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April 28, 2018

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Anthony Linton 345516 v State, 2013-CP-07-1104

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Beaufort County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc:
Ruston Neely, Esq.
Anthony Linton 345516.

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

THE STATE OF SOUTH CAROLINA

In The Supreme Court

RECEIVED

MAY 01 2018

S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Honorable Thomas A Russo, Circuit Judge

Case No.: 2013-CP-07-01104

Anthony Linton 345516.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Anthony Linton appeals the Honorable Thomas A Russo's April 4, 2018 Order of Dismissal. Undersigned counsel received notice of entry of the order on April 26, 2018. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

April 27, 2018

Ruston Neely, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Ruston Neely, Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this April 27, 2018.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Anthony G. Linton, #345516,	)	Case No. 2013-CP-07-01104
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

The above-captioned matter comes before the Court via an application for post-conviction relief (PCR) filed by Anthon G. Linton on April 24, 2013. This Court convened an evidentiary hearing into the matter on October 13, 2017, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by James Falk, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel, Ian Deysach, Esquire (Counsel), and Applicant were both present and testified. This Court had the opportunity to listen to their testimony and rule on their credibility. This Court also had before it a copy of the trial transcript, the records of the Beaufort County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the direct appeal records, and the pleadings in this matter.

I. PROCEDURAL HISTORY

On March 29-31, 2011, Applicant proceeded to trial and was convicted. Applicant was sentenced by the Honorable Michael G. Nettles to confinement for a period of twenty- seven years.

Applicant filed a timely Notice of Appeal. His appeal was perfected by Susan Hackett, Esquire, of the Office of Appellate Defense. Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Linton, No. 2012-UP-595 (S.C. Ct. App. October 31, 2012).

Applicant filed a Petition for Rehearing which was denied on December 19, 2012. Applicant filed a Notice of Appeal to the South Carolina Supreme Court. By Order dated March 13, 2013, the Supreme Court dismissed the appeal at Applicant's request. The Remittitur was issued on March 15, 2013.

II. ALLEGATIONS

Applicant alleged the following grounds in his application:

1. Ineffective Assistance of Counsel
   a. Counsel failed to object, request a mistrial, or request a curative instruction due to remarks made by the solicitor during opening and closing arguments.
   b. Counsel should have objected again when the nurse said the victim told me her father did it and went into details on page 147 of the transcript.

III. SUMMARY OF FACTS

On the night of November 28, 2009, Appellant raped a six-year old girl. (R. 160-162; R. 175-183.) Appellant performed vaginal, oral, and anal penetration on the six-year old victim ("Victim"), who was the biological daughter of Appellant's live-in girlfriend. (R. 92; R. 175-183.)

Before the trial began, Appellant's trial counsel requested that the judge inquire into whether any of the jurors, or their close relatives or friends, had been a victim of sexual abuse. (R. 3.) The State objected to that question. (R. 4.) The trial judge denied Appellant's request. (R. 4-9.)

At trial, Victim's brother ("Brother"), who was eight years old at that time, testified he saw Appellant "doing it" with Victim on the couch. (R. 160-162.) Brother saw Appellant take off his own clothes and Victim's clothes. (R. 160.) Appellant got on top of Victim and started "going up and down, up and down." (R. 160.) Victim screamed and tried to get Appellant off of her. (R. 161.) At some point, Appellant took Victim into the room he shared with her mother. (R. 161.) Appellant

continued to rape Victim. (R. 161.) After Appellant finished raping Victim, Appellant told her that if she told her mother, he would kill both of them (R. 162.)

When Victim's mother got home the next morning, Victim told her what Appellant had done. After learning about the rape, Victim's mother examined Victim's genital area and noticed a purple discoloration. (R. 131.) Thereafter, Victim's mother contacted the police. (R.132.)

Around 2:00 p.m. on November 30, 2009, Victim's mother took Victim to see Kristin Dalton, a nurse practitioner for Beaufort Pediatrics and Hope Haven Children's Advocacy Center. (R. 81.) At trial, the judge qualified Dalton as a pediatric medical expert. (R. 77.) Dalton testified she examined Victim and concluded that she had traumatic injury to the genital area, which included abrasions on her inner and outer labia, abrasions in the vaginal introitus, and a cut above the urethral opening. (R. 92.) In addition, Dalton testified the victim's injuries were consistent with blunt force trauma to the genital area. (R. 93.)

Shortly after Dalton testified, Victim testified against Appellant. (R. 167.) Victim testified Appellant woke her up and "started to do nasty stuff." (R. 176.) Victim testified that Appellant touched her crotch with his mouth and "pee-pee." (R. 177; R. 178-179.) In addition, Appellant touched her buttocks with his "pee-pee." (R. 178.) Furthermore, Victim stated that Appellant's "pee-pee" touched her mouth. (R. 179.) Victim testified that something came out of Appellant's "pee-pee" and landed on her crotch. (R. 181.) Appellant wiped it off with a shirt. (R. 181.)

During the trial, Amanda Webb, a SLED DNA analyst, testified she found semen in the crotch area of the victim's panties. (R. 275-277.) Moreover, she concluded that the DNA found in the victim's panties matched Appellant's DNA. (R. 278.)

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds Applicant has failed to satisfy his burden to prove Counsel's actions were deficient. Applicant also failed to prove he was prejudiced by Counsel's alleged deficiencies. This Court finds Counsel's testimony was credible. This Court finds Applicant's testimony was not credible. This Court finds Counsel properly prepared for Applicant's trial. This Court finds Counsel elucidated valid trial strategies in defending Applicant and preparing for trial. This Court finds Counsel rendered adequate assistance and exercised professional judgment in his decisions at trial. This Court dismisses Applicant's application for the reasons set out below:

A. Ineffective Assistance of Counsel

In evaluating allegations of ineffective assistance of counsel, the court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668, 669 (1984). First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). "The proper measure of counsel's performance remains whether he has provided representation within the range of competence required of attorneys in criminal cases." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsels' 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. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be

wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

1. Counsel should have objected again when the nurse said the victim told me her father did it and went into details on page 147 of the transcript.

This Court finds there was overwhelming evidence of guilt and this issue was ruled on by the South Carolina Court of Appeals. On direct appeal, Applicant contended, "The trial court judge erred when he allowed a state's witness to testify beyond the hearsay limitations that apply in cases involving criminal sexual conduct." (App. Final Brief p. 8). The issue alleged the nurse's testimony that the victim told her the perpetrator was the victim's father was inadmissible. Counsel objected to the nurse's statements on the basis of hearsay and was overruled on two separate occasions. (Tr. p. 146; 149.) The Court of Appeals did not dismiss the issue for lack of preservation and, instead, ruled, "As to whether the trial court erred in allowing inadmissible hearsay testimony by an expert witness: State v. Garner, 389 S.C. 61, 67-68, 697 S.E.2d 615, 618 (Ct. App. 2010) ("[I]mproper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice. Such error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors. An insubstantial error is harmless when guilt is proven by competent evidence such that no other rational decision could be reached . . . ." (internal quotations and citations omitted)); Huggler v. State, 360 S.C. 627, 634-35, 602 S.E.2d 753, 757 (2004) (holding the trial court did not err by allowing inadmissible hearsay testimony because the evidence of abuse was overwhelming). Linton, No. 2012-UP-595. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 670. Based on the transcript,

this Court agrees with the Court of Appeals' ruling and finds the evidence against Applicant was overwhelming and any error of Counsel would not have prejudiced Applicant. Applicant cannot prove prejudice where the evidence against him was overwhelming. See Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008).

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not objecting to the expert's testimony because the issue was ruled on by the Court of Appeals. Further, this Court also finds Applicant failed to prove the testimony prejudiced Applicant such that there was a reasonable probability the result of the trial would have been different had it been excluded because the evidence against Applicant was overwhelming. Accordingly, this Court denies and dismisses this allegation.

2. Counsel failed to object, request a mistrial, or request a curative instruction due to remarks made by the solicitor during opening and closing arguments.

Applicant alleges Counsel was deficient for failing to object to the solicitor's comments regarding emotions during her opening and closing arguments. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 670. Based on the transcript, this Court agrees with the Court of Appeals' ruling and finds the evidence against Applicant was overwhelming and any error of Counsel would not have prejudiced Applicant. Therefore, Applicant cannot prove prejudice where the evidence against him was overwhelming. Id.

Further, Counsel used the solicitor's emotional argument in Applicant's defense during his own closing argument. This Court finds Counsel's failure to object was a reasonable trial strategy and will not use the benefit of hindsight to find Counsel's decision at trial unreasonable. "Where

counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624 (2011).

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not objecting to the solicitor's remarks because he strategically used those arguments in his own closing argument. Further, this Court also finds Applicant failed to prove the testimony prejudiced Applicant such that there was a reasonable probability the result of the trial would have been different had it been excluded because the evidence against Applicant was overwhelming. Accordingly, this Court denies and dismisses this allegation.

V. CONCLUSION

Based on the foregoing, this Court finds and concludes 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 Applicant must file and serve a notice of appeal within thirty (30) days from 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 71.1g, SCRCP, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The Application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 4th day of April, 2018.

THOMAS A. RUSSO
Presiding Judge
14th Judicial Circuit

Florence, South Carolina

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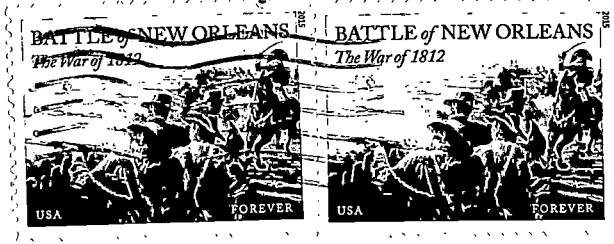

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