NOTICE OF APPEAL FROM A PCR DENIAL BY THE COURT OF COMMON PLEAS

THE STATE OF SOUTH CAROLINA
In Supreme Court of SC

APPEAL FROM LEE COUNTY
Court of Common Pleas

Goodstein, Circuit Court Judge

Case #2019-CP-31-0077

The State, Respondent,

v.

Johnny Haggins Appellant.

NOTICE OF APPEAL

Johnny Haggins, appeals the decision of the Court, in the order dated February 4, 2022, received by counsel on February 14, 2022, where Mr. Haggins was denied his request for Post-Conviction Relief. Mr. Haggins was represented at the hearing by Timothy L. Griffith, Attorney at Law who files this notice on behalf of the Appellant. The order herein attached and a copy of which is also forwarded to the SCCID Appellate Division.

Dated 2/15/22

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STATE OF SOUTH CAROLINA COUNTY OF LEE	)	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT
Johnny Haggins, SCDC #343140, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2019-CP-31-0077 **ORDER OF DISMISSAL**

I. INTRODUCTION

This matter comes before the Court by way of post-conviction relief (PCR) action commenced by Johnny Haggins (Applicant) on March 18, 2019. The State requested an evidentiary hearing through its return on July 18, 2019. A hearing into the matter convened before the undersigned November 17, 2021, via Cisco WebEx Meetings in accordance with the Chief Justice's administrative memorandum, *Court Operations*, dated September 14, 2020.[1] Applicant was present at the hearing and represented by Timothy L. Griffith, Esquire. Assistant Attorney General Lillian L. Meadows represented the State. Applicant; his sister, Niesha Miller; his trial counsel, Kevin Etheridge, Esquire; and former Assistant Solicitor Paul Fata all testified at the hearing.

In addition to the pleadings in this action, this Court had before it a copy of the Lee County Clerk of Court records regarding the subject convictions; Applicant's records from the South

[1] *See* S.C. Sup. Ct. Memorandum dated September 14, 2020 ("Judges . . . have discretion to determine whether it is appropriate to conduct a hearing using remote communication technology. Consent of the parties or counsel is not required. Please use WebEx, the conferencing platform supported by the Judicial Branch.").

Carolina Department of Corrections; the pretrial, trial, and sentencing transcripts; and the records of the current PCR action.

After hearing the testimony at the PCR hearing [redacted] having an opportunity to review the record in this matter (S) Court finds Applicant's allegations regarding ineffective assistance of trial counsel and due process violations are without merit. For the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

II. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lee County Clerk of Court. During its July 2015 term, the Lee County Grand Jury indicted Applicant for domestic violence of a high and aggravated nature (DVHAN) (2018-GS-31-0050) and second-degree burglary (violent) (2018-GS-31-0050). Kevin R. Etheridge (Counsel) initially represented Applicant on these charges. Assistant Solicitor Paul M. Fata prosecuted the case.

The case was first called to trial on June 4, 2018, before the Honorable Kristi F. Curtis. At that time, Counsel requested a continuance on the grounds that he had at that point been unable to reach Applicant to give him notice of trial. (Pretrial Tr. 4–6). Specifically, Counsel advised the Court that the telephone number Applicant provided him had been disconnected and all letters he sent to the address Applicant provided him ~~was~~ were DSG returned. (Pretrial Tr. 4). Judge Curtis granted the continuance to allow Counsel more time to attempt to find Applicant and issued a bench warrant. (Pretrial Tr. 14).

Over a month later, on July 10, 2018, Applicant's case was again called to trial before the Honorable George M. McFaddin, Jr. At that point, Counsel requested to be relieved, explaining that Applicant failed to keep in contact with him and, despite Counsel's efforts, he had been unable

to reach Applicant through mail or the family members Counsel contacted. (Trial Tr. 4). Counsel explained that he only met with Applicant once, which at that time occurred over a year prior. (Trial Tr. 4–5). Judge McFaddin granted Counsel's request, finding Applicant had a duty to maintain contact with his attorney and failed to do so. (Trial Tr. 6). The trial then proceeded in Applicant's absence. The jury convicted Applicant as indicted. At that time, Judge McFaddin sealed Applicant's sentence to be imposed once found and arrested.

On September 4, 2018, Applicant appeared before the Honorable R. Ferrell Cothran. Upon unsealing the sentence, Judge Cothran sentenced Applicant to concurrent terms of twenty years' imprisonment for DVHAN and fifteen years for burglary. Applicant did not appeal his convictions or sentences.

III. FACTS

On August 27, 2017, Applicant and his wife, Ashleigh Haggins (Victim),[2] got into an argument because Victim would not take Applicant to Columbia to confront a woman about his music credentials. (Trial Tr. 42). Victim said she did not hear from Applicant again until August 29, 2017. (Trial Tr. 43). On that date, Applicant and Victim got into an argument on Facebook about Victim giving their daughter up for adoption. (Trial Tr. 44). Applicant's sister was also involved in the online argument and it ended with Applicant telling his sister not to worry about it, "he was fixing to handle the situation." (Trial Tr. 44). Shortly thereafter, Applicant and his co-defendant, Coty Weaver[3] (Weaver), kicked in Victim's door. (Trial Tr. 44). Victim testified Applicant ran towards her yelling and screaming at her and, as she tried to get away, he began

[2] Victim testified at trial that she and Applicant were married on December 27, 2010 and they separated about two days after the wedding. Although they are currently still married, they do not live together.

[3] Weaver is referred to as Applicant's girlfriend in the trial transcript.

hitting and kicking her, and even stomped on her head. (Trial Tr. 46). Victim's son came home while Applicant was assaulting Victim. (Trial Tr. 49). Weaver yelled at Applicant to hit her harder and that is when Victim blacked out. (Trial Tr. 54). Applicant took Victim's phone with him when he left. (Trial Tr. 54). Victim went to a Pilot station with her son and called law enforcement. (Trial Tr. 30).

IV. SUMMARY OF TESTIMONY FROM EVIDENTIARY HEARING

Applicant

At the PCR hearing, Applicant testified he was sentenced to twenty years' imprisonment after being tried *in absentia*. Applicant testified he only met with his attorney, Kevin Etheridge, once, which was when he first hired him. Applicant had been released on bond the day prior to this meeting. He testified that, at that time, he lived with Weaver and had a cell phone in Weaver's name. However, the two got into an altercation at some point while he was out on bond, and Weaver kicked him out. He further testified that Weaver was the promoter for his music, and that, without her, he could not make any money. He stated his son's aunt was "supposed to talk on [his] behalf."

Applicant testified he did not have an address to forward letters to and that he could not contact his attorney via phone because his phone had been disconnected. However, he was aware that if he failed to communicate with his attorney, his attorney could move to be relieved. Applicant also admitted that he did not provide his attorney with updated contact information. He claimed he had no way to contact his attorney.

Applicant stated he did not waive his preliminary hearing, but that he did not have a preliminary hearing. He that he made most of his General Sessions court appearances until April of 2018. Applicant testified that, had he had notice of the trial dates, he would have made it to

court. He further testified that he was unaware that the bond paperwork stated he would be tried in his absence if he did not show up to court. He put Weaver's address on the bond paperwork.

Applicant further stated that he did not see any of the State's evidence in his case until he was incarcerated, nor did he know how to appeal. He further testified that his attorney failed to discuss a plea offer for five years, and that he also found out about this offer after he was incarcerated. Applicant admitted that he had previous convictions, and that he pleaded guilty to most of them. He stated that he was aware from his previous experience in court that he would be tried in his absence if he did not appear. However, he always appeared for court in matters regarding these prior charges.

Nieshia Miller

At the PCR hearing, Applicant's sister, Nieshia Miller, testified that Applicant was homeless at the time the instant charges were pending against him. However, she did not know what the charges were until after he was convicted. She testified that Applicant would come to her house occasionally and she would let him stay with her. She stated that she did not see Applicant around the community unless she happened to encounter him on the street or he showed up at her house. Miller testified that she was also having legal troubles at that time.

Paul Fata

At the PCR hearing, Paul Fata, Esquire, testified he was employed as a part-time assistant solicitor at the time of Applicant's trial. Fata recalled making a plea offer to Etheridge for a five-year cap for second-degree burglary, nonviolent, and to run the sentences concurrent. Fata testified he did not recall seeing Applicant at any of his prior court appearances. He recalled speaking to Etheridge on one of these occasions, who told Fata he could not find his client. He further recalled

initially calling the case for trial before Judge Curtis in June of 2018. Judge Curtis continued the case and issued a bench warrant.

Fata further testified that Applicant was released on bond, although Fata was not at the bond hearing. He testified that the standard bond form states that the defendant can be tried in his absence if he fails to appear. He testified a preliminary hearing did occur in this case, where the arresting officer testified about the facts of the underlying charges.

Kevin Etheridge

At the PCR hearing, Kevin Etheridge, Esquire, testified he was initially retained to represent Applicant. He recalled meeting with Applicant once, when he was first hired. Applicant gave him a general overview of his position. Etheridge testified that he did not have discovery at that time. Regarding the preliminary hearing, Etheridge testified he had nothing in his notes indicating he attended a preliminary hearing, but he cannot say with certainty whether he was there. Etheridge testified he appeared in court on Applicant's behalf, but without Applicant, three times. He stated that at least two of those times would have been the trial dates.

Etheridge testified he made several attempts to call Applicant, but that every phone number Applicant gave him was disconnected or he could not reach Applicant. He stated that the letters he sent to the address Applicant provided were returned. Etheridge further testified he was aware that Applicant and Weaver had a prior relationship, and that he believes he reached out to Weaver at some point to try and contact Applicant. Etheridge also tried to get in touch with Applicant through family members. However, despite his attempt to contact Applicant multiple times, he was not successful.

Etheridge testified he obtained discovery after his first and only meeting with Applicant. However, he was unable to review it with Applicant because he could not reach Applicant. He

further stated that the case was initially called to trial in June of 2018. Etheridge tried to communicate the trial date through phone calls and mail, but was unsuccessful. Etheridge testified he ultimately requested a continuance in June of 2018, but was never able to locate Applicant before the case was called to trial in July. Etheridge testified he moved to be relieved because he did not have any conversations with Applicant outside of their first meeting. He felt he could not effectively assist Applicant due to a lack of communication.

V. ISSUES BEFORE THIS COURT

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

1. "Ineffective assistance of trial counsel for failing to file a direct appeal pursuant to White vs. State, 263 S.C. 110."
2. "Ineffective assistance of trial counsel for failing to object to and/or challenge defendant being tried and/or sentenced in absentia."
3. "Ineffective assistance of trial counsel for failing to challenge the indictment in relation to count one in the indictment on the grounds of lack of jurisdiction and/or improper change of venue."
4. "Defendant was denied his Sixth Amendment right to be present at trial and/or sentencing and face accuser."
5. "The trial court abused its dicretion[*sic*] and/or committed reversible error when trying (holding the trial) and/or sentencing defendant in absentia without giving defendant proper notice of hearing date 7-10-18 which was seal sentence."
6. "Ineffective assistance of trial counsel for failing to notice defendant of waiver of preliminary hearing and future preliminary hearings requested by defendant."
7. "Defendant was denied due process to fair opportunity of defense."
8. "Defendant didn't have knowledge of being impeach[*sic*] by convictions to oppose and having fair opportunity to contest the use of such evidence."
9. "Defendant didn't have knowledge of plea offer by solicitor Paul M. Fata for 5 years non-violent unto[*sic*] after sentenced in absentia and placed in department of corrections."

10. "Defendant didn't have counsel upon the opening and reading of seal[*sic*] sentencing on date 9-4-18 to represent him and request appeal or/and reconsideration on sentencing on defendant[*sic*] behalf as well as disposition sentencing sheet for date 7-10-18 shows no proof of defendant or attorney for defendant was present for this hearing dated 7-10-18 which defendant was sentence[*sic*] in absentia."

VI. FINDINGS OF FACT & CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in this action incorporated by way of the State's return, this Court proceeds to the claims raised in the amended applications and finds each to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

A. Direct Appeal Issues

This Court finds claims 4–5 and 7–9 are direct appeal issues that are not cognizable under the Uniform Post-Conviction Procedure Act[4] (the Act). An applicant may seek PCR upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

2. That the court was without jurisdiction to impose sentence;

3. That the sentence exceeds the maximum authorized by law;

4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

[4] S.C. Code Ann. § 17-27-10 to -160.

> 5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
>
> 6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A). However, because an application for post-conviction relief is not a substitute for a direct appeal, and because of the modern simplification of criminal jurisdiction jurisprudence in South Carolina, the *overwhelming* majority of cognizable claims fall under the broad umbrella of "ineffective assistance of counsel," a contention under the Sixth Amendment of the United States Constitution. *See Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (noting that allegations of trial court error are not cognizable on PCR).

Free-standing claims of trial court error are not cognizable claims for post-conviction relief, and this prohibition has long been recognized. *See id.*; *e.g.*, *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (finding that alleged trial errors and sufficiency of evidence are direct appeal issues that are not cognizable PCR claims); *see also Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal."); *Stepney v. State*, 278 S.C. 47, 292 S.E.2d 41 (1982) (explaining that issues that could have been raised on direct appeal cannot be considered on PCR application absent claims of ineffective assistance of appellate counsel); *cf. Wolfe v. State*, 326 S.C. 158, 162 n.2, 485 S.E.2d 367, 369 n.2 (1997) (noting that trial court error does not constitute an appropriate basis for a finding of ineffective assistance of counsel, and is not a cognizable claim for post-conviction relief).

Further, an applicant "may allege constitutional violations in PCR proceedings . . . *unless the issue could have been raised by direct appeal.*" *Gibson v. State*, 329 S.C. 37, 41, 495 S.E.2d 426, 428 (1998) (citing S.C. Code Ann. § 17-27-20(a)(1)); *Simmons*, 64 S.C. at 423, 215 S.E.2d at 885 ("Generally, post-conviction hearing statutes do not afford relief in the case of alleged errors for which remedies were available before and during the original trial, or by review on motion for a new trial or on appeal. These statutes were not intended to afford a procedure to operate as a substitute for a motion for a new trial, or for an appeal or writ of error; and ordinarily a judgment of conviction may not be challenged on grounds which could have been raised by a direct appeal.").

Here, claims 4–5 and 7–9 alleged in the application are direct appeal issues that do not support a cognizable claim for post-conviction relief under any of the statutory grounds. *See, e.g.*, *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("[PCR] is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal."); *cf. Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (finding that direct appeal issues which could have been reviewed on appeal and were not objected to at trial or during guilty plea proceeding may only be presented to support a claim of ineffective assistance of counsel, not as a separate ground for relief). Accordingly, Applicant's request for relief by way of these allegations is **DENIED.**

B. Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP. The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. at 687. To obtain relief, a PCR applicant must prove (1) counsel's

performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance" demanded of attorneys in criminal cases. *Id.*

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.' " *Dunn v. Reeves*, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013)). In fact, "even if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that *no competent lawyer*

would have chosen." *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24).

"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*, 540 U.S. 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.").

Review of counsel's actions is hallmarked by deference, as "it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688–89; *see id.* at 691 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). "Defense lawyers have 'limited' time and resources, and so must choose from among 'countless' strategic options." *Dunn*, 594 U.S. ___, 141 S. Ct. at 2410 (quoting *Harrington*, 562 U.S. at 106–107). "Such decisions are particularly difficult because certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more

important issues." *Id* (quoting *Harrington*, 562 U.S. at 108). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland*'s deferential standard.

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see id.* at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695. It is not sufficient "to show [counsel's] errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to *deprive the defendant of a fair trial.*" *Id.* at 687 (emphasis added). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. Moreover, the South Carolina Supreme Court has repeatedly held a PCR 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. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Id.* at 686; *see Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); *cf. United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

1. ***Failure to file notice of appeal and motion to reconsider sentence***[5]

This Court finds Applicant's allegation that his attorney was ineffective for failing to file a notice of appeal is without merit. Because Etheridge did not represent Applicant at the time of sentencing and therefore never represented him in the timeframe in which he could have filed a notice of appeal, trial counsel could not have been ineffective. Further, Applicant complains that he was not represented at the sentencing hearing before Judge Cothran, and therefore no one filed

[5] Claims 1 and 10

a motion to reconsider the sentence or notice of appeal on his behalf. Crucially, however, the record reflects that Applicant neither objected nor requested counsel be appointed to represent him at sentencing. Accordingly, Applicant's request for relief by way of these allegations is **DENIED.**[6]

2. ***Failure to object to or challenge defendant being tried in absentia***

This Court finds Applicant's allegation that his attorney was ineffective for failing to object or challenge Applicant being tried *in absentia* is without merit. Crucially, at the time of his trial, Applicant was *pro se* and counsel did ***not*** represent Applicant, as counsel was relieved based on Applicant's own behavior, including wholly failing to communicate with counsel in the most basic ways, such as providing updated contact information. Therefore, any responsibility to object would not have been one trial counsel bore, as he simply did not represent Applicant at the time he was tried.

At the PCR hearing, Applicant testified he did not have an address to forward letters to and that he could not contact his attorney via phone because his phone had been disconnected. However, he was aware that if he failed to communicate with his attorney, his attorney could move

[6] To the extent Applicant claims he was denied his right to counsel, this matter was not raised at the PCR hearing. However, such a claim would nonetheless fail on the merits. The record reflects Applicant forfeited his right to counsel by failing to provide updated contact information and keep in contact with his attorney. *See State v. Cain,* 277 S.C. 210, 210–11, 284 S.E.2d 779, 779 (1981) (inferring waiver of counsel and affirming defendant's conviction and sentence where defendant, who was tried in absentia and without counsel for third-offense driving under the influence, failed to fulfill the conditions of his appearance bond and neglected to keep in contact with his attorney despite knowing the trial was imminent). Applicant even admitted that, based on his previous convictions and experience in court, to knowing that (1) if he failed to communicate with his attorney, his attorney could move to be relieved; and (2) he would be tried in his absence if he did not appear. Despite counsel's success in convincing the court to grant a continuance the first time it was called to trial, Applicant's failure to call or visit counsel's office when his living circumstances changed resulted in a delay and reached the level of frustrating the orderly and efficient progression of the case. *See State v. Suriano*, 2017 WI 42, ¶ 21, 374 Wis. 2d 683, 701, 893 N.W.2d 543, 551 ("A defendant who acts in a voluntary and deliberate way that frustrates 'the orderly and efficient progression of the case' forfeits his right to counsel.").

to be relieved. Applicant also admitted that he did not provide his attorney with updated contact information. He further stated that he was aware from his previous experience in court that he would be tried in his absence if he did not appear.

When the case was initially called to trial on June 4, 2018, Etheridge vehemently objected to Applicant being tried *in absentia*. He was ultimately successful in convincing Judge Curtis to continue the case to allow Etheridge more time to attempt to contact Applicant about his trial date. However, both parties agreed that Applicant would be tried in his absence if he did not appear for the next trial date. Etheridge ultimately moved to be relieved on the morning of July 10, 2018, because he was never able to locate or contact Applicant. At that point, Etheridge had no basis to object or challenge Applicant being tried *in absentia* because he no longer represented Applicant. The trial judge was aware of all of these circumstances but found Applicant failed in his duty to maintain contact with his attorney. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

3. ***Failure to challenge indictments***

This Court finds Applicant's allegation counsel was ineffective for failing to challenge the indictments is without merit. Applicant did not present any evidence or testimony at the PCR hearing regarding the basis upon which counsel should have challenged his indictments. Nonetheless, this Court finds Applicant's indictments are facially valid because each states all the necessary elements of the crime, the date of the offense, and the name of the accused. *Costello v. United States*, 350 U.S. 359, 363 (1956); S.C. Code Ann. §§ 17-19-20, -30. Both were true billed and signed by the foreman of the grand jury. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

4. ***Failure to notify Applicant of preliminary hearing***

This Court finds Applicant's allegation that counsel was ineffective for failing to notify him of his preliminary hearing is without merit. As an initial matter, this Court notes that, while every criminal defendant is entitled to notice of his right to a preliminary hearing "to determine whether sufficient evidence exists to warrant [his] detention and trial," neither South Carolina nor the United States Constitution recognize a constitutional right to a preliminary hearing. Rule 2(a), SCRCrimP; *State v. McClure*, 277 S.C. 432, 434, 289 S.E.2d 158, 160 (1982); *State v. Keenan*, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982). Moreover, no such hearing may be held if the defendant is indicted by a grand jury before a preliminary hearing is held. Rule 2(b), SCRCrimP; *see also State v. Ballington*, 346 S.C. 262, 551 S.E.2d 280 (Ct. App. 2001) (*overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009)). "The indictment itself constitutes a finding of probable cause and thus avoids the need for a preliminary hearing." *McClure*, 277 S.C. at 434, 289 S.E.2d at 160.

Here, Fata recalled attending the preliminary hearing, and that the arresting officer testified about the facts of the underlying charges. Etheridge testified he did not have any notes about attending the preliminary hearing, although he could not say with certainty that he was there. However, even assuming Etheridge was deficient for failing to notify Applicant of the preliminary hearing, Applicant cannot establish prejudice because he was indicted for these offenses by a grand jury. Because the indictment itself constitutes a finding of probable cause, Applicant's request for relief by way of this allegation is **DENIED.**

VII. ALL OTHER ALLEGATIONS

As to any and all allegations raised in the application or at the hearing in this matter and not specifically addressed in this order, this Court finds Applicant failed to present any evidence

regarding such allegations. Accordingly, this Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

VIII. CONCLUSION

Based on the evidence presented at the PCR hearing and a thorough review of the record, this Court finds and concludes Applicant failed to meet his burden of proof pursuant to *Strickland* and Rule 71.1, SCRCP. Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, based on the foregoing, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

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

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 4 day of February 2022.

Diane S. Goodstein

DIANE S. GOODSTEIN
Presiding Circuit Court Judge
Third Judicial Circuit

Summerville, ~~South~~ Carolina