THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Brian Gibbons, Circuit Court Judge

Case No. 2011-CP-12-0597

State of South Carolina, Respondent,

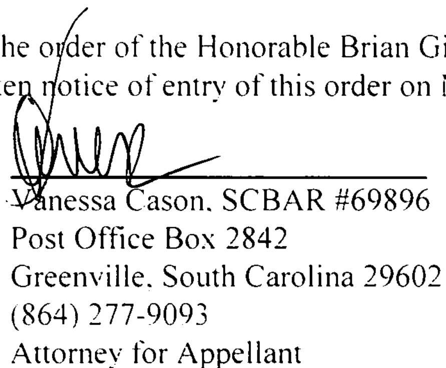
v.

Michael Lee Montgomery, II, Appellant.

NOTICE OF APPEAL

Michael L. Montgomery, II appeals the order of the Honorable Brian Gibbons dated February 23, 2014. Appellant received written notice of entry of this order on March 10, 2014.

March 10, 2014



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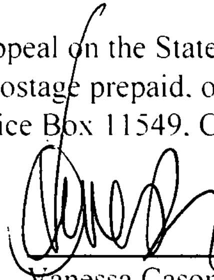
PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on March 10, 2014, addressed to the attorney of record, Mary Williams, Post Office Box 11549, Columbia, South Carolina 29211-1549.



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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHESTER	)	2011-CP-12-0597
Michael Lee Montgomery, II,	)	
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

CLERK OF COURT
CHESTER CO. S.C.
2014 FEB 26 P 3: 28
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This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 15, 2011. An evidentiary hearing was convened on February 3, 2014, at the Lancaster County Courthouse. The Applicant was present at the hearing and was represented by Vanessa Cason, Esquire. The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office.

At the hearing, Mark Grier, Esquire ("Counsel"), testified. Applicant did not wish to testify. This Court had before it the records of the Chester County Clerk of Court, the trial transcript, the appellate records, and the Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

At the time of hearing, Applicant was no longer incarcerated. Applicant was indicted for growing/manufacturing marijuana (2010-GS-12-0037) and possession with intent to distribute marijuana (2010-GS-12-0088). Applicant was represented by Mark Grier, Esquire. Applicant proceeded to a jury trial before the Honorable Doyet A. Early, III. Following a guilty verdict, Judge Early sentenced him to fifty-four (54) months for manufacturing/growing marijuana and to a

concurrent term of thirty (30) days for possession of marijuana (first offense).

A notice of appeal was filed, and an Anders brief was submitted on Applicant's behalf.[1] The appeal was dismissed. State v. Montgomery, Op. No. 2012-UP-412 (S.C. Ct. App. filed July 11, 2012). The remittitur was sent on July 27, 2012.

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

1. "There were no witnesses in the courtroom. This is against the 6th Amendment.
    a. "There were no witnesses on the motion of discovery."
2. "Marijuana was legalized in South Carolina in 1993 in SS12-21-5010 of the South Carolina Code of Laws."
    a. "Marijuana is no longer a controlled substance and is therefore legal in South Carolina according to SS12-21-5020 of the South Carolina Code of Laws. The judge lied in the court room during trial and said that there is no legalization of marijuana in South Carolina."
3. "I was framed and the arresting officer wasn't in court."
    a. "The arresting officer knows that I was framed."

At the PCR hearing, Applicant questioned Counsel regarding his failure to identify who had made the controlled purchase of marijuana which ultimately led to a search warrant at his house and his failure to call certain members of law enforcement as witnesses for the defense. This court construes these claims as claims of ineffective assistance of counsel in failing to investigate these matters and in failing to call the named individuals as witnesses at trial.[2]

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 at the post-conviction relief hearing. This Court has further had the opportunity to observe

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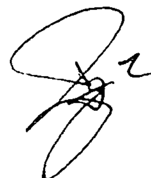
[1] Anders v. California, 386 U.S. 738 (1967).

[2] To the extent that Applicant's allegations can be construed as a claim of lack of evidence to support his conviction, such



the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80.

Ineffective Assistance of Counsel

The Applicant alleges 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) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland, supra). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's

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claim is inappropriate for PCR and is therefore denied and dismissed. S.C. Code Ann. § 17-27-20(a)(6).

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 of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Failure to Investigate / Failure to Call Witnesses

Applicant asserts that Counsel should have ensured that Applicant knew the identity of the person who had made an undercover purchase prior to issuance of the warrant and that Counsel should have called the officer who arrested him as a witness at trial.

During the pre-trial Jackson v. Denno[3] hearing, Captain Chuck Grant of the Chester County Sheriff's Office mentioned that the investigation had begun with a controlled purchase of marijuana.[4] (Tr. p. 33, lines 14-16.) After that purchase, a search warrant was obtained for Applicant's residence at 614 Dupree Street. (Tr. p. 33, lines 17-21.) The charges at trial were based upon the search of residence. No charge was brought as a result of the controlled purchase. At PCR hearing Counsel did not recall if the person who made the purchase was named. However, there is no evidence that obtaining this information would have been beneficial to Applicant.

Applicant also suggested that Agent Pendergrass should have been called as a defense witness or interviewed by Counsel. In the trial transcript Agent Pendergrass was mentioned as having been present when Applicant was provided with rights warnings and during the interview in which Applicant admitted that he was growing marijuana at the residence. (Tr. p. 35, lines 10-15; p. 37, lines 13-18; p. 69, line 24 – p. 70, line 13; p. 129, lines 8-13.) It was also mentioned that Agent

[3] Jackson v. Denno, 378 U.S. 368 (1964).
[4] Counsel objected to mention of the controlled buy before the jury. The objection was sustained and the jury instructed to disregard the testimony. (Tr. p. 56, lines 1-9; p. 56, line 21 – p. 57, line 2.)

Pendergrass may have been present at the execution of the search warrant at Applicant's home. (Tr. p. 57, lines 13-21.) Agent Pendergrass did not testify at the PCR hearing.

With regard to his claim regarding the arresting officer, it appears Applicant may be referring to Deputy Wendy Glenn. Captain Grant testified to receiving a call from Glenn asking if he was looking for Applicant. (Tr. p. 38, lines 2-10; p. 68, lines 19-21; p. 77, line 24 – p. 78, line 1.) Applicant testified at trial that his mother knew Glenn, and he had gone to his mother's house because of her acquaintance with Glenn when he found out police were at his home. (Tr. p. 123, lines 15-21.) Glenn did not testify at PCR hearing.

Counsel testified that he often communicated with Applicant via e-mail as Applicant lived in Columbia but did meet with him a few times. Counsel recalled that Applicant asked that many people be subpoenaed for the trial. Counsel decided that there would be no benefit in calling Agent Pendergrass at trial. When asked if he had any information that Agent Pendergrass would confirm Applicant's position that Applicant was framed, Counsel replied that he could not recall having such information. Counsel reflected that several of the witnesses Applicant thought should appear would have in fact only served to buttress the State's case against him.

Based on the evidence presented at hearing, I find that Applicant has failed to meet his burden of showing that Counsel's performance was outside reasonable professional norms. Moreover, Applicant has failed to produce any evidence which the additional witnesses could have provided. Therefore, this Court finds that Applicant has also failed to demonstrate prejudice such that the result of trial would have been different but for Counsel's alleged shortcomings. <u>See for example</u> <u>Moorehead v. State</u>, 329 S.C. 329, 496 S.E.2d 415 (1998) (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); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005)(applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence).

CONCLUSION

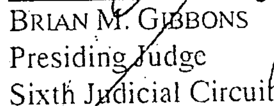
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. His attention is also directed to Rule 243, SCACR, for appropriate procedures after notice has been timely filed.

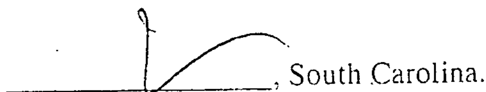
IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be DENIED AND DISMISSED WITH PREJUDICE; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 2 day of 2/14, 20__.



BRIAN M. GIBBONS
Presiding Judge
Sixth Judicial Circuit



__________, South Carolina.

STATE OF SOUTH CAROLINA)
COUNTY OF Chester)

IN THE [✓] COURT OF COMMON PLEAS
[ ] FAMILY COURT

Michael Lee Montgomery, II 343230
Vs
State of South Carolina

FILE NO: 2011-CP-12-0597

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Order of Dismissal (Document Served) in this action, dated February 23, 2014, on Atty Vanessa Cason (Name of person served) by

[ ] delivering it to him/her personally; or,

[ ] mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Atty Vanessa Cason
P.O. Box 2842
Greenville, S.C. 29602 ; or

CLERK OF COURT
CHESTER CO S.C.
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FILED

[ ] Other:

[See Rule 5(b)(1), SCRCP]

March 3, 2014
(Date)

Sue K. Carpenter
(Signature) Clerk of Court

SCCA/255

Post Office Box 2842
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Telephone: (864) 277-9093
Facsimile: (864) 277-3627

VANESSA CASON

ATTORNEY AT LAW

March 10, 2014

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

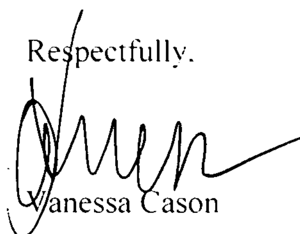
RE: State of South Carolina, Respondent, v. Michael Lee Montgomery, II
Case No. 2011-CP-12-0597

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed is the Proof of service of the notice of appeal on the respondent.

This appeal is being filed with the Supreme Court pursuant to Rule 203 of the South Carolina Rules of Appellate Practice.

Respectfully,



Vanessa Cason

VC/rml
cc: Mary Williams
Attorney for Respondent
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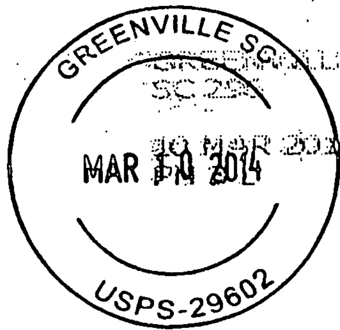

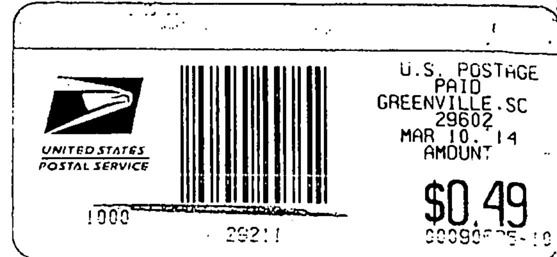

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