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RECEIVED

January 5, 2015

JAN 08 2015

Daniel E. Shearouse
Clerk of Court – SC Supreme Court
Supreme Court
P.O. Box 11330
Columbia, SC 29211

S.C. SUPREME COURT

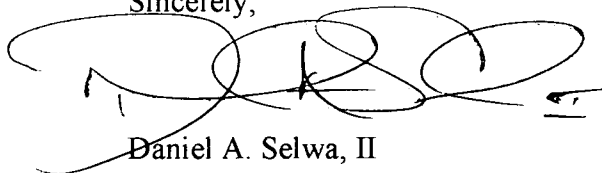
Re: Tyrone Beaty v. State of South Carolina, Case No.: 2013-CP-26-5929; John Elvis Bostic vs. State of South Carolina, Case No.: 2012-CP-26-7917; Keion Griffin vs. State of South Carolina, Case No.: 2011-CP-26-10757; Lorenzo Cross vs. State of South Carolina, Case No.: 2013-CP-26-3958; Nelson H. Castro vs. State of South Carolina, Case No.: 2013-CP-26-1591; Jeffrey Riebe vs. State of South Carolina, Case No.: 2013-CP-26-5292; Shannon T. Parker vs. State of South Carolina, Case No.: 2013-CP-26-2547; and Nearim Blackwell-Selim vs. State of South Carolina, Case No.: 2013-CP-26-6066.

Dear Mr. Shearouse:

Enclosed please find the original Notice of Appeal in each of the above-entitled actions and two copies for each. Please file and return one copy to me in the self addressed stamped envelope enclosed.

If you should have any questions or concerns, please do not hesitate to contact me.

Sincerely,



Daniel A. Selwa, II

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable John C. Hayes, III, Circuit Court Judge

Case No.: 2012-CP-26-7917

John Elvis Bostic, #348144, Petitioner,

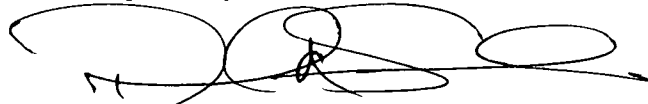
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable John C. Hayes', III, November 17, 2014, order, denying the Applicant's Petition for post-conviction relief. Undersigned counsel received notice of entry of the order on December 9, 2014. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Daniel A. Selwa, II
1053 London Street, Suite A
Myrtle Beach, SC 29577
Attorney for the PCR Applicant

January 5, 2015

Other counsel of record:

Alan Wilson, Attorney General

Joshua L. Thomas, Assistant Attorney General

Post Office Box 11549

Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Honorable John C. Hayes, III, Circuit Court Judge

Case No.: 2012-CP-26-7917

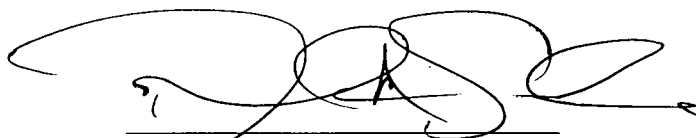
John Elvis Bostic, #348144 Petitioner,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I, Daniel A. Selwa, II, certify that I have served the within Notice of Appeal on the Respondent, the State of South Carolina, by depositing a copy of the same in the United States Mail, postage prepaid, addressed to his attorney of record, Alan Wilson, Attorney General, Post Office Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this 5th day of January 2015.



Daniel A. Selwa, II
1053 London Street, Suite A
Myrtle Beach, SC 29577
Attorney for the PCR Applicant

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 John Elvis Bostic,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT

C.A. No.: 2012-CP-26-7917

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 Horry County
 Clerk of Court

ORDER

This is a Post-Conviction Relief Proceeding

This is an Application for post-conviction relief (PCR) filed October 12, 2012 and an amendment on November 6, 2012. The undersigned heard this case on October 29, 2014. Daniel Selwa II, Esquire, represented the Applicant. The State was represented by Josh Thomas, Esquire.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. The Horry County Grand Jury indicted the Applicant at the March 2011 term of General Sessions for first-degree burglary (2011-GS-26-1259). Edward Chrisco, Esquire, represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On October 5, 2011, the Honorable Benjamin H. Culbertson sentenced the Applicant to fifteen (15) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire, of the South Carolina Office of Appellate Defense perfected the appeal in the form of an

*Anders*¹ brief. By order dated October 3, 2012, the Court of Appeals granted Applicant's motion to withdraw his appeal and dismissed the appeal with prejudice.

In his application for post-conviction relief and subsequent amendment, the Applicant alleges he is being held in custody unlawfully based on ineffective assistance of counsel. In his amended application, Applicant breaks this allegation down into 25 subsets. The court will not address all 25 grounds but as they are general, overlap and Applicant presented no evidence on most his complaint.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); *Butler*, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C.115, 386 S.E.2d 624 (1989).

The reviewing court applies 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, the court measures an attorney's performance by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625, citing *Strickland*. Second,

¹ *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

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.E. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984)).

Applicant alleges trial counsel was ineffective for failing to investigate. Applicant has not carried his burden of proof on this issue. Trial counsel's testimony establishes thorough investigation based on the discovery from the State. The issue below as to discoverable evidence not being provided to counsel cannot be laid at his doorstep.

Applicant alleges trial counsel did not adequately discuss the State's case against him or trial counsel's trial strategy. The evidence of record is that trial counsel met with Applicant three or four times prior to trial and was well versed in the evidence against Applicant.²

Trial counsel effectively worked a State error (discussed more below) into a very advantageous plea offer of charge reduction to burglary third, second offense for a sentence of five years which Applicant rejected.

During the trial, the State discovered evidence not previously disclosed by law enforcement. This existence of a report and series of photos of footwear and footprints and an unopened beer can apparently found in the loot from the burglary. A latent print found on the beer can was not identified as to any person. Applicant presented no evidence that the report or photos would have been exculpatory or beneficial to his defense.

² The evidence regarding the fingerprint on the beer can was inconclusive (TR p. 147 LL 1-7). As to the other mid-trial revealed evidence Applicant has not presented to the court any evidence that the report and photos of footwear and footprints would be exculpatory or have any value in Applicant's defense.

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Because the beer can, photos, and reports had not been provided to defense counsel the trial judge stated on the record that if a mistrial was requested it would be granted. This situation was discussed with Applicant who. After trial counsel's full explanation of Applicant's options and counsel's belief that the State had at that time already introduced enough evidence to get the case to the jury, Applicant made a decision to proceed and not ask trial counsel to request a mistrial.

At this point in the trial, the State offered Applicant the very favorable plea deal mentioned above.

Armed with the plea deal, the effect of a mistrial, his options, and trial counsel's observation as to how the trial was progressing Applicant, as was his absolute right, advised trial counsel to not move for a mistrial. The decision, according to the testimony of Applicant, was based his lack of understanding as to what a mistrial meant, and on his belief he was going to be "tricked" by the State. He felt the State would, if given extra time, make up evidence. Trial counsel confirmed Applicant's reluctance to opt for a mistrial.

Trial counsel testified he, prior to making a decision regarding a mistrial motion, explained to Applicant the ramification of obtaining a mistrial. Trial counsel testified the Applicant said to him that the police were lying enough already and their testimony as to him would be worse at a second trial.

Trial counsel testified that he believed the better course of action would have been to move for a mistrial. He thought the trial was not going well for Applicant and that the threat of the mistrial had leveraged a very favorable plea offer, a leverage lost if a mistrial was granted. In the end, trial counsel testified it was Applicant's final decision and even though trial counsel



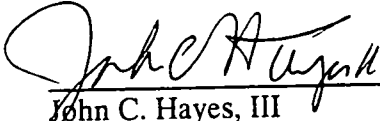
thought Applicant's best bet was to allow him to move for a mistrial the ultimate decision was for Applicant to make.

Again, Applicant set forth 25 allegations in support of his charge of ineffective assistance of counsel. At his hearing they were distilled down to 6. The issues addressed above were the only issues addressed by Applicant or covered by cross examination of trial counsel at the evidentiary hearing and therefore are the only issues the court can address. The burden of proof is on the Applicant.

The Court finds that trial counsel's representation of Applicant was effective. Therefore, Applicant's Application for Post-Conviction Relief is denied and dismissed with prejudice.

Applicant is hereby placed on notice that any petition for certiorari to the South Carolina Supreme Court must be filed within thirty (30) days. See Appellate Court Rules 203, 206, and 227(b).

IT IS SO ORDERED.



John C. Hayes, III
Presiding Judge # 5

November 16th, 2014
Conway, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)
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JOHN ELVIS BOSTIC, #348144)
)
vs)
)
STATE OF SOUTH CAROLINA,)
)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

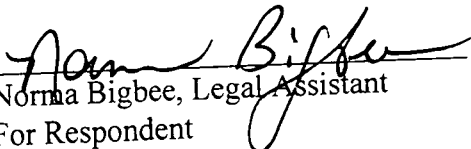
2012-CP-26-7917

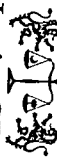
AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a filed copy of the Order in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Daniel A. Selwa, II, Esquire
1053 London St., Suite A
Myrtle Beach, SC 29577

DATED this 3rd day of December, 2014.


Norma Bigbee, Legal Assistant
For Respondent



DANIEL A. SELWA, II
ATTORNEY AT LAW, L.L.C.

1053 London Street, Ste. A
Myrtle Beach, S.C. 29577

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

