J. FALKNER WILKES

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August 30, 2016

Hon. Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211
via facsimile also to: (803) 734-1499

Re: Joseph Pettigrew Sanders, IV, 341505 v. State of South Carolina
2013-CP-39-1538

Dear Mr. Shearouse,

As PCR counsel in the above case I am enclosing a notice of appeal and related documents. I have taken the appropriate steps to assist Mr. Sanders to engage SCCID Appellate Division in the appeal of the case. My representation does not extend to the appeal of the case and therefore I intend to take no further action unless directed to do so by either the Court or OID. In the event that SCCID is unable to engage, then I will inform Mr. Sanders that he must retain counsel and formally move to be relieved. If there is anything else I need to do to protect Mr. Sanders' right to pursue his appeal please let me know.

Sincerely,

J. Falkner Wilkes

c.

Karen C. Ratigan, Esq.
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Counsel for Respondent

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via facsimile also to: (864) 898-5863

Joseph Pettigrew Sanders, IV, 00341505
Tyger River Correctional Institution
100-200 Prison Road
Enoree, SC 29335

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Court of Common Pleas, Pickens County
Honorable Edward W. Miller

Circuit Court Case No. 2013-CP-39-1538
Appellate Case No. _____

Joseph Pettigrew Sanders, IV, 341505, ... Appellant,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL
(PCR CASE)

Appellant hereby appeals the judgment of the Court of Common Pleas dismissing his action for post conviction relief, **ORDER OF DISMISSAL** signed by the Honorable Edward W. Miller on July 12, 2016 and entered of record on August 3, 2016. A copy of said order(s) is/are attached hereto and made a part hereof.

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

Court of Common Pleas, Pickens County
Honorable Edward W. Miller

Circuit Court Case No. 2013-CP-39-1538
Appellate Case No. _____

Joseph Pettigru Sanders, IV, ... Appellant,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I certify that on August 30, 2016, I served Appellant's notice of appeal and attached order(s) on the Respondent, and others if indicated, by placing a copy in the U.S. Mail, first class, postage prepaid, addressed as follows, and by electronic means if indicated:

Karen C. Ratigan, Esq.
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Counsel for Respondent

AND TO:

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Respectfully submitted,

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Counsel for Appellant

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

Joseph Pettigrew Sanders, IV,
S.C.D.C. No. 341505,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
C.A. No. 2013-CP-39-1538

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 17, 2013. Respondent made its return on May 29, 2014. An evidentiary hearing was held on April 20, 2015 at the Pickens County Courthouse. Applicant was present and represented by Jeffrey Falkner Wilkes, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented Respondent.

Applicant testified on his own behalf at the PCR hearing. Also testifying were: Nikki Holder, Taylor King, Jay Rowe, Justin Eades, DeAnn Wright, Brenda Cisson, Eddie Cisson, Scott D. Robinson, Esquire, and Applicant's trial counsel, John W. DeJong, Esquire. The Court had before it the trial transcript, the Pickens County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, the return, the appellate records, and Applicant's Exhibits 1-3.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. Applicant was indicted at the June 2010 term of the Pickens County Grand Jury for second-degree criminal sexual conduct (CSC)

with a minor (2010-GS-39-1115) and lewd act upon a child (2010-GS-39-1116). He was represented by John W. DeJong, Esquire.

After the State brought the case to trial,[1] Applicant was found guilty of lewd act upon a child and not guilty of second-degree CSC with a minor. On June 24, 2010, the Honorable G. Edward Welmaker sentenced Applicant to 14 years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Jeffrey Falkner Wilkes, Esquire perfected the appeal. The Court of Appeals affirmed Applicant's conviction and sentence. State v. Sanders, Op. No. 2013-UP-054 (S.C. Ct. App. filed January 30, 2013). The remittitur was sent on February 21, 2013.

ALLEGATIONS

In his PCR application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
   a. Failed to "investigate, prepare, present case, raise proper objections, make adequate motions and arguments."
2. Ineffective assistance of appellate counsel:
   a. Failed to "adequately present all arguments."
3. "State failed to comply with Rule 5/Brady/and Discovery."

At the start of the PCR hearing, Applicant waived all potential allegations of ineffective assistance of appellate counsel and proceeded solely upon the issue of ineffective assistance of trial counsel. See Carter v. State, 293 S.C. 528, 362 S.E.2d 20 (1987).

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 and arguments presented at the PCR hearing. This Court has further had the

[1] Applicant had a joint trial with his co-defendant, Anita Gearhart.

opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

Applicant alleges he received 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).

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. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

To establish counsel failed to adequately prepare for trial, applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (finding the failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present

witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

A.

Applicant stated he told trial counsel he wanted four particular witnesses to testify at his trial: Nikki Holder, Taylor King, Justin Eades, and Joseph "Jay" Rowe. Applicant stated Holder and King were Victim's friends and Rowe and Eades had information about the allegations. Applicant stated he asked trial counsel to contact these witnesses, but that trial counsel did not speak with any of them. Applicant admitted he never asked these witnesses to contact trial counsel. Applicant stated he also wanted trial counsel to call character witnesses at trial. Applicant stated trial counsel replied that his character was not on trial but Applicant stated if he believed all of his witnesses had been called, the outcome of his trial would have been different. Applicant admitted testimony about the following was elicited at trial: (1) that Victim recanted to a guardian ad litem, (2) that Victim was overheard saying she would get Applicant in trouble, and (3) that Victim wanted to return to Virginia.

Nikki Holder stated she was good friends with Victim for two years. Holder stated Victim "got what she wanted" and was very mad at Applicant because he would not let her go to Virginia for the summer. Holder stated she never spoke to trial counsel, but that he had contacted her mother. Holder stated she went to the trial because her mother said she may have to testify.

Taylor King stated she went to school with Victim and Applicant was her basketball coach. King stated Victim initially said Applicant touched her but later said she had lied because

she wanted to go to Virginia. King stated she told her mother and Applicant's co-defendant but did not believe it was important to tell the police or Applicant. King stated she did not tell trial counsel about Victim's alleged recantation because "everything was busy."

Justin Eades stated he was the co-defendant's grandson. Eades stated that, in June 2008, he heard Victim say she felt that she needed to move to Virginia to take care of her grandfather and that she would lie to a counselor that Applicant touched her. Eades stated he told his father about this. Eades stated he was told (during the trial) that he needed to appear. Eades stated he spoke to both trial counsel and co-defendant's attorney that day.

Joseph "Jay" Rowe stated he was Eades' father and the co-defendant's son. Rowe stated Eades said he had overheard a conversation between Victim and Megan Wilkerson that Victim's sexual abuse allegation was a way for her to be able to move to Virginia. Rowe stated Eades told him this in June 2008 – which was two years before the trial – and he told the co-defendant after she and Applicant were arrested. Rowe stated co-defendant's attorney called him during the trial and wanted Eades to come to court. Rowe acknowledged he was aware Applicant and co-defendant were facing serious charges but he did not contact the police or either defense attorney.

DeAnn Wright stated she had a child who was a pageant contestant. Wright stated Applicant was compassionate, had excellent character, and was a truthful person.

Brenda Cisson stated her daughter was a pageant contestant and lived at Applicant's home for a time. Cisson stated Applicant had fine character, was honest, and would have a reputation for truthfulness.

Eddie Cisson stated he had known Applicant since high school. Cisson stated Applicant's character was unimpeachable and that he would sometimes be truthful when there

was an advantage not to be.

Scott D. Robinson testified he was the attorney who represented Applicant's co-defendant. Robinson testified the co-defendant told him about Justin Eades during the trial and he was able to have Eades present (though he was from out-of-state). Robinson testified he and trial counsel had a chambers conference about Eades and discussed the gist of his testimony.

Trial counsel testified he represented Applicant for several months before trial. Trial counsel testified he had several meetings with Applicant, who stated he was innocent of the charges. Trial counsel testified he did not recall speaking to Nikki Holder or Taylor King. Trial counsel testified co-defendant's counsel located Justin Eades and the parties had a chambers conference to discuss whether his testimony would be based on first-hand knowledge or hearsay. Trial counsel testified there was no basis upon which to make a motion for a mistrial (based on the Eades issue) and explained he did not proffer Eades' testimony because he did not know what that testimony would be. Trial counsel confirmed Applicant wanted to call character witnesses but stated he did not call any such witnesses because Applicant's character was not put into issue. Trial counsel testified this was a "he said/she said" case and that he argued, among other things, that Applicant had erectile dysfunction. Trial counsel also confirmed evidence was presented at trial that: Victim recanted to the guardian ad litem, Victim was overheard saying she would punish Applicant, and Victim said she wanted to return to Virginia.

B.

Applicant's first contention is that trial counsel failed to investigate and present additional witnesses at trial. Applicant argues trial counsel should have called Nikki Holder to state Victim was mad at Applicant and wanted to return to Virginia. Applicant argues trial counsel should have called Taylor King to state Victim lied about the sexual abuse because she

wanted to return to Virginia. Applicant argues trial counsel should have called Justin Eades to state he overheard Victim say she would lie about sexual abuse because she wanted to return to Virginia and Jay Rowe to state he told co-defendant about this after she and Applicant were arrested.

This Court finds Applicant failed to meet his burden of proving that he is entitled to relief. This Court finds Applicant failed to demonstrate trial counsel was ineffective in this matter and that he was prejudiced as the result of counsel's representation. Applicant's contention is that presenting these four witnesses at trial would have shown Victim planned to lie about Applicant sexually abusing her because she wanted to move back to Virginia. Trial counsel's strategy at trial, however, was to present witnesses to explain Victim lied about the sexual assault because she wanted to (1) return to Virginia and (2) punish Applicant. Trial counsel executed this strategy through the following witnesses: (1) Judy Chapman, the guardian ad litem, who testified Victim said she lied about the sexual assault because she wanted to return to Virginia, (2) Jacquelyn Lankford, who testified she overheard Victim say she would make Applicant "pay," and (3) Charles Kelley, who testified he also overheard Victim say she would "get even" with Applicant. This evidence was all presented to the jury, who weighed the evidence in their deliberations. See State v. Pipkin, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct. App. 2004) (noting the jury is "the finder of fact and weigher of credibility"). It is clear that, regardless of the strong defense theory set forth by trial counsel, the jury simply did not accept Applicant's version of events. See Craven v. Cunningham, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987) ("The credibility of witnesses is for the triers of fact."). This Court finds the witnesses presented by Applicant at the PCR hearing (Holder, King, Eades, and Rowe) would have been merely cumulative to the witnesses presented in the defense case and, thus, Applicant cannot

prove he was prejudiced because they did not testify at his trial. See Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) ("We previously have held where evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward.") (citations omitted).

Further, this Court finds the witnesses presented at the PCR hearing were lacking in credibility. Nikki Holder and Taylor King could not provide reasons why they failed to contact trial counsel when they allegedly had potentially important information germane to Applicant's serious criminal charges. Even more unlikely, Justin Eades (co-defendant's grandson) and Jay Rowe (co-defendant's son) never contacted either co-defendant's attorney or trial counsel prior to trial. Eades and Rowe – though co-defendant and Applicant were facing very serious criminal charges – also never contacted police about what they believed was important information related to this case. Neither trial counsel nor co-defendant's counsel were made aware of the existence of Eades (and Rowe's) potential testimony until after the trial had already begun. This Court finds it strains belief that both the grandson and son of co-defendant – who was being tried with Applicant on these charges – never alerted law enforcement, co-defendant's counsel, trial counsel, or Applicant in order to advise they had information about Victim's possible motivations.

With Eades in particular, trial counsel was not deficient in not having his testimony proffered at trial. Co-defendant's counsel did not hear about Eades from co-defendant until during the joint trial. Both co-defendant's counsel and trial counsel testified there was a chambers conference on the matter. Trial counsel testified he chose not to proffer Eades' testimony because he did not know what Eades would testify about. Based on the circumstances, this Court finds this was a valid strategic decision. Where trial counsel articulates a valid reason

for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). "Counsel's strategy will be reviewed under 'an objective standard of reasonableness.'" Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). "Courts must be wary of second-guessing counsel's trial tactics." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). Regardless, even assuming arguendo that trial counsel should have proffered Eades' testimony, it (as well as Rowe's testimony) would have clearly been objectionable because it was hearsay. See, e.g., Rule 801(c), SCRE (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

C.

Applicant's second contention is that trial counsel failed to investigate and present character witnesses at trial. Applicant argues DeAnn Wright, Brenda Cisson, and Eddie Cisson would have testified at trial about his honesty and truthfulness.

This Court finds Applicant failed to meet his burden of proving that he is entitled to relief. This Court finds Applicant failed to demonstrate trial counsel was ineffective in this matter and that he was prejudiced as the result of counsel's representation. Trial counsel did not call any character witnesses because Applicant's character was not put into issue. It is clear from trial counsel's testimony that he did not call character witnesses because he made the strategic decision to avoid opening the door to character attacks on his client. A strategic or tactical

decision does not have to be articulated by counsel on the record; counsel does not have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. Wood v. Allen, 558 U.S. 290, 130 S. Ct. 841 (2010). Regardless, this Court finds the testimony from these three character witnesses would not have changed the outcome of Applicant's trial. Applicant's reputation for honesty and truthfulness were not at issue at trial. Rather, the issue was whether he sexually assaulted Victim over a period of time. This Court finds there is no reasonable probability that testimony from these three character witnesses would have changed the outcome of Applicant's trial. See Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735; Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

D.

Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

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

this Court finds Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and

2. That Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 12 day of July, 2016.

Edward W. Miller
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

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