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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE COUNTY OF DARLINGTON

Court of Common Pleas

The Honorable Circuit Court Judge J. Derham Cole

Case No. 2021-CP-16-0559

Damyon M. Cotton #359012..... Petitioner,

v.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Judge J. Derham Cole Order filed denying post conviction relief to the Petitioner.

The Order was received by the undersigned counsel on April 17, 2023. A copy of the said Order on appeal is attached to this Notice.

This is the 28th day of April, 2023

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STATE OF SOUTH CAROLINA COUNTY OF DARLINGTON	IN THE COURT OF COMMON PLEAS FOR THE FOURTH JUDICIAL CIRCUIT
Damyon M. Cotton, #359012, Applicant, v. State of South Carolina Respondent.	Case No. 2021-CP-16-0559 **ORDER OF DISMISSAL**

This matter comes before the Court by way of Applicant Damyon M. Cotton's July 13, 2021, application for post-conviction relief. Respondent made its return and motion to dismiss on October 15, 2021. The Honorable Michael Holt, circuit court judge, denied the State's motion to dismiss following a motion hearing held on March 15, 2022. An evidentiary hearing was convened July 27, 2022, at the Darlington County Courthouse. Steven W. Fowler, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto, Esquire, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Christie Wise Henderson, 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 or commitment of the Darlington County Clerk of Court. In July 2013, the Darlington County Grand Jury indicted Applicant for kidnapping (2013-CP-42-1438) and first degree criminal sexual conduct. (2013-GS-16-1439). Applicant was represented by Christie Wise

Henderson, Esquire and J. Richard Jones, Esquire, and Assistant Solicitors John W. Holt and Pattie Parker, of the Fourth Circuit Solicitor's Office, prosecuted the case. On February 24, 2014, Applicant proceeded to trial before the Honorable J. Michael Baxley, circuit court judge, and a jury. On February 26, 2014, Applicant was convicted, as indicted, of kidnapping and first degree criminal sexual conduct. For which, he was sentenced to a term of fifteen years' imprisonment for each of the offenses, to be served concurrently.

Applicant filed a timely appeal, and the appeal was perfected by Attorneys Lesley A. Firestone and Lara M. Caudy, Esquires. Applicant presented the following issues on appeal:

> Did the trial court err in admitting evidence of a prior bad act involving a single, isolated incident with a female that was wholly unrelated to and not the subject of the offense.

The South Carolina Court of Appeals affirmed the conviction on March 3, 2017. *State v. Cotton*, Op. No. 2017-UP-356 (Ct. App. Filed September 6, 2017). Applicant petitioned for a rehearing, and the petition was denied on October 19, 2017.

Applicant petitioned the South Carolina Supreme Court for a writ of certiorari, which was granted on April 19, 2018. Applicant presented the following issues:

1. In light of *State v. Perez*, and in particular Judge Hearn's concurrence in that case, should this Court overrule *State v. Wallace* and apply the common scheme or plan exception equally to sexual and nonsexual offenses alike?
2. Did the Court of Appeals err in affirming the trial court's admission of a prior alleged bad act involving a single, isolated incident with a female that was wholly unrelated and not the subject if the charged offense, under the common scheme exception to Rule 404(b), SCRE?

The Supreme Court of South Carolina affirmed the conviction on June 13, 2019. *State v. Cotton*, Op. No. 27965 (Sup. Ct. filed May 6, 2020). The remittitur was sent on July 8, 2020.

Statement of Relevant Facts

The victim, age nineteen at the time of trial, testified that she first met Applicant through a "chat line" over the phone.[1] (App. 10-11). After exchanging numbers on the chat line, the victim and Applicant talked on the phone and ultimately arranged to go to the movies together on February 1, 2013. (App. 11-12). Applicant picked the victim up around 6:30 pm, but when they arrived at the movie theater, Applicant "didn't want to go in" and instead tried to force the victim's head onto his penis. (App. 12; 166-167). After the victim refused to provide oral sex, Applicant then drove the victim to K-Mart to look for Valentine's Day gifts. (App. 13). Upon arrival, Applicant decided he did not want to go inside and instead again attempted to make the victim perform oral sex. (App. 13). He then tried to give the victim cash to go buy something from the store, but the victim threw the money back at Applicant. (App. 13). The victim subsequently asked Applicant to take her home. (App. 14). Applicant refused and instead took the victim's phone and drove her out to Turnpike Road to a wooded area. (App. 14). Applicant told the victim that she "been telling him a long time" that she was going to "give him some" and "now is the time." (App. 14). He also threatened to "take a gun out" if the victim did not cooperate. (App. 20).

At that point Applicant leaned over and tried to take off the victim's pants. (App. 15-16). When he was unable to do so, he exited the car, went around, and opened the passenger side door, and dragged the victim out of the car. (App. 16-17). The victim told Applicant she did not want to have sex but Applicant told her she had to do it since it was time. (App. 17). To dissuade Applicant, the victim told him she was pregnant and that she had herpes. (App. 18). Applicant

[1] The victim subsequently explained that although she initially met Applicant over the chat line, she saw him in person one time at a friend named Tanzy's house. (App. 21-22; 132-133).

said "we'll fix that," put on a condom, and vaginally penetrated the victim. When Applicant was finished, he threw the condom in the woods and gave the victim back her clothes. (App. 18). Applicant and the victim, who was crying, got back in the car and Applicant began apologizing, saying he loved the victim, and asking her not to call the police. (App. 18-19). He returned the victim's phone to her when they got on Highway 52. (App. 162). Applicant then dropped the victim off at home. The victim walked the long way around the car so she could memorize Applicant license plate number. As soon as she walked in the house, she ran to her mother and told her she had been raped. (App. 19).

The victim's mother testified she was watching television on the evening in question when the victim, looking disheveled, came in the house and immediately told her she had been raped. (App. 194-195). The victim's mother noticed the victim's jeans were not buttoned when she came inside and testified that these jeans had not been broken when the victim left the house. (App. 195). The victim's mother took the victim to the hospital immediately, where a nurse performed a rape kit. (App. 196). Although the victim had some difficulty communicating,[2] the victim told the nurse exactly what happened with a good bit of detail. (App. 241-242; 245-246). The nurse also collected the victim's clothing, including her jeans, and took swabs from the victim. (App. 243).

Police officers from Florence and Darlington counties responded to the hospital and interviewed the victim. (App. 197-198). The victim provided a statement to police that was consistent with her trial testimony. (App. 165-68; 202-209; 213-226; 502-503). Using the license plate number the victim provided, police ultimately figured out Applicant's name and created a

[2] The victim suffered from a "learning disability" and "mental difficulties" which made it more difficult for her to communicate clearly. (App.15; 135-137; 194; 242).

photo lineup. (App. 224-225). The victim picked Applicant out as the man who raped her. (App. 225). The evidence collected from the victim on the night of the rape was later submitted to SLED for analysis and Applicant's DNA was found on the buttonhole of the victim's jeans. (App. 249-260; 277-279).

Current Action Before this Court

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

1. Ineffective Assistance of Counsel
   a. Counsel did not investigate fingerprint, it was not in discovery
   b. Counsel missed several objections at trial, did not object to direct verdict being denied
2. The Court lacked Judicial Power (Jurisdiction)
   a. The Kidnapping indictment does not have the "knowing" element, and Counsel did not object.

At the PCR hearing, Applicant proceeded forward on the allegations raised in the original application and:

1. Ineffective assistance of counsel:
   a. For waiving his evidentiary and preliminary hearings.
   b. Failure to use rape kit at trial.
   c. Failure to review discovery.

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 testified that Counsel did not investigate a fingerprint and nothing regarding another fingerprint being found was anywhere in discovery. Applicant stated that he was unaware that a fingerprint existed as it was not disclosed in his motion. Applicant testified that he waived both his preliminary hearing and evidentiary hearing but believes he would have

wanted either one. He stated that the State mentioned two separate statements and they were used at trial in a way that he was not aware of. Applicant stated that Counsel brought up evidence not addressed in the motion for discovery while visiting him in jail.

Applicant testified that he believed the Court did not have judicial power because he was held in Darlington County, but the crime took place in Florence County. Applicant testified that he would have been more prepared at trial if he knew about the statement and fingerprint in advance. Applicant testified that he did not think the rape kit proved he committed a crime against the victim. Applicant testified to the fingerprint was on the button of the victim's pants and his DNA got on the victim's pants from a hug. Applicant stated that that was not the first night he met the victim. He stated that the rape kid does not show a match to him.

Counsel Testimony

Counsel testified she met with Applicant several times. Counsel testified she spoke with him about five charges. Counsel testified she met with Applicant's family member, Connie Cotton. Counsel stated the DNA analysis serology report showed the DNA on the victim's pants belonged to Applicant and he was told about this evidence. Counsel attested to filing extensive pre-trial motions and discussing the evidence in detail with Applicant before trial. She stated that she reviewed discovery with Applicant before trial. She stated that this evidence was not helpful to the defense.

Counsel discussed with Applicant that there were no jurisdictional issues, and this was discussed with Applicant before trial. Counsel concluded her testimony by stating she could gain no evidence proving that they were ever at the movie theatre.

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

Ineffective Assistance of Counsel

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 v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Ineffective assistance of counsel is governed by 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), SCRCP ("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.

Fingerprints

Applicant alleges ineffective assistance of counsel for "failure to investigate" the fingerprint evidence. *Strickland* makes clear that Defense counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. When highlighting failure to investigate as a ground for a larger ineffective assistance of counsel claim, judicial determination of this claim's validity is evaluated for "reasonableness [under] all the circumstances" with "a heavy measure of deference to counsel's judgments" applied. *Id.* That said, counsel is required to, at minimum, "interview potential witnesses and make an independent investigation of the facts and circumstances of the case", *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (quoting *Troedel v. Wainwright*, 667 F.Supp. 1456, 1461 (S.D.Fla.1986), *aff'd*, 828 F.2d 670 (11th Cir.1987)), including aggressively re-examining all the government's forensic evidence and conducting analyses of all other available forensic evidence." *Id.* (quoting *American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases, reprinted in* 31 Hofstra L.Rev. 913, 1015 (2003) (emphasis added)).

Counsel is not obligated to "investigate lines of defense that he has chosen not to employ at trial." *Strickland*, 466 U.S. at 682 (quoting *Washington v. Strickland*, 693. F.2d 1243, 1255 (5th Cir. 1982)). Further, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

Counsel testified that she discussed this with Applicant prior to trial and that she did not think this was helpful at trial. Accordingly, Applicant has not met his burden of proof and relief is denied.

Jurisdiction

Applicant claims Counsel was ineffective for failure to bring up a lack of jurisdiction issue. Counsel credibly testified that this case was properly heard in Darlington and that this fact was brought up to Applicant before trial. Accordingly, relief is denied.

Objections

Applicant claims Counsel was ineffective for failure to object during the trial. Whether failure to object constitutes deficient performance generally hinges on whether a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

Applicant has failed to identify anything Counsel specifically did not object to that he needed to object to to avoid a finding of deficiency. Additionally, there has been no showing of prejudice. Accordingly, relief is denied.

Object to Directed Verdict

Applicant claims Counsel was ineffective for failure to object to the directed verdict. This objection would have been fruitless, and no prejudice was inflicted as a result. Accordingly, relief is denied.

Failure to Review Discovery

Applicant claims Counsel was ineffective for failure to review discovery. Counsel credibly testified that she reviewed discovery with Applicant prior to trial. Accordingly, relief is denied.

Failure to Use Rape Kit

Applicant claims Counsel was ineffective for failure to present the rape kit at trial. Counsel credibly testified that she did not think the evidence discussed at the PCR hearing was helpful to the defense. This is a reasonable strategic reason for not presenting this and Counsel is not deficient as a result. This Court also declines to find what in the rape kit would have led to a different result at trial. Accordingly, relief is denied.

Waiver of Preliminary/Evidentiary Hearing

Applicant also claims Counsel was ineffective for waiving the preliminary and evidentiary hearings. In South Carolina, there is no constitutionally protected right to a preliminary hearing. *State v. Keenan*, 278 S.C. 361, 296 S.E.2d 676 (1982). Additionally, a preliminary hearing is not held if the defendant is indicted by a grand jury or waives presentment before the preliminary hearing occurs. Rule 2(b) SCRCrimP. Further, a preliminary hearing can be waived through "[p]lea negotiations and silence before the trial court regarding the desire for a preliminary hearing when entering a guilty plea. *O'Neil v. State*, 277 S.C. 230, 231, 285 S.E.2d 352, 353 (1981) (citing *Bonnettee v. State*, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981)).

This was waived by Applicant. 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), SCRCP 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 16th **day of** March**, 2023.**

J. DERHAM COLE
Presiding Judge
Fourth Judicial Circuit

_____, South Carolina

FILED
2023 MAR 27 A 11:06
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.