

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

RECORDED
IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
2015 OCT -8 11 11 AM

William R. Welch, #208451,

JAMES C. CAMPBELL 2013-CP-43-1169
CLERK OF COURT
SUMTER COUNTY, S.C.

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

CERTIFIED TRUE COPY
OF ORIGINAL FILED

Respondent.

James C. Campbell
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on July 9, 2013. Respondent made its amended return on November 22, 2013. An evidentiary hearing in to the matter was convened on April 15, 2015, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Casey Cornwell, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Applicant was indicted during the February 2008 term of the Sumter County Grand Jury for Criminal Sexual Conduct (CSC) with a Minor (First Degree), Committing or Attempting a Lewd Act Upon a Minor (2008-GS-43-0361)¹. Ernest Finney, III, Esquire, represented him. Applicant proceeded to a jury trial and was found guilty on June 4, 2008, of CSC with a Minor and Lewd Act Upon a Minor. The Honorable R. Ferrell Cothran, Jr.,

¹ The cover page of the Transcript of Record dated June 2, 2008, and the Applicant's PCR Application list the indictment number as "2008-GS-43-3332." This is a scrivener's error.

sentenced Applicant to twenty (20) years for CSC with a Minor and fifteen (15) years for Lewd Act, to be served concurrently.

The Applicant appealed to the South Carolina Court of Appeals. The Court of Appeals affirmed the Applicant's conviction and sentence. State v. Welch, Op. No. 2011-UP-503 (Ct. App. filed November 10, 2011).

Subsequently, Petitioner filed a petition for rehearing to the South Carolina Supreme Court. The South Carolina Supreme Court denied the petition on December 20, 2012. The Remittitur was issued on December 28, 2012

ALLEGATIONS

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

1. Ineffective assistance of counsel
 - a. "Failed to hire expert medical witness."
 - b. "Failed to object to vouching."

SUMMARY OF TESTIMONY PRESENTED

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

During the evidentiary hearing, Applicant testified that he proceeded to trial for criminal sexual conduct and lewd act. Applicant stated Trial Counsel was appointed to represent him at trial. Applicant stated that he had another attorney for his bond hearing, but he could not recall his name. Applicant stated that he met with Trial Counsel five or six times. Applicant stated



that they reviewed the evidence. Applicant could not recall whether they discussed any defenses or strategies. Applicant stated Trial Counsel told him that he would look into hiring an expert. Applicant stated Trial Counsel went to Charleston, SC and spoke with an expert. Applicant stated Trial Counsel informed him that the expert's opinion would not be favorable.

Applicant opined that the State coached the victim before the trial and on the forensic interview video. Applicant noted that Trial Counsel objected and was overruled by the trial judge. Applicant further opined that the solicitor vouched for the victim's credibility during closing arguments. Applicant stated that he received a plea offer of twenty years. Applicant stated that he turned down the plea offer and proceeded to trial.

Following Applicant's testimony, Trial Counsel was called to testify by the State. Trial Counsel stated that he met with Applicant in February 2008 for the first time. Trial Counsel stated that he met with Applicant at least six times. Trial Counsel stated Applicant was arrested January 1st. Trial Counsel noted that the trial began in June 2008.

Trial Counsel could not independently recall the videotaped interview of the victim; however he reviewed the trial transcript and noted that he made a motion to suppress the video during trial. Trial Counsel noted that it has been his experience that the video would be introduced at trial. Trial Counsel noted that the victim did testify and was subject to cross-examination. Trial Counsel opined that the introduction of the video was favorable because he was able to point out various inconsistencies of the victim's trial testimony as compared to the video. Trial Counsel noted that the video was introduced over his objection on page 245 of the trial transcript. Trial Counsel stated that he made a motion *in limine* and requested in camera testimony regarding the video. Trial Counsel opined that the solicitor's closing arguments were not objectionable.

Trial Counsel recalled that there was a family gathering where both Applicant and victim were present. Trial Counsel stated that Applicant and victim were riding on a four-wheeler in the woods and Applicant allegedly touched victim while they were in the woods. Trial Counsel stated that victim was taken to hospital by her family the following day. Trial Counsel noted that the doctor found no injury and prescribed Monistat for a yeast infection. Trial Counsel stated it was his strategy to show that the victim's alleged injuries or irritation could have resulted from simply riding the four-wheeler through the woods. Trial Counsel stated that he did not hire an expert to review the videotape or examine the victim. Trial Counsel stated that he tried to point out the various inconsistencies between the victim's statements on the video and her trial court testimony.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

INEFFECTIVE ASSISTANCE OF COUNSEL

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process

that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Ineffective assistance of counsel for failing to call expert to present an alternative theory to the State's theory that the victim was sexually assaulted.

The Court finds that Applicant's allegation that he received ineffective assistance of counsel for failing to hire an expert to present an alternative theory to the State's case is meritless. Initially, this Court notes Applicant did not call an expert at the PCR hearing to explain what alternative theory might have been available. As a result of Applicant's failure to present any expert testimony on this issue, this Court finds Applicant cannot show any prejudice. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the

applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative"). Furthermore, this Court finds Applicant has failed to show any deficient performance during Trial Counsel's representation. This Court notes Trial Counsel's cross-examination of Dr. Clanton, a State's expert in emergency medicine, developed the theory that there were other possible causes of the child victim's problems. Based on the foregoing, this Court finds that Applicant has fallen well short of his burden of proof and this allegation must be denied and dismissed with prejudice.

Ineffective assistance of counsel for failing to object to the solicitor vouching for the credibility of the victim.

This Court finds that Applicant's allegation that Trial Counsel was ineffective for failing to object to the solicitor's vouching for the credibility of the victim to be meritless. This Court has reviewed the solicitor's closing argument and finds nothing about the solicitor's argument concerning witness credibility was objectionable. The Solicitor simply argued the victim had been consistent in giving her accounts of what happened and that overall her credibility could not be questioned. Based on the foregoing, this Court finds Applicant has fallen well short of his burden of proof. Therefore, this Court finds that this allegation is denied and dismissed with prejudice.

ALL OTHER ALLEGATIONS

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



CONCLUSION

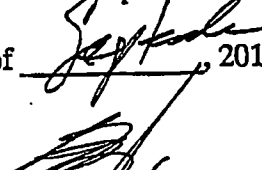
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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


IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 18 day of September, 2015.



GEORGE C. JAMES, JR.
Presiding Judge
Third Judicial Circuit



South Carolina

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP4301169

RECORDED

William Ricky Welch

2015 OCT -9 AM 11:26

South Carolina State of

CERTIFIED TRUE COPY
OF ORIGINAL FILED

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

Sherry H. Hinton
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

DEFENDANT(S)

PLAINTIFF(S)

Submitted by: Clerk of Court

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk: **See attached Order.**

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2143
Judge Code

10/9/2015
Date

For Clerk of Court Office Use Only

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

William Ricky #208451 Welch Lee Correctional Inst/Flo-S-
2237 990 Wisacky Hwy Bishopville, SC 29010
Fulton Casey Dale Cornwell 448 Deerwood Street Unit 9A
Columbia, SC 29205

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

James C. Campbell

James C. Campbell - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

