NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA

(In The Supreme Court)

APPEAL FROM ORANGEURG COUNTY

Court of Common Pleas

Diane Goodstein, Presiding Judge First Judicial Circuit

Case No.: 2010-CP-38-0292

State of South Carolina.....Respondent

Vs.

Reginald Montgomery, SCDC # 257290 .....Appellant

NOTICE OF APPEAL

Reginald Montgomery, SCDC # 257290 appeals the Order of Dismissal of the Honorable Diane Goodstein dated May 15, 2014. Appellants Counsel received written notice of entry of this order on May 31, 2014.

Belinda Davis-Branch
205 Elliott Street
Orangeburg, South Carolina
Attorney for Appellant

Other Counsel of Record:
Mary Williams, Assistant Attorney General
Office of The Attorney General
Rembert C. Dennis Building
Post Office Box 11549
Columbia, South Caraolina 29211-1549

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**FIRST JUDICIAL CIRCUIT**
COUNTY OF ORANGEBURG)	
)	
)	
Reginald Montgomery #257290)	**Case No.: 2010-CP-38-0292**
)	
)	
Appellant,)	
)	**Certificate of Service**
)	
vs.)	
Mary Wlliams,)	
Assistant Attorney)	
General State of South Carolina,)	
Attorney General Office)	
)	
)	
Repondent.)	

I, Belinda Davis-Branch, Attorney at Law hereby certify that a copy of the following documents: Notice of Intent to Appeal, Certificate of Service and a copy of the Order of Dismissal has been served on the following individual by depositing same in the United States Postal Service with the proper amount of first-class postage duly affixed:

Reginald Montgomery #257290

Served on:

Mary Williams
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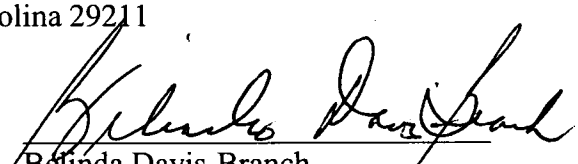

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June 12, 2014
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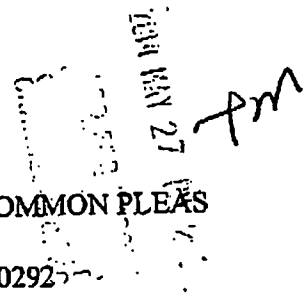

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	
		2010-CP-38-0292
Reginald Montgomery, #257290,	)	
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 23, 2010. An evidentiary hearing into the matter began on December 1, 2011, and was completed on December 2, 2011, at the Dorchester County Courthouse. The Applicant was present at the hearing and was represented by Belinda Davis-Branch, Esquire. The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was Thomas Sims, Esquire ("Counsel"). This Court had before it the records of the Dorchester County Clerk of Court, the trial transcript, the appellate records, the Applicant's records from the South Carolina Department of Corrections, an exhibit introduced at hearing, and the affidavit of Wanda Carter, Esquire ("Appellate Counsel").

PROCEDURAL HISTORY

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. The Applicant was indicted by the Orangeburg County Grand Jury for Armed

Robbery (2006-GS-38-2052). Thomas R. Sims, Esquire, represented him. Applicant proceeded to a jury trial before the Honorable J.C. Nicholson. Applicant was found guilty, and he was sentenced to twenty-two (22) years imprisonment.

A notice of appeal was filed and an appeal perfected. Following the submission of a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct 1396 (1967), the appeal was dismissed. State v. Montgomery, 2009-UP-134 (S.C. Ct. App. filed March 9, 2009). The Remittitur was sent on March 25, 2009.

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

1. Ineffective assistance of counsel.
    a. "Failure to conduct and independent investigation and prepare for trial."
    b. "Failure to speak to or utilize defense witness present at trial."
    c. "Failure to properly advise the Applicant regarding his right to testify."

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 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 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).

Summary of Facts Adduced at Trial

In the early morning hours of September 17, 2006, two men, their faces somewhat masked with stockings, entered a 24-hour Shell station in Bowman. One was shorter and armed with a pistol

equipped with a laser sight, and he remained near the door. The other man approached the clerk, Nicholas Herrington ("Herrington"), and retrieved money from the register. Herrington recognized the shorter man with the gun as a former schoolmate who had been in the store just a few nights before to cash in change. Herrington did not get a good look at the other man because he was focused on the man with the gun. In addition to Herrington, a cook and a customer were also in the dining area of the store during the robbery. After retrieving the money, both robbers fled from the store on foot. Herrington asked the cook to help him close the door and called 911. Herrington reported that approximately $600.00 was taken.

The man Herrington recognized was James Green ("Green"). Testifying at trial, Green admitted that he was the man holding the gun during the robbery. According to Green, Applicant was the taller man who retrieved money from the register. Green testified that he, Applicant, and Shawon Johnson ("Shawon") had met at a club in Bowman on the evening in question. They walked from the club to Green's house. According to Green, Applicant and Shawon discussed committing a robbery along the way, and Shawon testified that Green and Applicant discussed the robbery. However, Shawon did not want to participate because he was still "on papers," meaning on probation. Shawon also stated that he was intoxicated and went to sleep at Green's house. Shawon gave Green the pistol he had been carrying, and Green and Applicant left Shawon at Green's house.

After the robbery, Green went to the home of April Johnson ("April"), Shawon's sister. He knocked on her window and asked for a ride, claiming his girlfriend had left him at the store after an argument. April agreed to give Green a ride home. April, her friend Terrance, Green, and Applicant got into April's white Mustang. When they arrived at Green's house, Shawon was still there asleep.

Green's sister, Letangela Bellamy ("Bellamy"), stated that she saw April's white Mustang, and Shawon, Green, and Applicant were all outside when Green knocked on her window. April returned home with Shawon.

As officers roved the area looking for potential suspects, one officer noticed the white Mustang leaving. He then saw the Mustang return a very short time later and decided to knock and ask if anyone had seen the suspects. April reported that Green and another man had come by for a ride. Green stated he gave Shawon $20 for giving them the gun used in the robbery and $5 to give April for gas. The total take was approximately $300.00 according to Green.

Failure to Investigate

Applicant asserts that counsel failed to adequately investigate. Applicant testified that he retained Counsel for other charges, and Counsel agreed to represent him in this matter. Applicant stated that he spoke to Counsel before he went to the Department of Corrections on other charges and did not speak to Counsel again until about a month before trial when Counsel conveyed a plea offer. Applicant specifically takes issue with Counsel's failure to interview Letangela Bellamy. Applicant asserts that had Counsel interviewed Bellamy, he may have learned that she would identify him in court. Applicant stated that he was prejudiced by this because Counsel could have challenged the in-court testimony as compared to the original statements and could have moved to suppress the entire testimony.

Counsel did renew his motion for mistrial at the close of Bellamy's testimony based on the solicitor's failure to disclose that Bellamy had, since her written statements, named Applicant as the dark-skinned male referred to in her statements. While Counsel was unaware that Bellamy would

name Applicant prior to her testimony, he nonetheless cross-examined her on the fact that she had not named him in her written statements. (Tr. p. 209, line 3 – p.211, line 6.) Even if Counsel had found out before trial that Bellamy would name Applicant, there is no evidence that he would have been able to have the testimony excluded. He would have only been able to cross-examine her and argue that her identification was made later because she was trying to help her brother, just as he did at trial. Therefore, even if Counsel had interviewed Bellamy and learned that she would name Applicant at trial, the outcome of trial would have been no different, and Applicant has made no assertion that he would have chosen not to proceed to trial had he known of the identification.

Failure to Adequately Cross-Examine James Green

Applicant states that he first informed Counsel of a letter from co-defendant Green when they met some time prior to trial, but he did not have the letter with him at the time. According to Applicant, Counsel told him to bring the letter with him next time, and he did ultimately provide Counsel with the letter purportedly written by Green. Applicant claimed the letter was the result of several notes exchanged between himself and Green through a prison guard.[1] Applicant testified that he did provide the letter to Counsel prior to trial.

Even though he felt there would be evidentiary problems if he attempted to introduce the letter, Counsel stated that he had intended to use the letter on cross-examination of Green. Based on the lack of authentication and Counsel's cross-examination on other points calling credibility into question, this Court does not find Counsel's performance patently unreasonable. Nonetheless, even assuming that Counsel's failure to use the letter constitutes deficient performance, Applicant has failed to show what the result of cross-examination regarding the letter would have been. Glover v.

State , 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Therefore, I find that Applicant has failed to show prejudice in this regard.

Failure to Call Witnesses

Applicant also testified that Counsel was ineffective in failing to call defense witnesses Kevin Pringle and Eva Wright. Applicant believes that Pringle could have impeached the testimony of James Green and that Wright could have provided an alibi. According to Applicant, during the recess prior to the colloquy with the court on his right to testify, he and Counsel discussed whether he would testify. Applicant agreed with Counsel's advice that he not testify. Applicant believed, however, that Counsel would still present evidence from other witnesses and the letter purportedly written by Green.

In contrast, Counsel testified he did discuss whether they would present testimony from additional witnesses during the recess. Counsel recalled that they discussed how Counsel had been able to present issues with credibility through cross-examination. Counsel stated that after this discussion the decision was made collectively that, given the success of cross-examination, the defense would forego presenting witnesses in favor of making the last closing argument to the jury. Counsel also recalled that Applicant had informed him initially that Wright was his wife.

I find Counsel's testimony to be credible. Counsel articulated a valid strategy in deciding not to call defense witnesses in favor of closing argument, particularly where Counsel had success through cross-examination (for example, Herrington's admission on cross-examination that he knew

[1] This court accepted the letter only as to the reasonableness of Counsel's performance and does not consider the letter for

Applicant but could not say that Applicant was the other participant in the robbery and cross-examination of other witnesses regarding prior statements).

Further, Applicant has failed to present the testimony of these witnesses. Therefore, he has failed to demonstrate prejudice in this regard. Glover v. State, supra; Bannister v. State, supra; Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008) (defendant failed to present evidence that would show a reasonable probability that, but for counsel's failure to call expert witnesses, the result of his trial would have been different, and counsel vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence).

Indictment

Applicant further argues that Counsel erred in failing to move to quash his indictments. The faces of the indictments state "December 04, 2006 Term." The true bill stamp lists a date of "NOV 08 2006." The date printed below the stamp reads "December 6, 2006." Counsel opined that the scrivener's error with regard to the date was not a "fatal flaw" and that the elements of the crime were sufficiently set forth in the indictment. Therefore, he did not object.

I find Counsel's performance not unreasonable. Further, I find no resulting prejudice. Additionally, even if the trial court granted counsel's motion to quash the indictments, Applicant still could have been charged through re-indictment or direct indictment, then prosecuted and sentenced for the crimes at a later date. Under S.C. Code Ann. § 17-19-90 (2003), "every objection to any indictment for any defect apparent on the fact thereof shall be taken...on motion to quash such indictment before the jury shall be sworn and not afterwards." Since the Double Jeopardy Clause of the Fifth Amendment attaches in a jury trial only once the jury is sworn, a successful motion to

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the truth of any matters asserted therein or in lieu of testimony from the purported author.

quash, by its very definition, will not work to bar subsequent prosecution on the same allegation on that grounds. See State v. Prince, 279 S.C. 30, 301 S.E.2d 471 (1983). Accordingly, this Court finds Applicant has failed to prove resulting prejudice from counsel's failure to move to quash the indictments.

Ineffective Assistance of Appellate Counsel

A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Failure to Brief on Brady v. Maryland as to Statements of Letangela Bellamy

Counsel renewed his motion for mistrial following Bellamy's testimony based on the fact that Bellamy identified Applicant in court, and the defense was not aware that Bellamy had named Applicant in a verbal statement to law enforcement after her two written statements in which she only described a dark-skinned male. Had Appellate Counsel briefed the issue as objected to by Counsel, the issue would be without merit. State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (1996) (failure to disclose victim's statement made week before trial which was inconsistent with earlier statement did not result in prejudice, and thus was no Brady violation where defense counsel was able to impeach victim about new statement by introducing her prior statement and asking about the discrepancy). Therefore, I find Appellate Counsel was not ineffective in failing to raise this issue.

Presence During In-Chambers Conference

Applicant further attributes error to Appellate Counsel's failure to brief an issue of alleged error because Applicant was not present during an in chambers meeting including the trial judge, solicitor, and Counsel. As noted by Appellate Counsel in her affidavit, there is nothing in the transcript to give rise to this issue on appeal. This Court agrees with Counsel that the record does not reveal an objection regarding any in-chambers meeting nor does it support an argument that Applicant was absent from any critical stage of trial. Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002)(appellate counsel not ineffective for failing to raise an issue that was not preserved for appellate review).

Identification by April Johnson

Applicant has set forth this issue as one of ineffective assistance of appellate counsel in failing to brief the issue of an illegal show-up identification made by April Johnson. At trial, April identified Applicant as the person in her car with Green. On cross-examination, Counsel asked about her written statement in which April stated she had never seen the other individual before. (Tr. p. 178, line 3 – p. 179, line 25.) April insisted that she had seen the man before but had never seen him with Green and did not know his name. Counsel eventually asked whether April had been shown a photographic lineup. To his surprise, she responded that she had been a lineup by the solicitor. (Tr. p. 182, lines 2-20.) Following examination of the witness, Counsel moved for a mistrial based on the prosecution's failure to disclose the lineup. (Tr. p. 191, line 21 – p. 192, line 17.) Counsel argued that because the lineup had not been disclosed, he had lost the opportunity to move for suppression of the identification prior to trial. (Tr. p. 195, lines 6-17; p. 198, lines 3-10.) Counsel also stated that he had prepared for trial based on April's statement which indicated she did not know who the man with Green was. (Tr. p. 197, line 14 – p. 198, line 3.)

The solicitor initially stated that he had not shown April a photo lineup, only a booking photo which had been provided in discovery, during an interview in his office shortly before trial. (Tr. p. 193, line 2 – p. 195, line 5.) The solicitor then corrected himself, stating that he had shown April a six-photograph lineup, the same lineup shown to Green by law enforcement. (Tr. p. 200, lines 2 – 15.) The trial court denied the motion for mistrial but permitted Counsel to talk further with April and recall her as a witness for additional cross examination if he felt necessary. (Tr. p. 201, lines 10-20.) April was not recalled at trial.

At trial, Counsel argued that he had been unable to request a pre-trial hearing on the lineup as a basis for his mistrial motion and did not pose an objection to the lineup. Appellate Counsel did brief the issue in an Anders brief. However, even if Counsel had objected to the in-court identification based on the photo lineup shown to April, Applicant has failed to show that the outcome would have been different.

"An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). The only evidence in the record as to the identification process shows that the solicitor provided April with a lineup with no markings and containing six pictures. There is no evidence that she was encouraged to select any particular photo or that the photos themselves were suggestive. Further, April stated that she had seen Applicant before but did not know his name. April also reported that she got a good view of Applicant twice – when he got out of the car and when he came back out to tell her that Shawon would be out in a few minutes. Finally, April was not the only witness to identify Applicant as the man who arrived at her home with Green and rode with her to Green's house. Green named Applicant as the man accompanying him. Shawon identified Applicant as the man with Green when Green returned to the home. Green's sister, Bellamy, also identified Applicant as the man who returned to the home with Green in the white Mustang. Based on all the foregoing, even if Counsel had moved for suppression on basis of the photo lineup, it is unlikely the result of trial would have been different.

Other Allegations

No other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed waived because no evidence was presented.

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 South Carolina Appellate Court Rule 243 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 15 day of May, 2014.

DIANE S. GOODSTEIN
Presiding Judge
First Judicial Circuit

Dorchester, South Carolina.

BELINDA DAVIS-BRANCH
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PCR

June 12, 2014

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

RE: Reginald Montgomery, SCDC # 257290 vs. State of South Carolina
CASE NO.: 2010-CP-38-0292

Dear Honorable Clerk Shearouse:

Please find enclosed a Notice of Intent to Appeal, Certificate of Service and a copy of the Order of Dismissal in the above referenced case.

I am sending a copy of this letter and the attached documents to the Office of Appellate Defense.

Should you have any questions or comments, please do not hesitate to contact me.

With kindest regards.

Sincerely,

Belinda Davis-Branch

Belinda Davis-Branch
BDB/dls

cc: Mary Williams, Assistant Attorney General
Reginald Montgomery, # 257290
Office of Appellate Defense

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