

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

John P. Kehborn, Jr., SCDC #388160,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2023-CP-26-03861

ORDER OF DISMISSAL

RECEIVED

DEC 23 2024

S. SUPREME COURT

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CLERK OF COURT
HORRY COUNTY, S.C.

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FILED
HORRY COUNTY

Presiding Judge:
Applicant's Attorney:
Respondent's Attorney:
Trial Counsel:
Date of Hearing:
Court Reporter:

Hon. Deadra L. Jefferson
Steven W. Fowler, Esq.
Bryan T. Hall, Esq.
Kia T. Wilson, Esq.
July 31, 2024
Sallie Beth Todd

This matter is before the Court pursuant to an application for post-conviction relief ("PCR") filed by John P. Kehborn, Jr., ("Applicant") on June 20, 2023 challenging whether knowingly and voluntarily waived his right to a direct appeal. The State of South Carolina ("Respondent") filed its Return on April 25, 2024, and moved to dismiss the application for failure to comply with the statute of limitations.

On July 31, 2024, an evidentiary hearing convened before this Court on the sole issue of whether Applicant knowingly and voluntarily waived his right to a direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). Applicant was present and represented by Steven W. Fowler, Esquire. Assistant Attorney General Bryan T. Hall represented Respondent. At the hearing, Applicant testified on his own behalf. Respondent called as a witness Kia T. Wilson, Esquire, Applicant's Trial Counsel. Following a thorough review of the trial transcript, the records to the Horry County Clerk of Court, the PCR application, the Respondent's Return thereto, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not

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meet his burden of proof and is not entitled to a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). Thus, this Court denies relief and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections ("SCDC") serving a twenty (20) year sentence. In August 2020, the Horry County Grand Jury indicted Applicant for criminal sexual conduct with a minor – second degree (victim aged 11 to 14 years) (2020-GS-26-02911).¹ On February 14-16, 2022, Applicant proceeded to a jury trial before the Honorable Steven H. John. Assistant Solicitors George H. Martin, III, Esquire and Leigh A. Waller, Esquire prosecuted the case. Applicant was represented at trial by Kia T. Wilson, Esquire ("Counsel"). The Applicant was not present at the call of his trial and the proceeding continued in his absence. On February 16, 2022 the applicant was convicted as indicted and his sentence was sealed. On June 15, 2022, Judge Steven H. John sentenced Applicant to twenty (20) years for criminal sexual conduct with a minor – second degree and ordered that Applicant be placed on the child abuse and sex offender registry. Applicant did not appeal.

FACTS GIVING RISE TO THE CONVICTION

The incident occurred on May 26, 2020 at approximately 4:00 AM. The victim was thirteen (13) years old at the time of the incident. The Victim was home with her two (2) brothers and stepfather, the Defendant, while her mother was working overnight. The Defendant went into the Victim's room, turned her on her stomach, and had sexual intercourse with her. The Victim went into the bathroom and texted her brother. While the Victim and her brother were in the bathroom

¹ The offense of criminal sexual conduct with a minor – second degree (victim aged 11 to 14 years) is a violent, most serious felony punishable by imprisonment for not more than twenty years in the discretion of the court. See S.C. CODE ANN. § 16-3-655 (2015); S.C. CODE ANN. § 16-1-60 (2015); S.C. CODE ANN. § 17-25-45 (2014).



they were able to call their mother and father. The Victim's mother called law enforcement and then headed home. The Victim was taken to the Medical University of South Carolina where DNA was collected. DNA processed at the South Carolina Law Enforcement Division determined that the Defendant's DNA was located in the crotch of the Victim's underwear.

CURRENT APPLICATION

On June 20, 2023, the Applicant filed a PCR application alleging he "was denied effective assistance of counsel after trial due to my attorney not filing my direct appeal after I requested her to do so." The Applicant asserts that his Sixth and Fourteenth Amendment rights were violated pursuant to the United States Constitution.

Respondent filed a Return and moved to dismiss the application for failure to comply with the statute of limitations. At the evidentiary hearing, this Court ruled on Respondent's motion and limited the scope of the evidentiary hearing solely to the issue of whether Applicant knowingly and voluntarily waived his right to a direct appeal. *Wilson v. State*, 348 S.C. 215, 559 S.E.2d 581 (2002) (holding the statute of limitations for filing a PCR application does not bar an evidentiary hearing on the issue of whether an applicant knowingly and voluntarily waived his right to a direct appeal).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before this Court are the Horry County Clerk of Court records of the subject conviction; Applicant's records from SCDC; the trial transcript; and the records of the current PCR action. This Court has had the opportunity to review the trial transcript in its entirety and has heard the testimony at the PCR hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony. After a

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careful review based on the *Strickland* standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

SUMMARY OF RELEVANT PCR EVIDENTIARY TESTIMONY

APPLICANT'S TESTIMONY

The Applicant testified on his own behalf. On direct examination the Applicant testified that his attorney in the underlying case was Kia Wilson, Esq. of the Horry County Public Defender's Office. The Applicant testified that his underlying charge is Criminal Sexual Conduct with a Minor. The Applicant testified that he is a combat veteran, has severe anxiety, PTSD and severe depression. The Applicant testified that he was not present at his trial and was found guilty at the conclusion of his trial. Applicant testified that he was aware there was supposed to be a trial in his case. The Applicant further testified that there was not a lot of communication between himself and Attorney Wilson prior to trial except for the time immediately proceeding trial. Applicant testified that he was not at trial because he did not feel represented. Applicant testified that he did not appear for his trial. The Applicant testified that he often emailed Attorney Wilson, but would not receive a response. The Applicant testified that while present at his June 15, 2022, sentencing hearing, he asked Attorney Wilson to file a direct appeal. The Applicant testified that Attorney Wilson told him to call and remind her. The Applicant testified that he called the office the same day but did not speak with Attorney Wilson directly and was under the impression that a direct appeal would be filed. The Applicant testified that his brother also called Attorney Wilson regarding the Applicant's appeal. The Applicant testified that he had his brother call on his behalf before the one-year deadline, because the Applicant does not like to use the phone at the correctional facility as the calls are recorded. The Applicant testified that he believes the time in which an appeal must be filed is one (1) year. The Applicant further testified that he and his brother

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contacted Attorney Wilson within a year of his sentencing to request that a direct appeal be filed. The Applicant testified that Attorney Wilson told him what to do in order for his appeal to be filed and he took the necessary action.

On cross examination the Applicant testified that calls are logged and recorded at the correctional facility, however he does not have a log or recording showing when he called Attorney Wilson. The Applicant further testified that he does not know the exact date that his brother called Attorney Wilson. The Applicant confirmed that Attorney Wilson does not represent his brother. The Applicant further testified that he has lost most of his notes.

On re-direct examination, the Applicant testified that he is not employed at the prison system and does not know how records are kept at the correctional facility. The Applicant testified that he expected Attorney Wilson to file his direct appeal since he asked her to do so and she is employed to represent her clients. The applicant reiterated that he lost his notes during the course of transport from Texas to Kershaw and had to ship some back.

Kia T. Wilson, Esq. testified on behalf of the State. She was trial counsel for the Applicant. On direct examination Wilson testified that she has been practicing law for twenty (20) years. Wilson testified that the totality of her twenty (20) years of practice has been devoted to criminal law. Wilson testified that she is a Senior Trial Attorney with the Horry County Public Defender's Office and was working in that capacity in February, 2022. Wilson testified that the Applicant's underlying case was originally assigned to Clay W. Pinkerton, Esq. of the Horry County Public Defender's Office. Wilson testified that James C. Galmore, III, Esq. of the Horry County Public Defender's Office was originally sitting second chair on the case with Pinkerton. Galmore became ill approximately two (2) months before trial and Wilson stepped in. Wilson testified that the trial was scheduled for September 20, 2021 however Pinkerton went home sick on that date and the

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trial was continued. At some point Wilson took over as the lead attorney and the case went to trial on February 14, 2022 through February 16, 2022.² Wilson testified that she had constant communication with Applicant up to the time of trial through email, phone and in person. She further testified that one week prior to trial the Applicant was panicked and communicated that to her through email. Wilson testified that the Applicant never asked her to file a direct appeal. Wilson testified that the Applicant was convicted, his sentence was sealed on February 17, 2022, and a bench warrant was issued. Wilson testified that the Applicant had fled, was subsequently located, the sentence was unsealed and the Applicant was sentenced by Judge John on June 15, 2022. Wilson further testified that she and Applicant spoke in person prior to the sentencing but doesn't recall speaking to the Applicant following his sentencing on June 15, 2022. Wilson testified that the Horry County Public Defender's Office keeps a log of calls. Wilson testified that no call is logged from the Applicant following his sentencing. Wilson testified that eight (8) months after sentencing on February 2, 2023 at 10:54 a.m., the Horry County Public Defender's Office received a call from the Applicant's brother advising that the Applicant wanted an appeal but didn't know how to get in contact with his attorney. Wilson testified that the time period to file an appeal after a conviction is ten (10) days. Wilson testified that she advised the Applicant of his right to an appeal prior to his sentencing. Wilson further testified that she advised the Applicant that the time period in which an appeal must be filed is ten (10) days. Wilson testified that she never told the Applicant that the time period in which an appeal must be filed is one (1) year. Wilson testified that it is her standard practice to file an appeal whenever a client asks. Wilson testified that she does not file an appeal unless a client asks. Wilson testified that if the Applicant requested that an appeal be filed, she would have filed an appeal on the Applicant's behalf.

² Pages 67 through 79 of the trial transcript detail the trial in absentia procedure conducted by the trial court, Judge Steven H. John.

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On cross examination, Wilson testified that she did not have a second chair in the Applicant's underlying trial. Wilson testified that she was a Senior Trial Attorney at the time of the trial and did not need a second chair. Wilson testified that the original trial date was September 20, 2021 and the actual trial dates were February 14 – 16, 2022. Wilson testified that she had constant communication and multiple meetings with the Defendant. Wilson testified that she fully explored the issue of a DNA expert and funding for the Applicant's case. She further testified of the Applicant's insistence on trial in spite of the weight of evidence against him and his misinterpretation of the existing scientific evidence. Wilson testified that all clients are told that she will file an appeal if the client wants one. Wilson further testified that she tells clients to inform the front office if the client wants an appeal. Wilson advises clients against trying to leave a message or voicemail with their attorney because the time limit for an appeal is so finite. Wilson testified that there is not an automatic appeal policy at the Horry County Public Defender's Office. Wilson further testified that sometimes automatic appeals are filed for murder cases. Wilson testified that it is her practice that if a client wants an appeal she will file it and she hasn't missed that practice yet. She testified that to date she has not missed a request to file an appeal to date. She further testified that her only notice was the call from the Applicant's brother eight (8) months after the sentencing. She testified that the Applicant "never" called and "never" requested an appeal be filed. There was no re-direct examination of Wilson.

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRPC; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove "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 (1984); *Butler*, 286 S.C. at 441, 334 S.E.2d at 813. "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland*, 466 U.S. at 687-88; *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Waiver of Direct Appeal

Following a trial, counsel is required to inform a defendant of their right to an appeal. *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). Absent an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedures of *Anders v. California*, 386 U.S. 738 (1967). *Turner v. State*, 380 S.C. 223, 670 S.E.2d 373 (2008). The PCR judge determines whether an applicant knowingly and voluntarily waived his right to a direct appeal from his trial. *White*, 263 S.C. 110, 208 S.E.2d 35; *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

As a matter of general impression, this Court finds Counsel's testimony at the evidentiary hearing credible and persuasive, where she presented well-recalled testimony of relevant background, facts, and discussions leading up to and during the Applicant's trial and sentencing. This Court finds Applicant's testimony at the evidentiary hearing lacks credibility. This Court finds Counsel's performance and advice regarding Applicant's right to an appeal was reasonable under

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prevailing professional norms. This Court finds credible Counsel's testimony that she has practiced criminal law for over twenty (20) years. This Court finds credible Counsel's testimony that she advised Applicant of his right to a direct appeal after trial. This Court finds credible Counsel's testimony that she was aware that the deadline to file a notice of appeal is ten (10) days. This Court finds credible that Counsel advised Applicant to communicate his decision regarding an appeal to the front desk of her office if he could not reach her because Counsel recognized the finite timeframe to file an appeal. This Court finds credible Counsel's testimony that after advising Applicant of his right to an appeal, Applicant did not communicate to Counsel any desire to file an appeal. This Court also finds credible Counsel's testimony that the phone call log from the Horry County Public Defender's office, business records kept in the ordinary course of business, did not indicate that Applicant contacted Counsel's office to inform her of his desire to appeal. This Court further finds there is no evidence in the record that Applicant was prevented from communicating with Counsel via telephone while incarcerated. This Court finds credible Counsel's testimony that the only notification she received regarding Applicant's desire to appeal was from Applicant's brother in February 2023, approximately eight (8) months after Applicant's sentence.

This Court finds Applicant's failure to notify Counsel after being advised of his right to an appeal constituted an intelligent waiver of his right to an appeal. This Court does not find credible Applicant's testimony that after his sentencing, he informed Counsel in person and via telephone that he wished to appeal. Therefore, this Court finds Applicant failed to meet his burden of proving he did not knowingly and voluntarily waive his right to an appeal, and Applicant is not entitled to a belated appeal pursuant to *White v. State*.



ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence or testimony in support of the claims. Accordingly, this Court deems these allegations abandoned by the Applicant. Therefore, they are hereby denied and dismissed.

CONCLUSION

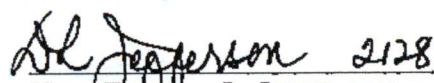
Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is **DENIED AND DISMISSED WITH PREJUDICE**.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty (30) days of receipt by counsel of written notice of entry of judgment. *See* 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 an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRPC. Applicant's attention is directed to South Carolina Appellate Court Rules 203, 206, and 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 10th day of December, 2024.


HON. DEEDRA L. JEFFERSON
Presiding Judge
Fifteenth Judicial Circuit

Charleston, South Carolina
At Chambers

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