

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

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Case No. 2012-CP-42-0106

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Rodney Alexander Simmons,

Appellant,

v.

State of South Carolina,

Respondent.

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NOTICE OF APPEAL

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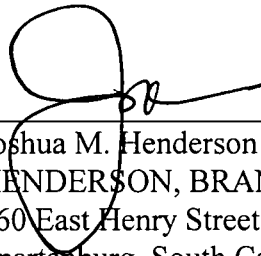
Rodney Alexander Simmons appeals from the Order of the Honorable Robin B. Stilwell, Circuit Judge dated March 5, 2014, bearing file number 2012-CP-42-0106, a Post Conviction Relief Hearing.

March 26, 2014

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S.C. SUPREME COURT



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PROOF OF SERVICE

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I certify that I have served the Notice of Appeal on State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on the 26 day of March, 2014, addressed to its attorneys of record, Suzanne H. White, Esq., P.O. Box 11549, Columbia, SC 29211.

March 26, 2014



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COUNTY OF SPARTANBURG )  
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Rodney Alexander Simmons, #343814, )  
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Applicant, )  
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v. )  
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State of South Carolina, )  
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Respondent. )  
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IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT

2012-CP-42-0106

**ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 10, 2012. The Respondent made its Return on or about August 24, 2012. An evidentiary hearing into the matter was convened on November 14, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Mark Nowell, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Richard Whelchel, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, Applicant's appellate records and the trial transcript.

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**PROCEDURAL HISTORY**

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the August 2008 term of General Sessions for criminal sexual conduct with a minor, second degree (08-GS-42-4629). The Applicant was

represented by Richard H. Whelchel, Esquire. On November 30, 2010, the Applicant proceeded to trial by jury and was convicted as indicted. The Honorable J. Derham Cole sentenced the Applicant to confinement for a period of eighteen (18) years.

A timely Notice of Appeal was filed on behalf of the Applicant. However, in an affidavit dated October 5, 2011, the Applicant indicated his desire not to go further with the appeal. The Order of Dismissal and Remittitur were issued October 13, 2011.

### ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel; in that,
  - a. Counsel denied at critical stage,
  - b. Counsel failed to effectively cross examine,
  - c. Counsel failed to make pre-trial objections,
  - d. Counsel failed to investigate facts and circumstances, and
2. Brady violation.

### 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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court 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 of Counsel

The Applicant alleges he received ineffective assistance of counsel. 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, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e),

SCRCP). Where ineffective assistance of counsel is alleged 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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that he was arrested in April 2008 for a charge of criminal sexual conduct with a minor – 2<sup>nd</sup> degree. Applicant testified that he first met with Counsel approximately ten to fifteen days following his arrest and they met a total of seven or eight times prior to trial. The Applicant testified that Counsel reviewed discovery materials with Applicant. However, Applicant testified that at the beginning of trial, Applicant requested to proceed *pro se*

because he felt Counsel was not doing what Applicant wanted for trial. Counsel testified that he met with the Applicant approximately ten to twelve times prior to trial. Counsel testified that he did share discovery materials with Applicant, including two videotapes from the victim's interviews with Wiley Garrett at the Children's Advocacy Center. Counsel testified that he did have conversations with the Applicant about things that Counsel could not do at trial.

Applicant testified that the State made a motion in limine to prevent the defense from going into other sexual accusations or behavior of the victim based upon the rape shield statute. However, Applicant testified that he did not think that the rape shield law prevented the presentation of other alleged sexual incidents involving the victim. Applicant testified that Counsel subpoenaed school records of the victim and subpoenaed two people from the school to testify. However, Applicant testified that one of the witnesses was just a supervisor.

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Applicant testified that he wanted to present the victim's prior behavioral problems, as well as the various emotional issues he had. Applicant testified the victim had been involved in a sexual assault, in which the victim was the perpetrator, at school. Applicant testified that the victim raped another kid at school. Applicant also testified that the victim was emotionally disturbed. Applicant testified that the victim had been diagnosed with various disorders, including ADHD. Applicant testified that although the victim's Mom and others testified that he began wetting the bed following the assault; Applicant did not believe that the victim's bedwetting could have been caused by a rape, but rather by ADHD. Applicant testified that the victim had exhibited anger and other bad behavior since 1999. Applicant testified that Counsel should have shown the videotape of the victim's interview at the Children's Advocacy Center because it would have shown how the child was emotionally disturbed. However, Counsel testified that he did not believe that it was ever a good idea to enter the videotapes of the child

victim in at trial because it puts the victim and his testimony before the jury even more.

Applicant also testified that Dr. Bomar Evans was qualified as an expert prior to the testimony that Dr. Bomar treated the victim for post-traumatic stress disorder (PTSD). Applicant testified that Counsel should have called a rebuttal witness to testify that PTSD was not a proper diagnosis because the victim had the desire to do what he did in the locker room, not fear as PTSD would indicate. Counsel testified that he discussed the rape shield statute with Applicant and the fact that testimony regarding the incident at school could not be discussed at trial.

Applicant testified that he wanted to take the stand on his behalf and testify, but was advised by Counsel that the consequences included the State bringing in any prior record and losing the ability to make the last argument. Applicant testified that he wanted to take the risk. Applicant testified that there was a discussion on the record regarding his prior assault on a female charge and the State was instructed to not mention it, but the State ended up impeaching him with a larceny, breaking and entering, and the charge of assaulting of female. However, Applicant also acknowledged that it was argued that he opened the door to that charge because of the references to his good character. Applicant testified that Counsel never objected to the improper impeachment of Applicant's character or the State's mention of that charge in their closing argument. Counsel testified that he believed the impeachment of Applicant was proper based upon Applicant's testimony which opened the door for the impeachment. Counsel testified that he did not object at the time of the impeachment or during closing because he did not want to call any more attention to the assault charge.

Applicant testified that Counsel should have gotten the witness list ten days prior to the trial because Kierra Tate had never given a statement and they did not know that she was testifying. Applicant testified that Counsel, on cross-examination of Dr. Nancy Henderson, was

able to get Dr. Henderson to acknowledge that there was no physical evidence of a sexual assault. However, Counsel should have asked Dr. Henderson what she looked for in the physical exam. Applicant testified that Wiley Garrett, therapist at the Children's Advocacy Center, testified that the victim's disclosure was "consistent" with sexual abuse.

This Court finds the testimony of Counsel to be more credible than the testimony of the Applicant. The Applicant's allegation that Counsel did not conduct an adequate pre-trial investigation is without merit. Following testimony and review of the transcript, it is clear that Counsel had reviewed the facts and evidence, as well as the options that Applicant faced. The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). The Applicant failed to point to any specific matters Counsel failed to discover, or any defenses that could have been pursued had Counsel been more fully prepared. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate preparation. This Court finds that the Applicant failed to meet his burden of proof as to this claim.

As to the additional evidence or witnesses Applicant asserts should have been presented in this case, this Court finds that in most probability, they would have been found inadmissible by the trial judge. Testimony regarding the conduct of the victim at another time and place

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would not have been relevant to the case at issue. Furthermore, it is doubtful that the defense could have obtained expert witnesses who would have propounded what the Applicant suggests. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court finds that ~~the Applicant has failed to meet his burden of proof as to this claim.~~

The failure of Counsel to object to the questioning of the Applicant regarding his prior record was not deficient and would not have materially affected the outcome of the trial. The Applicant's testimony on direct examination opened the door for the objectionable question, and Counsel reasonably calculated that an objection would simply draw more attention to the conviction. Therefore, this Court finds that the Applicant failed to meet his burden as to this claim. This Court finds that Counsel's performance was sufficient and reasonably calculated in the best interests of the Applicant.

#### **Brady Violation**

Although alleged in his application, Applicant failed to pursue this allegation at his hearing. Therefore, this Court finds that the Applicant voluntarily abandoned this allegation.

### Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, the Applicant's testimony is not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – ~~that he was prejudiced by Counsel's performance.~~ This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

### 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 cautions Applicant that he must file and serve a notice of appeal within thirty (30) 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


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denial of PCR. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

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

AND IT IS SO ORDERED this 5 day of MARCH, 2014.



Robin B. Stilwell  
Presiding Judge

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SPARTANBURG COUNTY  
2014 MAR -6 PM 3:16  
M. HOPE BLACKLEY



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March 26, 2014

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
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**RE: Rodney Alexander Simmons, Appellant v. State of South Carolina, Respondent**  
**Case Number: 2012-CP-42-0106**

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- 1) Proof of service of the notice of appeal on the respondent.
- 2) Order of Dismissal.

Very truly yours,

Joshua M. Henderson  
FOR: HENDERSON, BRANDT & VIETH, P.A.  
Email: [jhenderson@hbvlaw.com](mailto:jhenderson@hbvlaw.com)  
JM/loy  
Enclosures

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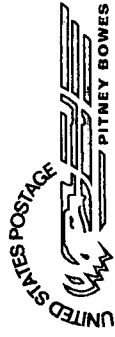
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**S.C. SUPREME COURT**

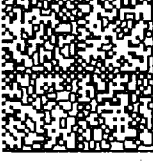
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