ALAN WILSON
ATTORNEY GENERAL

February 10, 2017

RECEIVED
FEB 10 2017
S.C. SUPREME COURT

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

Re: Timothy Young v. State of South Carolina
2014-CP-26-07509

Dear Mr. Shearouse:

Enclosed are the following:

1. Notice of Appeal
2. Proof of Service of the notice of appeal on the Respondent
3. A copy of the order which is to be challenged on appeal.
4. A letter ordering the PCR transcript from the court reporter

Sincerely,

Jessica E. Kinard
Assistant Attorney General
On behalf of
Valerie Garcia Giovandi

JEK/bea
Enclosures

cc: David B. Tarr, Esquire
The Honorable Renee Elvis, Clerk of Court of Horry County
The Honorable Jimmy A. Richardson, Fifteenth Circuit Solicitor
SCCID, Division of Appellate Defense
Barton J. Vincent, Esquire
Trisha Allen, Victims Services

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
FEB 10 2017
S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Paul M. Burch Circuit Court Judge

Case No. 2014-CP-26-7509

Timothy Young, ...Respondent,

v.

State of South Carolina, ...Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Paul M. Burch's order dated January 3, 2017 and filed January 6, 2017 granting post-conviction relief to the Respondent. The State received notice of entry of the order on January 17, 2017. A copy of the order on appeal is attached to this notice.

By: Jessica Elfvin for

VALERIE GARCIA GIOVANOLI
Assistant Attorney General
S.C. Bar # 102524
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737
February 10, 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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S.C. SUPREME COURT

The Honorable Paul M. Burch Circuit Court Judge

Case No. 2014-CP-26-7509

Timothy Young, ...Respondent,

v.

State of South Carolina, ...Petitioner.

PROOF OF SERVICE

I, Valerie Garcia Giovanoli, 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:

Mr. David B. Tarr, Esquire
Law Office of David B. Tarr, LLC
1313 Elmwood Dr., Suite B
Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served this 10th day of January, 2017.

Jessica E/Cmp for
VALERIE GARCIA GIOVANOLI
S.C. Bar. #102524
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
FEB 10 2017
S.C. SUPREME COURT

February 10, 2017

Teresa J. Bautz
PO Box 14076
Myrtle Beach, SC 29587

Re: **Timothy Young v. State of South Carolina**
2014-CP-26-07509

Dear Ms. Bautz:

Please prepare a **PCR Hearing** transcript taken **May 12, 2016**, of the above named individual, before the Honorable Paul Burch for the term of Court of Common Pleas in Horry County. If you have already typed it once for Appellate Defense, please let me know before you send me a copy. If this transcript no longer exists, please send a letter to that effect.

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.

If your preference is to e-mail the transcript, please note the e-mail address listed below.

Sincerely,

Brianna Arnone
Legal Assistant
(803) 734-3737
fifteenthcircuitpcr@scag.gov

cc: Desiree R. Allen, Court Administration

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	OF THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Case Number: 2014-CP-26-007509
Timothy Young, #345620,	)	
Applicant,	)	
v.	)	**ORDER GRANTING APPLICATION FOR POST-CONVICTION RELIEF**
State of South Carolina,	)	
Respondent.	)	

2017 JAN -6 PM 3:1[illegible]
HORRY COUNTY
CLERK OF COURT
ELVIS E. [illegible]
CLERK OF COURT
COUNTY, S[illegible]

This matter came before the Court by way of an Application for Post-Conviction Relief ("PCR") filed November 6, 2014. Respondent filed a return on or about March 5, 2015. The Court convened an evidentiary hearing into the matter where Applicant was represented by David Tarr, Esquire, and Jessica E. Kinard, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the hearing, testimony was received from Applicant, Tim Young, as well as from his trial counsel, Paul Cannerella, Esquire. The Court received testimony relating to all of the issues raised, as well as received arguments by the applicant's attorney and from the State. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings.

I. FACTUAL AND PROCEDURAL HISTORY

Applicant is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In March 2011, the Horry County Grand Jury indicted Applicant for one (1) count of Criminal Sexual Conduct, First Degree (2011-GS-26-01088) and one (1) count of Lewd Act on a Minor Child (2011-GS-26-01089).

Paul V. Cannarella, Esquire represented Applicant. On April 7, 2011, Applicant proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. The jury found Applicant guilty as indicted on all charges. Judge Culbertson sentenced Applicant to imprisonment for twenty-five (25) years for the count of Criminal Sexual Conduct, First Degree and ten (10) years for the count of a Lewd Act on a Minor Child. The sentences are set to run concurrently.

Applicant filed a timely notice of appeal. Laura L. Hiller, Esquire and Jonathan M. Hiller, Esquire, both of Hiller & Hiller, P.A., perfected the appeal with the filing of an Anders[1] brief. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence after review on June 5, 2013. State v. Young, Op. No. 2013-UP-236 (S.C. Ct. App. filed June 5, 2013). On August 22, 2013, the Court of Appeals denied Applicant's petition for rehearing. On September 23, 2013, Petitioner served a petition for certiorari. The Supreme Court of South Carolina denied certiorari on January 8, 2014.

The applicant, through his attorney, David Tarr, Esquire, filed an application for Post-Conviction Relief on November 6, 2014. On May 12, 2016, counsel filed an Amended Application for Post-Conviction Relief. The grounds are as follows:

(a) Ineffective assistance of counsel for failure to make contemporaneous objection to Trial Court ruling Denise Scearce's notes were "not discoverable" because they were "notes";

(b) Ineffective assistance of counsel for failing to conduct a meaningful and thorough cross examination of the alleged victim;

(c) Ineffective assistance of counsel for counsel failing to call a key witness who could have told the jury that the alleged victim said the Defendant never sexually abused her;

(d) Ineffective assistance of counsel for failing to object to Denise Scearce being qualified as an expert in child abuse assessment when there was no

[1] Anders v. California, 386 U.S. 738 (1967).

testimony offered as to her "reliability" which resulted in improperly admitted testimony that bolstered the victim's testimony;

(e) Ineffective assistance of counsel for failing to object to Diane Nordeen being qualified as an expert in child development as it relates to forensic interviewing when there was no testimony offered as to her "reliability" which resulted in improperly admitted testimony that bolstered the victim's testimony.

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe the witnesses who testified at the hearing, and to closely pass upon their credibility. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, Applicant must prove trial 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland,

466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

A. Ineffective assistance of counsel for failure to make contemporaneous objection to Trial Court ruling Denise Scearce's notes were "not discoverable" because they were "notes;"

Prior to trial, the trial court was asked to conduct an *in camera* review of the notes of Ms. Denise Scearce, one of the counselors that treated the alleged victim, to determine if they should be provided to the defense. After reviewing the documents, the court ruled that they were "not discoverable". Motion Hearing Tr. pp. 3-7. Trial counsel did not object. On appeal, Applicant's appellate counsel attempted to argue that the documents should have been reviewed under Pennsylvania v. Ritchie, 480 U.S. 39 (1987) to see if there was evidence favorable to the defense that should have been provided under Brady. However, the Court of Appeals ruled that this was not preserved for appeal due to the fact that trial counsel did not issue a contemporaneous objection.

Trial counsel testified that he believed at the time that the trial judge had reviewed all of the material. At no time did trial counsel indicate that he believed the trial judge was anything less than thorough in his review of Ms. Scearce's file. Trial counsel calls the fact that these may have been discoverable under Brady but not under Rule 5, SCRCP, "a difference without a real distinction" in that the trial judge was not inclined to allow them to be shared through discovery. PCR Tr. p.36; 2-3. He further recalled that the notes were made court's exhibits, however, they were not.

When reviewing trial counsel's performance, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. at 689. It is apparent from testimony that trial counsel believed he had taken every necessary step and precaution to attempt to obtain any discoverable information in these records. For these reasons, his conduct cannot be seen as deficient.

B. Ineffective assistance of counsel for failing to conduct a meaningful and thorough cross examination of the alleged victim;

Regarding trial counsel's cross-examination of the alleged victim, he testified that he was afraid of what she may say, which led him to be very careful during his examination. He instead relied on the testimony of other witnesses to show that the victim had provided inconsistent statements, rather than attempting to solicit the information from her. PCR Tr. p. 15. Trial counsel's testimony revealed that, between his uncertainty of the victim's testimony and the potential for coming across as a bully, he erred on the side of caution when examining the child victim. PCR Tr. p.18 – 19, 40, and 44 – 45.

Governing case law holds that, where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not effective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The Court finds no reason to second-guess trial counsel's approach with this witness.

C. Ineffective assistance of counsel for counsel failing to call a key witness who could have told the jury that the alleged victim said the Defendant never sexually abused her;

In August of 2008, the alleged victim began seeing counselor Ms. Denise Scearce. Tr. Tr. p. 248. In November of 2008, she disclosed to Ms. Scearce that her mother had touched her genitals inappropriately. Id. p. 251. Thereafter, she was referred to North Carolina DSS and was interviewed by Ms. Yolanda Daniels. Id. Ms. Daniels asked the alleged victim if Applicant had ever touched her inappropriately and the she said no. PCR Tr. p. 12-13.

Trial counsel obtained an out-of-state subpoena for Ms. Daniels in order for her to testify that the victim had informed Ms. Daniels that Applicant did not abuse her. Ultimately, trial counsel decided not to call Ms. Daniels. Rather than asking Ms. Daniels to testify, trial counsel chose to enter evidence of this statement through a law enforcement witness. When asked why this was his strategy, trial counsel testified that he was not entirely comfortable with Ms. Daniels' testimony, particularly because he had not been able to meet with her before the trial. PCR Tr. p. 15 – 17. The Court again declines to find that this was an unreasonable strategy.

D. Ineffective assistance of counsel for failing to object to Denise Scearce being qualified as an expert in child abuse assessment when there was no testimony offered as to her "reliability" which resulted in improperly admitted testimony that bolstered the victim's testimony;

At the trial of this case, Ms. Denise Scearce was qualified as an expert in child abuse counseling and treatment. Tr.Tr. pp.247-248. The bolstering of alleged child abuse victims through the testimony of such expert witnesses is a practice that is at times frowned upon and discouraged by appellate courts.

In State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), our Supreme Court established the standard that should be used in determining whether to qualify witnesses providing non-scientific testimony as experts.[2] Under White, there is a two pronged test that must be met before a witness providing non-scientific testimony may be qualified as an expert witness. First, the qualifications of the witness must be sufficient. Second, there must be a determination that the expert's testimony will be reliable. For purposes of this hearing, this Court finds that the parties agree that this witness had sufficient qualifications. However, this Court finds a lack of testimony regarding reliability. See Tr. Tr.

At the evidentiary hearing, trial counsel acknowledged that he did not object to the lack of testimony provided during *voir dire* of the witness pre-qualification regarding her reliability. PCR Tr. p. 24. He testified that he was familiar with State v. White. Id. at p. 22. However, he acknowledged that there was no testimony offered as to Ms. Scearce's reliability but he failed to object. This Court finds that counsel's failure to object was deficient and that because of the nature of the evidence in this case, was clearly prejudicial.

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[2] Subsequently, in State v. Chavis, 412 S.C. 101, 106, 771 SE2d 336, 338 (2015), our Supreme Court found that child abuse assessment experts and forensic interviewers provide non-scientific testimony. The State argued at the PCR hearing that Chavis should not apply because it was decided in 2015, four years after the trial in this case. However, it is notable that both this trial and the trial in Chavis took place in 2011. The only difference is in Chavis, trial counsel objected to the experts being qualified. Here, trial counsel did not.

E. Ineffective assistance of counsel for failing to object to Diane Nordeen being qualified as an expert in child development as it relates to forensic interviewing when there was no testimony offered as to her "reliability" which resulted in improperly admitted testimony that bolstered the victim's testimony.

At the trial of this case, Ms. Diane Nordeen was qualified as an expert in child abuse assessment as it relates to forensic interviewing. Tr. Tr. p. 335. At the evidentiary hearing, Mr. Cannerella acknowledged that he did not object to the lack of testimony provided during *voir dire* of the witness pre-qualification regarding her reliability. PCR Tr. p. 24. He testified that he was familiar with State v. White. However, he acknowledged that there was no testimony offered as to Ms. Nordeen's reliability and yet he did not object. This Court finds that counsel's failure to object was deficient and that because of the nature of the evidence in this case, was clearly prejudicial.

III. CONCLUSION

THEREFORE this Court finds that this matter should be, and is hereby, remanded for a new trial.

AND IT IS SO ORDERED.

The Honorable Paul M. Burch
Presiding Judge

Pageland, South Carolina
January 3, 2017