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January 15, 2018

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

Re: Ashley E. Moore v. State of South Carolina
Case No: 2016-CP-42-3555

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

Rodney Richey

RWR/
enclosures

cc: Valerie Garcia Giovanoli, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

HONORABLE GRACE GILCHRIST KNIE

2016-CP-42-3555

ASHLEY E. MOORE, SCDC# 345798

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

RECEIVED

JAN 18 2018

S.C. SUPREME COURT

NOTICE OF APPEAL

Ashley E. Moore appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Grace Gilchrist Knie, Circuit Judge on September 22, 2017 an Order issued on December 14, 2017 and filed on December 19, 2017. The Appellant received notice of the judgment on December 23, 2017.

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Attorney for Applicant

Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
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2016-CP-42-3555

ASHLEY E. MOORE, SCDC# 345798

APPELLANT,

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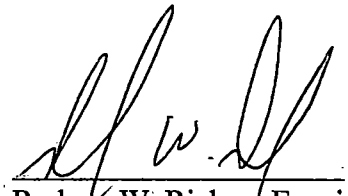
RESPONDENT.

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on January 15, 2018, addressed to their attorney of record, Valerie Garcia Giovanoli, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: January 15, 2018



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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Ashley E. Moore, #345798 Applicant, v. State of South Carolina, Respondent.	2016-CP-42-3555 **ORDER OF DISMISSAL WITH PREJUDICE**

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Ashley E. Moore (Applicant) on September 23, 2016. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on September 22, 2017 at the Spartanburg County Courthouse. Applicant was present and represented by Rodney Richey, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the start of the hearing, Respondent moved for summary judgement because the record conclusively refuted Applicant's sole allegation of ineffective assistance of counsel, and therefore no genuine issue of material fact was in dispute. This Court denied Respondent's motion. Thereafter, Applicant testified on his own behalf. Robert Hall ("Counsel") also testified. At the conclusion of Applicant's case, Respondent moved for a directed verdict. This Court denied Respondent's motion. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the trial transcript, the direct appeal records, the PCR application, and Respondent's return.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted by the October 2010 term of the Grand Jury for Spartanburg County for trafficking in cocaine base and possession of a firearm or knife during commission of or attempt to commit a violent crime (2010-GS-42-5975, count I & II). On April 25, 2011, Applicant proceeded to trial before the Honorable Roger L. Couch and a jury. Applicant was represented by Robert Hall, Esquire. Assistant Solicitor, Eddie Hunter, prosecuted the case. On April 26, 2011, Applicant was found guilty as indicted on both counts. Judge Couch sentenced Applicant to imprisonment of twenty-five (25) years for trafficking in cocaine base, and five (5) years for possession of a weapon during the commission of a violent crime, to be served concurrently.

Applicant filed a timely notice of appeal. The appeal was perfected by Dayne C. Phillips, Esquire, of the South Carolina Office of Division of Appellate Defense. The South Carolina Court of Appeals reversed Applicant's conviction on July 17, 2013, agreeing with the arguments made by Counsel that the extended detention of Applicant after a lawful traffic stop was unlawful. State v. Moore, 404 S.C. 634, 746 S.E.2d 352 (Ct. App. 2013). The State petitioned for rehearing *en banc*. This was denied by order on September 27, 2013. The State then petitioned the Supreme Court of South Carolina for writ of certiorari. On January 27, 2016, in a published opinion, the Supreme Court of South Carolina reversed the court of appeals and reinstated Applicant's convictions and sentence, finding that the Court of Appeals had exceeded its scope of review and that there was evidence in the record to support the trial court's finding that the stop was lawful. State v. Moore, 415 S.C. 245, 781 S.E.2d 897 (2016). The Remittitur was returned on February 12, 2016. Applicant petitioned the United States Supreme Court for

writ of certiorari, but was denied by order on June 13, 2016.

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

1. Ineffective Assistance of Counsel
   a. "4th Amendment violation – Counsel was ineffective for failing to object to the search and seizure."

TRIAL

On June 30, 2010, at approximately 1:10 a.m., Officer Dale Owens and Corporal Ken Hancock observed Appellant driving on Interstate 85 ("I-85") above the posted speed limit. (R. pp. 8-9.) In addition, Appellant failed to maintain his lane. (R. p. 9.) When Officer Owens first observed Appellant, Appellant was driving in the far right hand lane. (R. p. 14.) However, Appellant eventually moved to the center lane. (R. p. 14.) When Officer Owens turned his blue lights on to pull Appellant over for speeding and failing to maintain his lane, Appellant turned on his left turn signal. (R. pp. 14-15.) Appellant eventually turned on his right turn signal; however, according to Officer Owens, it took Appellant longer than the average time to pull over and come to a stop. (R. p. 15.) In Officer Owens' training and experience, it appeared to him that Appellant was preparing to flee. (R. pp. 15-16.)

After Appellant pulled over, Appellant failed to turn off his right hand turn signal, which, according to Officer Owens, was indicative of criminal behavior. (R. p. 17.) When Officer Owens approached Appellant's vehicle, Appellant was talking on the phone. (R. p. 19.) Officer Owens had to tell Appellant to hang up the phone. Officer Owens testified that, in his experience, most innocent people hang up the phone when they get pulled over. (R. pp. 19-21.) However, drug traffickers often have to answer to a higher person. (R. p. 19.) In some drug trafficking cases, when a drug trafficker gets pulled over, he or she will leave the phone on so

that the person he or she answers to can hear what is happening during the stop. Sometimes, the drug trafficker will leave the phone on so that in case he or she decides to flee, the person the drug trafficker answers to will know where the drug trafficker is located.

When Officer Owens approached Appellant's vehicle, Officer Owens smelled alcohol coming from inside the vehicle. (R. p. 21.) Officer Owens gave a signal to Corporal Hancock indicating that he smelled alcohol. In Officer Owens training and experience, people who traffic drugs will often drink alcohol in order to calm their nerves. (R. pp. 21-22.)

Officer Owens asked Appellant for Appellant's driver's license and registration. (R. p. 24.) Appellant informed Officer Owens that the car he was driving was a rental car. Appellant provided the rental agreement and his driver's license. Officer Owens noticed that Appellant's hand was shaking heavily. In Officer Owens' report, he noted that Appellant was overly nervous. Additionally, Appellant's breathing was accelerated, and the pulse in his neck appeared to be elevated and pounding.

Moreover, Appellant admitted he had been drinking. (R. p. 25.) At that point, Officer Owens asked Appellant to exit the vehicle. As Appellant exited his vehicle, he tried to pick up his cell phone, which was an indicator to Officer Owens that Appellant might try to flee. (R. p. 26.) When Appellant exited the vehicle, he started walking towards Officer Owens' patrol car; however, Appellant left the door to his rental car open. (R. pp. 25-26.) Appellant started smoking a cigarette, which indicated to Officer Owens that Appellant was trying to calm his nerves. (R. p. 27.)

Thereafter, Appellant consented to a pat down. (R. pp. 27-28.) Appellant raised his hands in the air even though the officers did not ask him to raise his hands. (R. p. 28.) Officer Owens felt like what he perceived to be a large sum of wadded money in Appellant's pocket. Corporal

Hancock took the wad of money out of Appellant's pocket. Appellant continued to keep his hands in the air in the "felony position." (R. p. 28.)

During the suppression hearing, Officer Owens testified that, in his estimation, Appellant had approximately $1,000 in his pocket. (R. pp. 28-29.) Because Appellant told the officers that he was unemployed, the amount of money in Appellant's pocket alarmed the officers of potential criminal activity. (R. p. 29.) Furthermore, Officer Owens continued to smell alcohol on Appellant even though he was no longer near Appellant's car. Even though the officers told Appellant not to place his hands in his pockets, Appellant placed his hands in his pockets. (R. pp. 30-31.)

Appellant told Officer Owens that he was coming from Lawrenceville, Georgia, which is a suburb of Atlanta, Georgia. (R. p. 32.) According to Officer Owens, Atlanta is a major drug source city. In Officer Owens' fourteen years of experience, approximately 95 percent of the drugs he has found on I-85 came from Atlanta.

Moreover, according to the rental agreement, Appellant was not the one who rented the vehicle Appellant was driving. (R. p. 24; R. pp. 31-33.) According to Officer Owens, a third party rental vehicle is one of the largest indicators of criminal activity. (R. p. 33.) Another thing that raised Officer Owens' suspicion was the fact Appellant told Officer Owens that he was on the way to visit his grandmother. (R. pp. 34-35.) Generally, most people do not visit their grandparents that late at night. (R. p. 35.)

Thereafter, Officer Owens administered three field sobriety tests to Appellant. (R. pp. 38-43.) Officer Owens concluded that Appellant was not impaired. (R. p. 43.) Appellant claimed he did not have any weapons, alcohol, or drugs in the vehicle. (R. p. 43.) After Officer Owens administered the field sobriety tests, he asked Appellant for consent to search Appellant's car;

however, Appellant refused to give his consent. (R. pp. 43-44.) In fact, Appellant told the officers that he did not want them to search his luggage, which was located in his trunk. (R. p. 44.)

Afterwards, Officer Owens gave Appellant a warning ticket.[1] However, Officer Owens advised Appellant that he was detaining Appellant based on his reasonable suspicion that Appellant was involved in criminal activity (other than the traffic violations and impaired driving). (R. pp. 44-45.) Officer Owens informed Appellant that they had to wait for a drug detection unit to come to the vehicle. Appellant was in an investigative detention; however, he was not handcuffed. (R. p. 46.)

Fifteen minutes later, approximately 31 minutes and 13 seconds into the stop, the drug detection unit arrived and the drug dog alerted to an odor. (R. pp. 45-47; R. p. 69.) The officers searched Appellant's vehicle and found an opened alcoholic beverage under the front passenger seat of the vehicle. (R. pp. 47-48.) Moreover, the officers found two containers of crack cocaine, a semiautomatic weapon, and approximately $4,000 in the trunk of Appellant's vehicle. (R. p. 48.)

After hearing all arguments, the trial judge denied Appellant's motion to suppress the contraband. (R. p. 89.)

SUMMARY OF TESTIMONY AT PCR

I. Applicant testified to the following:

Applicant testified that he believes Counsel could have objected more to the unlawful search and seizure in his case. Applicant also testified Counsel should have argued more strenuously at the motion to suppress.

[1] According to Officer Owens, most people calm down after he tells them they are only getting a warning for the traffic violation; however, Appellant remained nervous. (R. p. 38; R. p. 53.)

On cross examination, he admitted that he was pulled over at 1:00 AM and had been drinking. He also maintained he was on his way to visit his grandmother. However, Applicant could not articulate how Counsel could have better argued on his behalf or what additional arguments Counsel could have made.

II. Counsel testified to the following:

Counsel testified he has been practicing law for thirty years. Counsel was an assistant solicitor for seven years, a magistrate judge for fourteen years, and a public defender for nine years. He was appointed as an assistant public defender to represent Applicant. Counsel testified he argued extensively that the search and seizure of Applicant was unlawful in a pre-trial motion hearing. Counsel did this by attacking each of the factors relied upon by the officer who extended the original detention of Applicant in order to get a canine out to execute a sniff search. The Court of Appeals even agreed with Counsel's arguments and reversed Applicant's conviction. However, the Supreme Court found the Court of Appeals exceeded their scope of review and re-affirmed Applicant's conviction, finding there was evidence in the record to support the trial court's findings.

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 had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency. A Post-Conviction Relief application is not a venue for questioning each and every decision of trial counsel. Rather, the

Applicant must demonstrate by a preponderance of the evidence that trial counsel was deficient and that the deficiency prejudiced the outcome of his trial. Applicant has failed to do so.

I. Ineffective Assistance of Counsel

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 (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 (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.

It is abundantly clear not only from the testimony presented during the PCR hearing, but especially from the trial transcript and direct appeal records, that Counsel was anything but

ineffective. The pre-trial motion to suppress alone made up one third of the entire trial transcript and the direct appeal records are just as voluminous, if not more so, than the entire trial transcript. Applicant's case was exhaustively litigated through every court in this State based on the thorough arguments and issue presented by Counsel prior to trial.

Not only does the record conclusively refute Applicant's allegations, Applicant has failed to meet his burden of proof in this case. When asked why he thought Counsel could have argued his case better or how he could have done so, Applicant had no response. A vague, blanket allegation that Counsel "could have done better" is not sufficient to prove by a preponderance of the evidence that Counsel was ineffective in his representation nor is that the standard to which Counsel is held. Rather, Counsel's performance is based on a standard of reasonableness given the prevailing professional norms. Applicant has not presented one single argument that Counsel could have made in addition to the arguments actually made by Counsel. Applicant cannot provide one example of how Counsel could have more strenuously objected to the search and seizure. Applicant is simply displeased with the result of his trial and appeal. Unfortunately, the blame for that displeasure does not lie with Counsel, but more plainly with the facts of his case.

CONCLUSION

This Court finds that Applicant has failed to prove any deficiencies on the part of trial counsel and further, Applicant has failed to prove any prejudice from any alleged deficiencies in Counsel's representation of him. Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations 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 notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 14th day of December, 2017.

GRACE GILCHRIST KNIE
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

2017 DEC 19 AM 11:25
M. HOPE BLACKLEY

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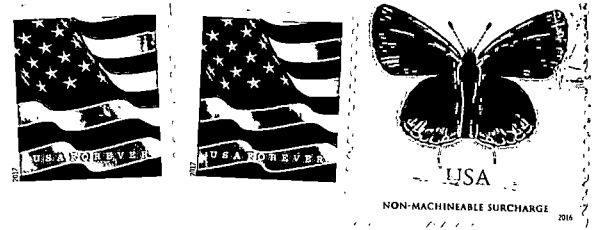

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