STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Oct 18 2023

S.C. SUPREME COURT

Certiorari to Darlington County

Honorable J. Derham Cole, Circuit Court Judge

DAMYON M. COTTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000782

JOHNSON PETITION FOR WRIT OF CERTIORARI

GARY H JOHNSON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

DID THE PCR COURT ERR IN FINDING COUNSEL WAS EFFECTIVE WHEN SHE FAILED TO INVESTIGATE THE UNKNOWN DNA PROFILE FOUND ON THE CLOTHING OF THE SEXUAL ASSAULT VICTIM WHEN THE DEFENSE WAS BASED UPON ALIBI AND ABSENCE OF A SEXUAL ENCOUNTER WITH PETITIONER?

STATEMENT

Petitioner and Yasmin Cusack communicated online over a period of time. App. 158, l. 13 – 159, l. 23. Petitioner indicated the relationship was also virtual but that he ended it following a disagreement with Cusack. App. 382, l. 6 – 385, l. 16. Petitioner indicated he only met Cusack one time in person, a brief encounter in the driveway of a relative with little physical contact involved other than a short hug. App. 388, l. 20 – 389, l. 15. In contrast, Cusack described another meeting that included an evening of forced sexual contact that occurred in multiple locations across two counties in petitioner's car on February 1, 2013. App. 160, l. 1 – 163, l. 20. Petitioner denied he had a sexual encounter with Cusack and denied driving her around Florence and Darlington counties against her will on the night of the alleged assault.[1] App. 385, l. 7 – 387, l. 4.

Petitioner presented several witnesses that confirmed his vehicle was inoperable and could not be driven on February 1, 2013.[2] App. 346, l. 6 – 347, l. 13; 359, ll. 2 – 23. Petitioner's friend, Calvin Harrison, also testified that petitioner spent the evening of the alleged assault at his house, as he did most Friday evenings. App. 368, l. 18 – 370. L. 23. A central aspect of petitioner's defense also centered around the lack of physical evidence connecting him to Cusack's allegations. Petitioner's DNA was not found under Cusack's nails, or the hairs removed from her clothing. App. 314, l. 3 – 315, l. 15. Petitioner's DNA was not detected on Cusack's underwear and no semen was identified. App. 316, ll. 2 – 18. The single piece of

---

[1] Petitioner was indicted for kidnapping and first degree criminal sexual contact on July 18, 2013. App. 494 – 498.

[2] These included petitioner's grandmother, Connie Gattison, and his father Ricky Cotton. App. 339, 357.

physical evidence that connected petitioner to any encounter with Cusack was touch DNA, found on the buttonhole of her jeans that contained a mixture of DNA from Cusack, an unknown source, and petitioner.[3] App. 552, l. 19 – 553, l. 1.

At trial petitioner was represented by Christie Wise and J. Richard Jones while John Holt, IV, and Patti Parker represented the state. App. 1. The alleged incident occurred on February 1, 2013, and petitioner was arrested on February 13, 2013. App. 494 – 498.

It was not until the middle of trial that petitioner first heard that this sole piece of physical evidence also included a DNA mixture both of Cusack and of a third, unidentified person. App. 521, ll. 11 - 21. At his PCR hearing, trial counsel indicated the written DNA report on the clothing was completed by the state just before trial. App. 552, l. 24 – 553, l. 12. However, trial counsel also testified that she knew of the results of the DNA test showing the unknown DNA profile well before trial but conducted no investigation of the unknown DNA profile despite the entire defense being based upon no sexual encounter between petitioner and Cusack. App. 531, ll. 1 – 24; 553, ll. 3 – 12.

Petitioner was convicted at trial before the Honorable J. Michael Baxley and a jury on February 24, 2014. App. 1. Judge Baxley sentenced petitioner to 15 years concurrent on both charges. App. 496; 499. Petitioner's direct appeal centered on the admission of another alleged sexual assault allegation as evidence of a common scheme under Rule 404(b), SCRE. The Court of Appeals affirmed the convictions in an unpublished opinion. State v. Cotton, Op. No. 2017-UP-356 (S.C. Ct. App. filed Sept. 6, 2017). Our Supreme Court affirmed the convictions and the admission of common scheme evidence under Rule 404(b), SCRE. State v. Cotton, 430 S.C. 112, 114, 844 S.E.2d 56, 57 (2020).

---

[3] Petitioner believes his DNA was transferred during the short meeting with Cusack before the alleged attack, potentially during the hug. App. 389, l. 16 – 390, l. 9.

Petitioner filed for post-conviction relief alleging ineffective assistance of counsel and violations of Brady[4] concerning the presence of the unknown DNA profile and its late disclosure on the eve of trial. App. 502. An evidentiary hearing was held on July 27, 2022, before the Honorable J. Derham Cole. App. 514. Petitioner was represented by Steven Fowler and Chelsey Marto appeared on behalf of the state. App. 514. Judge Cole heard testimony from both petitioner and his trial counsel and issued an order denying relief. App. 563 – 574.

This petitioner for certiorari follows.

[4] Brady v. Maryland, 373 U.S. 83 (1963).

ARGUMENT

THE PCR COURT ERRED IN FINDING COUNSEL WAS EFFECTIVE WHEN SHE FAILED TO INVESTIGATE THE UNKNOWN DNA PROFILE FOUND ON THE CLOTHING OF THE SEXUAL ASSAULT VICTIM SINCE THE DEFENSE WAS BASED UPON ALIBI.

A. Standard of Review.

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). To establish a claim for ineffective assistance of counsel, a PCR applicant must show (1) counsel's performance was deficient because it fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011).

B. The DNA evidence admitted at trial.

A key piece of evidence against petitioner was the presence of his touch DNA on the buttonhole of the jeans worn by Cusack on the night of the alleged assault.[5] Trial counsel

[5] During his PCR hearing, petitioner continually referenced this touch DNA as a fingerprint. App. 521, ll. 17 – 21; 522, l. 4 – 523, l. 23; 3. Trial counsel also equated the touch DNA evidence with fingerprints in her testimony before the PCR court. App. 552, l. 19 – 553, l. 1. As no fingerprint evidence was introduced at trial, the numerous references during his PCR

initiated the requested DNA analysis of Cusack's clothing on behalf of petitioner. App. 302, ll. 17 – 19. The results of the analysis of the clothing indicated a single location of petitioner's touch DNA on the buttonhole of a pair of jeans that also contained a mixture of DNA from Cusack and an unknown contributor. App. 302, ll. 11 – 19. Trial counsel indicated that while the DNA report was not completed by the state until just before trial, she was aware of the results showing the unknown profile in advance of the report and discussed it with petitioner.[6] App. 553, ll. 3 – 14. The absence of other DNA evidence of petitioner following the alleged sexual assault was telling. Petitioner's DNA was not found under Cusack's nails, or the hairs removed from her clothing. App. 314, l. 3 – 315, l. 15. Petitioner's DNA nor semen was detected from Cusack's underwear. App. 316, ll. 2 – 18.

C. The PCR hearing and the unknown DNA profile.

According to petitioner, this unknown DNA profile was not disclosed during discovery. App. 531, ll. 7 – 24. Despite knowing about this unknown DNA profile well before trial, and despite the defense being based upon petitioner not being the perpetrator, trial counsel did not conduct further investigation into the presence of this unknown DNA profile. App. 531, l. 18 – 532, l. 15; App. 558, ll. 8 – 14. Since the entire defense was built around petitioner having no sexual activity with Cusack and his alibi defense, the presence of this unknown DNA profile should have prompted trial counsel to conduct additional discovery and conduct an independent

---

testimony to a fingerprint, in the context of the button of Cusack's jeans, were actually references to this touch DNA evidence.

[6]The admission by trial counsel that she was aware of the DNA test results well before trial provided ample time to conduct a proper, independent investigation into this unknown source. The acknowledgement that she was aware of the results also limits any potential violation of Brady v. Maryland, 373 U.S. 83 (1963) concerning this unknown DNA profile.

investigation surrounding the presence of this unknown DNA. According to petitioner, no such investigation or additional discovery was attempted. App. 531, l. 18 – 532, l. 15.

> Q. In ll(a) which I think relates perhaps back to 10 a little bit in our discussions, but you said, could you read well, I got it, "counsel did not investigate fingerprint [touch DNA], it was not in discovery." So we're touching base on this fingerprint. You mentioned it to the court earlier so, you know, let's try not to be too repetitive here. But are you saying -- you're saying -- you said earlier there was a fingerprint that was a potential other person in this matter, correct?
>
> A. Yes, sir.
>
> Q. And that they -- that your attorney never investigate it, correct?
>
> A. Yes, sir.
>
> Q. Okay. I mean, and you did not -- and when did you find out about it?
>
> A. The second day of my trial.
>
> Q. Okay. So in terms of that fingerprint, there was no investigation, no private investigator so to speak, ever looked into that second fingerprint?
>
> A. No, sir.
>
> Q. And did your attorney ever go into it with you in depth?
>
> A. No, sir.
>
> Q. Okay. All right. Do you know why it was not in discovery, in your discovery before trial?
>
> A. No, sir. This is my first time ever hearing about it at trial and I kind of like was looking like why wasn't that in my motion of discovery.
>
> Q. Do you feel like that was prejudicial to you?
>
> A. Yes, sir.

> Q. Do you think your attorney performed inadequately in getting that information to you?
>
> A. Yes, sir.
>
> Q. Do you feel like that's why you are where you are now?
>
> A. Yes, sir.

App. 531, l. 1 – 532, l. 12.

As for trial counsel, she testified about receiving notice of the DNA issue well before trial, though the written report was not completed until the week before trial.

> Q. Okay. Do you recall the fingerprint?
>
> A. Yeah. And that's what I'm referring to when I say the DNA analysis. Yes, ma'am.
>
> Q. And you obtain that before trial?
>
> A. I can't remember the exact details, I just pulled when I was listening to Mr. Cotton's testimony. The date on the DNA report that was February 18, 2014. I believe this trial began on the 23rd or 24th of 2014. I do know that Solicitor, Assist[ant] Solicitor Holt and I had discussed these fingerprints that were allegedly found, DNA swabs that were found, excuse me, the DNA that was found on the alleged victim's pants well in advance of receiving the report and I know for a fact that I relayed that to Mr. Cotton.

App. 552, l. 24 – 553, l. 12.

D. The PCR court's ruling.

The PCR court ruled that trial counsel discussed the issue of the unknown profile with petitioner and indicated she did not think it was "helpful" to the defense of the case. App. 571. While the PCR court's finding that counsel discussed the issue with petitioner is supported by the record, the finding the evidence was not "helpful at trial" is not supported by the record. Petitioner testified that he was not informed of the existence of the unknown profile evidence

until trial started. App. 544, ll. 14 – 24. For her part, trial counsel testified that she informed petitioner of the results of the profile issue before trial, but did not testify that she did not think the DNA evidence was not important or helpful. App. 552, l. 19 – 553, l. 12. To the contrary, this unknown DNA profile was the subject of testimony during petitioner's original trial and trial counsel addressed it in her closing argument to the jury, pointing out the ability of the jury to believe both petitioner and Cusack since she may have been mistaken as to the identity of her assailant.

> We have no semen; we have no sperm. And we have two individuals' DNA, Damyon Cotton and someone else. Ask the prosecutor whose DNA is that, and why is he or she not there. Why haven't we heard testimony about this. For all we know, this other person's DNA could have been the individual that hurt her in some way, shape, or form, if she was in fact hurt.

App. 432, l. 22 - 433, l. 4.

E. The PCR court erred in ruling trial counsel was effective in handling this key item of evidence.

Generally, this Court "will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them." Thompson v. State, 423 S.C. 235, 239, 814 S.E.2d 487, 489 (2018). Here, the PCR court's factual finding that trial counsel did not think this issue was helpful at trial is not supported by the record. The cases cited by the PCR court involve strategic decisions of counsel in terms of lines of investigation. In fact, in Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), cited by the PCR court, our Supreme Court upheld the decision to grant a new trial when trial counsel failed to adequately investigate and challenge the state's gunshot residue. Contrary to the PCR court's holding, the Supreme Court in Catoe admonished trial counsel "aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence." Id., 372

S.C. at 332, 642 S.E.2d at 597 (quoting with approval the *American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases*, reprinted in 31 Hofstra L.Rev. 913, 1020 (2003)).

Further guidance here can be found in Bagwell v. State, 410 S.C. 259, 266, 763 S.E.2d 630, 634 (Ct. App. 2014). Counsel in Bagwell failed to conduct DNA testing on blood evidence the state used to place Bagwell on the scene of the crime. The Court of Appeals noted that "[a]lthough this court must give heavy deference to trial counsel's decision not to investigate, we find trial counsel's decision to not seek DNA testing prior to trial was objectively unreasonable." Id. 410 S.C. at 266, 763 S.E.2d at 634.

Here, trial counsel made no investigation as to the source of this DNA profile despite basing the entire defense on petitioner not being the perpetrator of the sexual assault. A request to the state to determine a profile match through CODIS of this unknown profile would have required minimum additional effort. *See* State v. Durant, 430 S.C. 98, 107–08, 844 S.E.2d 49, 54 (2020) (holding the failure to provide information that could be obtained through a NCIC search is a *Brady* violation."). Trial counsel should have requested discovery on whether this unknown profile was a match for the other samples taken during the sexual assault exam, such as hairs and material under Cusack's nails. App. 314, l. 3 – 315, l. 15; 316, ll. 2 – 18.

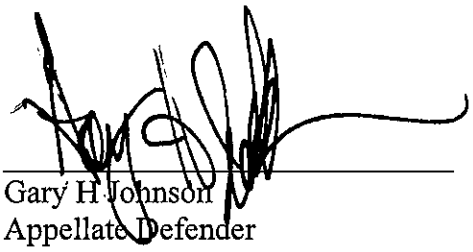
Petitioner's trial presented the jury with very contrasting factual alternatives. Petitioner and defense witnesses indicated he was not able to commit the crime by providing an alibi for his location and his inability to drive his broken car across two counties over several hours. App. 429, l. 23 – 430, l. 22. Cusack testified she was sexually assaulted and driven, against her will, to the location of the sexual assault over an extended time period. App. 159, l. 13 – 163, l. 8. The sole piece of physical evidence connecting petitioner to the assault was touch DNA that

contained additional DNA from an unknown profile. While trial counsel raised this unknown profile during trial and during her closing argument, she failed to conduct a meaningful investigation into the source of this DNA despite its connection to the charges and that decision was objectively unreasonable and ineffective assistance of counsel. *See* Bagwell v. State, 410 S.C. 259, 763 S.E.2d 630 (Ct. App. 2014).

Trial counsel's performance was deficient because it fell below an objective standard of reasonableness in failing to investigate the source of the unknown DNA profile. *See* Strickland v. Washington, 466 U.S. 668 (1984); Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011). As there was limited physical evidence supporting petitioner's conviction, and that limited physical evidence is infected with trial counsel's ineffective assistance, a reasonable probability exists "sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "When potentially strong evidence . . . is tainted by a significant error of counsel, it should not be considered as part of 'overwhelming evidence' that precludes a finding of prejudice." Smalls v. State, 422 S.C. 174, 194, 810 S.E.2d 836, 846 (2018). The DNA evidence here connecting petitioner to contact with Cusack was tainted by trial counsel's failure to investigate the source of this unknown DNA profile. The PCR court erred in finding trial counsel did not believe the evidence was "helpful." App. 571. This error deprived petitioner of effective assistance of counsel and warrants a new trial.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that this Court grant the writ of certiorari to allow full briefing on these issues.



Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of October, 2023.

RECEIVED
Oct 18 2023
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Darlington County

Honorable J. Derham Cole, Circuit Court Judge

DAMYON M. COTTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Damyon Marquise Cotton states:

1. He is 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 J. Derham Cole, which was held on July 27, 2022, 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 Damyon Marquise Cotton.

Respectfully Submitted,

Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of October, 2023.

RECEIVED

Oct 18 2023

S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

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."

Gary H Johnson
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 18th day of October, 2023.