Shawn M. Campbell
Kenneth P. Shabel

Campbell & Shabel

ATTORNEYS AT LAW

OF COUNSEL:
Sean Giovannetti

Sender's Email: jmoss@gc-lawfirm.com

Friday, April 04, 2014

VIA CERTIFIED MAIL
The Honorable Daniel Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Donald S. Jones, # 336980 vs. State of South Carolina
2012-CP-11-0574

Dear Mr. Shearouse:

Enclosed for filing are an original and a copy of a notice of appeal in the above-referenced case. I have been appointed to serve as attorney for the PCR applicant, Donald S. Jones, in this action. Also enclosed are the following:

1) Proof of service of the notice of appeal on the respondent.

2) A copy of the order which is to be challenged on appeal.

Insofar as this is an appeal from a Post-Conviction Relief case, I am not enclosing a filing fee, as I believe such fees are waived in these cases.

Best Regards,

Shawn M. Campbell, Esq.
Campbell & Shabel, LLC
104 North Daniel Morgan Ave-Suite 201
Spartanburg, S.C. 29306
Telephone: 864-583-0001
FAX: 864-583-1199
Attorney for Appellant

cc: client
Ms. Suzanne H. White, Assistant Attorney General

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Circuit Court

The Honorable Robin B. Stilwell

Case No. 2012-CP-11-0574

State of South Carolina, Respondent

vs.

Donald S. Jones, Appellant

NOTICE OF APPEAL

Donald S. Jones, hereby appeals the order of the Honorable Robin B. Stilwell, dated March 6, 2014 in Case Number 2012-CP-11-0574.

April 4, 2014

Shawn M. Campbell, Esq.
Campbell & Shabel, LLC
104 N. Daniel Morgan Ave, Suite 201
Spartanburg, S.C. 29306
Telephone: 864-583-0001
FAX: 864-583-1199
Attorney for Applicant

Other Counsel of Record:

Suzanne H. White, Esq.
SC Attorney General's Office
Post Office Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Circuit Court

The Honorable Robin B. Stilwell

Case No. 2012- CP-11-0574

State of South Carolina, Respondent

vs.

Donald S. Jones, Appellant

PROOF OF SERVICE

I certified that I have served the Notice of Appeal by depositing a copy of it in the United States Mail, postage prepaid, on the State of South Carolina, addressed to its attorney of Record, Suzanne H. White, Esq., SC Attorney General's Office, Post Office Box 11549, Columbia, SC 29211

April 4, 2014

Shawn M. Campbell, Esq.
Campbell & Shabel, LLC
104 N. Daniel Morgan Ave, Suite 201
Spartanburg, S.C. 29306
Telephone: 864-583-0001
FAX: 864-583-1199
Attorney for Applicant

MSW

STATE OF SOUTH CAROLINA

COUNTY OF CHEROKEE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2012CP1100574

FILED IN OFFICE OF CLERK OF COURT CHEROKEE COUNTY, S.C.
2014 MAR 7 AM 10:05
BRANDY W. McBEE

Donald Scott Jones #336980 *vs.* State Of South Carolina

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.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

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; ☐ Statement of Judgment by the Court:

Order of Dismissal

Dated at Gaffney, South Carolina, this the 6th day of March, 2014.

Court Reporter:

s/ Robin B. Stilwell

PRESIDING JUDGE - Robin B. Stilwell

This judgment was entered on the the 5th day of March, 2014, and a copy mailed first class this the 7th day of March, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

Shawn M. Campbell 104 N. Daniel Morgan Ave. Ste. 201 Spartanburg, SC 29306

ATTORNEY(S) FOR THE PLAINTIFF(S)

Alan McCrory Wilson PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE DEFENDANT(S)

Brandy W. McBee

Brandy W. McBee - Clerk of Court

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

STATE OF SOUTH CAROLINA COUNTY OF CHEROKEE	)	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Donald Scott Jones, #336980, Applicant, v. State of South Carolina, Respondent.	)	2012-CP-11-0574 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 6, 2012. The Respondent made its Return on or about August 14, 2013. An evidentiary hearing into the matter was convened on November 15, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Shawn M. Campbell, 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. Lucille Whelchel, Applicant's maternal aunt, and Susan Whelchel Clary, Applicant's first cousin, also testified on Applicant's behalf. Thomas E. Shealy, Esquire, also testified. This Court also had before it a copy of the records of the Cherokee 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.

Additionally, this Court held the record open for ten days to allow Applicant to conduct a deposition of the victim's son, who provided a written letter for the hearing, but was not present to testify. This Court disallowed the letter because of the inability to cross-examine the witness and inability to authenticate. A deposition was scheduled, but the witness did not appear to offer

testimony. Therefore, the record was closed following the ten day time period.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. The Applicant was indicted by the Cherokee County Grand Jury in July 2009 for criminal sexual conduct, first degree (2009-GS-11-0840) and assault and battery with intent to kill (2009-GS-11-0841). He was represented by Thomas Shealy, Esquire. On May 26, 2010, the Applicant was convicted of the charges by a jury. Applicant was sentenced by the Honorable J. Derham Cole to sentences of life without parole for both charges pursuant to S.C. Code Ann. §17-25-45 (1976).

A timely Notice of Appeal was filed and an appeal was perfected. The South Carolina Court of Appeals dismissed after review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Jones, Op. No. 2012-UP-158, (filed March 7, 2012). The Remittitur was issued on March 26, 2012.

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 failed to investigate.

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 convicted of CSC – 1st degree and ABWIK following an

incident involving Applicant and his aunt, Kay Spencer, ("victim") in May 2009. Counsel began representing Applicant in June 2009. Applicant testified that he met with Counsel for the first time in June and only met Counsel twice between June and the trial. However, Applicant acknowledged that he was able to review all of the facts and potential issues with the case with Counsel. Applicant testified that he informed Counsel that he and the victim have been involved sexually since Applicant was fifteen years old. Applicant testified that he informed Counsel that he did not think anyone knew about the relationship.

Applicant testified that he reviewed the investigative reports and believes there were inconsistencies between the reports because one report indicated that the victim's pants leg was found in her panties and one report did not indicate that. Applicant also testified that the victim's bra came off at some point during sex earlier that night, but she told police that she was fully clothed at the time she was stabbed. However, Applicant testified that there was no hole in the bra from a stab wound. Applicant testified that he was unsure if the bra was tested by SLED, but knows that Counsel did not have the bra independently tested. Applicant testified that the victim was on disability for mental health issues, but Counsel never obtained the victim's mental health records or cross-examined her on her disability. Applicant testified that he was aware that part of the trial strategy was to attempt to show that the victim had anger issues, but Counsel did not want to bring in too many witnesses. Counsel did proffer the testimony of Ms. Whelchel and a Ms. Hodge, which was not allowed in. However, Applicant testified that he believes that if Counsel had obtained the mental health records, the testimony would have been relevant.

Applicant testified that the victim claimed she had been choked by Applicant with a computer cord, but Applicant stated that he does not know if any blood or skin cells were found on the cord. Counsel did not have the cord tested. Applicant testified that Counsel never

objected to Mobley's qualification as a sexual assault nurse examiner or requested voir dire. Applicant testified that he believes Mobley's expert testimony led to the conviction. Applicant testified that Counsel was effective "to a degree," but ineffective overall.

Lucille Whelchel, Applicant's aunt and sister to the victim, testified that she was willing to testify on Applicant's behalf at trial. Whelchel testified that she was called as a witness by Counsel and her testimony regarding the victim's rage and mental health was proffered. Whelchel testified that she was aware that the victim had Applicant help her remodel homes, but had no personal knowledge of any sexual relationship between the victim and Applicant.

Susan Whelchel Clary, Applicant's first cousin and niece of the victim, testified that she was never called to testify or subpoenaed. However, Clary did testify that Counsel interviewed her as to what she would testify to at trial. Clary testified that she would have offered testimony regarding conflicts with the victim and the fact that the victim initiated a charge of assault and battery of a high and aggravated nature against Clary. Clary did acknowledge that the police arrested her for the assault and not the victim.

Counsel testified that he represented Applicant on these charges. Counsel testified that he met extensively with the Applicant because Counsel also represented Applicant on prior charges. Counsel testified that he met with Applicant before the first matter proceeded to trial and then also met with the Applicant every day the week before trial on these charges. Counsel testified that he and the Applicant discussed Applicant's defense and the risks of presenting it and whether or not the jury would believe. Counsel testified that Applicant always told him the same story. Applicant told him that he and the victim got into a fight regarding the victim's care of Applicant's grandfather and grandmother after they had consensual sex. Counsel testified that to his knowledge, all of the family members supported the Applicant, not the victim. Counsel

RBS

acknowledged that Applicant's grandfather died close to the time of trial, but he did not request a continuance based upon that reason.

Counsel testified that there were family members willing to testify, but much of the testimony would be considered hearsay. Additionally, no one could testify as to the alleged sexual relationship between the Applicant and the victim. Counsel acknowledged that he did not subpoena the victim's mental health records, but he did proffer testimony from two family members regarding the victim's anger issues. Counsel testified that he does not know if having the mental health records would have helped, but he does not believe that the testimony would have been allowed. Further, he was never told of who treated the victim or who he could subpoena. Counsel testified that he believed that he fully cross-examined the victim on the various inconsistencies in her story, but the victim's story was detailed.

In regards to Mobley's expert testimony, Counsel testified that she had over twenty years of experience and he did not think there was any benefit to objecting to her qualifications. Counsel testified that she did testify that the victim had trauma to her vaginal and rectal areas, but he did get her to admit that trauma could occur with consensual sex. Counsel testified that he did discuss the bra with Applicant and the fact that the bra had no stab hole, but he does not believe anything could have been done forensically. Additionally, Counsel testified that he saw no issue with the cord and no reason to spend the money for testing.

Counsel testified that there was a plea offer prior to the first trial for the Applicant to plead to both set of charges for a negotiated plea of twenty years, but Applicant told Counsel that he "could not do twenty years." Counsel testified that he discussed the fact that the State intended to seek a life without parole sentence with Applicant. Counsel testified that there were several concerns about the case, including the fact that after the victim shot at the Applicant

105

through a locked door after the altercation, the Applicant made a statement to police of "I hope the bitch is dead," and the fact that he did not call 911 following the altercation even though the victim had been stabbed. Counsel testified that he did as well as he could and does not think that the outcome of the trial would have changed had he done anything differently.

This Court finds the testimony of Counsel to be more credible than the testimony of the Applicant. 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). Following the testimony of Applicant and review of the transcript, it is clear that Counsel had reviewed the facts and evidence, as well as the options and potential defenses that Applicant had. Moreover, the Applicant has failed to show this Court what counsel could have discovered or what other defenses could have been pursued had counsel been more prepared. The Applicant's allegations that Counsel did not conduct an adequate pre-trial investigation are without merit and therefore dismissed.

Although the Applicant alleged that Counsel failed to have the bra or computer cord independently tested, there is no evidence to suggest that the outcome of the trial would have changed had either of those been tested. This Court finds that the Applicant may be second-guessing decisions made at trial; however, this Court finds that those decisions, although they could have been different, were reasonably calculated to support the best interests of the Applicant. Trial Counsel was competent and effective and elected not to do a host of things; however, this does not rise to the level of incompetency. Further, there was no evidence that had

Counsel made a motion for continuance based upon the Applicant's grandfather's death, it would have been granted, or that it would have affected the outcome of the trial. "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003).

In regards to Counsel's manner in questioning the expert witness and his decision to not object to her qualification or request *voir dire*, this Court finds that Counsel was not deficient. This court finds that Counsel acted in the best interest of Applicant and that Counsel calculated his motions and tactics in an effort to effect the goal of competent and effective advocacy on his client's behalf. It is not necessary that an attorney make every objection or motion that he possibly can under the South Carolina Rules of Procedure. It is only necessary that he or she make those objections and motions which are reasonably calculated to effect the substantive end. In this case, the record would suggest that Counsel did just that.

As to the allegation that Counsel was deficient in his cross-examination of the victim, this Court concurs with the precedent in this State and other jurisdictions that the nature and scope of cross-examination is inherently a matter of trial tactics and strategy. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). Although the Applicant alleged that Counsel should have cross examined the victim, officers, and expert witness about various inconsistencies in the reports, the Applicant did not present any testimony showing how the witnesses' answers at trial would have been different. Accordingly, the

Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense.

Although this Court does not question the credibility of either Whelchel or Clary's testimony, it is doubtful that their testimony would have been admissible at trial. Further, as indicated by the record and testimony, Counsel attempted to introduce similar testimony and proffered the testimony, but it was not allowed by the trial court. The Applicant produced no records that would have been helpful in his defense at trial or anyone that had first-hand knowledge of any mental health treatment the victim had obtained. Therefore, this Court finds no deficiency on Counsel's behalf in regards to his failure to attempt to introduce the victim's mental health records.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, this Court finds Counsel's testimony to be 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

135

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 denial of PCR. Rule 71.1(g), SCRCP, 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

CAMPBELL & SHABEL
104 N DANIEL MORGAN AVE STE 201
SPARTANBURG SC 29306

CERTIFIED MAIL™

7013 2630 0001 0539 1708

$7.110
US POSTAGE
FIRST-CLASS
FROM 29306
APR 04 2014
stamps.com

0062S0007255205

The Honorable Daniel Shearouse
Clerk, Supreme Court of South Carolina
PO Box 11330
Columbia SC 29211-1330