RECEIVED
MAR 29 2016
SC SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

The Honorable Tanya A. Gee, Circuit Court Judge

Case No. 2015-CP-43-037

Robert Troy Taylor, #315084, ...Respondent,

v.

State of South Carolina, ...Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Tanya A. Gee order dated February 19, 2016, and filed February 24, 2016, granting post-conviction relief to the Respondent. The State received notice of entry of the order on March 10, 2016. A copy of the order on appeal is attached to this notice.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

ALAN WILSON
Attorney General

DANIEL GOURLEY
Assistant Attorney General
S.C. Bar # 100934

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
Attorneys for the Petitioner

Columbia, South Carolina

March 23, 2016

Other counsel of record:

Tricia Blanchette, Esquire
Law office of Tricia A. Blanchette, LLC
P.O Box 12725
Columbia, SC 29211

RECEIVED
MAR 29 2016
SC SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

The Honorable Tanya A. Gee, Circuit Court Judge

Case No. 2015-CP-43-037

Robert Troy Taylor, #315084, ...Respondent,

v.

State of South Carolina, ...Petitioner.

PROOF OF SERVICE

I, Daniel Gourley, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Tricia Blanchette, Esquire
P.O Box 12725
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served this 23 day of March, 2016.

Daniel Gourley
S.C. Bar. #100934
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
Attorney for the Petitioner

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAR 29 2016
SC SUPREME COURT

March 23, 2016

Krystal J. Smith, Court Reporter
1509 Woods Drive
Florence, SC 29505

Re: **Robert Troy Taylor v. State of South Carolina**
2015-CP-45-037

Dear Ms. Smith:

Please prepare a Post-Conviction Relief Hearing transcript taken November 19, 2015, of the above named individual before the Honorable Tanya A. Gee for the term of the Court of Common Pleas in the Third Judicial Circuit.

Please note that Rule 243(f)(3), SCACR, now requires as detailed an index for PCR hearings as for trial transcripts filed in the Supreme Court. The index should include all exhibits. If exhibits were not introduced, then please note that no exhibits were submitted at the hearing. Please prepare the transcript in accordance with the format requirements as set forth in the Court Reporter Manual.

If the cost of this transcript will exceed $500, please inform me in writing before you complete the transcript. If you will prepare this transcript and forward it to me along with your statement, I will arrange for payment. Please note that all statements are to be signed

Sincerely,

Caroline Collins
Legal Assistant
(803) 734-0064
ccollins@scag.gov

cc: Desiree R. Allen, Court Administration

FILED

STATE OF SOUTH CAROLINA)
COUNTY OF WILLIAMSBURG)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

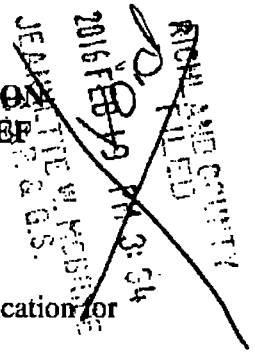
2016 FEB 24 AM 11:40

Robert Troy Taylor, #315084, Applicant,
v.
State of South Carolina, Respondent.

SHARON W. S... CLERK OF COURT KINGSTREE, S.C.

2015-CP-45-037

ORDER GRANTING APPLICATION FOR POST-CONVICTION RELIEF



This matter comes before the Court pursuant to Robert Troy Taylor's Application for Post-Conviction Relief filed on December 31, 2014, and amended on October 14, 2015. The State filed its Return on June 8, 2015.

Taylor is presently confined in the South Carolina Department of Corrections and is serving a life sentence without the possibility of parole for kidnapping and second degree criminal sexual conduct with a minor. The Honorable George C. James, Jr. presided over Taylor's jury trial, which began on July 10, 2007. Charles David Barr represented Taylor at trial.

Taylor appealed from his conviction, and Jeremy A. Thompson represented Taylor on appeal. On June 6, 2012, the South Carolina Court of Appeals affirmed Taylor's convictions and sentence. *State v. Taylor*, 399 S.C. 51, 731 S.E.2d 596 (Ct. App. 2012). Taylor then sought certiorari to the South Carolina Supreme Court, but his petition was denied. His case was remitted on April 7, 2014.

Since that time, Taylor filed this post-conviction relief action, and an evidentiary hearing was held on November 19, 2015, at the Sumter County Courthouse. Taylor was present and represented by Tricia A. Blanchette. Assistant Attorney General Daniel Gourley represented the State.

After carefully considering the testimony and exhibits presented during the evidentiary hearing, the records of the Williamsburg County Clerk of Court, the trial transcript, the appellate court filings, and the Appendix from Taylor's Georgetown County conviction, Taylor's application for post-conviction relief is granted for the reasons that follow.

FACTUAL BACKGROUND

The Court of Appeals provided this succinct explanation of the allegations against Taylor:

> Taylor was the pastor of the church Victim attended in Murrells Inlet, South Carolina. In November 1998, when Victim was 11, Taylor organized a camping trip with Victim and a group of six or seven boys from the church. Taylor took the boys to an area "just outside [the city of] Andrews" on Highway 521 and the group hiked about a mile into the woods to a campsite "right next to the Black River." Taylor and the boys set up a tent and a large tarp, made a fire, and cooked food. At approximately 11 p.m., the boys retired to their sleeping bags under the tarp. Later that night, Taylor woke Victim, placed his hand over Victim's mouth, and carried him to the tent. Once inside the tent, Taylor removed Victim's clothes and forced Victim to touch his penis and anus. Taylor also touched Victim's penis and anus. Next, Taylor raped Victim. After raping Victim, Taylor instructed Victim not to reveal the rape to anyone and returned Victim to his sleeping bag. Taylor slept next to Victim and held him throughout the course of the night.

State v. Taylor, 399 S.C. 51, 55, 731 S.E.2d 596, 598-99 (Ct. App. 2012).

This allegation will hereinafter be referred to as the "Williamsburg County incident," and it is the crime for which Taylor is serving a life without parole sentence and from which he seeks post-conviction relief.

As with many cases involving allegations of child sexual abuse, Victim did not disclose the Williamsburg County incident until many years later, when he was seventeen years old. On June 1, 2005, Victim provided the following written statement to the Georgetown County Sheriff's Office:

> Sometime between February and April LC3 Youth Groups went on a camping trip to Andrews, S.C. It was very cold outside and it rained a little bit. My friend Charles Harrison asked me if I wanted to go. We went back in the woods about a mile and a half. There were corn fields all around with two houses on either side of the street. We set up camp around like 7:30 PM. We made a bon fire and then went to bed around 11:00. About 2 to 3 hours later Troy woke me up by putting his hand over my mouth and telling me to be qui[et]. He took me to a sep[a]rate tent and started touching my penis. He was honestly rubbing and fondling it. He did this for like 30 minutes continuously touching me. I told him to stop numerous times he just told me to be qui[et]. After that he took me back to the other tent and made me sleep beside him. I g[ue]ss so I wouldn't say nothing. I'm not really sure if anyone saw anything but if they did Zack Webster or Charles Harrison would be the ones that saw.

Six months after disclosing the abuse from the 1998 Williamsburg County incident, Victim disclosed another incident of abuse at the hands of Taylor. This incident occurred in 1999 in Georgetown County. The Court of Appeals described it as follows:

> In August 1999, Taylor and a few other adults from the church organized a trip to the beach. After leaving the beach, the group returned to the church to use the showers. Once all the showers were occupied, Taylor asked Victim and another boy if they would like to use the showers at his house. Victim and the other boy accompanied Taylor to his home near the church. While Victim was showering, Taylor entered the bathroom, removed his clothes, and entered the shower. Taylor forced Victim to touch his penis and Taylor touched Victim's penis and anus. Next, Taylor raped Victim. After raping Victim, Taylor instructed Victim not to divulge the rape to anyone. Taylor drove Victim and the other boy back to the church.

State v. Taylor, 399 S.C. at 55-56, 731 S.E.2d at 599.

Taylor pleaded guilty in Georgetown County to this 1999 incident on April 20, 2006.[1] The Honorable Edward B. Cottingham sentenced Taylor to eight years', suspended to five years of active time and three years' probation.

In March of 2007, approximately four months before Taylor was tried for the 1998 Williamsburg County incident, the State served Taylor with a notice of intent to seek a sentence of life without the possibility of parole pursuant to section 17-25-45 of the South Carolina Code. The State relied on Taylor's 2006 Georgetown County conviction for second degree criminal sexual conduct to enhance Taylor's punishment.

At Taylor's trial, the State moved to strike the first jury that was selected, arguing that defense counsel had used eight out of ten strikes against white jurors. The trial judge found that defense counsel violated *Batson v. Kentucky*, when he struck juror number 146. Mr. Barr purportedly struck her because she was too educated, yet he sat a black, female juror with more education than juror number 146. A new jury was then selected, and juror number 146 was seated on the jury that convicted Taylor.

At trial, the State called four witnesses: (1) Gayle Allen Cooke of the Durant Children's Center, who was qualified as an expert in the field of counseling and treatment of childhood sexual abuse; (2) Victim's mother; (3) Victim; and (4) Sergeant Laura Rogers of the Williamsburg County Sheriff's Office. Ms. Cooke testified generally that a person who has been abused as a child may be withdrawn and have suicidal tendencies. She further explained that it was "pretty normal" for abused children to turn to alcohol or drugs and that it was very common for them to have difficulties with the law. She also testified that 69% of child victims wait to

[1] Taylor also pleaded guilty to two counts of lewd act on a minor, which appear to stem from this same incident although the record is not entirely clear.

disclose abuse until adulthood. On cross-examination, she admitted that she had never met Victim and did not know if he was sexually abused.

Victim's mother testified that her son attended the church camping trip in November 1998, when he was 11. She further testified that at the age of 14, Victim began abusing drugs and alcohol, and at some point prior to disclosing the abuse, he attempted to kill himself with an overdose of Xanax. On cross-examination, defense counsel asked Victim's mother a series of questions about the location of the camping trip, apparently attempting to demonstrate that she did not have firsthand knowledge that the campsite was located in Williamsburg County. (p. 90-92) Counsel also elicited testimony from her that Victim's behavior was not noticeably different between the ages of eleven and fourteen, when Victim began abusing drugs and alcohol. Victim's mother also admitted that she and her husband (Victim's father) were experiencing a "little bit" of marital difficulty when she "started noticing [Victim's] somewhat unwholesome behavior."

Victim, who was 19 years old at the time of the trial, also testified, describing both the 1998 Williamsburg County incident and the 1999 Georgetown County incident. Victim testified that after being abused, he was too scared to tell anyone. At 14, Victim admitted he began smoking marijuana, and a year later, he began drinking alcohol. He testified that he did this in an effort to drown out memories of the abuse, and by the age of sixteen he graduated to more serious drugs, such as cocaine and pills. At the age of 17, he took nine Xanax pills because he wanted to hurt himself. After that, Victim testified he told a male friend about being abused by Taylor as a child. Victim then disclosed the 1998 Williamsburg County incident to law enforcement, and six months later, he disclosed the 1999 Georgetown County incident. Victim specifically identified the location of the campsite as being in Williamsburg County. On cross-

examination, defense counsel pointed out discrepancies between Victim's initial statement and his testimony in court. For instance, defense counsel pointed out that Victim first identified the trip happening sometime between February and April, yet testified it happened in November only after finding a church bulletin listing the actual date of the youth camping trip. Defense counsel also questioned Victim about whether the other boys saw Taylor waking up next to Victim, and Victim acknowledged that they did but none of them said anything. Victim also testified that Taylor did not bring his son on the camping trip.

The State's final witness was Sergeant Laura Rogers, a victim's advocate for the Williamsburg County Sheriff's Office. She testified that the incident occurred in Williamsburg County, and at the time of the incident, Victim was 11 years old and Taylor was 39 years old. On cross examination, defense counsel focused on the location of the incident, pointing out that the Black Ricker runs through both Georgetown and Williamsburg counties.

The defense called one witness, Trevor Morton. Mr. Morton is Taylor's nephew and participated in the camping trip. According to Mr. Morton, he slept next to Taylor under the tarp, and Taylor had his three- or four-year-old son with him, sleeping in the same sleeping bag. Mr. Morton testified that he knew Taylor remained next to him all night because Mr. Morton did not sleep well due to being cold and feeling scared from the ghost stories told earlier in the evening. Mr. Morton confirmed that another tent was set up, but testified that the tent had everyone's gear stored in it. Mr. Morton did not remember Taylor sleeping next to Victim, nor did he remember anything unusual happening that night. On cross-examination, the State pointed out that Mr. Morton loved his uncle and did not want anything bad to happen to him. After Mr. Morton's testimony, the defense rested.

Defense counsel successfully requested that the trial judge charge the jury on the issue of venue, so that issue would be part of the jury's deliberation. As a result, counsel spent a fair amount time arguing venue in his closing statement, though he also questioned the victim's credibility in an effort to create a reasonable doubt. Ultimately, the jury convicted Taylor, and the judge sentenced him to life without the possibility of parole.

Taylor appealed his convictions and essentially argued the trial court erred in four respects: (1) granting the State's *Batson* motion, (2) allowing Victim to testify about the 1999 Georgetown County incident, (3) denying Taylor's motion for directed verdict because venue had not been established, and (4) sentencing Taylor to life without parole when the substantive facts of the predicate offense were admitted at trial as common scheme or plan evidence. The South Carolina Court of Appeals affirmed Taylor's convictions, and the Supreme Court denied certiorari.

Taylor filed this post-conviction relief action and raised the following allegations:

1. Trial counsel failed to prepare and investigate prior to trial, which resulted in a failure to present a reasonable defense at trial. Specifically, Taylor alleges trial counsel: (a) failed to investigate the scene and be aware of the location of the alleged incident; (b) pursued an unreasonable defense by focusing on venue, when minimal investigation revealed venue was proper and when the issue of venue is one for the trial court, not the jury; (c) failed to even speak to potential witnesses prior to trial; and (d) called only one of several possible favorable witnesses at trial without ever having spoken to that witness prior to trial.

2. Trial counsel failed to properly impeach and/or cross-examine the State's witnesses at trial.

3. Trial counsel's handling of Gaye Allen-Cook expert testimony was ineffective. Specifically, Taylor alleges trial counsel failed to: (a) request information regarding her findings prior to trial; (b) object and/or move to suppress her testimony. Alternatively, Taylor argues that post-conviction relief is appropriate based on the newly

discovered evidence that Gaye Allen-Cook would not have taken the stand for the State if given the opportunity to review the case and would have been willing to assist with the defense of Taylor.

4. Trial counsel failed to preserve for appeal the argument that Taylor should not have been sentenced to life without parole based on a previous conviction for CSC with a minor when earlier in the trial, the trial judge allowed evidence of the previous conviction under the common scheme or plan exception.

5. Trial counsel provided ineffective assistance of counsel in his handling of post-trial motions.

6. Trial counsel and appellate counsel did not provide effective assistance of counsel in their handling of the Batson motion matter at trial and on appeal.

7. Appellate counsel failed to raise all meritorious issues on appeal.

At the evidentiary hearing, Taylor testified along with Gaye Allen Cooke, William Eddie Brown, Chad Bernard, Nick Everett, Lina Taylor, John Pezzullo, Michelle Gallagher, Tonya Morton, Pete Skidmore, Jeremy A. Thompson, and Charles D. Barr. By agreement with the State, the testimony of two other witnesses, Zack Webster and Charles Harrison, was submitted by affidavit. After listening to this testimony, carefully weighing the witnesses' credibility, and reviewing the transcript from Taylor's trial, I agree that Taylor received ineffective assistance of trial counsel and grant his application for post-conviction relief.

LAW/ANALYSIS

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the defendant must prove that counsel's performance was deficient, meaning the performance "fell below an objective standard of reasonableness." *Franklin v. Catoe*, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001); *see also Strickland*, 466 at 687. Second, the defendant

must demonstrate that counsel's deficient performance resulted in prejudice. *Strickland*, 466 at 687. "To prove prejudice, [the convicted defendant] must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different." *Franklin*, 346 S.C. at 571, 552 S.E.2d at 723. The applicant in a PCR hearing bears the burden of establishing his entitlement to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

I. Trial Counsel Was Deficient for Failing to Investigate

Taylor argues that trial counsel failed to investigate witnesses and that counsel's lack of investigation fell below an objective standard of reasonableness. I agree.

"Without a doubt, '[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.'" *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting *Thompson v. Wainwright*, 787 F.2d 1447, 1450 (11th Cir.1986)). "[W]hile the scope of a reasonable investigation depends upon a number of issues, 'at a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case.'" *Id.* at 331-32, 642 S.E.2d at 597 (quoting *Troedel v. Wainwright*, 667 F.Supp. 1456, 1461 (S.D.Fla.1986) (emphasis in original)).

Courts recognize there are as many ways to try a case as there are lawyers. Accordingly, Courts considering an application for post-conviction relief strongly presume "that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case." *McKnight v. State*, 378 S.C. 33, 43, 661 S.E.2d 354, 359 (2008). So long as counsel can articulate a reasonable trial strategy, he will not be deemed ineffective. *Id.*

Here, trial counsel acknowledged that he never interviewed the other boys who went on the camping trip. Trial counsel claims that his trial strategy was to discredit the victim's testimony in an effort to create a reasonable doubt. If this were so, there is no valid strategic reason why trial counsel would not make some attempt to interview the other boys on the camping trip.

If trial counsel had spoken to the other boys, he may have been able to articulate a valid strategic reason for not calling them as witnesses; however, it is impossible for trial counsel to engage in strategic reasoning without first engaging in some investigation. According to trial counsel, he did not contact the other campers because he had never heard of them. This testimony is either not true or illustrative of counsel's deficient representation.

Had trial counsel properly prepared for this trial, he would have read the victim's statement, which identified Mr. Harrison and Mr. Webster as possible eye witnesses. Additionally, trial counsel received a letter from Taylor in which Taylor named other boys on the camping trip. Furthermore, numerous members of Taylor's family credibly testified that they had provided counsel with the names of the other boys on the camping trip. Indeed, some of the other campers were listed as witnesses on Taylor's pre-trial statement. Accordingly, I find that trial counsel knew of the other campers' identities. I further find that his failure to interview potential witnesses and independently investigate the facts and circumstances surrounding the allegations against Mr. Taylor was objectively unreasonable and was not the result of a valid trial strategy.[2]

[2] Taylor argues that trial counsel's strategy was to win an acquittal because the State had failed to prove the crime occurred in Williamsburg County. Taylor argues that such a strategy was unreasonable because (1) the issue of venue is one for the judge, not the jury; and (2) trial counsel would have known the campsite was in Williamsburg County had he engaged in minimal investigation. Taylor called several witnesses who testified that trial counsel discussed

II. Prejudice to Taylor

For a convicted defendant to receive post-conviction relief, he must not only prove that his counsel's performance was deficient, but that the defendant was prejudiced by the deficiency. "Prejudice" in this context means there is a reasonable probability that the result of the proceeding would have been different absent trial counsel's deficient performance. *Franklin*, 346 S.C. at 571, 552 S.E.2d at 723. The PCR applicant bears the burden of proving prejudice, and I find Taylor has met this burden.

At the evidentiary hearing, Taylor provided the affidavits of Zack Webster and Charles Harrison. Taylor also called three young men who were on the camping trip –William Edward Brown, Chad Bernard, and Nick Everett.

Mr. Brown testified that he has known Taylor since Mr. Brown was a child, and he recalled going on the camping trip. He provided vivid details of the trip, which included sleeping side-by-side on a tarp and no tents being set up at the camping site. He recalled Taylor's young son, Griffin, being on the trip and Griffin sharing Taylor's sleeping bag. Mr. Brown recalled waking up early the next morning and getting the fire started. Mr. Brown also remembered telling ghost stories prior to bed and sleeping very lightly. He did not witness anything strange or out of the ordinary. He confirmed that he was never contacted by trial counsel prior to trial and he willingly spoke with Taylor's private investigator prior to the PCR evidentiary hearing. Mr. Brown testified that he would have been willing to testify on behalf of the defense at trial.

---

this strategy with them, and the trial transcript reflects that trial counsel strenuously argued the issue of venue, particularly in his closing statement. However, at the evidentiary hearing, trial counsel testified that his strategy going into the trial was to discredit the victim and that the issue of venue arose only when the State's law enforcement witness testified uncertainly about the location of the incident. Considering the allegations against Taylor and the sentence he faced of life without the possibility of parole, I find that trial counsel's failure to investigate witnesses was deficient because without such an investigation, counsel was unable to make valid strategic decisions.

Mr. Bernard's testimony was similar to Mr. Brown's. Mr. Bernard testified that he attended Taylor's church and remembered going on the camping trip in question. He recalled some specifics of the campsite, which included sleeping side by side in sleeping bags and no tents being set up at the site. Specifically, Mr. Bernard testified that he had reviewed the victim's statements and disagreed that there was a separate tent set up as victim stated. Based upon his recollection of the campsite, Mr. Bernard believes it very unlikely for the assault to have occurred as the victim described it because all of the boys were sleeping so close together. Mr. Bernard testified that he believes that he would have woken up if Taylor carried away the victim from the sleeping area. Mr. Bernard testified that defense counsel never contacted him prior to trial and that he would have been willing to testify for the defense at trial.

Mr. Everett also testified regarding the camping trip, which he remembered attending as a boy. He testified that he had reviewed the victim's statements and there was no tent set up at the campsite. He testified that nothing out of the ordinary happened during the trip, and he believes he would have woken up if Taylor had arisen during the nighttime because they were all sleeping side by side. Mr. Everett testified that he was not contacted by defense counsel prior to trial and that he would have been willing to testify for the defense if he had been contacted.

Additionally, the affidavits of Zack Webster and Charles Harrison were admitted. Zack Webster testified:

> 1. I have reviewed the Voluntary Statement of [the victim] dated June 1, 2005, and Voluntary Statement of [the victim] dated November 23, 2005. I have read the trial testimony of [the victim] from the trial of Robert Troy Taylor on July 10-12, 2007.
>
> 2. My name is listed in the Voluntary Statement dated June 1, 2005 as possibly seeing the actions at issue. I was on the camping trip on November 6-7, 1998, and I did not witness anything out of the ordinary nor any behavior by Robert

Troy Taylor that was memorable. I do not remember Charles Harrison, who is also listed, on the trip.

3. I do not recall being contacted by Charles David Barr, Esquire, prior to Robert Troy Taylor's trial in July of 2007. I further do not recall receiving a subpoena for July 11th or 12th in 2007. If I had received a subpoena, I would have complied and been present as needed.

4. Prior to being shown the witness list for the State and the defense during the week of November 2nd of 2015 I was unaware that I had been placed on a witness list for either party. I would have been willing to testify for the defense at trial.

(Applicant's Exhibit 1)

Charles Harrison, who the victim identified as being a possible eye witness and who victim claimed had invited him on the trip, testified:

1. I have no memory of attending a camping trip with Robert Troy Taylor and other teenage boys, including [the victim], on November 6-7, 1998 near the Black River nor do I have any memory of witnessing anything as was referenced in [the victim]'s statement dated June 1, 2005.

2. I have verified with my parents that I did not attend the camping trip on November 6-7, 1998 near the Black River.

3. I do not recall being contacted by Charles David Barr, Esquire, prior to Robert Troy Taylor's trial in July of 2007. If I had received a subpoena, I would have complied and been present as needed.

(Applicant's Exhibit 2)

At the trial, the only evidence against Taylor came from the victim, who testified about the Williamsburg County incident and the Georgetown County incident. To refute that testimony, defense counsel called one witness and that witness (Trever Morton) was related to

Taylor.[3] On cross-examination, the State used this familial relationship to demonstrate bias. The other boys on the camping trip were not related to Taylor, and their accounts of the camping trip contradicted the victim's testimony with regard to things like the existence of a separate tent, the absence of Charles Harrison, and whether Taylor slept in the same sleeping bag with his young son. These other boys also expressed doubt that Taylor could have carried the victim away without them noticing. At trial, the case against Taylor was basically the victim's word against the testimony of Taylor's nephew. Had defense counsel called these other, non-related witnesses, the jury may have doubted the victim's story and there is a reasonable probability that the outcome of Taylor's trial would have been different.

III. Additional Issues Raised by Taylor

Taylor raised numerous other issues against both trial counsel and appellate counsel. Each of those issues is addressed in turn below.

A. Batson motion

Taylor alleges counsel was ineffective in the "handling of the Batson motion matter at trial." I agree that trial counsel was deficient, and this deficiency lends further support to my conclusion that counsel was ill-prepared to try Taylor's case; however, I do not find that this deficiency separately prejudiced Taylor.

During direct examination at the evidentiary hearing, Mr. Barr was asked about the reasons he provided for striking juror #146 during the Batson motion. The following testimony was elicited in response:

> Q: And can you just kind of explain? I mean were those the reasons why you actually struck her.

[3] At trial, Mr. Morton testified that he had not even spoken to defense counsel prior to the day he testified.

A: I didn't want her on the jury. That's why I struck her. I didn't think she would – I didn't – I didn't think she was – Batson is – from the standpoint of trial practice, Batson is the law, but Batson makes a whole lot of lawyers say things that are probably not exactly – and that's just a reality of how it's done.

Q: Uh-huh.

A: And – and anybody that won't admit it don't do it.

Q: Right.

A: But you – you – you decide who you want on a jury and then you develop – now, usually – usually, you know, when you strike somebody, you – you – you usually have a – try to be prepared with a race-neutral reason –

Q: Uh-huh.

A: -- so if you do get a Batson motion from the State that you can justify the strike you were taking.

Q: Right.

A: If I'm not mistaken, there were – there was – there was at least one person that I wanted and, **if I had gotten that one person, it would have turned the case.**

Q: Right.

A: So I took a chance on getting rid of that lady that I didn't want and maybe playing it along and getting somebody else that I – that I thought that was going to be much more favorable to our position. And when the time – when the time came, in terms of the race-neutral explanation that I attempted to give, Judge – Judge James found it, applying the law – and I agree with the young man who just testified as to the three-prong analysis that the Courts use to decide whether or not Batson has been violated, but the judge decided that Batson was violated. And as – as a result, he made us pick the jury over again.

Q: Did that provide you the opportunity to get the juror that you wanted?

A: No. No, sir.

On cross-examination, the following exchange took place:

Q: Do you recall the juror that you wanted sat when you said that you struck the other juror trying to get to a juror? Do you recall his name?

A: David Pressley.

Q: And why did you want him sat?

A: He's – he's – he's a friend of mine from Hemingway.

....

A: David Pressley is probably the only person in Williamsburg County that I would call a friend.

This Court finds that Mr. Barr's representation was deficient where he admittedly struck jurors in an effort to seat David Pressley, a friend of Mr. Barr's who Mr. Barr believed would have changed the outcome of the case. As a result of this improper purpose, Mr. Barr struck a number of white jurors and for one of them, juror #146, he provided a non-race neutral explanation. Although a trial attorney's failure to provide a race neutral explanation is not per se deficient performance, where the trial attorney admits that the true reason for striking the juror was to accomplish an improper purpose (i.e., seating a different juror who was a friend of the attorney), such behavior falls below professional norms. Mr. Barr's conduct during jury selection reinforces this Court's finding that trial counsel failed to investigate and prepare for this case because, according to Mr. Barr's own testimony, he relied on winning the trial based on seating a biased juror. To the extent prejudice resulted, it is the same prejudice already addressed above – trial counsel failed to properly investigate and call favorable witnesses on Taylor's behalf.

B. Venue and Failure to Properly Cross-Examine State's Witnesses

Taylor also argues that trial counsel was ineffective by focusing on venue and by failing to impeach and/or cross-examine the State's witnesses at trial. These allegations are encompassed

in the above findings regarding counsel's failure to prepare and investigate, which resulted in his failure to present a reasonable defense.

C. Expert Testimony of Gaye Allen Cooke

Taylor argues that trial counsel was ineffective for failing to request information regarding Gayle Allen Cooke's findings and opinions prior to trial, for failing to discuss those findings with her, and for failing to object and/or move to suppress her testimony. I disagree.

At the evidentiary hearing, Taylor's PCR counsel called Gaye Allen Cooke to the stand. The State stipulated to her expert qualification previously given at the trial in Williamsburg County. With regard to her involvement in the underlying trial, she recalled receiving a call from Kimberly Barr, Assistant Solicitor, and being asked to testify. Ms. Cooke understood that she would testify about the dynamics of child sexual abuse and delayed disclosure. She acknowledged that she was not contacted by defense counsel prior to trial, but testified that she would have spoken to him if he had contacted her. She affirmed that she did not have any knowledge of the victim or the particulars of the case prior to trial.

Turning to the trial, she remembered vividly that the courtroom was packed (standing room only) for Taylor, and empty on the side where she sat for the prosecution. She remembered leaving and thinking that defense counsel could have attempted to discredit her testimony on cross-examination, but it was the easiest cross-examination she had ever experienced.

As to her involvement in the PCR action, she indicated that she reviewed the complete file, including transcripts and the Appendix from the Georgetown case. One document of great interest to her was the South Carolina Department of Social Services Determination Fact Sheet (Applicant's Exhibit 3), which determined that Taylor presented no threat of harm of sexual

abuse to his children. She indicated that she would have asked for further information on the case if this finding had been presented to her prior to her trial testimony.

She explained that she had met with Robert Troy Taylor, Zack Webster, Trevor Morton, Chad Bernard, Tony and Linda Taylor, and Jimmy and Peggy Morris. She explained that she shared her findings from her meetings with PCR counsel and PCR investigator, Pete Skidmore. As to her specific findings, she noted that Zack Webster was very close to Taylor and Webster disclosed that Taylor never attempted to abuse him, which raised a red flag for her. She further explained that the Morrises were missionaries and ran a ministry in Romania involving an orphanage. She learned from them that they had seen Taylor interact with the children at the orphanage and had no concerns.

Ms. Cooke was emphatic that after reviewing the case file and meeting with the above listed individuals, she would not have testified for the State. She made it clear that she does not get involved with every case that she is contacted on and this case has red flags that would have kept her from testifying for the State. She also explained that at this juncture, she is willing to testify for the defense. She also expressed her concern that her testimony was used to bolster the victim's testimony.

This Court heard the testimony of Gaye Allen Cooke and found it to be admissible for the purpose for which it was offered at the evidentiary hearing. Upon review of her trial testimony, this Court finds that her expert testimony was in line with *State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999), and defense counsel was not deficient for never contacting her prior to trial or for not objecting to her trial testimony. She simply testified about generalities and did not vouch for the victim.

Alternatively, Taylor alleges that Gaye Allen Cooke's willingness to now testify on his behalf is newly discovered evidence that should allow him to have a new trial. To prevail on this claim, Taylor "must show that the after-discovered evidence: 1) is such that it would probably change the result if a new trial were granted; 2) has been discovered since the trial; 3) could not in the exercise of due diligence have been discovered prior to trial; 4) is material; and 5) is not merely cumulative or impeaching." *State v. Spann*, 334 S.C. 618, 619, 513 S.E.2d 98, 99 (1999).

Even though Ms. Allen Cooke testified that she would not have assisted the State if provided the information she has since reviewed and received prior to the evidentiary hearing, I find Taylor has failed to establish that her change in position could not have been discovered, in the exercise of due diligence, prior to trial. Additionally, I find that Ms. Cooke affirmed that the testimony she offered at trial was accurate regarding the topics addressed, and this Court struggles to find how her testimony changed the outcome of Taylor's trial. As a result, I deny Taylor's alternative allegation of newly discovered evidence.

D. Trial Counsel's Failure to Preserve Argument against the Imposition of LWOP

Taylor next argues that trial counsel was ineffective for failing to argue that the Georgetown incident should not have been used as a predicate offense to enhance Taylor's penalty to a life without parole sentence when the jury was allowed to hear testimony about that same incident under the theory that it was all a part of a "common scheme or plan." I find Taylor has failed to carry his burden of proof on this issue.

On March 15, 2007, the State served trial counsel with the "State's Notice of Intent to Seek a Sentence of Life without Parole pursuant to §17-25-45 (H), South Carolina Code of Laws." Applicant's Exhibit 16. Prior to the victim taking the stand in July of 2007, defense counsel made a motion *in limine*, seeking to exclude testimony regarding Taylor's prior

Georgetown conviction. The State proffered Victim's testimony, and each party offered arguments regarding the evidence in light of Rule 404(b), SCRE, and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Trial Transcript pp. 135-150. The State primarily argued "common scheme or plan" and provided the trial court with a list of the similarities between the two incidents and noted that the incidents were close in time (within a year of each other). Trial Transcript pp. 125, ln. 18-126, ln. 23. Specifically, defense counsel advanced the following arguments: 1) "In looking at the facts, clearly, we don't have the appropriate components for a *Lyle* exception," and 2) "The prejudice from admitting these confusing statements to the jury would – substantially outweigh any probative value of this information." Trial Transcript pp. 128, lns. 21-23, 129, lns. 5-9. Ultimately, the trial court ruled: "He (victim) can testify as to the events that occurred, but let's stay away from the conviction." Trial Transcript p. 150, lns. 15-18.

Once the jury returned a guilty verdict, the State sought to impose a sentence of life without parole (LWOP) pursuant to section 17-25-45 of the South Carolina Code. Trial Transcript p. 410, ln. 15. Following the State's lengthy argument, defense counsel stated: "Judge, our position is that this offense does not qualify for life without parole." Transcript p. 412, lns. 12-15. After the State responded, the Court had the following conversation with defense counsel:

> Court: Mr. Barr, is it your argument that the earlier conviction, the Georgetown county conviction, makes it such that these two convictions one for Kidnapping and one for Criminal Sexual Conduct with a minor in the second degree in this incident we tried, which is it that makes this not qualified for life without parole, is it Georgetown County?
>
> Barr: The date of the offense in the Georgetown County proceedings.
>
> Court: Yes sir. It was after this incident?
>
> Barr: Yes sir.

Trial Transcript p. 414, lns. 4-14.

Thereafter, the trial court ruled:

> Mr. Barr, I don't detect anything in the statute or in the case citations which I have read that talks about the fact that this statutory scheme would not apply because at the time of the offense as it compares to the date of convictions were in. So, if you've got any case citations that would support that, I don't know that they exist, but certainly you made that argument, I deny your motion to quash the notice and of course, if you want to make a motion for reconsideration because you detected a case on that regard you can certainly do that, but I have looked for it myself just in case the situation arose but I do not find it, so I would deny your motion to quash.

(Trial Transcript p. 415, lns. 9-20.)

Then, the trial court imposed a sentence of life without parole. (Trial Transcript pp. 438-9.)

Following trial, defense counsel filed a motion to reconsider, and a hearing was convened on September 27, 2007. After the trial court pointed out that the crimes occurred approximately nine months apart, defense counsel argued: "Judge, under the circumstances we would definitely take the position that... that with respect to the parties, with respect to the various allegations surrounding these two events that they... they certainly could easily be looked upon as one as opposed to two separate incidents." Reconsideration Transcript pp. 5, 6, lns. 14-17. Ultimately, the trial judge disagreed, finding:

> The defendant's actions did involve a common scheme or plan under *State v. Lyle*; however, there is no authority for the proposition that separate offenses which amount to a "common scheme or plan" under *Lyle* are necessarily "so closely connected in point of time that they may be considered as one offense" under Section 17-25-50. There may be some factual scenarios in which the conclusion argued by the defendant is correct, but under the circumstances of this case, the existence of a common scheme or plan under *Lyle* does not warrant a finding that the Williamsburg and Georgetown crimes were part of one continuous course of conduct under Section 17-25-50. Therefore, the LWOP notice should not be quashed on this basis.

On appeal, the following issue was argued in the Brief of Appellant: "The lower court improperly sentenced the Appellant to life without parole because the substantive facts of the predicate offense were admitted as common scheme or plan evidence." Brief of Appellant p. 22. Specifically, the following argument was made:

> S.C. Code Ann. §§17-25-45(F) and 17-25-50 must be construed together. State v. Gordon, 356 S.C. 143, 588 S.E.2d 105 (2003). §17-25-50 precludes an LWOP sentence "when the multiple offenses are inextricably connected and share an immediate temporal proximity." Bryant v. State, 384 S.C. 525, 532, 683 S.E.2d 280, 284 (2009). In other words §17-25-50 prevents the imposition of an LWOP sentence when the offense of conviction and the predicate offense(s) constitute "one continuous course of conduct." Gordon at 151, 588 S.E.2d at 109. "The cases which have found 'one continuous course of conduct' under §17-25-50 have been cases in which, for example, the defendant had two convictions arising out of a single incident; or situations which involve crimes closely connected in point in time; or apply to a single, continuous crime spree." Koon v. State, 372 S.C. 531, 533-534, 643 S.E.2d 680, 682 (2007) (internal citations omitted).
>
> The Appellant would contend that where, as here, substantive facts of prior convictions are admitted as common scheme or plan evidence pursuant to Rule 404(b), SCRE, those prior convictions cannot be used as predicate offenses under the "continuous crime spree" definition of "one continuous course of conduct" given in Koon. If evidence of another crime is so closely connected to the crime for which the defendant is on trial for committing, as was posited by the State in this case, then the "common scheme or plan" then the offenses must be "inextricably connected," and should be treated as "one continuous course of conduct" worthy of §17-20-25's protections. See Bryant, *supra* at 532, 683 S.E.2d at 284.

Brief of Appellant p. 24.

On December 21, 2011, the South Carolina Court of Appeals issued an Opinion affirming Applicant's conviction and sentence. *State v. Taylor*, 396 S.C. 193, 720 S.E.2d 522 (Ct. App.

2011) (hereinafter *Taylor I*). In regards to the issue raised regarding the imposition of the life sentence, the Court held:

> We find the issue of whether the crimes should have been considered one serious offense due to their close temporal proximity and inextricable connection is unpreserved because our review of the record reveals Taylor never raised it during trial. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating an issue must be "raised to and ruled upon by the trial judge to be preserved for appellate review") (emphasis added); *State v. Carriker*, 269 S.C. 553, 555, 238 S.E.2d 678, 678 (1977) (finding issue unpreserved because it was not raised by the appellant). Taylor appears to approach the issue at the post-trial motion hearing. Even so, this is insufficient to preserve the issue for our review because it was not raised at trial. *See Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding that an issue first raised in a post-trial motion is not preserved for appellate review); *see also Wilder*, 330 S.C. at 77, 497 S.E.2d at 734 (holding post-trial motions are not necessary to preserve issues that have already been ruled on; they are used to preserve those that have been raised to the trial court but not yet ruled on by it). The balance of the argument on the issue at the post-trial motion hearing was raised by the trial court, which is also insufficient to preserve the issue for our review. *Duncan v. Hampton Cnty School Dist. No. 2*, 335 S.C. 535, 545, 517 S.E.2d 449, 454 (Ct. App. 1999) (finding issue unpreserved where it was raised sua sponte by the trial court and not by the respondent). Furthermore, on appeal, Taylor argues "[t]he [trial court] improperly sentenced [Taylor] to life without parole because the substantive facts of the predicate offense were admitted as common scheme or plan evidence." However, at trial and during argument on his motion to reconsider, Taylor repeatedly maintained the trial court erred in sentencing him to life without parole because the predicate most serious offense, the 1999 rape, occurred after the 1998 rape. Taylor cannot argue one ground for error at trial and a different ground for error on appeal. *See State v. Haselden*, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). Accordingly, this issue is not preserved for our review.

Taylor I, 396 S.C. 193, 205-06, 720 S.E.2d 522, 528-29 (Ct. App. 2011).

By way of a footnote, the Court further stated:

> Taylor contends, in a persuasive argument, that the definition of "inextricably connected" and "continuous course of conduct," as

> applied to these facts, entitles him to lenity or other relief in the application of section 17-25-50. However, he did not raise this issue at trial; thus, we are bound by the laws of preservation.

Taylor I, 396 S.C. 193, 205 n.4, 720 S.E.2d 522, 528 n.4 (Ct. App. 2011).

After both parties petitioned for rehearing, the Court of Appeals refiled its Opinion on June 6, 2012. By way of the refiled Opinion, the Court again found the issue was not properly preserved by trial counsel for appeal, but no longer described Taylor's argument as "persuasive." *State v. Taylor*, 399 S.C. 51, 62-63, 731 S.E.2d 596, 602-3 (Ct. App. 2012) (hereinafter *Taylor II*).

When asked about the LWOP issue, Mr. Thompson (appellate counsel) explained the argument he made on appeal. According to Mr. Thompson, the Court was very interested in the issue based upon the questioning of the State at oral argument. Recalling his argument in front of the Court of Appeals in regards to preservation, Mr. Thompson stated: "I'm dealt the hand I'm dealt. I can't change the way that it – that it was argued." When asked if it would have aided his argument if he did not have to be concerned with preservation, he responded: "Absolutely, that's why we lost."

Because this issue was found to be unpreserved on direct appeal, Taylor has properly raised this issue in his application for post-conviction relief. *McLaughlin v. State*, 352 S.C. 476, 483 n.2, 575 S.E.2d 841, 844 n.2 (2003); *see also Foye v. State*, 335 S.C. 586, 518 S.E.2d 265 (1999), *cert. denied*, 529 U.S. 1072, 120 S.Ct. 1685, 146 L.Ed.2d 492 (2000) (holding that an issue raised on direct appeal but disposed of on preservation grounds may be raised in PCR proceeding). For Taylor to prevail in his post-conviction relief action, however, he bears the burden of proving that his appeal would have been successful if this issue had been preserved for review. I find that Taylor has not met this burden.

Although the Court of Appeals initially described Taylor's argument as "persuasive" in its *Taylor I* opinion, the Court of Appeals withdrew that opinion and issued *Taylor II*, which found only that the argument was not preserved. No other appellate decision has addressed this specific issue. However, a review of section 17-25-50 and the Supreme Court's interpretation of the language used in that statute suggest that Taylor would not prevail on appeal.

Section 17-25-50 states:

> In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offense.

The South Carolina Supreme Court reviewed this statute in *Bryant v. State*, 384 S.C. 525, 683 S.E.2d 280 (2009), and stated:

> We acknowledge the "so closely connected in point of time" language in section 17–25–50 may become ambiguous as applied to certain situations. When construing statutes forming part of the same legislative scheme, we must examine the statutes together as a whole. Accordingly, when we read the unambiguous timing feature of "a prior conviction" under section 17–25–45(F) alongside section 17–25–50, we construe the language of section 17–25–50 to preclude a life without parole sentence when the multiple offenses are inextricably connected and share an immediate temporal proximity.

384 S.C. at 532, 683 S.E.2d at 283-84.

Here, the Williamsburg County and Georgetown County incidents did not share an immediate temporal proximity, as required by section 17-25-50. The Williamsburg County camping trip occurred in November 1998 and the Georgetown County incident occurred in August of 1999, nine months later. Accordingly, I do not believe Taylor has satisfied his burden of proving that he would have prevailed on this issue if it had been preserved for appeal. To the

extent Taylor alleges additional issues relating to trial counsel's handling of the post-trial motion, I find Taylor has failed to demonstrate that trial counsel's performance was deficient or that Taylor was prejudiced.

E. Allegations against Appellate Counsel

Taylor also alleges that Mr. Thompson, his appellate counsel, was ineffective for failing to raise all meritorious issues on appeal. Specifically, Taylor claims that appellate counsel should have argued that the trial court erred in overruling defense counsel's objection to the officer testifying about Victim's verbal statement to her about the time and place of the alleged rape when that verbal statement was not provided to the defendant prior to trial. I disagree.

"Although appellate counsel is required to provide effective assistance of counsel, 'appellate counsel is *not* required to raise every nonfrivolous issue that is presented by the record.'" *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990)(emphasis in original). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy...." *Jones v. Barnes*, 463 U.S. 745, 754 (1983).

At the evidentiary hearing, Mr. Thompson testified at length about the process he used to determine what issues to raise on appeal. Mr. Thompson considered the time and place objection and decided not to raise it because he did not believe it had merit. Taylor has failed to carry his burden of proving why this issue should have been raised, nor has he proven that his appeal would have been successful if the issue had been raised.

CONCLUSION

Based upon the foregoing, this Court grants Taylor's Application for Post-Conviction for the reasons stated above. To the extent Taylor raised additional arguments that were not addressed in this Order, this Court finds those argument were waived because he did not present evidence to support them during the evidentiary hearing.

IT IS THERFORE ORDERED:

1. That Robert Troy Taylor has met his burden of proof as to his specific allegation of ineffective assistance of trial counsel as detailed above;

2. That Robert Troy Taylor has not met his burden of proof as to his allegation of ineffective assistance of appellate counsel;

3. That Robert Troy Taylor has not met his burden of proof as to his allegation of newly discovered evidence;

4. That Robert Troy Taylor's Application for Post-Conviction Relief is granted, that his convictions for second degree criminal sexual conduct and kidnapping are vacated, and that he is granted a new trial;

5. That Robert Troy Taylor shall be transferred from the custody of the South Carolina Department of Corrections to the custody of Williamsburg County pending the disposition of his criminal case, with normal bond proceedings.

AND IT IS SO ORDRED this 19th day of February, 2016

Honorable Tanya A. Gee
Presiding Judge
Third Judicial Circuit

Columbia, South Carolina