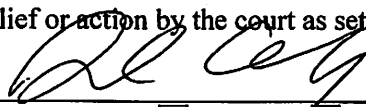


STATE OF SOUTH CAROLINA)
)
 COUNTY OF SUMTER)
)
 WAYNE WELLS, JR., #314139)
 _____)
 Plaintiff,)
 vs.)
)
 STATE OF SOUTH CAROLINA)
 _____)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 THIRD JUDICIAL CIRCUIT
 CASE NO.: 2013-CP-43-675

**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

2014 JUL 11 PM 2:51
 RECORDED
 JAMES C. CARROLL
 CLERK OF COURT
 SUMTER COUNTY, S.C.

| | |
|--|--|
| Plaintiff's Attorney: F. Casey Dale Cornwell, Bar No. _____ Address: PO Box 50143 Columbia, SC 29250 Phone: _____ Fax _____ E-mail: _____ Other: _____ | Defendant's Attorney: Daniel Gourley, Bar No. _____ Address: PO Box 11549 Columbia, SC 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____ |
| <input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input checked="" type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III) | |
| SECTION I: Hearing Information | |
| Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO | |
| SECTION II: Motion/Order Type | |
| <input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. | |
|  _____ Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant | June 25, 2014 Date submitted |
| SECTION III: Motion Fee | |
| <input type="checkbox"/> PAID - AMOUNT: \$ _____ <input type="checkbox"/> EXEMPT: (check reason) | |
| <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other: _____ | |
| JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____ | JUDGE CODE _____ Date: _____ |
| CLERK'S VERIFICATION | |
| Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____ | |

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER)
Wayne Wells, Jr., #314139,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Case No. 2013-CP-43-675
FILED TRUE COPY
OF ORIGINAL FILED

Sherry Wilson
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

ORDER OF DISMISSAL

RECORDED
2014 JUL 11 PM 2:55
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on April 18, 2013. Respondent made its return on June 13, 2013. An evidentiary hearing in to the matter was convened on May 29, 2014, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Casey Cornwell, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate that The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. The Applicant was true billed indicted at the October 2010 term of the Sumter County Grand Jury for Criminal Sexual Conduct with a Minor-Second Degree (2010-GS-43-337). Calvin Hastie, Esquire, represented him. Applicant proceeded to a jury trial and found guilty November 9, 2010. The Honorable W. Jeffrey Young sentenced Applicant to a twenty year imprisonment.

A timely Notice of Appeal was filed on Applicant's behalf by Susan Hackett, Esquire. The South Carolina Court of Appeals dismissed the appeal. State v. Wells, Op. No. 2012-UP-621 (Ct. App. filed November 21, 2012). The Remittitur was issued on December 10, 2012.

ALLEGATIONS

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

1. "Rule Canon 3B(5). C.S.C. Rule 501, SCACR
 - a. "A judge shall perform judicial duties without bias or prejudice."
2. Ineffective assistance of counsel
3. Due Process Violation
 - a. "Due process was violated deprive Applicant of fair trial."
 - b. "6th Amendment."
 - c. "14th Amendment."

During the evidentiary hearing, Applicant only proceeded on an allegation that Trial Counsel was ineffective for failing discuss plea offers, failing to object to judge's answer to the jury's question.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from Calvin Hastie, Sr. (hereinafter "Trial Counsel"). This Court also had before it a copy of the trial transcript, the Sumter County Clerk of Court records, Applicant's South Carolina Department of Correction records, appellate records, the PCR application, and return.

During the evidentiary hearing, Applicant stated he met with Trial Counsel one time for five to ten minutes prior to trial. Applicant stated that he discussed the crime with Trial Counsel. Applicant stated Trial Counsel failed to discuss the maximum penalties. Applicant stated that he reviewed the discovery material with Trial Counsel. Applicant stated that there was a ten year

plea offer and a seven year plea offer. Applicant stated he wanted to accept the seven year plea offer, but Trial Counsel stated that judge would not accept the offer.

Applicant stated that he told Trial Counsel the defense should be "mistake of age." Applicant further stated Trial Counsel argued this defense during opening and closing arguments. Applicant explained that Victim told him she was eighteen years old. Applicant stated he was not aware that she fifteen. Applicant stated that he testified during trial and recalled admitting that he and Victim had a boyfriend/girlfriend relationship. Applicant stated that he would visit the Victim at her parents' house in the early morning hours after getting off work. Applicant recalled admitting that he digitally penetrated the Victim. Applicant recalled apologizing for everything that happened. Applicant further recalled admitting that he committed a sexual battery with the Victim and she was fifteen, but he thought she was eighteen. Applicant further stated Trial Counsel argued this defense during opening and closing arguments.

Applicant stated the jury asked a question regarding whether mistake of age was a defense in South Carolina. Applicant stated Trial Counsel should have objected to the judge answering the question that mistake of age was not a defense. Applicant further stated he did not discuss the jury instruction with Trial Counsel, but he did understand them. Applicant stated that he filed a direct appeal, but his conviction and sentence was affirmed.

Following Applicant's testimony, Trial Counsel was called to testify by the State. Trial Counsel stated that he has been practicing law for fifteen years. Trial Counsel stated he was appointed in this case and met with Applicant several times prior to his trial. Trial Counsel stated he filed for and reviewed all rule 5 and discovery material. Trial Counsel stated he discussed the elements of the offense and what the State was required to prove. Trial Counsel

stated that he reviewed Applicant's version of events. Trial Counsel stated Applicant wanted his brother to testify during trial, but Trial Counsel did not call him because he had a criminal sexual conduct charge as well. Trial Counsel stated he had ample time to prepare for trial.

Trial Counsel stated Applicant was adamant that they present "mistake of age" as a defense. Trial Counsel stated that he thoroughly advised and Applicant fully understood that that mistake of age was not a valid defense in South Carolina. Trial Counsel stated Applicant was adamant about having his day in court and felt that he could convince the jury that he did not know her real age. Trial Counsel stated Applicant wanted to pursue the mistake of age defense over Trial Counsel's advice. Trial Counsel concluded that the final decision was Applicant's and therefore he attempted to argue that Applicant was not aware of Victim's true age. Trial Counsel stated that he did attempt to argue the mistake of age defense in opening and closing.

Trial Counsel characterized the State's evidence as "overwhelming." Specifically, Trial Counsel stated that Victim testified that they had a relationship and Applicant knew she was fifteen. Trial Counsel stated there were various witness testimonies stating Applicant knew Victim's age. Trial Counsel stated Applicant would come through Victim's window in the early morning hours. Trial Counsel stated Applicant was caught by Victim's step father in her bedroom.

Trial Counsel stated that he suggested to Applicant that he not testify, however Applicant testified. Trial Counsel stated he was not aware that Applicant was going to admit to digitally penetrating the Victim while on the stand. Trial Counsel clarified that it was the first time he heard Applicant admit to digitally penetrating the Victim and was completely unaware that he was going to say that while on the stand.

Trial Counsel stated there may have been plea offers, but he could not specifically recall. However, Trial Counsel stated that if there were plea offers he would have relayed them to Applicant. Trial Counsel further stated that if Applicant was willing to accept a plea offer then he would have went before a judge to plead guilty. However, Trial Counsel stated Applicant was adamant about going to trial and presenting his side of the story. Trial Counsel stated there was no offer available at the time of trial.

Trial Counsel stated that he did not object to the trial court's jury instruction because he did not see anything wrong with the jury instruction. Trial Counsel stated he received an advance copy of the jury instruction and reviewed it with Applicant. Trial Counsel further stated he did not object to the judge's answer to the jury's question because there was no objection to be made. Trial Counsel concluded that the judge properly answered the question that ignorance is no excuse in regards to Victim's age.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Specifically, this Court finds Trial Counsel's testimony credible and Applicant's testimony not credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

INEFFECTIVE ASSISTANCE OF COUNSEL

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, (1984); Butler, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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.

Counsel was ineffective for failing to relay plea offer.

This Court finds Applicant's allegation that Counsel was ineffective for failing to relay a plea offer to be without merit. This Court finds Counsel's testimony credible, while Applicant's testimony not credible. In Davie v. State, the applicant was granted post-conviction relief based upon ineffective assistance of counsel because counsel did not communicate a plea offer made by the State to the applicant. 381 S.C. 601, 675 S.E. 416 (2009). The South Carolina Supreme Court held that the standard to be successful on such a claim required that the Applicant prove that: (1) plea counsel's failure to communicate the State's initial plea offer constituted

deficient performance, and (2) the applicant was prejudiced by the deficient performance, or there was a reasonable probability that but for this deficient performance, he would have accepted the original plea offer. Id. at 608 and 420. The Davie Court held that, generally, failure to convey a plea offer constitutes deficient performance, although the existence of prejudice needs to be evaluated on a case by case basis. Id. at 609 and 420.

In Lafler v. Cooper, ___ U.S. ___, 132 S.Ct. 1376 (2012) and Missouri v. Frye, ___ U.S. ___, 132 S.Ct. 1399 (2012), the United States Supreme Court analyzed ineffective assistance of counsel in the context of lapsed or rejected plea offers. In Frye, the Court determined that a criminal defendant must prove three things to demonstrate prejudice for ineffective assistance of counsel for a plea that lapsed or was rejected. The second part of the test is broken into two subparts:

[1] defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel[;]

[2] [d]efendants must also demonstrate a reasonable probability:

[a] the plea would have been entered without the prosecution canceling it or

[b] [without] the trial court refusing to accept it, if they had the authority to exercise that discretion under state law[;] [and]

[3] [t]o establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Frye, 132 S. Ct. at 1409. Similarly, in Lafler, the Court articulated a three-part test for this proof.

A defendant must show “a reasonable probability

[1] that the plea offer would have been presented to the court (i.e.,

[a] that the defendant would have accepted the plea and

[b] the prosecution would not have withdrawn it in light of intervening circumstances),

[2] that the court would have accepted its terms, and

[3] that the conviction or sentence, or both, under the offer's terms would have been less severe" than the punishment ultimately faced.

Lafler, 132 S. Ct. at 1385. The two tests focus on the same factors.

For the issue of remedy once prejudice is proven, in Lafler, the Court held that a state trial court has three options on remand:

[1] "vacate the convictions and resentence respondent pursuant to the plea agreement";

[2] "vacate only some of the convictions and resentence respondent accordingly"; or

[3] "leave the convictions and sentence from trial undisturbed."

Lafler, 132 S. Ct. at 1391. The Court did not list a new trial as a remedy. In implementing the three options, the Court did not define the boundaries of a state trial court's discretion, and, instead, left "open to the trial court" how best to exercise its discretion. *Id.* The Court identified two considerations of relevance: the defendant's earlier willingness to accept responsibility for his actions and information discovered post plea. *Id.* at 1389.

In the present case, Trial Counsel credibly testified that it was his standard practice to relay all plea offers to his clients. Trial Counsel stated that if there were plea offers he would have relayed them to Applicant. Trial Counsel further stated that if Applicant was willing to accept a plea offer then he would have went before a judge to plead guilty. However, Trial Counsel stated Applicant was adamant about going to trial and presenting his side of the story. Trial Counsel stated there was no offer available at the time of trial. This Court finds Trial

Counsel's actions were reasonable in the circumstances, and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Furthermore, this Court finds Applicant has failed to allege sufficient evidence to meet his burden of proving that he was prejudiced by Counsel's alleged ineffectiveness.

Counsel was ineffective for failing to object to the judge's answer to the jury's question.

This Court finds Applicant's allegation that Counsel was ineffective for failing to object to the trial judge's answer to the jury's question to be without merit. During deliberations, the jury asked the question "If the defendant truly believed the victim was 18, does that matter and/or is ignorance of her age no excuse." (Tr. p. 198 lines 11-14). The trial judge responded "...if the defendant truly believed the defendant was over 18 does that matter, the answer is no, and ignorance is no excuse." (Tr. p. 198 lines 14-17). Counsel stated he did not object to the judge's answer to the jury's question because the judge's answer was not objectionable. Trial Counsel concluded that the judge properly answered the question that ignorance is no excuse in regards to Victim's age. This Court finds Trial Counsel's actions were reasonable in the circumstances, and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Furthermore, this Court finds Applicant has failed to allege sufficient evidence to meet his burden of proving that he was prejudice by Counsel's alleged ineffectiveness.

ALL OTHER ALLEGATIONS

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

CONCLUSION

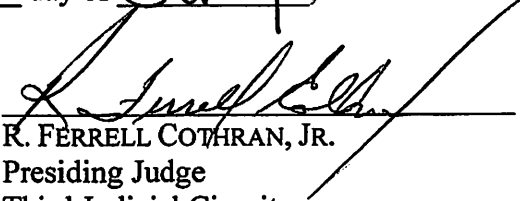
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

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 7 day of July, 2014.


R. FERRELL COTHRAN, JR.
Presiding Judge
Third Judicial Circuit

Manning South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP4300675

RECORDED

2014 JUL 11 11:31 AM South Carolina State of

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

CERTIFIED TRUE COPY
OF ORIGINAL FILED

Sherry H. How
DEPUTY CLERK OF COURT

Wayne Wells Jr

PLAINTIFF(S)

DEFENDANT(S)

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

Submitted by: Clerk of Court

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: _____
- 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; (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: **See attached Order.**

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.**

Circuit Court Judge

2144

Judge Code

7/11/2014

Date

For Clerk of Court Office Use Only

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

Wayne Jr #314139 Wells Turbeville Correctional Inst/Seloc
A-241 P O Box 252 Turbeville, SC 29162
Fulton Casey Dale Cornwell 448 Deerwood Street Unit 9A
Columbia, SC 29205

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)
James C. Campbell

Court Reporter

James C. Campbell - Clerk of Court

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.
