

LAW OFFICE OF BRIAN P. JOHNSON, LLC

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RECEIVED

JUL 26 2017

July 21, 2017

VIA U.S. POSTAL

S.C. SUPREME COURT

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

**Re: Ralph Beverly Hayes vs. State of South Carolina**  
**Case No.: 2015CP2303246**

Dear Mr. Shearouse:

I am writing regarding the above referenced case. Please find the Applicant's Notice of Appeal and Proof of Service attached.

If you wish to discuss the foregoing or need additional information please contact me at 864-331-1630.

Thank you.

Sincerely,



Brian P. Johnson, Esquire

BPJ/lf  
cc: Attorney General

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
HONORABLE GEORGE C. JAMES, JR.

RECEIVED

JUL 26 2017

S.C. SUPREME COURT

Case No.: 2015CP2303246

RALPH BEVERLY HAYES, )  
)  
PETITIONER, )  
)  
vs. )  
)  
STATE OF SOUTH CAROLINA )  
)  
RESPONDENT. )  
)

NOTICE OF APPEAL

The Petitioner, Ralph Beverly Hays, hereby appeals the Honorable George C. James, Jr.'s, July 22, 2016, order denying post-conviction relief to the Petitioner. A copy of the order on appeal is attached to this notice. Counsel for the Petitioner received a copy of the order denying post-conviction relief on June 26, 2017.

Respectfully submitted,



Brian P. Johnson, Esq.  
522 North Church Street  
Greenville, SC 29601  
Attorney for Petitioner

Date: July 21, 2017  
Other counsel of record: Attorney General's Office  
P.O. Box 11549/Columbia, SC 29211

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
HONORABLE GEORGE C. JAMES, JR.

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JUL 26 2017

S.C. SUPREME COURT


Case No.: 2015CP2303246

RALPH BEVERLY HAYES, )  
)  
PETITIONER, )  
)  
vs. )  
)  
STATE OF SOUTH CAROLINA )  
)  
RESPONDENT. )  
)

**PROOF OF SERVICE**

I, Brian P. Johnson, Esq., certify that I have today served the within notice of appeal upon the Respondent by depositing a copy in the United States Mail, postage prepaid, addressed to the attorney of record, Attorney General's Office, at P.O. Box 11549 Columbia, SC 29211.

Respectfully submitted,

  
\_\_\_\_\_  
Brian P. Johnson, Esq.  
522 North Church Street  
Greenville, SC 29601  
Attorney for Petitioner

Date: July 21, 2017

RECEIVED

JUL 26 2017

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )  
 )  
Ralph Beverly Hayes, )  
S.C.D.C. No. 320369, )  
 )  
Applicant, )  
 )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
 )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
2015-CP-23-3426

S.C. SUPREME COURT  
FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMMER  
2016 AUG 3 PM 2 15

ORDER OF DISMISSAL

ENTERED COMPUTER

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on May 28, 2015. Respondent filed its Return on or about November 30, 2015. An evidentiary hearing into the matter was convened on June 14, 2016, at the Greenville County Courthouse. Applicant was present at the hearing and was represented by Brian Johnson, Esquire. Also present was Applicant's trial counsels, Caroline M. Horlbeck, Esquire, and Teal A. Johnson, Esquire. Applicant and Ms. Horlbeck testified. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office.

**PROCEDURAL HISTORY**

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the October 2011 term of General Sessions for murder (2011-GS-23-7681, count 1) and possession of a weapon during commission of a violent crime (2011-GS-23-7681, count 2). Caroline Horlbeck, Esquire and Teal Johnson, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On October 17,

2012, the Honorable G. Edward Welmaker sentenced the Applicant to concurrent terms of life imprisonment for murder and 5 years for possession of a weapon during commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. Susan B. Hackett, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Hayes, Op. No. 2014-UP-385 (S.C. Ct. App. filed November 5, 2014). The South Carolina Supreme Court denied the Applicant's subsequent petition for writ of certiorari on March 18, 2015. The Remittitur was sent on March 20, 2015.

#### **Allegations**

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

1. Denial of Sixth and Fourteenth Amendment.

At the evidentiary hearing, Applicant proceeded on the following issues:

1. Ineffective assistance of trial counsel:
  - a. Failure to move to strike Jurors Adcock and Redding for cause;
  - b. Failure to object to the State's closing argument;
  - c. Failure to sequester witness;
  - d. Failure to object to leading;
2. Ineffective assistance of appellate counsel;
  - a. Failure to raise issue on appeal.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject



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convictions, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court makes the following findings of fact and conclusions of law based upon all of the probative evidence presented.

### **Ineffective Assistance of Trial Counsel**

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, 442, 334 S.E.2d 813, 814 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced 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.C. 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)).

#### **Failure to Move to Strike Jurors Adcock and Redding for Cause**

This Court finds Applicant has failed to meet his burden with respect to his allegation that trial counsel was ineffective for failing to strike jurors Adcock and Redding for cause. Juror Adcock was seated at a time during jury selection when the applicant had used nine of his ten strikes. Juror Redding was seated after the applicant had used all ten of his strikes. Even though Ms. Horlbeck testified that she probably should have moved to strike Ms. Redding for cause, if such a motion had been made, it would likely not have been granted. The same goes for Mr. Adcock. Both jurors stated that their fathers had been charged with criminal domestic violence. The trial judge properly asked follow-up questions, and both jurors stated they could be fair. There was no basis to strike either of them for cause, so counsel was not deficient for failing to so move. Though counsel may, in hindsight, have a different view of her actions, Applicant is not entitled to a new trial for the sole purpose of presenting a "fancier" case. See Simpson v. Moore, 367 S.C. 587, 598 n. 2, 627 S.E.2d 701, 707 n.2 (2006). Further, even if both counsels were deficient with respect to this allegation, there is no evidence of prejudice because both jurors said they could be fair. Applicant has failed to present any evidence otherwise, as is his burden. See Butler, supra. Accordingly, this allegation is denied and dismissed.

#### **Failure to Object to State's Closing Argument**



is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. 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)).

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#### **Failure to Object to State's Closing Argument**

Applicant also alleged counsel was ineffective in failing to object to an improper comment on the fact from the solicitor's closing argument. A solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). During the state's closing argument, the solicitor said "[n]o, there was no knife found because it's not there because he took it with him." This was not improper argument, as it was appropriate for the solicitor to argue inferences to be derived from the evidence. There was no knife found at the scene, so there is a logical (and perhaps inescapable) inference that whoever committed the crime took the murder weapon away from the scene. As Applicant has failed to meet his burden with respect to this allegation, it is denied and dismissed.

#### **Failure to Sequester Witness**

Applicant also alleged counsel was ineffective for failing to move to sequester witness White during *in camera* testimony of Detective Miller regarding the lineup and the identification made by witness White. Perhaps this was deficient performance in a general sense, as the very reason for sequestration is to make sure witnesses do not base their own testimony on the testimony of others. However, there is nothing in the record to establish whether White was paying close attention during the proffer or that he heard something from Detective Miller that changed his own testimony. White was very thoroughly cross-examined during his *in camera* testimony and in front of the jury. Applicant has failed to meet his burden to show prejudice.

#### **Failure to Object to Leading**



Applicant alleged counsel was ineffective in failing to object to a purported leading question asked of witness White as to the date he encountered Applicant. The solicitor was questioning White about the date in June that he encountered the applicant and asked "so this was in June?" White responded "Yes", and the solicitor asked "Maybe June 9<sup>th</sup>, does that sound about right?", and White responded "Yes". While perhaps leading, this was not prejudicial at all because the totality of White's testimony establishes his version of events as occurring shortly after the murder. If the objection to leading had been made, and the trial judge sustained the objection, there would have been no difference in White's overall testimony.

#### **Ineffective Assistance of Appellate Counsel**

Applicant also alleges appellate counsel was ineffective for failing to include a ground based on the solicitor showing the jury a photo.

A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999).

To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id., citing Evitts, 469 U.S. 387, 105 S.Ct. 830 (1999). Appellate counsel is not required to raise every nonfrivolous issue that is presented by the record,<sup>1</sup> but instead has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983).

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“For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy....” Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754, 103 S.Ct. 3308 (1983)); see also Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985) (Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. *Id.* Applicant has failed to meet his burden with respect to each of his allegations.

Applicant has failed to meet his burden. Trial counsel objected to the photograph, the trial judge sustained the objection, and promptly instructed the jury not to consider the photo in their deliberations. The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011). The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *Id.* No such abuse of discretion occurred here. This Court agrees with the trial judge that the showing of the photo, while objectionable, was not a basis for a mistrial. In this Court’s view, the appellate court would not have reversed the conviction even if it had been raised on appeal.

A handwritten signature in black ink, appearing to be 'R. J. ...', is located in the bottom right corner of the page.

**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, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

*[Signature follows]*

Handwritten signature or initials, possibly reading 'B. J. 8'.

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*[Signature follows]*

*Ba/8*

**CONCLUSION**

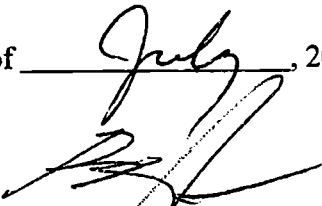
Based on the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

**IT IS THEREFORE ORDERED**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 22 day of July, 2016.

  
\_\_\_\_\_  
GEORGE C. JAMES, JR.  
Presiding Judge  
Thirteenth Judicial Circuit

\_\_\_\_\_, South Carolina



STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
CASE NO: 2015CP2303426

FILED-CLERK OF COURT  
GREENVILLE CO. SC.  
PAUL B. WICKENSIMER  
2015 AUG 3 PM 2:15

**Ralph Beverly Hayes 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: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

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

Dated at Greenville, South Carolina, this .

Court Reporter:

\_\_\_\_\_  
PRESIDING JUDGE - James C James Jr

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

\_\_\_\_\_  
Brian P. Johnson 522 North Church Street  
Greenville, SC 29601

\_\_\_\_\_  
Patrick Schmeckpeper PO Box 11549 Columbia,  
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

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

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2015CP2303426

2016 AUG 3 PM 2:15

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMER

Ralph Beverly Hayes vs. South Carolina State Of

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SCRCP (Vol. Nonsuit);  Rule 43(k), SCRCP (Settled);  Rule 12(b), SCRCP;  Rule 41(a), SCRCP;  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Rule 40(j) SCRCP;  Bankruptcy;  
 Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  
 Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

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

Dated at Greenville, South Carolina, this .

Court Reporter:

\_\_\_\_\_  
PRESIDING JUDGE - James C James Jr

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

Brian P. Johnson 522 North Church Street  
Greenville, SC 29601

Patrick Schmeckpeper PO Box 11549 Columbia,  
SC 29211

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

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

Law Office of Brian P. Johnson, LLC  
522 North Church Street  
Greenville, SC 29601



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0000284392 JUL 21 2017  
MAILED FROM ZIP CODE 29601  
**\$ 000.88<sup>0</sup>**

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

29211 11330 BO99 A POSTNET barcode consisting of vertical bars of varying heights, used for automated mail sorting.