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December 10, 2012

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

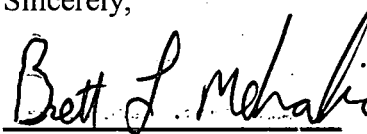
RE: Heyward Davis, Jr., v. State of South Carolina, Case No. 2009-CP-22-01540

Dear Ms. Kitchings:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Proof of service of the notice of appeal on the respondent.
- (2) A copy of the order which is to be challenged on appeal.
- (3) No filing fee has been included because this appeal is a belated appeal of the denial of Appellant's post-conviction relief action. Rule 240(d), SCACR.

Sincerely,



Brett L. Mehalic
Post Office Box 15849
Surfside Beach, South Carolina 29587
(843) 232-0750
Attorney for Appellant

cc:

Tyson Andrew Johnson, Esquire
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Attorney for Respondent
(803) 734-3737

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DEC 19 2012

S.C. Supreme Court

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DEC 12 2012

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2009-CP-22-01540

Heyward Davis, Jr.,

Appellant,

v.


State of South Carolina,

Respondent.

NOTICE OF APPEAL

Heyward Davis, Jr. appeals the order of the Honorable Larry B. Hyman, Jr., dated October 12, 2010. Appellant received written notice of entry of this order on October 25, 2010. Appellant was granted a belated appeal of this order by the Honorable Steven H. John in his order dated November 20, 2012 in case number 2011-CP-22-1620.

December 10, 2012



Brett L. Mehalic
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Attorney for Appellant

Other Counsel of Record:
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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on December 10, 2012, addressed to its attorney of record, Tyson Andrew Johnson, Esquire, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211.

December 10, 2012



Brett L. Mehalic
Post Office Box 15849
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(843) 232-0750
Attorney for Appellant

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S.C. Supreme Court SC Court of Appeals

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)
Heyward Davis, Jr., # 321720,)
))
Applicant,)
))
v.)
State of South Carolina,)
))
Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2009-CP-22-1540

FILED
GEORGETOWN COUNTY S.C.
2010 OCT 19 AM 10:52
ALMA Y. WHITE
CLERK OF COURT

**ORDER DENYING
POST-CONVICTION RELIEF**

This matter came before the Court pursuant to an Application for post-conviction relief filed September 23, 2009, by Heyward Davis, Jr. Respondent made a Return on October 22, 2009. An evidentiary hearing was convened at the Georgetown County Courthouse on August 26, 2010. The Applicant was present in court and represented by Paul Archer, Esquire. The Respondent was represented by Christina J. Catoe, Assistant Attorney General.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to convictions from Georgetown County. The Applicant was indicted in June 2006 for assault and battery with intent to kill (ABWIK) (2006-GS-22-0529), assault with intent to kill (AWIK) (2006-GS-22-0530), burglary in the first degree (2006-GS-22-0531) and possession of a weapon during the commission of a violent crime (2006-GS-22-0532). Charles D. Barr, Esquire, represented the Applicant. On May 1-2, 2007, the Applicant was tried before the Honorable Paul M. Burch, and a jury. He was convicted of all charges, and Judge Burch sentenced him to 20 years for ABWIK, 10 years for AWIK, 25 years for burglary first, and 5 years for the weapon charge. All sentences were to run concurrently. A timely notice of appeal was filed, and an

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appeal was perfected on the Applicant's behalf by LaNelle C. DuRant, Esquire. On April 27, 2009, the South Carolina Court of Appeals affirmed the conviction (2009-UP-166), and the case was remitted to the circuit court on May 13, 2009.

STANDARD OF REVIEW

In a post-conviction relief proceeding, the applicant bears the burden of proving his allegations by a preponderance of the evidence. Caprood v. State, 338 S.C. 103, 109-110, 525 S.E.2d 514, 517 (2000); Rule 71.1(e). "Where ineffective assistance of counsel is alleged 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.'" Dalton v. State, 654 S.E.2d 870, 873 (Ct. App. 2007) (citing Strickland v. Washington, 466 U.S. 668, 669 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985)). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id.

A two-pronged test is used to evaluate allegations of ineffective assistance of counsel. Dalton v. State, 654 S.E.2d 870, 873 (Ct. App. 2007). "In order to prove that counsel was ineffective, a PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Smith v. State, 375 S.C. 507, 515, 654 S.E.2d 523, 527-28 (2007) (citations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Id. (citations omitted). "Furthermore, when a defendant's conviction is challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. Id. (citations omitted). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable

professional judgment in making all significant decisions in the case.” Id. (citations omitted). The applicant must overcome this strong presumption in order to obtain relief. Stalk, supra (citation omitted).

Allegations

In his Application, Mr. Davis alleged that his custody was unlawful for the following reason(s):

- (1) Ineffective assistance of trial counsel: failure to properly challenge, by way of objection, request for curative instruction, or motion for mistrial, improper statements made by the solicitor in closing argument, as reflected at page 244, lines 2-15; page 245, lines 3-6; and page 245, lines 9-11.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the PCR hearing, this Court had before it the Applicant’s PCR file, the records of the Georgetown County Clerk of Court regarding the conviction, the Applicant’s records from the South Carolina Department of Corrections, the trial transcript, and the appeal records. The Applicant testified in his own behalf at the hearing. At the conclusion of the Applicant’s brief testimony, the State made a motion for summary judgment. Counsel for the State argued that the Applicant’s testimony raised no questions of fact; that the testimony presented no meritorious issues of ineffective assistance of counsel, and that the State was entitled to judgment as a matter of law. This Court granted the motion, finding that the Applicant’s contentions were clearly and entirely refuted by the trial transcript.

Regarding the allegation raised in the PCR Application, which is a matter of law regarding an improper closing argument by the solicitor, this Court finds that counsel was not

ineffective for failing to object to the solicitor's closing argument. The first comment referenced by the Applicant (Trial Transcript, page 244, lines 2-15) was an argument regarding the credibility of the victims, which is permissible. See e.g., Smith v. State, 375 S.C. 507, 522-23 654 S.E.2d 523, 531-32 (2007). The second comment referenced by the Applicant (Trial Transcript, page 245, lines 3-6) was a similar argument regarding credibility and the witnesses' motives, or lack thereof, to lie. This was also permissible. See Smith v. State, supra; see also Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). Finally, the last comment referenced by the Applicant (Trial Transcript, page 245, lines 9-11) was an argument that the victims' testimony was corroborated by the evidence presented at trial. Contrary to the Applicant's argument in his Memorandum of Law attached to his PCR Application, this was not an improper comment asserting that the solicitor had *independently* corroborated the victim's testimony in violation of Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002). In any event, the Applicant's trial counsel thoroughly responded to the solicitor's comments in his own closing argument, and the solicitor's comments were harmless in light of the overwhelming evidence in this case. See State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006).

CONCLUSION

Accordingly, this Court finds and concludes that the Applicant failed to show any entitlement to post-conviction relief. Therefore, the PCR Application must be denied and dismissed with prejudice for failure to meet the burden of proof under Strickland v. Washington, 466 U.S. 668 (1984), and Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

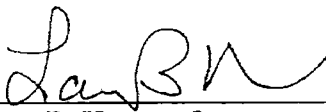
Counsel's attention is directed to Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), and Rule 59(e), SCRPC, regarding the filing of a Motion to Alter or Amend should counsel believe this Order fails to adequately address all issues raised as required by S.C. Code Ann. §

17-27-80 (2003). This Court further advises that if Applicant desires to secure appellate review of this Order, a notice of appeal must be filed and served **within thirty (30) days** of the service of this Order. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

IT IS THEREFORE ORDERED THAT:

1. The Application for post-conviction relief is **DENIED and DISMISSED with PREJUDICE.**
2. The Applicant must remain in the custody of the State for completion of his sentence.

AND, IT IS SO ORDERED this 12 day of ~~September~~^{OCTOBER}, 2010.



Larry B. Hyman, Jr.
Presiding Judge
Fifteenth Judicial Circuit

Coway, South Carolina



BOAN LAW FIRM, LLC
 Post Office Drawer 15849
 Surfside Beach, SC 29587

*Keyward
 Davis, Jr.*

The Honorable Jenny Abbott Katchings
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