THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2012-CP-14-0210

Donneil Woods, #272800,.....Respondent,

vs.

State of South Carolina,.....Appellant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Donneil Woods, the Appellant herein, by and through his attorneys, appeals the Order of Dismissal of Judge McMahon, dated November 21, 2013, and then Order denying the Rule 59(e) Motion of The Honorable R. Knox McMahon dated April 29, 2014 (Appellant having received notice of entry of this Order on January 15, 2015).

January 16, 2015

Ray E. Chandler, 1183
Coffey, Chandler & McKenzie, PA
Post Office Box 1292
Manning, South Carolina 29102-1292
803-435-8847
ATTORNEY FOR THE APPELLANT

Other Counsel of Record:

David Spencer, Assistant Attorney General
South Carolina Office of Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

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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 January 15, 2015, addressed to David Spencer, Assistant Attorney General, South Carolina Office of Attorney General, Post Office Box 11549, Columbia, SC 29211-1549.

January 16, 2015

Ray E. Chandler, #183
Coffey, Chandler & McKenzie, PA
Post Office Box 1292
Manning, South Carolina 29102-1292
803-435-8847
ATTORNEY FOR THE APPELLANT

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

Donneil Woods, #272800,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Case No. 2012-CP-14-00210

ORDER OF DISMISSAL

This matter is before this Court by way of an application for post-conviction relief (PCR) filed May 4, 2012. The State filed its return on August 31, 2012. A hearing into the matter was convened at the Sumter County Courthouse on September 30, 2013. Applicant was present and represented by Blair C. Jennings, Esquire and Raymond E. Chandler, Esquire. The State was represented by David Spencer of the South Carolina Office of the Attorney General.

Applicant called Deborah K. Butcher, Esquire, his trial counsel, and Marsha Nelson, the nurse that examined the victim in this case. This Court also had before it the pleadings from both parties, the transcript of Applicant's trial, the Clerk of Court's records regarding the subject convictions, and the Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. Applicant was indicted during the August 2008 term of the Clarendon County Grand Jury for Criminal Sexual Conduct – First Degree, Kidnapping, and Strong Arm Robbery (2008-GS-14-0365). He was represented by Deborah Butcher, Esquire. Applicant proceeded to jury trial before the Honorable Clifton Newman on

October 14-16, 2008 and was found guilty as charged. Judge Newman sentenced Applicant to concurrent sentences of thirty years imprisonment for Criminal Sexual Conduct – First Degree, thirty years imprisonment for Kidnapping, and fifteen years imprisonment for Strong Arm Robbery.

A timely Notice of Appeal was filed, and following the submission of an Anders brief, the South Carolina Court of Appeals dismissed the appeal. State v. Woods, 2011-UP-487 (Ct. App. filed Oct. 31, 2011). The Remittitur was sent on January 11, 2012.

ALLEGATIONS

Applicant alleges he is being held in custody unlawfully because he received ineffective assistance of trial counsel. Specifically he alleges counsel was ineffective for failing to timely attain victim's medical records and for failing to move for the prosecution to disclose the same records pursuant to Brady v. Maryland, 373 U.S. 83 (1963). Applicant further maintains these records should have been admitted at trial because they were inconsistent with victim's trial testimony.

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 presented 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. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The burden of proof is on the applicant in a PCR proceeding to prove the allegations in his application. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRCP.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

Applicant alleges that his trial counsel was ineffective for failing to require the State to disclose medical records under Brady v. Maryland, 373 U.S. 83 (1963). However, Applicant failed to offer any proof that the medical records referred to during the hearing were in the State's possession. Further, Counsel testified she did not need to file a motion for the prosecution to disclose medical records because she was simply able to subpoena the hospital and attain the records on her own, which she did about four days before trial. Counsel testified she felt she was prepared for trial and did not need a continuance.

Further, counsel testified she had plenty of time to review the medical records and familiarize herself with them. Applicant, in particular, alleges a written narrative account of the incident that Nurse Nelson recorded was inconsistent with victim's trial testimony. In contrast, counsel testified she considered the narrative to mostly corroborate victim's testimony and the inconsistencies were

not material enough to justify admitting the record. Instead, she felt the medical records were more harmful than helpful because the nurse's narrative verified that victim was upset and crying when she was examined. Further, the medical records indicated that victim had scratches and redness that would serve to corroborate victim's version of events. Counsel testified that victim's testimony was compelling and credible. She also noted that despite her best efforts, Applicant's demeanor during trial was poor and prejudicial to his own case. Counsel testified that she focused her defense on challenging law enforcement's investigation of the case. This strategy becomes particularly evident in counsel's exemplary closing argument, chastising law enforcement for failing to take various steps in the investigation. See p. 225, lines 12-15 ("It's not that they didn't bring you any evidence. What's more appalling is they didn't even try to get you evidence."). Concerning the medical records, counsel argued the following:

> One of the big things that I felt like was missing from this case is the medical records. Where were the medical records? They certainly could have been obtained. Was there anything in there that they did not want you to see? What is so scary, Ladies and Gentlemen, I do mean scary, the State is asking you to convict a man of very serious crimes. A horrible crime. And they refuse to even investigate the crime.

Tr. p. 227, lines 2-11.

Applicant alleges that counsel should have sought admission of medical records establishing victim had cannabis in her system. Counsel testified she did not think this was pertinent under the circumstances of the case, because the records would not establish that victim was high at the time as cannabis may remain in someone's system for about thirty days.

Applicant also argues counsel should not have objected to the admission of a SLED report indicating no semen was found and there was not a DNA match. Counsel testified that the jury was

well aware that no semen was found during the investigation and that there was not a DNA match. Keeping the report from being admitted into evidence furthered her strategy that law enforcement dropped the ball. See tr. pp. 225-226 (counsel's argument complaining about lack of DNA evidence and law enforcement's failure to collect DNA evidence).

This Court finds that counsel has expressed reasonable trial strategy as to all of these allegations. Victim's statement to Nurse Nelson mostly corroborates victim's trial testimony. At trial, as in the statement, victim indicated that she was stopping at a friend's house to pick up something (at trial she clarified a phone charger, Tr. p. 26). Applicant then asked victim to take him to the store and she did. Applicant went into the store and then on the way back to the friend's house, Applicant grabbed victim and made her drive down a dirt road. Tr. pp. 28-30; p. 32, lines 4-5. Both the statement and the testimony indicates that Applicant raped victim twice. The first time Applicant told victim to strip. Both the statement and testimony mention that the car became stuck on the dirt road, although the statement suggest Applicant may have pushed the car, while testimony indicated Applicant made victim push the car while Applicant drove to get it unstuck. Tr. pp. 35-36. The second rape occurred after Applicant drove further down the road and pulled the car over on either a driveway or path. Tr. p. 37. The statement corroborated victim's testimony that Applicant choked her. Tr. p. 38. Applicant complains that the statement varies from the testimony because Applicant testified she was raped the first time in the woods, while the statement seems to indicate the rape was outside the car. This Court does not believe that this proves victim was lying, as Applicant urges this Court to believe. This Court also does not believe this inconsistency undoes the efficacy of trial counsel's stated strategy.

Accordingly, this Court finds counsel's trial strategy reasonable, as the variances in the statement fail to rise to the level as to accuse victim of lying, as PCR counsel claims. It is not unusual to have some variance in a written statement and trial testimony, and in this case, the Court agrees with counsel that the statement tended to corroborate victim's trial testimony. Further, this Court finds counsel's investigation fell within professional norms and she had adequate time to review the medical records. For the same reason, this Court finds Applicant was not prejudiced. This Court does not believe cross-examination or admission of the statement would alter the outcome of trial.

This Court finds no merit in the assertion that a discovery violation of any type occurred in this case. Brady v. Maryland, 373 U.S. 83 (1963) is based on the requirement of due process. To succeed on a Brady claim, the defendant must show: 1) the evidence was favorable to the accused, 2) it was in possession of or known to the prosecution, 3) it was suppressed by the prosecution and 4) was material to the guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999).

This Court finds that Applicant failed to establish that the medical records in question were ever in the prosecution's possession and that the particular documents were known to the prosecution. State v. Gulledge, 326 S.C. 220, 487 S.E.2d 590 (1997) (financial records were in possession of third party corporation that was the victim of defendant's breach of trust charge and not the prosecution's possession; therefore, there was no discovery violation). Accordingly, this Court agrees with counsel's determination that a motion to compel was unnecessary in the present case. Counsel's strategy of not making an unnecessary and meritless motion to compel was reasonable and Applicant was not prejudiced since counsel did attain the medical records in question.

Finally, the prosecution's failure to disclose medical records was not prejudicial to Applicant as counsel independently attained the records and had adequate time to review the records. For Brady purposes, the court's function is to determine whether the appellant's right to a fair trial has been impaired, when viewing the non-disclosed evidence in the context of the entire record. State v. Osborne, 291 S.C. 265, 353 S.E.2d 276 (1987); see Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462, 470 (2004) (finding where the statement was made available to the defense at the end of the State's direct examination and the defense chose not to further impeach the State's witness with the statement, new trial on the basis of Brady was not warranted).

CONCLUSION

Based on 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 advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (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), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf.

IT IS THEREFORE ORDERED:

1. The application for Post-Conviction Relief is denied with prejudice;

2. The Applicant must be remanded to the custody of the Respondent.

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

R. Knox McMahon
Presiding Judge
3rd Judicial Circuit

[illegible], South Carolina

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE
DATE 12/11/13
Beulah H. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON	)	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT
Donneil Woods, #272800, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2012-CP-14-00210 **ORDER DENYING RULE 59(e) MOTION AND PRO SE RULE 59(e) MOTION**

This matter comes before the Court by way of Applicant's motion pursuant to Rule 59(e), SCRCP and Applicant's pro se attempt to amend the Rule 59(e) motion. Applicant applied for post-conviction relief (PCR) on May 4, 2012. The State filed its return on August 31, 2012. A hearing into the matter was convened at the Sumter County Courthouse on September 30, 2013. Applicant was present and represented by Blair C. Jennings, Esquire and Raymond E. Chandler, Esquire. The State was represented by David Spencer, Esquire, of the South Carolina Office of the Attorney General. The Court dismissed Applicant's PCR and Applicant filed his Motion to Alter or Amend the Order of Dismissal on December 11, 2013. Counsel and the Court were timely served a copy of the Motion.

RULE 59(E) STANDARD

Rule 59(e) SCRCP provides for a Motion to Alter or Amend the Court's judgment to preserve the record for appeal. *Pelican Building Centers v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993). The

motion provides the Circuit Court with an opportunity to rule properly after it has considered all relevant facts, law, and arguments. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).

South Carolina courts have consistently held that "[A] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990). "An argument is not preserved for review when it is presented it to the court for the first time in a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP." *Meehan v. Meehan*, 2006-UP-088, 2006 WL 7285712 (S.C. Ct. App. 2006). *See also Crary v. Djebelli*, 321 S.C. 38, 43, 467 S.E.2d 128, 131-32 (Ct. App. 1995) *rev'd on other grounds*, 329 S.C. 385, 498 S.E.2d 21 (1998) (Holding the court could not address the merits of appellants' argument as it was not properly preserved because appellants first presented it to the Court on a motion to alter or amend pursuant to Rule 59(e)).

DISCUSSION

In his motion, Applicant complains that the order addresses only ineffective assistance of counsel and not "Applicant's claims of the denial of his due process rights. In addition, the Court does not address the Applicant's claims of trial counsel's failure to adequately conduct her investigation into his case."

First, as to the allegation of a due process violation, Applicant does not address this issue with any specificity. Nonetheless, the denial of due process is a direct appeal issue and not appropriate for post-conviction relief. *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975).

As to the second issue concerning the generalized "failure to investigate" claim, this Court in its order found "counsel's investigation fell within professional norms and she had adequate time to review the medical records." (Order p. 6). This Court would additionally note that counsel's overall performance fell within professional norms and that Applicant has failed to prove deficiency of counsel. Further, Applicant has failed to offer any evidence to suggest that Applicant was prejudiced from counsel's alleged failure to investigate the case.

Additionally, Applicant claims in his motion: "The Applicant maintains that the State was in possession of these medical records . . . ." Applicant had the opportunity and failed to offer any evidence that the State was in possession of the specific records Applicant utilized during the PCR hearing. This Court would note that at the hearing, Applicant abandoned his *Brady* claim. This Court further would note that trial counsel obtained the records herself and therefore, no prejudice would have ensued if there was a failure to disclose. However, this Court finds that the State did not commit a discovery violation.

Applicant also filed a *pro se* motion to amend the Rule 59(e) motion. In this Amended Motion, Applicant maintains that he is actually innocent of the underlying charges. Applicant did not argue actual innocence during his Post-Conviction Relief Hearing on September 30, 2013. Applicant had the ability and opportunity to make this argument during the hearing, it is improper to present it to the Court for the first time in a Rule 59(e) motion, and thus his argument is without merit.

Accordingly, this Court denies Applicant's Rule 59(e) motion and further finds that the original order of dismissal comports with the requirements of Rule 52(a), SCRCP.

IT IS THEREFORE ORDERED that Applicant's Motion to Alter or Amend Judgment is **DENIED AND DISMISSED.**

AND IT IS SO ORDERED this 29th day of April, 2014.

The Honorable R. Knox McMahon
Presiding Judge
3rd Judicial Circuit

29 April 14

Lexington, South Carolina

COFFEY, CHANDLER & McKENZIE, P.A.

Attorneys At Law

WILLIAM C. COFFEY, JR.
RAY E. CHANDLER*
STEVEN S. McKENZIE
JOSEPH K. COFFEY
MATTHEW J. BURGESS

*OF COUNSEL

Est. 1970

2 North Brooks Street
Post Office Box 1292
Manning, South Carolina 29102-1292
Telephone (803) 435-8847
Facsimile (803) 435-8915
Email: lawfirm@cckmlaw.com

January 16, 2015

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: Donneil Woods, #272800 vs. State of South Carolina

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; and

(2) A copy of the Orders which are to be challenged on appeal.

Sincerely,

Ray E. Chandler

REC/cnt
Enclosures

cc: David Spencer, Assistant Attorney General
South Carolina Office of Attorney General
Post Office Box 11549
Columbia, SC 29211-1549