

McMAHAN & TAYLOR
ATTORNEYS LLC

March 15, 2019

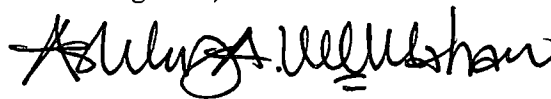
The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Johnny Neal Sexton, II, v. State of South Carolina
2018-CP-32-01143

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal along with the accompanying Order for the above-referenced matter. By way of this letter I am copying the Office of Appellate of Defense, as I was appointed to represent Mr. Sexton.

Best regards,



ASHLEY A. McMAHAN
ATTORNEY AT LAW

AAM

cc: Johnny Neal Sexton, II
Taylor Z. Smith, Asst. Attorney General
Lexington County Clerk of Court
Office of Appellate Offense

RECEIVED
MAR 18 2019
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Walton J. McLeod, IV, Circuit Court Judge

Case No. 2018-CP-32-01143

Johnny Neal Sexton, II, #363922, Petitioner,

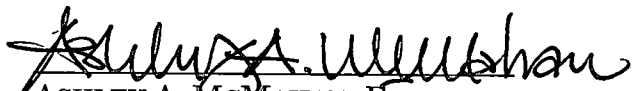
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant, Johnny Neal Sexton, II, appeals the order of the Honorable Walton J. McLeod, IV, dated March 1, 2019, and filed March 5, 2019.

Mar. 15th, 2019


ASHLEY A. McMAHAN, ESQUIRE

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ashley@macvance.com

SC Bar No. 71676

ATTORNEY FOR APPLICANT

Opposing Counsel:
Taylor Z. Smith, Asst, Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

RECEIVED

MAR 18 2019

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Walton J. McLeod, IV, Circuit Court Judge

Case No. 2018-CP-32-01143

Johnny Neal Sexton, II, #363922,Petitioner,
v.

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

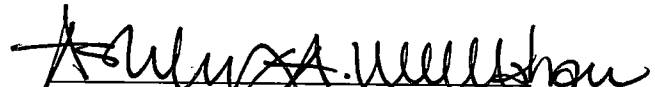
PROOF OF SERVICE

I, Ashley A. McMahan, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Taylor Z. Smith, Asst, Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

I further certify that all parties required by Rule to be served have been served.

Mar. 18th, 2019


ASHLEY A. McMAHAN, ESQUIRE

McMAHAN & TAYLOR, ATTORNEYS, LLC

PO Box 5501
West Columbia, SC 29171
803-219-1110

FILED

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON FOR THE ELEVENTH JUDICIAL CIRCUIT

Johnny Neal Sexton, II, #363922
LISA M. ECKER
CLERK OF COURT
LEXINGTON, SC

Case No. 2018-CP-32-01143

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

This matter comes before this court by way of an application for post-conviction relief filed April 3, 2018, by Johnny Neal Sexton, II (Applicant) and an amendment thereto filed January 20, 2019. The State of South Carolina (Respondent) made its return on July 5, 2018, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on January 24, 2019, at the Lexington County Courthouse before Judge Walton J. McLeod, IV. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Assistant Attorney General Kelly Oppenheimer, of the South Carolina Attorney General's Office, represented Respondent.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this court finds Applicant has failed to establish any constitutional violations and denies this application with prejudice.

PROCEDURAL HISTORY

The records before this court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. During its April 2015 term, the Lexington County Grand Jury indicted Applicant for three

counts of unlawful conduct towards a child (2015-GS-32-00989; -00990; -00991). Assistant Public Defender David M. Mauldin, of the Eleventh Circuit Public Defender's Office, represented Applicant on these charges. Senior Assistant Solicitor Rhonda W. Patterson and Assistant Solicitor Shannon A. Davis, both of the Eleventh Circuit Solicitor's Office, prosecuted the case. On April 15, 2015, Applicant's case was called to trial before Judge Thomas A. Russo. Due to Applicant's failure to appear for trial, Judge Russo found Applicant had proper notice his case would be called to trial and would be tried in his absence should he fail to appear. *See* Tr. 43, 61. Applicant was, therefore, tried in his absence on April 15-17, 2017, before Judge Russo and a jury. Following deliberations, the jury convicted Applicant as indicted on all counts. Judge Russo sentenced Applicant to consecutive terms of imprisonment of eight years for each charge, sealed the sentence, and issued a bench warrant for Applicant's arrest. Thereafter, on May 6, 2015, Applicant appeared before Judge R. Keith Kelly for sentencing. At the hearing, Judge Kelly imposed Judge Russo's sentence.

Applicant filed a timely notice of appeal, and Appellate Defender LaNelle Cantey DuRant, of the South Carolina Commission on Indigent Defense, Office of Appellate Defense, perfected an appeal on Applicant's behalf. On appeal, Applicant raised the following issues:

1. Whether the court erred in allowing Agent Mike Merckle to give his opinion that the substances in two mason jars were Coleman fuel and ether, both necessary ingredients for making "meth," when the substances were never tested in [Applicant's] case although Agent Merckle had tested similar substances in prior cases; therefore, the opinion was not reliable as shown by the judge instructing the jury on the spoliation of evidence; thus, the judge failed to fulfill his role as gatekeeper of the reliability of the evidence; [and]
2. Whether the court erred by ruling admissible the testimony that [Applicant] did not attend the subsequent DSS legal hearings on his three children, which were outside the time period stated in

the indictments, and therefore irrelevant to the crime of unlawful conduct towards a child, as well as the witness's testimony that [Applicant] did not show interest in getting his children back, since this testimony was a gratuitous attack and highly prejudicial?

Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence by unpublished opinion on December 6, 2017. *State v. Sexton*, Op. 2017-UP-454 (S.C. Ct. App. filed December 6, 2017). The remittitur was issued on December 28, 2017.

STATEMENT OF FACTS

Applicant was the children's father, and the family, including the three children, lived in a small camper between November 1, 2013, and February 21, 2014. The children's mother testified Applicant manufactured methamphetamine in the camper and his van during that time, and she and Applicant smoked methamphetamine inside the camper while the children were present. During cross-examination, Applicant implied the mother testified against him because he left her in January 2014, and prior to the arrival of law enforcement on February 21, 2014, he confronted her about her drug use and threatened to take the children away from her, all of which the mother denied. Tr. pp. 80-110.

A Lexington County Deputy testified he went to the camper in January 2014 and served eviction paperwork on Applicant personally. When he went back to the camper in February 2014 to eject the family, he met a Department of Social Services (DSS) caseworker who was going to the camper as well. Applicant was not at the camper when they arrived, and the deputy served the writ of ejectment on the mother, who consented to the deputy and caseworker entering the camper. The children were sitting inside the camper, and the deputy saw items he believed may be related.

to manufacturing methamphetamine sitting in the kitchen area, so he immediately escorted everyone outside and contacted narcotics investigators. Tr. pp. 110-23.

Agent Michael Merckle, of the Lexington County Sheriff's Department, testified he responded to the camper location in February 2014 to investigate the possibility of a methamphetamine lab. After describing the different types of methamphetamine labs, he stated the chemicals required to manufacture methamphetamine are very toxic and flammable, and having them around children, especially in a small, confined space like the camper, would be extremely dangerous. Tr. pp. 170-77.

The camper contained items associated with a methamphetamine lab, including mason jars containing liquid substances, coffee filters, and a coffee grinder containing what appeared to be ground pseudoephedrine, which is a central ingredient in methamphetamine. Over Applicant's objection, Agent Merckle testified based on his training and experience, the mason jars contained Coleman camp fuel and ether, which he identified by the smell and appearance. He further testified the chemicals in the jars were destroyed because they are potentially harmful, and cannot be stored in an enclosed evidence storage facility to be handled by personnel who are not specifically trained to do so. Tr. pp. 177-84.

The DSS caseworker who was present at the camper in February 2014, testified she was there to investigate an allegation of child abuse or neglect received by DSS. She stated there was little food inside the camper, and the children were only "minimally clean." The children were placed in emergency protective custody that day due to the circumstances and risk of harm to them. There were several subsequent hearings regarding the children's custody, and the mother, who was incarcerated, attended each one. Tr. pp. 203-12.

The State then asked the caseworker if Applicant had attended any of the hearings or shown any interest in getting his children back, and she replied "no." Applicant objected, arguing all the custody hearings occurred outside the dates included in the indictments and the State's question elicited "improper bad act evidence," and moved for a mistrial. The State responded the question related to Applicant's allegation he came to get the children in February 2014 because he wanted to take care of them because of the mother's drug use and showed he had no interest in the children. The court denied the mistrial motion, finding the question was an appropriate response to Applicant's allegations. Tr. pp. 213-16.

CURRENT APPLICATION

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

1. Ineffective Assistance of Counsel:
 - a. Did not have my best interest in mind while he was supposed to be investigating and preparing my case;
 - b. Neglected the necessary investigations and the preparation of my case;
 - c. My defense attorney did not try to have my case settled in a matter that would have been to my best advantage;
 - d. My defense attorney never explained to me or discussed with me how the elements of the crime charge[d] and the evidence that the prosecution planned to introduce into evidence against me related to one another and did not discuss how the sentencing would be done especially as it related to the elements of the crime as in State v. Boyd;
 - e. Knowing I was illeterate [sic] in the law, never properly ascertained whether or not I actually understood or comprehended all of the issues that were involved in my case;
 - f. Ineffective assistant [counseling];
 - g. Did not hear from him until about 2 weeks before my trial started;
 - h. Did not get anyone to testify on my behalf;
 - i. I asked him if I had a chance to win and he said yes;

- j. He never told me what the prosecution plan was;
- k. I didn't understand what the laws were; [and]
- l. I didn't have his full attention, and I [feel] like he could have done more for me.

In his amended application for post-conviction relief, Applicant raises the following additional grounds for relief:

1. Ineffective Assistance of Counsel:
 - a. Counsel failed to file a motion to reconsider the sentence;
 - b. Counsel failed to call Applicant's aunt, Deborah Wright, as a witness on his behalf at the trial; [and]
 - c. Counsel informed the Applicant that he had a good chance of winning if he went to trial.

At the evidentiary hearing, Applicant proceeded forward on the following allegations of ineffective assistance of counsel for:

1. Failing to prepare for trial;
2. Failing to investigate;
3. Failing to file a motion to reconsider the sentence; and
4. Informing Applicant he had a good chance of winning if he went to trial.

Additionally, at the hearing, Applicant waived his allegation of ineffective assistance of counsel for failing to call Applicant's aunt as a witness on his behalf at trial, as raised in his amended application for post-conviction relief.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented the testimony of Assistant Public Defender Mauldin (Counsel). This court also had before it a copy of Applicant's trial transcript, the records of the Lexington County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, and Applicant's appellate records.

During the evidentiary hearing, Applicant testified on his own behalf. Applicant testified he met with Counsel once or twice in Counsel's office while Applicant was out on bond for about thirty to forty-five minutes. He testified he could not specifically recall everything from his conversations with Counsel. He further testified they did not discuss much about his case, but they did discuss Applicant's aunt would be the only witness at trial. He elaborated he and Counsel discussed that his defense would be he was not at the house, which is how his aunt came into play; but the jury was unable to hear his side of the story. He further elaborated he told Counsel about his aunt and told Counsel to call her as a witness, but Counsel did not call Applicant's aunt as a witness. Applicant admitted, however, he did not give Counsel any leads or witnesses to investigate. He testified he did not know if his aunt was at trial because he was not at trial. Applicant also testified Counsel told him with what he was charged with and that he was facing ten years. Applicant could not recall if he and Counsel discussed the elements of the offenses, but they never reviewed what the State would have to prove at trial. He testified he and counsel did not discuss concurrent or consecutive sentences. He elaborated Counsel told him he had a chance to win at trial.

He also testified the State alleged he was cooking meth in a camper around his children. He testified he did not make any payments on the camper and never dealt with the landlord. He further testified, however, he did not show up at trial to dispute the landlord's testimony he did have dealings with Applicant. Applicant testified he was found on his aunt's property, but he was not cooking meth for his aunt at the time.

Applicant further testified he did not go to his trial, which he in his own words acknowledged was a "stupid" decision. He explained he did not go to his trial because he was

scared. He also testified he did not go to trial because he was at work one day and his driveway was washed out the next day. He elaborated he did not recall if Counsel offered to pick him up at home and did not recall refusing any offers from Counsel to pick him up.

He testified he was arrested after his trial and went to a sentencing hearing, where the judge read his sentence. He further testified at that time, he and Counsel discussed an appeal and a motion for reconsideration. Applicant elaborated Counsel told him he would take care of everything, which Applicant took to mean Counsel would file everything. He testified he did not know if Counsel filed a motion for reconsideration.

Following Applicant's testimony, Applicant rested, and Respondent presented the testimony of Counsel. Counsel testified he has been practicing law since 1997, and he has been employed with the Eleventh Circuit Public Defender's Office since 1999, so the majority of his practice has involved criminal law. Counsel testified he met with Applicant in person and talked to him via telephone, and his in-person meetings with Applicant were longer than his phone conversations with him. He testified Applicant was arrested in July 2014, and Counsel met with him in the jail on August 5, 2014, where he reviewed with Applicant the charges, the potential penalties, the elements, and the risk of harm. He also testified he told Applicant he was facing up to thirty years and explained concurrent and consecutive sentences to Applicant, although he did not specifically use the terms "consecutive" and "concurrent." Counsel explained he informed Applicant he was facing up to thirty years, and the court could stack each sentence on top of each other. He further testified on September 11, 2014, he received a plea offer from the State, which Applicant rejected, and on September 12, 2014, a preliminary hearing was held. Counsel testified Applicant had two appearances in October and November 2014, during which time Applicant

informed him he would not plead guilty; therefore, the trial was set for April 2015. He also testified in March 2015, he reviewed everything for trial with Applicant. Counsel testified Applicant understood everything Counsel explained to him. He also testified the last time he saw Applicant was April 7, 2015.

He testified he sent initial discovery to Applicant on August 27, 2014, and met with Applicant on September 4, 2014, to review the discovery and discuss that Applicant's co-defendant had pled guilty to these charges. Counsel testified the State had pseudoephedrine records, which showed Applicant was buying pseudoephedrine and is used in the manufacturing of methamphetamine. He testified Applicant alleged he was buying pseudoephedrine for his uncle, and his uncle paid him to purchase pseudoephedrine. He also testified Applicant's co-defendant testified against him at trial, which was important. Additionally, the State had the landlord testify as to Applicant's involvement in the lease and payments.

He testified he and Applicant discussed Applicant's version of the facts, and Applicant alleged during the time in which the camper was being used as a meth lab, he had moved out and was living with his aunt. Counsel further testified Applicant did not give him the names of any witnesses to investigate, but he did speak with Applicant's aunt prior to trial, who did tell him Applicant was living with her, but she could not account for Applicant's whereabouts. He testified the aunt also told him Applicant would occasionally spend the night with his wife, his co-defendant. He also testified if Applicant were to testify at trial, he would have presented the aunt's testimony in order to supplement Applicant's testimony.

Counsel further testified the State offered to drop one of Applicant's unlawful neglect of a child charges in exchange for a plea to the remaining two charges, which was the same offer

Applicant's co-defendant took. He testified ninety percent of the time, the State does not make any recommendations regarding sentencing. He testified he discussed the plea offer with Applicant, but Applicant did not want to plead guilty. Counsel explained he told Applicant he would likely receive an active prison sentence, as Applicant's co-defendant received an active sentence, but Applicant did not want to spend any time in prison, which he discussed with the solicitors.

He testified that at lunch on Wednesday, April 15th, he was informed they would pick a jury for Applicant's trial that afternoon, so he called Applicant. He further testified Applicant was working out of town, so Counsel picked a jury without Applicant and also made pre-trial motions. Counsel further testified the next day, Applicant did not appear for trial, and Counsel informed Applicant the trial would proceed without him. He explained Applicant told him his driveway was washed out, to which Counsel asked Applicant if he needed a ride and also told Applicant he could pick him up for trial. He further explained Applicant said his clothes were muddy, so he could not come to court in them. He also testified Applicant informed him he would appear to plead guilty the following day, but Applicant did not appear. Counsel testified based on this, Applicant did not want to appear at trial.

He also testified he made no guarantees to Applicant they would win at trial, because Counsel cannot know what a jury is going to do. He testified he explained to Applicant the evidence was circumstantial, and it would have been Applicant's word versus his co-defendant's word. Counsel also testified he made objections during the trial, and he objected to the pseudoephedrine records as well as Agent Merckle testifying beyond his training and experience, but that issue was affirmed on appeal.

Counsel testified he did not discuss a motion to reconsider with Applicant, but he is not required to discuss a reconsideration with his clients. He also testified he typically does not discuss motions to reconsider with his clients. He testified had Applicant asked him to file a motion to reconsider, he would have filed one. Counsel testified he does not recall ever having a client's sentence reduced on a motion to reconsider after the client had been tried in his or her absence. He explained motions to reconsider are typically unsuccessful. He testified, however, he and Applicant did discuss an appeal; and Counsel filed an appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant's allegations are ineffective assistance of counsel for: (1) failing to prepare for trial; (2) failing to investigate; (3) failing to file a motion to reconsider the sentence; and (4) informing Applicant he had a chance at winning at trial.

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the 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 444, 334 S.E.2d at 815.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. 442, 334 S.E.2d 815. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” *Id.*, 300 S.C. at 117, 385 S.E.2d at 625 (internal citation omitted). 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.

After careful review based on the standard discussed above, this court finds Applicant has failed to carry his burden in this action. Below are this court’s findings in regards to each of Applicant’s allegations of ineffective assistance of counsel.

Counsel's alleged failure to prepare for trial

Applicant alleges Counsel was ineffective for failing to prepare for trial. In particular, Applicant alleges Counsel was ineffective for failing to fully inform Applicant of the elements of the offenses and the potential sentences, specifically the difference between concurrent and consecutive sentences, and for failing to discuss the evidence with Applicant. “There is a strong

presumption counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Moreover, when there is evidence counsel met with Applicant in preparation for trial and there is no evidence additional preparation on the part of counsel would have affected the outcome at trial, counsel cannot be said to have been ineffective. *Harris v. State*, 377 S.C. 66, 73, 659 S.E.2d 140, 144 (2008), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

This court finds Counsel’s testimony with respect to this allegation credible, whereas Applicant’s testimony is not credible. Counsel testified he met with Applicant in person numerous times and also talked with Applicant on the phone, approximately seven times total. During these meetings, they discussed everything, including potential sentences, specifically that Applicant was facing up to thirty years imprisonment and that the sentences for each charge could be stacked on top of one another, the elements of the offenses, Applicant’s constitutional rights, the risk of harm in proceeding to trial, Applicant’s version of the facts, defenses, and the plea offer. Counsel also testified he reviewed all of the evidence with Applicant, including the pseudoephedrine records and the fact Applicant’s co-defendant would be testifying against him at trial and how she would be an important part of the prosecution’s case. This court, therefore, finds Applicant has failed to establish any deficiency on the part of Counsel. *See Harris*, 377 S.C. at 75, 659 S.E.2d at 145 (finding trial counsel was not deficient when he had been practicing law for a number of years and had met with the applicant, however brief, particularly in light of the fact counsel is presumed to have rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case).

This court similarly finds Applicant has presented no evidence which would establish any prejudice on the part of Applicant. In particular, Applicant has wholly failed to provide this court with any evidence as to what benefit could have been realized from additional preparation by Counsel. *See Id.* (“Furthermore, Harris did not offer any evidence or argument as to how counsel’s alleged lack of preparation prejudiced him. Therefore, it is merely speculative that counsel’s alleged deficient performance was prejudicial to Harris.”). Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel’s alleged failure to investigate

Applicant further contends Counsel was ineffective for failing to investigate. In particular, Applicant contends Counsel was ineffective for failing to investigate and call his aunt as a witness at trial. “Counsel’s concern is the faithful representation of the interest of his client and such representation frequently involves highly practical considerations as well as specialized knowledge of the law.” *Tollett v. Henderson*, 411 U.S. 258, 267-68 (1973). “Although counsel should conduct a reasonable investigation into potential defenses, *Strickland* does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client.” *Tucker*, 350 F.3d at 442 (quoting *Green v. French*, 143 F.3d 865, 892 (4th Cir. 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.” *Strickland*, 466 U.S. at 691; *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). Moreover, “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, 368 S.C. at 385-86, 629 S.E.2d at 357, *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836 (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

Here, Applicant admitted he did not provide Counsel with any leads or witnesses to investigate. Furthermore, Counsel testified he met with Applicant's aunt prior to trial in an effort to support Applicant's contention he had moved out before the camper was used as a meth lab, but Applicant's aunt could not account for Applicant's whereabouts at all times. Indeed, Counsel testified Applicant's aunt informed him Applicant would occasionally spend the night with his wife, who was his co-defendant. Additionally, Counsel testified Applicant's testimony would only supplement Applicant's testimony at trial, but Applicant failed to appear and present his side of the story to the jury. Based on the foregoing, this court finds Applicant has failed to establish any deficiency on the part of Counsel.

This court further finds Applicant has failed to establish any resulting prejudice from the alleged deficiency. Applicant wholly failed to present the testimony of any of these witnesses at the evidentiary hearing. Applicant's bare assertions as to what these witnesses would have testified, without more, do not give rise to the level of proof required for Applicant to meet his burden. *See Porter*, 368 S.C. at 385-86, 629 S.E.2d at 357 ("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."). In addition, Applicant has wholly failed to provide this court with any additional investigation counsel Casto should have performed or would have been beneficial to his case. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to file for a motion for reconsideration

Applicant further alleges Counsel was ineffective for failing to file a motion for reconsideration of his sentence. Applicant testified after his sentencing, he and Counsel discussed a motion to reconsider as well as an appeal. He further testified during this discussion, Counsel told him he would "take care of everything," which Applicant took to mean Counsel would file an appeal and a motion to reconsider. Applicant failed to testify he asked Counsel to file a motion to reconsider. Counsel, however, testified he did not recall if he and Applicant discussed a motion for reconsideration, but he did recall them discussing an appeal. He further testified it is not in his normal practice to discuss a motion to reconsider with his clients, but if Applicant had asked for one, Counsel would have filed a motion to reconsider. This court finds Counsel's testimony credible, whereas Applicant's testimony is not. Accordingly, because Applicant did not ask Counsel to file a motion for reconsideration of his sentence, Applicant has failed to establish Counsel was deficient.

Similarly, this court finds Applicant has wholly failed to establish any resulting prejudice from the alleged deficiency. A trial court has broad discretion in imposing criminal sentences within the limits prescribed by law. *State v. Franklin*, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976); *Clark v. State*, 259 S.C. 378, 383, 192 S.E.2d 209, 210 (1972). To be entitled to relief, the applicant must prove the alleged excessive sentence was the result of partiality, prejudice, oppression or corrupt motive, or that the sentence constitutes cruel and unusual punishment per se. *Clark*, 259 S.C. at 383, 192 S.E.2d at 210; *State v. Cogdell*, 273 S.C. 563, 569-70, 257 S.E.2d 748, 751 (1979). Here, Applicant was charged with three counts of unlawful conduct towards a child. A person who is convicted of or pleads guilty to unlawful conduct towards a child "must be fined in the discretion of the court or imprisoned not more than ten years, or both" S.C. Code Ann. §

63-5-70(B). Applicant was sentenced to a term of imprisonment of eight years for each charge of unlawful conduct towards a child. The sentence Applicant received was well within the sentencing range prescribed. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged promise to Applicant regarding success at trial

Applicant alleges Counsel was ineffective for informing him he had a good chance of prevailing at trial. Applicant testified during one of his brief discussions with Counsel, Counsel informed him he had a chance to win at trial. On the other hand, Counsel testified he made no guarantees to Applicant about his chances of prevailing at trial. Indeed, Counsel testified he had no way of predicting what a jury would do, so he did not promise Applicant he would be acquitted at trial. Counsel simply informed Applicant the State's case was based on circumstantial evidence and, should he testify at trial, the evidence would have rested between Applicant's word and his co-defendant's word. This court finds Counsel's testimony with respect to this allegation credible, whereas Applicant's testimony is not credible. Because Counsel made no guarantees to Applicant about the result at trial, this court finds Applicant has failed to establish any deficiency or resulting prejudice on the part of Counsel. Indeed, Applicant wholly failed to testify this alleged promise by Counsel led him to proceed to trial. Accordingly, this allegation must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED this 1st day of March, 2019.


WALTON J. MOLEOD, IV
Presiding Judge
Eleventh Judicial Circuit

Lexington, South Carolina

Ashley A. McMahan PO Box 5501 West Columbia, SC
29169

Kelly Oppenheimer Rembert C. Dennis Building PO Box
11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

LISA COMER/jp

Court Reporter

Lisa M. Comer - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

McMAHAN & TAYLOR
ATTORNEYS
PO Box 5501
West Columbia, SC
29171

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

