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RECEIVED

October 14, 2015

OCT 20 2015

The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

S.C. SUPREME COURT

RE: Keith Gadsden v. State of South Carolina, Case No.: 2014-CP-10-2610

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post Conviction Relief (PCR) case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal on the Respondent;
- (2) The Order of Dismissal &
- (3) A Request for Representation on Appeal.

The Applicant-Appellant was represented by me as an indigent pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR cases. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support thereof are signed by me as attorney for Applicant-Appellant. If you need anything further, do not hesitate to contact me. Thank you for your time and attention to this matter.

Sincerely,

Rodney D. Davis
South Carolina Bar #: 12396
4000 Faber Place Drive, Suite 300
Charleston, SC 29405
(843) 323-4353
Davis@LowcountryLawOffice.com

Enclosure(s). As stated above.
RDD/mmt

cc: J. Rutledge Johnson, Assistant Attorney General
Kimberly McCall, Appellate Division, SCCID

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger E. Henderson, Circuit Court Judge

Case No.: 2014-CP-10-2610

Keith Gadsden,

Appellant,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Keith Gadsden appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable Roger E. Henderson on July 20, 2015.

October 16, 2015



Rodney D. Davis
400 Faber Place Drive, Suite 300
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Attorney for Appellant

Other Counsel of Record:
J. Rutledge Johnson
Assistant Attorney General
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PO Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

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S.C. SUPREME COURT

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S.C. SUPREME COURT

Keith Gadsden,

Appellant,

v.

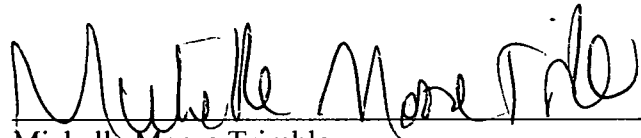
State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy of it to the address of record, J. Rutledge Johnson, P.O. Box 11549, Columbia, South Carolina 29211-1549, on October 16, 2015.

October 16, 2015



Michelle Moore Trimble
Paralegal to Rodney D. Davis
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Attorney for Appellant

Other Counsel of Record:
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Assistant Attorney General
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Columbia, SC 29211-1549
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger E. Henderson, Circuit Court Judge

Case No.: 2014-CP-10-2610

Keith Gadsden,

Appellant,

v.

State of South Carolina,

Respondent.

FILED
2015 OCT 16 PM 3:10
JULIE J. ARMSTRONG
CLERK OF COURT

NOTICE OF APPEAL

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October 16, 2015


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Other Counsel of Record:
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Columbia, SC 29211-1549
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger E. Henderson, Circuit Court Judge

Case No.: 2014-CP-10-2610

Keith Gadsden,

Appellant,

v.

State of South Carolina,

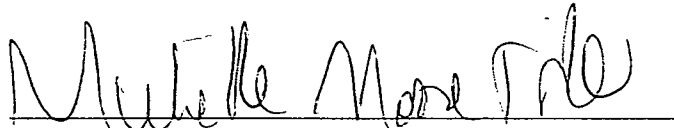
Respondent.

FILED
2015 OCT 16 PM 3:10
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy of it to the address of record, J. Rutledge Johnson, P.O. Box 11549, Columbia, South Carolina 29211-1549, on October 16, 2015.

October 16, 2015



Michelle Moore Trimble
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Attorney for Appellant

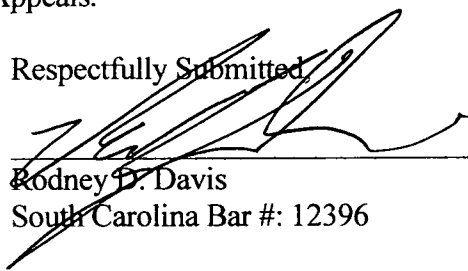
Other Counsel of Record:
J. Rutledge Johnson
Assistant Attorney General
Office of the Attorney General, State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

STATE OF SOUTH CAROLINA)	IN THE SUPREME COURT OF SOUTH CAROLINA
)	
COUNTY OF CHARLESTON)	Case No.: 2014-CP-10-2610
)	
)	
KEITH GADSDEN,)	
)	
Applicant.)	REQUEST FOR REPRESENTATION ON APPEAL
)	
-versus-)	
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;
2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;
3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;
4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;
5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting his appeal to the South Carolina Court of Appeals.

Respectfully Submitted,

 Rodney D. Davis
 South Carolina Bar #: 12396

Charleston, South Carolina
10/16, 2015.

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
)
)
Keith Gadsden, #350463,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

2014-CP-10-2610

ORDER OF DISMISSAL

FILED
2015 SEP 23 PM 4:24
JULIE J. ALBERTSON
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 22, 2014. The Respondent made its Return on March 4, 2015. An evidentiary hearing into the matter was convened on July 20, 2015, at the Charleston County Courthouse. Rodney Davis, Esquire represented Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Melissa Gay, Esquire also testified. This Court had before it a copy of the records of the Charleston County Clerk of Court, records from the South Carolina Department of Corrections, the trial transcript and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the June 2010 term of the Charleston County Grand Jury for criminal sexual conduct with a minor- first degree (2010-GS-10-4099). The Applicant was represented by Melissa Gay, Esquire.



On April 9-12, 2012, the Applicant proceeded to trial and was found guilty as indicted. The Applicant was sentenced by the Honorable Roger M. Young, Sr. to confinement for a period of thirty (30) years.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Susan Hackett, Esquire, of the Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Gadsden, No. 2014-UP-016 (S.C. Ct. App. January 15, 2014). The Remittitur was issued on February 3, 2014.

SUMMARY OF TESTIMONY

At the evidentiary hearing, Applicant testified he proceeded to trial in 2012 for Criminal Sexual Conduct of a Minor, 1st degree and retained Melissa Gay, Esquire. This was a four-day trial. Applicant stated Counsel called four witnesses on his behalf, including Applicant. Applicant testified there were no eye-witnesses. It was a he said-he said incident.

Applicant testified the State called Dr. Elsey as an expert in this case. Applicant stated there was an appeal filed in this case, and the issue of Dr. Elsey being an expert was not raised because it was not preserved. Applicant then testified he was convicted and sentenced to thirty (30) years.

On cross-examination, Applicant admitted there were witnesses called on both the State's behalf and his behalf. He also admitted Counsel thoroughly cross-examined Dr. Elsey about the lack of contact Applicant allegedly had with victim. However, Applicant was still convicted.

Counsel testified she has been practicing law since 1991 and has handled Criminal Sexual Conduct with a Minor cases before. Counsel testified the State called witnesses, including Dr. Elsey, who developed a profile of the victim without meeting with the victim. As to the issue of whether Dr. Elsey could be qualified as an expert in childhood sexual abuse, Counsel stated she believed she



properly objected and preserved the issue for appeal. Counsel testified Dr. Elsey met with neither the victim nor Applicant. Allegedly, the Solicitor did not tell Counsel about Dr. Elsey as a State's witness. In Counsel's opinion, the State only had Dr. Elsey testify to bolster the other witnesses' testimony.

Counsel testified her trial strategy was to explain to the jury that this incident never occurred. She also attempted to elicit that the victim had a motive to accuse Applicant, because victim's son was good friends with Applicant's son, and victim wanted access to his son's monthly social security check. Counsel admitted Applicant testified and was able to relay his version of the facts to the jury, but was ultimately convicted.

On cross examination, Counsel testified this case was essentially a swearing match between Applicant and victim as there was no physical evidence and no contemporaneous report. Counsel stated she found Dr. Elsey's testimony was not germane to the case and moved to suppress his testimony pre-trial. She then testified she believed the trial judge had already made his ruling and that she properly preserved the issue for appeal; however, according to the Court of Appeals opinion, Counsel did not contemporaneously object to this issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court had also read the trial transcript and the appellate records, all of which assists the Court in judging their credibility.

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

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.

The Court finds Applicant failed to meet his burden of proving prejudice from Counsel's arguable ineffectiveness for failing to renew her objection to Dr. Elsey's testimony during Applicant's trial. On an issue not "considered on direct appeal because it was unpreserved, an



examination of the merits of the issue is appropriate in analyzing the prejudice prong.” McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013). “A party is allowed to present expert testimony to the factfinder if “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.”” State v. Brown, 411 S.C. 332, 339, 768 S.E.2d 246, 250 (Ct. App. 2015), reh'g denied (Feb. 11, 2015), cert. denied (Aug. 6, 2015) citing State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003). The Court of Appeals also held “the circuit court properly admitted [expert’s] testimony because child abuse dynamics and delayed disclosures were subjects beyond the ordinary knowledge of the jury.” Brown at 342, 768 at 251. Brown further found because “[the expert] never commented on the credibility of the minor victims, but rather offered admissible expert testimony regarding the general behavioral characteristics of child sex abuse victims, we find such testimony did not improperly bolster the minor victims' testimony.” Id. at 345, at 253.

In the case at bar, the State presented Dr. Elsey as an expert in child sexual abuse. Dr. Elsey’s testimony was specifically and solely aimed at explaining the phenomena of “delayed disclosure” to the jury. (Tr. p. 171-177). Upon a thorough review of the record, this Court finds Dr. Elsey never even mentioned the victim in her testimony, let alone commented on the victim’s credibility. As in Brown, *supra*, this testimony did not improperly bolster the minor victim’s testimony. Thus, no prejudice can be shown by Counsel’s failure to renew her objection to Dr. Elsey’s testimony because the result of Applicant’s trial would not have changed had Counsel contemporaneously objected to Dr. Elsey’s proper expert testimony. Therefore, the Court dismisses this allegation.



Assuming *arguendo* that Counsel had renewed her objection during the trial to Dr. Elsey's testimony, because, as stated above, Dr. Elsey did not comment on the credibility of the victim, but only on a subject beyond the ordinary knowledge of the jury, the Applicant has failed to meet his burden of proving that this issue would have been meritorious in the appellate courts. See Brown, supra. Additionally, this Court gives no weight to Counsel's testimony at the PCR evidentiary hearing that Dr. Elsey "bolstered" the victim's credibility. This Court also notes that because it is the trier of fact in this PCR case, Counsel may not give testimony to the ultimate legal conclusion, as it does not assist this Court in understanding this case. See Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002).

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.

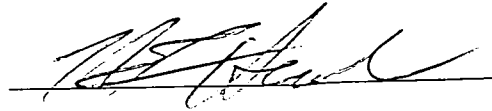
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, 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. Applicant's 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!



Roger E. Henderson
Presiding Circuit Court Judge
Ninth Judicial Circuit

September 15, 2015
Charleston, South Carolina

2014-CP-10-2610