

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM UNION COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson, Circuit Court Judge

Case No. 2010-CP-44-0410

Luther Pearson, #327560,

Appellant

vs.

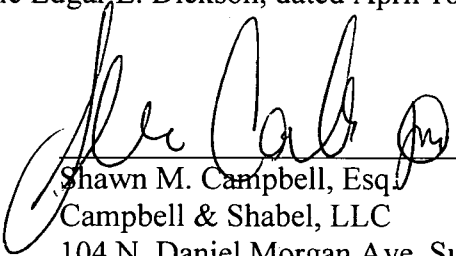
State of South Carolina,

Respondent

NOTICE OF APPEAL

Luther Pearson, South Carolina Department of Corrections Number 327560, hereby appeals the order of the Honorable Edgar E. Dickson, dated April 18, 2013 in Case Number 2010-CP-44-0410.

May 15, 2013


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Other Counsel of Record:

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S.C. SUPREME COURT

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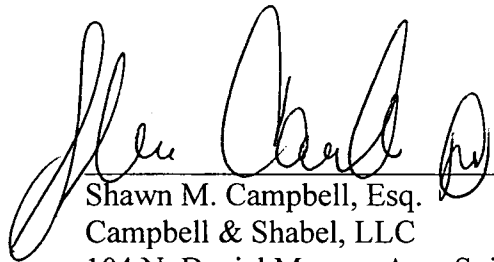
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PROOF OF SERVICE

I certified that I have served the Notice of Appeal by depositing a copy of it in the United States Mail, postage prepaid, on the State of South Carolina, addressed to its attorney of Record, J. Rutledge Johnson, Assistant Attorney General, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549

May 15, 2013



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STATE OF SOUTH CAROLINA)
COUNTY OF UNION)

IN THE COURT OF COMMON PLEAS)
SIXTEENTH JUDICIAL CIRCUIT)

Luther Pearson, Sr., #327560,)

2010-CP-44-0410)

Applicant,)

ORDER OF DISMISSAL)

v.)

WILLIAM F. GAULT)
CLERK OF COURT)
UNION, SC)

FILED FOR RECORD)
2013 MAY 9 PM 1 31)

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 8, 2010. The Respondent made its Return on May 3, 2011. An evidentiary hearing into the matter was convened on October 8, 2012, at the Moss Justice Center in York, SC. Shawn Campbell, Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Doug Brannon, Esquire also testified. This Court had before it a copy of the records of the Union County Clerk of Court, records from the South Carolina Department of Corrections, and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Union County. The Applicant was charged by direct indictments for Lewd Act Upon a Child (2007-GS-44-0416), and Criminal Sexual Conduct with a Minor, second degree (2007-GS-44-0417). The Applicant was represented by Douglas Brannon, Esquire, and David Collins, Esquire. On February 12, 2008, the Applicant

proceeded to a jury trial before the Honorable R. Knox McMahon. On February 14, 2008, the jury found the Applicant not guilty of Criminal Sexual Conduct with a Minor, and guilty of Lewd Act upon a Child. On February 15, 2008, Judge McMahon sentenced the Applicant to confinement for fifteen (15) years.

A notice of appeal was filed, and an appeal was perfected on the Applicant's behalf by Lanelle C. Durant, Esquire.¹ The South Carolina Court of Appeals affirmed his convictions and sentences. State v. Pearson, 2010-UP-216 (filed March 15, 2010). The Remittitur was sent on March 31, 2010.

II.

In his current Application, the Applicant alleges he is being held unlawfully for the following reasons:

1. "Not given a fast and speedy trial . . . and was incarcerated unjustly for an inappropriate bench warrant while represented by legal counsel"
 - a) "Case was dragged out to get me to plead guilty, arrested for failure to appear for court while having an

¹ The following issues were raised on appeal:

- (1) Did the trial court err in not allowing appellant to question the victim concerning her fifteen pages of school disciplinary actions under Rule 608 SCRE because the records were indicative of her credibility as a witness and character for truthfulness?
- (2) Did the trial court err in not allowing appellant to cross examine the victim's teacher, Ms. Balkum, on specific instances of the victim's conduct after the teacher testified that the victim had no disciplinary actions in her class room when the school records indicated that the victim did?
- (3) Did the trial court err in not granting a mistrial or providing a curative instruction when the State introduced a statement about the first blood sample taken from appellant in 2005 which was not admissible based on an insufficient chain of custody?

attorney who admitted to the courts that he failed to notify me for court hearings. This caused me to be arrested and was repeatedly denied bond after turning myself in. This caused me not to be able to seek affordable counsel which resulted in my imprisonment."

2. "Not properly represented by law by my legal representatives throughout my entire case"
 - a) "Attorney failed to notify me for court"
 - b) "He also failed to tell me that he was a member of the family of the alleged victim"
 - c) "Not filing appropriate legal motions on my behalf"
 - d) "Also not objecting to 2nd DNA test after State admitted to botching"

3. "Not properly sentence according to justice as an alleged first time offender for the alleged crime which I was not originally indicted on given the max"
 - a) "Initially arrested for Criminal Sexual Conduct I and II, not Lewd Act. But was read my indictment for Lewd Act against a minor on the third day of trial. Then given the maximum sentence for the crime as a first time offender for a nonviolent offense being found not guilty of CSC I and CSC II. Not to mention the repeated hung jury that was forced to [illegible]."

At the hearing, the Applicant proceeded on his claims of ineffective assistance of trial counsel.

SUMMARY OF TESTIMONY

The Applicant testified he was convicted of lewd act upon a minor child, but was acquitted of the criminal sexual conduct of a minor charge. He stated he alleged molested Victim by holding her down and ripping her clothes half-way down Victim's body. He testified ^{that he} originally hired Albert Smith, who represented him for around three to four years in various matters. He stated Mr. Smith

was related to the victim of this case. He then stated there was a bench warrant for his arrest for failure to make an appearance at a hearing. The Applicant testified Doug Brannon (Counsel) was his counsel for only thirty days prior to trial and he met with Counsel once before trial. He did not recall reviewing the discovery with Counsel. The Applicant asserted Counsel was ineffective for failing to interview and call witnesses at trial on his behalf; specifically, Victim's band teacher, a state trooper, his two sons, and his girlfriend. He further stated his story did not come out at trial. The Applicant also alleged Counsel did not cross-examine Victim concerning Victim's shoplifting charge. Additionally, the Applicant stated Counsel did not cross-examine Victim vigorously enough and that Counsel should have been more aggressive. He lastly stated Victim as lying about his condom usage in the case.

On cross-examination, the Applicant admitted he did not have any of the witnesses that Counsel allegedly failed to interview at the PCR hearing to testify on his behalf. Additionally, he admitted he actually did testify at trial and explained his version of the facts.

Counsel testified he has practiced criminal defense and family law for thirteen years. He stated he was appointed to the Applicant's case months before trial and had adequate time to prepare this case. Counsel testified he did not 'go easy' on Victim's cross-examination. He stated criminal sexual conduct of a minor is a heinous crime to defend against in front of jury, and he believed it was not strategically sound to 'beat-up' on female child victim. Counsel further testified he got Victim to admit everything he needed her to admit. He asserted he attacked Victim's credibility and did not need to ask Victim about her shoplifting charge, as he elicited that information from Victim's mother, who testified on the Applicant's behalf. Counsel stated he did not call Victim's band teacher to testify as it would have been duplicative. He also testified he found no reason to call Victim's

band teach after the trial judge ruled Ms. Balkum, another of Victim's teachers, was not allowed to testify about Victim's behavior in school. Additionally, Counsel testified he did not asked the Applicant's sons certain questions because, with their involvement with Victim, they would have been admitting to criminal sexual conduct with a minor. However, Counsel did call one of the Applicant's sons to testify about Victim's demeanor on the car ride to school on the morning of the incident. Counsel also testified the DNA found on Victim's panties, which matched the Applicant (with a probability of 1 in 1 quintillion), was a product of inevitable discovery.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court also has read the trial transcript, all of which assists the Court in judging their credibility. The Court finds the testimony of Doug Brannon, Applicant's trial counsel, very credible. This Court finds the Applicant's testimony concerning ineffectiveness of trial counsel is not credible.

Set forth below are the relevant findings of facts and conclusions of law as required pursuant to 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), SCRCP). 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." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (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. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing Strickland*. Second, 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.C. at 117-18, 386 S.E.2d at 625.

Failure to Interview/Call Witnesses

The Applicant alleges Counsel was ineffective for failing to interview and call witnesses on his behalf during the Applicant's trial.

The Applicant testified Counsel failed to call Victim's band teacher, a state trooper, his two sons, and his girlfriend. Counsel testified Victim's band teacher would have created cumulative testimony and did have a reason to call her as the trial judge had already ruled a different teacher was not allowed to testify about Victim's behavior in school. Additionally, Counsel testified he did not call one of the Applicant's sons because the son would have been admitting to criminal sexual conduct of a minor himself. The other son actually was called to testify on the Applicant's behalf. Further, Counsel called Victim's mother/Applicant's girlfriend, who testified very favorably on the Applicant's behalf.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An 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. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

This Court finds Counsel was effective in his representation of the Applicant in this case. Counsel did, in fact, call some of these witnesses on the Applicant's behalf at trial. Counsel also had a valid reason for not calling Victim's band teacher as duplicative and more likely would not have been allowed to testify. Most importantly, the Applicant, at the PCR hearing, failed to present any of these witnesses or evidence of what they would have testified to that would have affected the outcome of the Applicant's trial. Therefore, no prejudice from Counsel's alleged error can be shown. Accordingly, this allegation is denied.

Cross-examination of the Victim

The Applicant alleges Counsel was ineffective for failing to aggressively cross-examine Victim in this case.

The Applicant testified Counsel 'took it easy' on Victim during cross-examination, and Counsel should have been more aggressive in attacking her credibility. He also stated Counsel failed

to cross-examine Victim concerning her shoplifting charges. Counsel testified he did not 'take it easy' on Victim, but that criminal sexual conduct is a serious crime to defend against in front of a jury. Counsel stated, in his professional opinion, it was not a wise decision to 'beat-up' on a 'little girl' in front of the jury. Counsel also testified he was able to extract all of the necessary information from Victim on cross-examination. Counsel further asserted he attacked Victim's credibility, but found it unnecessary to ask about her shoplifting charges, as this information was brought to light through Victim's mother's testimony.

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions Counsel allegedly failed to ask, and did not present any testimony showing the Victim's answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense.

Additionally, our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Counsel articulated valid strategic reasons for not cross-

examining Victim concerning her shoplifting charges. Further, Counsel was able to discredit Victim using other tactics and angles. The Applicant has not shown that Counsel was deficient in that choice of tactics.

This Court finds the Applicant has failed to show that the outcome of his case would have been different had Counsel cross-examined Victim in a different manner. Cherry, supra. This Court also finds Counsel thoroughly discredited Victim in direct relation to the theory of the Applicant's defense: that Victim was upset about her father and mother separating and did not want her mother dating the Applicant. Additionally, the Applicant has failed to prove any resulting prejudice from Counsel's choice of tactics. Accordingly, this allegation is denied.

CONCLUSION

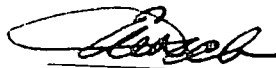
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED!

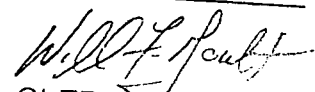


Edgar W. Dickson
Presiding Circuit Court Judge
Sixteenth Judicial Circuit

April 18, 2013

Orangeburg, South Carolina

**JUDGEMENT SIGNED AND
ENTERED UP** 5-9-13


CLERK OF COURT

Shawn M. Campbell
Kenneth P. Shabel

Campbell & Shabel

ATTORNEYS AT LAW

OF COUNSEL:
Sean Giovannetti

Sender's Email: jmoss@gc-lawfirm.com

Wednesday, May 15, 2013

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MAY 22 2013

VIA CERTIFIED MAIL

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

S.C. SUPREME COURT

**Re: Luther Pearson, # 327560 v. Sate of South Carolina
2010-CP-44-0410**

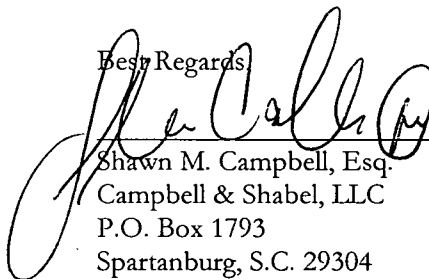
Dear Mr. Shearouse:

Enclosed for filing are an original and a copy of a notice of appeal in the above-referenced case. I have been appointed to serve as attorney for the PCR applicant, Luther Pearson, in this action. 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.

Insofar as this is an appeal from a Post-Conviction Relief case, I am not enclosing a filing fee, as I believe such fees are waived in these cases.

Best Regards,



Shawn M. Campbell, Esq.
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P.O. Box 1793
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Attorney for Appellant

cc: client
J. Rutledge Johnson, Assistant Attorney General

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