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Nov 08 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

MICHAEL EDWARD WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-002280

Certiorari to Greenville County

Honorable Alex Kinlaw, Circuit Court Judge

Petition for Writ of Certiorari Denied by Order dated October 24, 2022

PETITION FOR REHEARING

By order dated October 24, 2022, this Court denied Petitioner's writ of certiorari from the denial of his post-conviction relief application. Pursuant to Rule 221(a), SCACR¹, Petitioner

¹ As a threshold matter, Rule 221(a), SCACR, does not bar the filing of a petition for rehearing from an order denying a petition for writ of certiorari pursuant to Rule 243, SCACR. Rule 221(a) only bars filing a petition for rehearing from an order denying a petition for a writ of certiorari under Rule 242, SCACR, or from an order declining to entertain a matter under Rule 245, SCACR. See also State v. Rucker, 321 S.C. 552, 471 S.E.2d 145 (1996) (holding a petition for rehearing following the denial of a petition for writ of certiorari to the Court of Appeals is not authorized by South Carolina Appellate Court Rules). Neither the plain language of Rule 221(a), nor any cases interpreting Rule 221(a), bar a petition for rehearing from an order denying a petition for a writ of certiorari from the denial of an application for post-conviction relief.

respectfully requests this Court rehear the matter considering the significant points of law overlooked and/or misapprehended by this Court as discussed below.

While not controlling, Rule 242, SCACR, outlines considerations governing our Supreme Court's exercise of discretionary review of certiorari petitions to the Court of Appeals. Chief among those considerations is whether the question presented is a novel question of law. Rule 242(b)(1), SCACR. Whether counsel was ineffective for failing to object that the State had not met the foundation requirements for admission of a forensic interview under S.C. Code Ann. §17-23-175, when the minor was unable to testify to the making of the videotape or the elements of the offense, has not been addressed by the appellate courts of this State. Petitioner respectfully submits that the novel question of law presented in the petition for writ of certiorari merits consideration by this Court.

Petitioner was tried for criminal sexual conduct with a minor, first-degree and third-degree. He was acquitted of the first-degree charge but convicted of the third-degree charge. Importantly, the only evidence of the alleged abuse was the unsworn and unchallenged out of court testimony contained in the forensic interview videotape that was played for the jury. The PCR court incorrectly found that trial counsel was not deficient because trial counsel had objected to the admission of the forensic interview. However, the record is clear, both from the trial and the PCR hearing, that while trial counsel did object to the admission of the forensic interview, she only objected to the forensic interview on constitutional and hearsay grounds. Trial counsel never objected that the State had failed to meet the basic foundational requirements contained in the statute for admission of a forensic interview.

In Petitioner's case, the only evidence submitted to the jury regarding the allegations of sexual abuse came from the forensic interview. The record is entirely devoid of any sworn

testimony of Minor's allegations. The fact that no sworn testimony was taken regarding the elements of the offense and the making of out-of-court statement are uncontroverted proof that the foundational elements of S.C. Code Ann. § 17-23-175 were not met. Trial counsel had a duty to object to the admission of the video and argue that the State had not met the foundational requirements in the statute. Failure of trial counsel to object that the State had not met the foundational requirements set forth in the statute was ineffective assistance of counsel.

S.C. Code §17-23-175 states in relevant part:

(A) In a general sessions court proceeding...an out of court statement of a child is admissible if:

- (1) the statement was given in response to questioning conducted during an investigative interview of the child;
- (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);
- (3) *the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement;* and
- (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

(emphasis added). When the State seeks to admit a forensic interview pursuant to this section, it must show that all four statutory requirements have been met. The requirement that the child testify at the proceeding and is subject to cross examination on the elements of the offense and the making of the out-of-court statement are foundationally vital because the statute deals with the admission of otherwise unsworn, unchallenged, out of court testimony that would typically be inadmissible hearsay.

The primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature. Gilstrap v. South Carolina Budget and Control Board, 310 S.C. 210, 423 S.E.2d 101 (1992). The appellate courts must avoid construing a statute so as to lead to an absurd result. State v. Allen, 314 S.C. 539, 431 S.E.2d 563 (1993). A plain reading of the statute makes it clear

that the State, as the proponent of the evidence, must have the child testify at the proceedings to the elements of the offense and the making of the out-of-court statement *and* be subjected to cross-examination on the elements of the offense and the making of the out-of-court statement. To construe the plain language of the statute to mean that the State must only call the minor to stand, elicit no direct testimony regarding the allegation or the making of the videotape, submit the minor for cross-examination and expect defense counsel to produce the necessary testimony to establish the foundation for the videotape would lead to absurd results.

The onus cannot be on a defendant, or defendant's counsel, to elicit potentially harmful testimony from a child for the first time on cross examination and thereby satisfy the foundational requirements in the statute. The State, in seeking to admit the videotape, has the burden of proving the admission meets the statutory safeguards enacted in S.C. Code § 17-23-175. A thorough review of the cases addressing S.C. Code § 17-23-175 over the past decade reveal that in every instance a forensic interview was admitted the minor testified on direct examination to the alleged abuse and the making of the forensic interview as required by the statute.² If the State is unable to bring out the necessary facts on direct examination, then the videotape is not admissible.

In State v. Perry, 410 S.C. 191, 763 S.E.2d 603 (Ct. App. 2014), then Chief Judge Few acknowledged that while prior consistent statements are generally inadmissible as improper

² (See, e.g., State v. Legg, 785 S.E.2d 369 (2016); State v. Anderson, 776 S.E.2d 76 (2015); State v. Whitner, 732 S.E.2d 861 (2012); State v. Jennings, 716 S.E.2d 91 (2011); State v. Stahlnecker, 690 S.E.2d 565 (2010); State v. White, 784 S.E.2d 695 (2016); State v. Perry, 763 S.E. 2d 603 (2014); State v. Hill, 715 S.E.2d 368 (2011); State v. Russell, 679 S.E.2d. 542 (2009); State v. Bryant, 675 S.E.2d 816 (2009)). Counsel for Petitioner would also note that there are numerous unpublished opinions dealing with S.C. Code § 17-23-175 where the child testified to the elements of the offense. See, e.g., The State v. Mozeak, No 2018-UP-209.

bolstering, the intention of the legislature in the creation of S.C. Code Ann. § 17-23-175 was to specifically allow for bolstering in sexual assault cases. He wrote:

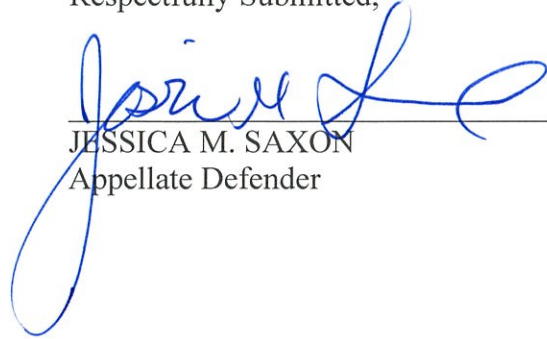
S.C. Code § 17-23-175 reflects our General Assembly's recognition that the central issue in the trial of almost any sexual assault case involving a child is whether the victim's testimony is truthful and accurate. It represents our General Assembly's policy determination that *a forensic interview should be admissible to enhance the credibility of a child sexual assault victim's trial testimony* – bolster – if it meets the criteria of the statute. Under section 17-23-175 and the policy underlying it, therefore, *the tendency of a forensic interview to enhance the credibility of the victim's testimony is precisely the reason that admission of the interview is proper.*

Perry, 410 S.C. at 209, 763 S.E.2d at 612 (Few, C.J. concurring in part, and dissenting in part) (emphasis added). However, the credibility of the minor's testimony cannot be bolstered if the minor never testifies about the alleged offense. In the case *sub judice*, Minor did not testify about the alleged abuse, therefore the forensic interview was not used to bolster her testimony. Instead, the forensic interview was relied upon as her trial testimony.

The record shows that trial counsel only objected to the admission of the videotape on various constitutional grounds. At no time did trial counsel raise the specific objection that the State failed to meet the foundational requirements set forth in S.C. Code Ann. §17-23-175(A)(3). During the PCR hearing trial counsel admitted that she had not made an argument or objection about the foundation for the admissibility of the video and offered no explanation for failing to make the objection. This was deficient performance which greatly prejudiced Petitioner as the only evidence that the jury could convict him with was the unsworn, unchallenged, out-of-court statement contained in the forensic interview.

For the reasons stated above, Petitioner respectfully requests that this Court exercise its discretion and grant the petition for writ of certiorari on this novel question of law.

Respectfully Submitted,



JESSICA M. SAXON
Appellate Defender

This 8th day of November, 2022.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

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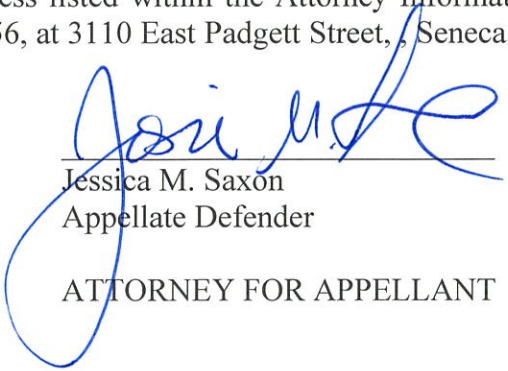
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-002280

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), the undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Taylor Z. Smith, Esquire, at the primary email address listed within the Attorney Information System (AIS); and Michael Edward Williams, #283356, at 3110 East Padgett Street, Seneca, SC 29678, this 8th day of November, 2022.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

From: [Warren, Kaylynn](#)
To: [Taylor Smith](#)
Cc: williamcorbett@scag.gov; [Saxon, Jessica](#)
Subject: 2018-002280 Michael Edward Williams v. The State
Date: Tuesday, November 8, 2022 11:06:00 AM
Attachments: [2018-002280 Michael Edward Williams v. The State Petition for Rehearing and COS.pdf](#)

Good Morning,

Please find attached for service in the above-referenced case the Petition for Rehearing and accompanying Certificate of Service which will be filed today, November 8, 2022, with the Court of Appeals via OneDrive.

Respectfully,
Kaylynn

Kaylynn Warren

Administrative Assistant
South Carolina Commission on Indigent Defense
Division of Appellate Defense
(803) 734-1330