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OCT 23 2017

S.C. SUPREME COURT

THE BOOZER LAW FIRM, LLC

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October 19, 2017

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

The Honorable Sharon W. Staggers
Clerk of Court
125 W Main St.
Kingstree, SC 29556

**RE: Faron Clements, #298780, v. State of South Carolina
2016-CP-45-266**

Dear Mr. Shearouse and Ms. Staggers:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Clements in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Clements in this appeal.

Yours very truly,



Lance S. Boozer

Enclosures

cc: Julie Coleman, AAG
Loriene French, OAD
Faron Clements, #298780

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

Case No. 2016-CP-45-266

Faron Clements, #298789Petitioner,

v.

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

NOTICE OF APPEAL

The Petitioner appeals the Honorable D. Craig Brown's Order dated June 21, 2017, and filed July 3, 2017, denying post-conviction relief to the Petitioner. Undersigned counsel was not served with a copy of the Order and instead discovered the filed Order on the Clerk of Court's website today, October 19, 2017. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



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v.

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

PROOF OF SERVICE

I, Lance S. Boozer, attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Julie Coleman, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 19th day of October, 2017.



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STATE OF SOUTH CAROLINA
COUNTY OF WILLIAMSBURG

Faron M. Clements, #298780,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

2016-CP-45-266

ORDER OF DISMISSAL

FILED
CLERK OF COURT

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on June 22, 2016. Respondent submitted its Return on February 28, 2017. An evidentiary hearing was convened on March 31, 2017, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial attorney, M. Amanda Shuler, Esquire, and Solicitor Kimberly Barr also testified. The Court had before it a copy of the trial transcript, the records of the Sumter County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

I. 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 Clerk of Court for Williamsburg County. Applicant was indicted by the October 2014 term of the Grand Jury for Williamsburg County for two counts of Criminal Sexual Conduct with a Minor – 2nd degree

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(2013-GS-45-0247). Applicant was represented at trial by M. Amanda Shuler, Esq. Applicant was convicted on both counts and was sentenced on October 16, 2014 by the Honorable Clifton Newman to eleven years' imprisonment for both counts, to be served concurrently.

Applicant filed a timely notice of appeal. An Anders brief was submitted, and the South Carolina Court of Appeals affirmed Applicant's conviction in an opinion filed March 30, 2016. State v. Clements, Op. No. 2016-UP-145 (S.C. Ct. App. 2016). The Remittitur was returned on April 29, 2016.

II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

1. Ineffective Assistance of Trial Counsel
 - a. "Counsel failed to pursue and use key testimony of witnesses who were subpoena[ed]."
 - b. "Counsel without explaining to me what stipulate to deliberate with eleven jurors meant, she chose to go forward."¹
2. Prosecutorial Misconduct
 - a. "Prosecutor violated 5th and 14th Amendments and doctrine of Brady."

III. 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

¹ Respondent interprets this to be a claim of ineffective assistance of counsel, though Applicant labeled this allegation as "Tainted, contaminated, and prejudice jury or jurors" in his application. Eleven jurors deliberated at Applicant's trial after one fell ill and could no longer participate. All parties consented to allowing the eleven jurors to continue deliberating.

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. With respect to guilty pleas, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

V. SUMMARY OF RELEVANT TESTIMONY

At the evidentiary hearing, Applicant testified that he was arrested for these crimes on June 12, 2013, and he first met with Trial Counsel three months after his arrest. He stated that they met four times before the trial. He stated that the State made him a plea offer for a recommended 0-4 year sentence, but Applicant rejected it because he did not do anything wrong and did not want to plead guilty and wanted a trial.

Applicant testified that in the State's closing argument to the jury, the Solicitor told a story about a former prosecutor that he believed was about him. ROA 178. He stated that she should not have told this story because it was an inappropriate comment about him and his case, but the jury did not know that the story was about him. He stated that Solicitor Barr persuaded the jurors to decide the case based on their minds, not the facts of the case. He stated that there were no issues obtaining discovery in this case.

Applicant testified that Trial Counsel failed to present witnesses at trial, like Mr. Willie Fred Morris, who was at his house during the time that the victim was there, and the victim used his phone. He stated that he told Trial Counsel about this witness, whom she subpoenaed, and requested a continuance when Mr. Morris was not at the trial. ROA 45. Applicant stated that Trial Counsel also failed to present testimony from the other man who raped the victim while she was at his house.

Applicant testified that Trial Counsel stipulated to continuing the trial with only eleven jurors when one juror was out sick and did not return, and she did not explain to him what it meant to make this stipulation.

Trial Counsel testified that she made a motion before the trial to obtain the victim's medical records, and the medical report was given to her right before the trial. She stated that she believed they were entitled to this information under Brady, but the Solicitor did not. She stated that receiving these documents at the last minute did not affect the outcome of the trial.

Trial Counsel testified that her trial strategy was to bring out inconsistencies in the testimony of the victim and law enforcement's investigator. She stated that Applicant admitted to her that he had picked up the minor victim on the side of the road and she did stay with him at his house, but he did not have sex with her. She stated that Applicant told her the name of the

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man who was alleged to have raped the victim at Applicant's house, but she could not find him. She stated that Mr. Morris was having surgery during the trial and could not be there to testify, so she requested a continuance. However, her request was denied.

Trial Counsel testified that Applicant made the decision to allow the jury to deliberate with one less juror; they discussed it extensively before stipulating, and Applicant decided that he did not want to request a mistrial. Trial Counsel stated that she had enough time to prepare for trial and was prepared to go forward. Trial Counsel testified that she does not think the Solicitor's comments to the jury swayed them because the trial judge charged them on reasonable doubt. She stated that she did not believe that any of the Solicitor's comments were objectionable.

Trial Counsel testified that she does not remember a 0-4 year plea offer from the State. She stated that there was a plea offer of ten years that Applicant rejected. She stated that she told Applicant it might be helpful to him to disclose the identity of the man who raped the victim to the Solicitor, but he did not want to do so. She stated that she told the Solicitor that Applicant knew who the man was, but he did not want to say who it was. She stated that she would not have told the Solicitor because it was not her information to tell.

Solicitor Kimberly Barr testified that she turned over discovery in this case in the beginning of June, 2014, and submitted supplemental discovery, including the DJJ psychological report of the victim, about which there was a discussion on the record before the trial. Solicitor Barr stated that in her opinion, there were no Brady violations, and she does not believe that her closing argument was inappropriate or objectionable. She stated that the trial judge explained the burden of proof to the jury and her comments did not change the jury's verdict.

Solicitor Barr testified that she had previously prosecuted a case against Applicant in Williamsburg County, and he was found not guilty. She stated that the story she told in closing argument was not about Applicant, but was a story that Judge Cothran told her when he was in the Solicitor's Office in Clarendon County. She stated that she was very interested to know the identity of the man who forcibly raped the victim while at Applicant's home, and Trial Counsel told her that Applicant knew who it was but did not want to disclose it. She stated that if he had told her this information, she would have taken that into consideration when contemplating a plea offer. However, she stated that the plea offer would still have included prison time based on his record, and she still would have prosecuted this case.

VI. 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. 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).

As a matter of general impression, this Court does not find Applicant's testimony and assertions to be credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant raises several allegations arguing that Trial Counsel was ineffective in her representation surrounding his trial. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-

Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). This Court finds that the testimony presented at the PCR hearing does not satisfy either prong of the Strickland test; Applicant can show neither ineffectiveness nor prejudice, thus these allegations should be denied and dismissed with prejudice.

Failure to present witness testimony at trial

Applicant alleges that Trial Counsel was ineffective for failing to present witness testimony at trial, including the testimony of Mr. Morris and of the man who was accused of raping the victim at Applicant's home. This allegation is meritless.

Trial Counsel credibly testified that she subpoenaed Mr. Morris to testify at trial, but he was having surgery during the trial and could not attend the trial. The record of the trial transcript indicates that Trial Counsel requested a continuance in order to have Mr. Morris present at the trial, but her continuance request was denied. Therefore, Trial Counsel was not deficient in not presenting Mr. Morris's testimony. Trial Counsel further testified that she investigated the man who allegedly raped the victim at Applicant's home but was unable to find him. Trial Counsel's investigation was reasonable within professional norms, and her inability to locate the witness does not render her deficient.

Furthermore, Applicant has failed to meet his burden of proving that he was prejudiced by the lack of these witnesses' testimony because he did not present either witness at the evidentiary hearing. The South Carolina Supreme Court "has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). "The

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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). Applicant did not present any testimony from Mr. Morris or the man who raped the victim to show how their testimony would have changed the outcome of the trial, thus he cannot prove prejudice.

Accordingly, because Applicant has failed to prove either prong of the Strickland test, this allegation is denied and dismissed with prejudice.

Failure to explain stipulation to eleven jurors

Applicant alleges that Trial Counsel was ineffective for failing to explain to him what it meant to stipulate to proceeding with trial with only eleven jurors after one fell ill. This allegation is meritless.

The trial transcript indicates that Trial Counsel consulted with Applicant over the decision to stipulate to an eleven member jury. ROA 210-211. Trial Counsel credibly testified that she discussed this decision and all the possible outcomes he could choose during the trial, and it was his decision to proceed with only eleven jurors. This Court finds that Trial Counsel was not ineffective in this manner, and this allegation is denied and dismissed with prejudice.

PROSECUTORIAL MISCONDUCT

Applicant alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on

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appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Applicant has not carried his burden of proving actual prosecutorial misconduct; therefore, this allegation must be dismissed.

While Trial Counsel testified that there were some items she believed should have been turned over to her in discovery, Solicitor Barr credibly testified that everything Applicant was entitled to in discovery was given to Trial Counsel. Furthermore, the trial court heard Trial Counsel's motion to obtain the DJJ report and allowed her to obtain it right before the trial. Trial Counsel credibly testified that receiving this document right before the trial did not affect the outcome of the trial. Finally, this Court finds that nothing in Solicitor Barr's closing statement to the jury was improper or objectionable, and her argument does not constitute prosecutorial misconduct.

This Court finds that Applicant has failed to prove any actions or inactions that amounted to prosecutorial misconduct, and Applicant has failed to prove that he was prejudiced by any of the Solicitor's actions that should result in a new trial. Therefore, 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.

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VII. CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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 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 Applicant wishes to seek appellate review, post-conviction relief 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:

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

AND IT IS SO ORDERED this 21 day of June, 2017.



D. CRAIG BROWN
Presiding Judge
Third Judicial Circuit

Florence, South Carolina

STATE OF SOUTH CAROLINA

County of Williamsburg

Faron M. Clements

Petitioner

vs.

STATE OF SOUTH CAROLINA

Defendant

IN THE COURT OF
COMMON PLEAS

Third Judicial Circuit

NOTICE OF APPOINTMENT
FOR LEGAL COUNSEL

Case Number 2016-CP-45- 266

To: Lance Boozer, Attorney at Law

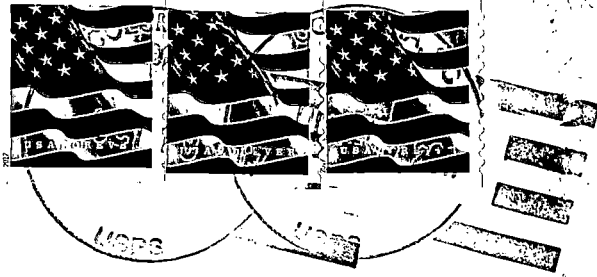
By order of the Chief Administrative Judge and pursuant to Rule 608, SCACR, you are hereby appointed
to act as attorney for Faron M. Clements, the Petitioner, in this action.

This 1st day of November b, 2016.

Sharon W. Shagers
Judge/Clerk of Court

THE BOOZER LAW FIRM, LLC

1400 Laurel Street, Suite 4A
Columbia, SC 29201



The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
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