

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Court of General Sessions

R. Lawton McIntosh, Circuit Judge

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Case No. 2005-GS-42-076

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Lamar A. Graves,

Appellant,

vs.

The State of South Carolina,

Respondent.

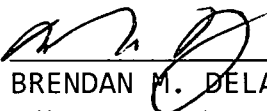
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NOTICE OF APPEAL

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Lamar A. Graves appeals the Order of the Court of General Sessions, the Honorable R. Lawton McIntosh, Circuit Judge presiding dated July 23, 2013. Appellant received written notice of said sentence on August 23, 2013.

August 28, 2013



BRENDAN M. DELANEY  
Attorney for Lamar A. Graves  
P.O. Box 2421, 147 E. St. Johns St.  
Spartanburg, S.C. 29304  
(864) 706-1591

Other Counsel of Record:

Mr. Robin File, Assistant Solicitor  
Office of the Solicitor  
Spartanburg County Courthouse  
Spartanburg, S.C. 29306

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MARIE BLACKLEY

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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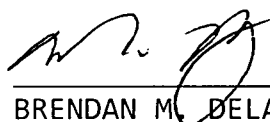
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PROOF OF SERVICE

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I certify that I have served the Notice of Appeal on the State of South Carolina by mailing a copy of same to Robin File, Office of the Solicitor General, Spartanburg County Courthouse, Spartanburg, S.C. 29306 on August 28, 2013.

August 28, 2013



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SC Court of Appeals

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BY: \_\_\_\_\_

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SPARTANBURG )

IN THE COURT OF GENERAL SESSIONS  
SEVENTH JUDICIAL CIRCUIT

The State of South Carolina, )

-vs-

Lamar A. Graves, )  
Defendant. )

ORDER  
2005-CP-42-076

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SPARTANBURG COUNTY  
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M. HOPE BLACKLEY

This matter was before this court by way of a motion filed by defendant Lamar A. Graves (Graves) for a new trial based on after discovered evidence (Rule 29 (b) of the South Carolina Rules of Criminal Procedure). A hearing was held on May 24, 2013. The defendant was present and represented by his appointed counsel, Brendan Delaney of the Spartanburg Bar. The State of South Carolina was represented by Robin C. File, an Assistant Solicitor for the Seventh Judicial Circuit. Also present was a witness for Graves: Demario Mack.

After hearing the testimony and evidence presented, and arguments of the defendant and his counsel as well as counsel for the State of South Carolina, for the foregoing reasons this court finds that the relief sought by the defendant should be denied.

Lamar A. Graves, SCDOC # 27024 (Graves) is currently confined in the South Carolina Department of Corrections as a result of his Spartanburg County conviction and sentence. The Spartanburg County Grand Jury indicted Graves in January 2005 for armed robbery (05-GS-42-076); burglary in the first degree, and pointing and/or presenting a firearm. He had a public defender who represented him on these charges.

On January 3-4, 2006, Graves received a jury trial for the armed robbery indictment before the Honorable J. Derham Cole. He was jointly tried with his co-defendant, Jovan Graves.

The jury found both defendants guilty and they were sentenced to 18 years imprisonment. Graves subsequently filed both an appeal, which was dismissed; and a Post-Conviction Relief (PCR) Application, which was also denied. Currently, Graves has a *pro se* Petition for Writ of Habeas Corpus pending in the United States District Court. Assistant Solicitor File provided this court with a partial copy of a Return and Memorandum of Law filed by the South Carolina Attorney General's Office in connection with Graves' Petition, for the purpose of providing this court with a procedural history of this case.

Graves argues through his motion that he should be granted a new trial based on after discovered evidence, presumably under Rule 29 (b) of the S. C. Rules of Criminal Procedure, although not specifically cited in his motion. Graves claim is that a victim/identification witness, Demario Mack (Mack) has changed his testimony and now states that he misidentified Graves; and that Graves was not involved in the armed robbery. During the investigation, and both *in camera* and before the jury at trial, Mack had previously identified Graves as being one of the perpetrators of the crime.

Mack was called to the stand as Graves' witness during the hearing before this court. Mack is also currently incarcerated in the South Carolina Department of Corrections serving a sentence for lynching in the first degree. Under direct examination through counsel for Graves, Mack testified about his initial identification of another person as the perpetrator; his trial testimony during which he identified Graves; and that he had come into contact with Graves in the Department of Corrections. He was vague on details, during cross-examination, about when their paths crossed, and how long they were together in the same institution. He testified that, after getting to know the defendant in the Department of Corrections, he came to realize that

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he was not the person who pointed a gun in his face and robbed him and the others in the incident. However, Mack also testified that the incident took place some time ago, and his testimony gave this court indication that his memory was less now than it was then. Mack also acknowledged that he was not the only witness who had identified Graves as a perpetrator, but indicated that he had been persuaded to do so by the other victims and witnesses to the crime.

Graves also testified, largely regarding his efforts to have counsel appointed to represent him; getting this motion heard; and seemingly implying that there was some conspiracy involved against him in this matter. His testimony added little, if any, to the matter before this court.

During questioning of counsel for both the defendant and the State it was acknowledged that there was an additional victim/witness to the crime, Troy Fisher who had identified Graves as a perpetrator both in and out of court. Additionally, there was a witness at trial who testified he took Graves to and from the scene of the crime, among other things.

In order for the defendant to prevail on a motion for a new trial based on after-discovered evidence, the movant must show the 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 the trial; (4) is material; and (5) is not merely cumulative or impeaching. State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999). This court finds that Graves has failed to show that Mack's new testimony, which might be characterized as a "change of heart," would have changed the outcome of the trial. There was other testimony that would have been sufficient to convict Graves even if the jury discounted Mack's testimony either partially or completely. In addition, this court finds that the

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identification issue regarding Mack could have been discovered prior to the trial. Mack was in close proximity to Graves at trial and was cross-examined several times during the trial, indicating that there was ample opportunity to explore and discover this issue.

Therefore, for the forgoing reasons, this court finds that Graves has failed to meet his burden as required by law and his motion should be denied.

IT IS SO ORDERED.

*(RLM)*

*7-23*

2013

~~Spartanburg~~, South Carolina

*Anderson*

*[Signature]*

R. Lawton McIntosh  
Circuit Court Judge

M. HOPE BLACKLEY

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SPARTANBURG COUNTY

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August 28, 2013

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, S.C. 29211

RE: The State vs. Lamar A. Graves

Dear Mr.s. Kitchings:

Please find enclosed for filing the original Notice of Intent to Appeal in the above referenced matter along with the Original Proof of Service upon opposing counsel and a copy of the Order to be appealed. Please call me if you have any questions.

Very truly yours,



Brendan M. Delaney

BMD:som  
Enclosures:

cc: South Carolina Office of the Attorney General  
1000 Assembly St., Room 519  
Columbia, S.C. 29201

Appellate Defense Office  
ATTN: Sharon Graham  
1330 Lady St., Suite 401  
Columbia, S.C. 29201

Inmate Lamar A. Graves #272024  
Allendale Correctional Institution SMU-241  
P.O. Box 1151  
Fairfax, S.C. 29827

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