

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas  
R. Lawton McIntosh, Circuit Court Judge

RECEIVED

JUL 25 2014

S.C. Supreme Court

Case No: 2011-CP-32-0152

Yancey Thompson,.....Petitioner.

v.

State of South Carolina.....Respondent.

NOTICE OF APPEAL

Yancey Thompson appeals the orders of the Honorable R. Lawton McIntosh dated November 26, 2013 and May 22, 2014. Attorney for Appellant received written notice of entry of the final order on June 26, 2014.

July 25, 2014



Robert W. Mills  
1728 Main Street  
Columbia, South Carolina 29201  
(803) 252-9648  
Attorney for Petitioner

Other Counsel of Record:  
Walt Whitmire  
Office of The Attorney General  
P.O. Box 11549  
Columbia, South Carolina 29211-1549  
Attorney for Respondent

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas  
R. Lawton McIntosh, Circuit Court Judge

RECEIVED

JUL 25 2014

S.C. Supreme Court

Case No: 2011-CP-32-0152

Yancey Thompson,.....Petitioner.

v.

State of South Carolina.....Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on July 25, 2014, addressed to the attorney of record, Walt Whitmire, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211-1549

July 25, 2014



Robert W. Mills  
1728 Main Street  
Columbia, South Carolina 29201  
(803) 252-9648  
Attorney for Petitioner

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

) IN THE COURT OF COMMON PLEAS  
) ELEVENTH JUDICIAL CIRCUIT  
)  
) FILED  
)  
) JUN 27 P 2:25  
) Case No. 2011-CP-32-0152

Yancey R. Thompson,  
S.C.D.C. No. 330395,  
  
Applicant,

)  
) BETH A. CARRIGG  
) CLERK OF COURT  
) LEXINGTON, SC  
)

v.  
  
State of South Carolina,  
  
Respondent.

)  
) **ORDER DENYING APPLICANT'S**  
) **MOTION TO ALTER OR AMEND**  
)  
)  
)  
)  
)

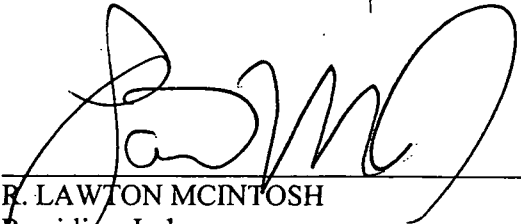
This post-conviction relief matter was filed January 14, 2011. A hearing was convened at the Lexington County Courthouse on January 28, 2013. This Application was denied and dismissed with prejudice in an order dated November 26, 2013. Applicant filed a Motion for Alter Judgment dated December 20, 2013. Respondent filed its Return to Applicant's motion on February 10, 2014. Last, Applicant filed to Respondent's Return on March 4, 2014.

Having carefully reviewed the entire record in this matter, this Court finds that no basis for altering or amending is prior ruling.<sup>1</sup> Therefore, this Court hereby denies the Applicant's Motion in its entirety, and affirms the previous Order of Dismissal.

This Court advises that if the Applicant desires to secure appellate review of this Order and the Order of Dismissal, a notice of appeal must be filed and served **within thirty (30) days** of the service of this Rule 59 Order. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

<sup>1</sup> The Court, in its discretion, has considered this matter based upon the motions submitted by the parties and the post-conviction relief file, since oral argument will not aid the Court in reaching its decision. See Rule 59(f), SCRCP.

AND, IT IS SO ORDERED this 27 day of May, 2014.



---

R. LAWTON MCINTOSH  
Presiding Judge  
Eleventh Judicial Circuit

Anderson, South Carolina

**ORIGINAL**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF LEXINGTON )

IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

Case No: 2011-CP-32-0152

Yancey R. Thompson,  
S.C.D.C. No. 330395,

BETH A. COOPER  
CLERK OF COURT  
LEXINGTON, SC

Applicant,

v.

**ORDER OF DISMISSAL**

State of South Carolina,

Respondent.

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed on January 14, 2011. The Respondent filed its Return on August 10, 2011. An evidentiary hearing into this matter was convened on January 28, 2013 at the Lexington County Courthouse. Applicant was present and was represented by Robert W. Mills, Esq. Respondent was present and represented by Walt Whitmire, Esq., of the Office of the Attorney General. A post-hearing deposition was convened at the Robert W. Mills Law Firm at 1728 Main St., Columbia, SC, on May 2, 2013. The parties remained the same at the deposition. The post-hearing deposition transcript was provided to this Court in May 28, 2013.

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the July 2007 term of the Lexington County Grand Jury for Disseminating Harmful Materials to Minors (2007-GS-32-2249), Criminal Sexual Conduct with Minor 11 to 14 years of age 2<sup>nd</sup> Degree (2007-GS-32-2252), and Criminal Sexual Conduct with Minor under 11 years of age 1<sup>st</sup> Degree (2007-GS-32-2250). Applicant was represented by Charles Brooks, Esq., and Irma

Brooks, Esq. On September 2-4, 2008, Applicant underwent trial and was found guilty as charged. The Honorable John R. Milling sentenced Applicant to confinement for a period of ten (10) years for Disseminating Harmful Materials to Minors; twenty-five (25) years for Criminal Sexual Conduct 2<sup>nd</sup> Degree; and twenty (20) years for Criminal Sexual Conduct 1<sup>st</sup> Degree with all sentences to run concurrent. A timely notice of appeal was filed on Applicant's behalf. The South Carolina Supreme Court affirmed Applicant's conviction and sentence. State v. Thompson, Memorandum Op. No. 2010-MO-028 (S.C. filed November 8, 2010). Remittitur was issued on November 24, 2010.

At the PCR hearing, Applicant proceeded on the following allegations:

1. Ineffective assistance of counsel for failure to communicate;
2. Ineffective assistance of counsel for failure to investigate;
3. Ineffective assistance of counsel for failure to present witnesses in Applicant's defense at trial;
4. Ineffective assistance of counsel for failure to object evidence from an uncharged offenses in a different county;
5. Ineffective assistance of counsel for making an improper opening statement;
6. Ineffective assistance of counsel for failure to object, make a motion to strike, ask for a curative instruction to hearsay and vouching
7. Ineffective assistance of counsel for failure to object to the solicitor's improper closing argument.

#### **SUMMARY OF TESTIMONY**

At the PCR hearing, counsel testified that he filed for discovery, received it, and reviewed the State's evidence with Applicant. At the time of trial, counsel viewed the improper hearsay testimony as cumulative to the victim's testimony. Counsel testified his strategy was to build a case for reasonable doubt and attack the credibility of State witnesses. Counsel's strategy at trial hinged on keeping out a 2003 Family Court order that restricted Applicant from his home that he shared with Thompson, the victim, and his children. The Family Court judge found the

victim had been sexually assaulted by an "unknown male perpetrator." Counsel expressed concerns because Applicant continued to reside with the victim after the order was issued years prior to being arrested and charged. As a result, counsel testified he did not want to present witnesses on Applicant's behalf and open the door to the order coming in at trial. Counsel testified he objected to the matters he desired to keep out. Counsel testified he wanted to keep the focus on the victim and focus on attacking the credibility of State witnesses on cross-examination. Counsel relented that he would have made more objections had the case been tried now due to the recent precedent regarding improper vouching and bolstering. Counsel testified that he believed he performed well on behalf of Applicant.

At the post-hearing deposition, co-counsel testified she and counsel were retained on Applicant's case a year prior to the trial. Co-counsel met with Applicant and interviewed his wife Julia Thompson in preparation for trial. Co-counsel testified the State's evidence was based upon the victim's credibility and Dr.'s Luberoff's findings. Counsel and co-counsel made numerous objections and motions throughout trial.

At the PCR hearing, Applicant made numerous allegations of ineffective assistance of counsel. Applicant testified he discussed discovery that related to the victim with counsel but never received a full copy of discovery. Applicant testified he desired Thompson testify at trial. Applicant testified he never made an inculpatory statement to police.

At the PCR hearing, Julia Thompson, Applicant's wife, testified she was willing to testify at trial. Thompson's brief testimony bared similarities to Applicant's testimony.

#### **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, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 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. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, *supra*. 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.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court's records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and exhibits from the prior proceedings,

and, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

I.

As a matter of general impression, this Court finds the testimonies from counsel and co-counsel's more credible than the testimonies from Applicant and Thompson. This Court finds the most of Applicant's allegations lacked merit. Applicant's attorneys adequately investigated the matter, made a valid decision not to present Applicant or Thompson, and conducted impressive cross-examinations of State witnesses. Applicant's attorneys made numerous objections and motions during the trial. However, this Court does find that the failure to object to impermissible hearsay and bolstering constituted deficiency. This Court finds the deficiency did not constitute prejudice. As a result of an examination of the entire record, this Court basis its findings on the lack of conflicting testimony regarding the commission of the offenses, the victim's testimony, Gleaton's testimony, and the strength of Dr. Luberoff's finding that the victim incurred permanent physical damage attributed from the sexual abuse that corroborated the victim's testimony. Thus, the failure to object to the impermissible testimony could not have affected the result of Applicant's trial.

A.

This Court finds Applicant did not meet his burden to prove his attorneys were deficient for failing to communicate with Applicant and investigate his case. 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). This Court finds the attorneys

investigated the State's evidence and discussed all relevant aspects of the case with Applicant. Therefore this allegation is denied and dismissed.

This Court finds Applicant failed to meet his burden to show what beneficial impact an investigation of the victim's 2003 medical records would have had in Applicant's defense. The document standing alone without testimony from a qualified expert's findings constituted mere speculation. Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) ("Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR."). Furthermore, Dr. Luberoff testified she reviewed information pertaining to the victim's health as a part of her finding. This Court notes both attorneys reviewed Dr. Luberoff's findings and had no reason to doubt her qualifications or the conclusions she reached. Excluding the presentation of the medical records, Applicant failed to produce any evidence of what his attorneys did not investigate but allegedly should have investigated. Therefore this allegation is denied and dismissed.

This Court finds Applicant did not meet his burden to prove his attorneys were ineffective for failing to interview and present Thompson or any other witnesses on his behalf. This Court finds interviewed Thompson as Applicant requested and made a valid decision to not call her as a defense witness at trial. See Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel). This Court agrees with counsel that the detriment of opening the door to the Family Court order that implicated Applicant for prior sexual abuse of the victim substantially outweighed any benefit to Applicant's case here. See Walker v. State, 397 S.C. 226, 242, 723 S.E.2d 610, 618 (Ct. App. 2012); see also Rule 608(a), SCRE ("The credibility of a witness may be attacked ... subject to these limitations: (1) the evidence may refer

only to character for truthfulness or untruthfulness.”). Furthermore, this Court finds the opinion of both attorneys compelling that Thompson lacked credibility. Therefore, this allegation is denied and dismissed.

**B.**

This Court finds Applicant failed to prove his attorneys were ineffective for failing to object to the presentation of evidence and testimony that Applicant sexually assaulted the victim in a neighboring county. Applicant alleged his attorneys should have objected to the uncharged offenses. This Court finds Applicant’s course of conduct while caring for the victim constituted admissible evidence as to the *res gestae* of the offenses he was properly convicted of in Lexington County. See State v. Martucci, 380 S.C. 232, 257, 669 S.E.2d 598, 611 (Ct. App. 2008) (“where evidence is admissible to provide this full presentation of the offense, [t]here is no reason to fragmentize the event under inquiry” by suppressing parts of the *res gestae*.”). Therefore, this allegation is denied and dismissed.

**C.**

This Court finds Applicant’s allegation that counsel was ineffective for making an improper blasé opening statement is without merit. This Court find counsel’s employment of sports analogy to emphasis the substantial burden of proof on the State to prove guilt beyond a reasonable doubt was reasonable. See Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984) (“There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.”). Therefore, this allegation is denied and dismissed.

**D.**

This Court finds Applicant did not meet his burden to prove his attorneys were ineffective for failing to object to impermissible hearsay and bolstering during the course of the trial. "Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011) (citing Rule 801(c), SCRE). "Hearsay is inadmissible except as provided by the South Carolina Rules of Evidence, by other court rule, or by statute." Id. (citing Rule 802, SCRE). "Improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice." Id. First, this Court finds Applicant failed to prove his attorneys were deficient for not objecting to Dr. Luberoff's testimony. Applicant alleged the testimony constituted improper hearsay. This Court finds the witnesses' testimony as a whole related to the diagnosis of the victim.

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.

Rule 803(4), SCRE (2008); see also Todd v. Joyner, 385 S.C. 421, 426, 685 S.E.2d 595, 597-98 (2009). Furthermore, this Court finds Dr. Luberoff's brief testimony to the victim's past sexual abuse was admissible within the hearsay exception that allows for limited corroborative testimony in criminal sexual conduct cases. See Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001) ("A well-settled exception in criminal sexual conduct cases allows limited corroborative testimony. When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible in corroboration; however, such evidence is limited to the time and place of the assault and cannot include details or particulars."). Thus, this

Court finds the Applicant's attorneys were not deficient for failing to object to admissible testimony.

Second, this Court finds Applicant met his burden to prove his attorneys were deficient for not objecting to Dr. Benedetto, the forensic interviewer, impermissible testimony that constituted vouching and hearsay. "For an expert to comment on the veracity of a child's accusations of sexual abuse is improper." Jennings, 394 S.C. at 480, 716 S.E.2d at 94. Applicant's attorneys were deficient for not objecting at various times during Dr. Benedetto's testimony. Counsel testified he was not aware of any impropriety in the testimony until recent developments in case law post-Applicant's conviction. Counsel testified he did not believe the trial judge would have sustained his objections here at the time of trial. Although this Court finds counsel's testimony credible, the objections were necessitated in order to preserve the record for appellate review. See State v. Dawkins, 297 S.C. 386, 393, 377 S.E.2d 298, 302 (1989).

Third, this Court finds Applicant met his burden to prove his attorneys were deficient for not objecting to Traci Barr's impermissible testimony regarding the victim's consistent disclosure. For the same reasons as above, the testimony constituted a comment on the veracity of the victim's account of the offenses. (Trial Tr. p.186). However, this Court finds the remainder of Barr's testimony was not objectionable. State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct.App.2003) ("An out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken.").

Accordingly, this Court finds Applicant met his burden to show his attorneys were deficient for not objecting to several instances of impermissible vouching and hearsay during Dr. Benedetto's testimony and one instance of improper vouching during Barr's testimony. However, this Court finds Applicant did not meet his burden to prove he was prejudiced as a

result of the failure of his attorneys to object, make a motion to strike, or ask for a curative instruction regarding the impermissible testimony at issue. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) (stating error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained); see also State v. Kromah, 401 S.C. 340, 360-61, 737 S.E.2d 490, 501 (2013). In examining the record as a whole, this Court finds the combination of the physical evidence, the victim's credible testimony that provided precise details of the offenses, Gleaton's testimony, and the lack of contradictory testimony the deficient performance in failing to object to the impermissible testimony could not reasonably have affected the outcome at trial.

This Court finds Dr. Luberoff's trial testimony compelling. Dr. Luberoff examined the victim at age nine and testified the victim was in sound health with a normal shaped hyman. Dr. Luberoff testified the victim incurred trauma that resulted in deep notching to her hyman. Dr. Luberoff testified to the rarity for a child sexual assault victim to have these injuries. Dr. Luberoff testified that typically after penetration, the child's body will completely heal itself in less than two weeks. The victim's injuries were permanent and were not the product of recent sexual abuse. Thus, Dr. Luberoff testified that to a reasonable degree of medical certainty, the victim's permanent injuries were related to penetration. The findings corroborated the victim's testimony.

This Court finds the victim's trial testimony credible. This Court takes into account the trial judge's comments that the sentencing phase of trial where the trial judge stated that the victim gave credible testimony. See Rogers v. Nation, 284 S.C. 330, 326 S.E.2d 182 (Ct.App.1985). The victim testified to years of sexual abuse at the hands of Applicant. The victim precisely detailed the commission of the offenses from the Applicant's use of hair grease, pornography, and to Applicant's conduct in psychologically grooming the victim. Furthermore,

Gleaton testified she obtained custody of the victim in December of 2006. Gleaton testified the victim was shy around men and had issues sleeping. This Court also notes the absence of contradictory testimony not presented at trial. The jury deliberated for less than forty minutes prior to returning guilty verdicts on both indictments. Thus, this Court finds the Dr. Luberoff's testimony regarding the victim's permanent injuries related to penetration where the Applicant was the victim's caretaker for period in question combined with the victim's credible testimony rendered the impact of the impermissible hearsay and vouching testimony harmless. Therefore, these allegations are denied and dismissed.

E.

This Court finds Applicant did not meet his burden to prove his attorneys were ineffective for failing to object to the solicitor's closing argument. The test of granting a new trial for alleged improper closing argument is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). If a solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs. Id. Undoubtedly, a solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony. See State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995). This Court finds the solicitor's argument was confined to reasonable inferences found from the evidence and testimonies presented and found to be admissible at trial. Therefore, this allegation is denied and dismissed.

II.

Except as discussed above, this Court finds that the Applicant affirmatively abandoned the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and

intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

### CONCLUSION

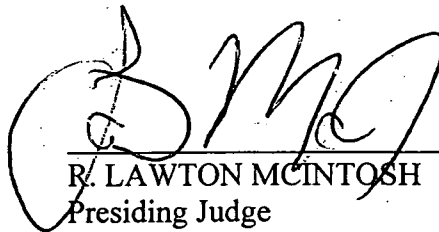
Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed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

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

### IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 26 day of Nov, 2013.



---

R. LAWTON MCINTOSH  
Presiding Judge  
Eleventh Judicial Circuit

Andrus, South Carolina