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September 29, 2017

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OCT 02 2017

S.C. SUPREME COURT

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

RE: Ricky Dale Pace, #360027 v. State of South Carolina  
2016-CP-30-00551

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal along with the accompanying Order for the above-referenced matter. By way of this letter I am copying the Office of Appellate of Defense, as I was appointed to represent Mr. Pace.

Best regards,

ASHLEY A. MCMAHAN  
ATTORNEY AT LAW

AAM

cc: Ricky Dale Pace  
Justin J. Hunter, Asst. Attorney General  
Laurens County Clerk of Court  
Office of Appellate Offense

Enclosures

STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

APPEAL FROM LAURENS COUNTY  
Court of Common Pleas

OCT 02 2017

The Honorable G. Thomas Cooper, Circuit Court Judge  
S.C. SUPREME COURT

Case No. 2016-CP-30-00551

Ricky Dale Pace, #360027, ..... Petitioner,

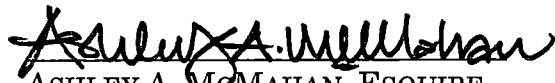
v.

State of South Carolina, ..... Respondent.

NOTICE OF APPEAL

Applicant, Ricky Dale Pace, appeals the order of the Honorable G. Thomas Cooper, filed August 21, 2017. This Order was received by the undersigned on September 29, 2017.

September 29, 2017



ASHLEY A. McMAHAN, ESQUIRE  
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ashley@macvance.com  
SC Bar No. 71676  
ATTORNEY FOR APPLICANT

Opposing Counsel:  
Justin J. Hunter, Asst, Attorney General  
S.C. Attorney General's Office  
PO Box 11549  
Columbia, SC 29211-1549

STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

OCT 02 2017

APPEAL FROM LAURENS COUNTY

Court of Common Pleas

S.C. SUPREME COURT

The Honorable G. Thomas Cooper, Circuit Court Judge

Case No. 2016-CP-30-00551

Ricky Dale Pace, #360027, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

PROOF OF SERVICE

I, Ashley A. McMahan, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Justin J. Hunter, Asst, Attorney General  
S.C. Attorney General's Office  
PO Box 11549  
Columbia, SC 29211-1549

I further certify that all parties required by Rule to be served have been served.

September 29, 2017



ASHLEY A. MCMAHAN, ESQUIRE  
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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF LAURENS )  
 )  
Ricky Dale Pace, )  
S.C.D.C. No. 360027, )  
 )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
OF THE EIGHTH JUDICIAL CIRCUIT

2016-CP-30-551

ORDER OF DISMISSAL

LAURENS COUNTY  
CLERK OF COURT

2017 AUG 21 AM 11:41

LYNN W. LANCASTER

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed July 7, 2016. An evidentiary hearing into the matter was convened on June 6, 2017, at the Laurens County Courthouse in Laurens, South Carolina. Applicant was present at the hearing and represented by Ashley McMahan, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Chip Howe and Chelsea McNeil, Esquires, also testified. This Court had before it a copy of Applicant's records from the Laurens County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's PCR Application and amendment, and Respondent's Return.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Laurens County Clerk of Court. Applicant was indicted at the August 2011 term of the Laurens County Grand Jury for five counts of lewd act on a child (2011-GS-30-1284 through -1288). For purposes of this Order, this Court will refer to indictments 2011-GS-30-1284, -1285, and -1286 as relating to "Victim 1" and indictments 2011-GS-30-1287 and -1288 as relating to "Victim 2." Applicant was represented by Chip Howe and

Chelsea McNeil, Esquires. He proceeded to a trial on May 13, 2014, before the Honorable Eugene C. Griffith, Jr. and a jury. He was acquitted on the three charges relating to Victim 1 but was found guilty on the two charges related to Victim 2 which he challenges in this action (2011-GS-30-1287 and -1288). Judge Griffith sentenced him to ten years imprisonment on each count to run concurrently.

Applicant filed a notice of appeal and an appeal was perfected by Appellate Defender Lara Caudy. Briefing was done and oral arguments were held, after which a memorandum opinion was filed affirming Applicant's convictions. State v. Ricky Dale Pace, 2016-MO-010 (Ct. App. Filed April 13, 2016). The Remittitur was sent April 29, 2016.

#### *PCR Application*

On July 7, 2016, Applicant filed an application for post-conviction relief. On May 30, 2017, Applicant filed a Motion to Amend. In his application and amendment, Applicant alleges the following grounds:

1. Ineffective assistance of counsel
  - a. Failure to object to prosecutor's prejudicial remarks Page 231 line 18-19 and line 22-24, page 242 line 3-9.
  - b. Failure to introduce a drawing by one of the victims of a living in a house. The drawing would have shown the incident clearly took place in a house, not a trailer where the Applicant was residing.
  - c. Failure to call as a witness one of the victim's friends, Melanie (daughter of Sonya Jones), whom Victim 2 told that the Applicant did not commit the crimes.
  - d. Failure to call Applicant's wife regarding her calendar that she habitually and meticulously kept and logged dates on, which would indicate that the incidents occurred when the children were with their father.
  - e. Failure to challenge how Victim 2 came up with the dates of the incidents.
  - f. Failure to raise the issue that Judge Griffith had a conflict of interest. Judge Griffith had represented Victim 2's grandparents in the past while he was still in private practice.

During the PCR hearing, Applicant informed the Court that he was abandoning his allegation that Judge Griffith had a conflict of interest.

## II. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order 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. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625.



### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds the testimony of Applicant's counsel to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

#### **Ineffective Assistance of Counsel**

##### **Failure to object to prosecutor's prejudicial remarks during closing argument**

Applicant alleged that his counsel failed to object to the solicitor's remarks during his closing argument. Specifically, Applicant points to the following lines: "There is not a cat or a mouse in the box. There is a man holding the box and is a child molester...Somebody sits in that chair and swore to tell the truth and then balled face lied to you." Trial Transcript p. 231 ll. 18-19, 22-24. "I want to tell you, there are three things I think we know from the evidence in this trial. Ricky Dale Pace is a person, he lives here, he is a child molester. You are not going to be able to go to that room and change the fact that he is a person or that he molested these children. The other one, we can take care of." Trial Transcript p. 242 ll. 3-9. Applicant testified that he believed these comments were improper and counsel should have objected as these comments were the solicitor's personal opinion.

*Cliff*

Counsel Howe testified that he believes he should have objected to the solicitor's comments, but testified that he could not say whether the outcome would have been different. Counsel McNeil testified that she did not think the solicitor's comments were extensive enough to the point where it improperly affected the jury. She testified that she did not think that these comments had an effect on the outcome of the trial because Applicant was actually acquitted on three of the lewd act charges related to Victim 1.

This Court finds Counsel was not ineffective for failing to object because the solicitor's remark was not objectionable. A solicitor's "argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Webb, 389 S.C. 174, 178-79, 697 S.E.2d 662, 664 (Ct. App. 2010) (citing State v. Rudd, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct.App.2003)). "Improper comments do not require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Id. (citing Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004)). The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Smith v. State, 375 S.C. 507, 522, 654 S.E.2d 523, 531 (2007).

This Court finds that the solicitor's contention that Applicant lied and his reference to Applicant as a "child molester" does not rise to the level of impropriety as to warrant a new trial. Applicant was on trial for charges of lewd act on a child and the solicitor's two comments did not infect the trial as to make the jury's verdict unreliable as the trial judge properly informed the jury of the presumption of innocence and the burden of proof. This Court finds that an objection would not have changed the outcome of the trial, especially considering the fact that Applicant



was acquitted on three of the five lewd act charges. As such, this Court finds that Applicant has failed to show that he was prejudiced by his counsel's actions in this regard. Accordingly, this allegation must be dismissed.

Failure to introduce a drawing by one of the victims of a living in a house. The drawing would have shown the incident clearly took place in a house, not a trailer where the Applicant was residing.

Applicant testified that his counsel was ineffective for not introducing a drawing by one of the victim's that depicted the layout of the house where the abuse took place. He testified that the drawing does not match his residence because he lives in a mobile home and the drawing matches the victim's grandparent's house.

Counsel McNeil testified that the drawing was from April 8, 2011 and drawn by Victim 2 at the Beyond Abuse Center. She testified that the drawing would not have helped the defense because it listed Applicant's room and because Victim 2 testified at trial that she was on the living room couch and could see Applicant retrieve the vibrator. She also testified that there was other testimony in the record saying that Victim 2 saw the vibrator in the bedroom. Counsel McNeil testified that Applicant never discussed with her the possibility that the incidents took place at another house. Counsel Howe testified that the floorplan of the house was not important to the defense. He testified that there was testimony at trial about the house and the specific rooms.

This Court finds that Applicant has not met his burden of proving counsel was ineffective for not introducing Victim 2's drawing of the layout of Applicant's house. This Court finds that both Counsel McNeil and Howe provided credible testimony that the drawing would not have helped Applicant's case because there was other testimony at trial concerning how Victim 2 saw Applicant retrieve the vibrator from his bedroom. This Court further finds that Applicant has failed to show that the outcome of the trial would have been different had his counsel introduced



this drawing into evidence. As Applicant has failed to meet his burden of proving his counsel were ineffective, this allegation must be dismissed.

**Failure to call as a witness one of the victim's friends, Melanie (daughter of Sonya Jones), whom Victim 2 told that the Applicant did not commit the crimes**

Applicant testified that Counsel was ineffective for failing to call Melanie Jones to testify at trial. He testified that right after he was charged, Melanie's mother Sonya Jones told him that Victim 2 told Melanie that Applicant did not molest her. He testified that he told this information to his counsel. He further testified that Melanie said that Victim 2 told her that her grandfather molested her.

Counsel McNeil testified that she talked to Sonya Jones before trial and included Melanie on the witness list. She testified that she did not call Melanie because Melanie was not going to testify the way she originally said she would. Counsel McNeil testified that she discussed all of this with Applicant. She testified that the Joneses potential testimony did not match up and would not have been helpful. Counsel Howe testified that he and Counsel McNeil made the decision not to call Melanie to the stand and would have done so had her testimony been helpful to Applicant.

This Court finds that Applicant's counsel was not ineffective for failing to call Melanie Jones as a witness. This Court finds that his counsel investigated Melanie and Sonya Jones and discussed their potential testimony with Applicant. This Court finds that his counsel included Melanie on the trial witness list but made the strategic decision not call her as a witness upon learning that she would not provide the favorable testimony that she had earlier indicated. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (Trial counsel testified that he chose not to use these witnesses because, in his judgment at the time, their testimony would not have been of value to petitioner's case).



Further, this Court finds that Applicant has failed to show that he was prejudiced by his counsel's actions as Melanie did not testify at the PCR hearing. In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). As Applicant has failed to meet his burden of proving his counsel were ineffective, this allegation must be dismissed.

Failure to call Applicant's wife regarding her calendar that she habitually and meticulously kept and logged dates on, which would indicate that the incidents occurred when the children were with their father.

Applicant testified that his wife, the mother of the victims, kept a calendar that had records of occurrences and when the victims were away from the home. He testified that his counsel should have introduced this calendar to verify the dates of the incidents and show that the children were not at his house at the time.

Counsel McNeil testified that the calendar was more of a journal and was not habitually or meticulously kept as Applicant believed. She testified that she had the journal pretrial but did not enter it at trial because there was a lot of material in the journal that she did not want in as it would have been harmful to Applicant's case. Counsel McNeil further testified that there was nothing in the journal that would have provided the jury with where the victims were at the time of the crime. Counsel Howe testified that he and Counsel McNeil did not see the journal in the same way as Applicant and testified that it did not provide any alibi defense.

This Court finds that Applicant has failed to prove that his counsel were ineffective. This Court finds that Applicant has failed to show that his counsel was deficient for failing to enter

*CHE*

the calendar at trial. This Court finds that his counsel provided credible testimony that they made the decision not to introduce the calendar/journal because it contained material harmful to Applicant's defense, did not provide an alibi, and did not indicate where the victims were at the time of the incidents. This Court finds that Applicant has failed to show that he was prejudiced by his counsels' actions as he has failed to show that this calendar would have helped his defense and made a difference in the outcome of the case. As Applicant has failed to meet his burden of proving his counsel were ineffective, this allegation must be dismissed.

Failure to challenge how Victim 2 came up with the dates of the incidents.

Applicant alleged that his counsel failed to challenge how Victim 2 came up with the dates of the incidents. He testified that he does not remember what specifically was asked at trial but believes his counsel should have focused more on this than they did at trial.

Counsel McNeil testified that she did challenge the dates of the incident during her cross examination of Victim 2. See Trial Transcript p. 147, ll. 7-19. She testified that she had to be more careful on her cross examination of Victim 2 given the victim's young age. Counsel McNeil testified that Victim 2 cried during cross examination and they had to take a short break. Counsel McNeil testified that given her experience with these types of victims, she did not want to push this issue too hard, especially when dealing with such an emotional young victim in front of the jury. Counsel Howe testified that he agrees with Counsel McNeil's explanation of her cross examination and agrees with her strategy in questioning a young victim.

Cross-examination is a matter of trial strategy, and as such, this Court must presume that Counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690). In making a fair assessment of attorney performance, a court must make every

effort 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. 668, 689. This Court finds that Counsel McNeil adequately cross-examined Victim 2 concerning the dates of the incidents and employed a valid strategy to tread delicately with a young, crying victim of a sex crime before the jury. This Court finds that Applicant has failed to show that Counsel McNeil's cross examination was deficient and has failed to meet his burden of showing that the outcome of his trial would have been different had Counsel McNeil undertaken different cross examination. As Applicant has failed to meet his burden of proving his counsel were ineffective, this allegation must be dismissed.

#### IV. CONCLUSION

Based on the foregoing facts, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Applicant failed to demonstrate that Counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf.




Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED THAT:**

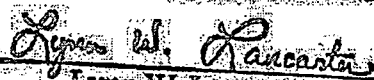
1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 15 day of August, 2017.

  
G. THOMAS COOPER, JR.  
Presiding Judge  
Eighth Judicial Circuit

Cawson, South Carolina

ATRUE COPY OF ORIGINAL

  
Lynn W. Lancaster  
Laurens County CCCP & GS



ALAN WILSON  
ATTORNEY GENERAL

August 17, 2017

The Honorable Lynn W. Lancaster  
Clerk of Court, Laurens County  
Post Office Box 287  
Laurens, South Carolina 29360-0287

Re: Ricky Dale Pace, #360027 v. State of South Carolina  
2016-CP-30-551

Dear Ms. Lancaster:

Enclosed please find the original Order of Dismissal, signed by the Honorable G. Thomas Cooper, Jr., in the above-captioned case for filing in your office. Please forward a time stamped copy back to our office for our files.

Sincerely,

Justin J. Hunter  
Assistant Attorney General

JJH/cc  
Enclosure(s)

LYNN W. LANCASTER  
2017 AUG 21 AM 11:43  
LAURENS COUNTY  
CLERK OF COURT

A TRUE COPY OF ORIGINAL

Lynn W. Lancaster  
Laurens County CCCP & GS

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

RICKY DALE PACE, #360027

Applicant,

v.

STATE OF SOUTH CAROLINA,

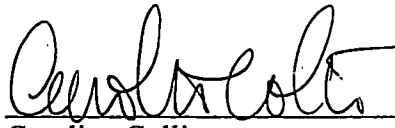
Respondent.

CERTIFICATE OF SERVICE

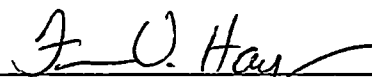
The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

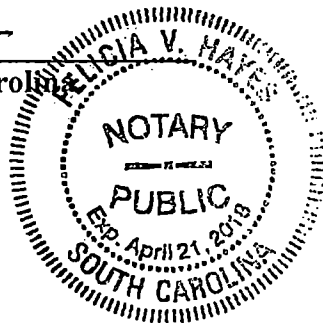
Ashley A. McMahan, Esquire  
Mac | Vance Attorneys, LLC  
Post Office Box 5501  
West Columbia, South Carolina 29169

This 27<sup>th</sup> day of September, 2017.

  
\_\_\_\_\_  
Caroline Collins  
Administrative Coordinator, PCR

SWORN to before me this 27<sup>th</sup> day of September, 2017.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires:

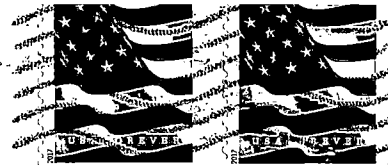




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WEST COLUMBIA SC 29171

29 SEP 2017 PM 1 L



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

29211-133030

