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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Richland County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

VICTOR D. SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000549

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

ISSUE PRESENTED.....1

STATEMENT.....2

STANDARD OF REVIEW5

ARGUMENT

The PCR judge erred in finding that counsel was not ineffective for failing to object to the lead investigator, Travis Holdorf’s, opinion that he believed that one of Petitioner’s co-defendants was being truthful when he implicated Petitioner in the murder because this was improper opinion testimony from a law enforcement officer.....6

CONCLUSION.....13

TABLE OF AUTHORITIES

Cases

<u>Anders v. California</u> , 386 U.S. 738 (1967).....	4
<u>Briggs v. State</u> , 421 S.C. 316, 806 S.E.2d 713 (2017).....	10
<u>Butler v. State</u> , 286 S.C. 441, 334 S.E.2d 813 (1985)	7
<u>Chappell v. State</u> , 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019)	11, 12
<u>Cherry v. State</u> , 300 S.C. 115, 386 S.E.2d 624 (1989)	8
<u>Johnson v. State</u> , 325 S.C. 182, 480 S.E.2d 733 (1997)	8
<u>Sellner v. State</u> , 416 S.C. 606, 787 S.E.2d 525 (2016).....	5
<u>Smalls v. State</u> , 422 S.C. 174, 810 S.E.2d 836 (2018)	5
<u>Smith v. State</u> , 386 S.C. 562, 689 S.E.2d 629 (2010).....	10
<u>State v. Barrett</u> , 416 S.C. 124, 785 S.E.2d 387 (Ct. App. 2016)	8
<u>State v. Dawkins</u> , 297 S.C. 386, 377 S.E.2d 298 (1989)	10
<u>State v. Dempsey</u> , 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000).....	8
<u>State v. Jennings</u> , 394 S.C. 473, 716 S.E.2d 91 (2011)	8
<u>State v. Kromah</u> , 401 S.C. 340, 737 S.E.2d 490 (2013)	9
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984).....	7, 8
<u>Tappeiner v. State</u> , 416 S.C. 239, 785 S.E.2d 471 (2016)	9
<u>Thompson v. State</u> , 423 S.C. 235, 814 S.E.2d 487 (2018)	10, 11

Rules

Rule 59(e), SCRPC	4, 7
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ISSUE PRESENTED

Did the PCR judge err in finding that counsel was not ineffective for failing to object to the lead investigator, Travis Holdorf's, opinion that he believed that one of Petitioner's co-defendants was being truthful when he implicated Petitioner in the murder since this was improper opinion testimony from a law enforcement officer?

STATEMENT

Petitioner was indicted in February 2010 by the Richland County grand jury for murder. App. 957 – 958. On September 19, 2011, Petitioner proceeded to trial before the Honorable Casey L. Manning and a jury. App. 1. Petitioner was represented by Christopher Hart and the state was represented by Daniel Goldberg and Carter Potts. App. 1.

Petitioner, along with three co-defendants, was accused of murdering Ernest Robinson. Robinson did not show up for work on September 28, 2008, or any day after that. A missing persons investigation was conducted by Dorothy Cronise with the Richland County Sherriff's Department. App. 158, l. 1 – 159, l. 20. She was assigned the case on December 29, 2008, and began her investigation by interviewing people at Robinson's place of employment, a restaurant called Beef O'Brady's. App. 162, l. 3 – 163, l. 5.

The owner of Beef O'Brady's, Mark Wickham, testified that Petitioner and Robinson both worked for him at his restaurant. App. 176, l. 8 – 177, l. 4; 178, ll. 17 – 21. Wickman said that Robinson worked on September 27, 2008, until about 10:00 p.m. but did not show up for work the following morning as scheduled. App. 177, l. 21 – 178, l. 16. According to Wickman, Petitioner showed up for work on September 28, but only stayed for about an hour and then "he just kind of disappeared." App. 178, l. 17 – 179, l. 8. The next time Wickman saw Petitioner was when he came to pick up his final paycheck the following Friday. App. 179, ll. 9 – 13. Wickman never saw Robinson again. App. 179, ll. 14 – 19.

On July 20, 2009, a surveyor found a human body wrapped and tied up with a belt in the retention pond area of the apartment complex where Petitioner had previously resided. App. 120, l. 1 – 123, l. 6. Dr. Clay Nichols performed an autopsy on the body that was recovered but was unable to make a positive identification on it. Dr. Nichols admitted that, at the time of the

trial, he did not know who the remains belonged to. App. 276, l. 9 – 277, l. 24; app. 283, ll. 11 – 18.

Marvin Shipman, a friend of Robinson's, testified that he last saw Robinson on September 27, 2008. App. 203, ll. 5 – 15. Shipman said that he picked up Robinson and a man named Allen¹ from Northstone Apartments to "hang out." App. 203, l. 17 – 204, l. 11. He recalled that they went to buy some marijuana and Robinson and Allen split a "twenty-dollar bag." App. 204, ll. 15 – 24. Shipman then dropped Robinson off at work and took Allen back to the apartment complex. App. 205, ll. 12 – 15. Shipman claimed that when he dropped Robinson off at work, Robinson told Allen to hold the marijuana they had purchased, and that Robinson would come to Allen's house after he got off work to smoke it. App. 206, ll. 3 – 12.

Allen Fulton, who was also arrested for the murder of Robinson, testified against Petitioner at his trial. App. 474. Fulton claimed that Robinson was planning to come over to Petitioner's house after he got off work on September 27 to finish smoking the marijuana that they had purchased earlier in the day when they were with Shipman. App. 478, ll. 12 – 19. Fulton said that when Shipman dropped him off at Petitioner's house, Petitioner, Jeremiah, Darius and Jazmine were all present in the apartment.² App. 479, ll. 3 – 7.

Fulton claimed that Petitioner accused Robinson of stealing his rent money and that he was planning to beat Robinson up that night when Robinson came to Petitioner's house. App. 479, l. 8 – 481, l. 25. After Robinson arrived at Petitioner's apartment that night, Fulton said that he punched Robinson and then Petitioner, Jeremiah and Darius joined in attacking Robinson.

¹ As will be seen later, this was Allen Fulton, one of Petitioner's co-defendants.

² Jeremiah Jones and Darius Smith, who was Petitioner's brother, were also both arrested for the murder of Robinson. Jazmine Bright was Petitioner's girlfriend at the time and was not charged as a co-defendant.

App. 483, l. 12 – 485, l. 3. Fulton claimed that after they finished physically assaulting Robinson, Petitioner shot Robinson in the head one time with a pistol. App. 485, l. 4 – 488, l. 6. According to Fulton, after Petitioner shot Robinson, they wrapped his body in a shower curtain and dumped him in the woods behind the apartment. App. 489, l. 22 – 490, l. 14. After disposing Robinson’s body, Fulton said that he and Jeremiah spent the rest of the night working to clean up the apartment. App. 490, l. 15 – 492, l. 5.

The jury convicted Petitioner as charged and the judge sentenced him to life imprisonment. App. 959. On direct appeal, Petitioner was represented by Kathrine Hudgins of Appellate Defense. App. 815 – 826. Appellate counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967) and the Court of Appeals dismissed the appeal pursuant to the Anders procedure. State v. Smith, No. 2013-UP-423 (filed November 20, 2013).

Petitioner filed his PCR application on July 9, 2014, and the state filed its return on July 23, 2015. App. 829 – 840. An evidentiary hearing was held on December 11, 2015, before the Honorable G. Thomas Cooper. App. 841. Petitioner was represented by Jonathan Waller and the state was represented by J. Clayton Mitchell, III. App. 841. Petitioner and his trial counsel, Christopher Hart, both testified at the hearing. App. 842. The PCR judge denied Petitioner’s application for relief. App. 942. PCR counsel filed a motion to amend the PCR judge’s order pursuant to Rule 59(e), SCRCP which was also denied by the PCR judge. App. 954 – 956.

Petitioner filed a petition for writ of certiorari in the Supreme Court on November 27, 2019. The Supreme Court transferred the petition to this Court on June 16, 2020. On June 29, 2022, this Court granted the petition as to question one and denied the petition as to the remaining issues.

This brief of petitioner follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue raised on appeal. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018). The reviewing court must defer to a PCR court’s findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, the appellate court reviews questions of law de novo, with no deference to the PCR court. Id.

ARGUMENT

The PCR judge erred in finding that counsel was not ineffective for failing to object to the lead investigator, Travis Holdorf's, opinion that he believed that one of Petitioner's co-defendants was being truthful when he implicated Petitioner in the murder because this was improper opinion testimony from a law enforcement officer.

Relevant Facts

The most significant evidence against Petitioner presented at his trial was the testimony of his two co-defendants, Allen Fulton and Jeremiah Jones. Jones testified that he and Petitioner were "like brothers," and that he did not want to get Petitioner in trouble, so he did not tell law enforcement the truth when he was first interviewed regarding the alleged murder of Robinson. App. 442, l. 13 – 443, l. 3. Jones later changed his story and claimed that he was present at Petitioner's house on the night of September 27, 2008, and witnessed Petitioner murder Robinson. App. App. 443, l. 8 – 449, l. 25. Jones further claimed that after the murder, Petitioner instructed him to dispose of Robinson's body and to clean up the blood in the apartment. App. 450, l. 5 – 452, l. 19.

At Petitioner's PCR hearing, PCR counsel alleged that trial counsel failed to object to testimony by Investigator Travis Holdorf which impermissibly bolstered the testimony of Jones. App. 850, ll. 6 – 18. At trial, Holdorf testified that he interviewed Jones regarding the alleged murder of Robinson. Holdorf testified:

[Jones] did not want to implicate [Petitioner], that [Petitioner] was like a brother to him. He was emotional. *I think it was very real what he was saying, because, again, it was emotional. There are just some things you get a feeling they're not faking.* He didn't want to tell, but he didn't have a choice. He even implicates himself in the murder.

App. 692, ll. 11 – 23 (emphasis added).

When trial counsel was asked what the trial strategy was in not objecting to this testimony by Holdorf, he only said: “Sitting here today, I can’t tell you that.” App. 905, ll. 1 – 5. The PCR judge did not address this specific issue in his initial order of dismissal. Instead, the PCR judge addressed the separate issue of whether trial counsel was ineffective in objecting to other alleged bolstering testimony by Holdorf. Specifically, whether counsel was ineffective for failing to object to Holdorf’s testimony that “Dotte Cronise has done a fantastic job.” App. 950 – 951.

PCR counsel then filed a motion to amend the PCR judge’s order pursuant to Rule 59(e), SCRPC. In his motion, PCR counsel argued that the order of dismissal was incomplete because the PCR judge did not address Petitioner’s allegation that his trial counsel was ineffective in failing to object to Holdorf’s testimony that Petitioner’s co-defendant Jones was being truthful when he implicated Petitioner in the alleged murder. App. 954. PCR counsel argued that this testimony by Holdorf was improper because it bolstered Jones’ testimony and that trial counsel was ineffective for not objecting. App. 954. The PCR judge denied Petitioner’s Rule 59(e), SCRPC motion. App. 956.

Discussion

In order to prove ineffective assistance of counsel, Petitioner must show that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

Court's use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient," meaning that it fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"The assessment of witness credibility is within the exclusive province of the jury." State v. Barrett, 416 S.C. 124, 131, 785 S.E.2d 387, 390 (Ct. App. 2016). "Therefore, witnesses are generally not allowed to testify whether another witness is telling the truth." Id. "Similarly, witnesses may not improperly bolster the testimony of other witnesses." Id.

Jones' credibility as a witness was critical to the jury's determination of whether the state met its burden of proof. Petitioner's trial counsel was ineffective for failing to object to the lead investigator's opinion testimony that one of Petitioner's co-defendants was telling the truth when he implicated Petitioner in the crime. The reason that counsel could not articulate a strategic reason for such a failure was because there was no strategic reason not to object to this improper opinion testimony.

In State v. Jennings, 394 S.C. 473, 479-480, 716 S.E.2d 91, 94 (2011), the Supreme Court held that a forensic interviewer's report, which stated that the three minor victims had made "a compelling disclosure of abuse," was improper bolstering and the trial court erred in failing to exclude it. The Court in Jennings further concluded that the error was not harmless "[b]ecause the children's credibility was the most critical determination of this case." Id. at 480, 716 S.E.2d at 95; see also State v. Dempsey, 340 S.C. 565, 568-69, 532 S.E.2d 306, 308 (Ct.

App. 2000) (holding that the trial judge erred in allowing a child sexual abuse counselor to testify that he had no reason to believe the victim was not telling the truth based on his thirteen counseling sessions with the victim and that children who make allegations of sexual abuse are being truthful in 95% of cases).

Similarly, in State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013), the Supreme Court noted that while experts are permitted to give opinion testimony, “they may not offer an opinion regarding the credibility of others.” Kromah further acknowledged that “[i]t is undeniable that the primary purpose for calling a ‘forensic interviewer’ as a witness is to lend credibility to the victim’s allegations.” Id. However, determinations of witness credibility are within the exclusive province of the jury, which is why a witness is generally not allowed to comment on the veracity of another witness’ testimony. Id. The state’s expert witness in Kromah testified that she made a “compelling finding” of physical child abuse after she interviewed the alleged minor victim. Id. at 351, 737 S.E.2d at 496. The Court in Kromah concluded that this testimony was “the equivalent of [the state’s expert] stating the [c]hild was telling the truth.” Id. at 359, 737 S.E.2d at 500.

Our appellate courts have also found that failing to object to such bolstering testimony constituted ineffective assistance of counsel in several PCR cases. In Tappeiner v. State, 416 S.C. 239, 785 S.E.2d 471 (2016), the Supreme Court found that trial counsel was ineffective for failing to object to the solicitor’s improper comments during closing argument. In Tappeiner, the assistant solicitor suggested that the police and the rape crisis counselor believed the alleged victim and did not believe the defendant. Id. at 246, 785 S.E.2d at 474-475. The Supreme Court found Tappeiner was prejudiced by her trial counsel’s failure to object to these comments

because the case turned solely on the credibility of the witnesses since there was no physical evidence of the defendant's guilt.

Similarly, in Briggs v. State, 421 S.C. 316, 327, 806 S.E.2d 713, 719 (2017), the Supreme Court found that trial counsel was ineffective, in part, for his failure to object to a forensic interviewer testifying that it was her job to determine whether the alleged minor victim knew the difference between the truth and a lie. The Briggs Court said that “a witness may not give an opinion for the purpose of conveying to the jury – directly or indirectly – that she believes the victim.” Briggs, 421 S.C. at 324, 806 S.E.2d at 717; see also Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) (holding that trial counsel's failure to object to forensic interviewer's testimony that she believed the minor victim constituted ineffective assistance of counsel where counsel gave no strategic reason for the failure to object, the credibility of the victim was central to the case, and there was not overwhelming evidence of guilt).

The Supreme Court further noted in Briggs that its prior decision in State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989) made it “clear that no witness may give an opinion as to whether the victim is telling the truth.” Briggs, 421 S.C. at 325, 806 S.E.2d at 718. Thus, the Briggs Court concluded:

[R]easonably competent trial counsel should know to object – absent a valid trial strategy – when a forensic interviewer gives testimony that indicates the witness believes the victim, but does not serve some other valid purpose. When the testimony directly conveys the witness's opinion that the victim is telling the truth, it is obviously improper bolstering.

Id.

In Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018), the Supreme Court also held trial counsel was ineffective for failing to object to improper bolstering testimony. In Thompson, an investigator testified that the victim's statements in her forensic interview were “consistent

with her own training and experience” and also that the physical findings of sexual abuse by the doctor who treated the victim “corroborated the account given by [the victim] during the forensic interview.” Id. at 241-42, 814 S.E.2d at 490.

Further, the forensic interviewer who interviewed the victim testified that the victim suffered from post-traumatic stress disorder (PTSD) “based upon the significant emotional distress and ‘genuine, just palpable grief’ exhibited by [the victim] during the interview.” Id. at 242, 814 S.E.2d at 490-91. The forensic interviewer went on to explain that the victim’s story was compelling in part because of “the emotional intensity that she was clearly experiencing in the room.” Id. In Petitioner’s case, as in Thompson, the investigator based his opinion that Petitioner’s co-defendant was telling the truth because of the emotion he exhibited during the interview. Trial counsel was required to object to such improper bolstering absent a reasonable trial strategy.

This Court considered whether trial counsel’s failure to object to an expert witness who testified that children do not often lie about sexual abuse constituted ineffective assistance of counsel in Chappell v. State, 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019). In Chappell, the defendant was charged with criminal sexual conduct with a minor and this Court found that the expert’s testimony that children do not often lie improperly bolstered the minor’s testimony. Id. at 75, 837 S.E.2d at 499. This Court stated the test for determining whether a witness’s testimony was improper bolstering:

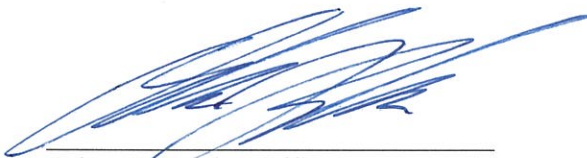
[T]he testimony of an independent expert, like the testimony of any witness, is improper bolstering if (1) the witness directly states an opinion about the victim’s credibility, (2) the sole purpose of the testimony is to convey the witness’s opinion about the victim’s credibility, or (3) there is no way to interpret the testimony other than to mean the witness believes the victim is telling the truth.

Id. at 77, 837 S.E.2d at 501. This Court held that the expert's statement that children do not often lie about sexual abuse was improper bolstering because the expert was opining on the credibility of a class of persons to which the victim belonged. Id. at 78, 837 S.E.2d at 501. This Court further held that the only reasonable interpretation of the expert's testimony was that she was improperly bolstering the victim's credibility and to "convey to the jury that the victim's allegations must be true and to encourage the jury to supplant their own credibility determination with that of [the expert]." Id. Here, Holdorf directly opined that Jones was telling the truth about Petitioner being involved in the alleged murder. Holdorf's testimony on this point served no purpose other than to convey to the jury that Jones was telling the truth and that the jury should supplant their own credibility determination with his.

Again, in this case, the improper bolstering came from the *lead investigator*, and he was bolstering the testimony of a testifying co-defendant. Because the co-defendants were the only eyewitnesses to the alleged crime, their credibility was crucial. Their credibility was also the sole province of the jury to determine. Instead of allowing the jury to determine credibility based on what the witnesses testified to, trial counsel's failure to object to Holdorf's testimony allowed the jury to hear the lead investigator directly comment on his belief that the co-defendant was telling the truth when he implicated Petitioner in the murder. The PCR judge erred in finding that trial counsel's failure to object was not ineffective assistance of counsel.

CONCLUSION

By reason of the foregoing arguments, Petitioner's conviction should be reversed and his case remanded to the Lexington County Court of General Sessions for a new trial.



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ATTORNEY FOR PETITIONER

This 26th day of July, 2022.