

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable Brian M. Gibbons, Circuit Court Judge

JASON S. SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000447

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Oct 13 2023

S.C. SUPREME COURT

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The PCR court erred by relying on alleged “overwhelming evidence of guilt” in the trial transcript when determining defense counsel’s credibility and his effectiveness where counsel maintained that he advised petitioner to accept the plea offer and plead guilty prior to trial since the PCR court’s assessment of the strength of the trial evidence against petitioner was not a proper consideration in its PCR analysis.		4
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ISSUE PRESENTED

Whether the PCR court erred by relying on alleged “overwhelming evidence of guilt” in the trial transcript when determining defense counsel’s credibility and his effectiveness where counsel maintained that he advised petitioner to accept the plea offer, and plead guilty prior to trial since the PCR court’s assessment of the strength of the trial evidence against petitioner was not a proper consideration in its PCR analysis?

STATEMENT OF THE CASE

Procedural history

Petitioner was indicted at the April 13, 2017 term of the Cherokee County grand jury for the offense of criminal sexual conduct with a minor in the first degree. The allegation pertained to the improper touching of a female less than 11 years old. App. 407-408.

Petitioner's case was called to trial on January 8, 2020, before the Honorable Roger Young, and a jury. App. 1. Petitioner was represented by Michael Morin. Matt Kendall and Kim Leskanic were the assistant solicitors. App. 1.

On January 10, 2020, the jury found appellant guilty. App. 344, ll. 5-8. Judge Young sentenced appellant to forty years imprisonment. App. 348, ll. 14-20.

Petitioner filed an application for post-conviction relief after his convictions were affirmed on direct appeal. App. 350-355. The state then filed a return and motion for a more definite statement on August 3, 2022. App. 356-365.

An evidentiary hearing was convened on February 13, 2023, before the Honorable Brian M. Gibbons. Rodney Richey represented petitioner. Chelsey Marto was the assistant attorney general. App. 366. Petitioner and his wife both testified during the PCR hearing. In addition, trial counsel, Michael Morin, also testified.

An order of dismissal was filed on March 9, 2023. App. 400-406. This order stated that petitioner maintained his attorney was ineffective for advising him not to accept the ten year plea offer, not to plead guilty and for telling him that he had a very good chance of prevailing at trial. The PCR court found that trial counsel was credible in his counter testimony that he thought pleading guilty was in petitioner's best interest and that he had informed petitioner "that he had

little chance of success at trial. This is substantiated by the overwhelming evidence of guilt exhibited in the trial transcript. Accordingly, relief is denied.” App. 405.

From this order, petitioner is seeking a petition for writ of certiorari pursuant to Rule 243 of the SCACR.

ARGUMENT

The PCR court erred by relying on alleged “overwhelming evidence of guilt” in the trial transcript when determining defense counsel’s credibility and his effectiveness where counsel maintained that he advised petitioner to accept the plea offer and plead guilty prior to trial since the PCR court’s assessment of the strength of the trial evidence against petitioner was not a proper consideration in its PCR analysis.

Relevant Facts - PCR

Petitioner testified during the PCR hearing that he was offered a ten-year prison term if he would plead guilty to this offense prior to trial. App. 373, l. 14 – App. 374, l. 5. Petitioner remembered that defense counsel Morin told him: “I had a good case to go home.” App. 374, ll. 6-9.

Based on this advice, petitioner turned down the ten-year plea offer. App. 374, ll. 10-12. If Morin had advised petitioner to take the ten-year plea offer, he would have accepted it. App. 374, ll. 13-16.

Petitioner confirmed that he was told that his DNA was found on a vaginal swab from the alleged victim’s panties. Petitioner did not recall the expert testimony that “the odds of it being somebody unrelated [to him] was 1 in 5,600.” App. 378, l. 4 – App. 379, l. 1. Petitioner also testified that he did not alter or manipulate the surveillance footage in his house as the state alleged at trial. The surveillance tape showed petitioner sleeping on the night, and time, in question. App. 380, l. 5 – App. 382, l. 17.

Petitioner’s wife, Melissa “Missy” Simmons, also remembered the ten-year plea offer. Missy recalled that defense counsel Morin told petitioner that if he did not take the plea offer that “he had a good case that he could win.” App. 385, ll. 4-20. She also testified that Morin told

petitioner that he had an eighty-five percent chance of winning his case if he went to trial and turned down the plea offer. App. 386, l. 15 – App. 387, l. 8.

Defense counsel Morin denied that he told petitioner that he had an eighty-five percent chance of winning his case. Morin “believed” that he recommended petitioner take the plea offer but “I can’t say for certain.” Morin testified that he believed that it was in petitioner’s best interest to accept the plea offer. App. 390, l. 25 – App. 392, l. 13.

Morin also said that the best odds that he had ever given a defendant on winning his trial “was 50/50.” “I’m pretty sure the eighty-five percent was on the losing recommendation. I have done those types of things before.” App. 392, l. 14 – App. 393, l. 4; App. 395, l. 10 – App. 396, l. 6. Morin said that petitioner was adamantly against pleading guilty. “[H]e said that he did not want to admit to something that he didn’t do.” App. 396, ll. 7-10.

Trial testimony

During the trial, the seven-year-old alleged victim, who was four years old when this molestation allegedly occurred, testified that petitioner’s wife, Missy, went to bed that evening leaving her and petitioner alone in the living room. The child was staying with petitioner and Missy because there had been a snowstorm, and she had been out of school for several days. Her mother thought her spending some time with Missy and petitioner would be a good change of scenery because the child was going “stir crazy” at home.

The child claimed at trial that petitioner touched her “in the private area” the night she stayed in their apartment. App. 82, l. 8 – App. 84, l. 25. The child also said petitioner used an electric toothbrush during this molestation. App. 85, ll. 1-15. The child testified that after this incident concluded that she went to sleep on the couch. She did not know where petitioner went. App. 85, ll. 13-21.

The child stated that petitioner told her that he would get in trouble if she told anyone about this event. The child said that she told her mother about what allegedly happened “in the Wal-Mart bathroom” the next day. App. 86, l 8 – App. 87, l. 6.

The child’s mother, Dana Fortner, testified at trial that petitioner’s wife, Missy, was her husband’s cousin. App. 98, l. 19 – App. 99, l. 12. Fortner recalled that around the time of this incident that it had been snowing for a few days “and Missy offered to take A.F. with her because A.F. was getting kind of stir crazy being in the house, so she stayed at their house for the night.” App. 100, l. 23 – App. 101, l. 10. Fortner recalled that petitioner and his wife lived in an upstairs bedroom apartment over his parent’s house. App. 101, l. 22 – App. 102, l. 7.

Fortner remembered that the next morning, petitioner brought the child home. Fortner claimed that petitioner was acting in a strange manner at the time. He “started talking about what if something happened to him and his health isn’t good and he needed to go to Charleston to see his doctor; if something happened to him, then what would happen to Missy, and she couldn’t pay the bills. And he got really emotional . . . which was strange...” App. 102, l. 18 – App. 103, l. 20.

Fortner confirmed that while in a Wal-Mart bathroom, the child disclosed that something of a sexual nature had occurred the night before “at Missy and Jason’s house.”¹ App. 104, l. 24 – App. 105, l. 17. At trial, petitioner took the stand in his own defense, and denied the child’s allegation against him. He was forty-five years old. He had suffered a brain injury earlier in his life. “I was shot when I was a baby, and in 2012 – I don’t know my age – I had a stroke.” Petitioner was permanently disabled at the time of trial. He had driven a tractor trailer earlier in his life before becoming disabled. App. 249, l. 20 – App. 250, l. 25.

¹ Samuel Stewart was the DNA expert in this case. He testified that petitioner’s DNA “match” to the child’s underwear in this case was “1 in 5,600. App. 226, l. 24 – App. 229, l. 9.

Petitioner testified on the night in question that the child slept next to his wife, Missy, in the bedroom. Petitioner slept on the couch or in a chair. Petitioner on certain nights slept in a chair when his spine was hurting badly. App. 258, l. 13 – App. 259, l. 9.

The next day, petitioner was the first one up in the apartment. He then drove the child home without incident. App. 259, l. 16 – App. 263, l. 3. Petitioner denied fondling or molesting the child.

Petitioner's wife, Missy Simmons, testified at trial that she and petitioner had taken the child out-of-state on another occasion to Knoxville, Tennessee. They were used to being with the child, and Missy denied anything improper had ever occurred with her. As of the day of trial, she did not believe the child was telling the truth. App. 283, l. 22 – App. 294, l. 22.

Order of dismissal

In the order of dismissal, the PCR court noted that petitioner had testified that defense counsel Morin was ineffective for telling him to plead not guilty because Morin would win his case at trial. The PCR court ruled that defense "counsel credibly testified that he thought pleading was in the applicant's best interest and that he had little chance of success at trial. This is substantiated by the overwhelming evidence of guilt exhibited in the trial transcript. Accordingly, relief is denied." App. 405.

Discussion

The PCR court erred by considering the court's own assessment of the strength of the trial evidence against petitioner when making a credibility determination whether defense counsel advised petitioner not to plead guilty or not guilty prior to trial, and in its PCR ineffectiveness analysis.

In Thompson v. State, 423 S.C. 235, 814 S.E.2d 478 (2018), this Court noted that in Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018) “we addressed the question of ‘overwhelming evidence’ in the PCR setting by balancing the individual impact of trial counsel’s error(s) against the strength of properly admitted evidence of a PCR applicant’s guilt.” This Court reiterated that it had held: “[T]he overall strength of the properly admitted evidence of [the applicant’s] guilt does not overcome the individual impact of each insistence of trial counsel’s deficient performance.” Thompson v. State, 423 S.C. 235, 245, 814 S.E.2d. 487, 492 (2018).

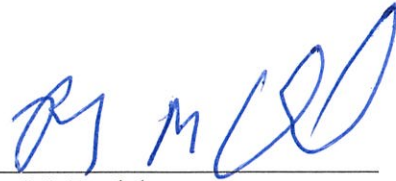
The same holds true in this case where the only issue before the PCR court was whether trial counsel was ineffective, as petitioner alleged and testified, for advising him not to plead guilty. Trial counsel conversely maintained that he did not advise petitioner not to plead guilty, and that he thought that it would have been in petitioner’s best interest for him to plead guilty, and accept the plea offer.

The PCR judge erred by concluding that because the state, in the court’s opinion, presented a strong case of guilt against petitioner at trial that defense counsel credibly testified that he did not advise petitioner to plead not guilty prior to trial. See Thompson v. State, 423 S.C. 235, 245, 814 S.E.2d. 487, 492 (2018). The only issue in this case was whether counsel’s performance fell below an objective standard of reasonableness if he advised petitioner to plead not guilty and not to accept the ten year plea offer. The second issue was whether petitioner suffered prejudice by defense counsel advising him not to plead guilty, which he obviously did since he received a forty year prison term rather than a ten year prison sentence. See Strickland v. Washington, 466 U.S. 668, 687-688 (1984). The PCR court’s ineffectiveness analysis was fatally flawed by its reliance on the purported strength of the state’s trial evidence against

petitioner while making PCR credibility determinations and deciding counsel's effectiveness or ineffectiveness.. Thompson v. State, 423 S.C. 235, 245, 814 S.E.2d. 487, 492 (2018).

CONCLUSION

By reason of the foregoing arguments, the ruling of the PCR court denying relief should be reversed.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of October, 2023.

STATE OF SOUTH CAROLINA

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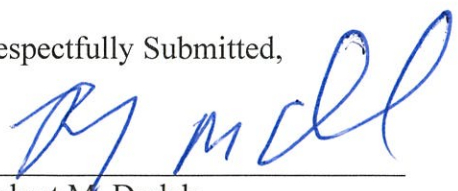
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jason S. Simmons states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Brian M. Gibbons, which was held on February 13, 2023, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Jason S. Simmons.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of October, 2023.

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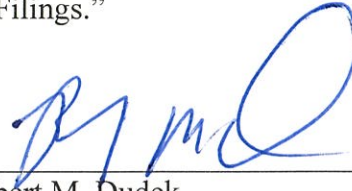
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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, 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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This 13th day of October, 2023.