

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
HONORABLE G EDWARD WELMAKER

Case No.: 2011CP2308176

BENJAMIN LOGAN MOORE, )  
)  
PETITIONER, )  
)  
)  
vs. )  
)  
STATE OF SOUTH CAROLINA )  
)  
RESPONDENT. )

NOTICE OF APPEAL

The Petitioner, Benjamin Logan Moore, hereby appeals the Honorable G. Edward Welmaker's April 30, 2013, order denying post-conviction relief to the Petitioner. A copy of the order on appeal is attached to this notice

Respectfully submitted,



Brian P. Johnson, Esq.  
522 North Church Street  
Greenville, SC 29601  
Attorney for Petitioner

Date: May 29, 2013  
Other counsel of record: Karen Ratigan  
P.O. Box 11549/Columbia, SC 29211

**RECEIVED**

MAY 30 2013

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
HONORABLE G EDWARD WELMAKER

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Case No.: 2011CP2308176

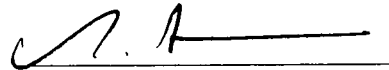
BENJAMIN LOGAN MOORE, )  
 )  
 PETITIONER, )  
 )  
 vs. )  
 )  
 STATE OF SOUTH CAROLINA )  
 )  
 RESPONDENT. )  
 )

**PROOF OF SERVICE**

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I, Brian P. Johnson, Esq., certify that I have today served the within notice of appeal upon the Respondent by depositing a copy in the United States Mail, postage prepaid, addressed to the attorney of record, Karen Ratigan, at P.O. Box 11549 Columbia, SC 29211.

Respectfully submitted,



Brian P. Johnson, Esq.  
522 North Church Street  
Greenville, SC 29601  
Attorney for Petitioner

**RECEIVED**  
MAY 30 2013  
S.C. SUPREME COURT

SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 20-H-GP-2308176

2013 MAY 3 PM 11:38

Benjamin Logan Moore vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):
  - Rule 12(b), SCRPC:  Rule 41(a).
  - SCRPC (Vol. Nonsuit):  Rule 43(k), SCRPC (Settled):  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):
  - Rule 40(j) SCRPC:  Bankruptcy:
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award:
  - Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
  - Affirmed:  Reversed:  Remanded:
  - Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order:  Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this 3rd day of May, 2013.

Court Reporter:

PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the 3rd day of May, 2013, and a copy mailed first class this 3rd day of May, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Brian P. Johnson Brian Johnson Law Firm 522 North Church St Greenville, SC 29601

Karen Christine Ratigan PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer - Greenville County Clerk Of Court - Clerk of Court

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Benjamin Logan Moore, )  
 S.C.D.C. No. 346663, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2011-CP-23-8176

**ORDER OF DISMISSAL**

REC'D  
 CLERK OF COURT  
 GREENVILLE, SC  
 MAY 3 2013  
 3:38 PM

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 9, 2011. The Respondent made its return on June 5, 2012. An evidentiary hearing into the matter was convened on April 16, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, Scott D. Robinson, Esquire. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the February 2011 term of the Greenville County Grand Jury for trafficking ephedrine (100 or more grams) (2011-GS-23-0561), manufacturing methamphetamine (2011-GS-23-0562), and

possession of a weapon during the commission of a violent crime (2011-GS-23-0563). He was represented by Scott D. Robinson, Esquire.

On June 23, 2011, the Applicant pled guilty. The Honorable Robin B. Stilwell sentenced the Applicant to concurrent terms of eight (8) years for possession of ephedrine, second offense, eight (8) years for manufacturing methamphetamine, second offense, and five (5) years for possession of a weapon during the commission of a violent crime. The Applicant did not appeal.

### ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

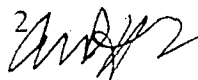
1. Ineffective assistance of counsel.
  - a. "I would aver that my Court Counsel was inept and Constitutionally ineffective for failing to investigate, research, and prepare my defense for Court."
  - b. "Counsel failed to inform me that I had a right to appeal."
2. Lack of subject matter jurisdiction.
  - a. "I would aver that the Circuit Court of Greenville County lacked jurisdiction to entertain my case and sentence me ... The Ratio Legis for this premise is my indictments are [not] 'filed' with the Greenville County Clerk of Court."

At the hearing, the Applicant proceeded upon the grounds of ineffective assistance of plea counsel and involuntary guilty plea.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly:

Set forth below are the relevant findings of fact and conclusions of law as required by



S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel/Involuntary Guilty Plea

The Applicant alleges his guilty plea was involuntary and that he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel’s representation was below the standard of reasonableness and that, but for counsel’s unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

The Applicant stated he met once with plea counsel and once with the investigator before

a meeting at the courthouse on the day he pled guilty. The Applicant admitted he was on bond at the time, however, and failed to contact plea counsel to make additional appointments to review his case. The Applicant stated they discussed some of the discovery materials and his version of events. The Applicant confirmed he had prior drug convictions and knew he was pleading guilty to second offenses. The Applicant argued, however, that plea counsel should have challenged the pleas to second offenses because the CDR code on the indictments was for a first offense. The Applicant also argued he should not have been allowed to plead to the possession charge because there was no indictment for possession.

Plea counsel testified he was appointed in this case and filed the usual discovery motions. Plea counsel testified he reviewed the discovery materials (and the NCIC report) with the Applicant and also discussed his version of events. Plea counsel testified he reviewed the indictments and did not notice any defects. Plea counsel testified the Applicant pled guilty to second offenses because of his criminal record. Plea counsel testified there was no issue with the CDR code on the indictment indicating a first offense when the Applicant pled guilty to a second offense. Plea counsel testified he explained to the Applicant that the trafficking ephedrine charge was being reduced to possession of ephedrine. Plea counsel testified several additional charges were dismissed as a result of the Applicant's guilty plea.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds the Applicant's testimony is not credible, while also finding plea counsel's testimony is credible. This Court further finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

The Applicant admitted to the plea judge both that he was guilty and that the facts recited

by the solicitor were true. (Plea transcript, p.6; p.8). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced in any way. (Plea transcript, pp.3-4; p.6). This Court finds the Applicant entered a knowing and voluntary guilty plea. See Boykin v. Alabama, 395 U.S. at 243-44, 89 S. Ct. at 1712.

This Court finds the Applicant failed to meet his burden of proving to adequately investigate his case and prepare a defense. Plea counsel testified he met with the Applicant and that they reviewed the discovery materials and the Applicant's version of events. Plea counsel testified there was a "mountain" of evidence against the Applicant and that the Applicant admitted to him that he was guilty on some of the charges. This Court finds plea counsel's testimony is credible. This Court notes the Applicant has failed to articulate what plea counsel should have done to better investigate his case. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (finding the failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial). This Court finds that, based upon the facts of the case, there is nothing more plea counsel could have done in order to secure a different outcome.

This Court finds the Applicant failed to meet his burden of proving plea counsel should have objected to alleged defects in the indictments and sentencing sheets. The Applicant testified he knew he was pleading guilty to second offenses on the day of the guilty plea. This is borne out by the signature on the sentencing sheets and references in the plea transcript. (Plea transcript, p.3; p.5; p.8). The Applicant further admitted both at the guilty plea hearing and the

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PCR hearing that he had prior drug convictions. (Plea transcript, p.10). That the CDR code on the indictment was for a first offense did not deprive the plea judge of subject matter jurisdiction. As plea counsel testified, it would have been prejudicial to have any notations on the indictments that the Applicant had prior convictions. Further, indictments are merely notice documents that do not confer subject matter jurisdiction upon the court. See State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). Both plea counsel and the Applicant were aware the Applicant was pleading guilty to second offense.

Similarly, the Applicant failed to meet his burden of proving the plea judge did not have jurisdiction to accept his plea to possession of ephedrine (because there was no indictment for that charge). The Applicant was indicted for trafficking ephedrine and pled to the lesser offense of possession. This was noted on the sentencing sheet, which the Applicant signed. Plea counsel testified he told the Applicant he would be pleading guilty to the lesser-included charge. This Court finds plea counsel's testimony is credible. This Court reasserts this did not deprive the plea judge of subject matter jurisdiction in this case. See id.

This Court notes the Applicant raised the issue in his PCR application that plea counsel failed to advise him of the right to appeal. This Court notes, however, that plea counsel has a constitutionally imposed duty to consult with the defendant about an appeal only when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that this defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036 (2000). Regardless, the plea judge advised the Applicant of the ten-day period in which to file a notice of appeal<sup>1</sup> and the Applicant failed to present any evidence that he requested plea counsel file an appeal on his behalf.

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<sup>1</sup> Guilty plea transcript, p.7.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel's performance.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### **All Other Allegations**

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

#### **CONCLUSION**

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Furthermore, the Applicant's guilty plea was entered knowingly and voluntarily within the mandates of Boykin. Therefore, this PCR application must be denied and dismissed with prejudice.

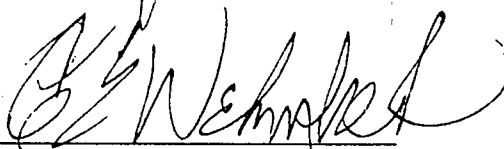
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This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

**IT IS THEREFORE ORDERED:**

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

AND IT IS SO ORDERED this 30 day of April, 2013.

  
\_\_\_\_\_  
G. Edward Welmaker  
Presiding Judge  
Thirteenth Judicial Circuit

  
\_\_\_\_\_, South Carolina.

Law Office of Brian P. Johnson, LLC  
522 North Church Street  
Greenville, SC 29601

**RECEIVED**

MAY 30 2013

**S.C. SUPREME COURT**

*Basement*



UNITED STATES POSTAGE



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