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September 9, 2015

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SEP 14 2015

S.C. SUPREME COURT


South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

In RE: Melody Holmes #239097 vs. State of South Carolina
Case #: 2013-CP-04-2236

Dear Sir/Madam:

Please find enclosed herewith the original and one (1) copy of the Appellant's Notice of Appeal in connection with the foregoing matter which I ask that you file for record, returning the clocked copy to my office. I also enclose a copy of the Order of Dismissal and the original Proof of Service on Walt Whitmire, Office of the Attorney General. Please use the enclosed self-addressed envelope to return the clocked copy to my office.

With kind regards,


Hugh W. Welborn

HWW/sba

cc: Office of the Appellate Defense
Office of the Attorney General
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

HONORABLE R. LAWTON MCINTOSH

2013-CP-04-2236

MELODY HOLMES, #239097

APPELLANT,

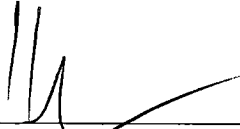
VS

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Melody Holmes, #239097 appeals the denial of her Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable R. Lawton McIntosh, Circuit Court Judge on February 9, 2015, and Order of Dismissal issued on September 4, 2015, and filed on September 9, 2015. The Appellant received Order of Dismissal on September 9, 2015.



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Attorney for Melody Holmes, #239097

Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM ANDERSON COUNTY
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MELODY HOLMES, #239097

APPELLANT,


vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

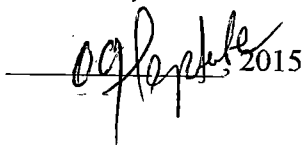
PROOF OF SERVICE

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 September 9, 2015, addressed to its attorney of record Walt Whitmire, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549



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2015

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STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Melody Holmes,
S.C.D.C. No. 239097,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

C.A. No. 2013-CP-04-2236

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SEP 14 2015

S.C. SUPREME COURT

ORDER OF DISMISSAL
(with prejudice) TRUE COPY

SEP - 9 2015

Richard D. Kelly

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on October 3, 2013. The State filed its responsive pleading. A hearing on the State's motion was convened on February 9, 2014 at the Anderson County Courthouse. Applicant was present at the hearing and was represented by Hugh Welborn, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted at the June 2013 term of the Anderson County Grand Jury for possession of crack cocaine with intent to distribute (2013-GS-04-1179), and trafficking in cocaine, 28 grams or more, but less than 100 grams, first-offense (2013-GS-04-1180), possession of marijuana with intent to distribute, first offense (2013-GS-04-1181). Applicant was represented by Kurt Tavernier, Esq. On August 12, 2013, the State called its case. Applicant entered a guilty plea as indicted. The Honorable Larry B. Hyman, Jr., sentenced Applicant to seven (7) years imprisonment for possession with intent to distribute crack cocaine, seven (7) years imprisonment for trafficking in cocaine, and

five (5) years imprisonment for possession with intent to distribute marijuana. The sentences were to be served concurrently. Applicant did not appeal his guilty plea or sentence.

At the PCR hearing, Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
 - a. failure to obtain and discuss the buy/bust surveillance video with Applicant;
 - b. failure to independently investigate and evaluate potential impeach value in the surveillance video;
 - c. failure to move to suppress the narcotics based on a defective search warrant;
 - d. failure to pursue an entrapment defense.

SUMMARY OF TESTIMONY AT THE PCR HEARING

(a) Applicant's testimony

Applicant testified that it was her opinion that this Court should be recused from the present action. Applicant further testified that this Court presided over her co-defendant son's companion case. Applicant noted that she was a purported alibi witness in the defenses' case. Applicant testified that she "thinks that she remembers" this Court presiding over a one day trial for her son's case that resulted in an acquittal. However, Applicant also testified that the State dismissed her son's charges after she pled guilty. Ultimately, Applicant waived on whether her versions of the procedural history of her son's case necessitated this Court's recusal in the present action.

On the merits of the PCR action, Applicant testified that counsel "made a fool out of her." She stated that "he never told me nothing, he led me on a wild goose chase." Applicant acknowledged that she was had obtained bond during the pendency of her charges. At the focal point of Applicant's post hoc contentions, she testified that counsel failed to provide her a copy

of the surveillance video of the buy/bust. She testified that she informed counsel that she did not want to proceed further with the case until she reviewed the surveillance video. Applicant testified that counsel informed her that her residence was under police surveillance for seventy-two (72) hours at the time of her arrest. Applicant testified that when she informed counsel of her desire to view the surveillance video, "he laughed at her." Applicant opined that the surveillance video should have been used to impeach the informant's credibility.

Applicant gave her opinion that the police conducted an illegal search of her residence pursuant to a defective search warrant. Applicant's opinion was based upon her testimony that the affidavit of probable cause did not clarify whether the contraband was cocaine or crack-cocaine. Last, Applicant testified that counsel should have pursued an entrapment defense based on the fact that informant initiated the narcotics transaction. She testified she stills wants know the identity of the informant.

Counsel's testimony

Counsel testified to his course of conduct during the representation. Counsel has primarily practiced criminal law since 1989 admission into the South Carolina Bar. Prior to practice, counsel's profession was law enforcement. Counsel held approximately six attorney/client consultations with Applicant. He provided Applicant a copy of the State's discovery disclosure at an early point in the representation.

Counsel gave brief summary of the events that led to Applicants arrest. He obtained and reviewed the buy/bust surveillance video. He explained that the surveillance video captured a narcotics transaction between an unidentified informant and an unknown male on the front porch of Applicant's residence. Counsel made a motion to compel the State to disclose the identity of

the informant; it was denied.¹ Counsel agreed with the propriety of Judge Macaulay's ruling. In counsel's professional opinion, the identity of the informant was a "red herring" in Applicant's case. First, Applicant was arrested for having dominion of half (1/2) a pound of marijuana, thirty-three (33) grams of cocaine, and ten (10) grams of crack-cocaine. She admitted her culpability and remained consistent in this posture throughout the duration of the case. Counsel stated Applicant's dominion of the various narcotics was unrelated to the facts of the buy/bust. Furthermore, he stated that an entrapment defense was unavailable in her case because she did not sell the contraband in the buy/bust. Instead, Applicant claimed dominion of the narcotics in her residence that were discovered by police. Counsel stated that the surveillance video established sufficient probable cause to obtain a search warrant. Counsel did not identify a meritorious suppression defense from the police search and seizure protocol here.

Counsel testified that he did not force a plea on Applicant where it was ultimately her decision to plead guilty.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and, legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant fell well short of meeting her burden to even make a credible prima facie showing on any of her allegations. In contrast, to

¹ Counsel noted that Applicant was not present for this motion hearing before Judge Macaulay.

Applicant's case, which solely relied on her suspect and unrealistic testimony, counsel provided compelling testimony on the matters at issue. His testimony was the product of clear diligence and preparation to testify in the PCR forum. This Court finds counsel's PCR testimony further evidenced the competency of his representation concerning the allegations at issue. The State's case against Applicant was simple and straight forward. She admitted to police that the various narcotics, found in her residence, belonged to her.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, 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 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 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 defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Kolle v. State, 386 S.C. 578, 588, 690 S.E.2d 73, 78 (2010)

A.

This Court finds that Applicant's pro se motion for recusal was improper and frivolous. See Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (Counsel is best able to use professional judgment to determine which arguments are relevant). Second, the motion was made and ultimately abandoned by Applicant. Regardless, Applicant has failed to meet her burden of production to establish a showing of any cognizable conflict to this Court's disposition of the present case. See Floyd v. State, 303 S.C. 298, 299, 400 S.E.2d 145, 146 (1991).

B.

This Court finds Applicant's allegation (a) ineffective assistance of counsel -- failure to obtain and discuss the buy/bust surveillance video with Applicant is without merit.

"Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). "Rule 5 permits inspection of evidence in the State's possession which [is] material to the preparation of his defense or [is] intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant upon request by the defendant."

Hyman v. State, 397 S.C. 35, 47, 723 S.E.2d 375, 381 (2012) (citing Rule 5(a)(1)(C), SCRCrP).

The Hyman Court determined the State “struck the appropriate balance by allowing defense counsel to view the videotape and providing Petitioner with stills during negotiations.” Id.

This Court finds counsel’s testimony on the matter persuasive and dispositive. Counsel took sound courses of action at the appropriate junctures. Counsel testified that although Applicant wanted to know the identity of the informant, Judge Macaulay’s adverse yet sound ruling had no legitimate bearing on her decision to plead guilty and protect her son from additional culpability. This Court finds counsel’s testimony credible and finds his assessment on the matter logical. In contrast, Applicant has presented no credible, let alone compelling justification of why she should be allowed to depart from the presumption of verity in her assurances to Judge Hyman concerning her satisfaction with counsel’s representation. Therefore, this allegation is denied and dismissed with prejudice.

Similarly, this Court finds Applicant’s allegation (b) ineffective assistance of counsel -- failure to independently investigate and evaluate potential impeachment value in the surveillance video to be without merit.

This Court again finds counsel’s testimony concerning the video surveillance recording to be dispositive. Regardless, Applicant failed to present any evidence to establish how the disclosure of the informant’s identity would benefit to Applicant’s case. See Moorehead v. State, 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”). Where further discussion on the matter is unnecessary, this allegation is denied and dismissed with prejudice.

C.

This Court finds Applicant's allegation (c) ineffective assistance of counsel --failure to move to suppress the narcotics based on a defective search warrant is without merit.

The Second Circuit expressed understandable reluctance to require defense counsel to file boilerplate motions merely to vindicate professional competence without regard to the grounds for the motion. U.S. v. Ditommaso, 817 F.2d 201, 215 (2nd Cir. 1987). Finally, counsel is not required to file a suppression motion that would have been meritless on the facts and law. Ceja v. Stewart, 97 F.3d 1246, 1253 (9th Cir. 1996). And even with debatable Fourth Amendment claims, the deference owed to trial counsel will carry the argument. Mason v. Godinez, 47 F.3d 852, 856-57 (7th Cir. 1995).

This Court finds Applicant again has failed to meet her most basic burden of production for this allegation. Applicant testifies that the search warrant failed to specify if the contraband was either cocaine or crack-cocaine. First, she has failed to produce the arrest warrant and its affidavit of probable cause in support of her allegation. Second, even assuming Applicant's contention here is correct, she has failed to produce any evidence or testimony to explain how search and seizure procedure in her case was illegal. See Huddleston v. U.S., 485 U.S. 681 (1988) (the defendant had made no showing that the evidence would have been suppressed).

Kolle v. State, 386 S.C. 578, 591, 690 S.E.2d 73, 80 (2010), is further instructive here. In granting the Kolle petitioner PCR relief, the Circuit Judge found his attorney was ineffective for failure to inspect discoverable State records and materials that, if presented, would have been outcome determinative for suppression under the exclusionary rule.² The Kolle petitioner

² The narcotics that established the factual predicate for the State's trafficking case were the inadmissible fruits of an unlawful search. The police responded to notice complaint concerning Kolle's apartment. No one answered the door. The officer observed what he reasoned to be "fresh" evidence of forced entry on the Apartment's exterior. Concerned about the welfare of possible occupants, the officer discovered crack cocaine during his protective sweep. A field test positively identified the narcotics. He obtained a search warrant and returned to the apartment within the hour. More narcotics were recovered. Kolle, at 582-84, 690 S.E.2d at 75-76.

presented critical evidence that negated the justification made to the General Session Judge at the pre-plea motion hearing that established the exigency for the warrantless entry into the apartment. Id. Similar to the present case, the Kolle petitioner pled guilty and challenged the voluntariness of the plea in PCR. Notably distinct, the Kolle petitioner actually presented tangible evidence to support his PCR case that included exhibits of the police call/dispatch logs among other things. Id. at 590-91, 690 S.E.2d 79, 80. Therefore, this allegation is readily denied and dismissed with prejudice.

D.

This Court finds Applicant's allegation (d) ineffective assistance of counsel -- failure to pursue an entrapment defense is without merit.

"The affirmative defense of entrapment is available where there is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for trickery, persuasion, or fraud of the officer." State v. Brown, 362 S.C. 258, 607 S.E.2d 93 (Ct.App.2004) (citation omitted). The defense of entrapment is not available to a defendant who is predisposed to commit a crime independent of governmental inducement and influence. Thus, the entrapment defense consists of two elements: (1) government inducement, and (2) lack of predisposition. Id. The fact that a government official merely affords opportunities or facilities for the commission of the offense does not constitute entrapment. State v. Johnson, 295 S.C. 215, 367 S.E.2d 700 (1988) (citing Sherman v. United States, 356 U.S. 369 (1958)).

This Court finds counsel's testimony compelling and dispositive on this matter. Counsel testified that Applicant was implicated after the contraband was found in her residence. He explained that third parties buy/bust narcotics transaction concerned a categorically distinct

matter to facts and evidence of Applicant's culpability. This Court agrees with counsel and finds the allegation to be facially lacking in merit. Again and in the alternative, Applicant has ignored her burden to present competent evidence in support of her allegation here. Therefore, this allegation is denied and dismissed with prejudice.

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, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

CONCLUSION

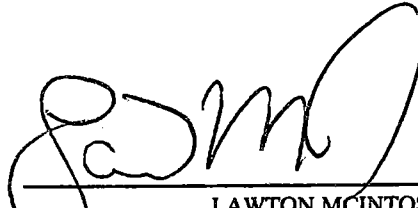
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 4 day of Sept, 2015.



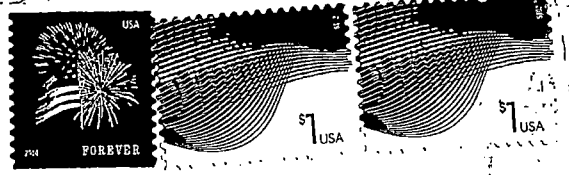
LAWTON MCINTOSH
Presiding Judge
Eleventh Judicial Circuit

Anderson, South Carolina

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