LAW OFFICE OF

Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

May 29, 2018

RECEIVED

MAY 31 2018

S.C. SUPREME COURT

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

RE: George Albert Jones, SCDC # 254442, vs. State of South Carolina
matter Appeal of Case No. 2012-CP-19-100
Authorization for Appeal pursuant to Austin v. State Case No. 2017-CP-19-367

Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service, a copy of the original court order which is to be challenged on appeal, and a copy of the court order granting an appeal pursuant to Austin v. State.

I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal so that they may begin representation of Mr. Jones, as I was appointed as counsel in this matter. I am also hereby requesting that Appellate Defense obtain a copy of the court transcript within the time required by this court.

Please let me know if you have any questions or concerns regarding this.

Respectfully,

Kristy Goldberg

CC: Alphonso Simon
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

George Albert Jones, SCDC # 254442
Broad River Correctional Institution

1720 Main Street • Suite 303 • Columbia, South Carolina 29201
Phone (803) 667-6633 • Facsimile (803) 799-4059

4460 Broad River Road
Columbia, South Carolina 29210

The Honorable Charles Reel
Clerk of Court
Post Office Box 34
Edgefield, South Carolina 29824

Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY 31 2018

S.C. SUPREME COURT

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2012-CP-19-100

George Albert Jones, #254442, ... Appellant

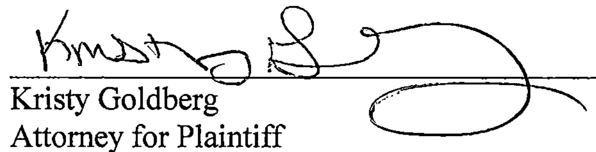
v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant George Albert Jones hereby appeals from the Order of the Honorable R. Lawton McIntosh presiding Judge for the 11th Judicial Circuit, filed April 1, 2014 in the matter of George Albert Jones v. State of South Carolina, Case No. 2012-CP-19-100. This Notice of Appeal is filed under the authority of the Order of Dismissal Granting Appellate Review pursuant to Austin v. State, signed by the Honorable William A. McKinnon on May 16, 2018 and received by counsel for the Applicant on or about May 24, 2018 in the matter of George Albert Jones v. State of South Carolina, Case No. 2017-CP-19-367.

May 29, 2018



Kristy Goldberg
Attorney for Plaintiff

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Other Counsel of Record:

Assistant Attorney General, Alphonso Simon
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAY 31 2018
S.C. SUPREME COURT

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2012-CP-19-100

George Albert Jones, #254442, ... Appellant

v.

State of South Carolina, ... Respondent.

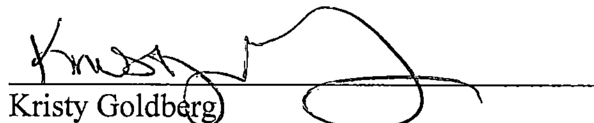
PROOF OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes and states:

She is the counsel of record for Applicant;
Service by mail is proper in this instance; and
She has served the NOTICE OF APPEAL on the following party on May 29, 2018 by depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Alphonso Simon
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

May 29, 2018



Kristy Goldberg

Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
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Phone (803) 667-6633
kristy@kristygoldberglaw.com

STATE OF SOUTH CAROLINA)
COUNTY OF EDGEFIELD)

GEORGE ALBERT JONES)
SCDC # 254442,)
Applicant,)

vs.)

STATE OF SOUTH CAROLINA,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

2017-CP-19-367

ORDER OF DISMISSAL GRANTING APPELLATE REVIEW PURSUANT TO AUSTIN V. STATE[1]

2018 MAY 21 PM 1:20
EDGEFIELD COUNTY
CLERK OF COURT
CHARLES L. REEL

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed October 27, 2017. The Respondent made its Return and "Partial Motion to Dismiss" on November 30, 2017. No Amended Application was filed. The matter was heard by this Court on April 18, 2018 at the Lexington County Courthouse. Applicant was present and was represented by Kristy Goldberg, Esq. Respondent was represented by Alphonso Simon of the Office of the Attorney General. Also present to testify was attorney Courtney Clyburn-Pope, former PCR counsel for Applicant.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Edgefield County Clerk of Court. Applicant was indicted at the July 2009 term of the Edgefield County Grand Jury for Lewd Act with a Minor (2009-GS-19-349); and at the November 2009 term of the Edgefield County Grand Jury for Criminal Sexual Conduct with a Minor, 1st Degree (2009-GS-19-409). Adrian L. Falgione, Esq. represented him during his jury trial held February 2-5, 2010, whereupon he was convicted of both charges. The Honorable William P. Keesley sentenced Applicant to thirty years on the CSC 1st conviction and 15 years on the Lewd Act conviction, both sentences to be run concurrently.

[1] Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

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A notice of appeal was filed, and the appeal was perfected when an Anders[2] Brief of Appellant was filed by Wanda Carter, Esq. with the Office of Appellate Defense on May 16, 2011. The Applicant also filed a Pro Se brief on May 25, 2011. On February 28, 2012, the Court of Appeals dismissed Applicant's appeal in an unpublished opinion. (George Jones v. State, No. 2012-UP-120). The remittitur was issued on March 16, 2012.

2012-CP-19-100

Applicant filed his first application for post-conviction relief on April 18, 2012. An evidentiary hearing was held at the Lexington County Courthouse on November 14, 2013. Applicant was present and was represented by Courtney Clyburn-Pope, Esq. The Respondent was represented by Walt Whitmire, Esq. of the Office of the Attorney General. At the hearing, Applicant testified on his own behalf. The State offered Adrian Falgione, Esq. as a witness at the proceeding. On November 21, 2013 the Honorable R. Lawton McIntosh filed a Form 4 Judgment with the Clerk of Court stating the decision of the court to deny the Application for Post-Conviction Relief and ordering the Attorney General to draft a proposed order. A copy of the Form 4 Judgment was mailed to Mr. Whitmire and Ms. Pope only.

The Application was officially denied and dismissed with prejudice by written order dated March 27, 2014. This order was filed with the Edgefield County Clerk of Court on April 1, 2014. The order stated Applicant must file and serve notice of appeal within thirty days "from the receipt of this order" to secure the appropriate appellate review.

Applicant submitted a written request for counsel to file and serve notice of appeal to the Edgefield County Clerk of Court's office, which was filed on April 17, 2014. The Clerk of

[2] Anders v. State of Cal., 386 U.S. 738, 87 S. Ct. 1396 (1967).

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Court records show that a copy of this letter was forwarded by the Clerk's office to Courtney Clyburn-Pope on April 21, 2014. Counsel for Applicant did not file a Notice of Appeal.

ALLEGATIONS

In his application for post-conviction relief in this action, Applicant presented the following allegations for relief:

(a) Ineffective assistance of PCR counsel for failing to perfect an appeal from the Order of Dismissal. "The defendant was represented at his PCR hearing by Courtney Clyburn Pope, Esquire[.] [Counsel failed] to file the notice of intent to appeal in this case. The defendant [has] been informed by the Clerk of the supreme court the Honorable Daniel E. Shearouse, since relief under Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1991), is sought by filing an application for post-conviction relief in the circuit court;"

(b) "The defendant contends that he never received his Rule 5 discovery to be able to present his defense;"

(c) "Did defendant receive effective assistance of counsel in accordance with the sixth Amendment when his trial counsel was ineffective over all, when he failed to properly prepare for trial, investigate all the elements of alleged crime scene, and challenges to the sufficiency of the indictment;"

(d) SUBJECT MATTER JURISDICTION. As stated in State v. Smalls, 364 S.C. 343, 613 S.E. 2d 754 (2005). Although an indictment does not confer subject matter jurisdiction, due process requires that a criminal defendant be properly served with a valid indictment. State v. Coleman, 17 S.C. 473, 1882 WL 5605 (1882). The indictment in question here, was not valid and the circuit court lacked subject matter jurisdiction in this particular case..

(e) BRADY V. MARYLAND VIOLATION.

At the beginning of the evidentiary hearing, Applicant stated that he would only be presenting argument and testimony regarding the claim for Austin relief and on the subject matter jurisdiction claim.

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

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accordingly. Further, this Court reviewed and considered the Clerk of Court's records regarding the subject convictions, Applicant's prior PCR, Applicant's direct appeal, Applicant's record from the South Carolina Department of Corrections, the current application for post-conviction relief, the transcripts and exhibits from the prior proceedings, and legal arguments of counsel. Pursuant to § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

APPLICANT IS ENTITLED TO RELIEF PURSUANT TO AUSTIN V. STATE

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application because prior PCR counsel, Courtney Clyburn Pope, Esq., failed to timely file a notice of intent to appeal. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395, (1991), a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his prior application.

Where an Applicant is denied an opportunity to properly appeal an adverse final ruling of a court in a post-conviction relief action, he or she may seek limited relief in a subsequent action to correct the unfairness. Austin, 305 S.C. at 454, 409 S.E.2d at 396. "A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived." Odom v. State. 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999) (citing King v. State, 308 S.C. 348, 348-49, 417 S.E.2d 868 (1992)). If the PCR court finds an applicant was denied his or her right to appeal, the applicant can petition for certiorari and the South Carolina Supreme Court will review whether he or she was prejudiced by the failure to obtain appellate review. Id. "The one-year statute of limitations for PCR applications is not applicable to appeals filed pursuant to Austin v. State." Id.

at 263, 523 S.E.2d at 756.

This Court finds Applicant requested appellate review be sought. This Court also finds Applicant was denied an opportunity to seek appellate review from the denial of PCR relief in his first PCR action as a result of PCR counsel's failure to file a notice of appeal from the order of dismissal. Applicant testified that Judge McIntosh orally stated his intention to dismiss the PCR application at the end of the evidentiary hearing. At that time, Applicant informed PCR counsel in person of his desire to appeal the decision. Applicant also testified that, although he never received a copy of the final order from his counsel or anyone else, he wrote a letter to the Clerk of Court informing the Court of his intention to have the matter appealed. This letter was received by the Clerk within thirty days of the filing of the final order denying PCR relief. This letter was provided to PCR counsel by the Clerk's Office. Applicant testified he did not mail the request to the office of Ms. Clyburn-Pope directly because he was never given her mailing address.

PCR counsel testified she did not recall whether or not Mr. Jones asked her to file notice of appeal or whether or not she ever received anything in the mail from him. She stated she could not confirm or deny his testimony. PCR counsel testified she did not have copies of any correspondence between herself and Mr. Jones or notes in her file to submit to the court relevant to this issue.

This Court finds Applicant's testimony was credible in that he made known to PCR counsel orally and in writing his desire to appeal the order denying PCR relief in his prior action, and he relied on Ms. Clyburn-Pope to file the notice of appeal. Applicant was denied his opportunity to appeal the denial of relief from the prior action when PCR counsel did not file the notice of appeal that was requested. Thus, this Court finds Applicant has established he is

entitled to appellate review of the first PCR action under Austin. Therefore, this Court grants Applicant relief pursuant to Austin v. State review of the Order of Dismissal filed April 1, 2014 denying his first PCR application (2012-CP-19-100).

THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION

During the evidentiary hearing, Applicant asserted that he believes the Edgefield County Circuit Court did not have subject matter jurisdiction over his indictments during the week of his trial, February 2-5, 2010. Applicant cited to South Carolina Code of Laws § 14-5-760(1), which provides for the specific terms of general sessions court in Edgefield County and does not include any available terms in February.

This Court would note that this statute was abrogated by Order of the Supreme Court dated July 17, 2009. *See attached Order.* The Order states that the terms of court as set forth in the above referenced statute was cancelled and the circuit court assignments would be posted on the South Carolina Judicial Department's website. The South Carolina Judicial Department website reflects that a term of general sessions court was scheduled in Edgefield County for the week beginning February 1, 2010, and the Honorable William P. Keesley was scheduled to preside over the term. *See attached printout.* Applicant's jury trial was held February 2 – 5, 2010 before the Honorable William P. Keesley.

Accordingly, this Court finds this allegation to be without merit and therefore denies the claim.

THE REMAINING ALLEGATIONS ARE BARRED BY THE STATUTE OF LIMITATIONS AND ARE SUCCESSIVE TO THE PRIOR PCR ACTION.

To the extent Applicant presented additional claims for relief in his application, this Court denies and dismisses those claims because they are barred by the statute of limitations and are successive to the application filed in 2012.

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S.C. Code Ann. § 17-27-45(A) specifically provides that

> [a]n application for relief pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

See also Peloquin v. State, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996) (allowing one-year grace period after effective date of § 17-27-45(A) for inmates whose convictions became final before effective date of statute).

Applicant was found guilty after a jury trial and he was sentenced on February 5, 2010. He then took an appeal, which the South Carolina Court of Appeals dismissed on February 29, 2012. See State v. George Jones, 2012-UP-120 (S.C. Ct.App., Feb. 29, 2012). The remittitur was sent to the Edgefield County Clerk of Court on March 16, 2012.

Applicant thereafter had one year from March 16, 2012, within which to file a PCR Application. He did not file this application until October 27, 2017. See Gary v. State, 347 S.C. 627, 557 S.E.2d 662 (2001) (mailing of a PCR application does not constitute filing, for statute of limitations purposes. Rather, the application is filed when received by the Clerk of Court). This is over five years and seven months after the Court of Appeals sent the remittitur to the Edgefield Clerk of Court, well beyond the limitations period in § 17-27-45(A). Therefore, excepting the claim and grant of relief pursuant to Austin v. State, the Court dismisses the application as barred by the statute of limitations.

Furthermore, this Court finds these additional claims are successive to the prior application. The Uniform Post Conviction Procedure Act provides that:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a

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> subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

S.C. Code Ann. § 17-27-90 (Supp. 2016).

"This statute forbids a successive PCR application unless an applicant can point to a 'sufficient reason' why the new grounds for relief he asserts were not raised, or were not raised properly." Aice v. State. 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). See also McCoy v. State, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013) ("Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing"); Robertson v. State, 418 S.C. 505, 519, 795 S.E.2d 29, 36 (2016). ("An individual under PCR effectively is granted one chance to argue for relief and must do so within a year of his final appeal. These limitations adequately prevent inmates from abusing the PCR process."); Wade v. State, 348 S.C. 255, 264, 559 S.E.2d 843, 847 (2002). Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

The Supreme Court in Aice expressly declined to interpret the term "sufficient reason" to include the ineffectiveness of original PCR counsel. Instead, the Court noted that it had defined this phrase "very narrowly" by Court Rule, and it held that "as long as it was possible to raise the argument in his first PCR application, an applicant may not raise it in a successive application. .... We will not engage in an exploration of why the grounds were not raised, it is sufficient that they could have been raised, but were not" Aice, 305 S.C. at 448, 409 S.E.2d at 392

Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief. Therefore, he has failed

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to meet the burden imposed upon him, and excepting the claim and grant of relief pursuant to Austin v. State, the Court dismisses the application as successive to Applicant's previous PCR application.

CONCLUSION

This Court finds that the grant of relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) is proper. This Court further finds Applicant's claim the trial court lacked subject matter jurisdiction is without merit. All other allegations are dismissed as untimely and successive.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from his attorney'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, his attorney 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.

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IT IS THEREFORE ORDERED:

1. That this current Application for Post-Conviction Relief be dismissed.
2. That the Applicant is granted an appeal from the denial of his first PCR application – filed April 18, 2012 and captioned 2012-CP-19-100.
3. The Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 16 day of May, 2018.

#2761

The Honorable William A. McKinnon
Presiding Judge

Lexington, South Carolina

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The Supreme Court of South Carolina

EDGEFIELD COUNTY
CLERK OF COURT
CHARLES L. REEL
2018 MAY 21 PM 1:21

ORDER

Pursuant to the provisions of S. C. CONST. Art. V, §4, the statutory terms of circuit court set forth in §14-5-620 through §14-5-820, 1976 Code of Laws of South Carolina, as amended, for the period commencing January 3, 2010 and ending July 3, 2010, are hereby canceled.

IT IS ORDERED that the terms of circuit court and assignment of circuit judges to preside over these terms for the period commencing January 3, 2010 and ending July 3, 2010, shall be as set forth on the South Carolina Judicial Department's WEB site at www.judicial.state.sc.us/calendar which schedule is incorporated herein and made a part hereof by reference. Additional terms of court may be scheduled and assignments or reassignments of circuit judges may be made during this period by subsequent orders. Where a circuit-wide nonjury term is indicated, the Chief Circuit Judge for Administrative Purposes for the circuit shall designate the time and location of the term among the counties within the circuit. In those circuits with two chief judges for administrative purposes, these responsibilities shall be assumed by the chief judge for administrative purposes for the court of common pleas. A term designated as a circuit wide administrative week shall be held at such times and locations within the circuit as designated by the Chief Circuit Judge for Administrative Purposes assigned to that term.

The general assignment of judges to judicial circuits pursuant to the provisions of S.C. CONST. Art V, §14, will be made by separate order.

Jean Hoefer Toal
Chief Justice

July 17, 2009
Columbia, South Carolina

February | 2010 | Go To Date

Terms of Circuit and Family Court
February 2010

Holiday:
Mon Feb 15. President's Day

Circuit Number	2/1/2010	2/8/2010	2/15/2010	2/22/2010
11	General Sessions Edgefield Keesley, William SHEPPARD Common Pleas Non-Jury/PCR McIntosh, R. THUEME 1, 2, 3 HARRIS 4 THOMAS 5 Common Pleas Lexington McMahon, R. PANTSARI	General Sessions Edgefield Keesley, William NO CR NEEDED 8, 9, 10 SHEPPARD General Sessions Lexington McMahon, R. PANTSARI General Sessions Lexington Russo, Thomas NO CR NEEDED 8, 9, 10 THUEME 11, 12 General Sessions Lexington Keesley, William SHEPPARD 8, 9, 10 NO CR NEEDED 11, 12 General Sessions Edgefield Russo, Thomas THUEME 8, 9, 10 NO CR NEEDED 11, 12		General Sessions McCormick Keesley, William SHEPPARD General Sessions Lexington McMahon, R. PANTSARI General Sessions Lexington McIntosh, R. THUEME 22, 23 NAY 24, 25, 26
	Family Court Lexington Chewning, Richard W. SHEALY Family Court Lexington Allen, Kellum W.	Family Court 9 Lexington Chewning, Richard W. SHEALY 9 Family Court 9 Saluda	Family Court Lexington Chewning, Richard W. SHEALY Family Court Lexington Allen, Kellum W.	Family Court Lexington Chewning, Richard W. SHEALY Family Court Lexington Allen, Kellum W.

	KAISER	[illegible] DERRICK 9 Family Court 12 Lexington Allen, Kellum W. KAISER 12	KAISER [illegible] COLLINS 19 Family Court Edgefield / McCormick / Saluda Neese, Deborah DERRICK Family Court 16 Lexington Neese, Deborah KAISER 16 Family Court 16 Edgefield / McCormick / Saluda Allen, Kellum W. DERRICK 16	KAISER [illegible] HARRIS 24, 25, 26 Family Court Lexington Neese, Deborah DERRICK

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
COUNTY OF EDGEFIELD	)	Case No. 2012-CP-19-100
George A. Jones, S.C.D.C. No. 252442, Applicant, v. State of South Carolina, Respondent.	)	**ORDER OF DISMISSAL**

EDGEFIELD COUNTY
CLERK OF COURT
SHIRLEY F. NEWBY
2014 APR -1 AM 10: 21

This matter comes to this Court by way of an Application for Post-Conviction Relief filed April 18, 2012. Respondent made its Return on March 13, 2013. A hearing was convened on November 14, 2013 at the Lexington County Courthouse. Applicant was present and was represented by Courtney Clyburn-Pope, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Edgefield County. The Applicant was indicted at the July 2009 term of the Court of General Sessions for Edgefield County for lewd act with a minor (2009-GS-19-349) and criminal sexual conduct with a minor, first degree (2009-GS-19-409). Adrian L. Falgione, Esq., represented Applicant. On February 5, 2010 a jury convicted Applicant as indicted. The Honorable William P. Keesley sentenced Applicant to a term of thirty (30) years imprisonment for the criminal sexual conduct with a minor, first-degree and to a term of fifteen (15) years imprisonment for lewd act. The sentences were to be served concurrently.

A notice of appeal was filed on Applicant's behalf and perfected by Wanda Carter, Esq., of the Office of Appellate Defense. On February 29, 2012 the Court of Appeals affirmed Applicant's sentence and conviction in an unpublished opinion. (George Jones v. State, No. 2012-UP-120). The remittitur was issued on March 16, 2012. At the PCR hearing, Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
   a. Failure to prepare Applicant's case for trial;
   b. failure to investigate and beneficial witnesses;
   c. failure to consult an expert witness to refute the State's herpes diagnosis;
   d. failure to advise Applicant to exercise his right to not testify;
2. Prosecutorial misconduct:
   a. failure to disclose DSS materials on the victim's mother.

SUMMARY OF TESTIMONY

Applicant alleged counsel was ineffective for failing to adequately prepare his case for trial. Applicant testified he was only provided a portion of the State's discovery disclosure on the eve of trial. He stated that he never received information from the State regarding the victim or the victim's mother. He stated counsel never discussed defenses with him. He testified that counsel failed to adequately present the defense theory that the victim's mother or another third party exposed the victim to genital herpes.

Applicant alleged counsel was ineffective for failing to interview character witnesses that would have been beneficial to the defense. He testified that he was a supportive father. He testified that counsel should have interviewed the victim's grandmother as a character witness. He opined that victim's grandmother would have conveyed important timeline information to counsel that showed when he lived with and cared for his family. Applicant alleged counsel should have also interviewed his sister and his cousin as potential character witnesses. Next,

Applicant alleged counsel should have interviewed Larry Galbraith. He stated that Galbraith was intimately involved with the victim's mother prior to the offense. He opined counsel could have used this to refute the victim's mother's allegation that Applicant exposed her to genital. Applicant further opined by inference that counsel should have used Galbraith to establish third party guilty because he had access to the home and the victim. Last, Applicant alleged counsel should have presented the victim's mother as a defense witness at trial. He testified that D.S.S. documents proved the victim's mother had genital herpes. He claimed that the D.S.S. matters were not mentioned at his trial.

Applicant alleged counsel was ineffective for failing to consult an independent medical expert to prove Applicant did not expose the victim to genital herpes. He testified that the State's medical expert testified at trial that the victim was specifically diagnosed with genital herpes while his diagnosis did not specify between genital herpes or the more common and benign version that is not attributed to sexual contact.

Last, Applicant alleged counsel was ineffective for failing to properly advise him on his right to testify in his own defense. He stated counsel "never told him what to say" on the stand and that he was unaware of counsel's trial strategy. He suggests that his trial testimony would have been more credible and convincing had counsel provided adequately performance here.

Counsel testified to his course of conduct during the representation. Counsel has twenty-four years of criminal trial experience and recalled this case to have been a difficult case. He testified that he tried the case to the best of his ability. Despite counsel's late appointment, he met with Applicant five times. Counsel obtained funding for a private investigator who also met with Applicant five times. In addition, counsel communicated with Applicant by phone and correspondence. Counsel noted that he purposefully only provided Applicant with portions of the

discovery materials. His rationale behind the general practice resulted from concerns that the physical copies of sensitive materials were at a high risk to be improperly circulated in the county jail. Thus, counsel utilized his investigator as a conduit for discovery. Counsel formulated a defense theory to establish a case for reasonable doubt; the strategy included distancing Applicant from the victim's genital herpes diagnosis and exploiting inconsistent statements made by the victim. It was counsel's opinion that the strategy was essential because the victim made a credible and sympathetic witness. It was counsel's opinion that his performance was sound. He noted that he was successful in getting the Dissemination of H.I.V. charge dismissed. Importantly, the early victory resulted in the trial judge sustaining his Rule 403, SCRE, motion that prevented the State from presenting testimony or evidence that mentioned Applicant's H.I.V. diagnosis.

Counsel investigated the victim's mother and discussed presenting her as a trial witness with Applicant. It was counsel's opinion that she would have been a harmful witness to the defense for several reasons. First, Applicant was convicted on criminal charges for getting her pregnant when she was thirteen or fourteen years old..Counsel did not want to open the door here at trial. Second, the victim's mother suffered from mild mental retardation and would have made a sympatric witness that could have personally turned the jury against Applicant. Third, the victim's mother was adamant that Applicant exposed her to genital herpes. Counsel independently investigated Culbraith and advised Applicant he would not have been a beneficial defense witness. Counsel noted that Culbraith was adamant that he never engaged in inappropriate conduct with the victim. Further, Culbraith's prior history made him a combustible witness.

Counsel testified Applicant's case did not warrant consulting an independent medical expert. First, counsel noted that he did not know of an expert who could testify that there was a realistic probability that the victim's mother infected the victim with genital Herpes through inadvertent non-sexual contact. Second, counsel noted that he prepared a thorough cross-examination of the State's medical experts to distance Applicant from a genital herpes diagnosis.

Counsel advised Applicant on his right to testify during trial preparations. He cautioned Applicant from deciding to testify. Applicant notified counsel in the middle of trial that he now wanted to testify in his defense. Counsel further cautioned him despite his persistence. Applicant told counsel that he thought he was sufficiently prepared to testify. The private investigator frantically did his best to prepare Applicant for the solicitor's cross-examination. Counsel warned Applicant that this particular solicitor was a seasoned and aggressive prosecutor. Counsel testified Applicant's late decision adversely affected the manner in which he presented the case. Furthermore, he noted that he would have devoted more time to preparing Applicant on the matter leading up to trial. Specifically, counsel stated he would have reinforced the necessity of testifying consistently to Applicant. Counsel stated that he had no doubt Applicant's testimony hurt the case where Applicant was impeached with a damaging statement when he got caught in a lie.

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, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 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. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, *supra*. Second, counsel's 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

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 reviewed the Clerk of Court's records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and exhibits from the prior proceedings, and legal arguments of counsel. 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 counsel's performance well above of Strickland's threshold sufficiently requirement. This Court finds counsel's testimony at the PCR hearing to be convincing. The fact that counsel presented a vigorous defense case while having to meander through delicate situations where any minor misstep would have opened the door for the State to present prejudicial testimony and evidence was impressive. Most of Applicant's issues in light an absence of supporting witness testimony at the hearing. Last, this Court finds Applicant's conviction was supported by overwhelming evidence of his guilt that included the victim's trial testimony that was corroborated by the medical evidence and Applicant's inconsistent trial testimony.

A.

This Court finds Applicant failed to meet his burden to prove counsel was ineffective for failing to properly investigate and prepare his case. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). "[B]revity of time spent in consultation, without more, is insufficient to establish ineffective assistance of counsel." Smith v. State, 404 S.C. 493, 499, 745 S.E.2d 378, 381 (Ct. App. 2012). This Court finds counsel's testimony significantly more credible than Applicant's testimony. Applicant has presented no credible evidence to show that he was not fully apprised of all relevant developments in his case. Nor has counsel presented credible evidence that even remotely calls into question the outcome at trial. See Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (finding PCR judge erred in finding counsel ineffective in preparing respondent's case where respondent failed to show how his counsel's lack of preparation prejudiced him given

respondent did not "present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Furthermore, counsel's decision to not provide Applicant with physical copies of the discovery disclosures was valid under the circumstances of the case. See Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."). As a result a result of Applicant's confinement in pre-trial detention, counsel made an intelligent decision to protect sensitive materials from being leaked to a potential "jailhouse witness." This Court finds that counsel took appropriate measures to keep Applicant apprised of developments in the case. The private investigator met with Applicant on a number of occasions. Therefore, this allegation is denied and dismissed.

For similar reasons announced above, this Court finds Applicant failed to meet his burden to prove counsel was ineffective for failing to interview and present certain allergy beneficial defense witnesses. This Court again finds counsel's testimony more credible than Applicant's testimony. "Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR." Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) Counsel's suspect testimony regarding his predictions on how the victim's mother, victim's grandmother, Culbraith, sister, and Investigator Young would have benefited his case lacked corroboration. See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."). However, in the interest of judicial economy this Court finds counsel presented valid reasons for limiting his investigation and not

presenting the mentioned witnesses at trial. This Court finds counsel made a necessary decision to not present the victim's mother at trial. Regardless of her consistent account that Applicant infected her with genital herpes, the threat that the jury might hear of Applicant's prior unlawful sexual intercourse with her was alone sufficient to support counsel's decision on the matter. Furthermore, this Court finds counsel conducted a limited investigation of the victim's mother based upon counsel's sound opinion of her utility to his defense theory.[1] Again, counsel made a valid strategic decision to not present Culbraith. He consistently denied any misconduct with the victim and would have testified in a hostile manner. See Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011) (citing Murray v. Griffith, 243 Va. 384, 416 S.E.2d 219, 222 (1992) (finding counsel's failure to interview a particular witness not deficient where the witness's testimony would have been cumulative and witness himself could have been harmful to the defense). The other alleged witnesses that Applicant mentioned were immaterial.

Last, this Court finds Applicant failed to meet his burden to prove counsel was ineffective for failing to consult an independent medical expert to support the defense theory that the victim's mother most likely infected the victim. Again, Applicant failed to present a relevant expert witness at the PCR hearing to show that he was prejudiced from counsel's performance here. Regardless, this Court finds counsel's performance in cross-examining Dr. Gordineer and Dr. Brenner to be exemplary. (Trial Tr. p.124; p.248). This Court notes that as a result of counsel's competent performance here, Applicant fortuitously received a windfall benefit from the imprecise Herpes testing from Applicant's blood sample employed by the State. See Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) ([C]ounsel's failure to procure expert witnesses did not render her representation deficient given she vigorously cross-examined

[1] This Court notes Applicant incorrectly pleaded this allegation as prosecutorial misconduct but presented as ineffective assistance of counsel at the PCR hearing. Regardless, counsel successfully obtained relevant D.S.S. documents. (Trial Tr. pp. 10-12). Therefore, this allegation is summarily denied and dismissed.

the State's witnesses and attacked the accuracy of the evidence."). Therefore, these allegations are denied and dismissed.

C.

This Court finds Applicant's allegation that counsel failed to adequately advise him on the possible detriments exercising the constitutional right to testify in one's defense. "The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const.Amend. V. The decision to testify or not is a perilous one." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Id. This Court finds counsel's testimony credible that he discussed the relevant constitutional rights and waivers in addition to strategic impacts of the decision well in advance of trial with Applicant. Counsel testified he did everything possible to prepare Applicant to testify when Applicant surprised him with his late decision at trial. See Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) ("We have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial."). In contrast, this Court finds Applicant's testimony irrational and unconvincing. Thus, this Court notes any prejudicial impact Applicant suffered as a result of his decision to testify cannot be associated with counsel's performance. See U.S. v. Pellerito, 878 F.2d 1535, 1543 (1st Cir. 1989) ("If counsel was ineffective in any sense, it was only because the client rendered him so, first by keeping Noriega in the dark, and then, by refusing to heed his advice. That is not the sort of "ineffectiveness" for which relief can be granted."). This Court finds counsel worked diligently to prepare Applicant to testify under the circumstances. This Court is convinced counsel sufficiently advised Applicant of the potential dangers at play prior to him taking the stand. Regardless, the trial judge conducted a thorough colloquy on the matter.

(Trial Tr. pp.340-48). See Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 381 (Ct. App. 2012) ("Further, the record shows the trial judge informed petitioner of his right to testify or not testify, and petitioner agreed with the trial judge that he had discussed this right with trial counsel."). Therefore, this allegation is denied and dismissed.

E.

Except as discussed above, this Court finds that the Applicant affirmatively abandons the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. 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 intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is

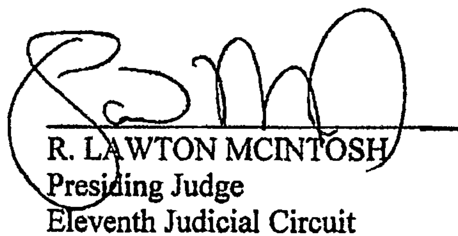
also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed:

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 27 day of March, 2014.



R. LAWTON MCINTOSH
Presiding Judge
Eleventh Judicial Circuit

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