeared in substitution for Theo Williams. That the Applicant was offered a five (5) year plea offer. He was informed and believe that his case would be continued in order that he could discuss this offer with Mr. Williams. He wanted to accept this offer.
3. That Trial Counsel was ineffective for his failure to discuss the case with the Applicant. Applicant never had the opportunity to properly prepare this case for trial with his attorney. Applicant was unable, nor did he have the opportunity to go over the discovery with Trial Counsel. He was never informed of what evidence the State had against him.
4. That the Applicant is informed and believes that there was a problem with the chain of custody in this case. That the Applicant believes that counsel was ineffective in his arguments regarding these deficiencies in the chain of custody.

At the outset of the evidentiary hearing, PCR counsel stated Applicant was proceeding only on the claims pled in the amended 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.

III. 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 by the Sixth Amendment. *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 post-conviction relief 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). The reviewing court applies the two-part test outlined in *Strickland v. Washington* to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel’s deficient performance. *Id.* at 687–88; *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either

deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that “[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable” (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the *Strickland* analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel’s performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption “by proving that his attorney’s representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy.” *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986); *cf. Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel’s performance in a highly deferential manner, will make every effort “to eliminate the distorting effects of hindsight,” and will “evaluate the conduct from counsel’s perspective at the time” in light of then-existing circumstances. *Strickland*, 466 U.S. at 689. In order to establish counsel’s performance was deficient, the applicant must demonstrate “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. Accordingly, counsel’s performance will be considered to be deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply “deviated

from best practices or most common custom.” *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland*, 466 U.S. at 691. In order for that burden to be met, counsel’s deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel’s unprofessional errors. *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625; see *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (“To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel’s representation fell below an objective standard of reasonableness and, but for counsel’s errors, there is a reasonable probability the result at trial would have been different.”). Importantly, “[t]he likelihood of a different result must be *substantial*, not just conceivable.” *Richter*, 562 U.S. at 112.

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 689–90. Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant’s burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel’s conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. 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. *Id.* at 686; see *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the

“benchmark” of the right to counsel is the “fairness of the adversary proceeding”); *cf. United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) (“[T]he threshold issue is not whether [the applicant’s] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.”).

IV. 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 applications 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.

As an initial matter, Applicant testified at the hearing that he was currently serving a twenty-five (25) year sentence for trafficking in cocaine. Applicant testified that he must serve eighty-five (85%) percent of his sentence, and his max-out date is 2041. Applicant also testified that he was not eligible for parole. Applicant testified that he is asking this Court for his conviction be set aside and for a new trial. Applicant affirmed that he understood the risk associated with his post-conviction relief action and that wished to proceed with his application.

A. Failure to Convey Acceptance of Plea Offer

Applicant first contends he was offered a plea deal for five years, which Applicant testified that he informed Counsel Williams he wished to accept. Applicant claims Counsel Williams was ineffective for failing to convey his acceptance to the prosecution on his behalf. Applicant further

contends Counsel Stitely, who went to court with him on the day the plea offer expired, was ineffective for failing to request a continuance. This Court disagrees, and finds credible and persuasive the testimony of Counsel Williams and Counsel Stitely, who presented well-recollected testimony of the events leading up to Applicant's trial.

At the PCR hearing, Applicant testified he met with Counsel Williams several times in the three years before trial, including during his roll call appearances. Applicant was out on bond for three years before trial. Applicant testified he understood the charge and that he could receive a mandatory minimum twenty-five to thirty year sentence. However, Applicant never thought he would face that much time because he never thought he would go to trial. Rather, Applicant testified there was a five-year plea offer, and he wanted to accept it. He testified he told Counsel several times that he did not want to go to trial and wanted to take the plea offer.

Applicant testified he appeared for a December roll call in 2015. Because Counsel Williams was involved in another trial that week, Counsel Stitely represented him. Applicant testified he told Counsel Stitely he wanted to accept the plea offer, but that he wanted a continuance so he could speak with Counsel Williams about it. Applicant further testified that he knew he would go to jail the day he plead guilty, and that he wanted a continuance because he did not want to be incarcerated during Christmas.

Applicant testified Counsel Stitely went into the solicitor's office to discuss the case, but that he is not sure what transpired during that meeting because he waited outside. Applicant was then given notice that his case would be called for trial in February of 2016. He testified he called Counsel Williams as soon as he got back into his car from the courthouse parking lot. Applicant testified he told Counsel Williams about the trial date at that time, and again told him he did not

wish to proceed to trial. Applicant testified that Counsel Williams told him he would not have to go to trial.

Regarding the alleged five-year plea offer, Applicant testified he never got the opportunity to accept it because he was never taken to court to enter the guilty plea. Applicant testified he told Counsel Williams several times that he wanted to accept the offer. Applicant claimed he did not find out until February that the five-year plea offer was withdrawn on the day he went to court with Counsel Williams. He again told Counsel Williams he did not want to go to trial. Applicant testified Counsel Williams told him the only plea offer available at that point was for twenty-five years. Applicant testified he wants to get the five-year offer back if possible. He stated that, had he had a chance to speak with Counsel Williams on the day he went to court with Counsel Stitely, he would not be sitting in prison with twenty-five years.

On cross-examination, Applicant testified Counsel Williams was the one who first told him about the five-year plea offer. He again stated he told Counsel Williams he wanted to accept it. When he went to court with Counsel Stitely in December, Applicant stated Counsel Stitely also told him the solicitor would give him the five-year plea deal. Applicant testified he never told Counsel Stitely he wanted to go to trial but that he wanted to speak with Counsel Williams first. Applicant claimed he asked Counsel Stitely to request a continuance, but that Counsel Stitely came out of the solicitor's office with the trial date and said this was the only court appearance they would give him. When asked whether he knew if, at that point, they would not continue the matter, Applicant testified he did not know anything about the law and that he was not aware the offer would be withdrawn.

The Court then told Applicant that, in general, a defendant who is offered a plea deal during roll call has to make a choice whether they want to plead or not that day. The offer is usually taken

off the table if it is not accepted at that time and a trial date is set. Applicant testified the offer was on the table the day he went to Court with Counsel Stitely; however, Counsel Stitely did not tell him the offer would be withdrawn if he did not accept it that day. Applicant testified that he would have accepted the offer had he known it was going to expire after that day.

Applicant's girlfriend, Misty Davis, also testified at the hearing. She stated she was not aware of a five-year plea offer based on what Applicant told her but that she knew he did not want to go to trial. She stated she attended Applicant's meetings with Counsel Williams and that she was in the car with Applicant when he called Counsel Williams about receiving the trial date. She testified Counsel Williams told Applicant he would not be going to trial.

As its first witness, the State called Counsel Williams, who testified Applicant hired him approximately three years before trial. Counsel Williams provided a summary of the facts of the case and what occurred during the stop. Counsel Williams further stated he met with Applicant on multiple occasions and extensively discussed the case with him. Counsel Williams also testified that at the time these charges were pending, the Applicant had pending charges in the states of Florida and Alabama.

Counsel Williams recalled engaging in extensive plea negotiations with Solicitor Bell in this case. In July 2015, the State made its offer, giving Applicant two options: (1) plead guilty to trafficking ten to twenty-eight grams, second offense, with a five to thirty year range; or (2) plead guilty to trafficking twenty-eight to one hundred grams, first offense, with a seven to twenty-five year range. Counsel Williams stated he would be able to ask the Court for any sentence within that range, but that Solicitor Bell would likely ask for a sentence on the higher end of the five to thirty-year range. Counsel informed Applicant that in his professional opinion, it was very unlikely

Applicant would received five years, and that the sentence likely would have been in the range of fifteen to twenty years.

Counsel Williams further stated that Applicant was arrested in Florida for cocaine while out on bond, and that Solicitor Bell was trying to have Applicant extradited for trial on those charges. Eventually Solicitor Bell was able to get Alabama, where Applicant also had pending charges, to waive any hold on they had on Applicant, who then returned to South Carolina. Counsel Williams testified that Applicant came back voluntarily, and further testified he believed Applicant would have had a better chance of getting a sentence on the lower end of the five to thirty year range had he not been arrested on cocaine charges in Florida and had pending charges in Alabama.

Counsel Williams further testified the State never offered a five-year negotiated sentence. Had such an offer been made, Counsel Williams stated there is a possibility Applicant would have accepted it; however Applicant never gave Counsel Williams any indication he would accept any plea offer. Rather, Counsel Williams testified Applicant conveyed to him his desire to "not to go to jail and to get a not guilty at trial." Counsel Williams stated there was never a question of Applicant pleading guilty, and does not think Applicant would have accepted even a five-year plea offer at that time. Applicant believed the State would not be able to prove trafficking since the drugs were not found on Applicant's person at the time of arrest.

Counsel Williams testified the deadline for the five-to-thirty year plea offer was September 4, 2015. When Applicant appeared at roll call with Counsel Stitely, Counsel Williams was drawing a jury in another case being tried that week. Applicant's sheet came back setting the trial date for February of 2016. Counsel Williams received a letter stating that Applicant turned down the five to twenty-five year offer three times. He also received an email on Monday, December 14, that Applicant rejected the offer for a third and final time, and that the State was revoking all offers.

Counsel Williams testified he did not know whether Applicant's appearance with Counsel Stitely was the third rejection of the plea offer, but surmised that Applicant may have been represented by a public defender for a short time before Counsel Williams took over the Applicant's.

Counsel Williams recalled speaking to Counsel Stitely after the December 2015 court appearance, but that he could not remember the details of their discussions about this. However, he did recall Applicant calling him from the courthouse parking lot after the court appearance. Counsel Williams testified that during this phone call, Applicant specifically told Counsel Williams he did not want to accept the plea offer. Counsel Williams told Applicant at that time that he would try to get a better offer, but he did not think it would happen.

On cross-examination, Counsel Williams reiterated that Applicant never told him or otherwise indicated he wanted to plead guilty. Had Applicant done so, Counsel Williams testified he certainly would have assisted him in pleading guilty. Counsel Williams agreed with PCR counsel that defense counsel typically receives written plea offers with an expiration date but they usually do not have a hard deadline. Counsel Williams stated they went back to Solicitor Bell after the offer expired in December, but that Solicitor Bell simply would not change his mind.

The State next called Counsel Stitely, who remembered being present for "eight or nine" of Applicant's roll calls in place of Counsel Williams. The December roll call was during "blue light" week with Judge Addy, where the solicitor's office schedules as many drug pleas as possible. Counsel Stitely recalled two potential plea dates. He recalled speaking to Solicitor Bell, who gave him the sentencing sheet. The sole plea offer from the State was a "straight up" plea with a sentencing range of five to thirty years. Counsel Stitely did not specifically recall his conversation with Applicant, but said he would have told Applicant that if he accepted the offer, a five-year sentence would be unlikely. He did not recall specifically whether Applicant asked him for a

continuance at the roll call hearing in December. However, Counsel Stitely explained that the procedure in Lexington would not be to move for a continuance; rather, he would ask the solicitor for more time. Counsel Stitely specifically recalled telling Applicant that this was the only plea deal he would get.

PCR counsel briefly re-examined Applicant. Applicant again testified he did not want a trial but that he did not want to plead until after Christmas because he did not want to be in jail during Christmas. This Court then asked Applicant if he would have plead guilty that day in December 2015 when he went to roll call with Counsel Stitely. Applicant replied that he only heard about the five-year offer and did not hear anything about thirty years. The Court then asked Applicant if the reason he did not want to plead guilty that day was because it was close to Christmas. Applicant stated that no, that was not the reason but that he did not want to plead guilty until after he spoke to Counsel Williams.

1. Deficiency

As an initial matter, this Court finds Applicant failed to demonstrate he was ever offered a five-year negotiated plea agreement. This Court would note that there is nothing in the record, beyond Applicant's own testimony, indicating Solicitor Bell ever made such an offer. Counsel Williams and Counsel Stitely both presented credible and believable testimony that the only offers presented to Applicant were (1) trafficking ten to twenty-eight grams, second offense, with a five to thirty year range; or (2) trafficking twenty-eight to one hundred grams, first offense, with a seven to twenty-five year range. Considering the facts of the case; the sheer amount of cocaine Applicant was charged for, almost a kilogram (1,000 grams), together with Counsel Williams' testimony that Solicitor Bell simply would not agree to a more favorable sentence, supports the

Court's finding that Applicant failed to prove that an offer of a negotiated five-year sentence was ever made.

In the context of plea negotiations, an attorney's failure to communicate a formal plea offer to a criminal defendant falls below an objective standard of reasonableness under *Strickland*. *Missouri v. Frye*, 566 U.S. 134, 149 (2012); *see Strickland*, 466 U.S. at 688 (explaining that counsel has a duty "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution."). Further, "allow[ing] an offer to expire without advising the defendant or allowing him to consider it" constitutes deficient performance. *Frye*, 566 U.S. at 145.

This Court finds neither Counsel Williams nor Counsel Stitely deficiently allowed Applicant's plea offer to expire without consulting him. Specifically, this Court finds Applicant failed to demonstrate that he did not understand or was never informed of any offer with a sentencing range of up to twenty-five or thirty years, particularly given Counsel Williams' testimony he received a letter and email from the solicitor's office that Applicant expressly turned down the five to twenty-five year offer three times. Applicant ultimately failed to demonstrate that the acts of either Counsel Williams or Counsel Stitely "were outside the wide range of professionally competent assistance" demanded of attorneys in criminal cases. *Strickland*, 466 U.S. at 690.

2. Prejudice

This further Court finds Applicant has failed to show he was prejudiced because his testimony precludes a finding that he intended to plead guilty prior to the alleged error by counsel. To satisfy the *Strickland* prejudice prong where a plea offer has lapsed or been rejected because of counsel's deficient performance, an applicant must demonstrate a reasonable probability that:

(1) he “would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;” (2) “the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;” and (3) “the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.”

Collins v. State, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (quoting *Frye*, 566 U.S. at 147); see *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (“In the context of plea negotiations, the prejudice element turns on whether counsel’s performance affected the defendant’s final decision to accept or reject a plea offer.”).

Beyond his own testimony, Applicant failed to present any evidence suggesting Applicant expressed any desire to plead guilty. Counsel Williams testified Applicant never told him he wanted to plead guilty because Applicant believed the State would not be able to prove the trafficking charges since the drugs were not actually found on Applicant’s person. Crucially, Applicant never testified or otherwise indicated he would have accepted the five to thirty or seven to twenty-five year plea offer. Rather, he repeatedly testified this offer did not exist, and that the offer was specifically for a negotiated five-year sentence. Even when asked by this Court whether he would have pleaded guilty that day in December 2015, Applicant responded that he only heard about a five-year offer and never heard anything about thirty years. Because Applicant refused to acknowledge the existence of the five-to-thirty year plea offer, this Court finds Applicant failed to show he would have accepted it.

As discussed above, this Court finds and concludes that Applicant has failed to present any evidence that a five-year negotiated plea offer existed. The remaining two showings required under *Collins* therefore do not apply. Accordingly, Applicant’s allegations pertaining to ineffective

assistance rendered by Counsel Williams and Counsel Stitely regarding the alleged five-year plea offer are **DENIED**.

B. Failure to Prepare Applicant for Trial

Applicant next contends Counsel Williams was ineffective for failure to prepare him for trial. Specifically, Applicant alleges Counsel Williams failed to review the discovery with Applicant or otherwise advise him of the State's evidence against him. At the hearing, however, Applicant testified he could not recall whether he and Counsel Williams reviewed the discovery. Applicant further testified he did not know what the State's evidence was against him, but later testified on cross-examination that he reviewed the dash cam video.

Counsel Williams testified he reviewed all the discovery with Applicant. The only piece of evidence he did not go over with Applicant the chain of custody sheet, which Counsel Williams received in January. Counsel Williams testified that nonetheless mailed a copy to Applicant. Counsel Williams further stated he did not do any independent investigation aside from the State's discovery. He testified that it was his belief that "this was a straightforward case" and did believe there was anything else he needed to look into.

Counsel Williams and Applicant both testified they met several times during the three-year period before trial. *See Harris v. State*, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (finding that, when there is evidence counsel met with a defendant in preparation for trial and there is no evidence additional preparation on the part of counsel would have affected the outcome at trial, counsel cannot be said to have been ineffective), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

Based on the testimony and evidence presented, this Court finds Applicant failed to overcome the “strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case.” *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Counsel Williams’ credible testimony indicates he met with Applicant prior to trial, reviewed the discovery with him, and discussed his case with him at length. Applicant failed to present “any evidence of how additional preparation or communication would have resulted in a different outcome.” *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012); *see Jackson v. State*, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998) (explaining that, where an applicant failed to present any evidence of what counsel could have discovered or what other defenses he would have requested counsel pursue had counsel more fully prepared for the trial, applicant failed to show his counsel’s lack of preparation prejudiced him); *Skeen v. State*, 325 S.C. 210, 214–15, 481 S.E.2d 129, 132 (1997) (finding applicant was not entitled to post-conviction relief where there was no evidence presented at the PCR hearing to show how additional preparation would have had any possible effect on the result of the trial).

Accordingly, Applicant’s allegation pertaining to Counsel Williams’ failure to properly prepare Applicant for trial is **DENIED**.

C. Failure to Adequately Challenge the Chain of Custody

Finally, Applicant contends Counsel Williams was ineffective for failing to properly challenge the chain of custody. Counsel Williams testified that he did not believe there was any reasonable chance that he would be able to successfully argue the drugs should be suppressed. Counsel Williams stated that while he has previously successfully suppressed drugs in previous cases, those cases involved many more breaks in the chain of custody than were present in

Applicant's case. Counsel Williams testified he believed there were better grounds to contest the validity of the stop than the chain of custody.

On cross-examination, PCR counsel asked Counsel Williams about a potential break in the chain of custody between the time the drug evidence was logged in and when the evidence custodian first came into contact with it.³ (Tr. 224–25; R. 193–94). Apparently the forensic technician who first logged in the evidence and placed it in the evidence room did not testify, although her signature was on the custody sheet. (Tr. 224–25; R. 193–94). The evidence custodian testified the evidence had already been logged in and placed in the evidence room when she first came into contact with it, and that she delivered it directly to the forensic scientist. (Tr. 224–25; R. 193–94).

The record shows Counsel Williams objected to the solicitor's leading questions during his direct examination of the evidence custodian, however, he did not object to the actual chain of custody. (Tr. 225–26; R. 194–95). Counsel Williams further moved for a mistrial on this basis. (Tr. 226–27; R. 195–96). Specifically, Counsel Williams argued the solicitor was attempting to "correct[] the witness's testimony where it clearly would have indicated a gap in the chain of custody." (Tr. 226–27; R. 195–96). Judge McMahon denied the motion and the State resumed its direct examination. (Tr. 227; R. 196).

PCR counsel also asked Counsel Williams about a discrepancy with the date the evidence custodian first came into contact with the evidence and brought it upstairs to the forensic scientist. (Tr. 224–25; R. 193–94). The evidence custodian later clarified that she misread the date. (Tr. 225–28; R. 194–97). Counsel Williams testified he did not object because the issue was essentially cured, and he believed Judge McMahon would have admitted the evidence anyway. Counsel

³ Counsel Williams did not have a copy of the transcript; however, he had a copy of the file which included custody sheet, SLED report, etc.

Williams further stated he is very experienced with chain of custody issues, and is certain he would have caught any possible issues. Additionally, the record shows Counsel Williams extensively addressed issues with the chain of custody in his closing argument at trial. (Tr. 313–316; R. 271–274).

This Court finds Applicant has failed to present any evidence Counsel Williams was ineffective in handling the chain of custody. In *State v. Hatcher*, our Supreme Court analyzed cases in other jurisdictions where “[c]ourts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts.” 392 S.C. 86, 94, 708 S.E.2d 750, 754 (2011). The Court ultimately held that “the State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable.” *Id.* at 95, 708 S.E.2d at 755.

Accordingly, Applicant’s allegation pertaining to Counsel Williams’ failure to adequately challenge the chain of custody is **DENIED**.

V. 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.

VI. 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

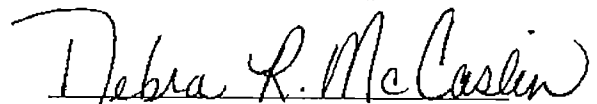
deprivations that would require this Court to grant his application for post-conviction relief. This Court finds that Counsel Williams nor Counsel Stitely was deficient in any manner, nor was Applicant prejudiced by Counsel's representation. Therefore, based on the foregoing, this Court denies relief 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. This Court denies relief and dismisses the action with prejudice; and
2. Applicant shall be remanded to the custody of the State.

IT IS SO ORDERED this 28th day of January, 2021.



DEBRA R. MCCASLIN
Presiding Circuit Court Judge
Eleventh Judicial Circuit

Lexington, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE ELEVENTH JUDICIAL
COUNTY OF LEXINGTON)	CIRCUIT
)	
)	
KENDRICK LAMONT MIMS, #376786)	
)	Case No.: 2018-CP-32-03115
Applicant,)	
)	
v.)	Certificate of Service
)	
State of South Carolina)	
)	
Respondent,)	
_____)	

1. Undersigned is counsel of record for the Respondent in the above-captioned action.
2. Pursuant to the South Carolina Supreme Court’s Order “RE: Operation of the Trial Courts During the Coronavirus Emergency” (Appellate Case No. 2020-000447), dated April 3, 2020), “a lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer’s primary email address listed in the Attorney Information System (AIS).”
3. Undersigned has served a copy of the **Order of Dismissal** in the above-captioned matter on opposing counsel by emailing a copy to the email address as listed in the AIS:

Tommy A. Thomas, Esquire
thomaslaw@me.com

DATED this 28th day of January, 2021

s/LillianMeadows
LILLIAN L. MEADOWS
Assistant Attorney General

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