

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Feb 27 2023

S.C. SUPREME COURT

CERTIORARI TO KERSHAW COUNTY

Court of Common Pleas

The Honorable Grace Gilchrist Knie, Circuit Court Judge

Case No. 2019-CP-28-00236

James Wayne Miller, #367454,

PETITIONER,

v.

State of South Carolina,

RESPONDENT.

Appellate Case No.: 2022-000753

JOHNSON PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

QUESTION PRESENTED 2

STATEMENT OF THE CASE..... 3

STANDARD OF REVIEW 5

STATEMENT OF THE FACTS 6

ARGUMENT

**The PCR court erred in finding trial counsel was effective when
counsel failed to call witnesses at the trial to rebut the victim’s
testimony.....**
9

CONCLUSION..... 16

QUESTION PRESENTED

1. DID THE PCR COURT ERR IN FINDING TRIAL COUNSEL WAS EFFECTIVE WHEN COUNSEL FAILED TO CALL WITNESSES AT THE TRIAL TO REBUT THE VICTIM'S TESTIMONY?

STATEMENT OF THE CASE

The Kershaw County Grand Jury indicted the Petitioner on March 9, 2016¹, for criminal sexual conduct, 2nd degree (2012-GS-28-1381) and incest (2012-GS-28-1382). (App. pp. 92-93; 97-98). Assistant Solicitors Kathryn Cavanaugh and Karlen K. Senn represented the State. Anna R. Good, Esquire, represented the Petitioner.

On March 14, 2016, the Petitioner proceeded to trial before the Honorable Tanya A. Gee. (App pp. 1-672). Petitioner was found guilty on both counts and sentenced to twenty (20) years imprisonment for criminal sexual conduct, 2nd degree and ten (10) years imprisonment for incest. App. p. 670, line 20 – p. 671, line 1. The sentences are to be served consecutively. (App. p. 671, lines 1-2.)

Petitioner timely filed a Notice of Appeal from his convictions and sentence and an a appeal was perfected. Appellate Defender Susan B. Hackett represented the Petitioner on appeal. Petitioner's conviction and sentence was affirmed by unpublished opinion by the SC Court of Appeals on March 21, 2018. (State v. Miller, 2018-UP-121.) (App. pp. 753-756). Petitioner filed a Petition for Rehearing on which was denied on May 24, 2018. (App. pp. 261-276). Petitioner timely filed a Petition for a Writ of Certiorari with the SC Supreme Court on July 5, 2018. (App. pp. 278-303). The Petition was denied on September 21, 2018.) (App. pp. 826). The Remittitur was sent on October 1, 2018. (App. p. 828.)

Petitioner filed his application for post-conviction relief (PCR) on March 11, 2019. (2019-CP-28-00236). (App. pp. 830-844). Petitioner amended his application

¹ The face of the indictments indicate that the Grand Jury convene on October 17, 2012. (App. pp. 92-93; 97-98.) However, the signature line indicates that the indictments were either true-billed or amended on March 9, 2016, and they were filed with the Clerk of Court that day.

on or about March 21, 2022. (App. pp. 845-850). The State filed its Return, Motion for a More Definite State, & Partial Motion to Dismiss on December 10, 2021. (App. pp. 851-877).

The PCR hearing was held on April 1, 2022, before the Honorable Grace Gilchrist Knie at the Richland County Courthouse. (App. pp. 878-1006). Petitioner was present and represented by Ola A. Johnson, Esquire. Senior Assistant Deputy Attorneys General William M. Blich, Jr. and Megan Harrigan Jameson represented the Respondent. On May 10, 2022, Judge Knie denied the Petitioner's PCR application by written order. (App pp. 1033-1086). This petition follows.

STANDARD OF REVIEW

The reviewing court defers to the PCR court's factual findings and will uphold them if supported by any evidence in the record. Smalls v. State, 422 S.C. 174, 179–181, 810 S.E.2d 836, 839 (2018). Furthermore, the reviewing court affords great deference to a PCR court's credibility findings. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). Questions of law are reviewed *de novo*, and this court will reverse the PCR court if its decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

STATEMENT OF THE FACTS

Petitioner and his wife, Tammy have five children together. (App. p. 269, lines 10-12; p. 268, lines 6-14). Petitioner worked in construction while Tammy stayed home with the kids, sometimes homeschooling them. (App. p. 271, lines 8-12; p. 173, lines 1-2; p. 271, lines 17-25; and p. 172, lines 1-21). Two of their children were twins – Minor² & her sister. (App. p. 274, lines 7-9).

Around July 4, 2011, Petitioner and his family visited some friends in Camden. (App. p. 275, lines 11-20; p. 175, lines 21-23). After spending time in Camden, Petitioner decided to move his family from Summerville to Camden, eventually finding a house to rent on Lake Wateree. (App. pp. 175-176.) The home needed work and Minor and Applicant stayed at the new house to fix it up while the rest of the family went back to Summerville to pack up. (App. pp. 177-178.) Applicant had experience in construction and as a day laborer and Minor 1 often assisted with the work on the house. (App. pp. 173-177). They slept in the family's camper while they worked on the house. (App. pp. 177-178).

On evening, Minor went into the camper to go sleep while the Applicant remained outside by the bonfire, spending time with friends. (App. pp. 178-179). Minor claimed she woke up to the Applicant performing oral sex on her. (App. p. 179, lines 12-13.) Minor pushed Applicant away and ran into the bathroom. (App. p. 179, lines 17-20). However, Applicant apologized so she left the bathroom and went to the couch. (App p. 180, lines 10-23.) Eventually, she went back to bed and fell asleep. (App p. 181, lines 1-6.) The victim claimed again that she woke up to the

² The victim/complainant in this matter is Minor and will be referred to as such throughout this Petition.

Petitioner on top of her, attempting to have sex with her. (App. p. 181, lines 6-7.) He had sex with her despite Minor's protest. (App. p. 181, lines 17-23.)

Minor insisted the abuse continued, even after the rest of the family finally moved into the lake house. (App. pp. 203-213.) She noted that the assaults continued even when she and her sister shared a room. (App. p. 188, lines 9-19.) Even though Minor claims there were many times the Petitioner continued to rape her, her family appeared to not know anything about it, even after Petitioner's wife confronted him about him being in Minor's room. (App. p. 195, lines 21-23, pp. 281-282.)

Once Minor disclosed the alleged assaults and the Applicant was arrested, her mother moved the family to Florida. (App. p. 313, lines 15-23.) Shortly after moving to Florida, Minor's mother starting dating another man. (App. p. 337, lines 12-17.) Eventually, Minor's mother sent all the other children to go live with an aunt, while Minor stayed with her mother. (App. p. 315, lines 16-21.) And then in 2013, Minor's mother moved in with her new boyfriend. (App. p. 315, lines 25-25; p. 316 lines 4-10.) Tammy finally divorced the Petitioner in 2015. (App. p. 337, lines 4-11.)

ARGUMENT

The PCR court erred in finding trial counsel was effective when counsel failed to call witnesses at the trial to rebut the victim's testimony.

In this matter, trial counsel was deficient for failing to call witnesses to rebut Minor's testimony. When reviewing a claim for ineffective assistance of counsel, the "court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (*quoting* Strickland v. Washington, 466 U.S. 668, 690 (1984)). To rebut this presumption and succeed on an ineffective assistance claim, a PCR applicant must show (1) trial counsel's performance was deficient, and (2) trial counsel's deficient performance prejudiced the outcome of the trial. Strickland, 466 U.S. at 687.

"To prove trial counsel's performance was deficient, a [PCR] applicant must show '[trial] counsel's representation fell below an objective standard of reasonableness.'" Smalls, 422 S.C. at 181, 810 S.E.2d at 840 (*quoting* Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005)).

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post-conviction relief hearing. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991). In order to show prejudice from the failure to contact an allegedly favorable witness, a PCR applicant must present the testimony of that witness at the PCR hearing. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An applicant must produce the testimony of a

favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Petitioner called two witnesses at the PCR hearing: Pamela Edwards and Michael Norwood. Ms. Edwards testified that Minor did have friends and an active social life. (App. p. 933, lines 6-9.) Minor had testified that the Petitioner would not allow her to have friends and always kept her isolated. (App. p. 182, lines 24-25; p. 186, lines 1-8; p. 215, line 12- p. 218, line 21.) Ms. Edwards also testified that the victim did not seem traumatized and was not acting like a victim. (App. p. 938, lines 5-8.)

Michael Norwood testified at the PCR hearing that he spent a lot of time with the Petitioner and his family and that his children stayed at the Petitioner's house with Petitioner's family. (App. p. 943, line 15-25; p. 944, lines 19-20.) He also noted that there were other people working on the house when Minor alleged she was raped by the Petitioner. (App. p. 946, line 21 – p. 947, line 6.)

The testimony of these witnesses would have helped rebut statements Minor 1 made during her testimony and therefore call into question her veracity. Trial counsel's actions in not calling these witnesses this was deficient. Had trial counsel called them, the outcome of the trial would have been different because Petitioner would have been found not guilty.

CONCLUSION

For the foregoing reasons, Petitioner submits this Court should grant the Petition for Writ of Certiorari and reverse the convictions and sentence and the case remanded for a new trial.

Respectfully submitted,



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Certiorari to Spartanburg County
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PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Wayne Miller states:

1. She is a member of the South Carolina Bar and was appointed to represent the Petitioner.
2. She has reviewed the records and transcripts of Petitioner's post-conviction relief hearing which was held on April 1, 2022. In her opinion seeking certiorari from the Order of Dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 SC 310, 364 SE2d 201 (1998), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Mr. Miller.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her ability this Johnson Petition for a Writ of Certiorari complies with SCACR 11(b) and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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