

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Terry Edward McCall, #233236,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE THIRTEENTH JUDICIAL CIRCUIT
)

) Case No. 2020-CP-23-1497
)

) **ORDER OF DISMISSAL**
)

FILED-CLERK OF COURT
PAUL B. WICKHAM
GREENVILLE, SC

2021 MAR -3 PM 3:08

This matter comes before this Court by way of an application for post-conviction relief filed on March 10, 2020, by Terry Edward McCall (“Applicant”). The State (“Respondent”) filed its return on June 23, 2020, moving for the summary dismissal of the application. An evidentiary hearing in this matter was held before the undersigned on January 5-6, 2021, with the parties appearing by WebEx due to the ongoing COVID19 pandemic. Applicant appeared by WebEx from Manning Correctional Institution and proceeded with the hearing as a pro se litigant. Assistant Attorney General Taylor Z. Smith of the South Carolina Attorney General’s Office represented Respondent. Applicant testified on his own behalf and called Randall Lee Chambers (“trial counsel”), Esquire, as a witness. Respondent called Sara Lee Meadow Drawdy, Esquire, as a witness. Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds that Applicant has failed to prove that he is entitled to post-conviction relief and denies the application for post-conviction relief with prejudice.

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PROCEDURAL HISTORY

Applicant is presently incarcerated in the South Carolina Department of Corrections. During its February of 2015 term, the Greenville County Grand Jury indicted Applicant for felony DUI resulting in great bodily injury (2012-GS-23-10242). Applicant was represented by trial counsel. Then-Assistant Solicitors Sara Lee Meador Drawdy and Stanford Lee Overby, Jr., of the Thirteenth Circuit Solicitor's Office, prosecuted the case. On May 12, 2015, through March 14, 2015, Applicant proceeded to a jury trial with the Honorable Robin B. Stilwell presiding.

At the start of the second day of trial, Applicant moved to relieve trial counsel as his attorney and to continue the trial so that he could hire another attorney to represent him at trial. Trial Tran. 167-68. Trial counsel joined in Applicant's motion to relieve him as counsel. Trial Tran. 170-71. Judge Stilwell granted Applicant's motion to relieve trial counsel but denied his motion to continue. Trial Tran. 168. Judge Stilwell ordered that someone from the Public Defender's Office be sent to serve as Applicant's standby counsel during trial, but that Applicant would be a pro se defendant for the remainder of trial. Trial Tran. 174. Jake Erwin, Esquire, was appointed as Applicant's standby counsel, but Erwin took on a more active role as Applicant's trial continued. Trial Tran. 175.

At the conclusion of trial, the jury found Applicant guilty as indicted. Judge Stilwell sentenced Applicant to imprisonment for a term of fifteen years, with credit for time served since applicant was first ticketed, and recommended that Applicant participate in the addiction treatment unit at the South Carolina Department of Corrections.

Erwin filed a timely notice of appeal. Appellate Defender John H. Strom of South Carolina Commission on Indigent Defense represented Applicant on appeal initially. Then-Assistant Attorney General William M. Blicht, Jr., of the South Carolina Attorney General's Office

represented Respondent on appeal. On September 29, 2016, Strom moved to hold the appeal in abeyance and remand for the reconstruction of the record, without object from Respondent, because portions of the transcript were unavailable after records were stolen from the court reporter. The South Carolina Court of Appeals granted Strom's motion and remanded the case to the circuit court for reconstruction of the record. State v. McCall, S.C. Ct. App. Order filed November 4, 2016. Appellate Defender Lara M. Caudy of the South Carolina Commission on Indigent Defense then began representing Applicant, beginning on October 11, 2017. On October 18, 2017, Caudy filed a motion, without any objection from Respondent, for the Court of Appeals to accept Judge Stilwell's oral ruling that the record of Applicant's trial was sufficiently reconstructed to allow for meaningful appellate review. The Court of Appeals granted Caudy's motion and accepted Judge Stilwell's ruling that the record was sufficiently reconstructed. State v. McCall, S.C. Ct. App. filed November 16, 2017.

Caudy then argued on appeal that (1) South Carolina's implied consent statute violates the Fourth Amendment by operating as a per se exception to the warrant requirement in violation of Missouri v. McNeely, 569 U.S. 141 (2013), (2) Judge Stilwell erred in denying trial counsel's motion to suppress evidence obtained from a warrantless collection of Applicant's blood and urine because no exigent circumstances existed justifying a warrantless search and because Applicant did not freely and voluntarily consent to the search, (3) Judge Stilwell abused his discretion in denying Applicant's motion for a continuance while also granting Applicant's motion to relieve counsel during trial, and (4) Judge Stilwell violated Applicant's Sixth Amendment right to counsel by granting Applicant's motion to relieve counsel without properly warning Applicant of the dangers of self-representation in accordance with Faretta v. California, 422 U.S. 806 (1975).

The Court of Appeals transferred to the South Carolina Supreme Court because the principal issue of the appeal was the constitutionality of South Carolina's implied consent statute. State v. McCall, S.C. Ct. App. filed February 22, 2019. The Supreme Court affirmed Applicant's convictions, finding Judge Stilwell did not err in overruling trial counsel's objection to the admission of the evidence because exigent circumstances existed that justified the warrantless search. State v. McCall, 429 S.C. 404, 412-13, 839 S.E.2d 91, 95 (2020). The Supreme Court also affirmed as to Caudy's arguments that Judge Stilwell violated Applicant's Sixth Amendment right to counsel by relieving Chambers during the course of trial and refusing to grant a continuance to Applicant thereafter. Id. at 409, 839 S.E.2d at 93, n.1 (citing the following authorities: "State v. Morris, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008) (noting that an appellate court will not reverse the denial of a continuance absent an abuse of discretion); State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) ('Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth.')(citing State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)); Wroten v. State, 301 S.C. 293, 294-95, 391 S.E.2d 575, 576 (1990) (holding that an appellate court looks to the record as a whole to determine whether the defendant was sufficiently apprised of the dangers of proceeding pro se)."). The remittitur was issued on February 21, 2020.

CURRENT PROCEEDING

In his application for post-conviction relief, filed on March 10, 2020, Applicant claims he is entitled to post-conviction relief based on multiple grounds, which are as follows:

1. Trial counsel was constitutionally ineffective for:
 - a. Failing to seek a ruling before trial regarding Applicant's pro se motion to relieve counsel;
 - b. Failing to move to be relieved as counsel in Applicant's underlying criminal case after being relieved as Applicant's counsel in other criminal matters;
 - c. Failing to request a recess or move for a continuance when Applicant was served with an indictment at trial so that he and Applicant could discuss the indictment;

- d. Failing to request that the State renew its plea offer or to make some motion concerning the plea offer when the offer expired on the same day it was extended to Applicant;
 - e. Failing to raise the issue at Applicant's bond hearing or before that Applicant was being unlawfully detained because a probable cause hearing was not conducted "within time of arrest";
 - f. Failing to serve Applicant with the indictment after he was served with it by the State;
 - g. Failing to object that Applicant was not properly warned of the dangers of self-representation when Applicant moved to have trial counsel relieved as counsel during trial;
 - h. Improperly captioning the witness list with a Family Court hearing and an incorrect indictment number;
 - i. Failing to interview and call witnesses at trial;
 - j. Failing to question the State's witnesses about the chain of custody at trial;
 - k. Failing to object to Judge Stilwell's failure to inform the jury of all the allegations found in the indictment;
 - l. Failing to object when the State alleged the traffic citation issued to Applicant contained the same charges as the indictment;
 - m. Failing to object to the admission of testing results on the basis that Applicant did not give his implied consent to the collection of the samples;
 - n. Failing to object to improper opinion testimony from Allen Hall that the victim would have died had he not received immediate medical attention;
 - o. Failing to object to Mark Allison's testimony that he did not know he was being recorded in the highway patrol vehicle;
 - p. Failing to object to Judge Stilwell's mispronunciation of names while reading the State's witness list to the jury;
 - q. Failing to argue that Title 56 of the South Carolina Code of Laws conflicts with Rule 3 of the South Carolina Rules of Criminal Procedure an "indictment must be drafted off an arrest warrant not traffic ticket";
 - r. Failing to inform Applicant of the possibilities that he might be denied parole and subjected to supervision requirements after being released from prison when Applicant would have pleaded guilty rather than proceeding to trial had he known of those possibilities ahead of time; and
 - s. Failing to object to the admission of a CD into evidence without challenging its authenticity;
2. Erwin was constitutionally ineffective for:
- a. Failing to inquire who informed someone that medications were expected after the blood and urine samples were taken from Applicant;
 - b. Failing to object to a witness's testimony of Wendy Bells concerning the procedures followed when the process required two people;
 - c. Committing hybrid representation by representing Applicant without Applicant's consenting on the record;
 - d. Making closing arguments that were prejudicial to Applicant;
 - e. Affording the constitutionally ineffective assistance of counsel in previous cases; and

- f. Failing to object to his appointment as standby counsel when he and trial counsel were appointed to represent Applicant and when trial counsel had just been relieved; and
3. Caudy was constitutionally ineffective for:
 - a. Failing to argue on appeal the strongest issue, that Applicant was not properly warned of the dangers of self-representation in accordance with Faretta.

Applicant prayed therein that the Court would grant post-conviction relief and vacate his conviction and sentence, reinstate his driving privileges, reinstate his driver's license, and order the State to repay him for all of his expenses.

On March 23, 2020, Applicant filed a document titled "Amendment to P.C.R. Applicant," which is an amended to the application. Therein, Applicant claims he is entitled to relief because (1) trial counsel was constitutionally ineffective for failing to ensure that Judge Stilwell adequately warned Applicant of the dangers of self-representation before relieving trial counsel as counsel during trial in accordance with Faretta. Applicant prays that the Court would grant post-conviction relief and award him a new trial.

On April 1, 2020, Applicant filed a document titled "2nd Amendment to P.C.R. Application," which is an amended application. Therein, Applicant claims he is entitled to post-conviction relief because (1) Judge Stilwell erred in appointing Erwin as Applicant's standby counsel at trial without Applicant's consent because Erwin had a conflict of interest due to his being appointed from the same office as trial counsel immediately after trial counsel was relieved as counsel, Erwin was not prepared to assist Applicant, and Applicant was not properly advised of the dangers of self-representation in accordance with Faretta and (2) trial counsel was constitutionally ineffective for failing to inform Applicant of the State's plea offer when Applicant wanted to secure a plea deal and plead guilty rather than proceeding to trial.

On April 27, 2020, Applicant filed a document titled "Motion for Leave To Amend P.C.R. and Amendment to PCR," which is an amended application. Applicant asserted therein that he

wanted to amend his application so as to make it clear that his position is that there is no genuine issue of material fact in regards to his claim that Judge Stilwell did not adequately inform him of the dangers of self-representation in accordance with Faretta, which entitles him to a new trial as a matter of law.

On May 1, 2020, Respondent received from Applicant an undated letter and a document titled "Applicants Motion for Summary Judgement," which was accompanied by an affidavit of Applicant and a portion of the transcript from Applicant's trial. Applicant moved therein for summary judgment in accordance with Rule 56, SCRPC, Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991), and South Carolina Code Section 17-27-70(c), arguing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. Applicant claimed therein that he is entitled to post-conviction relief because (1) his Sixth Amendment right to counsel was violated when Judge Stilwell granted Applicant's pro se motion to relieve trial counsel without conducting a hearing pursuant to Faretta or advising Applicant of the dangers of self-representation, (2) trial counsel was constitutionally ineffective for failing to object when Judge Stilwell relieved trial counsel as Applicant's attorney without conducting a Faretta hearing or advising Applicant of the dangers of self-representation, (3) his Sixth Amendment right to self-representation was violated when Judge Stilwell "thrust standby counsel" upon Applicant without Applicant's request or consent, and (4) trial counsel was constitutionally ineffective for failing to object when Judge Stilwell appointed Erwin as Applicant's standby counsel. Applicant prays that the Court would grant his motion for summary judgment, reverse his conviction and sentence, remand his case for a new trial, find that trial counsel was constitutionally ineffective for failing to protect Applicant during the Faretta hearing at trial, sanction Respondent, and grant any further relief deemed appropriate by the Court.

On May 27, 2020, Applicant filed a document titled "Applicant's Amendment to Summary Judgement Request for Leave to Amend," which appears to be an amendment to the motion for summary judgment that Applicant served on Respondent but did not file with the Greenville County Clerk of Court. Applicant alleges therein that he has an additional ground upon which he is entitled to summary judgment, which is that trial counsel was constitutionally ineffective for failing to ensure that Applicant received a probable cause determination within forty-eight hours of his warrantless arrest, as required by the Fourth Amendment of the United States Constitution. Applicant prayed therein that the Court would grant his motion for summary judgment.

On June 10, 2020, Applicant filed a document titled "Motion for Leave to Amend Application for Post-Conviction Relief & Amendment to P.C.R. Application," which is an amended application. Applicant claims therein that he is entitled to post-conviction relief because trial counsel was constitutionally ineffective for failing to ensure that Applicant was afforded a probable cause hearing within forty-eight hours of his warrantless arrest.

On June 18, 2020, Applicant filed two amended applications for post-conviction relief, arguing therein that Caudy was constitutionally ineffective for not arguing that the trial court erred by not quashing the indictment, that evidence produced from the arrest of Applicant should have been suppressed because no probable cause supported the arrest.

On August 26, 2020, Applicant filed two amended applications for post-conviction relief, claiming (1) trial counsel was constitutionally ineffective for representing Applicant despite having a conflict of interest by virtue of being aware that Applicant wanted to relieve him as counsel, (2) trial counsel was constitutionally ineffective for violating the Rules of Professional Conduct with respect to his representation of Applicant, (3) Applicant's Fourth Amendment rights were violated because he was unreasonably seized when a magistrate judge did not determine

within twenty-four hours of Applicant's arrest that probable cause supported the arrest, (4) trial counsel was constitutionally ineffective for denying Applicant's right to self-representation after being discharged from representation of Applicant by court order, (5) trial counsel was constitutionally ineffective for failing to object to the trial court's order relieving trial counsel as counsel, (6) trial counsel did not communicate to Applicant all plea offers extended by the State, and (7) trial counsel was constitutionally ineffective for failing to communicate with Applicant to such an extent that Applicant did not know what he was facing until served with the indictment on the day of trial.

Applicant filed an amended application on September 16, 2020, claiming therein that trial counsel was constitutionally ineffective for representing Applicant while having a conflict of interest.

Applicant filed an amended application on September 23, 2020, arguing trial counsel was ineffective in his argument while moving for the suppression of the results of Applicant's blood and/or urine tests.

On December 10, 2020, Applicant filed an amended application for post-conviction relief, raising claims he had raised in earlier filings.

Applicant filed two amendments to his application for post-conviction relief on November 5, 2020, claiming therein that: (1) trial counsel was constitutionally ineffective for failing to communicate to Applicant all plea offers extended by the State, (2) trial counsel was constitutionally ineffective for not objecting to Judge Stilwell's order relieving trial counsel as counsel, (3) Applicant was unreasonably seized when a magistrate did not find that probable cause supported the arrest of Applicant within forty-eight hours thereof, (4) trial counsel was

constitutionally ineffective for not moving for the dismissal of the case before the positive blood test came back from SLED.

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At the start of the evidentiary hearing on ~~November~~ ^{January} 5, 2021, Respondent requested that Applicant put on the record the claims upon which he intended to move forward. Applicant stated that he would argue that he was entitled to post-conviction relief based upon four claims only: (1) that his due process rights were violated because a probable cause hearing was not held within forty-eight hours of his arrest; (2) that trial counsel was constitutionally ineffective for failing to exercise due diligence in his representation of Applicant; (3) that trial counsel had a conflict of interest while representing Applicant in the underlying criminal case; and (4) that the State extended a plea offer of which trial counsel did not inform him. Applicant also stated that, though he had filed multiple motions, he wanted to be heard only on his motion for bail, and desired to withdraw all others. This Court finds that Applicant abandoned and waived all claims except for the four specifically identified above and that Applicant abandoned all motions except for his motion for bail.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Before this Court are: the records of the Greenville County Clerk of Court regarding Applicant's conviction and sentence; the records from Applicant's direct appeal, including but not limited to the parties' motions, the court orders, the parties' final briefs, the record on appeal, and the dispositive opinion; Applicant's records from the South Carolina Department of Corrections; the parties' filings in this matter; and the exhibits admitted into evidence at the evidentiary hearing. Set forth below are the relevant

¹ Once Applicant waived all claims but these four, Caudy and Erwin were released as witnesses with Applicant's explicit consent.

findings of facts and conclusions of law with regards to each of the claims Applicant advanced at the evidentiary hearing and to the parties' motions, as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Summary of the testimony presented at the evidentiary hearing.

At the evidentiary hearing before this Court, Applicant testified on his own behalf. He testified that the underlying case began when he was involved in a traffic accident on March 4, 2012. He testified that both he and the other vehicle's occupant were injured and were removed from their respective vehicles mechanically. He testified that he injured his head in the crash and that his teeth had to be removed because they were chipped. He testified that he also injured his hand and arm in the crash.

Applicant testified that there was no reason for the arresting officer to arrest Applicant, but stopped short of saying that the officer did not have a reason to have Applicant's blood drawn. Applicant testified that he consented to having his blood drawn. He testified that the blood test results were obtained without the requisite level of suspicion. He testified that his telling the arresting officer that he had taken prescription medications did not constitute proof that Applicant was driving while under the influence. He testified that there was no reason at all for the officer to have arrested him. He testified that trial counsel did not argue at trial that the arrest was illegal under a totality of the circumstances. He testified that he believes trial counsel would have been successfully²⁵⁵ if trial counsel had moved to dismiss the charge on the basis that there was not probable cause for his arrest. He cited an opinion of the Attorney General's Office, dated July 14, 2014, and argued that it is appropriate for law enforcement officers to delay in ticketing a defendant until the completion of a drug test, but testified that, in his case, the drug screen was not completed until after he had already been taken into custody. He also cited South Carolina Code Section 22-5-200.

Applicant testified that trial counsel did not exercise due diligence in his representation of Applicant because trial counsel did not make a probable cause argument at trial. He testified that no law enforcement officer submitted a sworn statement to a magistrate in order to seek an arrest warrant. He testified that, had trial counsel made this argument, his charges would have been dropped because the arresting officers did not follow proper procedure. He testified that no warrant was issued for his arrest and that there never was a judicial determination regarding his arrest. He testified that he wanted trial counsel to make this argument and that trial counsel never questioned the lack of probable cause.

Applicant testified that there was no affiant and South Carolina Code Section 17-23-162 was violated when the law enforcement officer testified at the preliminary hearing because the magistrate was taken out of the process and the testifying officer was not an affiant. He testified that trial counsel did not challenge the viability of the arrest warrant and that he was denied procedural due process thereby. He testified that he was taken to a preliminary hearing on a "blue ticket," which violated state law. He testified that there was no evidence at the time of his arrest that he was under the influence and that trial counsel did not defend him against this issue. He cited Gerstein v. Pugh, 420 U.S. 103 (1975), and County of Riverside v. McLaughlin, 500 U.S. 44 (1991), and argued that there has never been a judicial determination by a magistrate judge as to whether there was probable cause for his arrest within forty-eight hours thereof. He testified that he was held in jail for sixty days before a preliminary hearing was held in the underlying case.

Applicant testified that trial counsel did not know what witnesses Applicant wanted called at trial. He testified that he wanted to call his family members as witnesses but that trial counsel did not have them listed as witnesses on the witness list before trial. He testified that he asked trial counsel if the family members would testify. He testified that trial counsel did not investigate the

witnesses until the day of trial. He testified that the witness list that trial counsel submitted to Judge Stilwell and the State was captioned as if it was for a case in the Family Court. He testified that trial counsel also cited the Rules of Civil Procedure rather than the Rules of Criminal Procedure when arguing on Applicant's behalf at trial.

Applicant testified that he was not served with the indictment until the beginning of trial. He testified that trial counsel should have moved for a continuance or asked for a recess so that trial counsel and Applicant could discuss the indictment. He testified that trial counsel did not do this. He testified that, while he was in jail, he was told that he was in jail for felony DUI with death resulting. He testified that he did not know why he was in jail until the day of trial. He testified that he did not know the extent of the victim's injuries until trial.

Applicant testified that he did not want trial counsel to represent him. He testified that he and trial counsel started off on a bad note because trial counsel was relieved as counsel in another case. He testified that trial counsel did not seem interested in his case and that they had a dispute because trial counsel was unwilling to file a bill of particulars as Applicant requested. He testified that trial counsel told him that trial counsel could not tell Applicant what Applicant was charged with because the ticket did not reference a specific subsection in the criminal statute for felony DUI. He testified that he filed a motion to have trial counsel relieved on April 22. He testified that a circuit court judge relieved trial counsel as his counsel back in 2015 and that he did not know that he was required to have trial counsel relieved multiple times. He testified that trial counsel continue to represent him despite trial counsel's having been relieved. He testified that he filed a second motion to relieve counsel before trial back in March of 2015. He testified that he served trial counsel with that motion properly but that he was not heard on that motion. He testified that he told trial counsel on the second day of trial that he wanted trial counsel relieved. He testified

that it had gotten to the point that he refused to come out of his holding cell on that second day of trial. He testified that he believes trial counsel should have ensured that Applicant was heard on the motion. He testified that trial counsel did not waive the conflict of interest in representing Applicant while having been relieved as Applicant's counsel in another case.

Applicant testified that trial counsel met with him on May 1, 2015, in order to prepare for trial, and that trial counsel told him that the meeting would have to be short because trial counsel was going to trial counsel's daughter's law school graduation. He testified that trial counsel told him that his daughter's graduation was more important than Applicant's trial. He testified that trial counsel told him that he would send his paralegal to meet with Applicant instead. He testified that trial counsel did not come back to jail to meet with him or see him again until the first day of trial. He testified that Applicant met with him only twice while his case was pending.

Applicant testified that the only time that trial counsel told Applicant about the existence of a plea offer was at trial, at which point it was too late for him to accept it. He testified that trial counsel did not make him aware of any plea offer before that time. He testified that he would have accepted the plea offer had he known of it and he believes that the sentencing court would have accepted the offer had Applicant been given the opportunity to accept it. He testified that he thought that the State may have re-offered the ten-year offer if trial counsel had asked.

Respondent cross-examined Applicant. Applicant testified that he met with trial counsel only on three occasions and that he was unable to talk with trial counsel by phone because trial counsel would not call him back. Those meetings occurred on March 20, 2012, May 15, 2012, and on May 20, 2015. He affirmed that he and trial counsel did correspond by mail. When questioned about the veracity of his testimony that he would have accepted the plea offer had he known of it in light of his extensive testimony about the illegitimacy of his arrest, Applicant testified that he

would have taken the plea deal anyway. Applicant affirmed that he consented to the blood draw but denied that he had testified at trial that he did not give his consent to the blood draw.

Trial counsel testified before this Court at the evidentiary hearing. Trial counsel testified that he is self-employed primarily and has been practicing in the field of criminal law for about thirty-two years. He testified that he has represented many clients in DUI cases, including cases involving great bodily injury. He testified that he thinks he became involved in Applicant's case when he was appointed as a contract public defender in Greenville County. He testified that he was working as a contract public defender on a part-time basis. He testified that the rule at the public defender's office was that attorneys had to meet with their clients in jail within seventy-two hours of the clients' arrest.

Trial counsel testified that he could not remember if he represented Applicant in other criminal cases but said that it was possible that he had done so. He testified that he may have been relieved as counsel in Applicant's other criminal defense cases. He testified that he does not want to continue representing clients who do not want his representation. He testified that, early on, problems arose between he and Applicant, but that ^{their} ~~there~~ issues went away and they were able to work together to prepare for trial once the case was on the trial track. He testified that he was looking forward to trying the case and he believed that he and Applicant were getting along. He testified that he did not have any disagreement while representing Applicant that would have impeded his ability to represent Applicant to the best of his ability.

Trial counsel testified that, on the first day of Applicant's trial, there were no disagreements between ~~he and~~ ^{RSS} Applicant and him. He testified that he would have alerted Judge Stilwell if there had been any issues and tried to withdraw. He testified that Applicant filed a grievance against him with the Office of Disciplinary Counsel in which Applicant alleged that trial counsel was grossly

intoxicated before and during trial. He testified that the claim was dismissed and that the allegation was absurd.

Trial counsel testified as to the facts of Applicant's underlying crime. He testified that the collision occurred in a busy area of town. There was a wide median in the middle of the road, which most people used as a "turn lane." He testified that the victim was driving home with his daughter when Applicant's vehicle crossed over into oncoming traffic and hit the victim's car head on. The victim's injuries were severe and he almost died. Afterwards, Applicant was charged with felony DUI.

Trial counsel testified that he does not remember the number of meetings that he had with Applicant. He testified that Applicant was bonded out and that he went back to jail after picking up more criminal charges while out on bond. He testified that Applicant was in jail for more criminal charges than just the felony DUI in the underlying criminal case and that the entirety of Applicant's pre-trial time in jail was not due to the underlying case. He testified that his practice was to meet with clients when significant events take place. He testified that he went over the discovery with Applicant and provided a copy of the discovery to Applicant. He remembered Applicant was being smart and involved in his case. He testified that Applicant prided himself on his own knowledge of the law. He testified that Applicant told him that Applicant had previously studied to be a paralegal. He testified that he and Applicant met to discuss the ten-year plea offer extended by the State, and that Applicant rejected the offer because he wanted to go to trial, even though trial counsel believed that it would have been in Applicant's best interest to have accepted the offer. When asked if the ten-year plea offer expired on the same day on which it was offered, he testified that it would have been unusual for that to be the case and speculated that any letter indicating as much probably contained a typo.

Trial counsel testified that he and Applicant did trial preparation together. He testified that he explained the nature of the charges to Applicant and that Applicant knew what the allegations were. He testified that he and Applicant knew that it would be a case involving great bodily injury since the victim survived the crash. He testified that Applicant was aware of the possible sentences he could receive and the consequences of being found guilty.

Trial counsel testified that he and Applicant did not discuss the case over the phone, but testified that they did so in person and by mail. He testified that he does not like to discuss cases with clients who are in jail because their phone calls are recorded.

Trial counsel testified that he and Applicant discussed the need for the State to have probable cause to be able to get a warrant to get blood samples from Applicant. He testified that he addressed the issue through pre-trial motions. He testified that his trial strategy was to argue that Applicant was not under the influence at the time of the crash. He testified that Applicant told him that he suffered from some seizure disorder, but he testified that he had no evidence of that independent of Applicant's assertions. He testified that he would have discussed the seizures with Applicant's physicians if he thought that it would have made any difference to the trial. He testified that he believed that Applicant may have had a seizure and that they had to address the fact that Applicant's car did not have functioning brakes. He testified that the evidence left him with no option other than to argue that Applicant was not under the influence during the time of the crash. He felt that it would have been a waste of time to argue that the victim did not suffer great bodily injury.

Trial counsel testified that Applicant was adamant that he go to trial. He testified that the only plea negotiation that he can recall is when the State offered a ten-year plea deal. He testified that that was the best offer that they received, but Applicant turned it down.

Trial counsel testified that the State served him with the indictment shortly before trial, but that he had discussed it with Applicant before the first day of trial. He testified that he planned to move to quash the indictment due to lack of notice. He testified that the server had tried to serve the indictment on Applicant personally earlier than the first day of trial, but that Applicant had refused to accept service at that time because Applicant preferred that the indictment be served on trial counsel instead. He testified that Applicant was aware of the indictment at the time of the attempted service. He testified that Applicant was aware before trial that he would be tried for either felony DUI resulting in death or felony DUI resulting in great bodily injury, depending upon whether the victim lived or died.

Trial counsel did not remember whether he discussed with Applicant what witnesses to call, but said he would have called a particular witness if Applicant had asked him to do so. He testified that he was relieved as counsel at Applicant's request before he had the chance to call anyone as a witness. He did feel prepared for trial. He was not able to remember which witnesses he interviewed as part of his pre-trial preparation. He did testify, though, that his general practice is to only include on the witness list names of people with whom he has already spoken. He denied that he asked Applicant on the day of trial if there were any other witnesses that Applicant wanted included on the witness list, but testified that Applicant may have volunteered that information to him.

Trial counsel testified that, if he referred to the Rules of Civil Procedure rather than the Rules of Criminal Procedure while arguing in pre-trial motions, the mistake^{RS} was an innocent one and everyone would have understood what he actually meant. He testified that he would not have actually confused the Rules of Civil Procedure with the Rules of Criminal Procedure because he

does not represent clients in civil matters. He testified that that did not affect the outcome of the pre-trial hearings.

Trial counsel testified that the indictment was true-billed by the Greenville County Grand Jury. Trial counsel admittedly did not remember many details about Applicant's preliminary hearing, but he remembered that the arresting officer testified as a witness at that hearing. He testified that he remembered arguing at that hearing that the arrest was not supported by probable cause. He testified that criminal ^{deendants} ~~defense~~ frequently misunderstand the nature of a preliminary hearing, believing falsely that defense attorneys can introduce evidence and do other things that they are just not allowed to do. He testified that the leading law enforcement officer usually testifies and that he is allowed to question the officer and argue that there was no probable cause. He denied that he told Applicant that the defense would do nothing at the preliminary hearing but would merely allow the State to put up any evidence that it wanted.

Trial counsel denied that he met with Applicant at the jail and told Applicant that the meeting had to be brief because trial counsel was attending his daughter's law school graduation. Trial counsel testified that he has never had a paralegal meet with a client in jail and thinks it would be very difficult or impossible to do that anyway. He testified that his daughter did not even graduate from law school in that year and he would never tell a client that trial counsel's daughter's graduation was more important than that client's trial.

In response to questioning from Applicant, trial counsel testified that he made a probable cause argument at trial but that Judge Stilwell ruled against his arguments. He testified that he framed all of his arguments at trial in the way he thought most appropriate, but was unsuccessful. He testified that he would not have cited Gerstein at trial because Applicant had a preliminary hearing and he thought that the case applied in federal cases mostly.

Respondent called Drawdy as a witness at the hearing. She testified that she has been practicing law for twenty-eight years, with twenty-six of those years being spent in Greenville County. She testified that she previously worked at the Thirteenth Circuit Solicitor's Office, and was assigned the prosecution of Applicant about two weeks after he was arrested in the underlying criminal case. She testified that it may have been possible that the letter communicating the details of the plea offer to trial counsel gave an expiration date that was the same as the date of the letter's issuance, but explained that such a thing would have been due to the fact that the letter was generated by an automated system at the Thirteenth Circuit Solicitor's Office. She testified that she thinks she remembers extending the offer of a ten-year sentencing recommendation if Applicant were to plead guilty and that she and trial counsel discussed renewing the offer even after the deadline for acceptance had passed.

She testified that Applicant's stay in jail from the time of his arrest was not due entirely to the charges at issue in the underlying criminal case and that his stay was not continuous from the time of his arrest until the time of trial. She testified as to the periods of time in which he was in jail and was out of jail. By her testimony, Applicant was held in the Greenville County Detention Center for a total of 352 days from the time of his arrest until trial, if you add up all of the different stays.

She testified that trial counsel was initially appointed to represent Applicant on multiple criminal charges, but was relieved—at Applicant's request—on all of those charges except for the one in the underlying case: felony DUI. She testified that the court order relieving counsel memorialized an oral ruling issued from the bench during a hearing on Applicant's initial motion to relieve counsel. She testified that she was present for that hearing, which she testified took place on February 24, 2015. She testified that, at that hearing, Applicant said that he wanted to have trial

counsel relieved as counsel on every pending charge except for the one of felony DUI. She testified that, although Applicant did not specifically include that limitation in the motion that he filed, Judge Hill, who presided over that hearing, allowed Applicant to make that request orally at the hearing. She testified that Applicant told Judge Hill at that hearing that trial counsel had previously represented him in criminal cases and that he wanted trial counsel to continue representing him in the felony DUI case because he believe such representation would be beneficial to him and he felt comfortable with trial counsel. She testified that Judge Hill issued a written order after that hearing because he wanted those at the detention center to know that Applicant was pro se on some of his cases so that he would have access to legal resources and the like. She testified that the case number for Applicant's felony DUI charge was listed at the top of Applicant's motion to relieve counsel but is not listed at the top of Judge Hill's subsequent order relieving trial counsel.

She testified that she was under the impression that Applicant "waffled" back and forth as to whether he was happy with trial counsel's representation. She testified that trial counsel did not bring up the matter of being relieved again until trial. She testified that she was served with Applicant's second motion to relieve trial counsel. She and trial counsel discussed the motion on the first day of trial, and trial counsel told her that Applicant had decided to proceed with trial counsel's representation. She testified that trial counsel said that he and Applicant wanted to try the case and that they did not bring the matter up with Judge Stilwell.

She testified that she saw trial counsel and Applicant talk with one another on multiple occasions. She does not know what the two talked about, but trial counsel approached her after one of those meetings to say that Applicant had rejected the ten-year plea offer and that Applicant would never plead guilty.

She testified that a preliminary hearing was held early on in this case and that a magistrate judge found at that hearing that there had been probable cause for the arrest of Applicant. She also testified that, according to South Carolina Code Section 56-7-10, a traffic ticket is an appropriate charging document for felony DUI, which is a traffic offense.

On cross-examination, Drawdy testified that she learned of Applicant's motion to relieve counsel on the morning of trial.

Applicant's motion for bail is denied.

On September 30, 2020, Applicant filed a motion for bail. Respondent filed its return to the motion on November 5, 2020. Applicant argued before this Court, in reliance upon South Carolina Code Section 17-27-80, that he is entitled to bail due to the COVID-19 pandemic.

This Court denies Applicant's motion because bail is not meant for an applicant in Applicant's position. "The primary purpose of bail in a criminal case is to relieve the accused of imprisonment, and the state of the burden of keeping him, pending the trial (or pending appeal), and at the same time, to put the accused as much under the power of the court as if he were in the custody of the proper officer, and to secure the appearance of the accused so as to answer the call of the court and do what the law may require of him." State v. Gibbs, 353 S.C. 226, 229, 577 S.E.2d 454, 456 (2003) (citation omitted). Because Applicant was convicted and his conviction was affirmed by the South Carolina Court of Appeals, he is no longer an "accused." He has been found to be guilty and has been sentenced accordingly. The remittitur in Applicant's direct appeal was issued on February 21, 2020; finality has been achieved in this case. Applicant is no longer situated so as to lay claim to bail.

Furthermore, this Court denies Applicant's motion because this Court does not have the authority to grant Applicant a bond because, due to the nature of Applicant's sentence, that authority is reserved to the appellate courts of South Carolina only. When a defendant has been

sentenced to imprisonment for a period in excess of ten years, he "may only be admitted to bail by an appellate court." Rule 246, SCACR. At the conclusion of Applicant's trial, Judge Stilwell sentenced Applicant to imprisonment for fifteen years. Because Applicant's sentence of imprisonment exceeds ten years, only an appellate court has the authority to admit Applicant to bail.

Applicant's motion is denied without prejudice to Applicant's ability to raise the issue again if he is granted post-conviction relief.

Applicant has failed to prove that he is entitled to post-conviction relief based upon his claim that his due process rights were violated when a probable cause hearing was not held within forty-eight hours of his arrest.

Applicant argues that his arrest was not supported by probable cause and that he was unreasonably seized when he was arrested because no warrant had been issued for his arrest.

As an initial matter, this Court finds that Applicant's claim is not properly before this Court.

An applicant may commence a post-conviction relief action on the following grounds:

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 [was] 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). Post-conviction relief is not a substitute for remedies incident to the proceedings in the trial court or on direct appeal. S.C. Code Ann. § 17-27-20(B). An applicant can allege constitutional violations in an application for post-conviction relief unless the applicant could have raised the issue on direct appeal. Gibson v. State, 329 S.C. 37, 41, 495 S.E.2d 426, 428

(1998) (citing Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975) (affirming the PCR court's denial of relief because the applicant could have argued on direct appeal that the trial court erred in admonishing applicant's defense attorney and that the State improperly commented on the applicant's failure to call his wife as a witness at trial); S.C. Code Ann. § 17-27-20(b) (1976)); but see Fortune v. State, 428 S.C. 545, 837 S.E.2d 37, 44 (2019) (instructing that, in some instances, an applicant may argue a claim for post-conviction relief based on constitutional violations other than a violation of his Sixth Amendment right to counsel due to the ineffective assistance of counsel; recognizing Fortune was entitled to a new trial because the State made improper statements during its closing arguments at trial). The arguments that Applicant makes now about probable cause could have been raised on direct appeal. Applicant's appellate attorney raised four issues on appeal, which included a challenge to the constitutionality of the implied consent statute and challenging Judge Stilwell's denial of trial counsel's motion to suppress the State's blood evidence. A challenge to the existence of probable cause could have been lodged on appeal. Applicant has shown no reason that he should be allowed to raise this direct appeal issue now and is prohibited from doing so.

Even if Applicant's claim is properly before this Court, however, the claim fails on the merits. Probable cause is "a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise. Law v. South Carolina Dept. of Corr., 368 S.C. 424, 441, 629 S.E.2d 642, 651 (2006) (citing Jones v. City of Columbia, 301 S.C. 62, 389 S.E.2d 662 (1990)). Neither an arrest warrant nor any other judicial determination of probable cause is constitutionally required when an accused was not subjected to a significant period of pretrial detention. City of Goose Creek v. Brady, 288 S.C. 20, 21, 339 S.E.2d 509, 510 (1986) (per curiam)

(citing Gerstein v. Pugh, 420 U.S. 103 (1975) (holding “that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.”). Since the Fourth Amendment requires the probable cause determination, “substantive due process, with its scare and open-ended guideposts can afford [an accused claiming he was denied the Fourth Amendment protection when not given a post-arrest probable cause hearing] no relief. Albright v. Oliver, 510 U.S. 266, 275 (1994) (quotation omitted). Constitutional guarantees, like the right to a speedy trial, can protect an accused without constant need to appeal to the Fourth Amendment to ensure that the accused “will not be detained indefinitely before an ‘ultimate determination . . . of innocence is placed in the hands of the judge and the jury.’” Taylor v. Waters, 81 F.3d 429, 436-37 (4th Cir. 1996) (citations omitted).

The evidence before this Court shows that a neutral and detached magistrate found that Applicant’s arrest was supported by probable cause. Although Applicant testified that a magistrate judge never made a probable cause finding, that testimony is not credible. Trial counsel and Drawdy testified credibly that a preliminary hearing was held early on in Applicant’s criminal case and that there was a probable cause finding made at that time. Trial counsel’s credible testimony was that the arresting officer testified at that hearing, a point which was confirmed by Applicant’s own testimony, and that the magistrate judge rejected trial counsel’s probable cause arguments at that hearing. Applicant has also failed to prove that he was subjected to a significant period of pre-trial detention. Furthermore, Judge Stilwell appropriately denied trial counsel’s pre-trial motion to quash the indictment and dismiss the case in part because Applicant was indicted by the grand jury. Trial Tran. 9; see Law, at 436, 629 S.E.2d at 649.

This Court finds that Applicant had adequate notice of the charge against him. The ticket he received instructed him that he was being charged with felony DUI. Trial counsel credibly

testified that he reviewed the charge with Applicant and that they knew that they would be tried under the subsection of the felony DUI statute dealing with great bodily injury because the victim unexpectedly survived his injuries. Applicant's testimony that he had no idea what he was going to be tried for is not credible.

This Court finds that Applicant's claim that the arrest was not supported by probable cause is not properly before this Court and, even if it is, it fails on the merits. This claim is denied and dismissed with prejudice.

Applicant has failed to prove that trial counsel was constitutionally ineffective for failing to exercise due diligence in his representation of Applicant.

Applicant argues that trial counsel was constitutionally ineffective for not arguing at trial that Applicant's due process rights were violated on the basis that the arrest was not supported by probable cause and for not adequately preparing for trial. Applicant's argument about the alleged unpreparedness on trial counsel's part is apparently based upon Applicant's testimony that: trial counsel did not review or discuss the discovery with Applicant, did not review possibly defenses with Applicant, and did not call witnesses as requested by Applicant.

As an initial matter, this Court finds that Applicant waived his ability to maintain an application for post-conviction relief based upon a claim that trial counsel was constitutionally ineffective because trial counsel was relieved at trial at Applicant's request, after which point Applicant proceeded—at least for a time—as a pro se defendant. There is no controlling case law in which a defense attorney has been found to have been ineffective based upon his former client's decision that he had no choice but to represent himself at trial due to the inadequacy of the performance of the attorney; instead, authorities, such as Strickland v. Washington, 466 U.S. 668 (1984), and Hill v. Lockhart, 474 U.S. 52 (1985), allow an applicant to seek post-conviction relief if the applicant maintains that his attorney's deficiency forced him to plead guilty rather than facing

trial. An applicant's decision to move to relieve his counsel and proceed as a pro se defendant precludes that applicant from maintaining an application for post-conviction relief based upon a claim that he received the ineffective assistance of counsel. United States v. Bova, 350 F.3d 224 (1st Cir. 2003) (noting that the defendant did not have the right both to "represent himself and to enjoy the benefit of standby appointed counsel"); United States v. Lawrence, 161 F.3d 250 (4th Cir. 1998) ("[t]he Sixth Amendment does not require a court to grant advisory counsel to a criminal defendant who chooses to exercise his right to self-representation by proceeding pro se"); United States v. Mikolajczyk, 137 F.3d 237 (5th Cir. 1998) (holding that, as the defendant "had no right to standby counsel, it seems unlikely that standby counsel's failure to assist could be a violation of his Sixth Amendment rights").

Applicant is alleging in various ways that he is entitled to relief because trial counsel was constitutionally ineffective. By moving to have trial counsel relieved, Applicant took upon himself for a time the responsibility of prosecuting his own defense and thereby accept responsibility for any failures along the way. As the aforementioned authorities indicate, Applicant is not allowed to take the reins into his own hands if he was unhappy with trial counsel's representation and then seek a new trial based upon the alleged deficiencies of that representation; instead, post-conviction relief is available only to an applicant claiming he received the ineffective assistance of counsel and was truly forced to plead guilty due to his attorney's deficiencies or if there is a reasonable likelihood he would have been acquitted rather than convicted at trial in the absence of those deficiencies.

Notwithstanding this Court's finding that Applicant is barred from arguing that trial counsel was constitutionally ineffective after having trial counsel relieved and continuing with trial as a pro se defendant, Applicant's claim fails on the merits, too. This Court finds that there were

multiple findings of probable cause in the underlying criminal case. First, Drawdy and trial counsel both agreed that a preliminary hearing was held not long after Applicant's arrest, at which the magistrate judge made a finding that the arrest was supported by probable cause, over trial counsel's arguments and objections. Their testimonies are more credible than Applicant's, which seems to be that no such finding was made. Second, the Greenville County Grand Jury indicted Applicant for felony DUI resulting in great bodily harm. Applicant's own testimony shows that he was served with the indictment at the start of trial, and there is reason to think, based on trial counsel's testimony, that Applicant would have been served with the indictment earlier if he had not refused to accept service thereof. Drawdy argued to Judge Stilwell that probable cause supported the arrest because the Greenville County Grand Jury considered the same evidence available to the arresting officer and found probable cause. Trial Tran. 7. Judge Stilwell appropriately denied trial counsel's motion to quash the indictment and dismiss the case in part because Applicant was indicted by the grand jury. Trial Tran. 9; see Law, at 436, 629 S.E.2d at 649.

Having found fatal errors in Applicant's claim that trial counsel was constitutionally ineffective, this Court will now consider the particulars of Applicant's allegations regarding trial counsel's representation. Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that counsel was constitutionally ineffective, he must prove that "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, at 686. In evaluating allegations of ineffective

assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, at 117, 386 S.E.2d at 625 (quoting Strickland, at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

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, at 670. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or

omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney. Id. at 690.

This Court finds that Applicant has failed to prove that there was any deficiency in trial counsel’s performance with respect to trial counsel’s arguments before Judge Stilwell about probable cause. Despite Applicant’s allegations to the contrary, trial counsel did argue to Judge Stilwell that the arrest was not supported by probable cause. Trial counsel took the position in a pre-trial hearing that the arrest of Applicant was illegal. Trial Tran. 8. Although he did so in the context of moving for the suppression of the State’s blood evidence, trial counsel did argue that the arresting officer did not have probable cause to believe that Applicant was driving under the influence. Trial counsel argued that the evidence showed that Applicant’s car veered into oncoming traffic and struck the victim’s vehicle due to faulty brakes on Applicant’s vehicle. Trial Tran. 10-11. Trial counsel pointed out that Applicant had a medical condition that caused him to suffer from seizures and that Applicant informed people at the scene of the crash that he believed that a seizure was coming. Trial Tran. 11. He also noted that the arresting officer did not smell alcohol on Applicant’s breath and was aware that Applicant had suffered an injury to the head during the crash. Trial Tran. 11. Trial counsel argued that the arresting officer believed Applicant was under the influence only due to his perception of Applicant’s demeanor and the way that Applicant spoke. Trial Tran. 11. Assistant Solicitor Overby argued in response at trial that the arresting officer had probable cause to ticket Applicant because the officer inspected the accident scene, observed when he arrived at the hospital that the victim’s condition was critical, noticed that Applicant’s behavior indicated some level of intoxication, and took into consideration that Applicant admitted to taking prescription drugs. Trial Tran. 14. During a pre-trial hearing on the admissibility of the State’s blood evidence, trial counsel cross-examined the arresting officer, who

supported his position that he had probable cause to arrest Applicant by testifying: that Applicant's faulty-brake-pad explanation for the crash did not make sense because faulty brake pads would explain being a driver's being unable to brake, not a driver's veering into oncoming traffic; that Applicant was not responding to his questions normally; that Applicant's speech was not "true and plain"; and that Applicant's pupils were dilated. Trial Tran. 46, 52-53.

This Court finds that Applicant has failed to prove that he would have been acquitted but for the alleged deficiency in trial counsel's argument to Judge Stilwell. Dr. Tracy Lance testified at trial and was qualified as an expert in the practice of medicine, emergency medicine, and the pharmacological properties of prescription drugs and illegal drugs without objection from Applicant, who as a pro se defendant at the time. Trial Tran. 345-48. Dr. Lance treated Applicant at the hospital on the night of the crash. Trial Tran. 348. Applicant did not complain of a head injury or seizures to Dr. Lance, but told Dr. Lance that the crash was caused by Applicant's low blood sugar levels and noted that he had taken a prescription drug. Trial Tran. 349-51. Dr. Lance observed that Applicant's speech was slow. Trial Tran. 352. Dr. Lance ordered urine and blood tests for Applicant to ensure that Applicant would not be given any medications during his stay in the hospital that would interact with any other drugs in his system. Trial Tran. 355-56. The tests did not reveal a medically significant amount of alcohol in Applicant's system, but they did produce positive results for amphetamines, benzodiazepines, cocaine, marijuana, and opioids. Trial Tran. 356-57. Dr. Lance testified as to the effects that those drugs would have had on Applicant. Trial Tran. 357-58. Dr. Lance testified that the blood tests revealed that Applicant's blood sugar level was normal and that he did not see any trauma to Applicant's head or observe any evidence that Applicant was concussed or had recently had a seizure. Trial Tran. 352-54. Even without the State's blood evidence, the evidence of guilt that the State had independent of

Applicant's arrest, which included the investigation of the crash site, the testimony about the victim's injuries, Applicant's post-arrest statements to law enforcement officers, first responders, and medical personnel, and the blood evidence gathered by the hospital in the course of its treatment of Applicant, it is highly probable that Applicant would still have been convicted.

Applicant also claimed that trial counsel was constitutionally ineffective because trial counsel allegedly did not review or discuss the discovery with Applicant, did not review possibly defenses with Applicant, and did not call witnesses as requested by Applicant. This Court finds that Applicant has failed to prove any deficiency in trial counsel's performance with respect to this claim. Trial counsel testified credibly that he reviewed the discovery with Applicant, discussed potential defenses and trial strategies with Applicant, and spoke with any witness that he felt would have had information helpful to the defense. Trial counsel was unable to say exactly which potential witnesses he interviewed in preparation for trial, but he also testified that he likely would have spoken with any witness that he had on the witness list. Applicant's testimony that trial counsel did not go over the discovery with him, did not speak to any witnesses, and did not discuss strategies with him is not credible. The lack of credibility in Applicant's testimony is further shown by his testifying before this Court that he consented to the blood draw and his denying that he testified differently at trial; the record shows that Applicant testified at trial that he did not consent to the blood draw. Trial Tran. 77. Applicant has failed to prove that any mistake trial counsel made with the proposed witness was anything other than an innocent one that had no effect on the outcome of trial. Furthermore, trial counsel was relieved at Applicant's request before the State's case-in-chief ended, so it is not clear which witnesses trial counsel would and would not have called had he continued to represent Applicant throughout trial.

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This Court finds that Applicant has failed to prove any prejudice resulting from trial counsel's alleged failure to be prepared for trial. Applicant alleges that trial counsel did not interview or call as witnesses at trial those whom Applicant wanted interviewed or called, but he has not presented any evidence to this Court as to the identity of those alleged witnesses or what benefit would have accrued to the defense had they been interviewed or called at trial. A defense attorney has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland, at 691. Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). A defense attorney's "[f]ailure 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." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). An applicant alleging that his attorney failed to prepare for the case must show how additional preparation would have resulted in a different outcome. Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (S.C. Ct. App. 2014). An "applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish

prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)); see also Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (holding that the PCR court's finding that Dempsey was prejudiced by trial counsel's failure to call an expert at trial to rebut the State's expert was merely speculative when Dempsey failed to have an expert testify at his PCR hearing), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Applicant has presented no evidence whatsoever that there is any witness with testimony that would have been favorable to him who was not interviewed by trial counsel or called as a witness at trial. Applicant has not even speculated as to what even one of these witnesses would have had to offer. Due to his failure to make any evidentiary showing as to the prejudice prong, his claim fails.

Applicant claimed that trial counsel was constitutionally ineffective for not objecting to the magistrate judge's finding of probable cause on the basis that the arresting officer did not submit an affidavit at the preliminary hearing. This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective in this regard. Trial counsel credibly testified that the arresting officer testified at the preliminary hearing and that he was able to challenge the State's case at that hearing to some extent and to argue against the finding of probable cause. Applicant, whose testimony on this issue was not credible, argued that trial counsel should have objected because South Carolina Code Section 17-23-162 requires that the arresting officer present an affidavit at the preliminary hearing. The statute provides that "[t]he affiant listed on an arrest warrant or the chief investigating officer for the case must be present to testify at the preliminary hearing of the person arrested pursuant to the warrant." S.C. Code Ann. § 17-23-162. Trial counsel's testimony shows that that statute was not violated at Applicant's preliminary hearing

and that there would have been no reason for him to cite the statute in his argument at the preliminary hearing. This Court finds that Applicant has failed to prove any prejudice resulting from trial counsel's conduct at the preliminary hearing. Applicant's contention that the case would have been dismissed had trial counsel done so is absurd.

This Court finds that Applicant's claims that trial counsel was constitutionally ineffective are barred because trial counsel was relieved at Applicant's request, after which point Applicant proceeded with trial as a pro se defendant, at least for a time. Since he decided to proceed pro se rather than to plead guilty, he is not allowed to now maintain a collateral attack on his conviction. Notwithstanding that bar to his claims, Applicant has failed to prove that trial counsel's representation of him was deficient as compared to prevailing professional norms and has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different absent some deficiency in trial counsel's performance. This Court therefore denies the application for post-conviction relief with respect to these claims with prejudice.

Applicant has failed to prove that he is entitled to post-conviction relief because of any conflict of interest on trial counsel's part.

Applicant argues that he is entitled to post-conviction relief because trial counsel initially represented him on other criminal charges, trial counsel was eventually relieved as counsel with regard to those other charges, and that trial counsel therefore had a conflict of interest by continuing to represent Applicant in the underlying case despite having been relieved in the others. Applicant alleges that he did not want trial counsel to continue representing him and wanted trial counsel to be standby counsel only.

This Court finds that Applicant has presented no evidence that trial counsel had a conflict of interest. A conflict of interest occurs:

[W]hen a defense attorney places himself in a situation inherently conducive to divided loyalties If a defense attorney owes duties to a party whose interests

are adverse to those of the defendant, than an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (citing Zuck v. State of Alabama, 588 F.2d 436 (5th Cir. 1979)). The mere possibility that trial counsel had a conflict of interest is insufficient to impugn Applicant's conviction. State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005) (citing Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993)). The Supreme Court has instructed that:

In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance [A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.... But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.

Id. at 437-37, 315 S.E.2d at 810-11 (citing Cuyler v. Sullivan, 446 U.S. 335 (1980)). Even if Applicant's testimony about his unhappiness with trial counsel's representation of him is true, he has not presented evidence of a conflict of interest because he has not presented evidence that trial counsel owed duties to another so as to conflict with his duties to Applicant.

Even if this Court analyzes the claim by treating it as a claim that trial counsel improperly continued to represent Applicant despite his being aware that Applicant wanted him relieved as counsel, the claim still fails. Applicant testified that he was represented by Applicant on multiple charges and that he sought to have Applicant relieved, that he believed that Judge Hill relieved trial counsel was his attorney, that trial counsel's continued representation of him after that point was against Applicant's wishes, and that Applicant made it known to trial counsel that he did not want the representation to continue. But that testimony was not credible. Based upon the credible testimonies of Drawdy's and trial counsel's testimonies, this Court finds as follows: trial counsel was initially appointed to represent Applicant on multiple charges, trial counsel was relieved as

counsel on all charges except for the underlying charge of felony DUI resulting from great bodily injury, trial counsel was relieved in those cases at Applicant's request but was kept as counsel in the underlying case at Applicant's request, Applicant and trial counsel were able to work together to prepared for trial and had an amiable relationship, Applicant's behavior and his acceptance of trial counsel's help led trial counsel to believe that Applicant was satisfied with trial counsel's representation of him, and Applicant's sudden insistence on the second day of trial that trial counsel be relieved caught trial counsel unawares. The fact that trial counsel joined in Applicant's motion to have him relieved on the second day of trial corroborates trial counsel's testimony that he would have brought the matter to the attention of the courts if he had had reason to believe that Applicant wanted to have him relieved. The fact that Applicant's initial motion to relieve trial counsel lists the underlying case number but the subsequent order relieving trial counsel on every case except the underlying one did not reference this case corroborates Drawdy's testimony on this issue. Applicant has failed to show that trial counsel's ability to represent Applicant adequately was impaired by the fact that trial counsel was relieved in the other cases.

This Court finds that Applicant has failed to prove that trial counsel had a conflict of interest and denies the application with prejudice with respect to this claim.

Applicant has failed to prove that the State extended any formal plea offers of which Applicant was not informed by trial counsel.

Applicant argues that he is entitled to post-conviction relief because the State extended a formal plea offer of which trial counsel did not inform him. “[A] defendant has the right to effective assistance of counsel during the plea bargaining process.” Bell v. State, 410 S.C. 436, 440-41, 765 S.E.2d 4, 6 (S.C. Ct. App. 2014) (quoting Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)). A defense attorney “has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” Id. (quoting Missouri v. Frye, 566 U.S. 134 (2012)). Applicant testified before this Court that trial counsel informed him of the existence of a ten-year plea offer from the State only after the offer expired and that, had he known of the offer before it expired, he would have accepted it and pleaded guilty. Applicant also argued that he would have accepted any plea offer rather than proceeding to trial. Trial counsel testified that he informed Applicant of the ten-year plea offer made by the State and that Applicant rejected it. Trial counsel testified that Applicant was set on going to trial throughout the representation. Drawdy testified that she did extend a ten-year plea offer and that trial counsel informed her that Applicant rejected it. She testified that she personally saw that trial counsel and Applicant were meeting and talking and that trial counsel informed her after that that Applicant rejected the plea offer. This Court finds that Applicant has failed to prove that there was any plea offer made that trial counsel did not inform him of. Trial counsel’s credible testimony, along with the confirming testimony from Drawdy, proves that trial counsel informed Applicant of the ten-year plea offer and that Applicant rejected while insisting that he wanted to go to trial. Furthermore, Applicant’s fixation on the alleged illegitimacy of his arrest and the State’s blood test belies his ^{RSS}~~incredible~~ testimony that he wanted to plead guilty and would have taken the plea offer if he had known of it before it

expired. This Court finds, therefore, that Applicant has failed to prove that there was any deficiency in trial counsel's performance with respect to the communication to Applicant of formal plea offers extended by the State.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that he would have pleaded guilty. The evidence from trial counsel's testimony and from Drawdy's testimony shows that Applicant insisted on going to trial and gives no indication that Applicant was amenable to pleading guilty.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for not communicating to Applicant any formal plea offer extended by the State. This claim is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application is denied and dismissed with prejudice.


This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an 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 if the applicant wishes to seek appellate review, he must serve and file a Notice of Appeal.

Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 22 day of February, 2021.



R. Scott Sprouse
Presiding Judge

Walhalla, South Carolina

Copy mailed to
Attorney general / applicant
on 3 / 3 / 2021.