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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable R. Kirk Griffin, Circuit Judge

Case No.: 2016-CP-26-7592

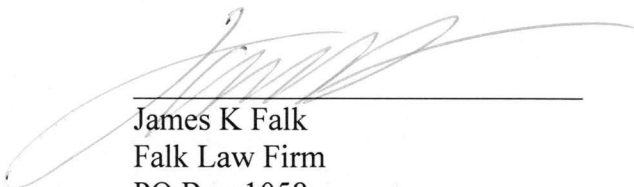
ALTON WESLEY GORE 322597.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Alton Wesley Gore 1 appeals the Honorable R. Kirk Griffin's February 23, 2021 Order of Dismissal. Undersigned counsel received notice of entry of the order on March 8, 2021. A copy of the order on appeal is attached hereto.



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STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)
 Alton Wesley Gore, #322597,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTEENTH JUDICIAL CIRCUIT

C.A. No. 2016-CP-26-7592

ORDER OF DISMISSAL

FILED
 HORRY COUNTY
 2021 FEB 25 P 2:22
 RENEE M. ELYS
 CLERK OF COURT
 HORRY COUNTY, S.C.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Alton Wesley Gore (Applicant) on November 29, 2016, and amended through counsel on October 16, 2019. Respondent made its Return on October 6, 2017, and Amended Return on January 10, 2018.¹ An evidentiary hearing into the matter convened December 10, 2020, via Cisco WebEx Meetings in accordance with the Chief Justice’s administrative memorandum, *Court Operations*, dated September 14, 2020.² James K. Falk, Esquire, represented Applicant. Assistant Deputy Attorney General Lindsey A. McCallister represented Respondent.

At the hearing, Applicant testified on his own behalf. Respondent called Applicant’s trial counsel, Timothy Kirk Truslow, and Bradley Richardson, one of the solicitors who prosecuted the case. This Court also had before it a copy of the Horry County Clerk of Court’s records regarding

¹ The State amended the Return to correct an error in the procedural history.
² See S.C. Sup. Ct. Memorandum dated September 14, 2020 (“Judges . . . have discretion to determine whether it is appropriate to conduct a hearing using remote communication technology. *Consent of the parties or counsel is not required.* Please use WebEx, the conferencing platform supported by the Judicial Branch.” (emphasis added)). Nonetheless, this Court questioned Applicant at the beginning of the hearing, and Applicant indicated his consent to the use of the WebEx platform.

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the subject convictions, records from the South Carolina Department of Corrections, the application and amendments, Respondent's Return and Amended Return, transcripts of the pre-trial hearing and trial, and Applicant's appellate records. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies relief.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the June 2010 term of the Horry County Grand Jury for trafficking in cocaine, between 200 and 400 grams (2010-GS-26-02326).³ Timothy Kirk Truslow (Counsel) represented Applicant on the charge. Michael O'Sullivan, of the Fifteenth Circuit Solicitor's Office, prosecuted the case pre-trial. Nancy Cote and Bradley Richardson, of the Fifteenth Circuit Solicitor's Office, prosecuted the case at trial.

Applicant appeared before the Honorable Steven H. John on March 15, 2011, for a pre-trial Franks⁴ hearing regarding the propriety of the search warrant permitting the search of his residence. Judge John found the search warrant affidavit proper and denied Applicant's motion to suppress the fruits of the search. On January 3 and 5, 2012, Applicant proceeded to trial before the Honorable Edward B. Cottingham and a jury. The primary factual point of contention at trial was whether or not the house in which the drugs were found was, in fact, Applicant's residence. After just over an hour of deliberation, the jury found Applicant guilty as indicted on January 5,

³ Applicant also faced seven other charges and indictments for various less severe drug crimes, all of which were dismissed without indictment or *nolle prosequi* after Applicant was convicted and sentenced on this indictment.

⁴ Franks v. Delaware, 438 U.S. 154 (1978).

2012. Judge Cottingham sentenced Applicant to imprisonment for a term of 25 years and a fine of \$100,000.00—the statutory minimum.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Nicole Nicolette Mace and Amy K. Raffaldt. The South Carolina Court of Appeals considered three issues:

1. “[Whether t]he trial judge properly denied Appellant’s motion to suppress where the search warrant affidavit was not submitted with intent to deceive or with reckless disregard for the truth and where the affidavit provided probable cause for issuance of the search warrant. Further, even if the search warrant had been defective, the good-faith exception applied to preclude suppression of the fruits of the search.”
2. “[Whether t]he trial judge properly allowed into evidence two photographs of Appellant which were relevant to proving he was a resident of the house, served to corroborate testimony, and which were not unfairly prejudicial. In any event, even assuming the judge erred, admission of the photographs was harmless in the context of the entire case.”
3. “[Whether t]he trial judge properly denied Appellant’s request for a lesser-included charge of simple possession where there was no evidence suggesting the Appellant was guilty of only the lesser-included offense.”

The parties proceeded to oral arguments before the Court of Appeals on December 10, 2013. By opinion decided April 2, 2014, the South Carolina Court of Appeals affirmed Applicant’s convictions. State v. Gore, 408 S.C. 237, 758 S.E.2d 717 (Ct. App. 2014). Applicant’s petition for rehearing was denied by order filed June 19, 2014. Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari, which was initially granted in part (as to Questions I and II) and denied in part (as to Question III) by order dated January 16, 2015. The parties proceeded to oral arguments before the Supreme Court on October 21, 2015. By opinion decided December 2, 2015, the Supreme Court dismissed certiorari as improvidently granted. State v. Gore, 414 S.C. 577, 780 S.E.2d 261 (2015). The remittitur issued on December 2, 2015.

SUMMARY OF TESTIMONY ADDUCED AT TRIAL

On March 5, 2010, narcotics officers with the Horry County Police Department executed a search warrant at Applicant's residence at 309 Junco Circle in Longs. The probable cause portion of the search warrant affidavit states as follows:

A confidential and reliable informant made a buy for cocaine out of the residence while being recorded and monitored by agents in the area. Also within the last seventy two hours agents followed the defendant from the residence to another location and were able to monitor and record another buy for a quantity of cocaine. It is the affiants belief that there are more illegal narcotics in the residence.

The affidavit was based on two controlled drug buys conducted by a confidential informant in July 2009 and February 2010. During the second buy, officers followed Applicant from the residence to another location where the transaction of cocaine occurred. The officers observed Applicant leave the house, get into his vehicle, and drive directly to a nearby location to conduct the sale. A few days later, officers conducted a traffic stop, detained Petitioner, and executed the search warrant at the residence. Officers found 397 grams of cocaine in the home.

Applicant's defense at trial centered around ownership of the residence and the items, including the drugs, found inside it. It was undisputed at trial that Applicant's mother owned the house, although she did not live there at the time. It was also undisputed that Applicant's co-defendant and former girlfriend, Angel Deangelo, had a lease agreement for a separate residence in North Carolina. Deangelo testified that around the time of Applicant's arrest, she was going to school and working in North Carolina during the day and driving down to spend three or four nights per week with Applicant at his house.

Prior to executing the search warrant, police obtained a key to the house from Applicant. Applicant's vehicles were parked at the house. Police officers testified that based on their

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observations during their narcotics investigation, Applicant lived at the residence. A clerk's office employee testified that the address listed on Applicant's bond document (which was signed by Applicant) was the address where the cocaine was found. A home-detention officer testified he monitored Applicant on bond from March 2010 through 2011; Applicant's address was the same address where the cocaine was found; and he visited Applicant at that address while monitoring him. Men's clothing was found in the master bedroom, and the most of the cocaine was found hidden in a stack of men's pants in that bedroom. Additionally, officers found multiple pictures of Applicant in the bedroom, wearing pants and clothing similar to the clothing found in the closet.

ALLEGATIONS

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

1. "Placing a limine law on the trial was unconstitutional"
 - a. "If counsel wouldn't put limits on trial, results would've been different"
2. "Unprofessional Franks hearing violated due process"
 - a. "If counsel would've gotten magistrate subpoenaed to Franks hearing, different results"
3. "Disqualifying jury before the trial started [Prosecutorial] Misconduct with co-defendant"
4. "Counsel should've disqualified jury after co-defendant picked with then testified against."

In his amended application, Applicant further alleges:

1. Trial counsel provided ineffective assistance of counsel by seeking to challenge the lawfulness of the search warrant by requesting a hearing under Franks v. Delaware, 438 U.S. 154 (1978). Applicant is informed and believe that had trial counsel sought to suppress the search warrant based upon the insufficiency of probable cause alleged within the four corners of the warrant affidavit it is likely that the trial court would have suppressed all evidence seized under the search warrant.
2. By seeking a motion in limine to preclude all mention of defendant's prior drug arrests, trial counsel provided ineffective assistance of counsel. As a result of the Court's ruling on the motion, trial counsel was precluded trial (sic) from attempting to introduce testimony questioning the reliability of the confidential informant.

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3. Trial counsel provided ineffective assistance of counsel by failing to seek and (sic) order requiring the State to disclose the identity of the confidential informant.
4. Applicant was prejudiced by trial counsel's failure to seek a continuance of the trial once Applicant's co-defendant agreed to testify as a state witness. Trial counsel and applicant had insufficient time to prepare to cross-examine the co-defendant.
5. Applicant was prejudiced by trial counsel's failure to strike the jury panel after co-defendant agreed to testify against Applicant. Co-defendant participated in the selection of the jury, and after the jury was sworn, but before the opening statements, the co-defendant met with the Solicitor and agreed to testify against Applicant. Applicant was prejudiced by his co-defendant's participation because Counsel for co-defendant exercised its (sic) five peremptory strikes against jurors 159, 133, 24, 2, and 122. Additionally Counsel for co-defendant exercised peremptory strikes against jurors 355 and 270 as potential alternates. Trial counsel prejudiced Applicant's 6th Amendment rights and Due Process rights by allowing him to be tried before a jury that was selected in part by a State's witness.
6. Trial counsel provided ineffective assistance of counsel by failing to raise contemporaneous objections to the introduction of testimony and evidence obtained under the search warrant.
7. Trial counsel failed to object to testimony by Officer Kent Donald and Officer Mark Cooper that they each had experience in conducting undercover drug buys. Applicant is informed and believes that the jurors inferred that one or both officers conducted the undercover buys leading to Applicant's arrest.
8. The Solicitor engaged in prosecutorial misconduct by failing to fully disclose the deal that was provided to the co-defendant in exchange for her testimony.

At the evidentiary hearing, Applicant proceeded on the allegations in his amended application, which encompasses and expands upon the allegations in his original application. To the extent the allegations in Applicant's original application can be construed as separate grounds for relief, this Court finds Applicant waived and abandoned those grounds, and they are dismissed with prejudice.

SUMMARY OF TESTIMONY AT EVIDENTIARY HEARING

Franks hearing and objections to evidence obtained under the search warrant

Applicant testified he is alleging he received ineffective assistance of counsel because Counsel sought a Franks hearing instead of seeking suppression of the drugs found in the home based upon the face of the search warrant affidavit. Applicant testified he believes the affidavit

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contained inaccurate information based upon the juxtaposition of the first two sentences: "A confidential and reliable informant made a buy for cocaine out of the residence while being recorded and monitored by agents in the area. Also within the last seventy-two hours agents followed the defendants from the residence to another location and were able to monitor and record another buy for a quantity of cocaine." Applicant testified he also felt there were other problems with the affidavit, and it would have been better to attack the sufficiency of the probable cause contained within the four corners of the document. Applicant explained the first drug buy, which allegedly took place at the residence, occurred in July, and the second buy occurred in February - seven months apart from each other. Applicant further testified the defense did not receive any evidence on the buys regarding the identity or credibility of the confidential informant. Applicant testified he felt officers used an "investigative tactic" to join the two buys and connect drug activity to the house. Applicant stated he felt it would have been better for Counsel to argue the first two sentences were insufficient to establish probable cause. Applicant also testified he believes Counsel was ineffective for not challenging the testifying officer, Ard's, testimony about what he told the magistrate to supplement the warrant because Ard should have testified on camera or made a recording of what he told the judge.

Applicant further testified he believed Counsel should have challenged the search warrant so Applicant had a better understanding of whether or not he committed these crimes while the State was making him plea offers. Applicant explained anybody could have made allegations against him, and he felt if the charges from the drug buys were dismissed, the charges stemming from the warrant should be dismissed also. Applicant testified he could not say he had done something if he has not had an opportunity to examine the evidence. Applicant further stated if he

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had been convinced the confidential informant's testimony was accurate, he would have been more likely to agree to a plea bargain.

Counsel testified he filed the Franks motion, and although they argued that issue, the hearing also turned into a more traditional suppression hearing. Counsel testified the judge treated the hearing as a suppression hearing and ruled on that issue as well. Counsel explained his intent in arguing it as a Franks issue was to try to remove certain statements from the affidavit and then evaluate probable cause without those statements. However, the judge upheld the search warrant and found probable cause because the officer, Ard, provided oral supplementation. Counsel explained the judge ruled the officer could testify as to what he told the magistrate, so he provided supplemental information in addition to the affidavit when he testified at the hearing. Counsel testified the case law is clear officers are allowed to supplement the affidavit by sworn testimony, but if they had not done that, it would have been better for Applicant, as in Counsel's opinion, the warrant was not valid without supplementation. Counsel testified at the time he filed the motion, months before trial, he did not consider challenging probable cause based only on the four corners of the affidavit, but the judge ruled on that issue anyway.

Counsel also testified he made a standing objection to the introduction of various pieces of evidence, including evidence obtained pursuant to the search warrant. Counsel noted these issues were preserved and raised on appeal.

Motion in limine and identity of confidential informant

Applicant next testified he believes Counsel was deficient in his handling of the motion in limine, which Counsel made to preclude mention of Applicant's prior drug arrests, because Applicant believes the motion actually worked to his detriment. Applicant explained Counsel said

he wanted to limit testimony about Applicant's prior drug activities, but Applicant felt that testimony was relevant because it would have provided a basis for the defense to obtain evidence about the confidential informant. Applicant explained he believes Counsel's decision to make the motion prejudiced him because it resulted in the exclusion of a "material witness" and testimony about how the officers got probable cause for the search of the house. Applicant acknowledged he was not tried on the charges arising from the controlled buys themselves, but he stated he repeatedly asked Counsel to find out if any audio or video of the controlled buys actually existed so they could review it. Applicant testified he believes Counsel was ineffective because Counsel did not do that, and he believes the motion in limine prevented the defense from being able to attack the validity of the confidential informant.

Applicant testified if he knew whether any video or audio existed, he would not have gone to trial. Applicant testified he told Counsel multiple times he wanted to know the identity of the confidential informant, and he needed to see that evidence in order to evaluate the strength of the case against him and decide whether or not he had done what the State accused him of. Applicant further testified the State made several plea offers, and in order to decide if he wanted to accept those offers, he needed to see the evidence to confirm he had done this. Applicant testified he needed to know "everything" about the confidential informant, and Counsel should have asked for an in-camera hearing to determine if the informant actually existed and a buy really occurred, but instead, Applicant never got the chance to challenge the evidence. Applicant further testified Counsel also could have filed a motion to have the informant, as an eyewitness, pick Applicant out of a lineup, which Applicant stated could have prevented him from going to trial because he would not have gone to trial if he had the opportunity to challenge the evidence.

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Counsel testified he filed the motion in limine because he wanted to prohibit the State from presenting evidence about Applicant's prior bad acts, specifically prior drug activity, and the motion was granted. Counsel testified an issue then came up during his cross-examination of the co-defendant, DeAngelo, when he asked her about a phone call she had made to Counsel's office inquiring about retaining Counsel to represent her ex-husband who had been arrested on federal drug conspiracy charges. Counsel testified his strategy on cross-examination was to point out she lived in the house, and she was closely connected to another man who was a federal drug defendant at that time. Counsel testified the questioning was part of his overall defense strategy that Applicant did not have control of the home and the drugs were not his. However, Counsel explained, the trial judge warned him that if went too far into the co-defendant's drug history, he could open the door to testimony about Applicant's history that had already been excluded by the motion in limine. Counsel testified he got the information about the co-defendant's ex-husband in, but then he stopped his questioning on that subject. Counsel testified if the judge had not warned him against continuing that line of questioning, he may have been able to flesh the argument out more to make the connection more obvious.

As to the identity of the confidential informant, Counsel testified he did not file a motion to reveal the informant's identity or otherwise seek that information from the State because he knew the solicitors would not give it to him. Counsel stated Applicant was tried only on the trafficking charge, not the drug buys involving in the informant. Counsel testified he recalled being told there was audio and video evidence, but he did not believe he ever received discovery on the distribution charges and did not recall ever seeing the video.

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Jury Picked by Co-defendant and Failure to Move for Continuance

Applicant testified his trial began as a joint trial with his co-defendant, Deangelo. Applicant testified Deangelo was not the informant or one of the people involved in the buys. He stated she became involved after his arrest, when officers brought him back to the house, and she claimed the house was hers. Applicant testified she was then also arrested. Applicant further testified Deangelo later became a witness against him at trial and claimed the house belonged to Applicant, not her.

Applicant explained Deangelo began the trial as a co-defendant and helped pick the jury and made a motion to sever the trial, but then the next day she changed her mind and decided to testify against Applicant. Applicant testified Deangelo's attorney struck jurors 159, 133, 24, 2, and 122 using peremptory strikes. Applicant testified he wanted Counsel to request a mistrial and draw a new jury that Deangelo was not involved in picking. Further, Applicant testified he believed Counsel should have asked for a continuance after they were informed Deangelo would testify for the State because Applicant did not believe Counsel had enough time to prepare for her cross-examination.

Counsel testified he suspected Deangelo would ultimately decide to testify against Applicant and did not think there was anything further he could have done to prepare for her testimony. Counsel testified he debated moving to strike the jury once Deangelo agreed to testify for the State, but at the time he felt that having a co-defendant help pick the jury did not hurt Applicant, and, potentially, it might even help. He testified, in hindsight, he thought perhaps Deangelo picked people she felt would be favorable to her or believe her, but at the time, he did not feel it necessary to make a motion. However, Counsel also testified he believed it could help

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Applicant to have the jury see Deangelo change sides, and it allowed him to call her credibility into question.

Failure to Object to Testimony of Officers Regarding Undercover Experience

Applicant further testified he believes Counsel was ineffective in his handling of testimony by Officers Donald and Cooper. Applicant explained Counsel did not object to either officer's testimony regarding their experience as undercover agents. According to Applicant, there was no evidence presented at trial as to how investigators obtained the search warrant for the residence, but Donald and Cooper testified about their prior work with confidential informants and posing undercover as drug dealers, which might have lead the jury to think the officers conducted the buys with Applicant. Applicant testified he believed this testimony was a "back door" way to get evidence of the undercover buys in front of the jury.

Counsel testified he did not have any concerns about the testimony from Donald and Cooper regarding their previous undercover experience. Counsel explained although he could see Applicant's point, if the jury stretched the testimony, but such testimony is routine, and he did not see any basis to object to them giving a description of their job duties.

Prosecutorial Misconduct

Finally, Applicant testified he believes there was already a deal in place between the State and Deangelo before she testified against him at trial. Applicant testified she must have had a deal in place because, afterwards, she was sentenced to time-served, the drug charges against her were dropped, and she pleaded guilty only to resisting arrest. Applicant further testified the State told him only that they agreed to inform the judge about her cooperation, but given the ultimate outcome, it "had to be preordained." Applicant testified his understanding is Deangelo was

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indicted on two counts of possession and one count of trafficking cocaine, which records show were dismissed on January 31, 2012. Instead, Applicant testified, Deangelo was convicted for resisting arrest and sentenced to one year suspended to time served. Applicant further testified he needed to know if Deangelo had received a deal because Counsel could have impeached her for bias, as she would have had motivation to blame Applicant.

Counsel testified the only information he was given about the agreement between Deangelo and the State was that she had signed a cooperation document, which he received. Counsel testified it was unusual to have a written agreement, and it set forth her reward, but it was vague, saying the State would take her testimony into consideration. Counsel explained Deangelo was facing a mandatory minimum sentence of twenty-five years, so he did not think she would have agreed to plead guilty unless she expected not to be sentenced under that statute; however, he did not have any information or confirmation a specific deal had been made.

The prosecuting solicitor, Bradley Richardson, testified he could not recall who initiated Deangelo's cooperation, but after jury selection, she decided she wanted to cooperate with the State. Richardson explained she elected to sign a proffer agreement, which he provided to Counsel. Richardson testified the agreement stated she would not be deceptive and the State would take any cooperation she provided into consideration in disposing of her charges. Richardson testified she had no agreement other than what was contained in the proffer agreement. Richardson further testified the decision on how to dispose of her charges was made after the trial and took into account whether her conduct at trial was consistent with the agreement.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses, evaluated their credibility, and weighed the testimony and evidence accordingly in its discussion below. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the appellate records, and Applicant's original and amended applications, as well as the pre-trial and trial transcripts. This Court finds the combined record from the criminal case and the testimony and evidence presented the evidentiary hearing establishes Applicant received effective assistance of counsel, and this application should be denied. Set forth below are the relevant findings of fact and conclusion of law as required by section 17-27-80 of the South Carolina Code of Laws.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

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The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688 (1984)). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

This Court finds Applicant has failed to prove his trial counsel's performance was deficient in any way, nor was Applicant prejudiced by his performance. Counsel met with Applicant and reviewed with him the evidence and discovery in the case, as well as Applicant's version of the facts and possible defenses. This Court finds Applicant ultimately chose to proceed to trial and contest the State's versions of events. This Court finds trial counsel appropriately challenged the search warrant and, ultimately, ably prepared and presented a defense centered around whether the home and/or the drugs at issue actually belonged to Applicant. Therefore, for the reasons stated below, the Court denies relief and dismisses the allegations with prejudice.

1. Franks hearing and objections to evidence obtained pursuant to search warrant

Applicant alleges Counsel was constitutionally ineffective “by seeking to challenge the lawfulness of the search warrant by requesting a hearing under Franks v. Delaware, 438 U.S. 154 (1978). . . .” rather than “based upon the insufficiency of probable cause alleged within the four corners of the warrant affidavit.” This Court disagrees and finds Counsel appropriately argued for suppression of the search warrant pursuant to Franks, and, in any event, the judge ultimately ruled on both issues.

Franks v. Delaware gives defendants in some circumstances the right to challenge a search warrant after it has been issued and executed. Franks sets forth a two-step process. First, a defendant must make a *prima facie* showing the warrant, either intentionally or with reckless disregard for the truth, includes false or misleading information, in which case, an evidentiary hearing is required. 438 U.S. at 155-56. Then, if the judge determines by a preponderance of the evidence that any statement within the warrant is false or misleading, that statement is to be excised, and the court determines if sufficient probable cause for the warrant still exists. Id. at 156. If not, the warrant should be voided and the fruits of the search suppressed as if probable cause was lacking on the face of the affidavit. Id.

Here, Counsel testified his intent in framing this as a Franks issue was to try to remove the first two statements from the affidavit and then evaluate probable cause without those statements, because, in his opinion, it was clear probable cause did not exist without them. However, at the hearing, the investigating officer, Ard, testified he supplemented the information in affidavit when he presented it to the magistrate and made clear the buys occurred seven months apart. Ard further testified he not put the date and time of the buys in the affidavit he because did not want to risk disclosing the identity of confidential informant. The judge ultimately ruled the two statements at

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issue in the affidavit were not false or misleading – essentially a denial of the Franks motion – and also that the affidavit contained sufficient probable cause on its face – a denial of the suppression argument.

This Court finds trial counsel articulated a valid strategic reason for requesting the Franks hearing, and therefore, Counsel was not deficient. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996). Courts must be wary of second guessing counsel's trial tactics, and where counsel articulates a valid reason for employing a particular strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E. 2d 529 (1992). Moreover, because the pre-trial judge ultimately ruled on both the Franks issue and the issue of suppression based on the face of the affidavit, Applicant has failed to meet his burden of proving prejudice.

Applicant also alleges Counsel was deficient for allegedly failing to raise contemporaneous objections to the introduction of testimony and evidence obtained under the search warrant. However, Counsel testified, and the record confirms, Counsel made what the trial judge considered to be a standing objection to the evidence seized pursuant to the search warrant. The search warrant issue was preserved, raised on appeal, and affirmed, and thus, this Court finds Counsel was not deficient, nor was Applicant prejudiced in any way. Accordingly, this Court denies relief and finds this allegation should be dismissed with prejudice.

2. Motion in limine and identity of confidential informant

Applicant also alleges his counsel was constitutionally ineffective "by seeking a motion in limine to preclude all mention of defendant's prior drug arrests..." because "[a]s a result of the Court's ruling on the motion, trial counsel was precluded... from attempting to introduce testimony



questioning the reliability of the confidential informant.” This Court disagrees and finds Counsel was in no way deficient, nor was Applicant prejudiced, by Counsel’s decision to make a motion in limine and not to seek the identity of the informant.

Decisions primarily involving trial strategy and tactics may be made by trial counsel. Sexton v. French, 163 F.3d 874, 885 (4th Cir.1998). Examples of such decisions include what evidence should be introduced, whether to object to the admission of evidence, and which motions to file. Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014). Where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

This Court finds Counsel articulated a valid strategic reason for making the motion in limine in that he was seeking to keep damaging testimony about Applicant’s prior drug history out of evidence. Moreover, the trial court ruled in Applicant’s favor on the motion, and although the ruling ultimately hindered Counsel’s ability to cross-examine the co-defendant to the full extent Counsel may have wished, Counsel was still able to get the testimony he wanted – that the co-defendant’s ex-husband, with whom she still had some sort of relationship, was involved in drug activity – before the jury.

Additionally, this Court finds the allegation Counsel was constitutionally ineffective for failing to seek the identity of the confidential informant is without merit. The informant was not a witness in this trial, as Applicant was not tried on the distribution charges arising directly from the drug buys. See State v. Humphries, 354 S.C. 87, 579 S.E.2d 613, 614-15 (“[T]he State is generally privileged from revealing the name of a confidential informant. . .”).

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Because the Court finds neither deficiency in Counsel's performance nor any prejudice to Applicant, relief is denied, and these allegations are denied and dismissed with prejudice.

3. Co-defendant's participation in jury selection and failure to move for continuance

Applicant next alleges Counsel was constitutionally ineffective for failing to move to strike the jury panel or request a continuance after Applicant's co-defendant agreed to testify for the State against Applicant. This Court disagrees and denies relief as to this issue.

This Court finds Counsel was not deficient for failing to object to the co-defendant's participation in jury selection, nor was Applicant prejudiced by the lack of objection, as no constitutional violation occurred, and therefore, Counsel had no basis to object. United States v. Whitehead, 238 F.3d 949, 951 (8th Cir. 2001) ("[W]here there are codefendants at the time a jury is selected, unless there was reversible error in trying those defendants jointly, there is no error in allowing a total of ten peremptory challenges, even if one codefendant subsequently drops out of the case... because remaining defendants are no worse off than they would have been if all defendants had remained. . . .") (internal citations omitted); United States v. Phillips, 874 F.2d 123, 130 (3d Cir. 1989) (rejecting the argument that the defendant's rights were violated when the co-defendant "participated in the shaping of the jury" since at the time the co-defendant "had every right to participate in juror selection"); United States v. Amer, 924 F.2d 906, 907-08 (11th Cir. 1987) ("A defendant is not entitled to a jury composed only of members of his own choosing, if at the time of selection he properly has a codefendant, regardless of whether the codefendant ends up being jointly tried."); People v. Maass, 981 P.2d 177, 182 (Colo. Ct. App. 1998) ("If the jury was fairly selected in accordance with the applicable law, and if no facts are presented that show the jury as finally selected was other than representative and impartial to the remaining defendant, the trial may proceed to its conclusion.").

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Additionally, this Court finds Counsel was not deficient nor was Applicant prejudiced by Counsel's failure to move for a continuance. In order to show that counsel was ineffective for failing to move for a continuance, applicant must show what benefits would accrue from additional preparation. Skeen v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997). Applicant has the burden of proving that additional time for preparation would have yielded some benefit to the applicant. Id. However, Applicant did not present any witnesses or testimony he claims Counsel's failure to move for a continuance prevented him from presenting at trial. See id. (finding applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial); Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Moorehead, 329 S.C. at 334, 496 S.E.2d at 417 (holding trial counsel's failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial).

Moreover, this Court finds Counsel articulated a valid strategic reason for continuing with the trial after Deangelo changed her plea, in that he felt that it would benefit Applicant for the jury to see her change sides, and it would allow him to emphasize bias and question Deangelo's credibility. Counsel also testified he anticipated Deangelo would ultimately decide to testify against Applicant, and he did not feel there was anything further he could do to prepare for her testimony. The Court finds this testimony to be credible.

BKG

Accordingly, because the Court finds neither deficiency in Counsel's performance nor any prejudice to Applicant, relief is denied, and these allegations are denied and dismissed with prejudice.

4. Failure to object to testimony of officers regarding undercover experience

Applicant alleges Counsel was constitutionally ineffective for failing to object to testimony by Officer Kent Donald and Officer Mark Cooper that they each had experience in conducting undercover drug buys because the jurors might have inferred that one or both officers conducted the undercover buys leading to Applicant's arrest. This Court disagrees and denies relief as to this issue.

Applicant's testimony about the effect of such testimony is purely speculative and insufficient to meet his burden of proving prejudice. See, e.g., Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (mere speculation insufficient to support finding of ineffective assistance of counsel). Moreover, this Court finds Counsel was not deficient in choosing not to object to the testimony, as a law enforcement officer's background is generally relevant testimony. See Rule 402, SCRE ("All relevant evidence is admissible...").

5. Prosecutorial misconduct

Applicant alleges the prosecutors engaged in prosecutorial misconduct by failing to fully disclose the details of the plea bargain between the State and Applicant's co-defendant after she agreed to testify against him. This Court disagrees and denies relief as to this issue.

It is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794 (1989). In this case, however, Applicant has provided nothing more than speculation about the existence of a plea bargain between his co-defendant and the State, other than as

disclosed in the proffer agreement turned over to the defense at trial prior to the co-defendant's testimony. See, e.g., Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (mere speculation insufficient to support finding of ineffective assistance of counsel). Richardson testified there was no agreement other than what was provided to Counsel in the proffer document, and the Court finds this testimony credible. The Court therefore finds this allegation is without merit and should be dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations which would require this Court to grant relief. Counsel was not deficient in any manner, nor was Applicant prejudiced by his representation. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

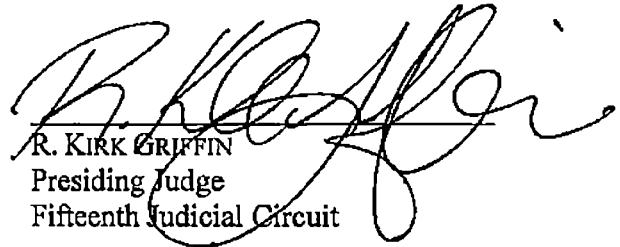
Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). Pursuant to Austin v. State, 305 S.C. 453, 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), SCRCR, 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 the appropriate procedures for appealing a judgment in a PCR action.

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IT IS THEREFORE ORDERED:

1. the Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.


R. KIRK GRIFFIN
Presiding Judge
Fifteenth Judicial Circuit

February 23, 2021

R/KG