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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Common Pleas

The Honorable Kristi Curtis, Circuit Court Judge

Case No.: 2020-CP-10-422_____

Carlos A. Ruiz..... ...…….……. Appellant

v.

State of South Carolina…….……..…… Respondent

NOTICE OF APPEAL

Carlos A. Ruiz appeals the order of the Honorable Kristi Curtis, filed September 26, 2024, and served on his counsel September 26, 2024, that dismisses the PCR action. The Defendant/Appellant requests that the order be reversed, and he be granted a new trial. Defendant/Appellant received proper notice of the entry of the written order on September 26, 2024.

October 21, 2024

/s/Christopher L. Murphy
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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Carlos A. Ruiz, #371060, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2020-CP-10-422 **ORDER OF DISMISSAL**

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Carlos A. Ruiz (Applicant) on January 23, 2020. Respondent made its return requesting an evidentiary hearing. On June 30, 2023, an evidentiary hearing convened before the Honorable Kristi Curtis. Applicant was present and represented by Christopher Murphy, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. At the hearing, the Court heard testimony from Applicant and Mary Ford (trial counsel). After reviewing the records before this Court and the testimony presented at the hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the Department of Corrections serving three life sentences. In January 2017, the South Carolina State Grand Jury indicted Applicant for three counts of first-degree criminal sexual conduct (CSC) with a minor (2017-GS-10-875, -876, -877) and three counts of second-degree CSC with a minor (2017-GS-10-878, -879, -880). On January 9-13, 2017, Applicant proceeded to a jury trial before the Honorable Roger M. Young, Sr. Public Defenders Mary Ford and Nicolas Smit represented Applicant. Assistant Solicitors Deborah Herring-Lash and Nina Savas prosecuted the case. The jury convicted Applicant as indicted, and

Judge Young sentenced him to concurrent life sentences for each first-degree CSC with a minor and twenty years for each second-degree CSC with a minor.

Applicant filed a notice of appeal, which was perfected by Chief Appellate Defender Robert M. Dudek. On appeal, Applicant argued the trial court erred in allowing testimony of Letrice Smalls, a caseworker with the Department of Social Services, that was irrelevant and improperly bolstered the minor victim. The Court of Appeals affirmed, finding the issue was unpreserved. *State v. Ruiz*, 2019-UP-044 (filed January 30, 2019). The remittitur was sent February 15, 2019.

CURRENT APPLICATION

On January 23, 2020, Applicant filed this PCR application alleging trial counsel was ineffective for:

> 1. Failing to adequately prepare with Applicant and investigate prior to trial;
>
> 2. Failing to make legal objections to testimony and charges;

Applicant also alleged appellate counsel was ineffective for:

> 3. Failing to raise all preserved meritorious issues.

As relief, Applicant requested a new trial.

At the PCR hearing, Applicant proceeded only on the following allegations of ineffective assistance of counsel:

> 1. Counsel failed to object to the DSS caseworker's testimony;
>
> 2. Counsel failed to convince Applicant to testify;
>
> 3. Counsel failed to request third-degree CSC with a minor as a lesser-included offense; and
>
> 4. Counsel failed to object to the illegal sentence.

This Court finds that Applicant waived his claim related to appellate counsel and his claims related to trial counsel's failure to adequately prepare Applicant for trial and failure to investigate prior to trial. This Court further finds that as to the second issue in the original application, Applicant alleged only that counsel failed to object to the DSS caseworker's testimony, failed to request third-degree CSC with a minor, and failed to object to the illegal sentence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the records before it, including the Charleston County Clerk of Court records of the underlying convictions; Applicant's records from the South Carolina Department of Corrections; the trial transcript; the records of Applicant's direct appeal; and the records of this PCR application. This Court has also had the opportunity to observe the witnesses presented at the PCR hearing, closely pass upon their credibility, and weigh their testimony accordingly.[1] After a careful review based on the *Strickland* standard set forth below, this Court finds that Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). In evaluating claims of ineffective assistance of counsel, courts apply the two-pronged test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). First, an applicant must prove counsel's performance was deficient. *Id.*; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance

[1] This Court will reference PCR testimony where relevant below.

based on "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625. There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," and to receive relief, an applicant must overcome this presumption. *Id.*; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. Second, a PCR applicant must prove the deficiency prejudiced him 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.

Failed to object to testimony by DSS caseworker

Applicant first contends counsel was ineffective for not objecting to testimony by DSS caseworker Letrice Smalls. Specifically, Applicant contends counsel should have objected to the following:

> Q. And have you worked with lots of families where the supportive parent of—the non-abusive parent is non-supportive and non-believing?
>
> [Trial counsel]: Objection. I'm not quite sure where this is going.
>
> [Solicitor]: That's it about.
>
> [Trial counsel]: Well, relevance to this case, Your Honor.
>
> The Court: Is she offering some sort of opinion? What is she testifying about?
>
> [Solicitor]: That it's not unusual at this point the children remain in foster care.
>
> The Witness: They remain in foster care? Yes, Ma'am.
>
> By [the solicitor]:
>
> Q. What would have to happen for the Department of Social Services to return them—

> A. There would have to be a change of circumstances. Currently Mr. Ruiz resides in the home with Ms. Lorenzo and the other issue is that **Ms. Lorenzo doesn't believe Minor**, and because of this, the agency would feel that she's unable to protect.
>
> [Solicitor]: Those are all the questions I have, Ms. Smalls. Thanks. Please answer any questions [trial counsel] has.

(R. 243-44; Tr. 353-54, emphasis added).[2]

This Court finds Applicant did not prove counsel was ineffective in this regard. Initially, Applicant did not clarify or set forth at the PCR hearing *what* legal objection he believed should have been made to this testimony and thus did not meet his burden of proving deficiency or prejudice. To the extent Applicant asserts counsel should have objected based on relevance (an argument raised on direct appeal), this Court finds counsel *did* object to the testimony based on relevance, and counsel's failure to object again on the same basis was reasonable under prevailing professional norms and not deficient. Further, this Court finds it is not reasonably probable a further objection on relevance would have excluded the testimony or changed the outcome of trial.

To the extent Applicant believes counsel should have objected based on improper bolstering (also argued in his direct appeal), this Court finds Applicant did not prove counsel was ineffective in this regard. Critically, counsel's trial strategy was to undermine the minor victim's credibility in part by highlighting the fact the minor victim's mother, Nancy Lorenzo, did not believe the sexual abuse occurred. This is evidenced by counsel's cross-examination of Smalls, where she elicited testimony that the primary reason Lorenzo did not have custody of her children was that she did not believe the sexual abuse occurred. (R. 244-48; Tr. 354-58). This is further evidenced by trial counsel's direct examination of Lorenzo, where she elicited testimony that

[2] This issue was raised in Applicant's direct appeal, but the Court of Appeals found it unpreserved in a Rule 220(b), SCACR-style opinion.

Lorenzo did not believe her daughter's accusations against Applicant. (R. 323-24, 346, 349, 351-57, 367-69; Tr. 440-41, 463, 466, 468-74, 484-86). Finally, this is evidenced by counsel's closing argument, where she argued:

> You heard a lot from Nancy and from Ms. Smalls, the DSS worker, about Nancy not being able to have the kids back, and that's why she's such a credible witness, because all she has to do is say the magic words: I believe. It doesn't have anything to do with the fact that [Applicant] is currently staying with her because he wasn't there for months and months and months, and they never would give her the kids back. They wouldn't give her the kids back now if [Applicant] wasn't there. She has to say, I believe.
>
> Many people may think, just as a parent, you should say—even if you don't believe, you should say it to get your kids back, and so maybe you believe that's the right thing to do as a parent. Maybe that's what Nancy should have done, but Nancy can't do that because she can't lie. She can't lie, especially when it comes to having to sacrifice someone.

(Tr. 553). This Court finds counsel's strategy here—to highlight the fact the minor victim's mother did not believe her as a way of impeaching the minor victim's testimony—was reasonable under prevailing professional norms and not deficient. Likewise, because Smalls' foregoing testimony that Lorenzo did not believe the minor victim supported this strategy, counsel was not deficient for not objecting. Finally, because this testimony supported a valid trial strategy and was ultimately cumulative to other testimony elicited as part of this valid strategy, it is not reasonable likely an objection would have changed the outcome. Thus, this claim is denied.[3]

[3] At the evidentiary hearing, Applicant also cited to page 353 of the record on appeal (transcript pg. 470) as support for his claim that counsel should have objected. This portion of the transcript is trial counsel's direct examination of Lorenzo. Read in context, this testimony supported trial counsel's strategy of impeaching the minor victim by showing Lorenzo did not believe her. As stated, this Court finds this was aa valid trial strategy, and Applicant did not prove deficiency here or resulting prejudice.

Failed to convince Applicant to testify

Applicant next contends counsel was ineffective for not convincing him to testify. At the evidentiary hearing, he testified counsel told him he could testify if he wanted to. Trial counsel testified she discussed with Applicant his right to testify and explained to him that it was his decision. She further testified she was able to get the evidence she needed for her strategy—that the minor victim had a motive to lie—through other witnesses. Counsel explained she does not typically take a strong stance when advising a defendant whether or not to testify; she did not recall taking a strong stance with Applicant.

This Court finds counsel's foregoing testimony credible, and counsel's advice to Applicant here was reasonable under prevailing professional norms and not deficient. This Court further finds it was ultimately *Applicant's* decision to not testify, which he waived after being advised by the trial court of his right to testify. (Tr. 434-35, 515-17). Finally, it is not reasonably probable the testimony Applicant offered at the PCR hearing would have changed the outcome of trial. Ultimately, Applicant's testimony centered on his contention that he could not sexually abuse the minor victim due to an accident that caused erectile dysfunction. This evidence was brought out at trial through Lorenzo, and Applicant's testimony here was largely cumulative. This Court finds Applicant did not prove deficiency or prejudice in this regard, and this claim is denied.

Failed to request lesser-included offense

Applicant next contends counsel was ineffective for not requesting third-degree CSC with a minor as a lesser-included offense of first- and second-degree CSC with a minor. This contention lacks merit. "The test for determining whether an offense is a lesser included of that charged in the indictment is whether the greater of the two offenses includes all the elements of the lesser offense." *State v. Green*, 343 S.C. 207, 209, 539 S.E.2d 419, 420 (Ct. App. 2000). The statute

proscribing the offense of CSC with a minor provides:

> (A) A person is guilty of criminal sexual conduct with a minor in the first degree if:
>
> > (1) the actor engages in sexual battery with a victim who is less than eleven years of age; or
> >
> > (2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).
>
> (B) A person is guilty of criminal sexual conduct with a minor in the second degree if:
>
> > (1) the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age; or
> >
> > (2) the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim. However, a person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in consensual sexual conduct with another person who is at least fourteen years of age.
>
> (C) A person is guilty of criminal sexual conduct with a minor in the third degree if the actor is over fourteen years of age and the actor wilfully and lewdly commits or attempts to commit a lewd or lascivious act upon or with the body, or its parts, of a child under sixteen years of age, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child. However, a person may not be convicted of a violation of the provisions of this subsection if the person is eighteen years of age or less when the person engages in consensual lewd or lascivious conduct with another person who is at least fourteen years of age.

S.C. Code Ann. § 16-3-655.

Third-degree CSC requires the State to prove the actor committed or attempted to commit a lewd or lascivious act upon a minor "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child." First- and second-degree CSC with a minor do not contain this requirement. Because third-degree CSC with a minor contains an element that is not in first- or second-degree CSC with a minor, it is not a lesser-included offense of first- or second-degree CSC with a minor. Thus, counsel's failure to request this charge was reasonable under prevailing professional norms and not deficient. Likewise, and for the same reason, Applicant cannot show prejudice from counsel's failure to request this charge.[4]

Failed to object to illegal life sentence

Finally, Applicant contends counsel was ineffective for not objecting to the life sentences, which he contends were illegal. This argument lacks merit. § 16-3-655 of the South Carolina Code was amended in 2006 to provide that a person convicted of first-degree CSC shall be imprisoned "for a mandatory minimum of twenty-five years, no part of which may be suspended or probation granted, or must be imprisoned for life." 2006 Act. No. 342, § 3, effective July 1, 2006. Applicant was indicted for first-degree CSC offenses that occurred between August 3, 2009, and August 3, 2014. Thus, the life sentences were not illegal, and counsel was not ineffective for not objecting.

[4] Even if third-degree CSC with a minor was a lesser-included offense, counsel had a valid strategic reason for not requesting it here where her primary strategy was to undermine the credibility of the minor victim. Ultimately an attorney must take a calculated risk in assessing whether to request a lesser-included offense, but such decision must be assessed at the time of trial rather than in hindsight. Counsel's strategy throughout was to attack the credibility of the minor victim, and it was reasonable to forego requesting a lesser-included offense when her strategy was ultimately to persuade the jury to not believe minor victim's story at all. Further, it is not reasonably likely, based on the minor victim's testimony, that the jury—upon concluding the minor victim was credible—would have determined this was not a sexual battery but rather third-degree CSC with a minor.

CONCLUSION

Based on the foregoing, this Court concludes Applicant has not established any constitutional violations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice. Should Applicant wish to appeal, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment per Rule 203, SCACR. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). If Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appellate procedures.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and

2. Applicant shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 19th day of September, 2024.

Kristi Curtis

KRISTI CURTIS
Presiding Judge
Ninth Judicial Circuit

Charleston, South Carolina

ALAN WILSON
ATTORNEY GENERAL

September 23, 2024

The Honorable Julie J. Armstrong
Clerk of Court - Charleston County
100 Broad Street, Suite 106
Charleston, South Carolina 29401

Re: **Carlos A. Ruiz, #371060 v. State of South Carolina**
Case No.: 2022-CP-10-00422

Dear Ms. Armstrong:

Enclosed please find the original Order of Dismissal signed by the Honorable Kristi Curtis, in the above-captioned case, for filing in your office. Please forward a time-stamped copy back to our office for our file.

Sincerely,

Danielle Dixon
Assistant Attorney General

DD/vh
Enclosure

cc: Christopher L. Murphy, Esquire