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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Honorable Heath P. Taylor, Circuit Court Judge

VERNON COOLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000362

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the PCR judge correctly find that Petitioner did not freely and voluntarily waive his appellate rights and is entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974)?

2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to improper bolstering when a detective testified that she interviewed the minor witness who reported a sexual assault, that the minor witness made a similar report to the nurse completing the sexual assault kit, and made a similar report to the forensic interviewer, and then testified that, "Given the report from MUSC that I received and the consistent disclosures from the juvenile, I prepared an affidavit and presented it to the magistrate for a warrant."?

STATEMENT

In August of 2018, the Dorchester County Grand Jury indicted Petitioner, Vernon Lamar Cooley, for criminal sexual conduct with a minor second degree, amended indictment #2016-GS-18-0534. (App. pp. 352-353). On August 27, 2018, Petitioner proceeded to jury trial before the Honorable Diane S. Goodstein. Charlie Lee Whirl represented Petitioner at trial. Sheila Mims and Ryan Templeton prosecuted the case. The jury returned a verdict of guilty. Judge Goodstein sentenced Petitioner to twenty (20) years in prison. (App. p. 354). Trial counsel did not file a notice of intent to appeal.

On July 23, 2019, Petitioner filed an application for post-conviction relief [PCR]. (App. pp 355-361). On November 17, 2021, the State filed a return and partial motion to dismiss. (App. pp. 362-369). On January 25, 2023, an evidentiary hearing was held before the Honorable Heath P. Taylor. Christopher R. Geel represented Petitioner at the PCR hearing. Caroline Whitney O'Kelly represented the State. In a written order signed February 21, 2023, Judge Taylor a belated appeal but denied other relief. (App. pp. 404-412). A timely notice of intent to appeal was served on March 2, 2023. This petition for writ of certiorari and a separately filed brief pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) follow.

ARGUMENT

1. **The PCR judge correctly found that Petitioner did not freely and voluntarily waive his appellate rights and is entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).**

In the order of dismissal the PCR judge wrote, "The record before this Court demonstrates that trial counsel failed to file a notice of appeal, and failed to adequately inquire whether Applicant desired that a direct appeal be filed. Applicant testified that he never waived his right to an appeal, and that he never intended to relinquish that right." (App. p. 407). The order of dismissal discusses the fact that trial counsel elected not to file a notice of intent to appeal and was unaware of the procedure available for Petitioner to pursue his direct appeal with the assistance of appointed counsel. (App. p. 407). The PCR judge wrote, "This Court hereby finds that Applicant did not knowingly and intelligently and voluntarily waive his right to direct appeal. Consequently, he is entitled to relief on this ground." (App. pp. 407-408). The PCR judge correctly found that Petitioner did not freely and voluntarily waive his appellate rights and is entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

2. **The PCR judge erred in refusing to find trial counsel ineffective for failing to object to improper bolstering when a detective testified that she interviewed the minor witness who reported a sexual assault, that the minor witness made a similar report to the nurse completing the sexual assault kit, and made a similar report to the forensic interviewer, and then testified that, "Given the report from MUSC that I received and the consistent disclosures from the juvenile, I prepared an affidavit and presented it to the magistrate for a warrant."**

At the beginning of the PCR hearing PCR counsel told the judge, "As to the second issue, we are simply alleging that trial counsel, Mr. Whirl, was ineffective in failing to object to vouching and bolstering testimony." (App. p. 373, lines 10-12). There were two witnesses at trial who provided improper bolstering testimony, Detective Melissa Blanchard with the Dorchester County Sheriff's Office and Katherine Fabrizio, who was qualified, without

objection, as an expert in child abuse pediatrics. (App. p. 259, lines 3-9). PCR counsel raised the bolstering testimony by Fabrizio as an alternate allegation of ineffective assistance of counsel. After the proffer of Fabrizio's testimony, defense counsel objected to the testimony as improper bolstering. (App. p. 247, lines 11-24). The trial judge limited the testimony and Fabrizio then testified before the jury. Defense counsel did not renew the objection when Fabrizio testified before the jury. The PCR judge specifically found that trial counsel's objection to Fabrizio's testimony during the proffer preserved the bolstering issue for appellate review. (App. pp. 410-412). As a result, the PCR judge declined to address the issue as an allegation of ineffective assistance of counsel. (App. pp. 410-412). The separately filed brief pursuant to White v. State addresses Fabrizio's improper bolstering testimony. If this Court disagrees with the PCR court and finds that the failure to renew the objection waived the issue for appellate review, Petitioner respectfully requests the opportunity to separately brief the issue as an allegation of ineffective assistance of counsel.

As to Detective Blanchard's testimony, PCR counsel argued that trial counsel should have objected to the detective's testimony as bolstering. (App. p. 399, line 19 – p. 400, 401, lines 1-15). The PCR judge included the following portion of Detective Blanchard's trial testimony in the order of dismissal:

> Q: Okay. Did you have - did you have the opportunity to speak with the victim in this case?
>
> A: I did.
>
> ...
>
> Q: Okay. Did she ultimately reveal the sexual assault occurred?
>
> ...

A: She did.

Q: Did you review the report from [the] sexual assault kit? A: I did.

Q: Did she make a similar report to the nurse doing that sexual assault kit?

A: She did.

Q: Okay. Did you set up any other interviews with the victim in this case?

A: I did.

Q: Okay. What other interviews did you set up with her?

A: I set up a forensic interview at Dorchester Children's Advocacy Center in Summerville

Q: Okay. And did you actually - you didn't conduct that interview, did you?

A: I did not.

Q: Okay. Did you view that interview.?

A. Yes, sir, I watched it.

Q: Okay. Did she indicate the same actions occurred?

A: Correct.

Q: Okay. Once you had all that information together, what did you do next?

A: Given the report from MUSC that I received and the consistent disclosures from the juvenile, I prepared an affidavit and presented it to the magistrate for a warrant.

(Tr. 134-136) (App. pp. 409-410).

The PCR judge then wrote:

> When asked about this exchange during Applicant's PCR proceeding, trial counsel indicated that he did not believe that this testimony constituted vouching or bolstering testimony, and therefore he saw no permissible basis for objecting or attempting to exclude this testimony. This Court agrees. Although Blanchard clearly indicated that the various statements the victim gave led directly to her decision to charge Applicant with criminal sexual conduct, Blanchard did not express her personal opinion about the veracity of the victim's statements, which is the primary concern expressed in Kromah and similar cases.

(App. p. 410). The PCR judge erred. Detective Blanchard's testimony referencing similar reports and "consistent disclosures from the juvenile" constitutes improper bolstering. Trial counsel was ineffective in failing to object to the testimony. Petitioner was prejudiced by the deficient performance.

Petitioner is the maternal grandfather of the minor complaining witness. On March 5, 2016, the minor, who was twelve at the time, and her two younger siblings went to their grandfather's house with plans to go eat breakfast. (App. p. 99, line 9 – p. 100, lines 1-23). Minor testified that while she was in the house and her siblings were still outside Petitioner put his finger inside her vagina and rubbed his penis on the outside of her vagina. (App. p. 102, lines 3-7). According to the minor, they then went to Burger King and when they returned, she went home, got on her bike, and rode to her mom's friend's house that was "kinda far." (App. p. 104, lines 1-20). The mother's friend was not at home but Minor knew a friend in the area so she borrowed her phone, called her stepdad, and asked him to come and pick her up. (App. p. 104, line 21 – p. 105, lines 1-3). Minor testified that when he picked her up she told her stepdad that "Papa tried to rape me." (App. p. 105, lines 5-9). Stepdad confirmed that ordinarily Minor would have been in trouble for riding her bike that far away. (App. p. 139, lines 2-13). The

stepdad called the police and Minor was taken to the hospital for an examination. (App. p. 106, lines 1-17).

The SANE[1] nurse who examined Minor on March 5, 2016, Stacey Defrank, did not testify at trial. (App. p. 269, line 24 – p. 270, lines 1-3). Instead, Dr. Michelle Amaya testified at trial. Dr. Amaya was qualified, without objection, as an expert in child abuse pediatrics. (App. p. 269, lines 18-22). Dr. Amaya reviewed images and the report by the SANE nurse as well as a follow-up report done by Katherine Fabrizio. (App. p. 269, line 24 – p. 270, 271, lines 1-14). Dr. Amaya did not interview or examine the minor. (App. p. 249, lines 17-19). The doctor testified that some redness was observed on the hymenal tissue during the initial examination on March 5, 2016. (App. p. 271, lines 2-9). Redness was not seen during the follow-up exam. (App. p. 271 lines 15-21). The doctor opined that digital penetration could have caused the redness but also admitted there could be other causes. (App. p. 272, line 18 – p. 273, lines 1-16). The DNA analysis was inconclusive. (App. p. 227, lines 2-7).

Detective Blanchard was a fact witness who met with stepdad on March 5, 2016, and was asked at trial, "What did he tell you had occurred?" (App. p. 182, line 3). The detective was allowed to testify, without objection, about what the stepdad told her about the phone call from Minor. The detective testified, "When he answered the phone, he asked why she had gone all the way over there on her bike, and she indicated that she couldn't tell him at that moment over the telephone. And so, he went to that location and stated that, that's where he picked her up from and when the vehicle – she was in the vehicle and she was crying and when he asked her what was wrong, that she said, 'Papa tried to rape me.' " (App. p. 182, lines 8-14).

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[1] Sexual Assault Nurse Examiner.

When asked what Minor told her, the detective was allowed to testify, without objection, beyond the time and place limitation of Rule 801(d)(1)D). (App. p. 183, lines 13-22). The detective then testified that Minor revealed that a sexual assault occurred. (App. p. 183, lines 23-25). The detective testified that Minor made a similar report to the nurse and a similar report to the forensic interviewer. (App. p. 184, lines 1-25). Neither the SANE nurse nor a forensic interviewer from the Dorchester Children's Advocacy Center testified at trial. The prosecutor asked the detective, "Once you had all that information together, what did you do next?" (App. p. 185, lines 1-2). The detective testified, "Given the report from MUSC that I received and the consistent disclosures from the juvenile, I prepared an affidavit and presented it to the magistrate for a warrant." (App. p. 185, lines 3-5). The testimony from the detective about similar reports and consistent disclosures impermissibly bolstered the credibility of Minor. Trial counsel was ineffective in failing to object to the testimony.

When questioned about why he did not object to Detective Blanchard's testimony, trial counsel testified that he did not consider the detective's testimony to be bolstering. (App. pp. 388-391). PCR counsel asked, "So as you sit here today you don't regard this particular testimony as bolstering; is that fair to say?" (App. p. 391, lines 8-9). Trial counsel answered, "It's on the verge , but, no, I do not." (App. p. 391, line 10). Trial counsel admitted that if he thought the testimony was bolstering, he would have objected. (App. p. 391, lines 16-18). Trial counsel admitted there was no strategic reason not to object to bolstering testimony. (App. p. 391, lines 19-21). In denying relief, the PCR judge found that the detective's testimony was not bolstering. Both trial counsel and the PCR judge erred. The testimony about similar reports and consistent disclosures crossed the line into impermissible bolstering.

"The assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Discussing Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) the Court in Briggs v. State, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017) wrote, "Smith demonstrates the central point of the prohibition against improper bolstering: a witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim."

In Chappell v. State, 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019), the Court noted 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. See Briggs v. State, 421 S.C. 316, 325, 806 S.E.2d 713 (2017); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011); State v. McKerley, 397 S.C. 461, 465, 725 S.E.2d 139, 142 (2012). See, also, State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013); Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002).

The detective's testimony that Minor made similar reports to the nurse and to the forensic interviewer and the detective's testimony that she got an arrest warrant for Petitioner based on the report from MUSC and the **consistent** disclosures from the juvenile indicated that the detective believed the Minor was credible. In State v. Geter, 434 S.C. 557, 569–70, 864 S.E.2d 569, 575–76 (Ct. App. 2021), cert. granted (Sept. 7, 2022), the South Carolina Court of Appeals found that the trial judge erred in admitting an investigator's testimony that a witness' trial testimony was consistent with a prior statement. The Court of Appeals wrote:

> Investigator Clarke did not *directly* comment on the veracity of Stone's testimony. By definition, consistent does not necessarily mean truthful, but it does mean "free from variation or contradiction," thus creating the impression of accuracy

> and truthfulness. The question serves no other purpose than to bolster Stone's trial testimony and puts an improper imprimatur on Stone's testimony as truthful. Notably, Stone's prior statement would not have been admissible to prove it was consistent with this trial testimony unless Geter had suggested Stone's trial testimony was a recent fabrication. Therefore, it was inappropriate for Investigator Clarke to opine as to the consistency of Stone's testimony with his prior statement.

Geter, 434 S.C. at 569–70, 864 S.E.2d at 575–76 (n. 5, and n. 6 omitted). Like Investigator Clark's testimony in Geter, Detective Blanchard's testimony about similar reports and consistent disclosures in the present case created the impression of accuracy and truthfulness. The sole purpose of the testimony was to convey to the jury that the detective believed the Minor was credible. There is no way to interpret the testimony other than to mean the detective believed the Minor is telling the truth. Unlike Geter, the bolstering testimony in the present case was not harmless.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable

probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective in failing to recognize that Detective Blanchard's testimony improperly bolstered the credibility of the minor witness. Trial counsel was ineffective in failing to object to the improper testimony. There is a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different. The credibility of the minor witness was a critical determination for the jury. The jury needed to make that determination without the detective's testimony indicating that she believed the minor was credible. The failure to object to the improper bolstering was particularly prejudicial in light of the additional improper bolstering testimony from Katherine Fabrizio and discussed in the belated appeal. The failure to object to the improper bolstering requires a new trial.

CONCLUSION

Based on the above arguments, this Court should find that the PCR judge correctly granted the belated appeal pursuant to White, allow the belated appeal to go forward and reverse on the ground raised in the separately filed brief. This Court should additionally find that the PCR judge erred in refusing to find trial counsel ineffective for failing to object to the improper bolstering testimony from Detective Blanchard. This Court should grant the petition for writ of certiorari to allow further briefing on the bolstering issue.

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ATTORNEY FOR PETITIONER

This 27th day of September, 2023.