

STATE OF SOUTH CAROLINA)
 COUNTY OF GREENVILLE)
)
 Terry Lemore McCarrell, #171323,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT

2016-CP-23-1089

ORDER OF DISMISSAL

FILED - CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMMER
 2017 MAY 10 10 49 PM '17

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on February 22, 2016. Respondent submitted its Return and Motion for More Definite Statement on August 16, 2016. An evidentiary hearing was convened on February 23, 2017, at the Greenville County Courthouse. Applicant was present at the hearing and was represented by William G. Yarborough, III, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

I. PROCEDURAL HISTORY

The records before this Court indicate that Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. Applicant was indicted by the February 2013 term of the Greenville County Grand Jury for Criminal Sexual Conduct, First Degree (2012-GS-23-00967) and Lewd Act Upon a Child (2012-GS-23-00968). Applicant was subsequently indicted by the June 2014 term of the Greenville County Grand Jury for Contributing to the Delinquency of a Minor (2012-GS-23-01662) and Grand Larceny (2012-GS-23-02622). Alex Stalvey, Esquire, represented him. On July 7, 8, and 10, 2014, Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted on all charges. The Honorable Robin B. Stilwell sentenced Applicant to confinement

for twenty years for the count of Criminal Sexual Conduct, First Degree, fifteen years for the count of a Lewd Act Upon a Child, three years for the count of Contributing to the Delinquency of a Minor, and five years for the count of Grand Larceny. The sentences are set to run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to Anders v California, 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal after review. State v. McCarrell, Op. No. 2016-UP-005 (filed on January 13, 2016). Remittitur was issued on January 29, 2016.

II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

1. "All of the charges were tried together, the trial should have been severed to separate the Grand Larceny charges from the others. His attorney failed to sever the trial." (sic)
 - a. "Because the Defendant pled guilty to Grand Larceny, his guilt of that charge spilled over into the jury's perception and assessment of his innocence of the charges he did not plead guilty to."
2. "The victim of Grand Larceny was shown a photographic line up, and his identification was tainted by law enforcement's use of unnecessarily suggestive identification procedure. Additionally, this line up was introduced at trial and was prejudicial to the Defendant. His attorney failed to prevent the admission of this evidence and testimony."
 - a. "The line up included photographs that were clearly mugshots and the other mens' appearance in regard to skin tone, age, weight and hair style (including facial hair), varied widely. Therefore, the Grand Larceny victim and witness only had to choose from two photographs to identify the Defendant, instead of six. The admission of this line up at trial was also prejudicial to the Defendant because the mugshots of the Grand Larceny charge spilled over into the jury's perception and assessment of his innocence of the charges he did not please guilty to."
3. "His attorney failed to object at various instances of prejudice to the Defendant at trial."
 - a. "Evidence and testimony were introduced that were unduly prejudicial to the Defendant."




III. APPLICABLE LAW

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.Ed.2d 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. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, 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 (1985).



V. SUMMARY OF RELEVANT TESTIMONY

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from Trial Counsel, Alex Stalvey, and Brooklin Pollard.

Trial Counsel testified at the hearing that he works in private practice, and at the time he represented Applicant, he was a contract Assistant Public Defender who was appointed to the case. He stated that he met with Applicant at least once before the trial, and he believed they met three times. He stated that Applicant maintained his innocence and wanted a trial and would not accept a plea offer. Trial Counsel testified that he visited Applicant on June 28, 2014, ten days before the trial, but he recalled having the case longer than just ten days because he spent time having significant conversations with the Solicitor about plea negotiations. He stated that Brian Johnson previously represented Applicant before he took the case, but he never met with him to discuss the file.

Trial Counsel testified that he did not have much of a relationship with Applicant. He stated that he felt fully prepared for trial and that there was no reason to request a continuance; if he had felt like he needed more time, he would have asked for a continuance. Trial Counsel stated that Applicant was tried in his absence; he chose to leave the courthouse right before they picked a jury for trial and did not return. He stated that he does not recall being given any reason why Applicant left the trial.

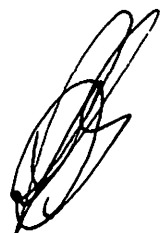
Trial Counsel testified that the minor Victim in this case had a juvenile record, but he would not have been able to get any of her prior convictions in at trial on cross-examination because they were inadmissible. However, he testified that the Victim testified about her prior convictions and all the trouble she had been in on the stand at trial.



Trial Counsel testified that he chose not to move to sever the charges into two separate trials because his strategy was to attack the credibility of the Victim, which he could not have done unless all the charges were tried together. He stated that the Victim was involved in the Grand Larceny, and his defense was that the Victim fabricated the Criminal Sexual Conduct allegations so that she would not be blamed for the theft of the stolen rings. He stated that the Victim admitted on the stand at trial that she lied about being pregnant with Applicant's child to avoid blame for the stolen rings.

Trial Counsel testified that he moved to suppress the photo lineup in a Neil v. Biggers hearing before the trial began. He stated that he challenged the reliability of the lineup based on the skin tones, facial hair, and ages of the men in the photographs, but his motion was denied and the lineup was found to be admissible. Trial Counsel testified that, even if the photographs in the lineup had been different, he does not believe that it would have changed the outcome of the case because the minor Victim and the theft Victim had spent significant amounts of time with Applicant and both identified him multiple times.

After Trial Counsel's testimony, Applicant took the stand. Applicant testified that he was arrested for grand larceny for the theft of a pair of rings on December 20, 2011. He stated that he bonded out, but he was arrested again for criminal sexual conduct around January, 2012. He stated that Brian Johnson was appointed to represent him after he was arrested again, and he was released again on bond in April of 2012. Applicant stated that he had a good relationship with his first attorney and they met several times. He stated that on June 27, 2014, he received a letter from Trial Counsel telling him that he now represented him on his case and Mr. Johnson had been relieved.



Applicant testified that he showed up for court on July 7, 2014, ready and knowing that he was going to trial that day. He stated that he talked to Trial Counsel about his case, but he did not know that Trial Counsel was his lawyer at that point; he still thought Mr. Johnson was his lawyer. He stated that he told Trial Counsel about some facts of his case that he believed would help him, but Trial Counsel was not listening, so he became frustrated, which is why he left. He stated that he did not have enough time to talk to Trial Counsel before the trial, but he did not ask for a continuance or file a motion to have counsel relieved because he did not know that he could do so.

Applicant testified that he met the minor Victim through her mother, and he had no relationship with her. He stated that he was a close friend of the family and he spent time around the Victim four or five times while her mother was at work, and they watched television together. He stated that he did not have a sexual relationship with the Victim or her mother.

Applicant testified that he was indicted of grand larceny only two weeks before the trial, and he was surprised, because the whole time they were preparing for trial, he thought it was just over the CSC charges. However, he stated that he was arrested for the grand larceny charge.

Finally, Applicant presented testimony from witness Brooklin Pollard. Ms. Pollard testified that she is Applicant's daughter. She stated that she testified at trial for the State about the text messages used as evidence at trial. She stated that they were her messages and they came from her cell phone.

VI. 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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their



testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant has asserted several allegations of ineffective assistance of counsel. This Court finds these claims to be meritless and they should be denied and dismissed with prejudice. Each allegation presented at the evidentiary hearing is addressed below.

Generally

In general this Court finds that Trial Counsel was adequately prepared for Applicant's trial and did not fall below the standards of professional norms in any manner. Trial Counsel credibly testified that he had enough time to prepare for trial and did not have any reason to request more time. He communicated properly with Applicant and reviewed all discovery materials with him. Based on this testimony and the record before the court, this Court finds that Trial Counsel's representation was not ineffective in any regard.

Failure to move to sever the charges into separate trials

Applicant alleges that Trial Counsel was ineffective for failing to move to sever the Grand Larceny charge into a separate trial from the Criminal Sexual Conduct charges. This allegation is meritless.

Trial Counsel testified that he had a very specific trial strategy in choosing not to sever these charges. He stated that he wanted to attack the credibility of the minor Victim, and he



would not have been able to do that for any charge without trying all of them together. Trial Counsel's strategy was to suggest to the jury that the minor Victim fabricated her story about the criminal sexual conduct in order to escape punishment for stealing the rings, which were the subject of the grand larceny.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

This Court finds that Trial Counsel articulated a valid trial strategy in choosing not to sever the trials, and thus his choice was not deficient. Furthermore, Applicant has failed to show any prejudice resulting from his choice not to sever. Because Applicant failed to prove either prong of the Strickland test, this allegation is denied and dismissed with prejudice.



Failure to prevent the admission of the photo lineup

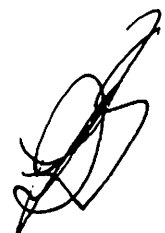
Applicant alleges that Trial Counsel was ineffective for failing to prevent the admission of the photo lineup. This allegation is meritless.

Trial Counsel did, in fact, object to the photo lineup and challenged its admissibility in a pre-trial hearing. He argued to the trial court that the differences in skin tone, facial hair, and age between the men in the photographs made it unreliable, but the trial court found the lineup admissible after considering his argument. There was nothing further Trial Counsel could have done in order to prevent its admission. Therefore, this Court finds that Trial Counsel was not deficient in any manner with regard to this allegation, and Applicant can show no prejudice resulting from any inaction. This allegation is denied and dismissed with prejudice.

Failure to challenge text messages from cell phone

At the evidentiary hearing, Applicant attempted to raise an allegation of ineffective assistance of counsel based on Trial Counsel's failure to challenge the cell phone records admitted at trial, which he alleged were text messages that came from a phone that was used by people other than Applicant. Respondent objected, claiming this allegation was outside the scope of his original application. Respondent noted that it had filed a Return and Motion for More Definite Statement, and no amended application was filed regarding this allegation. This Court sustained Respondent's objection and held that Applicant could not raise any additional allegations regarding the cell phone records.

This Court finds that any allegation regarding the text messages or cell phone records shall not be considered as they were not properly raised, and thus are denied and dismissed with prejudice.



ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

VII. CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

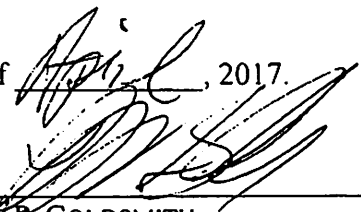
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IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 20 day of April, 2017.



BROOKS P. GOLDSMITH
Presiding Judge
Thirteenth Judicial Circuit

_____, South Carolina