

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Writ of Certiorari
To the Court of Appeals

S.C. Supreme Court

Appeal from Charleston County
Honorable Kenneth G. Goode, Circuit Court Judge

Court of Appeals Appellate Case No. 2013-000854

MARK EDWARD VAIL,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
S.C. Bar #100269

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the Court of Appeals err in reversing the lower court's denial of the Respondent's application for post-conviction relief when there was probative evidence to support the lower court's ruling that counsel was not ineffective for failing to object to hearsay testimony during trial, several of the challenged statements were admissible, trial counsel articulated a valid strategic reason for failing to object, and counsel's performance did not affect the outcome of the Respondent's trial?

STATEMENT OF THE CASE

The Respondent is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Respondent was indicted at the May 2004 term of the Charleston County Grand Jury for lewd act upon a minor (2004-GS-10-2733) and criminal sexual conduct (CSC) with a minor, second-degree (2004-GS-10-2734). The Respondent was later indicted at the November 2004 term of the Charleston County Grand Jury for a second count of CSC with a minor, second-degree (2004-GS-10-8316). V. Craig Jones, Esquire, represented the Respondent.

On January 14, 2005, Respondent proceeded to trial, after which a jury found him guilty of lewd act upon a minor and one count of CSC with a minor, second-degree (2004-GS-10-8316). The Honorable Daniel F. Pieper sentenced Respondent to confinement for a period of eight (8) years for lewd act upon a minor and ten (10) years for CSC with a minor- second degree. The sentences were to run concurrently. A timely Notice of Appeal was filed on Respondent's behalf. The Respondent later withdrew his appeal and it was dismissed by the Court of Appeals by Order dated February 22, 2006.

The Respondent subsequently filed an application for post-conviction relief on April 26, 2006. An evidentiary hearing was held on January 23, 2008 at the Charleston County Courthouse. The Respondent was present and represented by Tara D. Shurling, Esquire. Michelle J. Parsons, Esquire, of the Attorney General's Office represented the Petitioner. The Honorable Kenneth G. Goode denied and dismissed the Respondent's application by Order dated November 17, 2008.

The Respondent filed a timely Notice of Appeal. The Court of Appeals Court granted Respondent's Petition for Writ of Certiorari. Full briefing and oral argument by the parties

followed. On February 20, 2013, the Court of Appeals reversed the circuit court's denial of post-conviction relief and remanded the matter for a new trial. Vail v. State, Op. No. 5092 (S.C. Ct. App. filed February 20, 2013). The Court of Appeals found trial counsel was ineffective for failing to object to several portions of the challenged testimony. The Petitioner filed a Petition for Rehearing which was denied by Order dated March 20, 2013. This Petition follows.

ARGUMENT

The Court of Appeals erred by reversing the denial of the Respondent's application for post-conviction relief when there was probative evidence to support the lower court's ruling that counsel was not ineffective for failing to object to hearsay testimony during trial, several of the challenged statements were admissible, trial counsel articulated a valid strategic reason for failing to object, and counsel's performance did not affect the outcome of the Respondent's trial.

The Petitioner submits the Court of Appeals erred by reversing the lower court's denial of the Respondent's application for post-conviction relief when the Respondent failed to carry his burden of proving counsel was ineffective for failing to object to alleged hearsay statements made during trial. Therefore, this Petition for Writ of Certiorari should be granted and the lower court's decision ultimately affirmed.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional

norms." Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. 668). Second, counsel's deficient performance must have prejudiced the 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. at 117-18, 386 S.E.2d at 625. The Petitioner submits that the Respondent did not satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The Court of Appeals erred in finding several statements made during trial were inadmissible hearsay statements. The Court of Appeals held the lower court erred by finding the challenged testimony fell either under Rule 801(d)(1), was an exception to the rule against hearsay, or did not fit within the definition of hearsay. The Court of Appeals also erred in finding trial counsel was deficient for failing to object to the challenged statements. The Petitioner submits there is probative evidence to support the circuit court's finding.

The Court of Appeals held the testimonies of Kelsey R., the victim's sister, and Caroline O. were hearsay and did not satisfy the requirements of Rule 801(d)(1)(B) or (D), SCRE. The Petitioner asserts the testimonies of both Kelsey R. and Caroline O. are non-hearsay under Rule 801(d)(1)(B), SCRE. Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Under Rule 801(d)(1)(B), prior statements by witnesses are non-hearsay and admissible if the declarant testifies and is subject to cross-examination, the declarant is implicitly accused of a recent fabrication or having an improper influence or motive, the statement was

consistent with the declarant's testimony, and the statement was made prior to the alleged fabrication or the existence of the alleged improper influence or motive.

Kelsey R. testified "she admitted to us that she and Coach Vail had been having sex." (App. 238:19-23). Caroline O., the victim's friend, testified that "as soon as she informed Kelsey that they had been having sex...[victim] informed me that they had been having sex as well." (App. 293:13-19). This testimony was admissible since trial counsel implicitly accused the victim of developing the motive to lie after she learned the Respondent was engaged. Counsel articulated this theory during the post-conviction relief hearing when he testified his "thought was that [the victim] was mad that he had any other type of relationships with students, not sexual, but the trigger for these allegations was his engagement to [Respondent's girlfriend]." (App. 995:4-15 and 1025:8-18). Counsel elicited testimony from the victim about her speculation on when the Respondent was going to get engaged to Mullins and how and when she learned of the engagement. (App. 155:11-18 and 210:8-15).

The victim took the stand at trial and was subject to cross-examination and her statements at trial were consistent with those made by Kelsey R. and Caroline O. (App. 128:11-25 and 208:1-15). Lastly, the victim's statements to Caroline O. and Kelsey R. were made prior to the victim's knowledge of the Respondent's engagement, which is when trial counsel implied the victim's improper motive to lie developed. The statements made by the victim to Caroline O. and Kelsey R. were made prior to her learning of the Respondent's engagement and were admissible to refute trial counsel's accusation that the victim developed a motive to lie after learning of the Respondent's engagement. This testimony was admissible to show the statements the victim made about her sexual encounters with the Respondent before and after she learned of the engagement were consistent. Trial counsel did not err by not objecting to this testimony at trial.

The Court of Appeals erred by finding challenged statements were hearsay offered for the truth of the matter asserted or were more prejudicial than probative. Specifically, the Court of Appeals held the testimony from Thomas Mullins, the victim's school principal, was hearsay. Thomas Mullins testified "there was a rumor or a statement that there was some inappropriate behavior with [the Respondent] and another student" (App. 446:15-18). The Petitioner asserts the testimony of Thomas Mullins was not offered for the truth of the matter asserted, but rather to explain subsequent conduct taken by Mullins. Mullins' statement was in response to a question about what prompted him to seek out the Petitioner to give him advice on his interactions with students. (App. 446:5-20). The fact that his testimony was not offered for the truth of the matter asserted is further evidenced by the lack of details in Mullins' statement. Mullins does not state the nature of the inappropriate behavior or indicate in any way that the behavior was sexual. Trial counsel did not err by not objecting to this testimony at trial.

The Court of Appeals erred by finding the testimony of Caroline O. and Virginia Murray did not fall under Rule 803(3), SCRE. Under Rule 803(3), a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, but not including a statement or memory or belief to prove the fact remembered or believed is not excluded by the hearsay rule. Caroline O. testified the victim told her "[Petitioner] was mad at her for telling us and somehow he found out that she had told us they had sex." (App. 300:14-20). This statement falls under the exception in Rule 803(3) because it indicates the victim's anger during her conversations with her sister about the incident. Caroline O. goes on to say that during this conversation, the victim was very upset and expressed strong feelings during their discussion. (App. 300:21-25).

Virginia Murray testified the victim was very upset the Respondent had left the school, and stated "it was because of her and everybody would hate her because of it...and then she went

on to say that she had given her virginity to him and that's why she was really upset." (App. 320:11-16). This statement falls under the exception in Rule 803(3) as the victim's then existing state of mind and emotion while disclosing the abuse to her teacher. Murray testified the victim became very upset and had to be taken out of class because she was crying. (App. 318:2-16).

Murray's testimony was also not hearsay because it was not offered for the truth of the matter asserted. Her testimony was offered to explain what prompted Murray to take the victim to the principal's office to alert the principal and ultimately the victim's parents about the abuse by the Respondent. The Petitioner submits the Court of Appeals erred by finding trial counsel should have objected to several portions of the challenged testimony. There is probative evidence to support the lower court's ruling that the Respondent failed to carry his burden of proving counsel was ineffective for failing to object to the alleged hearsay statements.

The Court of Appeals also erred by finding trial counsel's failure to object resulted in deficient performance. The Court held that trial counsel's statement that some of the hearsay from the witnesses was also introduced through the victim is not a trial strategy or valid reason for failing to object to hearsay testimony. The Petitioner asserts the Court of Appeals narrowly misstated the trial strategy articulated by counsel and the strategic reasons articulated by counsel for his actions at trial were valid.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of

counsel's performance must be highly deferential. Id. at 689. Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

The Court of Appeals described counsel's trial strategy as failing to object because some of the hearsay from witnesses was also introduced through the victim's testimony. The Petitioner asserts trial counsel articulated a much broader trial strategy than that described by the Court. At the post-conviction relief hearing counsel articulated several strategic reasons for his actions at trial. First, counsel stated he could not argue against the November 4th instance of sexual conduct so his strategy "was to attack all the other instances that occurred, and hopefully affect the credibility on behalf of that one." (App. 971:7-20). Second, counsel testified his strategy was also to highlight the inconsistencies in the victim's testimony. (App. 1028:24-1029:1). Third, counsel stated his strategy was for the Respondent to appear transparent to the jury because he did not want the Respondent to appear as if he was trying to hide something. (App. 1029:2-6). Lastly, counsel testified he was trying to show that the victim created a fantasy romance that existed with the Respondent. (App. 994:9-20). Counsel was able to use some of the hearsay testimonies to attack the victim's credibility. (App. 1029:19-21). Ultimately, counsel stated it was purely strategy and most of the testimony that came in he felt he could deal with and spin to the Respondent's benefit at trial. (App. 1030:4-9).

The Petitioner asserts trial counsel articulated a valid strategy for failing to object to alleged hearsay testimony at trial. With regard to the testimony given by both Caroline O. and Kelsey R., trial counsel testified he needed their testimony about the victim's allegations to challenge the victim's credibility and to elicit testimony from the witnesses about the victim's

later recantation. (App. 971:17-20). At trial, counsel was able to successfully elicit testimony from both Caroline O. and Kelsey R. about the victim's recantation. Counsel stated he used the testimony from Caroline O. about the victim's recantation to elicit testimony about the victim's obsession with the Respondent and to attack the victim's truthfulness. (App. 1029:7-18). He was even able to elicit from Kelsey R. testimony that she initially thought the victim was lying about the allegations. (App. 263:11-264:12).

With regard to the testimony of Thomas Mullins about the Respondent's inappropriate behavior with another student, counsel's failure to object fit within his trial strategy of attacking the victim's credibility. After the jury heard Mullins' testimony, trial counsel was able to call Anne Chalmers whose testimony about her interactions with the Respondent strongly differed from that of the victim. Chalmers testified she also would speak to the Respondent on the phone frequently and they had developed a strong friendship. (App. 684:10-14). She testified further their relationship was never inappropriate and was merely a friendship. (App. 685:11-14).

The Court of Appeals cited Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001), in support of its ruling that counsel's trial strategy was not reasonable. The Petitioner asserts the strategy articulated by counsel was reasonable and can be distinguished from the strategy articulated in Dawkins. In Dawkins, this Court held that trial counsel was ineffective for failing to object to improper corroboration testimony. The Court also stated that trial counsel's strategy of failing to object to avoid confusing or upsetting the jury did not constitute a valid trial strategy. Here, unlike in Dawkins, trial counsel articulated a trial strategy that went beyond the effect of counsel's objections on the jury and was not solely based on the fact that the testimony was merely cumulative to that of the victim. In this case, trial counsel's strategy was based on

what he felt was the best way to refute the evidence against the Respondent which was by highlighting the inconsistencies in the victim's statements and challenging her truthfulness.

This Court should look to Watson v. State, 370 S.C. 68, 634 S.E.2d 642 (2006), for guidance in this case. In Watson, this Court acknowledged that the failure to object to improper hearsay testimony in a criminal sexual conduct case because the testimony is merely cumulative is not a reasonable strategy where the evidence is not overwhelming or the improper testimony bolsters the victim's testimony. Id. at 72, 634 S.E.2d at 644. Watson then went further to hold that where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Id. In Watson, counsel's reason for failing to object was to avoid the more damaging introduction of the victim's videotape. Id.

Like in Watson, trial counsel's reasoning for failing to object to testimony during trial was valid and went beyond failing to object because the testimony was merely cumulative. Counsel testified the testimony was needed to elicit testimony about the victim's recantation and to challenge the victim's truthfulness. Counsel's strategy in the present case is comparable to that articulated by counsel in Watson and the Court of Appeals erred by distinguishing the strategy articulated in this case from that articulated in Watson.

The Petitioner asserts this Court should also consider dispositive this Court's ruling in Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002). In Rhodes, this Court held that trial counsel's strategy of failing to object to improper character evidence on the basis that he sought to convert the evidence to the defendant's advantage was an objectionably reasonable strategy. Like in Rhodes, counsel testified most of the instances of hearsay that were not objected to were statements he felt "we could deal with and we could actually kind of spin them to our benefit". (App. 1030:1-7). This Court should consider the Court's rulings in Rhodes and Watson to

reverse the Court of Appeals and hold that counsel articulated a valid trial strategy for his failure to object to the alleged hearsay testimony presented at trial.

Lastly, the Court of Appeals erred by mischaracterizing the evidence presented against the Respondent at trial and finding prejudice resulted from counsel's performance. The Court of Appeals held that since the State's case was built upon the victim's story against the Respondent's story, the alleged hearsay testimony cannot be harmless. The Petitioner asserts the State's case against the Respondent was not based solely on the victim's testimony. In support of its case, the State also presented evidence of hours of unexplained phone conversations and testimony about the Respondent describing the victim's underwear.

The Petitioner also asserts counsel's failure to object to the alleged hearsay statements did not result in prejudice to the Respondent. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668 (1984). An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Id. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. United States v. Valenzuela-Bernal, 458 U.S. 858, 866-867 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Strickland, 466 U.S. 668. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. Id.

The Respondent failed to carry his burden of proving that counsel's failure to object to the challenged testimony undermined the reliability of the jury's verdict at his trial. Many of the

alleged hearsay statements could not have been prejudicial to the defense when trial counsel stated that several of the statements gave him the opportunity to elicit testimony that was very beneficial to the Respondent at trial such as the victim's recantation of the allegations.

The Court of Appeals erred when it ruled that the testimony of the victim's father was especially prejudicial. At trial, the father's testimony that the victim said to him "he took everything" was not so prejudicial that it affected the outcome of the Respondent's trial. The statement "he took everything" was very vague and did not specifically indicate what the Respondent took from the victim. The statement also did not reference any sexual activity. The Petitioner asserts the Court of Appeals erred by finding trial counsel's performance prejudiced the Respondent. There is probative evidence to support the lower court's ruling that the Respondent failed to carry his burden of proving counsel was prejudiced by counsel's performance and the outcome of his proceeding would have been different.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

[Signature on the following page.]

Respectfully submitted,

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

BY: Ashleigh R. Wilson
Ashleigh R. Wilson

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

June 24, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

The Honorable Kenneth G. Goode, Circuit Court Judge

Case No. 2009-CP-10-112367

MARK VAIL

Respondent,

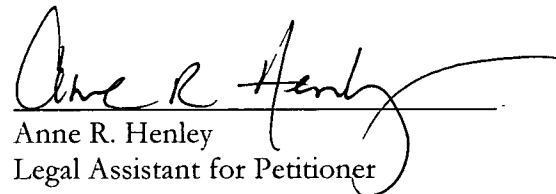
v.

STATE OF SOUTH CAROLINA,

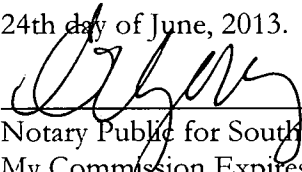
Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari has been served upon opposing counsel, Daniel Westbrook, by mailing two (2) copies in an envelope properly addressed with postage prepaid this 24th day of June, 2013.


Anne R. Henley
Legal Assistant for Petitioner

SWORN to before me this
24th day of June, 2013.


Notary Public for South Carolina
My Commission Expires: 10/28/2014

(L.S.)