

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas
HONORABLE BRIAN M. GIBBONS
2020-CP-11-00375

RECEIVED
MAR 17 2023
S.C. SUPREME COURT

JASON SIMMONS, SCDC# 382078

APPELLANT,

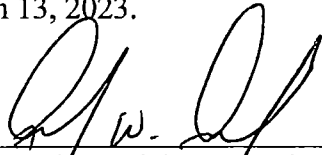
vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Jason Simmons appeals the denial of his Post-Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Brian M. Gibbons, Circuit Judge on February 13, 2023 an Order issued on March 7, 2023 and filed on March 9, 2023. The Appellant received notice of the judgment on March 13, 2023.



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MAR 17 2023

STATE OF SOUTH CAROLINA)
COUNTY OF CHEROKEE)

IN THE COURT OF COMMON PLEAS)
FOR THE SEVENTH JUDICIAL CIRCUIT)
SOUTH CAROLINA SUPREME COURT)

Jason Simmons, #382078,)
Applicant,)

Case No.: 2022-CP-11-00375

v.)

ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2023 MAR -9 A 11: 01
BRANDY W. MCBEE

This matter comes before this Court by way of Applicant's post-conviction relief application filed June 1, 2022. Respondent made its return on July 29, 2022, requesting an evidentiary hearing be convened. An evidentiary hearing was held on February 13, 2023, at the Spartanburg County Courthouse. Rodney W. Richey, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's wife and Counsel Michael Morin, Esquire, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Cherokee County Clerk of Court. During its April 2017 term, the Cherokee County Grand Jury indicted Applicant for first degree criminal sexual conduct with a minor (2017-GS-11-00580). Applicant was represented by Michael Morin, Esquire. Assistant Solicitor Matt Kendall and Kimberly Lesknic, Esquires, of the Seventh Circuit Solicitor's Office prosecuted the case. On January 8-10, 2020, Applicant proceeded to trial before the Roger

M. Young, circuit court judge, and a jury. Judge Young sentenced Applicant to forty years' imprisonment.

Applicant filed a timely notice of appeal on January 21, 2020 that was perfected by Susan B. Hackett, Esquire, through filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Simmons*, 2022-UP-050 (S.C. Ct. App. filed Feb. 9, 2022). The remittitur was issued on March 11, 2022.

Summary of Relevant Facts

The minor victim testified that she used to spend the night at Applicant's house. (Tr. 81-82). She stated that when Misty, Applicant's partner, went to sleep, Applicant sexually assaulted her. (Tr. 83). She stated he assaulted her in the living room. (Tr. 84). He touched her both inside and outside her private area. (Tr. 84-85). He used an electric toothbrush. (Tr. 85). Applicant gave her chocolate while the abuse was going on. (Tr. 86). This occurred when the victim was four years old. (Tr. 86). She stated that she told her mother about the abuse, spoke to an interviewer at CAC, and went to the hospital. (Tr. 86).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Victim changed story.
2. Nurse misdated evidence.
3. Lawyer failed to object.
4. Lawyer got email from D.A. prior to . . . got picture of evidence during sentencing.

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective assistance of counsel:
 - a. For erroneously telling Applicant not to plead because he would win at trial.
 - b. For not sharing all discovery with Applicant.
 - i. Failure to discuss DNA results.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant stated he had a jury trial on his underlying criminal charge and that he was represented by Counsel. He stated that he thought Counsel was ineffective. He stated that Counsel told him he would win at trial. He stated that he discussed the DNA test with Counsel, who told him that the numbers shown were not correct. He stated he did not discuss the impact of testifying at trial with Counsel. He stated that he had a ten year offer on the table, which he rejected because Counsel told him he would win at trial. He stated he had six strokes and did not recall accepting or rejecting plea. He stated he did not talk about the child's underwear in his attic with Counsel. He stated that the State said he manipulated the video footage to make it look like it happened on the night of the incident when it did not. He stated that the video footage was not manipulated. He stated he testified to this at trial as well. He stated he did not know about all the evidence against him.

Wife Testimony

Applicant's wife testified that she has been married to Applicant since 2015. She stated that she was with Applicant at the time of the incident. She stated that Applicant was given a ten-year plea offer that was discussed on the trial date. She stated Counsel told Applicant he could not tell him what to do but said that he had a good case. She stated that she was present during discussions regarding DNA results and security. She stated that the underwear was mentioned. She stated Counsel told Applicant he had an eighty-five percent chance of winning. She stated that Applicant likely would have pled if he knew he had an eighty-five percent chance of losing.

Counsel Testimony

Counsel testified that the evidence against Applicant included DNA evidence, jail calls, vaginal swabs, and security footage. He stated that Applicant was offered a ten-year plea offer to the lesser-included offense. He stated he never told Applicant he had an eighty-five percent chance of winning. He stated that the highest likelihood of success he has ever given a client is fifty percent. He stated that if he told Applicant eighty-five percent, it was regarding chances of losing, not winning. He stated he thought that pleading was in Applicant's best interest and that he thought he told Applicant to plead.

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. Before this Court are Applicant's Cherokee County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, the direct appeal records, and the current PCR application. 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 conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984);

Butler, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRPC ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695.

Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Failure to Review Discovery

Applicant claims Counsel failed to review discovery with him. Specifically, he stated Counsel did not review the DNA results with him. Counsel credibly testified that he did review this evidence with him. Accordingly, this claim is dismissed and relief denied accordingly.

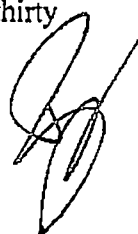
Erroneously Telling Applicant Not to Plead

Applicant claims counsel was ineffective for erroneously telling Applicant not to plead because he would win at trial. Counsel credibly testified that he thought pleading was in Applicant’s best interest and that he had little chance of success at trial. This is substantiated by the overwhelming evidence of guilt exhibited in the trial transcript. Accordingly, relief is denied.

Conclusion

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

This Court notifies Applicant that he must file and serve a notice of appeal within thirty

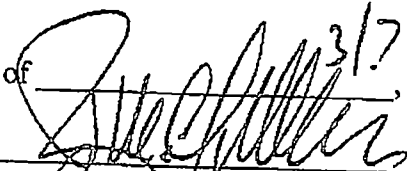


days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this _____ day of _____, 2023.



BRIAN M. GIBBONS
Presiding Judge
Seventh Judicial Circuit


_____, South Carolina.