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OCT 15 2018
S.C. SUPREME COURT

October 11, 2018

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

Re: Daniel Owens vs. State of South Carolina
C/A No: 2015-CP-33-0434

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Owens in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,

Jonathan D. Waller

Cc: Lindsey A. McCallister, South Carolina Office of Attorney General

Enclosures

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STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
OCT 15 2018
S.C. SUPREME COURT

APPEAL FROM MARION COUNTY
Michael G. Nettles, Circuit Court Judge

2015-CP-33-0434

Daniel Owens, Jr., #356538,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Daniel Owens, Jr., #356538, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed September 19, 2018, issued by the Honorable Michael G. Nettles, Presiding Judge, Twelfth Judicial Circuit.

Jonathan D. Waller

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ATTORNEY FOR PETITIONER

October 11, 2018

Other Counsel of Record:

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STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM MARION COUNTY
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2015-CP-33-0434

Daniel Owens, Jr., #356538,

Appellant,

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STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Lindsey A. McCallister, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to her office located at P.O. Box 11549, Columbia, SC 29211.

Christopher Leventis

Christopher Leventis

October 11, 2018

STATE OF SOUTH CAROLINA COUNTY OF MARION	)	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT
Daniel Owens, Jr., #356538, Applicant, v. State of South Carolina, Respondent.	)	C.A. No. 2015-CP-33-0434 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed by Daniel Owens, Jr. (Applicant) on April 28, 2015, and received by Respondent on January 8, 2017. Respondent made its Return on April 19, 2017. An evidentiary hearing into the matter was convened on November 15, 2017, at the Florence County Courthouse before the undersigned. Jonathan Waller, Esquire, represented Applicant. Lindsey A. McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant's sister, Doris Bryant, and trial counsel Thurmond Brooker, Esquire (Counsel), also testified. Margaret Grover, the grandmother of the victims, testified on behalf of Respondent. This Court also had before it a copy of the records of the Marion County Clerk of Court, records from the South Carolina Department of Corrections, the application, Respondent's Return, the trial transcript, and Applicant's appellate records.

PROCEDURAL HISTORY

Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Marion County Clerk of Court's orders of commitment. Applicant was indicted by

the February 2010 term of the Marion County Grand Jury for one count each of first-degree criminal sexual conduct with a minor (2010-GS-33-0050), and committing or attempting a lewd act on a minor (2010-GS-33-0050). Thurmond Brooker, Esquire, represented him. On August 12-14, 2013, Applicant proceeded to trial before the Honorable Steven H. John and a jury. Applicant was found guilty as indicted on both charges. Judge John sentenced Applicant to thirty-five years' imprisonment for first-degree criminal sexual conduct and fifteen years' imprisonment for a lewd act on a minor. The sentences are to be run concurrently.

Applicant filed a timely notice of appeal. An appeal was perfected by Benjamin John Tripp, Esquire. The South Carolina Court of Appeals dismissed Applicant's appeal by Order filed March 18, 2015. State v. Owens, Op. No. 2015-UP-154 (S.C. Ct. App. filed March 18, 2015). The Remittitur was returned on April 3, 2015.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel
    a. "Failed to do the necessary pre-trial investigations that would have provided counsel with information and data to prepare an effective defense for the applicant."
    b. "Failed to formulate an effective line of defense against the charges."

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 PCR 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 (2003).

Applicant alleges he received ineffective assistance of counsel. In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "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 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688 (1984)). 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. A reasonable

probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

"[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) (reversed on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014)). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). Further, "[d]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include 'which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.'" Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (quoting Sexton v. French, 163 F.3d 874, 885 (4th Cir.1998)).

Applicant testified his sister retained Counsel for him, and Counsel came to meet with him at the jail. Applicant testified he was charged with two separate incidents, which occurred in 2004 and 2007, with two separate victims. According to Applicant, he and Counsel met several times to discuss the case, including Applicant's version of the facts. Applicant testified he and Counsel

watched the victims' forensic interviews together and discussed the medical reports, which found no physical evidence of sexual abuse.

Applicant also testified the State alleged first incident took place at his brother, David's, house, and Applicant told Counsel he and his brother did not get along and did not have a relationship in 2004. Applicant also testified he discussed the 2007 incident with Counsel, which the State alleged took place at Applicant's trailer home. Applicant testified he told Counsel to investigate the use of a key to unlock the bedroom door, because according to Applicant, only the front and back doors could be locked or unlocked with a key. Applicant further testified he told Counsel the victim could not have washed the sheets the next morning as she claimed because the trailer home did not have a washer and dryer at the time. However, Applicant conceded he had sold the trailer "to a man in Charleston" by the time of his arrest in 2009.

Applicant also testified he obtained a statement from the girls' father attesting that Applicant had not been around the children, but he did not know what was done with the statement, if anything. Further, Applicant testified the case arose because one of the girls reported the abuse to "Doris," and Applicant has a sister named Doris who did not testify at trial.

Doris Bryant testified she is Applicant's sister and is the only Doris in their family. Ms. Bryant testified the victims were her great-nieces, and neither of them had ever disclosed any abuse to her. Further, Mrs. Bryant testified law enforcement never interviewed her. Mrs. Bryant also testified she went to Counsel's office to watch the girls' forensic interviews, and she told Counsel the girls had never disclosed abuse to her. Finally, Mrs. Bryant testified she lives in Darlington and was not present at Applicant's trial.

Counsel testified this case arose when two sisters made separate allegations against Applicant – one from a 2004 incident and one from a 2007 incident. Counsel testified the

disclosures made to two aunts; the 2004 allegations were disclosed to "Aunt Michelle," who testified at trial, and the 2007 allegations were disclosed to "Aunt Doris," who did not testify at trial. According to Counsel, Michelle then reported what the girls said to their paternal grandmother, who made a report to law enforcement and took the girls to the doctor.

Counsel testified the girls were then given forensic interviews at Care House, which were recorded, and which he reviewed with Applicant. Counsel testified there was a statement in discovery from the victims' grandmother, but no statement from either Doris or Michelle, and he asked for them, specifically, prior to trial. Counsel further testified he was "perplexed" by Mrs. Bryant's testimony, and he had not been told of her existence prior to trial. Counsel testified he specifically discussed possible witnesses who could help counter the allegations with Applicant, who gave him the names of Michelle and the girls' mother and father. Counsel further explained it is his standard practice to have his client or other family members contact potential witnesses and ask the witnesses to call Counsel's office. Counsel testified this method usually works better than attempting to contact witnesses himself when the family has a relationship with them. Counsel further testified the family was instrumental in putting him in contact with the mother, father, and Michelle, but no one named Doris ever contacted him.

Counsel testified if Doris had contacted him with this information, he would have asked her to testify. However, he testified it is his practice not to subpoena uncooperative witnesses because they can devastate a trial, and he will not put a witness on the stand if he does not know what the witness will say.

Margaret Grover testified she is the victims' biological grandmother, now mother, as she is raising them. Ms. Grover testified the Doris to whom the girls first disclosed the abuse is her husband's sister, not Ms. Bryant.

This Court finds Applicant has failed to prove Counsel's performance was deficient in any way. Counsel investigated the existence of an "Aunt Doris" to the best of his ability. Counsel credibly explained why, as a matter of course, he does not subpoena witnesses who have not shown an interest in participating in the defense and when he does not know what they will say at trial. This Court finds Counsel's strategy is valid, and Counsel made a reasonable decision not to subpoena a witness whose testimony he had never heard. Additionally, the Court finds the witness called by Applicant at the evidentiary, Doris Bryant, is not the same "Aunt Doris" described and discussed at trial. See Tr. pp. 115-16, 238. Therefore, this Court further finds Applicant has failed to prove he was prejudiced by any deficiency in Counsel's investigation of Doris because he has failed to produce the witness he alleges should have been called to testify. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (holding a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence in order to prove counsel was ineffective for failing to call a witness.). Applicant's speculation as to the existence of helpful witnesses and/or testimony is insufficient to meet his burden on this allegation. Accordingly, this allegation is denied and dismissed.

CONCLUSION

Based on all 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. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel's representation. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.

MICHAEL G. NETTLES
Presiding Circuit Court Judge
Twelfth Judicial Circuit

FILED
2018 SEP 19 AM 10:11

September, 2018
9-7, South Carolina

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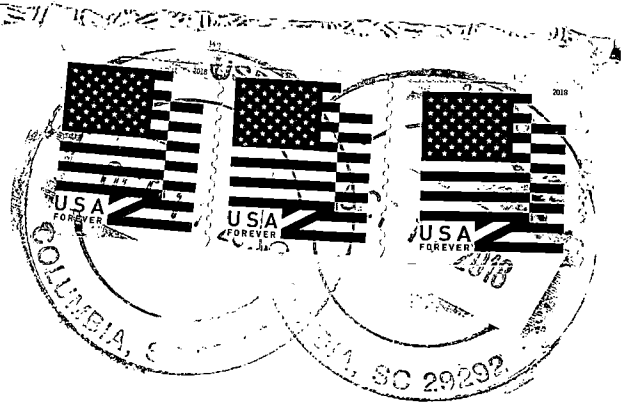

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