

RICHEY AND RICHEY
ATTORNEYS AT LAW

A PROFESSIONAL ASSOCIATION

RODNEY W. RICHEY
LOLA S. RICHEY

POST OFFICE BOX 10916
GREENVILLE, SOUTH CAROLINA 29603

(864) 467-0503
(864) 467-0646 FAX

RECEIVED

MAR 02 2020

S.C. SUPREME COURT

February 25, 2020

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

RE: Cleveland Edward Young vs. The State of South Carolina
Case No: 2018-CP-44-00122

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,



Rodney Richey

RWR/
Enclosures
cc: Janell H. Gregory, Esquire

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM UNION COUNTY
Court of Common Pleas
HONORABLE MICHAEL G. NETTLES
2018-CP-44-00122

RECEIVED
MAR 02 2020
S.C. SUPREME COURT

CLEVELAND EDWARD YOUNG, SCDC# 141241

APPELLANT,

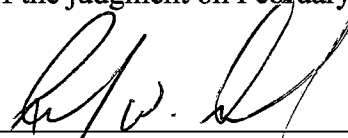
vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Cleveland Edward Young appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Michael G. Nettles, Circuit Judge on January 10, 2020 an Order issued on February 7, 2020 and filed on February 13, 2020. The Appellant received notice of the judgment on February 25, 2020.



Rodney Richey, Esquire
Attorney for the Appellant
33 Market Point Drive
Post Office Box 10916
Greenville, SC 29603
(864) 467-0503
(864) 467-0646 fax

Other Counsel of Record:
Janell H. Gregory, Esquire
Office of Attorney General State of SC
Post Office Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM UNION COUNTY

Court of Common Pleas

HONORABLE MICHAEL G. NETTLES

2018-CP-44-00122

RECEIVED

MAR 02 2020

S.C. SUPREME COURT

CLEVELAND EDWARD YOUNG, SCDC# 141241

APPELLANT,

vs.

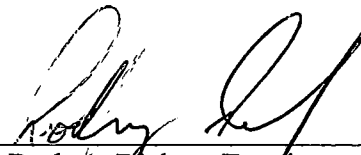
STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on February 25, 2020, addressed to their attorney of record, Janell H. Gregory, Esquire Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: February 25, 2020



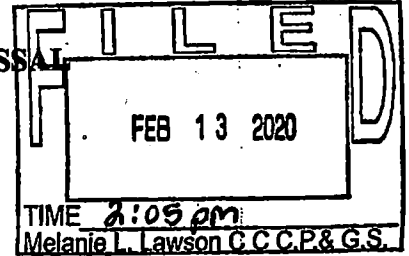
Rodney Kichey, Esquire
Attorney for the Appellant
33 Market Point Drive
Post Office Box 10916
Greenville, SC 29603
(864) 467-0503
(864) 467-0646 fax

STATE OF SOUTH CAROLINA)
COUNTY OF UNION)
Cleveland Edward Young, #141241,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL CIRCUIT

2018-CP-44-00122

ORDER OF DISMISSAL



This matter comes before this Court by way of an application for post-conviction relief filed on March 19, 2018, by Cleveland Edward Young (Applicant). The State (Respondent) filed a Return on July 5, 2018, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on January 10, 2020, at the Moss Justice Center. Applicant was present at the hearing and represented by Rodney W. Richey, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General’s Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf. Assistant Public Defender Erik Delaney (Delaney) of the Sixteenth Circuit Public Defender’s Office and Jennifer Nichols Williams (Williams), Esquire, also testified. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Union County Clerk of Court. In July 2015, the Union County Grand Jury indicted Applicant for first-degree criminal sexual conduct with a minor (2015-GS-44-0501) and third-degree criminal sexual conduct with a minor (2015-GS-44-0913). Delaney and

Williams represented Applicant. Deputy Solicitor John C. Anthony of the Sixteenth Circuit Solicitor's Office prosecuted the case. Applicant proceeded to trial before the Honorable R. Knox McMahon. The jury found Applicant guilty as indicted. On March 28, 2016, Judge McMahon sentenced Applicant to imprisonment for life without parole.

Applicant filed a timely notice of appeal. David Alexander, Esquire, of the Office of Appellate Defense submitted a brief and motion to be relieved pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals granted counsel's motion to be relieved and dismissed the appeal on June 28, 2017. The remittitur was returned to the circuit court on July 14, 2017.

SUMMARY OF FACTS

On January 28, 2015, Sarah Arnold, the teacher of the seven year-old victim, observed Victim making inappropriate gestures with a yogurt stick. (Trial Tr. 60.) Victim placed the yogurt stick in her mouth as if she was performing oral sex and then made gestures that imitated an ejaculating man. (Trial Tr. 60.) The teacher talked to Victim about her actions and Victim disclosed incidents of sexual abuse committed by Applicant. (Trial Tr. 91-93.) The school reported the allegations to law enforcement and Victim was taken for a physical examination. (Trial Tr. 62.) Following that examination, Victim tested positive for rectal chlamydia. (Trial Tr. 62.)

During the investigation it was learned that Victim lived with her mother and father in Union County and would visit her grandparents, Aunt "Nita" and "BB", Applicant, in Whitmire, South Carolina. (Trial Tr 69-70.) Aunt "Nita" and Applicant owned two dogs that Victim would play with during her visits. (Trial Tr. 70 -71.) At times, Victim would be outside alone with Applicant and that is when Applicant penetrated Victim anally, vaginally and had her perform oral

sex on him behind buildings on his property. (Trial Tr. 63-62.) During the trial, Victim testified Applicant "humped" her more times than she could count. (Trial Tr. 72, 74.)

ALLEGATIONS RAISED

On January 10, 2020, Applicant's post-conviction relief hearing was held at the Moss Justice Center. During the hearing, Applicant proceeded on the following allegations:

1. Ineffective Assistance of Counsel:

- a. Counsel was ineffective for failing to investigate a plea offer for Applicant;
- b. Counsel was ineffective for failing to discuss the pros and cons of going to trial with Applicant;
- c. Counsel was ineffective for failing to investigate Applicant's case;
- d. Counsel was ineffective for failing to have a cohesive trial strategy;
- e. Counsel was ineffective for failing to zealously represent Applicant.

APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 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. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. Id.

Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." *Id.* (citing *Strickland*, 466 U.S. at 688). Second, any 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." *Id.* at 117-18, 300 S.C. 115.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court viewed 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 has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, the application for post-conviction relief, and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

Counsel was ineffective for failing to investigate a plea offer for Applicant.

Applicant alleges Delaney and Williams were ineffective for failing to investigate whether the State would provide a plea offer in his case. However, at the post-conviction relief hearing, Applicant testified he would not have pleaded guilty under any circumstances and would not have entertained any offer from the State. Applicant testified he would not have pleaded guilty to his charges because he is not guilty of his charges.

Delaney testified Applicant was never interested in a plea offer. Delaney testified he thought they could get a good plea offer, but Applicant was adamant that he did not commit these crimes and would never entertain a plea offer prior to trial. Delaney testified he provided Applicant with a hypothetical situation of a plea offer for time served and Applicant still would not entertain accepting a plea offer. Delaney testified Applicant's attitude was "trial or bust."

Williams testified Applicant was always adamant about going forward with trial and was not interested in any plea offers from the State.

This Court also questioned Applicant regarding his testimony that he would not have entertained a plea offer from the State, and Applicant adamantly stated he would not have plead guilty under any circumstances. This Court finds the testimony of Delaney, Williams, and Applicant credible as to this allegation. This Court finds Delaney and Williams cannot be found deficient for failing to provide Applicant with a plea offer as his own testimony is that he would not have accepted any plea offer from the State. Further, based on his own testimony, Applicant has failed to establish that he would have accepted a plea offer from the State rather than proceed to trial had his attorneys been able to secure a favorable offer from the State. Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Delaney and Williams were constitutionally ineffective and this allegation is denied and dismissed with prejudice.

Counsel was ineffective for failing to discuss the pros and cons of going to trial with Applicant.

Applicant alleges Delaney and Williams were ineffective for failing to discuss with him the pros and cons of proceeding to a jury trial in his case. Applicant testified his attorneys did not discuss the lack of physical evidence against him, or the witness statements made by Victim. Applicant testified he did not know he could still be convicted without physical evidence. Applicant testified his attorneys never discussed the possibility of losing his case at trial and that he could risk conviction even though there was no physical evidence. Applicant testified his attorneys told him they had a good case and they would win.

Delaney testified he went over the pros and cons of proceeding to trial with Applicant. Delaney testified the stakes were high in this case and testified he is never confident in cases like

this where the victim is a young child. Delaney testified Applicant was confident he would not be convicted despite Delaney's discussions with him regarding his concerns with proceeding to a jury trial in Applicant's case. Delaney testified he has been involved in a handful of criminal sexual conduct cases and they are difficult cases to predict. Delaney testified he expressed concerns to Applicant about taking this case to trial and Delaney's concerns did not seem to faze Applicant. Delaney testified he never told Applicant that they would win at trial.

Williams testified Delaney discussed problems with Applicant's case with Applicant, but that Applicant was always adamant about proceeding to trial.

Here, this Court finds the testimony of Delaney and Williams credible as to this allegation, whereas Applicant's testimony is not credible. This Court finds Delaney discussed the pros and cons of proceeding to trial with Applicant, however, based on Applicant's own testimony, he was adamant about proceeding to a jury trial in his case and would not have entertained entering a guilty plea despite Delaney's concerns with proceeding to trial. Further, Applicant has failed to show any resulting prejudice from the alleged deficiency as Applicant's own testimony shows he was not willing to accept a plea offer in this matter regardless of Delaney's concerns with Applicant proceeding to trial. Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Delaney and Williams were constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

Counsel was ineffective for failing to investigate Applicant's case.

Applicant alleges Delaney and Williams were ineffective for failing to investigate his case. Applicant testified his attorneys did not review discovery with him and did not provide him with any input on the evidence in his case. Applicant testified he located an expert witness, Alicia

Fester, for his attorneys to call as a witness, however, they did not call her or utilize her at trial. Applicant testified his attorneys told him the State did not have any direct or circumstantial evidence and that the State's witnesses were not credible.

Delaney testified he obtained discovery in Applicant's case and reviewed it with him. Delaney testified he would have made copies of the discovery for Applicant, but that sometimes defendant's in a CSC case do not want copies of their discovery to take back to their cells. Delaney testified there were a few videos of Victim during her forensic interview at the Child Advocacy Center, and Applicant was shown those videos. Delaney testified he did investigate the case despite his office not having an investigator at the time. Delaney testified he talked to people involved in the case, including Anita Kinard, and took photos of the areas where the abuse was alleged to have occurred. Delaney testified he does not believe there is anything an investigator would have done that he did not do in this case. Delaney testified he does not recall Applicant providing him with the name Alicia Fester, but he believes Anita Kinard provided him with that name. Delaney testified he was not familiar with Fester and had questions about her qualifications. Delaney testified he did not believe he needed to bring anyone else on as he did not recall anything standing out with the way the forensic interviews were conducted.

Williams testified she was brought into the case as a second chair right before trial. Williams testified the investigation had already been completed by the time she was added to the case. Williams testified she has never heard of Alicia Fester.

"[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), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (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, to establish Counsel failed to adequately prepare the case, Applicant must present evidence of what Counsel could have discovered or what other defenses could have been pursued had Counsel more fully prepared. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Applicant's mere speculation about what Counsel would have discovered is insufficient to support his burden of proof.

This Court finds the testimony of Delaney and Williams credible as to this allegation, whereas Applicant's testimony is not credible. This Court finds Delaney investigated Applicant's case and obtained and reviewed discovery with Applicant. This Court finds Applicant has failed to prove deficient on behalf of his attorneys as he has failed to provide this Court with any evidence

showing what Delaney and Williams should have investigated that would have had a possible effect on the results of his trial.

Further, Applicant has failed to prove any resulting prejudice from the alleged deficiency as Applicant failed to provide testimony from Alicia Fester during the post-conviction relief hearing, so any alleged benefit Alicia Fester would have provided to Applicant at trial is speculative. As such, Applicant cannot meet his burden to show this Court that the outcome of his trial would have been different had Delaney and Williams utilized Alicia Fester at trial. See Rule 71.1(e), SCRCP (an applicant has the burden of proving the allegations in his or her application); Caprood, 338 S.C. at 109, 525 S.E.2d at 517 (an applicant has the burden of proving both deficiency and prejudice). See also State v. Decker, 275 Kan. 502, 507, 66 P.3d 915, 920 (2003) (internal citations omitted). Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Delaney and Williams were constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

Counsel was ineffective for failing to have a cohesive trial strategy.

Applicant alleges Delaney and Williams were ineffective for failing to maintain a cohesive trial strategy during his jury trial. Applicant testified neither Delaney nor Williams discussed a trial strategy with him or how they would prove his innocence. Applicant testified he knew the State had to prove his guilt beyond a reasonable doubt.

Delaney testified his trial strategy was to focus on the lack of physical evidence in Applicant's case. Delaney testified Victim tested positive for an STD and Applicant tested negative for that STD. Delaney testified Victim made inconsistent statements and, as part of his trial strategy, he cross-examine her on those inconsistencies during the trial. Delaney testified they

had certain things in their favor such as the State's medical expert claiming Applicant could have had the STD, but that before he was tested the STD went away without treatment. However, the study she based that opinion on was a study of pregnant women, which clearly would not have applied to a male defendant like Applicant. Delaney testified he cross-examined the State's medical expert on that study and highlighted it again during his closing argument. Delaney also testified they also obtained all of Applicant's medical records and records from the Department of Health and Environmental Control (DHEC), which all showed Applicant had never had the STD. Victim was alleged to have obtained from him as a result of the sexual abuse. Delaney testified he addressed all of the inconsistencies in the State's evidence and the lack of physical evidence in his closing argument as well. Delaney testified they stuck to their reasonable doubt trial strategy, but were ultimately unsuccessful.

Williams testified she was "a little bit" involved in developing a trial strategy in Applicant's case. Williams testified the strategy focused on the inconsistent statements of the witnesses, Applicant's negative STD test, and other reasonable doubt aspects of Applicant's case.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Gentry, 540 U.S. at 8 (quoting Massaro, 538 U.S. at 505). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith, 386 S.C. at 567, 689 S.E.2d at 632. See also Ingle, 348 S.C. at 470, 560 S.E.2d at 402 (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "Courts must be wary of second guessing

counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead, 308 S.C. at 122, 417 S.E.2d at 531.

This Court finds the testimony of Delaney and Williams credible as to this allegation, whereas Applicant's testimony is not credible. This Court finds Delaney and Williams had a reasonable trial strategy to focus on reasonable doubt in Applicant's case. This Court finds that strategy was executed consistently throughout Applicant's trial. This Court finds Applicant has failed to prove deficient on behalf of his attorneys as both attorneys testified they had a reasonable trial strategy in presenting Applicant's case at trial.

Further, Applicant has failed to prove any resulting prejudice from the alleged deficiency as Applicant failed to show this Court what trial strategy Delaney and Williams could have or should have presented that that would have had a reasonable probability of changing the outcome of his trial. Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Delaney and Williams were constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

Counsel was ineffective for failing to zealously represent Applicant.

Applicant alleges Delaney and Williams were ineffective for failing to zealously represent him at trial. However, Applicant failed to provide this Court with any evidence or testimony as to this allegation during the post-conviction relief hearing. Applicant failed to provide testimony regarding how the representation of Delaney and Williams fell short of zealous representation.

As discussed in previous sections, Delaney testified he met with Applicant, reviewed discovery with Applicant, investigated Applicant's case, and developed a valid trial strategy in Applicant's case. Delaney testified he provided the jury with a closing argument that summarized

the weaknesses of the State's case. Delaney and Williams testified they maintained a reasonable doubt trial strategy throughout the Applicant's trial.

This Court finds the testimony of Delaney and Williams credible as to this allegation. This Court finds that the performance of Delaney and Williams was reasonable under professional norms. Cherry, 300 S.C. 117, 385 S.E.2d at 625 (citing Strickland). Furthermore, this Court finds Applicant has failed to carry his burden of establishing how he was prejudiced by any alleged deficiency. Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Delaney and Williams were constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

CONCLUSION

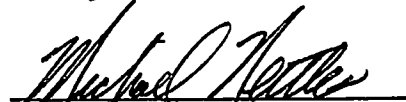
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from post-conviction relief 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, 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 THAT:

1. The application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant is to remain in the custody of Respondent.

AND IT IS SO ORDERED this 7 day of Feb, 2020.


MICHAEL G. NETTLES
Presiding Judge
Sixteenth Judicial Circuit

Roencel, South Carolina

RICHEY AND RICHEY, P.A.
Attorneys at Law
Post Office Box 10916
Greenville, SC 29603

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

