STATE OF NORTH CAROLINA COUNTY OF CARTERET	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA	)	
	)	
V.	)	FILE NO.: 14-CRS-50372, 50376-77
	)	
DUSTIN JAMAL WARREN	)	MOTION FOR APPROPRIATE RELIEF
	)	

****

NOW COMES THE MOVANT DUSTIN JAMAL WARREN, and moves this Court to grant him appropriate relief from his conviction and sentence, pursuant to N.C.G.S. § 14-18.

The following documents are attached here as exhibits:

- Exhibit A: Affidavit of Petitioner Warren
- Exhibit B: Affidavit of Cassie Flowers
- Exhibit C: Affidavit of Mark Thomas
- Exhibit D: Affidavit of Kathleen Roberts
- Exhibit E: Excepts of Motion Hearing Transcript
- Exhibit F: Excepts of Trial Transcript

INTRODUCTION

1. Movant was arrested January 31, 2014 and charged with possession and distribution of methamphetamine precursor, in violation of N.C.G.S. § 90-95 (d1)(2), manufacturing methamphetamine, in violation of N.C.G.S. § 90-95(b)(1a), and conspiracy to manufacture methamphetamine, in violation of N.C.G.S. § 14-2.4(a). Movant pleaded not guilty. On February 24, 2014, Movant was indicted on charges of possession of precursor chemicals with the intent to manufacture methamphetamine, manufacturing methamphetamine, conspiracy to manufacture methamphetamine. The indictment also charged Movant as a habitual felon.

2. Movant proceeded to trial September 8, 2014 and he was convicted by a jury on all counts. At sentencing, the trial court consolidated 14 CRS 50372, possession and distribution of a methamphetamine precursor, with 14 CRS 50376, manufacture of methamphetamine, then sentenced the Movant for the Class C felony to a presumptive term of 127 months minimum to 165 months' maximum in the Department of Correction. In 14 CRS 50377, conspiracy, the Movant was sentenced to the presumptive range of 127 months minimum to 165 months' maximum to be served at the expiration of the previous sentence.

3. Movant's direct appeal was denied November 17, 2015 by the Court of Appeals. In its Order, the Court of Appeals ruled,

> From the cold record, we are unable to determine whether defense counsel's failure to make an offer of proof regarding Elps' testimony or defense counsel's failure to call Flowers and Thomas to testify regarding Kennon's untruthfulness constituted trial strategy or conduct that may rise to ineffective assistance of counsel. We dismiss these arguments without prejudice to Movant's right to pursue these claims in a subsequent MAR proceeding.

4. A timely petition for discretionary review in the North Carolina Supreme Court was denied January 28, 2016.

5. This motion follows.

STATEMENT OF FACTS

6. Shortly before 12 p.m. on 29 January 2014, Movant drove his gold Buick to the Seashore Motel in Atlantic Beach, North Carolina. Accompanying Movant was Heather Kennon ("Kennon"), an acquaintance Movant knew through his brother. Movant pulled up to the motel office, Kennon alighted the car, and went into the office to register for a room. Scott Way ("Way"), the manager of the Seashore Motel, watched as Kennon alighted from the front passenger seat. Kennon filled out a registration card and paid for a room for the night. On the registration card,

Kennon listed her name and the license plate of Movant's gold Buick. Way accepted the registration and payment and gave her a key to room 9. After checking in, Way testified Kennon and Movant stayed in the car for a "little while," and then proceeded into the room.

7. Approximately two hours after checking in, Kennon returned to the motel office and asked for an extra space heater. Snow was on the ground that day and it was very cold outside. Carla Thomas ("Carla"), an assistant manager at the Seashore Motel, explained to Kennon the motel is old and another space heater would likely blow the circuit breaker. Way brought extra blankets to room 9 and offered them in lieu of a second space heater. Way testified a man opened the door roughly two or three inches and "announced that they were in, you know, in – not decent," and did not want the extra blankets. Way testified he heard a male voice, and did not observe any males enter or exit room 9 except for Movant.

8. The next morning, Way and Carla began the process of checking out guests and cleaning rooms previously rented. Around 9:00 or 9:30 a.m., Carla knocked on the door of room 9 to ascertain whether Kennon and Movant needed anything or would like to register for another night. After no answer, Carla announced her identity and that she was about to enter the room. Carla unlocked the door and entered the room. She noticed a black bag which contained, among other items, a mask and a glue gun. Carla also noticed a pickle jar turned upside-down with a dried white reside at the bottom. After viewing the contents of room 9, Carla informed Way of her findings. Together, they determined the police needed to be summoned. Way called 911.

9. Kennan testified that on 28 January 2014, she met Movant at the Doubletree Hotel in Atlantic Beach, North Carolina. Kennan and Movant shared a room at the hotel, where they injected and inhaled methamphetamine, respectively. Movant had already obtained the materials

to make methamphetamine, with the exception of cold packs. Kennon and Movant stopped by Cassie Flowers' ("Flowers") residence to obtain cold packs.

10. On 29 January 2014, Kennon accompanied Movant to the Seashore Motel. After registering and paying for the room, Movant parked the gold Buick in front of room 9. Kennon testified Movant brought a black suitcase into the room, which contained the precursors to, and various supplies necessary to manufacture, methamphetamine. Movant began removing the precursors and supplies from the suitcase and arranging them in preparation to make methamphetamine.

11. While Movant prepared the supplies, Kennan injected herself with methamphetamine she had received from Movant the previous day. Kennan attempted to assist Movant in making methamphetamine. Movant became dissatisfied with Kennan's assistance and manufactured the methamphetamine alone, as Kennon looked on. Kennon testified the manufacturing process yielded approximately 4.5 grams of methamphetamine.

12. After Movant finished, he left the supplies in room 9 at the Seashore Motel and they traveled to Anique Pittman's ("Pittman") residence. Pittman was Movant's girlfriend. Kennon testified she, Movant, Pittman, and Mark Thomas ("Thomas") drank beers, ingested methamphetamine, and spent the night. Kennon testified Movant had the key to room 9 and intended to return to the Seashore Motel to retrieve the black suitcase and supplies prior to check out. The next morning, Movant left Kennon at Pittman's house to retrieve the materials left in room 9. Kennon testified while Movant was gone, Thomas texted Pittman's phone "saying the law got [Movant]."

13. In the midmorning hours of 30 January 2014, Atlantic Beach Police Lieutenant Brian Prior ("Lieutenant Prior") received a call regarding a potentially hazardous chemicals and

HAZMAT situation at the Seashore Motel. Upon arrival, Lieutenant Prior made contact with Carla, who told him about the items she had discovered inside room 9.

14. Lieutenant Prior entered the room, and observed: (1) a 7-up two-liter bottle with an unknown "red slushy residue" at the bottom; (2) plastic tubing; (3) a soda cap that had been "hollowed out" with a tube placed though the cap and secured with glue; (4) a funnel; (5) a face mask; (6) a glass jar with an unknown white powdery substance at the bottom; (7) Coleman fuel; (8) cardboard containers with salt in them; and (9) a used syringe located in the trashcan. Lieutenant Prior determined these items were consistent with items in a methamphetamine lab, based on his training and experience. Lieutenant Prior secured the room and obtained a search warrant.

15. After the search warrant was issued, room 9 was processed by North Carolina State Bureau of Investigation ("SBI") agents. SBI Special Agent Kelly Ferrell ("Agent Farrell") was in charge of responding to clandestine laboratories found in the eastern portion of the state as a "Site Safety Officer." Agent Farrell was called to room 9 of the Seashore Motel to process a suspected methamphetamine laboratory on 30 January 2014. Agent Farrell documented the items located in room 9.

16. Agent Farrell analyzed the red slushy residue found in the bottom of the 7-up bottle, which tested positive for hydrochloric acid, a precursor chemical for methamphetamine. Agent Farrell also observed a bottle of Flow Easy drain cleaner, which contains sulfuric acid, and a Walgreens cold pack, which contains ammonium nitrate. Agent Farrell testified both sulfuric acid and ammonium nitrate are precursor chemicals for methamphetamine. Agent Farrell also observed various other trappings of a methamphetamine laboratory in room 9, including: (1) masks; (2)

burnt aluminum foil; (3) a hot glue gun; (4) coffee filters; (5) green rubber gloves; (6) a bottle of hydrogen peroxide; and (7) a two pack of Energizer brand batteries of advanced lithium.

17. Agent Kennon testified the materials found in room 9 were "typical of what [is] see[n]" at a methamphetamine lab using the "one-pot cook" method. Agent Farrell testified: (1) it took her "less than a minute" to determine the materials found in room 9 were a clandestine methamphetamine laboratory; and (2) the precursor chemicals found in room 9 were in fact used to produce methamphetamine.

18. Atlantic Beach Police Officer David Ennis ("Officer Ennis") arrived at the Seashore Motel and assisted Lieutenant Prior. Officer Ennis briefly looked inside room 9 and sealed off the crime scene to ensure no one entered or exited except those authorized to do so. Officer Ennis reviewed the registration card Kennon had filled out at the time of check in. Officer Ennis ran the vehicle license plate number Kennon listed on the registration card, and found the plate was issued to a Buick vehicle registered to Movant.

19. While Officer Ennis remained on the scene, he noticed a gold Buick enter the Seashore Motel parking lot. Officer Ennis made contact with Movant, the driver of the car, and asked him why he was at the motel. Movant replied he was "just driving around." While talking to Movant, Officer Ennis noticed two blue pills located in "the grip of the driver's side door" handle of Movant's vehicle. Movant admitted the pills were Adderall, a controlled substance.

20. Officer Ennis instructed Movant to exit his vehicle, handcuffed him, and placed him under arrest for possession of a controlled substance. Thomas was inside the car at the time of Movant's arrest and was also arrested on unrelated charges. Officer Ennis performed a pat down of Movant and a key fell "from the lower half of his body." Officer Ennis picked up and examined

the key, issued to room 9 at the Seashore Motel. Movant was transported to the Carteret County Detention Center for processing.

ARGUMENT

MOVANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL FAILED TO PREPARE FOR TRIAL, FAILED TO REQUEST THE TRIAL COURT BRING A WITNESS IN FROM JAIL TO MAKE AN OFFER OF PROOF CONCERNING THE STATE'S CHIEF WITNESS HEATHER KENNON, AND FAILED TO HAVE TWO WITNESSES TRANSPORTED FROM THE DEPATMENT OF CORRECTION TO TESTIFY TO HEATHER KENNON'S UNTRUTHFULNESS.

A. Introduction

21. The right to effective assistance of counsel and to due process of law are guaranteed in the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 19 and 23 of Article I of the Constitution of North Carolina. *See* U.S. Const. amends. V, VI, XIV; N.C. Const. art. I, §§ 19, 23; *State v Rogers*, 352 N.C. 119, 124-25 (2000); *State v. Tunstall*, 334 N.C. 320, 432 S.E.2d 331 (1993).

22. "It is implicit in the constitutional guarantees of assistance of counsel and confrontation that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense." *See State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977). The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive Due Process of Law in an adversarial system of justice. *See United States v. Cronic*, 466 U.S. 648, 658 (1984).

23. The Supreme Court has held that "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under the *Strickland* standard, ineffective

assistance of counsel is made out when the Movant shows that (1) trial counsel's performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the "counsel guaranteed the Movant by the Sixth Amendment," and (2) the deficient performance prejudiced the Movant enough to deprive him of due process of law. *See Strickland, 466 U.S.* at 687; *see also State v Blakeney*, 352 N.C. 287, 307-08 (2000).

24. A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *See Strickland*, 466 U.S. at 690.

25. To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (quoting *Strickland*, 466 U.S. at 694). However, prejudice to a defendant is presumed when "'the likelihood that any lawyer, even a fully competent one, could provide effective assistance' is remote." *See Tunstall*, 334 N.C. at 329, 432 S.E.2d at 336 (quoting *Cronic*, 466 U.S. at 659-660); *see also State v. Maher*, 305 N.C. 544, 550, 290 S.E.2d 694, 698 (1982).

B. Movant was denied the effective assistance of counsel where Trial Counsel failed to investigate Movant's case and prepare for trial resulting in Trial Counsel's request to withdraw because he could not "zealously advocate" on Movant's behalf

26. The previous month the case had been set for trial and defense counsel moved to continue to be given more time to prepare. The case was continued. The week prior to trial defense counsel moved to withdraw stating:

> Your Honor, this is a case that I was retained in. As we've kind of gone along with it, I don't think Mr. Warren and I see eye-to-eye on everything. I don't think I can zealously represent him at a trial based on the evidence, the conversations we've had. So it's going to be my motion to withdraw from the case.

(See Transcript of Motion Hearing, September 2, 2014 "Motions Hearing" at pp. 2-3).

27. Additionally, counsel told the court that he had not finished being paid. *Id.* The trial court denied the motion to withdraw. (Motions hearing at p. 7). On the day of trial, Trial Counsel again moved to continue the case explaining that after the denial of his motion to withdraw the previous week, Trial Counsel sent out subpoenas, although many had not been served as of the date of trial. (See Trial Transcript Vol. I September 8, 2014 ("T.T.") at p. 7). Apparently defense counsel had not used the earlier months' continuance to subpoenas the witnesses. *Id.* The trial court denied the motion to continue. *Id.*, at pp. 7-8.

28. Counsel proved to be unprepared to try the case and to zealously defend the defendant, just as he informed the Trial Court the week before trial. Trial Counsel's failures highlight his abdication of a basic principle under the rule of professional conduct: "As advocates, a lawyer zealously asserts the client's position under rules of the adversary system." *See* N.C. Rules of Professional Conduct, Rule 0.1(2).

29. The Constitutions of both the United States and North Carolina guarantee the right to the assistance of counsel for his defense and case law has interpreted the Constitutions as

guaranteeing the effective assistance of counsel. *See Strickland v. Washington, supra.; see also State v. Braswell,* 312 N.C. 553, 562 (N.C. 1985). Here, it is clear Trial Counsel had failed to prepare the case for trial. He waited until the week before trial to send out subpoenas for witnesses and expressed his disinterest in preparing any defense by claiming his intent to withdraw from the case because he had not been paid completely.

30. Trial Counsel can offer no reasonable or tactical explanation for failing to issue subpoenas for witnesses, obviously important to any defense at trial, until the week before trial was to begin. There is no evidence the failure to prepare was the fault of Mr. Warren or that he interfered with his lawyer's efforts. Trial Counsel knew the importance of the witnesses for which he issued subpoenas and yet waited until the week before trial to issue the mechanism by which they would be brought to court. His admission on the day of trial that many of the subpoenas had not been served, thereby denying Mr. Warren a full defense at trial, is further evidence of Trial Counsel's lack of preparation and interest in zealously advocating on behalf of his client.

31. In examining Mr. Warren's claim that he was denied effective assistance of counsel, the Court is required to examine both the objective reasonableness of Trial Counsel's failure to issue trial subpoenas for witnesses who would have significantly impeached the State's chief witness, Heather Kennon, and the prejudice Mr. Warren suffered at trial as a result of these witnesses not appearing. Here, there is no objectively reasonable basis not to be prepared for trial, particularly having witnesses in court that were critical to Mr. Warren's defense. Second, the jury was not able to evaluate the testimony of the witnesses, who would have testified that Kennon had a history of untruthfulness, and had the jury heard these witnesses, there is a reasonable likelihood that the outcome of the trial would have been different.

C. Movant was denied the effective assistance of counsel where Trial Counsel failed to request that witness Brandon Elps be brought from jail to court to testify concerning Heather Kennon getting him in trouble and then reporting him to law enforcement, which was Movant's theory of defense at trial.

32. The North Carolina Constitutional right to effective assistance of counsel requires a defense lawyer to interview potential defense witnesses, prepare a defense, and secure witnesses' attendance at trial. *See State v. McEntire*, 71 N.C. App. 720 (N.C. Ct. App. 1984); *State v. Moorman*, 320 N.C. 387, 402 (1987).

33. Heather Kennon, who was defendant's alleged accomplice, testified for the State providing detailed testimony of the defendant's conspiracy with her to manufacture methamphetamine and the steps he took securing the hotel room and setting up the process. There was no witness to the conspiracy other than the defendant and Ms. Kennon. No one placed the defendant manufacturing the methamphetamine except Ms. Kennon. Her testimony was crucial to the State. Thus her credibility was crucial to the State.

34. Trial Counsel failed to have Brandon Elps, who was being held in the local jail, to be brought into Court to testify on behalf of the defense. (T.T. p 330). Trial Counsel represented to the court that Mr. Elps would impeach Ms. Kennon, the most crucial witness in the State's case. Counsel represented Mr. Elps would testify that on previous occasions Ms. Kennon got Mr. Elps into trouble and then went to the law. He proffered this testimony evidenced a pattern of behavior on her part, which was the defense theory at trial. *Id.*

35. Inexplicably counsel did not have Mr. Elps brought over at least to make an offer of proof by issuing a trial subpoena. (T.T. p 331). This failure was further exacerbated when Trial Counsel failed to seek the Court's assistance in getting Elps from jail to testify. The procedure to bring forward an inmate from the Department of Correction is straightforward. Every court of

record, upon application by defense counsel, has the power to issue a Writ of Habeas Corpus ad Testificandum for writs bringing before the court any prisoner who may be detained in any prison within the state for the purpose of that inmate testifying as a witness on behalf of the defendant making the application. *See* N.C.G.S. §17-41.

36. Here, Trial Counsel unreasonably failed to invoke the Trial Court's authority to have a key witness for the defense brought to Court. Elps was critical in that his testimony would impeach the credibility of the State's chief witness and her credibility was central to the State's ability to prevail. The jury was denied the opportunity to hear from Elps and to consider his testimony in evaluating the veracity of the State's case. If the jury had heard the testimony, there is a reasonable likelihood the outcome of the trial would have been different.

D. Movant was denied the effective assistance of counsel where Trial Counsel failed to have two witnesses transported from the Department of Correction to testify to the untruthfulness of the State's key witness, Heather Kennon.

37. The North Carolina Constitutional right to effective assistance of counsel requires a defense lawyer to interview potential defense witnesses, prepare a defense, and secure witnesses' attendance at trial. *See State v. McEntire*, 71 N.C. App. 720 (N.C. Ct. App. 1984); *State v. Moorman*, 320 N.C. 387, 402 (1987).

38. Ms. Kennon who was Mr. Warren's alleged accomplice, testified for the State as its chief witness implicating Mr. Warren. She testified in detail the alleged conspiracy between she and Mr. Warren to manufacture methamphetamine and the steps he took securing the hotel room and setting up the process. There was no witness to the conspiracy other than Mr. Warren and Ms. Kennon and no one testified to seeing Mr. Warren manufacture methamphetamine other that Ms. Kennon. In short, her testimony was crucial to the State's case and thus her credibility.

39. One of the most common methods of impeachment is by showing that the witness's character is bad, which may be done by means of "character witnesses." *See* Brandis & Broun N.C.Evid. §155 p. 553 (7th Edition). There were two witnesses, Cassie Flowers and Mark Thomas, who were in the custody of the State. Both were expected to testify Ms. Kennon was not truthful in her testimony at trial and that the claims against Mr. Warren were false. The procedure to bring forward an inmate from the Department of Correction is straightforward. Every court of record, upon application by defense counsel, has the power to issue a Writ of Habeas Corpus ad Testificandum for writs bringing before the court any prisoner who may be detained in any prison within the state for the purpose of that inmate testifying as a witness on behalf of the defendant making the application. *See* N.C.G.S. §17-41.

40. Trial Counsel waited until after his motion to withdraw (a week before trial) was denied, and he was forced to take the case to trial that he first told the Trial Court that he had issued a subpoena to have these witnesses available at trial. Both were in the custody of the State at the time. However, despite his representations, there was no indication defense counsel ever executed upon the Writs of Habeas Corpus Ad Testificandum for these two necessary witnesses. Such a failure cannot be explained away as a reasonable strategic decision and the failure robbed Mr. Warren of the ability to fully present his defense at trial.

41. Pursuant to Strickland, Mr. Warren is entitled to a new trial. In the alternative, the record is inconclusive and cannot affirmatively refute the claims made and thus it is appropriate for this Court to set this matter for an evidentiary hearing.

CONCLUSION AND RELIEF REQUESTED

42. Movant has set forth factually intensive issues which can and should only be properly presented during an evidentiary hearing. N.C.G.S.§ 15A-1420(c)(1) provides that "any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit."

43. In *State v. McHone*, 348 N.C. 254 (1998), the North Carolina Supreme Court found that the right to a hearing is not automatic, but is to be determined by the trial court from the motion and any supporting or opposing information presented. In *McHone*, the Court found that the Movant was entitled to a hearing because there was a question of fact that could only be determined by a fact-finding hearing.

44. In *State v. Hardison*, 126 N.C.App. 52 (1997), the Court of Appeals determined that a hearing was appropriate to determine factually disputed issues such as ineffective assistance of counsel. In *Hardison*, the Movant argued that there existed a conflict of interest with the counsel representing him during the entry of his guilty plea. The Court determined that the nature of the claim was such that it would not appear on the face of the record but would instead require a hearing.

45. The Movant respectfully submits that the issues presented herein require remand for new sentencing hearing, or in the alternative, an evidentiary hearing to be properly presented and fully litigated. Pursuant to N.C.G.S. § 15A-1420(a)(1)(c1), counsel certifies that there is a sound legal basis for the motion and that it is being made in good faith; and that the attorney has notified both the District Attorney's office and the attorney who initially represented the Movant of the motion; and further, that counsel has reviewed the trial transcripts.

WHEREFORE, DUSTIN JAMAL WARREN respectfully requests that this Court grant the instant motion, vacate his judgment of conviction, and order a new trial; permit counsel to file any additional memoranda or briefs at least thirty (30) days prior to signing any Order; permit counsel to review any proposed Order submitted by the State before this Court makes a decision on the motion; and grant Movant such other and further relief as this Court deems just, proper and equitable.

Dated: December 8, 2016

Respectfully Submitted,

_____

Patrick Michael Megaro, Esq.
33 East Robinson Street, Suite 210
Orlando, Florida 32801
(o) 407-255-2164
(f) 855-224-1671
pmegaro@halscottmegaro.com
North Carolina Bar ID # 46770
New Jersey Bar ID # 3634-2002
New York Bar ID # 4094983
Florida Bar ID # 738913
Texas Bar ID # 24091024
Washington State Bar ID # 50050

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. First Class Mail on December 8, 2016 to:

Office of the Clerk of Court
Superior Court Division
In and for Carteret County
300 Court House Square
Beaufort, NC 28516

Office of the District Attorney
In and for Carteret County
302 Court House Square
Beaufort, NC 28516

Rodney G. Fulcher, Esq.
416 Live Oak Street
Beaufort, NC 28516

_____
Patrick Michael Megaro, Esq.