

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Apr 18 2024

S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
R. Scott Sprouse, Circuit Court Judge

Circuit Court Case No. 2022-CP-23-00973

Dwayne C. Tallent, #357180 ,..... Appellant/Petitioner,
v.
State of South Carolina,..... Respondent.

NOTICE OF APPEAL

Dwayne C. Tallent appeals the attached Order of Dismissal signed by the Hon. R. Scott Sprouse which was entered of record on March 24, 2024. The Appellant received written notice of the entry of this Order on April 1, 2024 by U.S. Mail.

s/J. Falkner Wilkes
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Counsel for Appellant/Petitioner

April 18, 2024.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
Dwayne C. Tallent, #357180,)	
)	Case No.: 2022-CP-23-00973
Applicant,)	
)	
v.)	ORDER OF DISMISSAL
)	
State of South Carolina,)	
)	
Respondent.)	ENTERED COMPUTER

This matter comes before the Court by way of an application for post-conviction relief filed by Dwayne C. Tallent on February 22, 2022. Respondent filed the Return and Motion for a More Definite Statement June 20, 2022.¹

An evidentiary hearing was scheduled for January 17, 2024, at the Greenville County Courthouse. Applicant and his appointed counsel, J. Falkner Wilkes, Esq., were present. Assistant Attorney General W. Joesph Maye represented the Respondent. After reviewing the pleadings, materials submitted, testimony, arguments of counsel, and the applicable law, the Court finds that the Applicant has failed to meet his burden of proof. Accordingly, the Application for Post Conviction Relief is DENIED.

Procedural History

Applicant is presently imprisoned in the South Carolina Department of Corrections, Broad River Correctional Institution, pursuant to orders of commitment of the Greenville County Clerk of Court. During its January of 2015 term, the Greenville County Grand Jury indicted Applicant for first-degree criminal sexual conduct with a minor (2014-GS-23-011873). During its December of 2016 term, the Grand Jury true-billed amended indictments for first-degree

¹ Counsel for Applicant submitted an email to Respondent on December 19, 2023, making Applicant's claims definite and certain. Respondent accepted the clarification and deemed the motion satisfied.

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criminal sexual conduct with a minor (2014-GS-23-011873), second-degree criminal sexual conduct with a minor (2014-GS-23-011877), lewd act upon a child (2014-GS-23-011875), and contributing to the delinquency of a minor (2014-GS-23-011874).

On July 17-19, 2017, Applicant proceeded to a jury trial, with the Honorable Robin B. Stilwell presiding. Matthew J. Kappel represented Applicant at trial, and Assistant Solicitor L. Mark Moyer of the Thirteenth Circuit Solicitor's Office prosecuted the case. At the conclusion of trial, the jury found Applicant guilty as indicted. The trial court sentenced Applicant as follows: for contributing to the delinquency of a minor, imprisonment for three years; for lewd act on a minor, imprisonment for 15 years; for second-degree criminal sexual conduct with a minor, imprisonment for twenty years; and for first-degree criminal sexual conduct with a minor, imprisonment for thirty years. All sentences were ordered to run concurrently with credit for time served.

Trial counsel filed a timely notice of appeal. J. Falkner Wilkes ("appellate counsel") later filed a notice of appearance indicating that he would be co-counsel on appeal with trial counsel. Appellate counsel argued on appeal that the trial court erred: (1) in denying trial counsel's motion to sever the charge of contributing to the delinquency of a minor from the charges of criminal sexual conduct with a minor and lewd act on a minor; and (2) in admitting evidence of Applicant's manufacture, sale, and use of cocaine, crack cocaine, and methamphetamine. The South Carolina Court of Appeals affirmed the convictions and sentences, finding that "[t]he trial court did not abuse its discretion in denying [Applicant's] motion to sever and in admitting evidence related to drug use and manufacturing." *State v. Tallent*, 430 S.C. 438, 449, 845 S.E.2d 508, 514 (Ct. App. 2020). The Court of Appeals later denied appellate counsel's petition for rehearing. The South Carolina Supreme Court then denied appellate counsel's petition for a writ

of certiorari. *State v. Tallent*, S.C. Sup. Ct. Order filed March 9, 2021. The remittitur was issued on March 15, 2021.

Claims Raised

The original *pro se* application was filed on February 2, 2022, and raised the following claims:

1. Trial counsel was constitutionally ineffective for failing to properly prepare and investigate;
2. Trial counsel was constitutionally ineffective for failing to make necessary objections to preserve issues for appeal;
3. Trial counsel was constitutionally ineffective for failing to make necessary motions to suppress evidence and testimony;
4. Trial counsel was constitutionally ineffective for failing to adequately cross-examine witnesses;
5. Trial counsel was constitutionally ineffective for failing to communicate all plea offers to Applicant in a timely fashion and to give accurate and adequate advice to Applicant in regards to said offers; and
6. Trial counsel was constitutionally ineffective for failing to conduct adequate discovery, to offer relevant evidence, to make adequate argument to the jury, and to present an adequate defense.

On December 19, 2023, Applicant, through counsel, provided response to Respondent's Motion for a More Definite Statement alleging:

1. "FAILURE OF COUNSEL to introduce evidence that contradicted key state witness on his being an eyewitness (Christopher Greco) to abuse by viewing through a keyhole. I will present the testimony of Russell Brinson, a long-time friend of the Applicant's to show that he has personal knowledge that there was no keyhole on the bedroom door. Also, the Applicant's family are still searching for family photos of the house that might show the door or doors in the home. This is unlikely to happen but I'm always hopeful. The Applicant's mother Lenior Brissey may testify to the lack of keyholes as well. hole."
2. "FAILURE OF COUNSEL to object to the admission of other bad acts. Christina (Chrissy) Rosado was offered as the State's last witness to testify

that the Appellant abused her and that she was traumatized by it. This was objectionable as the other bad acts did not meet the test to admissible. The issue was not properly preserved for appeal.”

3. “FAILURE OF COUNSEL to properly advise client on potential of conviction if other bad act evidence was introduced such that he would have taken the plea offer for 7 years. (I’m not certain but the plea offer may have expired by the time Matt Kappel learned of the State’s intent to present the Rosado evidence of other bad acts).”
4. “FAILURE OF COUNSEL to present evidence contradicting testimony about eyewitness bending over and peeping through a keyhole (that didn’t exist). Witness had a broken back at that time and was in a brace that prevented him from being able to bend over. Applicant’s mother, Lenior Brissey, will testify to that fact, and she is a retired RN. By Matt’s cross and closing it seems to sound like he was going to or thought he had offered evidence on the impossibility of the events given the witnesses’ broken back and being in a brace at that time.”
5. “FAILURE OF COUNSEL to impeach Christopher Greco Shoplifting conviction 2013. Greco alleged that he was an “eyewitness” to the abuse and therefore his impeachment was critical to the defense of the case.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In addition to carefully considering the record and the arguments presented by counsel, this Court has also had the opportunity to consider the testimony presented at the PCR evidentiary hearing and has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance Claims

For claims that trial counsel provided ineffective assistance, this Court is guided by the familiar test: To show a violation of the Sixth Amendment, an applicant must show that counsel’s representation fell below an objective standard of reasonableness, and but for counsel’s error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Simpson v. Moore*, 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). “A reasonable probability is a probability sufficient to undermine

confidence in the outcome” of the trial. *Strickland*, at 694. It is presumed that counsel made all decisions in exercise of reasonable judgment. *Strickland*, at 689. It is the applicant’s burden to prove, by a preponderance of the evidence, that he is entitled to relief. Rule 71.1 (e), SCRPC. *See also Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) (“the burden of proof is on the applicant to prove the allegations in his application”).

Applicant called trial counsel, Mr. Kappel, to give testimony regarding his representation of Applicant. Applicant did not testify on his own behalf. After considering the record, arguments presented by counsel, and the controlling case law, this Court finds that Applicant failed to meet his burden of proof.

General Summary of Relevant Facts from Trial

The Victim in this case was twenty-nine years old at trial. She was around five years old when Applicant began sexually abusing her. (Trial Tr. pp. 146-47). Applicant was a father figure to the Victim and was in her life from when she was eighteen months old until the time she moved away at fourteen. (Trial Tr. pp.133-134). At trial, the Victim described numerous accounts of Applicant’s sexual abuse, including oral sex acts and penetration. (Trial Tr. pp. 150-161). Around the age of eleven, Christopher and Joesph, the Victim’s brothers, moved into the home with Applicant, Victim’s mother, and victim. (Trial Tr. p. 136, pp. 140-41). The abuse continued until Victim moved in with her biological father at the age of fourteen. (Trial Tr. p. 168).

Christopher and Joesph testified at trial as to witnessing Applicant’s sexual abuse of the victim. On one account, Christopher looked through the keyhole of the bedroom and saw Tallent and Victim under the covers. Tallent was touching himself and Victim with his other hand. He told her “that is how you do it.” Christopher kicked open the door and demanded to know how

long it had been going on. He called Tallent sick. Tallent “freaked out” and jumped out of bed. Tallent chased Christopher outside, threw coolers at him, and told Christopher that Christopher could ruin his whole world. (Trial Tr. p. 260; p. 274). When asked if they were clothed, Christopher testified Tallent was in his boxers, he could not tell whether Victim was dressed or not. (Trial Tr. p. 262). Christopher and his brother moved out afterwards. They told their father and Christopher told DSS about what happened. (Trial Tr. p. 261).

CR provided *Lyle* testimony. She was fifteen years old when she testified at trial. Her and her mother moved in with Tallent. Tallent was a father figure in CR’s life. At the time of trial, she lived with her sister’s grandfather since being placed there by DSS. (Trial Tr. p. 331). She lived at both Tallent’s mother’s farmhouse and Tallent’s doublewide trailer. At the time, she was close to Tallent’s mother. She is not anymore.

Tallent started touching CR when she was around five years old, and she did not know it was wrong. As she later realized the abuse was wrong, she kept it to herself because she was scared. (Trial Tr. pp. 336-38). She explained she still loved Tallent and even told the jury Tallent is a good person. Nonetheless, she explained Tallent would touch around her vagina. The abuse would continue until Tallent moved away when CR was eleven years old. (Trial Tr. pp. 339-40). Tallent also touched CR’s chest and kissed her on the lips. (Trial Tr., pp. 340-41). Sometimes the abuse occurred with the clothes on and sometimes Tallent took her clothes off. (Trial Tr. p. 341). Tallent told her not to tell because nobody would understand it and that nobody would understand his love for her. (Trial Tr. p. 343). She explained she did not want to tell anyone because she was worried she would lose the only family she had, and she noted that is exactly what happened, she lost her family after she disclosed the abuse and began living with her sister’s grandfather. (Trial Tr. p. 343).

Allegation I & IV: Failure to Call Witnesses

As to Applicant's claims regarding the existence of a keyhole, and the likelihood that the witness was physically able to see Applicant and victim through the keyhole, the Court finds that Applicant failed to satisfy his burden of proof under *Strickland*.

Mr. Kappel was not examined by Applicant or the State regarding matters in relation to the existence of keyhole, or to the physical incapacities Applicant claimed an eyewitness suffered rendering his trial testimony impossible. Applicant has not produced any testimony or evidence to substantiate these claims, and thus has not established any prejudice from the failure to call witnesses at trial. *Dalton v. State*, 376 S.C. 142-43, 654 S.E.2d 876-77 (Ct. App. 2007). There is no credible evidence to support these allegations, and no testimony to support or refute the allegations. Thus, Applicant failed to show deficient representation.

Applicant has failed to satisfy his burden of proof of showing *Strickland* deficient performance and prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). *See also Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (where "witnesses" the Applicant "claimed could have provided an alibi defense did not testify at the PCR hearing," the Applicant "could not establish any prejudice from counsel's failure to contact these witnesses."). *Accord Clark v. State*, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) ("conjecture" as to testimony insufficient to show omission "would probably change if a new trial" granted).

Applicant is required to prove his PCR allegations by a preponderance of the evidence and Applicant failed to show any deficiency or prejudice by counsel in regard to the alleged witnesses. Thus, Applicant is not entitled to any relief on these claims.

Allegation II: Failure to Object

The singular issue for which Mr. Kappel was examined, and the sole issue which the

parties provided argument, was whether counsel was constitutionally ineffective under *Strickland* for failing to preserve for appeal the issue of the trial court's admitting of C.R.'s testimony that Applicant abused and traumatized her. This Court finds neither error on part of counsel nor prejudice.

Applicant argued that the failure to make a contemporaneous objection following the pretrial ruling was conclusively a failure to preserve the issue, and in light of the change in the law that came *after* trial under *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020), that alleged error was prejudicial under *Strickland*. Respondent argued that the admission of the 404(b) evidence was not contrary to the controlling law at the time under *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), overruled by *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020), and that the trial court's ruling was in alignment with other precedent about the interpretation and application of *Wallace*. See *State v. Scott*, 405 S.C. 489, 500, 748 S.E.2d 236,242 (Ct. App. 2013). Applying *Wallace* to the specific set of circumstances in this case, the trial judge found C.R.'s testimony to be relevant, that the similarities of the Applicant's abuse toward both victims outweighed the differences, and that the probative value outweighed the prejudicial effect. (Trial Tr. pp. 89-90).

On direct examination, Mr. Kappel testified that his failure to renew the 404(b) objection was an oversight that he believed to be prejudicial to the Applicant. On cross examination, Mr. Kappel testified that he recognized the controlling authority at the time of the objection and cited what he believed to be the relevant law. The record shows that Mr. Kappel referenced *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) and *State v. Rogers*, 293 S.C. 505, 362 S.E.2d 7 (1987), overruled by *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993) on the matter, distinguishing from *Wallace* that in this case there were two separate victims with different types

of sexual misconduct. (Trial Tr. 76-79). At the hearing Mr. Kappel expressed disagreement as to how the court weighed the evidence under the factors provided by *Wallace* but he did not identify an error of law by the court.

Generally, a motion in *limine* is not a final determination; a contemporaneous objection must be made when the evidence is introduced at trial to be preserved for appellate review. *State v. Wiles*, 383 S.C. 151, 679 S.E.2d 172 (2009). However, there is an exception to this general rule when a ruling on the motion in *limine* is made “immediately prior to the introduction of the evidence in question.” *Id.* This exception is based on the fact that when the trial court’s ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection. *Id.* (citing *State v. Mueller*, 319 S.C. 266, 268–69, 460 S.E.2d 409, 410 (Ct.App.1995)). *Wiles* has identified a party’s reference to a pretrial motion issue during opening statements as a factor to consider in judging the finality of a ruling. (See *State v. Wiles*, 383 S.C. 151, 679 S.E.2d 172 (2009)). Further, if no evidence is offered between a preliminary ruling and the admission of the evidence ruled upon, then “the decision is final” and there is no need for an additional objection. *State v. Morales*, 439 S.C. 600, 889 S.E.2d 551 (2023) (citing *State v. Jones* 435 S.C. at 144, 866 S.E.2d at 56).

Here, both the parties relied upon the ruling of the court as a final ruling on the matter when they referenced C.R. and the purpose of her testimony to the jury during opening arguments. (see *State v. Wiles*, 383 S.C. 151, 679 S.E.2d 172 (2009) (see also Trial Tr. pp. 109-110, p.116, p. 120). As such, no further objection was needed at the time of C.R.’s testimony.

Applicant’s allegation incorrectly operates under the presumption that trial counsel failed to preserve the issue on appeal, however there is support for the argument that had this issue been raised, it would have been preserved for review. Additionally, appellate counsel is not

prohibited from raising claims that may be dismissed due to lack of preservation, and Applicant cannot guarantee the State would have argued a lack of preservation of this issue as a defense had the issue been raised. Applicant bears the burden of proof in post-conviction relief matters, and he has failed to demonstrate that this alleged 404(b) claim was not raised on appeal because appellate counsel believed it to be unpreserved. Applicant has failed to call and examine appellate counsel as to the reason why this issue was not raised, and in the absence of such testimony or evidence, the court cannot speculate as to what an unrepresented witness might have said. Such is definitively insufficient for establishing prejudice under *Strickland*. See *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 810 (1998).

Applicant has failed to show trial counsel's deficiency. As an initial matter, based on case law precedent, the issue likely would have been deemed preserved on appeal. Applicant cannot conclusively determine the outcome if the issue had been raised nor can he depend on the testimony of appellate counsel as he has not been produced as a witness. *Perry* overruled *Wallace* in 2020, nearly five years after the Applicant's trial, and the court must consider the law as it existed at the time of trial and "not as it has evolved today" See e.g. *Chappell v. State*, 429 S.C. 68, 79, 837 S.E.2d 496, 501 (Ct. App. 2019). Accordingly, trial counsel will not be found deficient for failing "to be clairvoyant or anticipate changes in the law" *Id.* Therefore, this Court finds that Applicant failed to satisfy his burden of proof under *Strickland*.

Allegation III: Failure to Properly Advise

As to Applicant's claim that counsel failed to properly advise him on the potential of a conviction if other bad act evidence were introduced and alleging that he would have taken the State's offer of seven (7) years instead of proceeding with trial, this Court finds that Applicant failed to establish deficiency and prejudice under *Strickland*.

Mr. Kappel was not questioned on the issue, and Applicant offered no supporting evidence or testimony to satisfy the burden of proof for this claim. Applicant cannot satisfy the deficiency prong of *Strickland*, as there is no testimony from Mr. Kappel or Applicant, nor any corroborating evidence to show deficient representation in this matter. Applicant's mere dissatisfaction with the trial outcome cannot be blamed on counsel's defense when in hindsight, a plea deal rendering a lesser sentence was more favorable to Applicant. *Strickland*, 466 U.S. 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "To show prejudice under *Strickland*, a defendant must demonstrate a reasonable probability that: (1) he 'would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;' (2) 'the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;' and (3) 'the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.'" *Collins v. State*, at 262, 810 S.E.2d at 877 (quoting *Frye*, 566 U.S. at 147). Applicant presented no evidence or testimony to overcome his burden of proof. As such, Applicant has not shown deficiency in Mr. Kappel's representation regarding this matter, and cannot, at any rate, show resulting prejudice. E.g., *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998).

Allegation V: Failure to Impeach

Applicant alleges counsel was ineffective for failing to impeach Christopher Greco, a central witness, with a 2013 shoplifting conviction. As discussed above, trial counsel was not questioned on matters related to this claim, and Applicant has not produced any testimony or evidence to substantiate this claim. He thus has not established any prejudice from the failure to impeach Greco at trial. *Dalton v. State*, 376 S.C. 142-43, 654 S.E.2d 876-77 (Ct. App. 2007). Therefore, Applicant has not satisfied his burden under *Strickland*.

CONCLUSION

For the above stated reasons, this Court finds that Applicant failed to carry his burden of proof. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

IT IS THEREFORE ORDERED:

1. Applicant's application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant is remanded to the custody of Respondent for completion of his sentence.

AND IT IS SO ORDERED this 12 day of March, 2024.



R. SCOTT SPROUSE
Presiding Judge