STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Jerry Simpson, S.C.D.C. No. 255266, Applicant, v. State of South Carolina, Respondent.	Case No.: 2019-CP-42-3259 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed by Jerry Simpson ("Applicant") on September 11, 2017. Respondent made its return on or about January 8, 2018. The Court convened an evidentiary hearing into the matter on October 7, 2019, at the Spartanburg County Courthouse in South Carolina. Applicant was present at the hearing and represented by William Yarborough, III, Esquire. Jacob A. Isenberg, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Joseph Watson, Esquire ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's direct appeal record and the pleadings. After thorough review of the testimony as well as evidence in the record, this Court finds the application should be dismissed with prejudice.

I. PROCEDURAL HISTORY

Applicant is presently confined in a Federal Correctional Institution. In March 2016, the Spartanburg County Grand Jury indicted Applicant for trafficking in cocaine, more than 200 grams

(2016-GS-42-1687). Applicant was subsequently indicted in August 2016 for conspiracy to traffic cocaine, more than 200 grams (2016-GS-42-4459).

Joseph J. Watson, Esquire, represented Applicant. Assistant Solicitor James Zachary Farr represented the State. On October 14, 2016, Applicant pled guilty to the lesser included offenses of conspiracy to traffic cocaine, 28 to 100 grams, second offense (2016-GS-42-4459) and possession with intent to distribute cocaine, second offense (2016-GS-42-1687) before the Honorable J. Derham Cole. Pursuant to a negotiated sentence, Judge Cole sentenced Applicant to imprisonment for twelve years for conspiracy to traffic cocaine to be served concurrently with Federal supervised release Applicant had violated which was approximately thirty-seven months. Also pursuant to a negotiated sentence, Judge Cole sentenced Applicant to thirty years suspended to five years of probation for possession with intent to distribute cocaine, to be served consecutively to the twelve year conspiracy sentence.

On October 26, 2016, Joseph J. Watson, Esquire, filed a timely notice of appeal on behalf of Applicant. By order filed on February 1, 2017, the South Carolina Court of Appeals denied a motion by Applicant to appoint new counsel and also dismissed Applicant's appeal for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. State v. Simpson, App. Case No. 2016-002199. The Remittitur was issued on February 17, 2017.

II. CURRENT APPLICATION

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

1. Ineffective Assistance of Counsel for failure to suppress
   a. In violation of the Applicant's Fourth Amendment rights, the State seized evidence following an illegal open air K-9 sniff. The illegal open air K-9 sniff was conducted at a private rental unit, was not authorized by a search warrant backed by an articulated probable cause, and the circumstances did not allow for any exception to the Fourth Amendment search warrant rule.

Additionally, no license, express or implied, existed to allow the police a lawful entry into the private storage facility to conduct the open air sniff with the K-9. The storage facility was in no position to grant police access without a search warrant because under the circumstances it was a direct breach of their contract. The result of the illegal open air K-9 sniff was used as the probable cause basis for the later acquired search warrant used to enter the private storage unit, arrest the co-defendants, and arrest the Applicant. Due to the illegality of the search, trial counsel should have moved to suppress all of the evidence gathered following the open air K-9 sniff.

b. Trial counsel failed to move to suppress evidence of the large sums of cash found in Applicant's car believed to be linked to drug funds. Investigator Hancock collected $12,037 from the Applicant's car during the arrest. The serial numbers from the bills collected were compared to serial numbers of bills used for controlled buys that supposedly were linked to Applicant. According to Investigator Kyle's report, none of those bills matched, thus, indicating the Applicant's cash was not from illegal activity that was the focus of the investigation.

2. Ineffective Assistance of Counsel for failure to quash an indictment based upon lack of probable cause

a. In the Greenville Police Department's investigation into narcotics, according to several investigative reports, Applicant was never seen handling drugs, possessing drugs, or distributing drugs at any point. Additionally, according to Investigator Kyle's report, the search of the storage unit yielded no drugs. Rather, the drugs collected in this case were found in co-defendant Gary Lewis, Jr.'s vehicle. There is no evidence that the bag containing drugs found in co-defendant Gary Lewis, Jr.'s car came from the storage facility or in any way belonged to the Applicant. No police officer saw co-defendant Gary Lewis, Jr. remove the bag containing drugs from the storage unit to his car. Furthermore, co-defendant Gary Lewis, Jr.'s statements to the police, which led them to believe the drugs belonged to the Applicant, were recanted in a sworn statement signed by Mr. Lewis on June 16, 2016. Due to the aforementioned reasons, trial counsel should have moved to quash the indictment based on a lack of probable cause to arrest Applicant for the charges brought against him.

3. Ineffective Assistance of Counsel for failure to investigate the facts of the case, pursuant to Edwards v. State. 392, S.C. 449, 456, 710 S.E.2d 60, 63 (2011).

a. Trial counsel failed to investigate all potential witnesses. There was no interview or any statement gathered from co-defendant and the lease holder for the property that was the subject of the search warrant, Natisha Jackson.

b. Trial counsel failed to request the field records of the K-9 involved in the illegal "free air sniff" search.

c. Trial counsel failed to seek forensic test results including DNA, finger prints, and drug analysis of all of the items confiscated from this investigation.

4. Trail counsel was ineffective, pursuant to Flores-Ortega, for the decision making process to forego trial based on inaccurate and ineffective actions of counsel, leading up to advising his client to plea bargain to an offense. 528 U.S. 470, 483 (2000).[1]

Applicant requests relief as follows:

- Vacate Plea, Vacate Conviction, and Grant Trial.

At the evidentiary hearing, Applicant proceeded forward on the on all above-mentioned allegations, except for one, as well as the following: 1) Ineffective assistance of counsel based upon the failure to object to an illegal sentence; and 2) Illegal sentence.[2]

III. SUMMARY OF FACTS

At the plea hearing, Applicant informed the court he sold cocaine and possessed more than twenty eight grams. (Tr. 7-8). Subsequently, the Assistant Solicitor summarized the facts as follows:

> For the conspiracy, this happened in early January up to the 20th of January. There was an investigation going on with the [Applicant] here. The Spartanburg County Sheriff's Office ended up doing two controlled buys with a co-defendant in this case on a Joshua McKinney. Mckinney has – gave statements that he would call [Applicant] in this case to get at least a half ounce to an ounce of cocaine and that he would go sell it. He did that on two occasions. On one occasion, he actually got [Applicant] in this case to give him the actual half ounce to ounce of cocaine. On the second occasion, he actually called [Applicant]. [Applicant] told him to call the other co-defendant, Andrew Smith. And Andrew Smith actually delivered the cocaine in that distribution case.
>
> And then on the 20th of January, they got word that they were going to clean out the Public Storage Unit here in Spartanburg County once you pass West-Gate Mall. They were doing surveillance. The uncle in this case, Gary Lewis, drove up, went to the storage unit,

[1] Applicant failed to provide any testimony or evidence in support of this allegation at the evidentiary hearing. Therefore, this Court finds the allegation should be dismissed with prejudice.

[2] This Court advised Applicant the remedy for serving an illegal sentence is being afforded a new sentencing hearing. This Court advised Applicant a sentencing court would have discretion to administer more time. Applicant made a knowing and voluntarily decision to proceed forward with this claim.

opened the storage unit up, picked up a black bag, and in that black bag, Your Honor, was 242 grams of cocaine.

Gary Lewis gave a statement that [Applicant] told him to go to the storage unit and get this bag, gave him the key and pass code.

(Tr. 9-10). Immediately after, Applicant affirmed the facts as follows:

The Court: All right. You heard what he told me?

Applicant: Yes, sir.

The Court: You agree with it?

Applicant: Yes, sir.

The Court: Still want to plead guilty?

Applicant: Yes, sir.

(Tr. 10-1).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant 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 v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; 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, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "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). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). 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 prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he/she would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

1. Failure to suppress evidence collected based upon sniff search

Applicant contends Counsel deficiently failed to suppress drugs from evidence based upon an illegal open air sniff search. Counsel is not deficient, based upon a failure to suppress, where arguments at issue would have been futile based upon the State's theory. Palacio v. State, 333 S.C. 506, 515, 511 S.E.2d 62, 67 (1999) (Reversing a deficiency decision where applicant failed to identify anything that could have been used at trial to rebut evidence introduced to show he gave consent).

Here, Applicant testified the search took place at a unit that was not open to the public. Applicant testified he was not the owner of this unit. Applicant testified he was an authorized user in the lease agreement. Thereafter, he testified law enforcement looked inside this unit after talking to an employee. Applicant testified he gave his co-defendant, Lewis, consent to enter the storage unit. Applicant testified he did not give law enforcement consent to enter the storage unit. Finally, Applicant testified law enforcement illegally entered before executing a search warrant.

On the other hand, Counsel testified he reviewed the facts and notified Applicant of his legal opinion on this matter. He concluded the K-9 did not conduct an illegal sniff search based, in part, on consent. This conclusion was based upon the storage facility's owner giving law enforcement consent to search storage facility property. Thereafter, Counsel testified the K-9 conducted an open-air sniff on storage facility property, not inside a unit.

Counsel testified he concluded Applicant lacked standing. He testified the lease agreement only referred to unit entrance and not the storage facility's property. Therefore, Counsel testified he did not believe standing for this search could be established through the agreement.

Finally, Counsel testified the State intended to argue they recovered the drugs legally based upon consent. He testified the State planned to argue any alleged search of the unit was irrelevant because nothing was recovered from it. Specifically, Counsel testified the State planned to introduce evidence the drugs were recovered from a vehicle. Lewis was driving the vehicle. Counsel testified he found out Lewis also owned the vehicle. Counsel testified Lewis planned to testify that he gave authorization to law enforcement to search this vehicle after being stopped.[3] Counsel reviewed the relevant statements from Lewis with Applicant countless times to explain these circumstances. Counsel recalled Lewis telling law enforcement Applicant sent him to retrieve the drugs in the vehicle. Counsel also recalled law enforcement was present when Applicant called Lewis to figure out the whereabouts of the drugs. Ultimately, Counsel testified he did not believe a suppression motion was the best course of action.

Accordingly, this Court finds Counsel gave credible testimony on his basis for not filing a suppression motion. Moreover, this Court finds Counsel gave credible testimony on the State's theory of consent for this search issue. Therefore, this Court finds the State had a theory of consent to argue the drugs were admissible based upon testimony from Lewis. This Court further finds Counsel had a reasonable basis to believe Lewis would testify against Applicant.

On the other hand, this Court finds Applicant has failed to provide sufficient evidence that Counsel had basis to challenge this consent theory. The constitutional immunity from unreasonable searches and seizures may be waived by valid consent. Katz v. United States, 389 U.S. 347, (1967). Warrantless searches and seizures are reasonable within the meaning of the

[3] Counsel testified this was the majority of access he had to Lewis based upon the circumstances. Lewis was not available for interview without consent of his own lawyer. Counsel testified the only response he got from Lewis' lawyer was affirmation Lewis intended to testify at Applicant's trial. In addition, the State reaffirmed Lewis intention to testify against Applicant.

Fourth Amendment when conducted under the authority of voluntary consent. Palacio, 333 S.C. at 514, 511 S.E.2d at 66. This Court finds Applicant's testimony that the K-9 sniff occurred inside the unit to not be credible. Applicant also offered a lease agreement to claim Counsel should have filed a motion to suppress the drugs. It reflects Applicant was an authorized user of the unit. However, Applicant fails to explain how the lease agreement could prevent a search of Lewis' vehicle.[4] Moreover, Applicant fails to explain how it would prevent Lewis from giving consent to search his own vehicle. Therefore, this Court finds Applicant has failed to overcome his burden to prove deficiency on this issue.

Applicant contends he was prejudiced by a K-9 sniff search of his storage unit. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. State v. Dill, 423 S.C. 534, 816 S.E.2d 557 (2018), reh'g denied (Aug. 2, 2018) Evidence *seized* in violation of the Fourth Amendment must be excluded from trial. Id. (emphasis added). "Search" compromises individual interest in privacy; "seizure" deprives individual of dominion over his or her person or property. Horton v. California, 496 U.S. 128, (1990). Person who is aggrieved by illegal search and seizure only through introduction of damaging evidence secured by search of third person's premises or property has not had any of his Fourth Amendment rights infringed. Rakas v. Illinois, 439 U.S. 128 (1978).

There are several issues with Applicant's claim. First and foremost, Applicant testified the drugs recovered did not belong to him. Furthermore, Applicant testified he had no ties to the drugs found in Lewis' car. Applicant has failed to explain how drugs he did not own were entered into evidence in violation of his Fourth Amendment right.

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[4] Applicant repeatedly testified a search of his unit required *him giving permission*. Therefore, it strains credibility to believe Applicant did not recognize Lewis could give law enforcement *permission* or consent to search Lewis' own vehicle.

Second, Applicant testified the search became illegal after an employee gave law enforcement access to the unit. Thereafter, Applicant testified the K-9 entered his unit to sniff for drugs. However, Applicant has provided no evidence to corroborate this testimony. Accordingly, this Court finds it to not be credible. On the other hand, this Court finds Counsel credibly testified the K-9 sniffed company property after consent from the owner. Therefore, Applicant has failed to explain how the K-9's sniff sufficiently constituted a "search" for purposes of asserting his Fourth Amendment rights.

Third, the record reflects these drugs were not seized from the unit. (Tr. 10). Instead, it reflects they were recovered from Lewis' vehicle. (Tr. 10). Moreover, Counsel credibly testified Lewis owned the vehicle. Therefore, this Court finds Lewis owned the vehicle where drugs were recovered. Based upon lack of ownership, Counsel credibly testified he did not believe Applicant had standing to assert the vehicle's search. Accordingly, Applicant has failed to provide evidence he had standing to challenge the search.

As a result, Applicant has failed to overcome the burden to prove he was prejudiced from any alleged failure to attempt to suppress evidence based upon the alleged illegal K-9 search.

2. Failure to suppress evidence based upon illegal vehicle search

Applicant contends Counsel deficiently failed to suppress evidence illegally seized from an illegal search of his co-defendant's vehicle. Counsel is not deficient, based upon a failure to suppress, where an applicant fails to provide evidence that was readily accessible to rebut the State's theory. Palacio v. State, 333 S.C. 506, 515, 511 S.E.2d 62, 67 (1999) (Reversing a deficiency decision where applicant failed to identify anything that could have been used at trial to rebut evidence introduced to show he gave consent).

Counsel testified he concluded Applicant would not have standing to challenge a search or seizure from Lewis' vehicle. Counsel testified he advised Applicant that Lewis' consent waiver would also prevent suppression of evidence collected from the vehicle.

Counsel testified he meticulously reviewed at least seven different statements from Lewis with Applicant. Based upon review of those statements, Lewis intended to say law enforcement stopped him when he left the storage facility; Lewis told law enforcement about drugs in his vehicle; Lewis said Applicant sent him to pick up those drugs; Lewis let police locate drugs in his trunk; Lewis received a call from Applicant with law enforcement present; law enforcement allowed Lewis to answer the call; and Applicant requested Lewis' location followed by asking about the drugs. Counsel testified Lewis' lawyer and the State repeatedly indicated Lewis intended to testify against Applicant. Counsel testified he did not receive consent from Lewis' lawyer to conduct a one-on-one interview. Therefore, Counsel concluded Lewis would be testifying against Applicant based upon available information. On the other hand, Applicant testified Lewis retracted his statement. However, Applicant provided no context to the extent of retraction during his testimony.[5]

Accordingly, this Court finds Applicant's testimony to not be credible on this issue. Furthermore, this Court finds Counsel reasonably believed Lewis would testify he consented to the search of his vehicle. Accordingly, this Court finds Applicant has failed to identify evidence Counsel could have used to rebut the State's consent theory. As a result, Applicant has failed to overcome the burden to prove prejudice.

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[5] Applicant alleged the retraction came in a sworn statement signed on June 16, 2016. However, Applicant failed to proffer any testimony about this statement. Therefore, this Court finds no credible evidence or testimony has been offered to prove a material recantation occurred.

Applicant claims he was prejudiced by a failure to suppress illegally seized contraband. As previously mentioned, a person who is aggrieved by illegal search and seizure only through introduction of damaging evidence secured by search of third person's premises or property has not had any of his Fourth Amendment rights infringed. Rakas v. Illinois, 439 U.S. at 133-4.

To reiterate, the record reflects these drugs were not seized from the unit. (Tr. 10). Instead, it reflects they were recovered from Lewis' vehicle. (Tr. 10). Moreover, Counsel credibly testified Lewis owned the vehicle. Therefore, this Court finds Lewis owned the vehicle where drugs were recovered. Based upon lack of ownership, Counsel credibly testified he did not believe Applicant had standing to assert the vehicle's search. Accordingly, Applicant has failed to provide evidence he had standing to challenge the search. As a result, Applicant has failed to prove how he was prejudiced in an alleged failure to challenge admissibility of evidence claim.

3. Failure to quash indictment based upon witness recanting statement

Applicant contends Counsel deficiently failed to quash the indictments based upon a lack of probable cause resulting from Lewis recanting his original statements. When defendant timely objects to the sufficiency of the indictment, before the jury is sworn, a ruling that an indictment is not sufficient will result in the quashing of the indictment unless the defendant waives presentment to the grand jury and pleads guilty. State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006), overruled on other grounds by Gentry, 363 S.C. 93, 610 S.E.2d 494. Non-jurisdictional defects apparent on the face of the indictment must be timely raised, as required by S.C. Code Ann. § 17-19-90[6] (2003), or they are waived. Hooks v. State, 353 S.C. 48, 577 S.E.2d 211 (2003), overruled on other grounds by Gentry, 363 S.C. 93, 610 S.E.2d 494; State v. Young, 243 S.C. 187, 133 S.E.2d 210 (1963).

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[6] S.C. Code Ann. § 17-19-90 requires all indictment objections, based upon noticeable defects, must be made before the jury is sworn "and not afterwards."

Counsel testified he review the indictments without noticing any issues. Based upon his experience, Counsel testified he had sufficient time to review them. Both indictments were true-billed and signed by a Grand Jury foreman. Counsel testified the charges did not rely only upon the incident involving Lewis. Applicant was charged and indicted based upon multiple controlled buys by the Spartanburg County Sheriff's Office. Accordingly, this Court finds the record sufficiently corroborates Counsel's testimony. The record reflects a Grand Jury true-billed both indictments. Moreover, it reflects law enforcement conducted two controlled buys from Applicant when Lewis was not present. (Tr. 10). Ultimately, this Court finds Counsel reasonably reviewed the indictments before deciding they did not contain defects. Therefore, this Court finds Applicant has failed to overcome the burden to prove Counsel was deficient in this regard.

Applicant contends he was prejudiced by a failure to quash based upon a violation of his due process rights. Specifically, Applicant testified he did not waive presentment to the Grand Jury. Accordingly, this Court finds the record reflects both material indictments were true-billed by a Spartanburg County Grand Jury. Therefore, this Court finds Applicant has failed to overcome the burden to prove prejudice based upon this claim.

Applicant contends he was prejudiced by a failure to quash based upon failing to sign either indictment. An indictment that cites the applicable general criminal statute is sufficient to fulfill the required notice and jurisdictional functions, where the body of the indictment indicates the particular crime of which the defendant is accused. See Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998). Non-jurisdictional defects apparent on the face of the indictment must be timely raised or they are waived.[7] Hooks v. State, 353 S.C. 48, 577 S.E.2d 211 (2003), overruled on other

[7] S.C. Code Ann. § 17-19-90 requires all indictment objections, based upon noticeable defects, must be made before the jury is sworn "and not afterwards."

grounds by Gentry, 363 S.C. 93, 610 S.E.2d 494; State v. Young, 243 S.C. 187, 133 S.E.2d 210 (1963).

Here, this Court finds Applicant's testimony provided a misstatement of the law. There is no requirement for his signature to be on the indictments. However, this testimony does provide the basis for a colorable claim he did not receive sufficient notice of the indictment.

At the plea hearing, Applicant stated under-oath that he understood the charges against him after an explanation from the court. (Tr. 5). At the evidentiary hearing, Applicant testified under-oath he did not understand the charges. Applicant further testified to not wanting to challenge anything at the plea hearing in an effort to finalize the guilty plea. However, this Court finds that is not a valid reason to depart from conclusive statements made at the plea hearing. Therefore, this Court finds Applicant has failed to overcome the burden to prove he was prejudiced based upon a failure to sign the indictments.

4. Failure to interview co-defendant

Applicant contends Counsel failed to interview Lewis before participating in a guilty plea. In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation "was itself reasonable." Taylor v. State, 404 S.C. 350, 364, 745 S.E.2d 97, 104 (2013). Additionally, Counsel is not deficient in conducting a reasonable investigation as long as they interview potential witnesses "when it is reasonable to do so." Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011).

Counsel testified contacting Lewis directly without the consent of Lewis' lawyer would have been potential witness tampering. Counsel testified he was in constant contact with Lewis' lawyer about potential participation in the case against Applicant. Lewis' lawyer stated his client intended to testify against Applicant every single time. Counsel testified he received at least seven

statements in discovery from Lewis. Counsel testified he reviewed these statements extensively with Applicant. He testified that either Lewis' lawyer or the State gave verbal notice Lewis intended to testify he gave law enforcement consent to search. Counsel testified he planned to thoroughly cross examine Lewis at trial based upon inconsistent statements. He testified he notified Applicant of this strategy. However, Applicant became interested in pleading guilty to a ten year sentence. Applicant decided to accept an offer after Counsel negotiated it to twelve years.

Applicant testified Counsel reviewed the discovery with him. Applicant testified Counsel reviewed all of Lewis' statements with him and gave him a copy of Lewis' statements to review independently.

Accordingly, this Court finds undisputed evidence Counsel reviewed Lewis' statements with Applicant. Moreover, this Court finds Counsel conducted a reasonable investigation, without have direct access to the witness, where he reviewed all available statements, identified inconsistencies, and followed up to see how this witness planned to testify. Therefore, Applicant has failed to overcome the burden to prove Counsel was deficient in this regard.

Applicant contends he was prejudiced based upon a failure to interview the co-defendant based upon Lewis recanting unfavorable statements. The prejudice prong is dependent upon whether counsel's deficiencies "affected the outcome of the plea process." Frierson v. State, 417 S.C. 287, 789 S.E.2d 762 (Ct. App. 2016), aff'd as modified, 423 S.C. 257, 815 S.E.2d 433 (2018). To establish it through witness corroboration 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." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. SCRE 801. Mere "speculation" about the details

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of what a witness would testify about is insufficient to establish prejudice. Dalton v. State, 376 S.C. 130 at 143, 654 S.E.2d 870 at 877.

Counsel testified Lewis made several statements to law enforcement. Counsel testified he identified contradictions in the statements that he planned to use for impeachment purposes at trial. However, Lewis' lawyer and the State relayed information that Lewis intended to testify against Applicant. Counsel concluded Lewis planned to give testimony unfavorable to Applicant.

On the other hand, Applicant testified Lewis recanted his original statement to law enforcement. Applicant testified Lewis' did not plan to testify that he gave consent to law enforcement.

Accordingly, Lewis did not testify at this evidentiary hearing. Therefore, this Court finds Applicant is merely speculating about the details of Lewis' potential testimony at trial. As a result, this Court finds Applicant has failed to prove he suffered prejudice based upon a failure to interview Lewis.

5. Failure to interview leasehold of property searched

Applicant contends Counsel deficiently failed to interview the person who gave permission to law enforcement to enter the storage facility. In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation "was itself reasonable." Taylor v. State, 404 S.C. at 364, 745 S.E.2d at 104. Additionally, Counsel is not deficient in conducting a reasonable investigation as long as they interview potential witnesses "when it is reasonable to do so." Edwards v. State, 392 S.C. at 457, 710 S.E.2d at 65.

Counsel testified the person who gave permission to law enforcement was the owner of this storage facility. He testified this individual was acting manager at the time and this individual had authority to allow law enforcement to conduct an open air sniff on facility property. Counsel

testified law enforcement conducted an open air sniff on facility property. Counsel testified Applicant's lease agreement did not have appropriate language to challenge these actions based upon the language only covering circumstances where people enter the unit. Counsel testified, in this case, law enforcement did not enter the unit before a search warrant was obtained. Accordingly, Counsel testified he did not believe this issue was significant because nothing was recovered from the unit. Therefore, Counsel testified he did not initiate an interview with the owner.

On the other hand, Applicant testified the acting manager actually allowed law enforcement to enter this storage unit. Applicant testified this violated his lease agreement with the facility based upon language in the agreement requiring three days' notice prior to entry from law enforcement. Applicant then testified he was not given appropriate notice. Finally, Applicant testified this was an illegal search based upon his storage unit being private property.

At the plea hearing, Applicant notified the court he agreed with facts presented by the State. Those facts contained reflected a positive free-air sniff for cocaine occurred. (TP: 10). Applicant now wishes to depart from this affirmation to claim law enforcement searched inside his unit. However, this Court finds he has not provided a valid basis to depart from that statement. Moreover, this Court finds Counsel's testimony on the issue to be credible. Therefore, this Court finds Counsel reasonably decided against investigating the owner

Applicant contends he suffered prejudice based upon the failure to interview the storage facility owner, who would have provided favorable testimony. The prejudice prong is dependent upon whether counsel's deficiencies "affected the outcome of the plea process." Frierson v. State, 417 S.C. 287, 789 S.E.2d 762 (Ct. App. 2016), aff'd as modified, 423 S.C. 257, 815 S.E.2d 433 (2018). To establish it through witness corroboration an applicant "must produce the testimony of

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a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. SCRE 801. Mere "speculation" about the details of what a witness would testify about is insufficient to establish prejudice. Dalton v. State, 376 S.C. 130 at 143, 654 S.E.2d 870 at 877.

Here, Applicant testified the owner would have said he gave law enforcement access to the actual unit. However, the owner did not testify at this evidentiary hearing. Therefore, this Court finds Applicant is merely speculating about what the owner would testify towards at trial. Accordingly, this argument is insufficient to overcome the burden to prove prejudice based upon a failure to interview this witness.

Additionally, Applicant testified this illegal search would have prevented the drugs recovered from coming into evidence. The constitutional immunity from unreasonable searches and seizures may be waived by valid consent. Katz, 389 U.S. 347. Here, Counsel credibly testified Lewis had consent to enter Applicant's unit. Thereafter, Counsel credibly testified Lewis entered Applicant's unit and retrieved drugs. Counsel then credibly testified the drugs were recovered from a vehicle owned by Lewis. Thereafter, Counsel credibly testified Lewis provided consent for law enforcement to search the vehicle. Finally, Counsel credibly testified no evidence was recovered in the unit. Accordingly, this Court finds Lewis gave valid consent to law enforcement to search his vehicle followed by seizing drugs recovered. Therefore, this Court finds Applicant has failed to establish the prejudice suffered from an alleged illegal search of his unit.

6. Failure to investigate field records of material K-9

Applicant contends Counsel deficiently failed to investigate the animal used to conduct an open air sniff for drugs at the storage facility. Applicant did not offer a specific reason to merit investigation of the animal. On the other hand, Counsel testified he had no basis to question the animal's open air sniff. Counsel further testified it was not significant enough to warrant an investigation. Counsel explained the sniff was conducted on storage facility property with consent from the owner. Counsel testified the lease agreement did not prevent open air sniffs from being done on facility property. Counsel testified law enforcement did not collect any evidence from the unit based upon the open air sniff.

Accordingly, this Court finds Counsel reasonably decided the animal's role was not significant enough to merit an investigation.

Applicant contends the animal's records would have, somehow, caused this search to be deemed illegal. However, Applicant did not offer any evidence or testimony to corroborate this allegation. Therefore, this Court finds Applicant merely speculated the field records would have been favorable to this case. As a result, this Court finds Applicant has failed to overcome the burden to prove he was prejudiced based upon this issue.

6. Failure to investigate material forensic test results

Applicant contends Counsel failed to seek test results of fingerprints on the bag that the drugs were recovered from.

Counsel testified he discussed potential trial strategies with Applicant. Counsel testified he concluded the trial would come down to witness credibility and Applicant knew his strategy was to impeach unfavorable witnesses. Counsel testified he planned to utilize all inconsistent statements available to impeach Lewis.

Applicant contends he would have gone to trial if he had known about the fingerprint test Counsel allegedly failed to investigate. However, the S.C. Supreme Court held a defendant could not prove prejudice where his decision to plea was not based upon the error by counsel. Goins v. State, 397 S.C. 568, 575, 726 S.E.2d 1, 4 (2012).

Counsel testified the State indicted Applicant for conspiracy. Counsel knew Lewis told law enforcement Applicant directed him to pick up the bag of drugs because law enforcement listened in on a phone call between Applicant and Lewis. Counsel then testified Applicant asked where Lewis was with the drugs during that phone call. Counsel testified he and Applicant discussed all of this. Ultimately, Applicant decided he would accept an offer of ten years based upon the circumstances.

Accordingly, this Court finds Applicant is merely speculating about the results of the fingerprint test. Moreover, this Court finds Applicant's motivation to plea was based upon the amount of time he was offered. This Court finds Applicant's testimony, that he would not have pled with access to fingerprint results, to not be credible. Therefore, this Court finds Applicant has failed to overcome the burden to prove prejudice based upon lack of access to fingerprint results.

7. Failure to object to illegal sentence

Applicant contends he was prejudiced based upon the failure to object to an illegal sentence being administered. Applicant was sentenced to thirty years *suspended* upon the service of five years of probation. A second offense, Possession with Intent to Distribute Cocaine sentence can be suspended at the discretion of the plea judge (Sec. 44-53-370(b)(1). Applicant testified he would rather serve the five years of probation than thirty years incarcerated. Counsel testified Applicant would have received a worse sentence if he objected to the one given. Counsel testified

the probation given did not prejudice Applicant based upon the alternative of thirty years. Therefore, this Court finds Applicant has failed to prove prejudice based upon an alleged failure to object and this allegation is without merit.

V. CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

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2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 31st **day of** December, **2019.**

G. Thomas Cooper

G. THOMAS COOPER
Presiding Judge
Seventh Judicial Circuit

Clemson, South Carolina

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CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX