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November 2, 2016

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S.C. SUPREME COURT

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

RE: Ortavious R. Mitchell, #355516, Appellant/Petitioner v. State of
South Carolina, Respondent, Case No.: 2014-CP-46-01705.

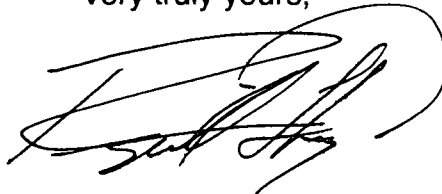
Dear Mr. Shearouse:

Enclosed for filing, please find a Notice of Appeal of the Post Conviction Relief Order in the above referenced case. Also enclosed, please find Proof of Service of the Notice of Appeal on the Respondent. A copy of the Order which is to be challenged in the Petition for Writ of Certiorari in this Post Conviction Relief matter is attached to Notice of Appeal.

This Notice of Appeal is being filed with the Supreme Court pursuant to Rule 243, SCACR and no filing fee is included pursuant to Rule 240(d), SCACR. If anything additional is needed or if you should have any questions, please do not hesitate to contact me. Thank you for your assistance with this matter.

With kind regards, I am

Very truly yours,



Reginald I. Lloyd

Enclosures

cc: Mr. Justin J. Hunter, Esq.,
Attorney for Respondent,

Hon. David Hamilton,
York County Clerk of Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

Alison R. Lee, Circuit Court Judge

Case No. 2014-CP-46-01705

Ortavious R. Mitchell, #355516Petitioner,

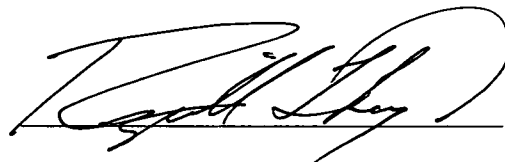
v.

State of South Carolina,Respondent.

NOTICE OF APPEAL

Ortavious R. Mitchell, Inmate #355516, appeals the Post Conviction Relief Order of the Honorable Alison R. Lee, dated September 29, 2016. Appellant received written notice of the entry of this Order on October 4, 2016.

November 2, 2016



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(803) 432-0004
Attorneys for Appellant

Other Counsel of Record:

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South Carolina Attorney General's Office
1000 Assembly Street, Room 519
PO Box 11549
Columbia, South Carolina 29211
Attorneys for Respondent

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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NOV 03 2016

S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

Alison R. Lee, Circuit Court Judge

Case No. 2014-CP-46-01705

Ortavious R. Mitchell, #355516Petitioner,

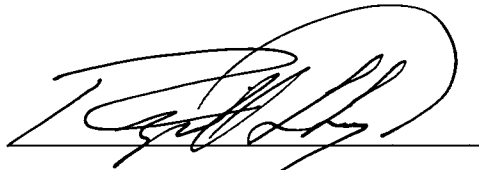
v.

State of South Carolina,Respondent.

PROOF OF SERVICE

I certify the I have served the Notice of Appeal on counsel for the State of South Carolina, Mr. Justin J. Hunter, Esq., by depositing a copy of it in the United States Mail, postage prepaid, on November 2, 2016, addressed to counsel at PO Box 11549, Columbia, South Carolina 29211.

November 2, 2016



Reginald I. Lloyd
The Lloyd Law Firm, LLC
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(803) 432-0004
Attorneys for Appellant

For Clerk of Court Office Use Only

This judgment was entered on **October 3, 2016**, and a copy mailed first class or placed in the appropriate attorney's box on **October 3, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

Reginald I. Lloyd 715 West Dekalb Street PO Box 1555
Camden, SC 29021

Justin James Hunter PO Box 11549 Columbia, SC 29211

Ortavious R. Mitchell #355516 Turbeville Cl, 1578
Clarence Coker Hwy Turbeville, SC 29162

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
)
Ortavious R. Mitchell, #355516,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Case No. 2014-CP-46-01785

ORDER

FILED-RECEIVED
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CLERK OF COURT
YORK COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief. Applicant Ortavious Mitchell (“Applicant”) filed the application on May 22, 2014. The State (“Respondent”) made its Return on September 24, 2014. A hearing was convened November 17, 2014 at the York County Courthouse. Applicant was present at the hearing and was represented by counsel, Reginald I. Lloyd, Esquire. Respondent was represented by Assistant Attorney General J. Rutledge Johnson. After reviewing all testimony and evidence presented at the hearing, along with a review of all records provided to the Court, this Court finds that there are no constitutional deprivations or other grounds on which to grant relief and denies and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the October 2011 term of the York County Grand Jury for Trafficking in Crack Cocaine greater than 100 grams (Indictment No. 2011-GS-46-03323), and Possession of Crack Cocaine (Indictment No. 2011-GS-46-3606). Reginald I. Lloyd, Esquire represented Applicant on the charges. On May 21, 2013, Applicant appeared before the Honorable John C. Hayes, III (“Trial Judge”) for a pre-trial motion to suppress the evidence. An evidentiary hearing was conducted during which exhibits were introduced and witnesses testified. At the conclusion of the hearing, the Court denied the motion to suppress. After jury selection, Applicant pled guilty to a lesser charge of one count of Trafficking Crack Cocaine, 20-100 grams, for a negotiated sentence between 10 to 15 years. The Possession of Crack Cocaine charge was dismissed.

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In the application for post-conviction relief, Applicant alleges that he is held in custody unlawfully on the basis of being denied due process and equal protection provided in the United States and South Carolina Constitutions, including the Fifth and Fourth Amendments to the United States Constitution. Applicant also argues that he was deprived of his right to a fair trial when the Trial Judge failed to suppress evidence that was seized in violation of Applicant's Fourth Amendment right, and when the Government proceeded with prosecution based upon an illegal profile which led to the search of the vehicle. Additionally, Applicant contends that the Government violated the Fourteenth Amendment to the United States Constitution through its pattern and practice of illegally impounding and conducting an inventory search on vehicles, which Applicant claims is apparent in this case.

However, at the post-conviction relief hearing, Respondent made a motion for Summary Judgement under Rule 56(b), SCRPC. Although Respondent agreed that post-conviction relief is the proper forum to address due process claims, Respondent argued that Applicant's claim is a direct appeal issue, and post-conviction relief is not a substitute for an appeal.

SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

At the evidentiary hearing, this Court had before it the transcript of the pre-trial hearing and Applicant's guilty plea, the records from the York County Clerk of Court regarding the subject conviction, and Applicant's records from the South Carolina Department of Corrections.

Applicant testified on his behalf at the hearing. On the night of the traffic stop, August 3, 2011, Applicant was traveling on Highway 5 with his girlfriend when he was stopped by law enforcement for traffic violations. Applicant testified that after he was stopped, a female officer came to the passenger side of the vehicle and asked for his license, registration, and proof of insurance. Applicant provided the officer with the information. Applicant further testified that a male officer came to the driver's side and asked him to step out of the vehicle. Applicant stepped out of the vehicle and was told to put his hands on the trunk. Applicant was arrested for speeding and driving left of the center line. After Applicant was arrested, a narcotics agent and four to five officers arrived at the scene. Applicant asked the officer why he was stopped, and Applicant testified that the narcotics officer accused him of being a drug dealer. Initially, Applicant told the officers that they could not search the vehicle; however, after the arrest, the officers conducted an inventory search of the vehicle.

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After Applicant was placed in handcuffs, Applicant explained he was standing outside while the officers searched the vehicle. The officers searched the trunk, the gas compartment, and the backseat of the vehicle. No drugs were found until the officers searched under the hood of the vehicle. After the search, Applicant's father as well as the owner of the vehicle arrived at the scene before the car was towed, and they asked law enforcement to tow the car to the owner's address. However, law enforcement needed to process the vehicle to verify the identity of the owner. Upon cross examination, Applicant further testified that he pled guilty in order to have his girlfriend released. During the plea, the Trial Judge advised Applicant that he was forfeiting his right to all defenses and waiving his right to challenge the validity of the search.

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

Applicant argues that his constitutional rights were violated when the court failed to suppress the drug evidence found in the vehicle he was driving at the time of the incident. In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. *Hyman v. State*, 397 S.C. 35, 42, 723 S.E.2d 375, 378 (2012) (citing *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985)). Courts have held that post-conviction relief is not a substitute for a direct appeal or asserting errors for the first time which could have been reviewed on direct appeal. *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1974); *see also Drayton v. Parker D. Evatt*, 312 S.C. 4, 430 S.E.2d 517 (1993). Accordingly, absent a claim of ineffective assistance of counsel, a post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. *Drayton*, 312 S.C. at 9, 430 S.E.2d at 520; *Ashley v. State*, 260 S.C. 436, 196 S.E.2d 501 (1973). Here, Applicant states that he is not arguing ineffective assistance of counsel; rather, only a constitutional violation of Applicant's rights when the Trial Judge denied Applicant's motion to suppress the evidence found in the vehicle. Applicant contends that post-conviction relief is the correct forum to address the trial court's ruling on Applicant's motion to suppress based on a new constitutional principal that occurred after Applicant's guilty plea.

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Courts have held that an applicant may assert constitutional violations for claims based on a new constitutional principle between the time of direct appeal and the petition for post-conviction relief. *Gibson v. State*, 329 S.C. 37, 41, 495 S.E.2d 426, 428 (1998). The “question of whether a decision announcing a new rule should be given prospective or retroactive effect should be addressed at the time of the decision.” *Talley v. State*, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007) (citing *Teague v. Lane*, 489 U.S. 288, 300, 109 S.Ct. 1060, 1070 (1994)). A “case announces a new rule when it breaks new ground or imposes a new obligation on the government or if the result was not dictated by precedent existing at the time ... defendant’s conviction became final.” *Lucero v. State*, 414 S.C. 238, 245, 777 S.E.2d 409, 413 (Ct. App. 2015) (quoting *Chaidez v. United States*, ___ U.S. ___, 133 S.Ct. 1103, 1107 (2013)). However, a case does not announce a new rule when it is “merely an application of the principle that governed a prior decision to a different set of facts.” *Id.* (internal quotation marks omitted). Thus, the retroactivity of decisions from the Supreme Court depends on whether they are novel. *Chaidez*, 133 S.Ct. at 1107.

In the present case, Applicant was arrested for traffic violations. Pursuant to department policies, the officers were required to conduct an inventory search of the vehicle before it was towed to a secure location. During the inventory search, the officers found drug evidence in the vehicle, and thereafter charged Applicant with Trafficking Crack Cocaine and Possession of Crack Cocaine. At the pre-trial hearing, the Trial Judge ruled that the drugs found in the vehicle are admissible at trial, and as a result, Applicant pled guilty to a lesser offense of Trafficking Crack Cocaine. Now, Applicant argues that *State v. Adams*, 409 S.C. 641, 763 S.E.2d 341 (2014), decided after his conviction, has clarified the ruling regarding admission of evidence after a traffic stop, and as a result, the Trial Judge improperly denied Applicant’s motion to suppress on the grounds that the intervening traffic stop, impoundment, and inventory search of the vehicle was permissible. Applicant further argues that this matter is similar to *Adams, supra*, in that the officers utilized a traffic stop to justify an unconstitutional search. Post-conviction relief is not the proper forum for the Applicant in this case, to address the Trial Judge’s ruling on his motion to suppress evidence.

First, the facts in *Adams, supra*, is not analogous to the facts in the present case. In this case, a drug enforcement unit, the Multi-jurisdictional Drug Enforcement Unit (“DEU”), was investigating Applicant before he was arrested. The DEU received information from a confidential informant that Applicant was seen with a large amount of crack cocaine, and from an anonymous

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tip that Applicant was involved in illegal activities. On the day of the traffic stop, the DEU received another anonymous tip that Applicant was traveling to Anderson, South Carolina to purchase large quantity of crack cocaine. The anonymous tip provided specific details regarding Applicant's whereabouts, the type of vehicle he was driving, who owned the vehicle, and the highway Applicant would take to return home to Leach Road in York County. Based on the tip, law enforcement moved towards Highway 5 to wait for Applicant. After law enforcement identified Applicant in the vehicle on Highway 5, they followed Applicant and eventually stopped him for speeding and driving left of center line.

Contrary to this case, the officers in *Adams* installed a GPS device on the defendant's vehicle to monitor his movements unbeknownst to him. The officers initiated a traffic stop and searched the defendant's vehicle. The *Adams* Court stated that the installation of the GPS device on defendant's vehicle without a warrant was a violation of the Fourth Amendment. *Id.* As a result, the *Adams* Court ruled that one of the exceptions to the Fourth Amendment Exclusionary Rule, the Intervening Act Doctrine, did not apply since the traffic stop was entirely predicated on information obtained from the GPS device, and it was coupled with the officers' desire to search the defendant's vehicle for drugs. *Id.*

In this case, Applicant claims that the Fourth Amendment violation occurred when the officers used subjective motives to conduct an inventory search on the vehicle. Unlike *Adams*, the officers in the present case did not install a GPS to obtain information about Applicant's location; instead, the information was received from an anonymous tip. There was no violation of the Fourth Amendment in gathering the information which lead to the traffic stop. The officers were able to corroborate the information received in the tip prior to stopping Applicant. Thereafter, Applicant was arrested for traffic violations and the inventory search resulted from the custodial arrest. The Trial Judge ruled that the traffic stop was legal, and as a result of the arrest, the officers had a right to conduct an inventory search of the vehicle. The trial court also found the scope of the search was reasonable.

Second, there is no authority to show that the decision in *Adams* is a new rule. *See Lucero*, 414 S.C. 238, 777 S.E.2d 409 (Ct. App. 2015). The decision in *Adams* is not new law since the court in *Adams* applied settled law to different set of facts that existed at the time of Applicant's conviction. The Supreme Court decision was not the announcement of a novel issue of law to be applied retroactively. Therefore, Applicant cannot benefit from the ruling in a post-conviction

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proceeding. Thus, any error in the trial court's ruling could have been raised on direct appeal. Post-conviction relief is not a substitute for asserting claims that could have been raised on direct appeal. *Drayton*, 312 S.C. at 9, 430 S.E.2d at 520.

CONCLUSION

Based on all the foregoing, this Court finds that 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 is denied and dismissed with prejudice.


This Court notes 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), SCRCR, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on an applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

ORDER

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED.



ALISON RENEE LEE
Presiding Judge

September 29, 2016
Columbia, South Carolina

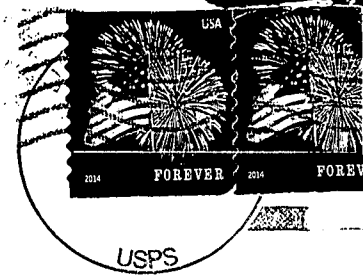
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