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June 18, 2013

VIA UNITED STATES POSTAL SERVICE

Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: *Adam Lee Berard, #310249 v. State of South Carolina*
Case No.: 2012-CP-46-05386

Dear Madams and Sirs,

Please find enclosed for filing the Petitioner's Notice of Appeal of Order denying Post-Conviction Relief filed on June 3, 2013, and Proofs of Service upon J. Rutledge Johnson, Loriene French and Adam Lee Berard.

Respectfully submitted,

Jennifer McQueen Creech

Enclosure

Copy: J. Rutledge Johnson
Loriene French
Adam Lee Berard

RECEIVED
JUN 21 2013
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Honorable John C. Hayes, III, Circuit Court Judge

Case No.: 2012-CP-46-05386

Adam Lee Berard, #310249..............................Petitioner,

v.

State of South Carolina..................................Respondent,

---

NOTICE OF APPEAL

Adam Lee Berard appeals the Honorable John C. Hayes' June 3, 2013, Order denying Post-Conviction Relief. Undersigned counsel received notice of entry of the filed order on June 6, 2013. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

Jennifer McQueen Creech
514 Oakland Avenue, Suite 100
Rock Hill, SC 29730
Attorney for Petitioner

RECEIVED
JUN 21 2013
S.C. SUPREME COURT

June 18, 2012

Other counsel of record:
J. Rutledge Johnson
P.O. Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Honorable John C. Hayes, III, Circuit Court Judge

Case No.: 2012-CP-46-05386

Adam Lee Berard, #310249..............................Petitioner,

v.

State of South Carolina.................................Respondent,

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PROOF OF SERVICE

I, Lauren E. Rickman, certify that I have today served the within Notice of Appeal of Order denying Post-Conviction Relief filed on June 3, 2013 upon the Respondent, by depositing a copy of it in the United States Mail, addressed to the attorney of record, J. Rutledge Johnson, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 18th day of June, 2013.

Lauren E. Rickman
Assistant to Jennifer McQueen Creech
514 Oakland Avenue, Suite 100
Rock Hill, SC 29730

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP4605386

Adam Lee Berard	South Carolina State Of
PLAINTIFF(S)	DEFENDANT(S)
Submitted by: Judge John C. Hayes, III	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: ____________

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ 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; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER

ORDER INFORMATION

This order ☐ ends X Does not end the case.

Additional Information for the Clerk: ____________

June 3, 2013

S/ John C. Hayes, III
Circuit Court Judge

2049
Judge Code

June 3, 2013
Date

CPFORM4M
SCCA SCRCP Form 4C (Revised 12/2011)

For Clerk of Court Office Use Only

This judgment was entered on **June 3, 2013**, and a copy mailed first class or placed in the appropriate attorney's box on **June 3, 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

Jennifer M. Creech
514 Oakland Ave Ste 100
Rock Hill, SC 297303532

ATTORNEY(S) FOR THE PLAINTIFF(S)

James Rutledge Johnson
PO Box 11549
Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

Court Reporter

CPFORM4M
SCCA SCRCP Form 4C (Revised 12/2011)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

C.A. No.: 2010-CP-46-5386

Adam Lee Berard, #310249,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER

FILED-RECEIVED
2013 JUN -3 PM 3:00
DAVID HAMILTON
C.C.C.P.&G.S.
YORK COUNTY, SC

The Applicant filed this application for Post-Conviction Relief December 17, 2010. The Court heard this matter in open court on May 17, 2013. The Applicant was represented by Jennifer Ash, Esquire, the State by J. Rutledge Johnson, Esquire.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. The Applicant was indicted at the August 2008 term of the York County Grand Jury for Assault and Battery with Intent to Kill (ABWIK) and Criminal Sexual Conduct (CSC), 1st degree (2008-GS-46-3020). He was also indicted at the September 2009 term of the York County Grand Jury for Kidnapping (2009-GS-46-3928) and Burglary, 1st degree (2009-GS-46-3929). Gary Lemel, Esquire, represented the Applicant. From December 14-18, 2009, the Applicant proceeded to trial and was convicted as indicted. The Honorable John C. Few sentenced him to confinement for twenty (20) years for ABWIK, thirty (30) years, consecutive, for CSC, 1st degree, thirty (30) years, consecutive to the ABWIK conviction but concurrent with the CSC conviction, for Kidnapping and life for Burglary, 1st degree.

The applicant filed a timely Notice of Appeal with the South Carolina Court of Appeals. An Anders brief was submitted on his behalf. The South Carolina Court of Appeals affirmed his

JC #1

conviction and sentence. State v. Berard, Op. No. 12-UP-320 (S.C. Ct. App. Filed May 30, 2012). The Remittitur was sent on June 20, 2012.

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

1. "Ineffective Counsel by not investigating defensive scenarios and preparing a strong investigative defense, and failed to defeat and remove the erroneous add-on charges of Kidnapping, Burglary, and Criminal Sexual Conduct."
   a. "The State's witnesses including the Medical Examiner and SLED's DNA Analyst testified there was no evidence of sexual rap/penetration occurred vaginally or anally by Mr. Berard."
2. "Mr. Berard had an open invitation like any grandson to visit his grandmother, thus kidnapping could not have occurred."
   a. "Mr. Berard was invited daily, and on this occasion, asked over for dinner, and made no attempt to kidnap his beloved Grandmother, Loretta Moss. The State failed to provide any evidence of plans, intentions, or kidnapping paraphernalia by Mr. Berard for committing the act of kidnapping."
3. "Burglary was not possible because Mrs. Moss invited Mr. Berard over for dinner ad she often did."
   a. "Mr. Berard arrived with Mrs. Moss waiting for him, and they sat down on the patio. He did not have any burglary tools, no duffel bags, and no plans of burglary. The State has no evidence of burglary, no witnesses, and there were no reports of any items missing by Mrs. Moss."
4. "Lemel failed to challenge erroneous assault charge."
   a. "The State provided no witnesses, but only a possible scenario of the assault. An unconscious Mrs. Moss had no recollection of any assault occurring. Mrs. Moss only repeated what her grandson Russ and his girlfriend Megan told her though neither were present during the accident."
5. "Lemel made a serious mistake by introducing previous charges to the jury. Lemel admitted his mistake to Mr. Berard and the judge admonished Lemel for his error of judgment."
   a. "The Trial Transcripts(sic) states the judge warned in lengthy conversation not to open the dorr of Mr. Berard's previous charges that would prejudice the jury. However, Mr. Lemel admitted his [mistakes] in his examination of Mr. Berard on the witness stand."

JC #2

Prior to the presentation of testimony PCR counsel set forth the issues the Court is being asked to consider as:

1. An issue required the prior conviction evidence elicited by the State..
2. Applicant's decision to testify.
3. Trial counsel concerns by Applicant.
4. Applicant's motion to remove trial counsel.
5. Applicant's admission to the Commission of Assault and Battery with Intent to Kill.

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, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, 80 L.Ed2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 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 177-18, 386 S.E.2d at 625. With respect to

JC443

guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

Applicant called as his first witness trial counsel, Gary Lemel, Esquire who testified he had represented Applicant on a previous assault and battery of a high and aggravated assault charge. He testified Applicant had a prior Ohio conviction for an alleged forcible oral sexual encounter with a female. Trial counsel testified that during pre-trial he had successfully moved to preclude introduction of Applicant's prior record in the event Applicant testified at trial.

Trial counsel testified he met with Applicant many times prior to trial and discussed with Applicant his right to remain silent and not take the stand and testify. Trial counsel denied ever telling Applicant that he, Applicant, had to testify but that the only way to get before the jury Applicant's version (his story) of the incident was for Applicant to testify.

Trial counsel testified that he did not go to the scene of the alleged incident, Applicant's grandmother's (the alleged victim) house, due to the grandmother's hostility toward trial counsel.

Trial counsel testified that Applicant claimed his brother "wanted to put him away" and his brother concocted the story related to the jury and told the concocted story to his mother and his girlfriend, Megan.

Trial counsel recalled that Applicant had requested the Court relieve trial counsel as his attorney and believes the request was a product of Applicant's frustration as to the length of time elapsing without disposition of Applicant's case.

Trial counsel testified he "opened the door" to the introduction of the Ohio sexual offense conviction and that the interjection of this prior offense, admitted on cross-examination by

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Applicant, was "clearly prejudicial" and "highly prejudicial."[1] However, trial counsel could not say the evidence of Applicant's prior conviction made a big impact on Applicant's trial.

Trial counsel testified Applicant chose to testify and that he, trial counsel, had expressed to Applicant that as trial counsel, his opinion was that Applicant should have testified. Trial counsel testified that Applicant had admitted hitting his grandmother with a stick or bat.

Trial counsel testified that the facts which were being presented were that Applicant's brother and his girlfriend saw Applicant lying on top of his then naked grandmother; that Applicant fled the scene;[2] that Applicant went to a co-worker who offered to take Applicant to the hospital for treatment of a cut Applicant had sustained on his flight; that Applicant was found hiding under bed covers at his girlfriend's house and when found asked a probation officer, "how's Nanny doing." Trial counsel testified the evidence of flight was highly prejudicial.

Trial counsel testified Applicant did not dispute striking his grandmother and claimed he was present at his grandmother's house as an invited guest.

Trial counsel testified that he felt the State had not established the necessary element of penetration but acknowledged that "not much" penetration was needed for the State to prove penetration beyond a reasonable doubt. Trial counsel testified the victim, Applicant's grandmother, testified only that Applicant "was or was trying" to affect penetration at the time of the alleged sexual battery.

Trial counsel testified the State offered Applicant a plea bargained forty- year sentence and that trial counsel was trying to get Applicant a sentence of no more than twenty to thirty years. Trial counsel testified the length of sentence was really a moot issue because, with the offense and his prior record, Applicant would probably ultimately be found to be a sexually

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[1] As set forth later herein, the undersigned is not convinced trial counsel "opened the door" to the prior conviction.
[2] Applicant admitted this and in addition, while in flight, cut off his parole electronic monitor severely cutting himself in the process. (TR p .779, LL 3-13).

JC-974 5

violent predator and would therefore likely never be released into the general public again. Based on the posture of Applicant's prospects regarding imprisonment, perhaps for life, trial counsel testified that there was no real option other than proceeding to trial. Trial counsel acknowledged that it was only his opinion, not a sure thing, that Applicant would ultimately be determined to be a sexually violent predator.

Trial counsel testified Applicant's version of the pertinent events was not credible.

Applicant testified he had concerns about trial counsel's representation as he did not think Mr. Lemel would be "adequate" and would not defend him. This was based on his prior representation by trial counsel who he described as "not aggressive."[3] Applicant testified he moved to have Mr. Lemel relieved as they were not getting along and Mr. Lemel was not doing his job like Applicant wanted him to.

Applicant testified he told trial counsel the subject event was an accident. He testified he admitted to having committee an assault and battery with intent to kill because trial counsel insisted that he take the stand, but he did not want to testify. Applicant testified at the time of his trial he was 27 years old, had an eleventh grade education and felt bullied and pressured into testifying. Applicant testified he felt trial counsel knew the right thing to do to convince him to take the stand and that trial counsel used word play to convince Applicant to take the stand. Applicant testified he did not want nor need to testify.

Applicant testified the testifying witnesses, the victim, Applicant's brother and Applicant's brother's girlfriend, gave inconsistent statements and that trial counsel would not listen to anything Applicant had to say.

Applicant testified he wanted trial counsel to go to the scene, his grandmother's house, so he could see that the girlfriend could not have seen what she said she saw.

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[3] He later testified his non-aggressive counsel "bullied" him into testifying.

JC 946

Applicant testified he met with trial counsel five times for fifteen minutes or so a time and that at trial he told trial counsel he did not want to testify but that trial counsel made him believe his only option was to testify.

Applicant testified he was told by trial counsel to admit swinging a bat and was told he would get life if he did not take the stand.

On cross-examination, Applicant admitted he told the police he was swinging a bat and accidently hit his grandmother. He also admitted that the trial judge explained to him at trial his right to remain silent.

On recall, trial counsel testified he never bullied or threatened Applicant to testify, but did let Applicant know how strongly he felt Applicant should testify and explained to Applicant what the trial judge would tell Applicant about his right to remain silent.

Trial counsel testified he met with Applicant more than five times and the length of each meeting was more than fifteen minutes. Trial counsel testified that all he could do regarding any witnesses' inconsistent testimony was to impeach them with their previous statement. Trial counsel testified he did not feel he needed to visit the scene and acknowledged that he could have gotten a court order to go on the property where the incident allegedly occurred and also acknowledged that Applicant always told him the girlfriend was lying.

As to the issue regarding trial counsel's failure to go to the scene, Applicant has failed to carry his burden of proof that such was necessary and thus trial counsel was ineffective for failing to visit the scene. Applicant has presented no pictures or diagrams from which the Court can assess the girlfriend's ability to observe that to which she testified so there is no way to determine a scene visit would have had any value in the defense of Applicant.

JC 7/#7

The credible testimony of trial counsel and the Trial Transcript reflect that Applicant freely and voluntarily took the stand to testify fully understanding his right to remain silent. Applicant's general "concerns" about counsel are without merit based on the Trial Transcript, and the credible testimony of trial counsel.

The Court's refusal to relieve trial counsel does not constitute any ineffective assistance of counsel and if the Court was in error for refusing Applicant's motion this would have been a ground for a direct appeal, not a post-conviction relief proceeding.

Applicant's complaint as to his admission to having committed assault and battery with intent to kill is not an allegation of merit as to trial counsel's representation except to the extent that Applicant claims trial counsel told him to admit he hit his grandmother with a stick or bat. Applicant had admitted to striking the victim, (TR p. 774, L 24), while on her house's porch. He testified this was an accident.

At trial, Applicant did not take the position that he accidentally hit his grandmother. At trial, he testified he "assaulted" his grandmother. (TR p. 774, L 23 to p. 775, L 7). (See also TR p. 790, L 14, p. 792, L 2; p. 795, L 22 to p. 796, L 19; p. 799, L 14; and p. 804, L 16). Applicant, even if advised by trial counsel to admit to such an offense, is the one who freely and voluntarily took the witness stand and admitted to striking his grandmother and inviting the jury to convict him of assault and battery with intent to kill. Applicant had prior to trial told trial counsel he was in fact guilty of assault and battery with intent to kill. Applicant's testimony on the stand to that which he had admitted to counsel cannot be laid at trial counsel's feet and is no evidence of ineffective assistance of trial counsel. At the post-conviction relief hearing Applicant testified not that he was not guilty of assault and battery with intent to kill, but that he admitted it because

trial counsel insisted Applicant take the stand. Earlier the Court addresses Applicant's issue with having taken the stand and need not revisit it here.

Trial counsel, in his testimony, made it clear that he thought he made a mistake in asking Applicant a question that opened the door for the State to introduce Applicants prior Ohio offense of gross sexual imposition.

After much discussion, the trial judge allowed the State to ask Applicant about his prior conviction based on the Applicant having put his character in issue. The Court based the ruling on the question and answer. He discussed with the State and trial counsel that he, the trial judge, felt Applicant had opened the door to his character. In analyzing this, based on the record, the undersigned finds, in spite of the ruling by the trial judge, that trial counsel asked no question which "opened the door." Perhaps an answer by Applicant which arguably should have been "no" but was "never" is the answer on which the trial judge hinged his ruling. Trial counsel cannot be found to be ineffective based on Applicant's answer save the answer being directly precipitated by the question. The only exchange by trial counsel and Applicant that the Court can find that may have occasioned the Court's ruling is this:

> Q. At any point in time did you try to commit any sort of sexual act with your grandmother?
>
> A. Absolutely not.
>
> Q. Did you do that?
>
> A. Never.
>
> (TR p. 784, LL 4-8).

Trial counsel's questions related solely to whether or not he committed a sexual battery on his grandmother. The question was proper and arguably necessary. That Applicant chose to

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answer "never" rather than "no" cannot be laid at trial counsel's feet. Therefore, that the trial judge found Applicant had placed his character in issue and based on that allowed the State to introduce the prior conviction was Applicant's own doing and not trial counsel's. If the trial judge was in error, that would have been an issue for direct appeal.

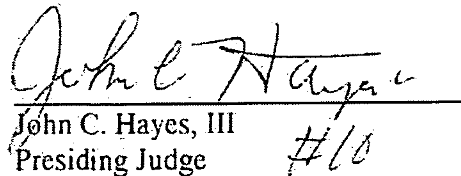
After a thorough review of the record and consideration of the testimony at Applicant's hearing, I find trial counsel's testimony to be credible in all respects and rely on trial counsel's testimony as opposed to Applicant's where their testimony differs.

I find trial counsel's representation was not ineffective when measured by the standards of Strickland, supra; Butler, supra; and Cherry, supra. Having so found, the prejudice prong of Cherry, supra is not implicated.

Therefore, Applicant's Application for Post-Conviction Relief is denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. See Rules 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.



John C. Hayes, III
Presiding Judge #10

May 28th, 2013
York, South Carolina

<table>
<tr><td>STATE OF SOUTH CAROLINA
COUNTY OF YORK

ADAM LEE BERARD, #310249,

Applicant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.</td><td>IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CERTIFICATE OF SERVICE
C.A. NO.: 2010-CP-46-5386</td></tr>
</table>

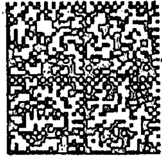
The undersigned hereby certifies that the **ORDER,** filed on June 3, 2013, delivered by certified mail, article no. 7011-2970-0001-7071-9879, on June 7, 2013, to the following:

Adam Lee Berard #310249
McCormick Correctional Institute
386 Redemption Way
McCormick, SC 29899

Lauren Rickman
Assistant to Jennifer McQueen Creech
514 Oakland Avenue Suite 100
Rock Hill, South Carolina 29730
(803) 327-3300
(803) 327-3399 (fax)

June 7, 2013

Law Office of Jennifer M. Ash
514 Oakland Avenue, Suite 100
Rock Hill, South Carolina 29730



The Supreme Court of South Carolina
P. O. Box 11330
Columbia, SC 29211