

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Hon. Heath P. Taylor, Circuit Court Judge

Case No. 2019CP1801373

Vernon Cooley,

Petitioner,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Vernon Cooley, Petitioner, appeals the Order issued by the Honorable Heath P. Taylor on February 21, 2023. Petitioner, through counsel, received notice of the entry of the Order on February 27, 2023 (attached hereto).

Additionally, pursuant to the Order filed, Petitioner was granted a belated direct appeal pursuant to White v. State, and Petitioner hereby notices his intent to appeal his underlying conviction filed in the Court of General Sessions on August 28, 2018 (attached hereto).

Date: March 2, 2023



Christopher R. Geel
Geel Law Firm, LLC
PO Box 21771
Charleston SC 29413
843-277-5080
Attorney for Petitioner

RECEIVED

MAR 07 2023

S.C. SUPREME COURT

FILED-RECORDED

State of South Carolina Dorchester County	2023 FEB 21 AM 10:28 CHERYL GRAHAM CLERK OF COURT DORCHESTER COUNTY	In the Court of Common Pleas For the First Judicial Circuit Case No(s): 2019CP1801373 (PCR Application)
Vernon Cooley (#377574) v. State of South Carolina		ORDER PARTIALLY GRANTING AND PARTIALLY DENYING APPLICATION FOR POST- CONVICTION RELIEF

This matter came before this Court in the First Judicial Circuit on January 25, 2023 upon Applicant's request for post-conviction relief ("PCR"). At the hearing, the Applicant Vernon Cooley, through counsel, made several arguments in support of his alleged grounds for Post-Conviction Relief. Those arguments and this Court's findings regarding each alleged ground for relief are discussed in detail below.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Dorchester County Clerk of Court. Applicant was arrested on March 10, 2016, following an investigation into the alleged sexual assault of a minor victim. Applicant was indicted in August 2018 for criminal sexual conduct with a minor in the second degree. On August 27, Applicant proceeded to trial before the Honorable Diane Goodstein. Applicant was represented by Charlie Whirl, and the State was represented by Ryan Templeton and Sheila Mims. At the end of trial, Applicant was convicted on the sole count of the indictment. The trial court sentenced Applicant to twenty years' imprisonment. Applicant did not file a direct appeal.

Applicant filed a *pro se* PCR application in Dorchester County on July 23, 2019. That application was subsequently amended by PCR counsel. The matter was convened

for an evidentiary hearing on January 25, 2023. At that evidentiary hearing, Cooley asserted the following grounds for relief:

1. The Applicant is entitled to a belated direct appeal, pursuant to White v. State, 263 S.C. 110 (1974). Applicant never received a direct appeal, and Applicant never knowingly and intelligently waived this right.
2. Trial counsel was constitutionally ineffective pursuant to Strickland v. Washington when he failed to object to improper vouching/bolstering testimony.

At the evidentiary hearing, Applicant testified on his own behalf, and the Court also heard testimony from trial counsel Charlie Whirl. Having heard the evidence presented in this matter, the application is hereby GRANTED in part and DENIED in part, for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Synopsis of Trial Evidence

This case arises from an allegation that on March 5, 2016, the Applicant Vernon Cooley sexually assaulted his 15-year-old granddaughter. The State alleged that on the date in question, Applicant had agreed to take the victim out for breakfast. Instead, they went to Applicant's house and the victim alleged that Applicant kissed her, removed her clothing, and digitally penetrated her vagina. After the alleged incident, the victim reported these events to her step-father, who contacted police. Applicant was subsequently charged with criminal sexual conduct, and he maintained his innocence throughout the underlying proceedings. At trial, the State presented testimony of the victim, the victim's mother (Applicant's daughter), the victim's step-father, and several law enforcement personnel who responded to the scene on the date in question. At issue in this proceeding is the testimony of two witnesses who interviewed the victim – (1) Melissa Blanchard, a Dorchester County Sheriff's Office investigator who spoke to the victim on the date of the

incident, and (2) Katherine Fabrizio, a nurse practitioner at M.U.S.C. who met with the victim on March 24, 2016, nineteen days after the incident took place. The details of their testimony are set forth in greater detail below.

The forensic evidence presented at trial was ultimately inconclusive. Investigators analyzed the victim's underwear but serology testing did not identify the presence of semen or saliva. (Tr. 170-71). Similarly, a DNA sample recovered from the sexual assault kit could not be matched to Applicant. (Tr. 177-79). However, Katherine Fabrizio testified that two weeks prior to her examination of victim, redness was observed on victim's hymenal tissue. (Tr. 189). Fabrizio testified that this redness was not present during her follow-up examination, and "the fact that it was gone says to me that it was most likely an acute finding," and expressed her opinion that her "diagnosis" was sexual assault. (Tr. 190-91).

Ineffective Assistance of Trial Counsel

Applicant alleges that he received ineffective assistance of trial counsel in several respects. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389 (2002). Mere allegation of ineffective assistance is not sufficient to warrant granting relief. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977). 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, (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Attorneys are held to an objective standard of "reasonably effective assistance" under "prevailing professional norms." Cherry v. State, 300 S.C. 115, 117 (1989)(quoting Strickland, 466 U.S. at 688). A PCR applicant must also show prejudice to receive relief. Prejudice is defined as a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Lafler v. Cooper, 566 U.S. 156, 163 (2012). A reasonable probability is a probability sufficient to undermine

confidence in the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

I. Belated direct appeal, pursuant to White v. State, 263 S.C. 110 (1974).

Applicant alleges that he was deprived of his right to a direct appeal, and that he never knowingly and voluntarily waived this right. This Court agrees, and finds that Applicant is entitled a belated direct appeal pursuant to White. The record before this Court demonstrates that trial counsel failed to file a notice of appeal, and failed to adequately inquire whether Applicant desired that a direct appeal be filed. Applicant testified that he never waived his right to an appeal, and that he never intended to relinquish this right. Moreover, trial counsel candidly admitted that he elected not to file a notice of appeal in order to ensure that Applicant had meritorious issues to raise in his PCR proceeding. This was clearly an objectively unreasonable choice on counsel's part, since Applicant did not stand to benefit in any conceivable way from counsel's failure to pursue an appeal. Further, counsel candidly admitted that he was unaware of the appellate procedures that would allow Applicant to pursue his direct appeal with the assistance of appointed counsel, nor the procedures that would resurrect Applicant's right to a belated appeal under White v. State. In summary, trial counsel was simply misinformed or unaware about the procedural issues at play, and the possible consequences of failing to file an appeal. In other words, his decision was not the product of strategic reasoning, nor was it informed by an adequate understanding of the law. Whether or not clarifying this point was trial counsel's responsibility, the end result was that Applicant was deprived of his right to a direct appeal, and there is no evidence whatsoever that Applicant intended to give up this right at any time. An applicant who meets the burden of showing that he did not knowingly and voluntarily waive his right to a direct appeal of his trial conviction is entitled to a belated appeal. Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002); Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986). This Court hereby finds that the Applicant did not knowingly and

intelligently and voluntarily waive his right to direct appeal. Consequently, he is entitled to relief on this ground.

II. Failing to object to alleged vouching/bolstering testimony

Applicant alleges that trial counsel was constitutionally ineffective for failing to object to testimony from the State's witnesses that Applicant alleges constitutes vouching/bolstering, which is prohibited under State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (S.C. 2013) and related cases. In Kromah, the supreme court clarified the scope permissible testimony from forensic interviewers as follows:

Our courts have previously held that the assessment of witness credibility is within the exclusive province of the jury, and that witnesses generally are not allowed to testify whether another witness is telling the truth. . . . Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter. Because the admissibility of forensic interviews and the testimony based thereon at trial has been the subject of several recent appeals, we believe it would be helpful to set forth, by way of example, the kinds of statements that a forensic interviewer should avoid at trial:

- that the child was told to be truthful;
- a direct opinion as to a child's veracity or tendency to tell the truth;
- any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a "compelling finding" of abuse;
- any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or
- an opinion that the child's behavior indicated the child was telling the truth.

State v. Kromah, 401 S.C. 340, 358-60, 737 S.E.2d 490 (S.C. 2013)(internal citations and quotations omitted). Applicant specifically points to two witnesses whose testimony

Applicant claims was impermissible under Kromah, and Applicant further alleges that trial counsel was ineffective for failing to object to such testimony and/or seek its exclusion from trial. The substance of this testimony and this Court's analysis of Applicant's claims will be presented separately.

Testimony of Melissa Blanchard

Applicant cites the following exchange during Blanchard's testimony:

Q: Okay. Did you have – did you have the opportunity to speak with the victim in this case?

A: I did.

...

Q: Okay. Did she ultimately reveal the sexual assault occurred?

A: She did.

...

Q: Did you review the report from [the] sexual assault kit?

A: I did.

Q: Did she make a similar report to the nurse doing that sexual assault kit?

A: She did.

Q: Okay. Did you set up any other interviews with the victim in this case?

A: I did.

Q: Okay. What other interviews did you set up with her?

A: I set up a forensic interview at Dorchester Children's Advocacy Center in Summerville.

Q: Okay. And did you actually – you didn't conduct that interview, did you?

A: I did not.

Q: Okay. Did you view that interview?

A: Yes, sir, I watched it.

Q: Okay. Did she indicate the same actions occurred?

A: Correct.

Q: Okay. Once you had all that information together, what did you do next?

A: Given the report from MUSC that I received and the consistent disclosures from the juvenile, I prepared an affidavit and presented it to the magistrate for a warrant.

(Tr. 134-36). When asked about this exchange during Applicant's PCR proceeding, trial counsel indicated that he did not believe that this testimony constituted vouching or bolstering testimony, and therefore he saw no permissible basis for objecting or attempting to exclude this testimony. This Court agrees. Although Blanchard clearly indicated that the various statements the victim gave led directly to her decision to charge Applicant with criminal sexual conduct, Blanchard did not express her personal opinion about the veracity of the victim's statements, which is the primary concern expressed in Kromah and similar cases. Because this Court finds that this evidence was properly admissible, the Court further finds that there was no appropriate basis for trial counsel to object to this testimony. Thus there is no basis for this Court to conclude that trial counsel's choice to *not object* to this testimony was unreasonable under Strickland. Counsel cannot be expected to make frivolous or groundless objections to admissible testimony, nor would making such objections give rise to a reasonable probability that the evidence would be excluded, much less change the outcome of the trial. Consequently, counsel cannot be deemed ineffective under the Strickland framework for choosing not to object in this manner, and Applicant's claim must be denied for this reason.

Testimony of Katherine Fabrizio

Applicant argues that the testimony of Katherine Fabrizio impermissibly bolstered the victim's credibility, and that trial counsel was ineffective under Strickland for failing to object to her testimony or exclude it from trial. Applicant's claim fails for the simple reason that trial counsel *did* seek exclusion of this evidence at trial, but his objection was overruled by the trial court. During Applicant's PCR hearing, Applicant's counsel asked trial counsel about the need for a contemporaneous objection to Fabrizio's testimony, and trial counsel did not recall any strategic reason for not renewing his objection during Fabrizio's actual testimony. However, this Court finds that such an objection was not necessary under the circumstances in order to preserve counsel's objection for appellate review.

Typically, when a party moves *in limine* to exclude evidence or testimony, the moving party must also make a contemporaneous objection to the evidence when it is actually presented in order to preserve the issue for appellate review. State v. Moses, 390 S.C. 502, 511 (Ct. App. 2010). This is because rulings on motions *in limine* are provisional rulings, and are typically not final. Kromah, 401 S.C. at 353 ("Generally, a motion in limine is not a final determination; a contemporaneous objection must be made when the evidence is introduced."). However, our courts have identified an important exception to this general rule, which occurs when the motion *in limine* is made immediately prior to the introduction of the evidence in question. State v. Forrester, 541 S.E.2d 837, 343 S.C. 637 (S.C. 2001) ("where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection. The issue is preserved."). Such is the case here. Trial counsel requested exclusion of Fabrizio's testimony immediately prior to its presentation at trial. (Tr. 198). In fact, immediately before her actual trial testimony, Fabrizio's proposed testimony was proffered outside the presence of the jury and both parties argued its admissibility to the court. (Tr. 181-205). Trial counsel even argued that the evidence should be excluded *because* it constitutes bolstering, and it "[adds] to the credibility of the child."

(Tr. 198). In summary, trial counsel specifically argued that Fabrizio's testimony should be excluded on the grounds alleged by Applicant herein. Although this Court does not express its opinion on the admissibility of this evidence, there is no basis for finding that trial counsel was ineffective under Strickland for his handling of this evidence. Counsel moved to exclude the evidence immediately prior to its presentation to the jury, and the trial court made a ruling on the admissibility of the evidence. Further objections from counsel were not necessary in order to preserve this issue for appellate review, and thus it cannot be said that trial counsel was deficient in any regard. Therefore Applicant cannot carry his burden under Strickland, and this ground for relief must be denied.

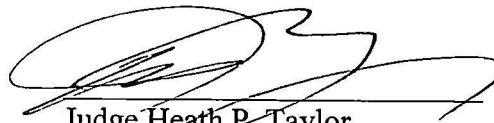
CONCLUSION

Based on the foregoing, this Court finds that Applicant has failed to establish sufficient constitutional violations regarding trial counsel's handling of the alleged "vouching/bolstering" testimony, and consequently the Applicant is not entitled to Post-Conviction Relief on that ground. The application must therefore be DENIED as to that ground. Regarding Applicant's belated appeal pursuant to White, the Court hereby finds that Applicant was deprived of his right to a direct appeal, and that he never voluntarily relinquished that right. Consequently, Applicant is entitled to a belated direct appeal, and therefore the application must be GRANTED with respect to that ground.

IT IS THEREFORE ORDERED that the Application for Post-Conviction Relief must be GRANTED as to Ground 1 (belated appeal pursuant to White), and DENIED as to the remaining ground for relief.

IT IS SO ORDERED!

Date: February 21, 2023


Judge Heath P. Taylor
Presiding Judge
First Judicial Circuit

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

Dorchester

VS.

Vernon Lamarr Cooley

CERTIFIED COPY

INDICTMENT/CASE#: 2016GS18-0554

AKA:

Race: BLACK

Sex: M

Age: 7/58

DOB: 11/3/33

NWI: 2016A1810300188

Date of Offense: 3/3/2016

S.C. Code § 16-3-655(3)

CDR Code #: 0397

Address: 316 Danberry Drive

City, State, Zip: Summerville, SC 29485-4921

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADS

TO: Criminal Sexual Conduct with Minor - Victim 11 to 14 Yrs of Age inclusive - Second Deg.

in violation of: § 16-3-655(B)(2)

of the S.C. Code of Laws, bearing CDR Code # 0396

☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory OPS☐ §17-25-45

(CSC w/minor 1st or CSC w/minor 3rd)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

(defendant's initials)

The plea is: ☐ Without Negotiations or Recommendation,☐ Negotiated Sentence,☐ Recommendation by the State.

ATTEST:

Solicitor

15784

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the

☒ State Department of Corrections,☐ County Detention Center,for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the SCDOP.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

days/hours Public Service Employment

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fines:

§ 14-1-206 (Assessments 107.5 %)

\$

§ 14-1-211(A)(1) (Conv. Surcharge)

\$100

\$

§ 14-1-211(A)(2) (DUI Surcharge)

\$100

\$

§ 56-5-2995 (DUI Assessment)

\$12

\$

§ 56-1-286 (DUI Breath Test)

\$25

\$

Proviso (Public Def/Probation)

\$500

\$

§ 14-1-212 (Law Enforce. Funding)

\$25

\$

§ 14-1-213 (Drug Court Surcharge)

(\$150)

\$

§ 50-21-114 (BUI Breath Test Fee)

\$50

\$

§ 56-5-2942(J) (Vehicle Assessment)

\$40/ea

\$

3% to County (if paid in installments)

\$ 3.75

TOTAL

\$ 128.75

Clerk of Court/Deputy Clerk

Court Reporter:

SCCA/217 (04/2018)

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: The Court finds thatthe actual assault wasNON essential. Defendant mustwork as a sex offender and bemonitored electronically upon release☐ Appointed PD or appointed other counsel

Proviso requires \$500 be paid to Clerk

during probation and shall be collected before

any other fees

Presiding Judge: Deane ShorterJudge Code: 218Sentence Date: 8-27-18

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEASJUDGMENT IN A CIVIL CASE
CASE NUMBER 2019CP1801373

Vernon Lamarr Cooley

2023 FEB 21

South Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

2023 FEB 21 AM 11:51
 CLERK OF COURT
 DORCHESTER COUNTY
 CERTIFIED COPY

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Judge Heath Taylor
Circuit Court Judge

2775
Judge Code

2/21/2023
Date

For Clerk of Court Office Use Only

This judgment was entered on **2/21/23**, and a copy mailed first class or placed in the appropriate attorney's box on **2/21/23**, to attorneys of record or to parties (when appearing pro se) as follows:

Vernon Lamarr Cooley Broad River Inst., 2081B, #377574
4460 Broad River Road Columbia, SC 29210
Christopher Reginald Geel PO Box 21771 Charleston, SC
29413

Megan Harrigan Jameson PO Box 11549 Columbia, SC
29211
Samantha W. Hancock 1332 Main Street, Suite 225
Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Court Reporter

Cheryl Graham - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCp.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.