THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SALUDA COUNTY
Court of Common Pleas
Post Conviction Relief

J. Derham Cole, Circuit Court Judge

Lower Court Case No.: 2016-CP-41-201

David Andrew Bower #358706,..... Petitioner

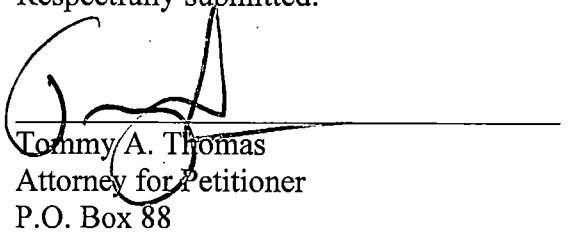
vs.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

The Appellant, David Andrew Bower, appeals the Order of Dismissal signed by the Honorable J. Derham Cole, dated May 14, 2020 and filed on May 18, 2020. Appellant received written notice of entry of this order on June 24, 2020.

Respectfully submitted.



Tommy A. Thomas
Attorney for Petitioner
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

July 15, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SALUDA	)	THE ELEVENTH JUDICIAL CIRCUIT
	)	
	)	2016-CP-41-201
David Andrew Bowers,	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes to the Court by way of an application for post-conviction relief (PCR) filed September 16, 2016, and amended September 11, 2017. Respondent made its return on August 24, 2017, and filed an amended return on October 10, 2017. An evidentiary hearing was held February 23, 2018. Applicant was present and represented by Tommy A. Thomas, Esquire. Assistant Attorney General Susannah Cole of the South Carolina Attorney General's Office represented Respondent. Applicant and trial counsel C. Lance Sheek, Esquire testified. The Court had before it records from the Saluda County Clerk of Court and South Carolina Department of Corrections (SCDC) and Applicant's trial transcript.

Following review of testimony presented at the hearing and all other evidence, this Court finds Applicant received constitutionally effective assistance of counsel at all stages of his trial and relief must be denied.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Saluda County. Applicant was indicted at the February 2013, term of the Saluda County Grand Jury for one count each of criminal sexual

conduct with a minor ("CSC"), 1st degree (2012-GS-41-440), and criminal solicitation of a minor (2013-GS-41-010). Applicant was represented at trial by Lance Sheek, Esq. on February 4-6, 2014. The jury convicted Applicant of all charges. The Honorable William P. Keesley sentenced Applicant to twenty-five years' imprisonment for CSC with a minor, 1st Degree, and ten years for criminal solicitation of a minor, to run concurrently.

Applicant filed a timely notice of appeal and an *Anders* brief was submitted by Katherine Hudgins, Esquire on behalf of Applicant. The South Carolina Court of Appeals affirmed Applicant's conviction on June 15, 2016. *State v. Bowers*, Op. No. 2016-UP-252 (S.C. Ct. App. 2015). The Court returned the remittitur on June 24, 2016.

In his amended application of September 11, 2017, Applicant alleged he is being held in custody unlawfully due to ineffective assistance of trial counsel. In support of his claim, Applicant alleged counsel provided ineffective assistance for the following reasons:

a) Failure to bring out the fact that the results of the medical examination of the minor was negative.
b) Failure to bring out that the statement given by the Applicant by the police was coerced. He was told that if he signed the statement that he could go home. Counsel was ineffective for not filing a Motion to Suppress this statement.
c) Failure to investigate and bring out the relationship of the witnesses and that some of them were related to each other and their potential bias.
d) Failure to properly explain the ten (10) year plea offer to the Applicant.
e) Failure to file a Post-Trial Motion to reconsider the sentence.
f) Failure to properly investigate the Jury Pool. One on the Juror's and the victim's Father were Facebook friends.

At the hearing, Applicant proceeded on the grounds of ineffective assistance of counsel raised in the amended application.

SUMMARY OF THE TRIAL TESTIMONY

Prior to the start of trial, Applicant requested the court conduct a *Jackson v. Denno*[1] hearing to determine whether Applicant's statement to the Saluda County Sheriff's investigator was voluntary. At the time Applicant gave his statement, he was in custody and had waived his *Miranda* rights. Applicant wrote the statement himself, signed it, and two deputies witnessed it. In his statement, Applicant admitted he touched the minor between her legs, put his hand down her pants, touched her breasts, and put his finger in her vagina. Applicant claimed he was provoked by the ten year old victim. The trial court found the statement admissible.

The victim's father, Russell, testified Applicant is his cousin, who also worked for him. Russell said he provided a cell phone for his ten year old daughter to use during her custodial visits with his ex-wife. On the day of the incident, Russell and his family and Applicant and his wife attended a gathering to watch a football game. On the way back from the gathering, Applicant and victim rode in the same car. When they arrived back home, Russell went to bed while the children stayed up to watch a movie. Russell said he did not know Applicant was still in the house. The next morning, Russell felt something was unusual, so he reviewed the text messages from his daughter's phone. In the messages, the victim and Applicant discuss feeling "horny," getting "drunk," being "sexy," and clearly refer to an incident that occurred on the car ride home the night before in which Applicant digitally penetrated the victim. After finding the texts on his daughter's phone, Russell immediately took the phone to the sheriff's department.

The victim testified she spent a great deal of time with Applicant because he babysat them sometimes and lived nearby. The victim said Applicant taught her some of the graphic

[1] *Jackson v. Denno*, 378 US 368 (1964).

language she used in the texts. The victim said the texts occurred over time. The victim corroborated the testimony of her father, and explained that after her family went to bed, she and Applicant stayed up to watch a movie. Applicant touched her leg, then put his hand down her pants, than touched her vagina and penetrated her with his fingers. Applicant also touched her breasts. On cross examination, the victim said she denied what happened because she was embarrassed and scared. The victim acknowledged she denied the activity when she was examined at the Dickerson Center, but then later told the sheriff's deputy what happened.

The State introduced copies of phone calls Applicant made to his girlfriend from the detention center following his arrest in which he admitted the assault of the child, but claimed he was drunk and said he was "pursued into that." In his defense, Applicant admitted he sent the text messages to the victim, but claimed he was only joking with the ten year old girl.

SUMMARY OF THE PCR EVIDENTIARY HEARING TESTIMONY

Applicant testified his family retained counsel, and they spoke briefly while he was in jail, but Applicant was also able to meet with counsel at his office while released on bond. Applicant said he met with counsel many times, during which they went over the State's evidence against him. Applicant knew the State had his explicit text messages to the victim, as well as his own statement in which he admitted the crime. Applicant testified counsel informed him of the State's offer of a ten year sentenced and advised him to accept the offer, but Applicant said he told counsel he wanted to wait. Applicant admitted counsel told him the solicitor wanted a decision about the plea offer immediately, but he decided to think about the offer anyway. Applicant said he when told counsel he changed his mind, the offer was no longer available.

Applicant testified that during jury selection, he recognized one of the jurors as a teller at the bank where the victim's father conducted business. Applicant said he later discovered the juror and the victim's father were Facebook friends.

Applicant also recalled his statement to law enforcement in which he admitted he digitally penetrated the victim. Applicant claimed the statement was untrue and he was coerced into making it by the officers. Applicant recalled counsel attempting to suppress the statement before the trial. Applicant also acknowledged the officers got a warrant for his phone and retrieved his text messages, but said counsel never requested a search of the victim's phone. Applicant also believed the report from the Dickenson Center, in which victim made inconsistent statements, and the medical report, in which no physical signs of sexual assault or DNA were found, would have supported his defense the victim was lying. Applicant said counsel did not discuss the DNA findings with him and he believed counsel should have used the victim's statements to more aggressively confront her about her changing story.

Trial counsel Lance Sheek testified he filed all the appropriate Rule 5 and *Brady* motions and reviewed the evidence with Applicant. Counsel said that in addition to the texts to the victim and Applicant's statement to law enforcement admitting the conduct, recordings of jail phone calls were damaging to the defense. Counsel said although a cell phone extraction was not performed on the victim's phone, the phone was made available to the defense for inspection. Counsel said Applicant had admitted to sending the texts, so counsel did not want to discover or bring attention to possibly more damaging texts that could be found on victim's phone.

Concerning the plea offer, counsel said the victim's family wanted Applicant to serve ten years, and he advised Applicant strongly to take the plea in light of the State's case. Counsel said

he told Applicant it was a "now or never" offer from the solicitor and warned him that if he waited, the offer would not be available. Counsel said when Applicant called the next day, the offer was off the table.

Counsel said his best defense at trial was to attempt to portray the victim's story as a fantasy, and that the State could not prove their case beyond a reasonable doubt. Counsel attempted to impeach the victim with the report from the Dickerson Center, but had to proceed carefully because attacking a child's credibility can make an unfavorable impression on the jury. As for the lack of medical evidence, counsel said he did not want to defend Applicant on the basis that a relationship happened, but there was no penile penetration. Counsel also said the danger of attacking the report from the Dickerson Center would be opening the door for testimony from an expert on why a child's disclosures can be inconsistent. Counsel thought it would be more harmful than helpful to draw too much attention to those findings.

Counsel testified that because the trial was in Saluda, he was not particularly surprised a juror may have had a business connection with the victim's father, but he was unaware of any more serious relationship between the juror and the victim's family. Counsel said he did not want to use one of his strikes on a juror that said she did not know the victim's family because he wanted to save his strikes until necessary. Counsel also said there was no bias to exploit in the father's testimony because it was undisputed the victim and her father were related, as well as related to Applicant. Counsel said there was no advantage to making this argument. Counsel also said he did not file a motion to reconsider the sentence because Applicant received the statutory minimum and such a motion could not help his client.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record, and further had the opportunity to observe the witnesses presented at the evidentiary hearing, closely pass upon their credibility, and weigh their testimony accordingly. This Court finds trial counsel's testimony is credible and should be afforded great weight. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80. Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency.

Ineffective Assistance of Counsel

Applicant alleges numerous claims of ineffective assistance of counsel. In evaluating allegations of ineffective assistance of counsel, the court applies the two-pronged test outlined in *Strickland v. Washington*, 466 U.S. 668, 669 (1984). First, Applicant must prove counsel's performance was deficient. *Id.* Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). "The proper measure of counsel's performance remains whether he has provided representation within the range of competence required of attorneys in criminal cases." *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsels' deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* "[E]very effort

must be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. *Strickland,* 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

After careful review of the record and testimony presented at the evidentiary hearing, and based on the standard above, this Court denies and dismisses with prejudice the application for relief.

Failure to argue the results of the medical exam were exculpatory

Applicant alleges counsel was ineffective in failing to argue the report and medical exam from the Dickenson Center exculpated Appellant. Specifically, Applicant argues the lack of his DNA evidence found on the victim, as well as inconsistencies in the victim's statements, proved the victim was lying about the criminal sexual conduct.

At trial, the State stipulated to the results from the Dickerson Center, which showed no physical evidence of sexual assault and included statements from the victim denying anything had happened between her and Appellant. (Trial Tr. p. 83.) The State even mentioned the findings in its opening statement. (Trial Tr. p. 107.) The State further asked the victim about the examination from the Dickenson Center during its direct examination of her. (Trial Tr. p. 165.) The record reflects counsel also asked the victim about her inconsistencies on the stand. Counsel additionally asked the victim about other incidents in which she had made false statements. (Trial Tr. p. 182.) At the PCR hearing, counsel explained he carefully cross-examined the victim because attacking a young girl would not make a favorable impression on the jury. Counsel also said that given the scenario described in Applicant's statement to law enforcement, he would not

expect DNA to be present. Further, counsel elected not to aggressively pursue the findings of the Dickerson Center because he thought the State might call an expert to explain the effects of sexual assault on a child and why the victim might make inconsistent statements.

This Court finds Applicant has failed to meet his burden in proving Counsel was ineffective for failing to "bring out" or emphasize the results of the DNA evidence, the medical exam, and the Dickerson Center. This Court finds Counsel made a strategic decision to not dwell on the findings of the Dickerson Center considering the nature of the allegation. Counsel credibly testified he thought that line of questioning could do more harm than good, given the nature of the alleged penetration. As counsel testified, cross-examining a child witness is a delicate task. Also, in an effort to discredit the investigation, counsel attempted to impeach investigators with their failure to request DNA testing of the victim's rape kit. However, because DNA would not normally be found from digital penetration, counsel elected not to draw too much attention to the medical reports, for fear the State would call its own expert on sexual trauma to children. This was a reasonable trial strategy. *See Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 530 (1992) (Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance). This Court finds Counsel was not deficient.

Failure to challenge the admission of Applicant's confession

Applicant alleges counsel was ineffective in failing to have Applicant's statement to law enforcement suppressed because his statement was not given voluntarily. Applicant said his statement was coerced, but offered no substantive testimony of how he was coerced into confessing to CSC, except his claim that officers told him he could receive twenty-five years'

imprisonment to life imprisonment if convicted. The record reflects counsel did attempt to suppress Applicant's statement at the pre-trial hearing, but the trial court found the statement admissible. (Trial Tr. p. 56.) Later at trial, counsel attempted to cast doubt on the voluntariness of Applicant's statement when he cross examined law enforcement on why they had not videotaped or audio recorded their interview with Applicant. (Trial Tr. p. 203.)

This Court finds counsel challenged the voluntariness of Applicant's statement, and when the statement was deemed admissible, attempted to cast doubt on the investigators' methods to obtain the statement. Moreover, Applicant has not testified to any reason the statement would not be considered voluntary, when Applicant acknowledged the officers warned him of an accurate possible sentencing range. Applicant has failed to carry his burden of proof counsel was deficient in failing to challenge his statement or that he was prejudiced in any way from counsel's efforts.

Failure to argue witness bias

Applicant next alleges counsel was ineffective for failure "to investigate and bring out the relationship of the witnesses and that some of them were related to each other and their potential bias." The Confrontation Clause permits a defendant to cross-examine a State's witness when there exists "a substantial possibility the witness would give biased testimony" against a defendant. *See, e.g. State v. Sims*, 348 S.C. 16, 558 S.E.2d 518 (2002). " 'On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." *State v. Brewington*, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (citing 98 C.J.S. Witnesses s 560a). Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by any other evidence. *SCRE 608(c); State v. Brown*, 303 S.C. 169, 399 S.E.2d 593 (1991).

In this case, however, it was clear from the testimony at trial that the witnesses were related to each other, including Applicant. When the victim's father testified, he immediately identified himself as her father. (Trial Tr. p. 114.) Further, the victim's father testified the Applicant was his "first cousin's oldest son." (Trial Tr. p. 118.) Counsel credibly testified at the PCR hearing there was no reason to argue the witnesses were biased based on their familial relationship because the witnesses were all members of the same family. This Court finds this allegation wholly without substance or merit.

Failure to properly explain the plea offer

Applicant alleges counsel failed to properly explain the plea offer, but his testimony at the PCR evidentiary hearing contradicts that claim. Applicant testified counsel informed him of the State's offer, advised him it would be in his best interest to accept the offer, and finally warned Applicant the offer would be rescinded if he delayed in accepting it any longer. Applicant said that in spite of counsel's advice, he told counsel he wanted to think about the offer overnight. Because of Applicant's delay, the solicitor rescinded the offer. Counsel's testimony was consistent with Applicant's.

This Court finds counsel adequately and reasonably advised Applicant as to the plea offer. Plea agreements rest upon contract principles. *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341 (1994). The plea agreement exists only as an "offer" until the defendant accepts by entering into a court-approved guilty plea; until which point neither the State, the defendant, nor the court are bound by the plea agreement. *Reed v. Becka*, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999) (citations omitted). The State may withdraw a plea offer at any time prior to the court accepting the defendant's plea. *Id.* at 688. Applicant was warned the State would withdraw the offer.

Nonetheless, Applicant failed to take counsel's advice to accept the offer immediately. Counsel cannot be ineffective in failing to advise Applicant about the plea when Applicant admitted he ignored counsel's competent advice to accept the plea without delay. This allegation is denied and dismissed with prejudice.

Failure to file a post-trial motion to reconsider the sentence

Applicant alleges counsel failed to file a motion to reconsider his sentence. Applicant was convicted of both crimes of CSC with a minor and criminal solicitation of a minor. Although Applicant received ten years' imprisonment for the solicitation charge, he received a concurrent term of twenty-five years for CSC with a minor. Twenty-five years' imprisonment is the statutory minimum for that offense. *See* S.C. Code Ann. § 16-3-655(D)(1). Counsel testified that in light of Applicant's receipt of the minimum sentence for the CSC charge, he did not file a motion to reconsider the sentence. In his collateral action, Applicant has provided no grounds to support a motion for reconsideration of the sentence, given his sentence of minimum time falls within the confines of the sentencing statute. Applicant has failed to meet his burden of proof on his claims counsel was ineffective on this ground. This Court finds counsel was not deficient for failing to file a motion to reconsider and Applicant was not prejudiced.

Failure to strike a juror

Applicant alleges counsel was ineffective for failing to strike a juror who knew and was Facebook friends with the victim's father. Applicant said he recognized the juror as working at a bank in which the victim's father had a business relationship. Applicant said he learned of the Facebook friendship after the trial. In contrast, counsel said the juror did not indicate she knew the victim's father or that she could not be impartial during the trial judge's questioning. Counsel

also said that because Applicant was tried in a small county, it would not be unusual for a juror to have some remote connection with Applicant or the witnesses. Counsel said his strikes were accumulating quickly, and he did not want to waste a strike on someone when it was not necessary. Neither the juror nor the witness was called to testify regarding the alleged relationship.

This Court finds Applicant has failed to meet his burden with respect to this allegation. While the Sixth and Fourteenth Amendments to the United States Constitution provide a defendant with the constitutional right to a fair and impartial jury of his peers, this right does not entitle a defendant to handpick a jury. *State v. Stanko*, 376 S.C. 571, 577, 658 S.E.2d 94, 96-97 (2008); *see also State v. Edwards*, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009) (a defendant is not entitled to the jury of his or her choice); *Magazine v. State*, 361 S.C. 610, 617, 606 S.E.2d 761, 765 ("a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury"). The Constitution, after all, "does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury." *Stanko*, at 97, 658 S.E.2d at 576 (citing *Morgan v. Illinois*, 504 U.S. 719, 729 (1992)). The process of jury selection inherently falls within the expertise and experience of trial counsel. *Magazine* at 617, 606 S.E.2d at 764 (citing *Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999)). In a PCR proceeding, an applicant must provide credible evidence that the trial attorney's refusal to strike a juror prejudice the defense.

Applicant has failed to present any credible evidence that his right to a trial by a competent and impartial jury was violated. Applicant has not shown counsel's decision to reserve his strikes constituted a deficiency in any way. Further, this Court construes Applicant's

claim to suggest that in the absence of a juror favorable to the victim's family, he would not have been convicted. Applicant cannot convince this Court he was prejudiced by counsel's failure to strike the juror when the State presented overwhelming evidence of Applicant's guilt.

This Court finds Applicant failed to prove there was a relationship between a juror and a witness or that counsel was deficient for failing to strike said juror. Applicant's assertion of a relationship is based purely speculation. This Court also finds Applicant failed to prove he was prejudiced by counsel's failure to strike a juror such that the juror's presence caused a reasonable probability of altering the result of the trial. Accordingly, this Court denies and dismisses this allegation.

CONCLUSION

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

This Court notes Applicant must file and serve a notice of appeal within thirty 30 days from receipt of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 1991, Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1g, SCRCP, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

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

AND IT IS SO ORDERED this 14 day of May, 2020

J. DERHAM COLE
Presiding Judge
Eleventh Judicial Circuit

_____, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF SALUDA	)	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUI
David Andrew Bowers, #358706	)	Case No. 2016-CP-41-0201
Applicant,	)	
v.	)	Certificate of Service
State of South Carolina	)	
Respondent,	)	

1. Undersigned is counsel of record for the Respondent in the above-captioned action.

2. Pursuant to the South Carolina Supreme Court's Order "RE: Operation of the Trial Courts During the Coronavirus Emergency" (Appellate Case No. 2020-000447), dated April 3, 2020), "a lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer's primary email address listed in the Attorney Information System (AIS)."

3. Undersigned has served a copy of the **Order of Dismissal** in the above-captioned matter on opposing counsel by emailing a copy to the email address as listed in the AIS:

Tommy Thomas, Esquire
thomaslaw@me.com

DATED this 24th day of June, 2020.

s/LillianMeadows

LILLIAN L. MEADOWS
Assistant Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
LillyMeadows@scag.gov