



ALAN WILSON
ATTORNEY GENERAL

July 22, 2011

RECEIVED

JUL 22 2011

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia SC 29211

S.C. Supreme Court

**Re: Devario Simpson v. State of South Carolina
2008-CP-23-4201**

Dear Mr. Shearouse:

Attached are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above case.

Sincerely,

Karen C. Ratigan
Assistant Attorney General

KCR/jacc
Enclosures

cc: Wanda H. Carter, Esquire
Trisha Allen, Victim Services

The Supreme Court of South Carolina

Devario Marshatt Simpson, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Edward W. Miller
Greenville County
Trial Court Case No. 2008-CP-23-04201

ORDER

For good cause shown, the request for an extension until July 22, 2011 to serve and file the Return to the Petition for Writ of Certiorari in this matter is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what measures are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Brenda J. Shealy*
Clerk

Columbia, South Carolina

June 23, 2011

cc: Deputy Chief Appellate Defender Wanda H. Carter
Assistant Attorney General Karen Ratigan



ALAN WILSON
ATTORNEY GENERAL

June 22, 2011

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

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JUN 22 2011

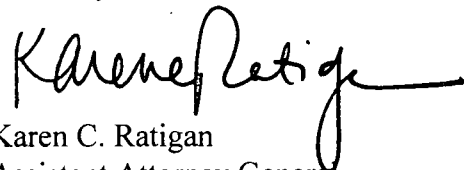
S.C. Supreme Court

RE: **Devario Simpson v. State**
2008-CP-23-4201

Dear Mr. Shearouse:

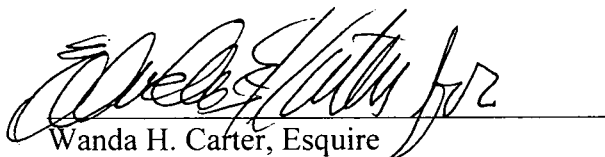
The Return to Petition for Writ of Certiorari in the aforementioned matter is due to be served and filed today. I would respectfully request a third and final 30-day extension in which to serve and file the Return. This request is not intended for the purpose of delay. Rather, this request is necessitated by my workload. In the past month, I have filed a brief of respondent in Chavis Jordan v. State and a return to petition for writ of certiorari in Anthony Johnson v. State. In addition, I have represented the State at a term of court in the Fourth Judicial Circuit and have drafted several dozen proposed pleadings and orders of dismissal. Opposing counsel indicates consent by the signature below.

Sincerely,



Karen C. Ratigan
Assistant Attorney General

I CONSENT:



Wanda H. Carter, Esquire



Salley W. Elliott
Deputy Assistant Attorney General

The Supreme Court of South Carolina

Devario Marshatt Simpson, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Edward W. Miller
Greenville County
Trial Court Case No. 2008-CP-23-04201

ORDER

For good cause shown, the request for an extension until June 22, 2011 to serve and file the Return to the Petition for Writ of Certiorari is granted.

Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

May 24, 2011

cc: Deputy Chief Appellate Defender Wanda H. Carter
Assistant Attorney General Karen Ratigan



ALAN WILSON
ATTORNEY GENERAL

May 23, 2011

RECEIVED

MAY 23 2011

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

(2)

S.C. Supreme Court

RE: Devario Simpson v. State

Dear Mr. Shearouse:

The Return to Petition for Writ of Certiorari in the aforementioned matter is due to be served and filed today. I would respectfully request a second 30-day extension in which to serve and file the Return. This request is not intended for the purpose of delay. Rather, this request is necessitated by my workload. In the past month, I have filed a return to petition for writ of certiorari in Herman Beasley v. State, a brief of respondent in David Burress v. State, and a return to petition for writ of certiorari in Robert Doll v. State. I have also prepared numerous pleadings and proposed orders and represented the State at a week-long term of court in the Thirteenth Judicial Circuit.

Sincerely,

Karen C. Ratigan
Assistant Attorney General

cc: Wanda H. Carter, Esquire

The Supreme Court of South Carolina

Devario Marshatt Simpson, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Edward W. Miller
Greenville County
Trial Court Case No. 2008-CP-23-04201

ORDER

The request for an extension until May 23, 2011 to serve and file the Return to the Petition for Writ of Certiorari is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Wanda J. Shealy

Clerk

Columbia, South Carolina *Chief Deputy*

April 22, 2011

cc: Deputy Chief Appellate Defender Wanda H. Carter
Assistant Attorney General Karen Ratigan



ALAN WILSON
ATTORNEY GENERAL

April 21, 2011

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APR 21 2011

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

S.C. Supreme Court

RE: Devario Simpson v. State
2008-CP-23-4201

Dear Mr. Shearouse:

The Return to Petition for Writ of Certiorari in the aforementioned matter is due to be served and filed today. I would respectfully request a 30-day extension in which to serve and file the Return. This request is not intended for the purpose of delay. Rather, this request is necessitated by my workload.

Sincerely,

Karen C. Ratigan
Assistant Attorney General

cc: Wanda H. Carter, Esquire

The Supreme Court of South Carolina

Devario Marshatt Simpson, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Edward W. Miller
Greenville County
Trial Court Case No. 2008-CP-23-04201

ORDER

For good cause shown, the request for an extension until March 7, 2011 to serve and file the Petition for Writ of Certiorari and Appendix in this matter is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what measures are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda J. Shealy
Clerk

Columbia, South Carolina

Chief Deputy

February 7, 2011

cc: Deputy Chief Appellate Defender Wanda H. Carter
Assistant Attorney General Karen Ratigan

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Appeal from Saluda County
The Honorable Michael G. Nettles., Circuit Court Judge

RECEIVED

FEB 04 2011

DEVARIO MARSHATT SIMPSON,

S.C. Supreme Court
PETITIONER,

V.

THE STATE,

RESPONDENT

**PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI
AND APPENDIX**

(3)

The undersigned counsel would respectfully request a thirty day extension in which to file the petition for writ of certiorari and appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following exigent circumstances:

1. Petition for writ of certiorari and appendix in this case are due to be served and filed today, having been extended by two prior orders of this Court.
2. Counsel will be filing the initial brief of appellant and designation of matter in the case of State v. Jennifer Rayanne Dykes today. Counsel will also be filing the initial brief of appellant and designation of matter in the case of State v. George Jones on Monday, February 7, 2011. Additionally, Counsel is preparing for an oral argument in the Court of Appeals scheduled for Tuesday, February 8, 2011, in the case of State v. Jonathan K. Hill. Counsel filed the Brief of Petitioner in the case of Brian Gebhard v. State on February 3, 2011. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Herman Lee Beasley on January 31, 2011. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of

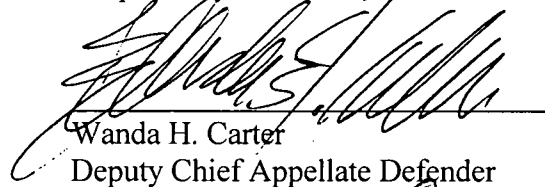
State v. Larry B. Horton on January 28, 2011. On January 18, 2011, Counsel filed the initial brief of appellant and designation of matter in the case of State v. Donald Jones. Counsel filed the initial brief of appellant and designation of matter in the case of State v. Abel Jacobs on January 14, 2011. Also, on January 6, 2011, Counsel filed the initial brief of appellant and designation of matter in the case of State v. Andrew Ladron.

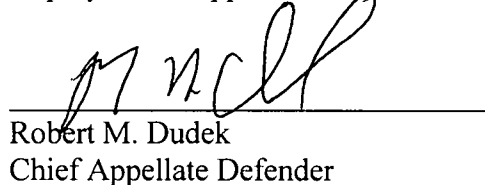
3. This request is made in good faith, and not for purposes of delay.

4. As indicated by her consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty-day extension in which to file the petition for writ of certiorari and appendix in this case. Counsel requests that the time limits for filing the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

Respectfully submitted,


Wanda H. Carter
Deputy Chief Appellate Defender


Robert M. Dudek
Chief Appellate Defender

February 4, 2011

I DO NOT OPPOSE:


Karen Ratigan

The Supreme Court of South Carolina

Devario Marshatt Simpson, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Edward W. Miller
Greenville County
Trial Court Case No. 2008-CP-23-04201

ORDER

For good cause shown, the request for an extension until February 4, 2011 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

January 7, 2011

cc: Deputy Chief Appellate Defender Wanda H. Carter
Assistant Attorney General Karen Ratigan

ORIGINAL

RECEIVED

JAN 05 2011

S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Saluda County
The Honorable Michael G. Nettles., Circuit Court Judge

DEVARIO MARSHATT SIMPSON,

PETITIONER,

v.

THE STATE,

RESPONDENT

**PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI
AND APPENDIX**

(2)

The undersigned counsel would respectfully request a thirty day extension in which to file the petition for writ of certiorari and appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following exigent circumstances:


1. Petition for writ of certiorari and appendix in this case are due to be served and filed today, having been extended by one prior order of this Court.
2. Counsel is working on the initial brief of appellant and designation of matter in the case of State v. Andrew Ladron due to be filed tomorrow, January 6, 2011. For December 2010, counsel has filed the initial briefs of appellant and designations of matter in the following cases: State v. Benjamin P. Green, State v. Kevin J. Williams, Sr., State v. Craig Stephens Furcron, State v. Otis Lamar Bland, Jr., State v. Darrell L.

Williams, State v. Gerald Carlisle, and State v. Michael Paul Cornelius. Also in December 2010, counsel filed the petitions for writ of certiorari and appendices in the following cases: Emmett Kelly v. State, Edward Davis v. State, and Bruce lee Hudson v. State.

3. This request is made in good faith, and not for purposes of delay.

WHEREFORE, the undersigned counsel would respectfully request a thirty-day extension in which to file the petition for writ of certiorari and appendix in this case. Counsel requests that the time limits for filing the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

January 5, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Saluda County
The Honorable Michael G. Nettles., Circuit Court Judge

DEVARIO MARSHATT SIMPSON,

PETITIONER,

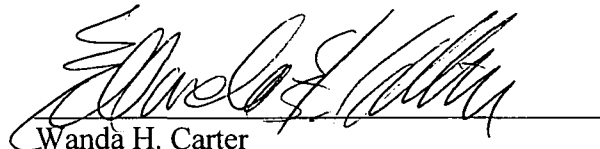
V.

THE STATE,

RESPONDENT

CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies the petition in which to file the petition for writ of certiorari and appendix in the above referenced case has been served upon Karen Ratigan, Esquire, Assistant General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 5th day of January, 2011.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 5th day of January, 2011.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 2, 2013 .

The Supreme Court of South Carolina

Devario Marshatt Simpson, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Edward W. Miller
Greenville County
Trial Court Case No. 2008-CP-23-04201

ORDER

The request for an extension until January 5, 2011 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

December 7, 2010

cc: Deputy Chief Appellate Defender Wanda H. Carter
Assistant Attorney General Karen Ratigan

ORIGINAL



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

December 6, 2010

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DEC - 6 2010

S.C. Supreme Court

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Devario Marshatt Simpson v. State of South Carolina

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in the above-referenced case are due to be served and filed today. Because of my present workload, I respectfully request a thirty-day extension of this deadline. No prior extensions have been requested in this case.

By copy of this letter, I am informing Karen Ratigan, Esquire, of the Office of the Attorney General, of this extension request.

Thanking you for your cooperation and assistance in this matter.

Sincerely,

Wanda H. Carter
Deputy Chief Appellate Defender

WHC/kam

cc: Karen Ratigan



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

October 7, 2010

RECEIVED

OCT - 7 2010

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

Devario Marshatt Simpson v. State of South Carolina

10/7/2010

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Sharon A. Graham
Administrative Coordinator



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

June 21, 2010

RECEIVED

JUN 21 2010

S.C. SUPREME COURT

Ms. Caroline Hiskell
Circuit Court Reporter
109 Unit A Deborah Lane
Greenville, SC 29611

Dear Ms. Hiskell:

Our office has been requested to perfect the appeal arising out of:

Devario Marshatt Simpson v. State of South Carolina Case #: 08-CP-23-04201

County: Greenville Date of Trial: February 23, 2010

Presiding Judge: Edward W. Miller

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

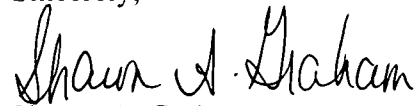
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Caroline Hiskell
June 21, 2010
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Sharon A. Graham". The signature is written in a cursive style with a large initial 'S'.

Sharon A. Graham
Administrative Coordinator

cc: S.C Supreme Court
Attorney General's Office

RECEIVED

STATE OF SOUTH CAROLINA JUN 05 2010

JUDGMENT IN A CIVIL CASE

COUNTY OF GREENVILLE

CASE NO: 2008CP2304201

IN THE COURT OF COMMON PLEAS

S.C. SUPREME COURT

Devario Simpson vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other:
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

FILED CLERK OF COURT
PAUL B WICKENSIMER
GREENVILLE CO. SC
2010 APR 29 PM 1:02

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 29th day of April, 2010, and a copy mailed first class this 29th day of April, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Lawrence W. Crane 101 Whitsett Street
Greenville, SC 29601

Karen Christine Ratigan Attorney Generals
Office Po Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP-24/FORM 4

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Devario Marshatt Simpson,)
 S.C.D.C. No. 154029,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2008-CP-23-4201

ORDER OF DISMISSAL

FILED CLERK OF COURT
 PAUL B. WICKENS/NER
 GREENVILLE, CO. SC
 2008 APR 29 PM 1:02

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 3, 2008. The Respondent made its return on August 27, 2008. An evidentiary hearing into the matter was convened on February 23, 2010 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Lawrence W. Crane, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

At the start of the hearing, counsel for the Applicant argued he should be allowed to view a videotape from the solicitor's file. A representative of the Thirteenth Circuit Solicitor's Office argued there was no right to discovery in post-conviction relief. This Court ordered: (1) the videotape be turned over to the Applicant's PCR counsel and (2) the evidentiary hearing would proceed.¹

The Applicant testified on his own behalf at the PCR hearing. Also testifying were: (1) Ikeetha Brown, (2) Thomas Nix, (3) the prosecuting attorney, John Newkirk, Esquire, and (4) the

¹ The following day, the representative from the solicitor's office appeared before the Court and reported there was no videotape in the solicitor's office file.

1
Lawrence W. Crane

Applicant's trial counsel, Steven W. Sumner, Esquire. The Court had before it the trial transcript, the records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the Respondent's return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted by the Greenville County Grand Jury for trafficking cocaine (2003-GS-23-4310), resisting arrest (2003-GS-23-4316), and assault and battery of a high and aggravated nature (ABHAN) (2003-GS-23-6205). He was represented by Steven W. Sumner, Esquire.

After the State called the case to trial, the Applicant was found guilty of trafficking cocaine and resisting arrest. On April 28, 2005, the Honorable G. Edward Welmaker sentenced the Applicant to concurrent terms of thirty (30) years for trafficking cocaine and one (1) year for resisting arrest.

A notice of appeal was filed at the South Carolina Court of Appeals. Aileen P. Clare, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Simpson, Op. No. 2007-UP-304 (S.C. Ct. App. filed June 8, 2007).

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
 - a. Did not properly and adequately investigate the case and did not interrogate witnesses indicated to him by the Applicant.



- b. Did not subpoena and call to testify witnesses that had been made aware to him by the Applicant.
 - c. Did not properly challenge the stop of the Applicant.
 - d. Did not interview or question the owner of the vehicle in with the Applicant was apprehended and did not call this person as a defense witness.
 - e. Did not ask appropriate questions or make appropriate inquiries during the trial as to the lack of evidence against the Applicant.
 - f. Failed to move to be relieved as counsel because the Applicant had filed a grievance against counsel prior to trial.
2. Abuse of discretion by the trial judge:
- a. Error in allowing the Applicant to proceed to trial with trial counsel as his attorney because the Applicant had filed a complaint against that attorney.

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective

performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "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).

The Applicant stated he had two (2) meetings with counsel before trial. The Applicant stated they barely discussed the State's evidence or the incident reports. The Applicant stated they did not discuss the elements of the charges or possible defenses. The Applicant stated he did not believe trial counsel visited the scene of the arrest. The Applicant argued he asked to view the videotape (from the police car), but never saw it. The Applicant argued that he told trial counsel well before trial that the car he was driving when he was arrested belonged to Thomas Nix. The Applicant argued he told trial counsel the cocaine in the backseat must have belonged to Nix, but that trial counsel never spoke to Nix. The Applicant argued he asked trial counsel to speak to Ikeetha Brown (the passenger in the car when he was stopped), but that counsel failed to do so. The Applicant stated he also wanted trial counsel to speak to Steve Smith, but that counsel did not contact him. The Applicant stated trial counsel wanted him to plead guilty. The Applicant stated trial counsel had no interest in representing him, so he filed a grievance (which was dismissed). The Applicant stated he tried to relieve counsel during the trial but the judge would not allow it.

Ikeetha Brown stated she was the Applicant's passenger when police stopped the car. Brown stated the Applicant did not assault the officer or resist arrest. Brown stated that, while

she had her mother call trial counsel, counsel never spoke to her.

Thomas Nix testified the Applicant was driving his car when he was arrested. Nix testified he spoke to the prosecutors about the car, but not to trial counsel. Nix testified he left no personal belongings in the car when he loaned it to the Applicant.

John Newkirk, the prosecuting attorney, testified he vaguely remembered this case. Newkirk testified that, while he did not recall a plea offer in this case, he was sure he and trial counsel discussed the issue. Newkirk testified he did not recall if there was a videotape in this case.

Trial counsel testified he filed discovery motions in this case, reviewed those materials with the Applicant, and gave him a copy of those items. Trial counsel testified he did not visit the scene of the traffic stop and arrest. Trial counsel testified he did not remember if there was a videotape. Trial counsel testified there was no viable defense in this case. Trial counsel stated the Applicant did not ask him – prior to trial – to contact any witnesses. Trial counsel stated that, when he asked the Applicant about potential witnesses, the Applicant told him those witnesses would contact him. Trial counsel stated he was not contacted by any witnesses before trial. Trial counsel stated the first time the Applicant told him about Brown, Nix, or Smith was on the day of trial. Trial counsel testified it would have been difficult to speak to Brown or Nix anyway, as they were represented by counsel on charges related to this traffic stop. Trial counsel testified he would have been very reluctant to call Nix as a defense witness. Trial counsel testified he recalled the State had offered an open plea (with a 7-25 year sentence range), which the Applicant rejected. Trial counsel testified that, while the Applicant had filed a grievance against him, he did not believe he should have moved to be relieved. Trial counsel confirmed there was tension between him and the Applicant.

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This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not adequately prepare his case for trial. This Court finds credible trial counsel's testimony that they discussed the case and reviewed the discovery materials. This Court also notes the Applicant gave inconsistent testimony on this issue. The Applicant originally stated he thought they only had two meetings before trial, but then later said they had at least 1-2 meetings before he filed the grievance against trial counsel and at least 1-2 meetings after the grievance was dismissed.

This Court finds the fact that trial counsel did not visit the scene of the traffic stop – to investigate if it was a 2-way or 4-way stop – would not have been relevant. The Applicant's conduct at the stop sign is what alerted police. (Trial transcript, pp.161-65). Further, as the Applicant failed to present evidence (such as photographs) of the intersection at the PCR hearing, he cannot prove trial counsel's failure to investigate the scene was prejudicial to his case. Cf. Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

This Court also finds the Applicant failed to prove trial counsel should have obtained a videotape of the traffic stop from the police car. Based upon the evidence before this Court, the Applicant has failed to prove that such a tape even exists. Both trial counsel and the prosecuting attorney testified they did not recall such a tape. The representative from the Thirteenth Circuit Solicitor's Office informed this Court there was no such tape in the solicitor's file.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have contacted his witnesses: Thomas Nix, Ikeetha Brown, and Steve Smith. Trial counsel testified the Applicant never informed him of these witnesses before trial. This is corroborated by the trial transcript. When the Applicant complained to the trial judge on the first day of trial that his witnesses were not there, trial counsel explained he had only received their names the day before. (Trial transcript, pp.114-16). This Court finds trial counsel's testimony on this issue is more credible. Further, it is doubtful trial counsel would have been able to speak to Ikeetha Brown or Thomas Nix anyway, as they had been arrested at the same time as the Applicant and were represented by counsel. (Trial transcript, p.171; p.180; p.209). Regardless, Thomas Nix testified at the PCR hearing that, while the car was his, he did not leave any personal items in the car when he loaned it to the Applicant. It is doubtful Nix would have testified at the Applicant's trial that approximately 900 grams of cocaine belonged to him. This Court finds that, based on Ikeetha Brown's pending charges, she would not have made a credible witness. Further, if Ikeetha Brown had wished to testify in the Applicant's defense, she could have contacted trial counsel sometime between the April 2003 arrest and the April 2005 trial. This Court also notes that, as Steve Smith did not testify at the PCR hearing, any discussion about what he would have testified to at trial is purely speculative. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis in original).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have filed a motion to be relieved. It is undisputed both that the Applicant filed a grievance

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against trial counsel and that it was later dismissed. Trial counsel testified that he did not believe the filing of a grievance against him meant he had to move to be relieved. This Court agrees and finds that, while the Applicant and his attorney may have had a difficult relationship,² trial counsel represented the Applicant to the best of his ability. The Applicant clearly benefited from trial counsel's performance, as the jury acquitted him of the ABHAN charge. This Court finds the Applicant has failed to show that trial counsel's performance was in any way affected by the fact that the Applicant had filed a grievance against him.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

² This Court notes trial counsel was the Applicant's third attorney. (Trial transcript, pp.227-31).



CONCLUSION

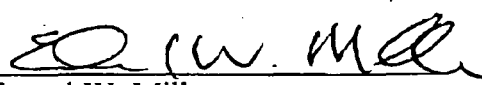
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.


This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this _____ day of 4-26, 2010.


Edward W. Miller
Presiding Judge
Thirteenth Judicial Circuit

, South Carolina.

Law Office of Lawrence W. Crane

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May 19, 2010

Mr. Daniel E. Shearouse
Clerk of the S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED
MAY 24 2010
S.C. SUPREME COURT

Re: Devario Simpson vs. State of South Carolina

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with the Certificate of Service. The Notice has been filed with the Greenville County Clerk of Court.

Thank you for your attention to this matter.

Sincerely,



Lawrence W. Crane

cc: Office of the Attorney General
Office of Appellate Defense

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
THE HONORABLE EDWARD W. MILLER

CA No. 2008-CP-23-04201

DEVARIO SIMPSON,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA

RESPONDENT.

RECEIVED

MAY 24 2010

S.C. SUPREME COURT

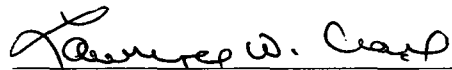
FILED-CLERK OF COURT
PAUL B. WICKENSIMER
GREENVILLE CO. SC

2010 MAY 21 AM 9:33

NOTICE OF APPEAL

Appellant, DEVARIO SIMPSON, appeals from the Order of the Honorable Edward W. Miller, Circuit Court Judge, clocked April 29, 2010 and received by counsel May 3, 2010.

Respectfully submitted,



LAWRENCE W. CRANE

101 Whitsett St
Greenville, SC 29601

Date: May 19, 2010

Other Counsel of Record: Karen Christine Ratigan, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

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GREENVILLE SC 296

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Simpson*

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