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February 27, 2015

VIA U.S. POSTAL

Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Keith DeSue vs. State of South Carolina
Case No.: 2014-CP-23-00257

RECEIVED

MAR - 5 2015

S.C. Supreme Court

Dear Supreme Court Clerk:

I am writing to you regarding the above referenced case. Please find enclosed a Notice of Appeal, Proof of Service, and a copy of the Order of Dismissal.

If you wish to discuss the foregoing or need additional information please contact me at 864-331-1630.

Thank you.

Sincerely,



Brian P. Johnson

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE EUGENE C. GRIFFITH, JR.

RECEIVED

MAR - 5 2015

S.C. Supreme Court

Case No.: 2014-CP-23-00257

KEITH DESUE,)
)
PETITIONER,)
)
vs.)
)
STATE OF SOUTH CAROLINA)
)
RESPONDENT.)
)

NOTICE OF APPEAL

The Petitioner, Keith DeSue, hereby appeals the Honorable Eugene C. Griffith, Jr's February 4, 2015 Order of Dismissal denying post-conviction relief to the Petitioner.

A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner
SC Bar: 73996

Date: February 26, 2015
Other counsel of record: Karen Ratigan
P.O. Box 11549/Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE EUGENE C. GRIFFITH

RECEIVED

MAR - 5 2015

S.C. Supreme Court

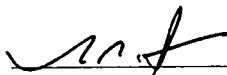
Case No.: 2013-CP-23-00257

KEITH DESUE,)
)
PETITIONER,)
)
vs.)
)
STATE OF SOUTH CAROLINA)
)
RESPONDENT.)
)

PROOF OF SERVICE

I, Brian P. Johnson, Esq., certify that I have today served the within notice of appeal upon the Respondent by depositing a copy in the United States Mail, postage prepaid, addressed to the attorney of record, Karen Ratigan, at P.O. Box 11549 Columbia, SC 29211.

Respectfully submitted,



Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner
SC BAR: 73996

Greenville, SC
~~February 27, 2015~~
March 2

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2014CP2300257

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2015 FEB 11 PM 4 27

Desue Keith vs. South Carolina State Of

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.

- ACTION DISMISSED (CHECK REASON):**
SCRCP (Vol. Nonsuit); Rule 43(k), SCRCP (Settled); Rule 12(b), SCRCP; Rule 41(a);
 Other: _____

- ACTION STRICKEN (CHECK REASON):**
 Rule 40(j) SCRCP; 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; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - Eugene C. Griffith, Jr.

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

Brian P. Johnson 522 North Church Street
Greenville, SC 29601

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Keith Antravus Desue,)
S.C.D.C. No. 349222,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
C.A. No. 2014-CP-23-0257

ORDER OF DISMISSAL

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2015 FEB 11 PM 4 27

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 16, 2014. The Respondent made its return on May 14, 2014. An evidentiary hearing into the matter was held on December 16, 2014 at the Greenville County Courthouse. The Applicant was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Scott D. Robinson, Esquire. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the December 2010 term of the Greenville County Grand Jury for first-degree criminal sexual conduct with a minor (2009-GS-23-4190). He was represented by Scott D. Robinson, Esquire.



After the State brought the case to trial, the Applicant was found guilty. On January 10, 2012, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to twenty-five years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. On November 7, 2013, the Court of Appeals issued an order dismissing the appeal based upon the Applicant's request. The Remittitur was sent on November 26, 2013.

ALLEGATIONS

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

1. Ineffective assistance of counsel:
 - a. Failure to object.
 - b. Failure to investigate.
2. "Prosecution misconduct."
 - a. "Failure to disclose exculpatory evidence."
3. "Newly discovered evidence."
 - a. "New testimony corroborating claim of innocence."

At the PCR hearing, the Applicant proceeded upon an allegation of ineffective assistance of trial counsel and abandoned all other issues.

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 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).

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Ineffective Assistance of Counsel

The 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).

The Applicant confirmed the victim in his case was his daughter (who was five years old at the time of the incident). The Applicant stated trial counsel allowed the State to bolster the victim. The Applicant stated trial counsel asked the victim whether she had been coached and the State then argued the Jeffcoat¹ case against him. The Applicant stated trial counsel’s argument was that the blood in the victim’s underwear resulted from her bowel issues. The Applicant also admitted trial counsel brought up the victim’s inconsistent statements and that, while the victim mentioned a knife, no knife was ever found. The Applicant stated there was no evidence against him except for the victim’s testimony.

¹ State v. Jeffcoat, 350 S.C. 392, 565 S.E.2d 321 (Ct. App. 2002).

this case, he should have done so on appeal. See Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (finding a post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal).

Regardless, Petitioner failed to meet his burden of proving he suffered any prejudice resulting from the application of Jeffcoat in this case because the State presented such strong evidence of his guilt. The victim, of course, testified about the sexual abuse by the Applicant. The victim had blood in the crotch of her underwear. (Trial transcript pp.63-64). A medical examination noted a laceration on the victim's labia and redness at her vaginal opening. (Trial transcript, pp.82-83). The victim also had a transection of the hymen on the same side of her body as the laceration. (Trial transcript, pp.140-41; pp.145-48). The victim's videotaped forensic interview was published to the jury. (Trial transcript, p.137). As the State presented abundant evidence that the Applicant sexually assaulted the victim, the Applicant cannot demonstrate he was prejudiced by any alleged error made by trial counsel. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

Accordingly, this Court finds the 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. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he

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


This Court advises the 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.

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IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 14th day of February, 2015.



Eugene C. Griffith, Jr.
Presiding Judge
Thirteenth Judicial Circuit

Hawley, South Carolina.



Law Office of Brian P. Johnson

522 North Church Street
Greenville, SC 29601



Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

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