

# Law Office of Leah B. Moody, LLC

Leah B. Moody  
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Facsimile (803) 329-1344

December 6, 2018

The Honorable Daniel E. Shearouse  
The Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29221

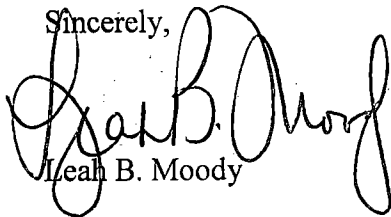
**RE: Devionne D. McClain, #243860, v. State of South Carolina**  
**Case No.: 2017-CP- 46-03610**

Dear Mr. Shearouse:

The York County Court of Common Pleas appointed my office to represent **Devionne D. McClain** in his Post-Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the Notice of Appeal and Proof of Service in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope. Also enclosed is a copy of the Order Dismissing Post-Conviction Relief Application.

Thank you for your assistance with this matter.

Sincerely,



Leah B. Moody

LBM/aw

Enclosures

Cc Devionne D. McClain  
Christian Saville, Esquire, SC Attorney General's Office  
The Honorable David Hamilton, Clerk of Court, York County  
Sharon Graham, SCCID

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DEC 14 2018  
S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED  
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S.C. SUPREME COURT

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

The Honorable William A. McKinnon, Presiding in York County

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Case No. 2017-CP-46-03610

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Devionne D. McClain, #243860, ..... Appellant,

v.

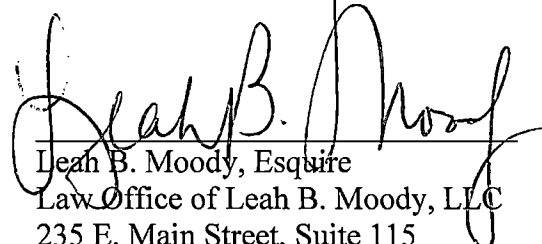
State of South Carolina, ..... Respondent.

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NOTICE OF APPEAL

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Devionne D. McClain appeals the order of the Honorable William A. McKinnon, dated November 26, 2018. Appellant received notice of entry of the final order via electronic mail on November 27, 2018.



Leah B. Moody, Esquire  
Law Office of Leah B. Moody, LLC  
235 E. Main Street, Suite 115  
Post Office Box 1015  
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Other Counsel of record:  
Christian Saville, SC Attorney General's Office  
Rembert C. Dennis Building  
Post Office Box 11549  
Columbia, South Carolina 29211-1549  
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IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

The Honorable William A. McKinnon, Presiding in York County

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Case No. 2017-CP-46-03610

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Devionne D. McClain, #243860, ..... Appellant,

v.

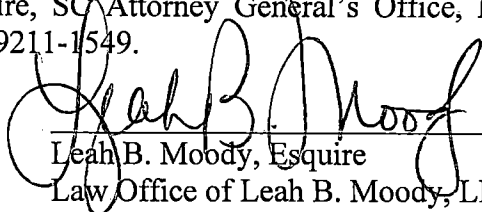
State of South Carolina, ..... Respondent.

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PROOF OF SERVICE

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I certify that I have served the Notice of Appeal on Christian Saville by depositing a copy of it in the United States Mail, postage prepaid, on 12/11, 2018, addressed to its attorney of record, Christian Saville, Esquire, SC Attorney General's Office, Post Office Box 11549, Columbia, South Carolina, 29211-1549.

  
Leah B. Moody, Esquire  
Law Office of Leah B. Moody, LLC  
235 E. Main Street, Suite 115  
Post Office Box 1015  
Rock Hill, South Carolina 29731

December 10, 2018

Cc Devionne D. McClain  
Christian Saville, Esquire, SC Attorney General's Office  
The Honorable David Hamilton, Clerk of Court, York County  
Sharon Graham, SCCID

## Paralegal of Leah B. Moody

---

**From:** Paralegal of Leah B. Moody <paralegal2@comporium.net>  
**Sent:** Monday, December 10, 2018 11:14 AM  
**To:** 'Paralegal of Leah B. Moody'  
**Subject:** FW: PCR/ 2017CP4603610/ Devionne McClain # 243860

On Nov 27, 2018, at 3:16 PM, Foster, Donna <[Donna.Foster@yorkcountygov.com](mailto:Donna.Foster@yorkcountygov.com)> wrote:

Hi Leah,

I hope you had a great Thanksgiving Holiday! Please find attached an Order of Dismissal signed by Judge McKinnon regarding Mr. Devionne McClain # 243860. Should you have any questions or concerns please do not hesitate to contact our office.

With Kindest Regards,  
Donna Foster

### **Donna Foster**

*Jury & Court Specialist*

*Common Pleas*

*Clerk of Court*

*York County Government*

---

[Donna.Foster@yorkcountygov.com](mailto:Donna.Foster@yorkcountygov.com)

Phone: 803-684-8507

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STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )  
Devionne McClain , #243860, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
IN THE SIXTEENTH JUDICIAL CIRCUIT

2017-CP-46-3610

ORDER OF DISMISSAL

2018 NOV 27 AM 11:11  
DAVID HAMILTON  
C.C.P. & GS  
YORK COUNTY, SC

FILED-RECEIVED

This matter is before the Court by way of post-conviction relief (“PCR”) application filed on December 5, 2017 by Devionne McClain (“Applicant”). Respondent submitted a return on May 17, 2018. An evidentiary hearing was held on July 31, 2018 in York County, South Carolina. Applicant was present at the hearing and was represented by Leah B. Moody, Esquire (“PCR Counsel”). Respondent was represented by Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office.

Before this Court were the records of the York County Clerk of Court regarding these convictions, Applicant's records from the South Carolina Department of Corrections, Applicant’s appellate records, the trial transcript, the State’s Return, and the application. The Court gave counsel an opportunity to submit further briefing on the issue of the standard for a traffic stop (reasonable suspicion or probable cause), but counsel did not submit further briefing.

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections (“SCDC”) pursuant to orders of commitment from the York County Clerk of Court. Applicant was indicted by the York County Grand Jury for failure to stop for a blue light (“FTSBL”) (2015-GS-46-3842) in December of 2015. Jessica Marie Russo, Esquire (“Trial Counsel”), represented Applicant.

Assistant Solicitor Hannah Grove prosecuted the case. Applicant proceeded to a jury trial before the Honorable Daniel D. Hall. Applicant was found guilty and was sentenced to five years imprisonment. Additionally, Judge Hall revoked Applicant's probation from earlier convictions for possession with intent to distribute ("PWID") crack cocaine and PWID crack cocaine in proximity to a school, sentencing him to serve nine years of imprisonment for each, with all three sentences to be served concurrently.

Applicant filed a notice of appeal. Appellate Defender John H. Strom, of the South Carolina Commission on Indigent Defense, perfected an appeal on Applicant's behalf. In his brief, Applicant argued the arresting officer did not have probable cause to initiate the traffic stop which led to the failure to stop for blue lights charge that is the subject of this PCR application. The South Carolina Court of Appeals affirmed Applicant's conviction on October 18, 2017, finding the issue not preserved for appeal because Applicant moved to dismiss the indictment based on a lack of reasonable suspicion at trial, rather than lack of probable cause. Accordingly, the Court of Appeals did not address the merits of the issue. State v. McClain, Op. No. 2017-UP-400 (Ct. App. 2017). The remittitur was issued on November 6, 2017.

#### **Statement of the Facts**

At approximately 3:00am on April 30, 2015, Officer McNeely observed a vehicle traveling at approximately forty-five miles per hour in a thirty-five mile per hour zone. Officer McNeely then confirmed this observation with his radar gun. Officer McNeely then activated his patrol car's blue lights. Officer McNeely then observed the vehicle accelerate and attempt to evade him. At the PCR hearing, Applicant admitted he accelerated and fled from the police. During the short pursuit, Applicant made several sharp turns at a high rate of speed before losing control and crashing into an RV parked in a residential driveway. Applicant proceeded to jump out of the

vehicle and led law enforcement on a foot-chase through the neighborhood before eventually being apprehended.

## II. ALLEGATIONS

In his original application, Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
2. "Constitutional, statutory, and rule violations."
3. "Unlawful restraint."
4. "See addendum after appointment of counsel."

At the PCR hearing, Applicant informed the court he was only proceeding on the ineffective assistance of trial counsel claim. Applicant argued that trial counsel was ineffective for arguing the incorrect standard for a lawful traffic stop: trial counsel argued reasonable articulable suspicion was the correct standard, rather than probable cause. Specifically, Applicant argued that had trial counsel argued lack of probable cause, his FTSBL charge would have been dismissed prior to conviction (or the conviction would have been overturned on appeal), he would not have been sentenced to 9 years on his probation revocation, and he would not presently be confined in SCDC.

### SUMMARY OF RELEVANT TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. Trial Counsel also testified.

#### *Applicant*

Applicant took the stand and admitted to fleeing from law enforcement once Officer McNeely initiated the traffic stop. In fact, Applicant recounted he fled from the police, he accelerated, and then he ran because he did not want to go to trial.

Applicant testified he told Trial Counsel that law enforcement did not have probable cause to pull him over, and alleged that as a result of her not saying "probable cause," he was sentenced to five years. However, Applicant also testified he received a plea offer for ninety days but Trial Counsel did not speak about his case at all. Applicant asserted law enforcement lacked probable cause to initiate the traffic stop because, according to Applicant, a human eye cannot detect speeding, and also alleged Officer McNeely did not have his radar turned on.<sup>1</sup>

#### *Trial Counsel*

Trial Counsel testified she met with Applicant numerous times. Trial Counsel recalled she explained to Applicant that lack of probable cause to initiate a traffic stop was not a recognized defense to failure to stop for a blue light regardless of whether the standard is probable cause or reasonable suspicion. Trial Counsel summarized, "We would have had to make new law" for such a defense. Nevertheless, as Trial Counsel explained, Applicant insisted that law enforcement lacked probable cause. Trial Counsel testified it was and still is her belief that reasonable suspicion was the proper standard of challenging the traffic stop. Regardless, Trial Counsel testified she felt a better defense was to suggest Officer McNeely was too far behind Applicant when he activated the blue lights for Applicant to see them. Trial Counsel recalled raising this issue at trial as well. Plea offers were presented to Applicant, and Trial Counsel testified she wished he would have taken the plea deal as she advised.

#### *Arguments from Counsel*

Following testimony, this Court heard arguments from both PCR Counsel and Respondent. PCR Counsel argued Trial Counsel incorrectly applied the standard of reasonable suspicion when

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<sup>1</sup> The assertion Officer McNeely did not have his radar turned on is incorrect. As explained at trial, Officer McNeely's radar was turned on to measure and display the speed of Applicant's vehicle. The radar is merely a separate unit from the video recording device in the patrol car and therefore the radar's speed measurement is not reflected in the video footage from the patrol car. Tr. p. 44, l. 25; p. 62, l. 13.

moving to dismiss Applicant's charge, and this deprived him of having his appeal heard on the merits. Respondent argued the lack of reasonable suspicion or probable cause is not a defense to failure to stop for a blue light regardless of the correct standard for a lawful traffic stop. Respondent further argued the Applicant cannot prove prejudice from the lack of issue preservation because the facts of this case provided the law enforcement officer probable cause to initiate the traffic stop, as Officer McNeely visually perceived Applicant speeding approximately ten miles per hour above the speed limit and confirmed this visual perception with his radar unit.

### III. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, (1984); Butler, 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 counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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.

#### IV. DISCUSSION

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 (1985).

First, this Court finds Trial Counsel's testimony to be credible and persuasive.

##### 1. Applicant has Failed to Establish Prejudice

Applicant alleges Trial Counsel was ineffective for arguing law enforcement lacked reasonable suspicion to initiate a traffic stop of Applicant when Trial Counsel should have argued law enforcement lacked probable cause. This Court finds this allegation to be meritless as Applicant has failed to satisfy his burden of proving prejudice.

[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even address both components of the inquiry if the defendant makes an insufficient showing on one ... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Strickland, 466 U.S. at 697.

First, after hearing testimony from Trial Counsel, arguments from both parties, and allowing opportunity for briefing in the event relevant case law is found, this Court observes that both probable cause and reasonable suspicion for the stop existed because Officer McNeely

observed Applicant travelling above the posted speed limit and confirmed his visual speed estimation with his radar gun.

As an alternative ground, lack of probable cause or reasonable suspicion to initiate a traffic stop is not a legal defense to the charge of failure to stop for a blue light. As Trial Counsel correctly testified, the defense would have been required to make new law for such a defense to be successful even if the trial court somehow found Officer McNeely lacked probable cause to initiate the stop. The fruits of an unlawful stop would be suppressed, but the lack of basis for the traffic stop is not a defense to failure to stop.

There is no reasonable probability the outcome of the proceedings would have been different had trial counsel argued to dismiss the FTSBL based on a lack of probable cause, because probable cause did exist for the stop, and even if it did not, the absence of a basis for the stop is not a defense to this charge. Accordingly, this application is denied and dismissed with prejudice.

**2. Applicant waived the remaining grounds for relief.**

As noted above, Applicant stated at the hearing that he was only proceeding on his ineffective assistance of trial counsel claim. Therefore, the remaining grounds raised in his application were explicitly waived.

**V. CONCLUSION**

Based on all the foregoing, this Court finds and concludes 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 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

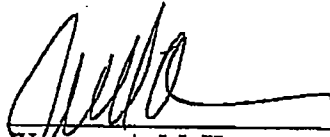
appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction 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 is denied and dismissed with prejudice in regard to all allegations; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 26 day of November, 2018.

November 26, 2018  
York, SC, South Carolina

 # 2761  
WILLIAM A. MCKINNON  
Presiding Judge  
Sixteenth Judicial Circuit

# Law Office of Leah B. Moody, LLC

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Christian Saville, Esquire  
South Carolina Attorney General's Office  
Post Office Box 11549  
Columbia, South Carolina 29211

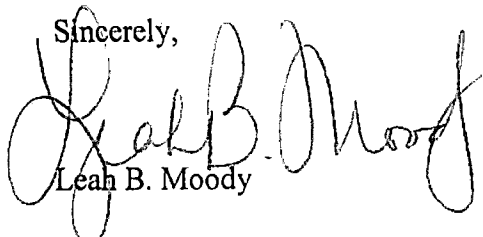
RE: **Devionne D. McClain, #243860, v. State of South Carolina**  
**Case No.: 2017-CP- 46-03610**

Dear Mr. Saville:

The York County Court of Common Pleas appointed my office to represent **Devionne D. McClain** in his Post-Conviction Relief action. Please find enclosed a copy of the Notice of Appeal and Proof of Service in this matter.

If you have any questions or concerns, please feel free to contact my office. Thank you for your attention in this matter.

Sincerely,

A handwritten signature in black ink that reads "Leah B. Moody". The signature is written in a cursive style with a large, stylized initial "L".

LBM/aw

Enclosures

Cc Devionne D. McClain  
The Honorable Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court  
The Honorable David Hamilton, Clerk of Court, York County  
Sharon Graham, SCCID

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DEC 14 2018  
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York County Clerk of Court  
Post Office Box 649  
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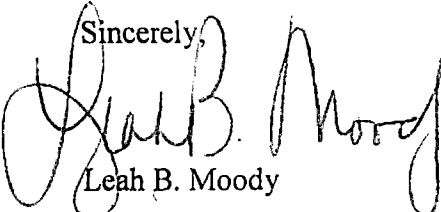
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Sincerely,



Leah B. Moody

LBM/aw

Enclosures

cc Devionne D. McClain  
Christian Saville, Esquire, SC Attorney General's Office  
The Honorable Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court  
Sharon Graham, SCCID

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December 6, 2018

Mrs. Sharon Graham  
SC Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11433  
Columbia, South Carolina 29211-1433

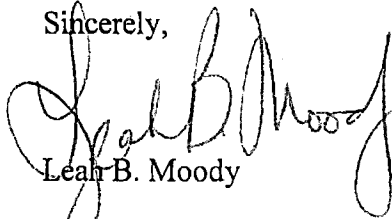
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**Case No.: 2017-CP-46-03610**

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Sincerely,



Leah B. Moody

LBM/aw

Enclosures

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ROCK HILL, SC 29730



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