

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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AUG - 9 2013

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

The Honorable J. Mark Hayes, Circuit Court Judge

Case No. 2011-CP-42-5555

Travis Montre Smith, # 285273,

Plaintiff/Applicant

vs.

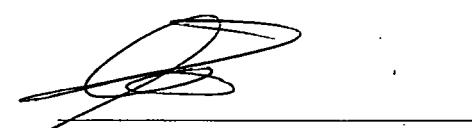
State of South Carolina,

Respondent

NOTICE OF APPEAL

Travis Montre Smith, South Carolina Department of Corrections Number 285273, hereby appeals the order of the Honorable J. Mark Hayes, dated July 24, 2013 in Case Number 2011-CP-42-5555.

August 5, 2013

  
Kenneth P. Shabel, Esq.  
Campbell & Shabel, LLC  
104 N. Daniel Morgan Ave, Suite 201  
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Telephone: 864-583-0001  
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Attorney for Applicant

Other Counsel of Record:

Suzanne H. White  
SC Attorney General's Office  
PO Box 11549  
Columbia, SC 29211

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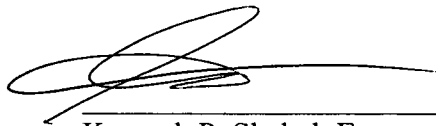
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**PROOF OF SERVICE**

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I certified that I have served the Notice of Appeal by depositing a copy of it in the United States Mail, postage prepaid, on the State of South Carolina, addressed to its attorney of Record, Suzanne H. White, Assistant Attorney General, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549

August 5, 2013



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Attorney for Applicant

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STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT

Travis Montre Smith #285273,

2011-CP-42-5555

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 December 14, 2011. The Respondent filed its Return on September 11, 2012. An evidentiary hearing into the matter was convened on April 5, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Kenneth P. Shabel, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. The transcript of a telephone deposition conducted with William McPherson, Esquire, ("Counsel") was submitted to the Court on behalf of the Respondent. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, the transcript, memoranda of law presented by both Applicant and Respondent, and as Court's Exhibits, three photos of the BEST bag submitted to the jury during trial.

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## PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the July 2007 term of General Sessions for trafficking in cocaine (08-GS-42-3530). The Applicant was represented by William H. McPherson, Esquire. On February 27, 2009, the Applicant proceeded to trial and was convicted as indicted. The Honorable J. Derham Cole sentenced the Applicant to confinement for a period of twenty-five (25) years.

A timely Notice of Appeal was filed on behalf of the Applicant and an appeal was perfected. The South Carolina Court of Appeals affirmed the conviction. State v. Smith, Op. No. 2011-UP-201 (Filed May 3, 2011). The Remittitur was issued on May 19, 2011.

## ALLEGATIONS

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

1. Ineffective assistance of counsel; in that,
  - a. Counsel failed to investigate the case,
  - b. Counsel failed to request for exculpatory evidence,
  - c. Counsel failed to represent or challenge initial arrest,
  - d. Counsel failed to prepare for pre-trial suppression hearing or trial,
  - e. Counsel failed to subpoena witnesses,
  - f. Counsel failed to present favorable evidence at pre-trial hearing or trial,
  - g. Counsel failed to object to indictments,
  - h. Counsel failed to move for dismissal of indictments,
  - i. Counsel failed to request a continuance,
  - j. Counsel failed to raise evidence of tampering,
  - k. Counsel failed to object to inadmissible evidence and its admissions,
  - l. Counsel failed to object to testimony of prosecution witness resulting in hearsay,
  - m. Counsel failed to move for impeachment of prosecution witness for misconduct,
  - n. Counsel failed to object to expert's qualifications,

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- o. Counsel failed to challenge chain of custody,
- p. Counsel failed to object to inflammatory closing argument of the prosecution,
- q. Counsel failed to challenge evidence during pre-trial stage,
- r. Counsel failed to challenge initial search and seizure in form of probable cause,
- s. Counsel failed to challenge forensic analysis's manner of process and procedure of handling such controlled substances,
- t. Counsel failed "to challenge evidence and facts that was not into evidence."

### 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).

This Court notes the Applicant informed this Court that he would be proceeding solely on the allegation of ineffective assistance of counsel because of Counsel's failure to object to the BEST bag being sent back to the jury, when it appeared to contain both the bag of cocaine and the bag of crack cocaine. All other allegations raised in the application were not pursued by the Applicant at the hearing; therefore, this Court finds that those allegations are voluntarily waived.

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#### 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. 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. 183, 188, 480 S.E.2d 733, 735 (1997) (*citing* Strickland).

Applicant testified that he was arrested for trafficking in cocaine and trafficking in crack cocaine on February 13, 2008. Applicant testified that he was also arrested for loitering for purposes of drug activity, but was found not guilty in magistrate's court on that charge. Applicant testified that although he was charged with both drugs, at trial, the State only proceeded on the charge of trafficking in cocaine. However, following the chemist's testimony, Counsel failed to object to the entry of the BEST bag into evidence, in particular since it appeared to contain both the cocaine and the crack cocaine.

Counsel testified that he did not object to the entry of the BEST bag into evidence.

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Counsel testified that he did not recall if both the eleven grams of cocaine and ninety-four grams of crack cocaine were contained in the BEST bag.

This Court finds that the Applicant failed to meet his burden of proof as to this claim. This Court remains shocked by Counsel's failure to stop the crack from going back to the jury and believes that Counsel was clearly deficient for failing to object to the jury viewing the BEST bag which contained both packages of drugs. However, there is sufficient evidence in the record to support the Applicant's conviction. The testimony presented to the jury included the very credible testimony of two officers and the chemist that tested the drugs, along with the evidence of the dash cam video. This Court finds that it would require speculation to determine if the jury was influenced negatively against the Applicant by Counsel's failure to stop the crack cocaine from going into the jury room.

This Court finds that the Applicant was not prejudiced by any alleged deficient representation because there was overwhelming evidence of the Applicant's guilt. In a direct appeal matter, the South Carolina Supreme Court found that although testimony regarding a much larger buy of cocaine was more prejudicial than probative, any error was harmless beyond a reasonable doubt based upon the overwhelming evidence of appellant's guilt. State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991). In a post-conviction relief matter, the Supreme Court reversed the finding of a PCR judge, finding that although the court correctly determined that trial counsel was deficient in failing to object to the solicitor's "Golden Rule" closing argument, the Applicant failed to prove that there was a reasonable probability that but for this error the result of his trial would have been different, in addition to the Court finding that there was overwhelming evidence of the Applicant's guilt. Brown v. State, 383 S.C. 506, 519, 680 S.E.2d 909, 916 (2009). "[N]o prejudice occurs, despite trial counsel's deficient performance,

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where there is otherwise overwhelming evidence of the defendant's guilt. Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010) (citing Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009)). Likewise, because of the overwhelming evidence of guilt, the Applicant has failed to demonstrate the requisite prejudice resulting from deficient representation.

*Summary*

Accordingly, this Court finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

**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.

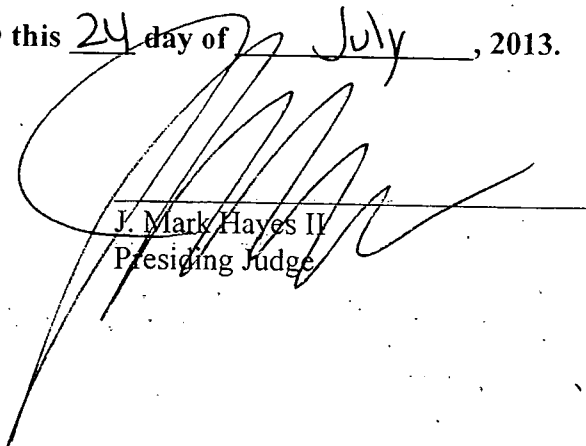
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 533 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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**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 24 day of July, 2013.



J. Mark Hayes II  
Presiding Judge

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M. HOPE BLACKLEY

Shawn M. Campbell  
Kenneth P. Shabel

# Campbell & Shabel

A T T O R N E Y S   A T   L A W

OF COUNSEL:  
Sean Giovannetti

Sender's Email: [jmoss@gc-lawfirm.com](mailto:jmoss@gc-lawfirm.com)

August 5, 2013

**VIA CERTIFIED MAIL**

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

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**S.C. Supreme Court**

**Re: Travis M. Smith, #285273 vs. State of South Carolina  
2011-CP-42-5555**

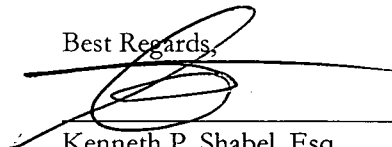
Dear Mr. Shearouse:

Enclosed for filing are an original and a copy of a notice of appeal in the above-referenced case. I have been appointed to serve as attorney for the PCR applicant, Travis Smith, in this action. Also enclosed are the following:

- 1) Proof of service of the notice of appeal on the respondent.
- 2) A copy of the order which is to be challenged on appeal.

Insofar as this is an appeal from a Post-Conviction Relief case, I am not enclosing a filing fee, as I believe such fees are waived in these cases.

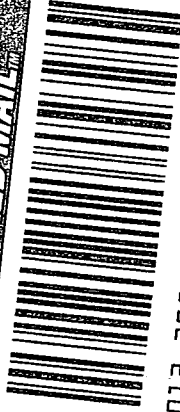
Best Regards,



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FAX: 864-583-1199  
Attorney for Appellant

cc: client  
Ms. Suzanne H. White, Assistant Attorney General

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