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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Edgar W. Dickson, Post-Conviction Relief Court Judge

Case No. 2019-CP-10-3150

Hamzeh Hamdi Saadeh.....Respondent,
v.
State of South Carolina, Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Edgar W. Dickson’s order granting post-conviction relief filed April 17, 2020. The State filed a timely motion to reconsider, alter, or amend pursuant to Rule 59(e), SCRCP, which was denied by Judge Dickson by written order filed and received on July 24, 2020. Copies of the order granting post-conviction relief and the order denying the State’s motion to reconsider, alter, or amend are attached hereto.

July 28, 2020

Respectfully submitted,

ALAN WILSON
Attorney General

BENJAMIN LIMBAUGH
Assistant Attorney General
S.C. Bar No. 103334

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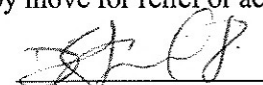
By: s/ Benjamin Limbaugh
Attorneys for Petitioner

Other counsel of record:
Dana S. Fields, Esquire
The Law Office of Dana Fields, LLC
PO Box, 21221
Charleston, SC 29413
Attorney for Respondent

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Hamzeh Hamdi SAADEH)
 Plaintiff,)
 vs.)
 State of South Carolina)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CASE NO.: 2019-CP-10-3150

**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

Plaintiff's Attorney: Dana S. Fields, Bar No. 0076711 Address: 652 Rutledge Ave., Ste. A Chas. Sc 29403 Phone: 8437180741 Fax 8554306569 E-mail: danafieldslaw@gmail.com Other: _____	Defendant's Attorney: Benjamin H. Limbaugh, Bar No. _____ Address: PO Box 11549 Columbia SC 29211 Phone: 8037343737 Fax _____ E-mail: blimbaugh@scag.gov Other: _____
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant	07/24/2020 Date submitted
SECTION III: Motion Fee	
<input type="checkbox"/> PAID - AMOUNT: \$ _____ <input type="checkbox"/> EXEMPT: (check reason)	
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in op Name of Court Reporter: _____ <input checked="" type="checkbox"/> Other: Judge's Order on Motion to Rec	
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE COE Date: _____
CLERK'S VERIFICATIO	
Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____	

*General Session
 case #'s*
 67492HA
 4102PO160776
 69584HA

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Hamzeh Hamdi Saadeh,)
Applicant,)
-versus-)
State of South Carolina,)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
NINTH CIRCUIT
CASE NO.: 2019-CP-10-3150

ORDER DENYING MOTION TO RECONSIDER

This matter came before the Court on January 23, 2020, as a result of Applicant's request for post-conviction relief. Attorney Dana S. Fields was present on behalf of the Applicant and Benjamin Limbaugh was present on behalf of the State. This Court granted the Applicant's post conviction relief at the hearing and a formal order was issued on April 17, 2020. Subsequently, the State filed a motion to reconsider the Court's April 17, 2020, order.

After carefully reviewing the motion and supporting memorandum, this Court respectfully **DENIES** the State's Motion to Reconsider.

IT IS SO ORDERED!

July 20, 2020



Edgar W. Dickson
Circuit Court Judge
9th Judicial Circuit

BY _____
JULIE J. ARMSTRONG
CLERK OF COURT
2020 JUL 24 PM 4:01

FILED

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Hamzeh Hamdi Saadeh,)
Applicant,)
-versus-)
State of South Carolina,)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
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Circuit Court Judge
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FILED
2020 JUL 24 PM 4:01
JULIE J. ARMSTRONGS
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH CIRCUIT
CASE NO.: 2019-CP-10-3150

Hamzeh Hamdi SAADEH,)
Applicant,)

AMENDED ORDER GRANTING
APPLICATION FOR POST CONVICTION
RELIEF

-versus-)

State of South Carolina,)
Respondent.)

FILED
2020 JUL 24 PM 4:01
JULIE J. ARMSTRONG
CLERK OF COURT

DATE OF HEARING: January 23, 2020
PRESIDING JUDGE: Honorable Edgar W. Dickson
APPLICANT’S ATTORNEY: Dana S. Fields
RESPONDENT’S ATTORNEY: Benjamin Limbaugh
COURT REPORTER: Liana Teller

This matter came before me in Charleston County on January 23, 2020 upon Applicant’s request for post-conviction relief (“PCR”). The Applicant, Hamzeh Hamdi Saadeh, made several arguments in support of his claim of evidence of material facts not previously presented. Those arguments and the Court’s findings on each are discussed below.

PROCEDURAL HISTORY

Applicant is currently located in Charleston County, South Carolina. He is not in the custody of the State nor immigration. Applicant had two previous convictions for Simple Possession of Marijuana and one conviction for Possession of Drug Paraphernalia as a plea agreement to an initial charge of Simple Possession of Marijuana.

On May 6, 2017, Applicant was arrested and charged with Simple Possession of Marijuana in violation of S.C. Code Ann. § 44-53-370(d)(4) on ticket number 67492HA. August 8, 2017, Applicant was represented by North Charleston Public Defender, Bob Haley. Applicant pled guilty to a reduced charge of Possession of Drug Paraphernalia as an alternative to the initial charge of Simple Possession of Marijuana. Applicant was sentenced to a fine.

On October 5, 2017, Applicant was given a courtesy summons for Simple Possession of Marijuana in violation of S.C. Code Ann. § 44-53-370(d)(4) on ticket number 4102P0160776. October 23, 2017, Applicant received deferred prosecution until January 23, 2018 on this charge. He was not represented by any Counsel. The Applicant did not successfully complete the terms of the deferral of the prosecution and this case was referred to the court for a court date of February 21, 2018 at 1pm. The Applicant received a letter of the court date and appeared in court wherein he pled guilty and was sentenced to a fine. He was not represented by any Counsel.

On February 07, 2018, Applicant was arrested and charged with Simple Possession of Marijuana in violation of S.C. Code Ann. § 44-53-370(d)(4) on ticket number 69584HA. On February 21, 2018 at 8.30am, the Applicant did not appear in court and was found guilty in his absence. Applicant was sentenced to a fine. He was not represented by any Counsel.

On June 5, 2019, Applicant filed an initial application for post-conviction relief in the court of disposition, the City of North Charleston Municipal Court. June 7, 2019 the Chief Municipal Judge advised there would be no further action taken on the tickets, advised he would not hold a PCR hearing for the charges, and advised to file for post-conviction relief with the circuit court. June 12, 2019, Applicant filed the application for post-conviction relief with the circuit court within one year of finding out of the evidence.

Applicant claims that his convictions and sentences were in violation of the Constitution of the United States and the laws of South Carolina in that there exists evidence of material facts, not previously presented and heard, that requires vacation of the convictions and sentences in the interest of justice for the following reasons:

1. At no time did the State provide evidence to the court that the alleged marijuana contained THC greater than .3% dry weight basis.

2. At no time was Applicant informed that an element the State needed to prove was that the alleged marijuana had to contain THC greater than .3% dry weight basis.
3. At no time was the State able to analyze the alleged marijuana for a percentage of THC dry weight basis.
4. Applicant was not given Faretta Warnings prior to pleading.

At the hearing of this matter, Applicant proceeded on all four grounds in the application.

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 the Post-Conviction Relief hearing. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2003).

A. Ineffective Assistance of Counsel

The Applicant did not allege ineffective assistance of counsel and none were found.

B. New Evidence

December 14, 2018, SLED made an announcement that it was ending its marijuana testing program of microscopic analysis and Duquenois-Levine chemical spot test. SLED advised that it had researched the issue extensively and found that its testing procedures could not differentiate between industrial hemp and marijuana. “Be advised that SLED has researched this issue extensively and has determined that due to the creation of the industrial hemp program, the marijuana testing procedures covered in this program (microscopic analysis and Duquenois-Levine Chemical Spot Test cannot differentiate between industrial hemp and marijuana.” A new testing program will be a quantitative analysis – THC Quantitation (DC-THCQ). Under S.C. Ann. § 44-53-120(5), it is the duty of SLED to promulgate regulations to provide uniform procedures for the seizure, inventory, reporting, auditing, handling, testing, storage, preservation for evidentiary use, and destruction or other lawful disposition

of controlled substances. Therefore SLED, itself, was unaware of the issue with its testing until December 14, 2018. All of applicant's convictions were prior to this date.

On February 7, 2014, the United States President signed into law the Federal Farm Bill. This law, under 7 U.S.C § 5940 (b)(2) defined as Industrial hemp.--The term "industrial hemp" means the plant Cannabis sativa L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

On June 2, 2014, South Carolina passed its own SC Industrial Hemp Cultivation bill. S.C. Code Ann. § 46-55-30 specifically excludes industrial hemp is from the definition of marijuana in S.C. Code Ann. § 44-53-110. Further, S.C. Code Ann. § 46-55-10 reflects that:

For the purposes of this chapter: (2) 'Industrial hemp' means all parts and varieties of the plant cannabis sativa, cultivated or possessed by a licensed grower, whether growing or not, that contain of no more tetrahydrocannabinol concentration than adopted by federal law in the Controlled Substances Act, 21 U.S.C. 801, et seq. (emphasis added).

The Industrial Hemp Cultivation bill was amended on May 10, 2017. There was a change of numbering of S.C. Code Ann. § 46-55-30 to S.C. Code Ann. §46-55-50, however it still excluded industrial hemp from the definition of marijuana in S.C. Code Ann. § 44-53-110. S.C. Code Ann § 46-55-10(2) was amended to not cross-reference federal law, but to include the State's own determination of industrial hemp concentration. "Industrial hemp' means the plant Cannabis sativa L. and any part of the plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dried weight basis."

Under South Carolina Rules of Procedure, Rule 6(a), the analysis testing performed in each case, at the time, would have been accepted as proper (provided the remaining portion of the Rule is complied with) at the time of the conviction, even though later it was announced that in fact the testing was not proper under the changes to the state's law.

All three of Applicant's convictions were between May 2, 2014 and December 14, 2018. Under *State v. Spann*, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999), to prevail on a request for Post-Conviction Relief, the Defendant must show the after-discovered evidence: "(1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to trial; (4) is material; and (5) is not merely cumulative or impeaching."

1. Change the Result

In all three of Applicant's convictions, the results would probably change because the testing at the time was improper. In all three of Applicant's convictions, there was a small amount of green plant-like material (GPM) found and it is unlikely it could have contained the percentage of THC needed for the State to meet its burden under the statute. The law at the time that should have been applied was the State's burden to prove the GPM contained THC greater than .3% dry weight basis. Due to the testing at the time not being able to differentiate between industrial hemp and marijuana, there is no way the State could have met its burden in any of the three convictions. The record also reflected that the State did not provide any analysis testing to the court, and that there was not enough evidence to find the Applicant guilty in cases 41102P0160776 and 69584HA, even without the changes in the law due to the inception of the industrial hemp program. There was no marijuana testing analysis in the court's record, even to show whether THC was present in the GPM (4102P0160776 and 69584HA). Therefore, the introduction of this evidence would probably change the result if a new trial was granted.

2. Discovered Since Trial

The issue with the previous SLED marijuana testing program was researched extensively by SLED. This announcement by SLED was not made until after the trial. Therefore, the evidence was discovered since the convictions.

3. Could Not in the Exercise of Due Diligence have been Discovered Prior to any of the Trials

From June 2, 2014 until December 14, 2018 it does not appear that anyone understood the impact of the change of law on the SLED approved marijuana testing program, not even SLED. The testing of the GPM was in accordance with SLED policies, procedures and S.C.C.R.P. Rule 6. There was nothing to give notice of any inability of the approved testing to differentiate between industrial hemp and marijuana. Therefore, the evidence of improper testing analysis could not have been discovered by the exercise of due diligence prior to any of the trials.

4. Materiality

Due to the inception of the South Carolina Industrial Hemp program, it is necessary for the State to prove that GPM is not industrial hemp but is in fact marijuana to comport with S.C. Ann. § 44-53-370(d)(4). The State must first prove that the GPM contains a level of more than .3% THC dry weight basis in order to meet its burden. The fact that the testing program could not differentiate this level is material to the Applicant's convictions.

5. Not Merely Cumulative or Impeaching Evidence

Proper analysis of the GPM would determine whether it was lawful or unlawful by its percentage of THC dry weight basis. There is nothing else able to determine this level without proper testing of the GPM. Therefore, this is not cumulative or impeaching evidence but goes directly to an element of the offense charged.



The Applicant has met the test put forward by *State v. Spann*, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999), to prevail on his application for post-conviction relief.

C. FARETTA WARNINGS AND FUNDAMENTAL FAIRNESS

This Court finds that Faretta Warnings were not contained as a part of the court's records (4102P0160776). A plea colloquy was not contained in the court's records. (67492HA and 4102P0160776). A Defendant in a criminal case has the right to the assistance of counsel. U.S. Const. Amend 6. "Defendant may waive his right to counsel, but he must do so knowingly and intelligently." *Osbey v. State*, 425 S.C. 615, 618-619, 825 S.E.2d 48, 50 (2019).

"For a knowing and intelligent waiver of defendant's right to counsel to occur, defendant must be: (1) advised of his right to counsel, and (2) adequately warned of the dangers of self-representation." *Id.* at 619.

The record reflected that the Municipal Court generally does not provide Faretta Warnings to Defendants proceeding without Counsel in every *pro se* case. Thus, this Court finds that the Defendant was not sufficiently aware of his right to counsel and the dangers of self-representation.

CONCLUSION

Based on the foregoing reasons, this Court finds and concludes that the Applicant has established sufficient grounds required to grant his application for Post-Conviction Relief. The after-discovered evidence of the improper marijuana testing regarding all of Applicant's convictions at issue in this application (tickets numbers 67492HA; 41102P0160776; and 69584HA): 1) would change the result if new trials were granted; 2) has been discovered since the trials; 3) could not in the exercise of due diligence have been discovered prior to any of the trials; 4) is material; and 5) is not merely cumulative or impeaching. Therefore, this application must be granted, and the Applicant's cases reversed and remanded to be heard in accordance with the findings in this order.



State of South Carolina
The Circuit Court of the First Judicial Circuit

Edgar Warren Dickson
Judge

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190 Gibson Street, Suite 207
Orangeburg, SC 29116-1949
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edicksonj@sccourts.org

MEMORANDUM

To: Dana S. Fields
From: Judge Dickson
Subject: Enclosed Order signed by Judge Dickson
Date: 7/20/2020

Please have the enclosed Order that has been signed by Judge Dickson filed in the appropriate Clerk of Court's Office and serve copy(ies) on opposing counsel or pro se defendant(s).