

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

—————
Certiorari to Greenville County

Honorable Carmen T. Mullen, Circuit Court Judge

—————
GARY R. THOMPSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000442

—————
APPENDIX
—————

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demonstrate he would have been successful on appeal had trial counsel objected contemporaneously to the stipulation that Applicant had previously been convicted of first-degree criminal sexual conduct with a minor.

This Court failed to consider Cross while finding trial counsel was not constitutionally ineffective for failing to request to bifurcate Applicant's trial so as to avoid the jury's knowing of Applicant's prior conviction of criminal sexual conduct with a minor.

Applicant argued at his PCR hearing that trial counsel was constitutionally ineffective for failing to request that Applicant's trial be bifurcated in order to avoid the jury's hearing that Applicant had a prior conviction for criminal sexual conduct with a minor and was listed on the South Carolina Sex Offender Registry, and argues now in his motion to alter or amend that this Court failed to consider Cross when finding trial counsel was not constitutionally ineffective for failing to request that Applicant's be bifurcated. The South Carolina Supreme Court had not yet issued its decision in Cross at the time of Applicant's PCR hearing and did not issue Cross so as to give this Court adequate time in which to incorporate an analysis pursuant to Cross into its Order of Dismissal. This Court was therefore unable to incorporate into its Order of Dismissal an analysis of Applicant's claim as to bifurcation in light of Cross. After reviewing Cross, this Court finds that its analysis of Applicant's claim that trial counsel was constitutionally ineffective for failing to request that Applicant's trial be bifurcated should be amended as explained herein, but also finds that Applicant has nevertheless still failed to show that he is entitled to post-conviction relief.

In the Order of Dismissal, this Court found Applicant was not entitled to a bifurcated trial as Applicant failed to identify any authority authorizing the bifurcation of a trial for the commission of first-degree criminal sexual conduct with a minor in violation of Section 16-3-655(A)(2). This Court cited State v. Hamilton when finding the propriety of the admission of the evidence of Applicant's prior conviction in light of the trial court's limiting jury instruction at

trial. Hamilton, 327 S.C. 440, 486 S.E.2d 512 (S.C. Ct. App. 1997), cert. denied, Hamilton v. State, 525 U.S. 901 (filed Oct. 5, 1998). In Hamilton, the defendant was tried for first-degree burglary according to Section 16-11-311(A)(2), which required the State to prove, as an element of the offense, that the burglary was committed "by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both" Hamilton, at 443, 486 S.E.2d at 513. The South Carolina Court of Appeals held that the trial court did not err in admitting evidence of Hamilton's prior convictions because the trial court adequately instructed the jury that it could consider Hamilton's prior convictions only for the purpose of determining whether he was guilty of one of the aggravating factors that the State had to prove as an element of first-degree burglary. Id. at 447-48, 486 S.E.2d at 516. In its Order of Dismissal, this Court also cited State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000), to support its finding that bifurcation was not necessary to preserve the fairness of Applicant's trial in light of the trial court's charging the jury with a limiting instruction regarding Applicant's prior conviction. In Benton, the defendant was tried for first-degree burglary according to Section 16-11-311(A)(2). Benton, at 153-54, 526 S.E.2d at 229-30. The South Carolina Supreme Court instructed that, to ensure that a defendant is not convicted on an improper basis while allowing the State to prove the elements of first-degree burglary, a trial court presiding over a trial for the offense should limit the evidence to the prior convictions, refuse to admit particular information about the prior crimes, and, upon request, instruct the jury that it could not consider the defendant's prior convictions in order to determine whether he had entered the dwelling at issue in the present trial without consent and with the intent to commit a crime therein. Benton, at 156, 526 S.E.2d at 230-31.

In Cross, the South Carolina Supreme Court acknowledged that the evidentiary issues in Cross resembled those presented in Benton and Hamilton and that the trial court in Cross followed the instructions provided in Benton for the mitigation of the prejudicial effect of introducing evidence of Cross's prior conviction. Cross, at 478, 832 S.E.2d 281, 288 (citations omitted). The Supreme Court acknowledged that bifurcation had not been required previously or commonly seen in proceedings in this State or in the federal courts. Cross, at 478-79, 832 S.E.2d at 288 (citing Chubb v. State, 303 S.C. 395, 397, 401 S.E.2d 159, 161 (1991) ("[A] bifurcated proceeding is not required in a non-capital case."); State v. Bennett, 256 S.C. 234, 242, 182 S.E.2d 291, 295 (1971) ("[A bifurcated trial] is not required by either the common law, the statutory law, or the constitution of this State. It has not been settled by the United States Supreme Court that a bifurcated trial is not required by the United States Constitution."); Spencer v. Texas, 385 U.S. 554, 568 (1967) ("Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure.")). All of these serve as indication that this Court's analysis of this issue, as found in the Order of Dismissal, was reasonable in light of the existing authorities at the time of its issuance.

However, the Supreme Court held in Cross that the trial court had erred in denying Cross's request to bifurcate his trial because the trial court had the authority to bifurcate, stemming from Rule 11(a), SCRE, and had the duty to bifurcate in order to ensure that the State could present evidence to prove an element of Section 16-3-655(A)(2) while simultaneously guarding against a violation of Rule 403, SCRE. Cross, at 479, 832 S.E.2d at 288-89 (quoting Rule 11(a), SCRE ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and

presentation effective for the ascertainment of the truth”). The Supreme Court, writing as a divided Court in Cross, instructed that it was not creating new law. Id. at 479-80, 832 S.E.2d at 289 (stating that the majority’s reliance upon Rule 611(a), SCRE, is “not a disguise for a motivation on our part to change the law or adopt a new rule of procedure. It is simply a plain reading of the English language.”; arguing that “[i]t is equally apparent that, contrary to the position taken by the dissent, we are changing no procedural rule and are creating no procedural rule. We are simply recognizing what has been there all along.”). The disagreement as to whether Cross has brought about a change in law appears to stem from the disagreement between the members of the Supreme Court about whether the Court had the authority to hold that bifurcation is authorized or required by Rule 11 in light of this State’s constitutional mandate that changes in procedural law be submitted for approval to the General Assembly, not from any intention on the part of the Supreme Court’s that Cross be applied directly to post-conviction relief cases stemming from trials conducted years before the Supreme Court took up Cross. Cross, at 484-85, 832 S.E.2d at 291-92 (Few, J., dissenting).

Under the first prong of the two-part test for the constitutional ineffectiveness of counsel, which was outlined by the United States Supreme Court in Strickland v. Washington, 466 US. 668 (1984), the post-conviction relief court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required 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. (citing Strickland, 690). Applicant must overcome this

presumption to receive relief. Cherry, at 118, 386 S.E.2d at 625. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id., at 697. Therefore, the function of the post-conviction relief court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney. Id. at 690.

This Court finds Applicant has failed to demonstrate any deficiency in trial counsel’s performance with respect to his failing to request that Applicant’s trial be bifurcated. Applicant has not shown that the prevailing professional norms at the time of his trial would have required Applicant to request the bifurcation. Although Applicant was correct in his motion to alter or amend the judgment that this Court’s analysis of this claim should be modified in light of Cross, he has failed to show that the range of professional competence demanded in criminal defense practice included requests to bifurcate in trials for criminal sexual conduct under Section 16-3-655(A)(2). Furthermore, when this Court considers the Supreme Court’s language that Cross did not represent a change in law in the full context of the opinion and the disagreement between the majority and the dissent, and considers the Supreme Court’s careful acknowledgements that other courts had held that bifurcation was not required by the Constitution, that bifurcation had not been in common practice at the time of Cross’s trial, and that Cross’ trial court had tried to follow the practice specified by the South Carolina Supreme Court in the context of burglary trials, this Court finds it would have been unreasonable to expect Applicant’s trial counsel to have anticipated that the South Carolina Supreme Court would hold in July of 2019,

approximately five-and-a-half years after Applicant's trial, that Rule 11(a), SCRE, authorizes the trial court to bifurcate a trial for CSC under Section 16-3-655(A)(2) and that bifurcation was required in order to overcome prejudice resulting from the lack of bifurcation. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (explaining that the South Carolina Supreme Court "has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial."). It is simply not a requirement of constitutional effectiveness that a defense attorney be a trailblazer in the courts' acceptance of a new legal and procedural practice.

Applicant has failed to show that trial counsel was constitutionally ineffective for failing to request to bifurcate the trial. Although this Court's analysis of the issue has changed in light of Cross, this Court's denial of post-conviction relief is reaffirmed. This Court's findings of fact and conclusions of law, as presented in the section of the Order of Dismissal concerning the claim that trial counsel should have requested that the trial be bifurcated, are amended as specified herein. This Court's analysis of the issue in light of Cross and as presented in this order, is substituted for the Court's analysis on the same issue as presented in the Order of Dismissal.

CONCLUSION


Based on all the foregoing, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. With respect to the four grounds for relief presented in his motion to alter or amend the judgment, only Applicant's argument that this Court failed to consider Cross when finding trial counsel was not constitutionally ineffective for failing to request that Applicant's trial be bifurcated has presented has provided any reason for this Court to alter or amend its

judgment. Though this order presents new findings and analysis as to that issue, this Court's finding that Applicant is not entitled to post-conviction relief is reaffirmed.

IT IS THEREFORE ORDERED:

1. Applicant's motion to alter or amend the judgment, pursuant to Rule 59(e), SCRPC, is granted in that this Court has altered its analysis of Applicant's claims in light of State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019);
2. Applicant's motion to alter or amend the judgment is denied in that this Court's finding that Applicant has failed to demonstrate that he is entitled to post-conviction relief is reaffirmed herein; and
3. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 26 day of February, 2020.


 Carmen T. Mullen
 Presiding Judge

Beaufort, South Carolina

Copy mailed to Attorney <u>General / S. Ross</u> on <u>3 / 3 / 2020</u>

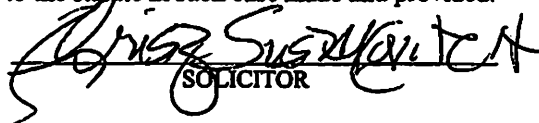
STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

AMENDED INDICTMENT FOR
DISSEMINATING OBSCENITY TO A MINOR

At a Court of General Sessions, convened on **NOV 26 2013** the Grand Jurors of Greenville
County present upon their oath:

That GARY REECE THOMPSON, JR. did in Greenville County, between September 21, 2006 and May 13,
2010, knowingly and unlawfully disseminate obscene material to a minor under the age of twelve years. This is in
violation of § 16-15-355 of the South Carolina Code of Laws as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

WITNESSES

Ty Bracken

Greenville County Sheriffs Office

9/21/2010

ARREST WARRANT NUMBER

1482998

ACTION OF GRAND JURY

TRUE BILL



FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

AMENDED INDICTMENT
DOCKET NO. 2010-GS-23-008831

CLK

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

November

TERM 2013

~~1-19-14~~

THE STATE

vs.

GARY REECE THOMPSON, JR

Amended Indictment for

✓ 3131

DISSEMINATING OBSCENITY TO A MINOR

VIOLATION § 16-16-0355

WITNESSES

Ty Bracken *TBM*

Greenville County Sheriffs Office

9/21/2010

ARREST WARRANT NUMBER
DIRECT PRESENTMENT

DOB: [REDACTED] /1969 W/M SSN: [REDACTED]

ACTION OF GRAND JURY

TRUE BILL

[Signature]

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

AMENDED INDICTMENT
DOCKET NO. 2013-GS-23-000700 *A*

CLK

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

November TERM 2013

1-19-14

THE STATE

vs.

GARY REECE THOMPSON, JR.

Amended Indictment for

3022

CRIMINAL SEXUAL CONDUCT WITH A MINOR
FIRST DEGREE

VIOLATION § 16-03-0655(A)(2)

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Greenville
STATE VS.

INDICTMENT/CASE#: 2010GS2308831

Gary Reece Thompson

A/W#: 1482998

AKA:

Date of Offense: 9/21/2006

Race: WHITE Sex: M Age: 44

S.C. Code § : 16-15-0355

DOB: -1969 SS#:

CDR Code #: 3131

Address:

City, State, Zip: GREENVILLE, SC 29605

DL#: SID#:

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No

CONVICTED OF or PLEADS

In disposition of the said indictment comes now the Defendant who was TO: Obscene / Disseminating obscene material to a minor 12 Y or younger

in violation of § 16-15-0355 of the S.C. Code of Laws, bearing CDR Code # 3131
NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury, (defendant's initials)
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: 70325
Sustalovitch, Varsity Kednock SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
for a determinate term of 5 days/months/years or under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: 0700A
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered
Total: \$ plus 20% fee: \$
Payment Terms:
Set by SCDPPPS

PTUP
days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning
\$ paid to Public Defender Fund
Other:

Recipient:

Table with 3 columns: Description, Amount, Total. Includes items like § 14-1-206 (Assessments 107.5%), § 14-1-211(A)(1) (Conv. Surcharge) \$100, § 14-1-211(A)(2) (DUI Surcharge) \$100, § 56-5-2995 (DUI Assessment) \$12, § 56-1-286 (DUI Breath Test) \$25, Proviso 47.9 (Public Def/Prob) \$500, § 14-1-212 (Law Enforce. Funding) \$25, § 14-1-213 (Drug Court Surcharge) \$150, § 50-21-114 (BUI Breath Test Fee) \$50, § 56-5-2942(J) (Vehicle Assessment) \$40/ea, Proviso 90.5 (SCCA Surcharge) \$5, 3% to County (if paid in installments), TOTAL.

Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Paul B. Wickens
Court Reporter: H. Jenkins
SCCA/217 (03/2011)

Presiding Judge
Judge Code: 2138
Sentence Date: 1-15-14

STATE OF SOUTH CAROLINA)
 COUNTY OF Greenville)
 STATE VS.)
 Gary Reece Jr Thompson)
 AKA:)
 Race: WHITE Sex: M Age: 44)
 DOB: -1969 SS#:)
 Address:)
 City, State, Zip: GREENVILLE, SC 29605)
 DL#: SID#:)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS2300700A
 A/W#: 2013GS2300700A
 Date of Offense: 10/11/2007
 S.C. Code § : 16-03-0655(A)(2)
 CDR Code #: 3022

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No
 In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS
 TO: Sex / Criminal sexual conduct w/ minor, victim under 16 and offender w/ previous record under 23-03-0430(c) or (d), sex offense

in violation of § 16-03-0655(A)(2) of the S.C. Code of Laws, bearing CDR Code # 3022
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC §17-25-45
 w/minor 1st or Lewd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (defendant's initials)
 The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST
 [Signature] 70325
 Sustaikovitch, Christy Kednol SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
 for a determinate term of LIFE days/months/years or under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections.
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered
 Total: \$ _____ plus 20% fee: \$ _____
 Payment Terms: _____
 Set by SCDPPPS _____

PTUP _____
 _____ days/hours Public Service Employment
 Obtain GED
 Attend Voc. Rehab. or Job Corp. _____
 May serve W/E beginning _____
 Substance Abuse Counseling
 Random Drug/Alcohol testing
 Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund
 Other: _____

Recipient: _____

*Fine:		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$ 5
3% to County (if paid in installments)		\$
TOTAL		\$

Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/ Deputy Clerk Paul B. Wickens
 Court Reporter: H. Jenkins
 SCCA/217 (03/2011)

Presiding Judge [Signature]
 Judge Code: 2138
 Sentence Date: 1-15-14