RECEIVED

Feb 06 2024

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

Thomas Anthony Styla,
S.C.D.C. No. 369609

Applicant,
v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2017-CP-11-00801

ORDER

This matter comes before the Court by way of a Motion for Reconsideration and/or Relief from Judgment or Order to Amend, Alter or Modify the Court's Order signed by the Honorable Mark Hayes on February 19, 2021 pursuant to S.C.R.C.P. 59(e). The Motion for Reconsideration was filed by Applicant, Thomas Anthony Styla, on March 12, 2021.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. Applicant was indicted at the April 2015 term of the Cherokee County Grand Jury for criminal sexual conduct with a minor, first-degree (2011-GS-42-04171). Andrew J. Johnston, Esq. represented Applicant, and G. Matthew Kendall, Esq., of the Seventh Circuit Solicitor's Office, prosecuted the case. A jury trial was held on August 30, 2016 before the Honorable R. Keith Kelly. Applicant was found guilty as indicted on September 1, 2016 and was sentenced to 25 years in prison.

Applicant filed a timely notice of appeal dated September 7, 2016. By and through appellate counsel Jack B. Swerling, Esq., Applicant moved to dismiss his appeal by filing June 5, 2017. The South Carolina Court of Appeals granted Applicant's motion by order filed June 12, 2017. The Remittitur was issued on June 28, 2017.

An application for post-conviction relief was filed on October 23, 2017. Respondent made its return on or about January 12, 2018. A hearing was held on November 6, 2018. Applicant was present at the hearing and represented by Jack B. Swerling and Alissa L. Wilson, Esqs. Jordan A. Cox, Esq., of the South Carolina Attorney General's Office, represented Respondent. The hearing was not concluded on November 6th due to time constraints.

The Court reconvened on September 27, 2019. Applicant was again represented by Jack B. Swerling and Alissa L. Wilson, Esqs. Johnny Ellis James Jr., Esq., of the South Carolina Attorney General's Office, represented Respondent. Across the two hearings, a total of eight witnesses testified: Applicant's trial counsel Andrew J. Johnston, Esq.; Applicant; Applicant's appellate attorney in conjunction with Mr. Swerling, Katherine Goode, Esq.; Dottie Crowder; Lee Howell; Wendy Reveles; Chad Wright; and Olivia Wright.

At the conclusion of the proceedings, the Court requested briefs from each of the parties to address the issues at dispute in the matter. Both Respondent and Applicant submitted briefs dated December 11, 2019. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Cherokee County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, the pleadings, the exhibits introduced at the post-conviction relief hearings, the transcript of the post-conviction relief hearing held on November 6, 2018, and the post hearing briefs. The Court filed an informal decision denying Applicant post-conviction relief on March 6, 2020. An Order of Dismissal was filed on February 25, 2021.

Applicant filed a Motion for Reconsideration and/or Relief from Judgment or Order to Amend, Alter or Modify on March 12, 2021. Respondent filed a Return to Applicant's Motion to Alter or Amend the Order of Dismissal on June 16, 2021.

Oral argument via Webex was heard on November 10, 2022. Prior to the hearing, the Court advised the parties it had concerns about the issues relating to trial counsel's failure to interview Robin Christian Smith, the minor's guidance counselor, prior to calling her as a witness at trial.

This Court filed its informal decision granting relief to Applicant on December 9, 2022, and now formalizes it as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW: INEFFECTIVE ASSISTANCE OF COUNSEL

1. FAILURE TO INTERVIEW WITNESSES

Applicant alleges Trial Counsel, Mr. Johnston, was ineffective for calling witness Robin Christian Smith, the minor's school guidance counselor, at trial. A defense attorney may perform deficiently where he or she calls a witness without first conducting a reasonable investigation to ascertain whether the witness will be helpful to the defense's theory of the case. See Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002) (finding counsel ineffective for calling a witness based on the defendant's insistence and her conspicuous absence from the State's case-in-chief); McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008) (finding counsel ineffective for calling an expert witness who had been harmful to the defense in a prior trial).

Through the discovery process, Mr. Johnston had received a copy of Smith's notes which were made contemporaneously with the minor's disclosure detailing what the minor said to Smith. Johnston's trial strategy was to call Smith in order to impeach the minor because there were discrepancies between the testimony of the minor at trial and Smith's notes.

At trial, the minor testified that:

1. Applicant never asked her to wear particular shorts that were short in length; (Trial Tr. 102);
2. Applicant stated does that feel good, not that she liked it. (Trial Tr. 94-95);

3. The minor walked out of the room in a hurry, she did not run. (Trial Tr. 95-97);

Specifically, Smith's notes stated the following:

1. The minor told Smith that Applicant would ask her to wear particular shorts that were short in length; (Trial Tr. 346)
2. The minor told Smith that she was lying down and Applicant was on top of her straddled and when she told him to stop, he told her that she liked it; (Trial Tr. 346-47) and
3. The minor told Smith that she then told Applicant it was his turn for a massage, and when he got off of her for his turn, she ran into the other room. (Trial Tr. 346-49).

At trial, Mr. Johnston called Smith as a witness and promptly presented her with the notes she provided to law enforcement in order to impeach the minor. (Trial Tr. 342-43). Mr. Johnston was unable to get the notes themselves admitted as an exhibit, but nonetheless began exploring the details of the disclosure to Smith. (Trial Tr. 343-47). When Johnston asked Smith if the minor told her that she "then told her step-grandfather that it was his turn for a massage[,]" as was set out in Smith's notes, Smith denied the minor so disclosed, much to Johnston's palpable surprise and dismay. (Trial Tr. 347-48). Smith explained the inconsistency as a typographical error because she was hurriedly typing up the report for law enforcement. (Trial Tr. 348-50). Smith additionally testified minor child led her to believe that there were numerous other incidents of abuse or inappropriate conduct. (Trial Tr. 352-54). But for Johnston's decision to call Smith as a witness, her testimony would not have been otherwise admitted.

At the first PCR hearing, Johnston testified that he obtained a copy of Smith's notes prior to trial. (PCR Nov. 2018 Tr. 62-63). Mr. Johnston acknowledged that Smith's testimony did not pan out as planned, and explained that he had not expected her to dispute her own notes. (PCR Nov. 2018 Tr. 63, ll. 6-16). Johnston acknowledged he did not speak to Smith prior to trial, that the safer practice would have been to do so, and that he had even asserted as much in his closing argument contending that the solicitor must have spoken to Smith, which is why he decided not to call her as a witness. (PCR Nov. 2018 Tr. 63-64).

Johnston agreed Smith turned out to be an adverse witness. (PCR Nov. 2018 Tr. 64, ll.17-19). Johnston also acknowledged that Smith testified to extensive details of minor child's disclosure to her. (PCR Nov. 2018 Tr. 64-68). When challenged that the "typo" story would have been discoverable if only Johnston had called Smith, he answered "[i]f she had told me, yes." (PCR Nov. 2018 Tr. 65, ll. 19-24). However, there is no evidence that Smith would not have disclosed this information to Mr. Johnston.

Mr. Johnston also noted that Smith reported that the minor disclosed that the abuse happened multiple times, but at trial, the minor testified she was only ever penetrated once. (PCR Nov. 2018 Tr. 68, ll. 10-15). Johnston acknowledged Smith testified she had reported the errors in her report to the solicitor. (PCR Nov. 2018 Tr. 69-71), and thereafter acknowledged his extensive closing argument excoriating Smith for her prevarication. (PCR Nov. 2018 Tr. 71-78).

On cross-examination, Johnston testified he "couldn't imagine she was going to go with the story that – the point I was trying to raise about prior inconsistent statements were typographical errors. I was shocked at that and remain so." (PCR Nov. 2018 Tr. 100, ll. 22-25). Johnston admitted Smith did not turn out like he hoped, which is that he would elicit testimony consistent with Smith's contemporaneous notes, which he could then use as prior inconsistent statements by the minor. (PCR Nov. 2018 Tr. 101, ll. 1-8). Instead, Mr. Johnston "had to do with a very hastily prepared plan B, which was that she was changing her story after Smith understood that [minor] was not supporting those particular points." (PCR Nov. 2018 Tr. 101, ll. 9-12). On redirect examination, Johnston acknowledged that in their closing arguments, both he and the solicitor condemned Smith as a liar. (PCR Nov. 2018 Tr. 119-20).

During the trial both the State and Mr. Johnston commented on the testimony of Smith during closing arguments. Johnston offered the following hypothesis for Smiths' testimony:

> The guidance counselor. My momma told me it's not polite to call people a liar. But I'm awful tempted to call that guidance counselor a liar. I can tell you that I can find some more polite words for it. She's a prevaricator, which means a liar. But it sounded better.
>
> I could not believe the explanation that that woman offered under oath. The woman took contemporaneous notes at the time that [Minor] made what they're calling a disclosure. She took

notes while she was doing it. And I believe she said that she typed it up in a very neat fashion within about 30 minutes.
(Trial Tr. 410, ll. 15-25).

...

I'm going to tell you what happened. The Solicitor called the guidance counselor to talk to her about her testimony, as is very proper. It's very proper for the attorney. In fact, it's your duty to call and talk to your witnesses.

But I'll bet you that during that conversation, the subject came up of, well, [Minor] says that she don't remember this thing about the shorts, about Thomas asking her to wear particular shorts very short in length. And she don't remember the part about she asked him to stop and he told her that if she liked it, and that she ran into another room.

The guidance counselor, [ruh-roh], I wrote it down. I typed it up that way. I like [Minor]. I don't want her to lose her case. I don't want her to lose her case because of me. So I'm going to prevaricate. I'm going to try to claim to that jury that that was a typo. A typo. Two different things. Two different very key things.

And the two key things that [Minor] happens to now disclaim just happen to be the only typos that the guidance counselor made in her documentation. It's an insult to your intelligence.
(Trial Tr. 412, ll. 3-24).

...

I don't know why she's not the guidance counselor at that school house now, but I'm glad she's not. Notice who had to call the guidance counselor. The State didn't call her. The State could have called her. They could have called her as a witness. Who called her? The Defense. They didn't call her because they thought she hurt their case. And, boy, did she ever hurt their case.
(Trial Tr. 413, ll. 9-15)

The State also commented on Smith's testimony during its closing argument stating the following:

Next, ladies and gentlemen, you heard from the guidance counselor. I'd like to point something out about the guidance counselor's testimony. This wasn't our witness. We didn't call the guidance counselor. The guidance counselor, clearly, didn't know what happened or what she was talking about. And we didn't call her. She was a Defense witness, who the Defense is now claiming is a liar, but somehow wants you to believe the parts he wants you to believe. She wasn't a consistent statement – she wasn't a consistent witness. And that's why we didn't call her.

The witnesses we did call were truthful witnesses. Witnesses that were fudging truths, no. Witnesses that didn't remember things, no. This was a Defense witness they put up there to show she was a liar and then wants you to believe what the underlying statement she gave us was.

And when she tried to testify to you and explain what was happening, the Defense got upset about it and wanted her to stick to this report she had done, which she admitted was inaccurate and admitted it was wrong. And we didn't tell her to say that. We didn't even call her as a witness.

The idea that somehow she was coached into doing something is incorrect. This was their witnesses that turned out to be someone who was not telling the truth. And, now, they somehow want you to believe her statements on the parts they like and ignore the parts that aren't true. That's, clearly, what happened in this case.

She did - - was not willing to say she did not remember the short shorts. She did not remember who said who was going to give a massage. And he can call her a prevaricator if he wants to and he can challenge her honesty if he wants to, but that's their witness, not ours. We didn't put her on the stand to be all confusing and not knowing what's going on. They did. This wasn't a State's witness. This was a Defense witness.
(Trial Tr. 450-452).

Mr. Johnston had access to Smith's typed notes made in close proximity of time to when the disclosure was made by the minor to Smith. The trial transcript clearly reflects Johnston's surprise by the change in the witness' trial testimony from her typed notes. The trial transcript and PCR hearing transcript reflect the damage done by this witness to Johnston's intended trial strategy in calling the witness to impeach the minor. The change in the trial testimony also unexpectedly bolstered the minor's credibility and factually added to the state's case. A reasonable inference is that the witness altered her recollection prior to taking the stand, however, nothing in the record suggests that Smith's testimony was a result of a "sudden" recollection prompted by an event occurring at the trial. Thus, it is more likely than not, that she would have advised Mr. Johnston of her altered recollection if she had been asked prior to her testimony in trial, as she had previously informed the Solicitor.

In order to establish ineffective representation of counsel, Applicant must prove that (a) counsel's performance was deficient, in that it fell below an objective standard of reasonableness and (b) the deficient performance prejudiced Applicant. Troedel v. Wainwright, 667 F. Supp. 1456, 1460 (S.D. Fla. 1986), aff'd, 828 F.2d 670 (11th Cir. 1987), *see also* Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In Ard v. Catoe, the Supreme Court of South Carolina expanded on the second factor stating that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The Supreme Court defines a reasonable probability as "a probability sufficient to undermine confidence in the outcome of the trial.

Furthermore, when a defendant's conviction is challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" Id., *quoting* Strickland at 695.

In reviewing the quality of representation, the Court takes note that the "'finely ground lens of 20/20 hindsight' does not affect our vision." Martin v. Maggio, 711 F.2d 1273, 1279 (5th Cir. 1983), *quoting* Williams v. Maggio, 695 F.2d 119, 123 (5th Cir. 1983). To be effective, counsel is required to conduct a "reasonable amount of pretrial investigation." *Id.*, at 1280.

A criminal defense attorney has a duty to perform a reasonable investigation. Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986). The case law establishes that when evaluating reasonableness of counsel's conduct, a court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case presented to him. While "the scope of a required investigation depends on a number of issues that may be unique to the case and their complexity, the strength of the government's case and the overall strategy of trial counsel, at a minimum, counsel has a duty to interview potential witnesses and to make an *independent* investigation of the facts and circumstances of the case." Troedel v. Wainwright, 667 F. Supp. 1456, 1461 (S.D. Fla.1986), aff'd, 828 F.2d 670 (11th Cir. 1987), *citing* Nealy v. Cabana, 764 F. 2d 1173, 1177 (5th Cir. 1985) *and* Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983).

The Troedel factors support the Court's decision in the present PCR. Mr. Johnston had a duty to make an independent investigation of the facts and circumstances and failed to question witness Smith prior to placing her on the witness stand. Applicant has carried his burden to establish that Johnston's decision not to question or interview witness Smith was an error. Clearly, Smith's testimony improperly bolstered the minor's testimony.

The assessment of witness credibility is within the exclusive province of the jury. Witnesses are not allowed to testify as to whether another witness is telling the truth, or improperly bolster the

credibility of another witness. State v. McKerley, 397 S.C. 461, 464, 725 S.E. 2d 139, 141 (Ct. App. 2012). At trial, Mr. Johnston called Robin Christian Smith to testify for the defense. The minor had disclosed the alleged abuse to Smith. Smith made notes immediately after the disclosure which she provided to law enforcement. Johnston hoped to discredit the minor by highlighting inconsistencies in Smiths' notes with the minor's testimony at trial. However, when questioned by Johnston as to the inconsistencies, Smith explained that she had hurriedly typed up the notes and the inconsistencies were simply typographical errors. (Trial Tr. 348-350).

Because of Johnston's failure to interview Smith, his direct examination of her elicited testimony that the State would not have been permitted to elicit without the defense first opening a door to same. Smith disclosed that minor child led her to believe there were numerous other incidents of abuse and/or inappropriate conduct. (Trial Tr. 352-354). Additionally, Johnston elicited testimony from Smith regarding specific acts in extensive detail that the minor had advised had occurred. (Trial Tr. 345-349, 352-354). Had Smith been a witness for the State, she would have been restricted to testimony regarding time and place in regards to what the minor child disclosed to her. However, Johnston elicited the following testimony from the guidance counselor:

1) That the Applicant either allegedly asked the minor child to wear shorts that were very short in length or told her that he liked her to wear short shorts (Trial Tr. 346-347);
2) That the Applicant was straddled over the minor lying on a bed and told her that she liked it (Trial Tr. 346-347);
3) That Applicant gave the minor child a massage and when it was her turn to massage him, she ran out of the room (Trial Tr. 347-349);
4) And that the way the minor presented the information to Smith, she believed that it was possible she had been abused many times (Trial Tr. 352-354).

Experts are precluded from offering an opinion regarding the credibility of other witnesses, especially a child victim in a sexual abuse case. State v. Kromah, 401 S.C. 340, 358-359, 737 S.E.2d 490, 499-500 (2013), *see also* State v. Makins, 433 S.C. 494, 501, 860 S.E.2d 666, 670 (2021). Doing so, invades the province of the jury. Briggs v. State, 421 S.C. 316, 328, 806 S.E.2D 713, 719 (2017).

By the above testimony from Smith, Johnston not only bolstered the credibility of the minor, but put a witness on the stand who testified that she believed that it was possible the minor had been abused many times by the Applicant. Similarly to Briggs, there was no physical evidence of abuse in the present matter, and thus the minor's credibility was very important. Id., at 324.

"To deem an error harmless, the court must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. McKerley, at 467 (quoting State v. Fonseca, 383 S.C. 640, 650, 681 S.E.2d 1, 6 (Ct. App. 2009)). This case turned solely on the credibility of the minor and the Applicant.

South Carolina case law opines that it is improper for an expert, or any other witness, to comment on the veracity of a child's accusations of sexual abuse. State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011), see State v. Dawkins, 297 S.C. 386, 393-94, 377 S.E. 2d 298, 302 (1989).

In Jennings, the Supreme Court found that the State improperly introduced written reports because those reports allowed the forensic interviewer to improperly vouch for the minor's credibility. The Court found that the error was not harmless because the only evidence provided by the State was that of the children and other hearsay evidence of their accounts. 394 S.C. 473, 479-80.

In State v. Anderson, the State called an expert in forensic interviewing and child abuse assessment. The Supreme Court found that it was error to qualify the witness as an expert in "child abuse assessment and forensic interviewing" and found that those two errors prejudiced Appellant. The Court found that because the case turned solely on the credibility of the minor and the credibility of the

Appellant, the testimony of the witness impermissibly bolstered the minor's credibility. 413 S.C. 212, 776 S.E. 2d 76 (2015).

As in Anderson and Jennings, here, the State's evidence against the Applicant consisted solely of the minor's testimony. There was no physical evidence presented at trial to corroborate her allegations. The State did not call Smith as a witness in their case in chief. The decision by Johnston to put Smith on the witness stand without first interviewing her, cannot be considered harmless error in that she not only bolstered the minor's testimony, but also added details to the accounts that would not have otherwise been admissible and heard by the jury.

Initially, the Court considered the issue regarding Mr. Johnston failing to interview witness Smith a close call. However, the motion, the additional briefing, oral arguments, and research were beneficial in clarifying the issue. For all of the reasons cited above, the Court finds that Applicant has shown that his trial counsel, Mr. Johnston, was deficient/ineffective and acted unreasonably by not interviewing witness Smith prior to calling her during the trial.

2. FAILURE TO PUT BENCH CONFERENCES ON THE RECORD

Applicant raised the issue of the failure of Mr. Johnston to place bench conferences on the record as a basis for claiming he was deprived of a constitutionally fair trial. The Court has extensively reconsidered the issue. Broadly, this Court agrees that it is the duty of trial counsel to protect his client's interest in assuring a proper record is made when the trial judge conducts an off-the-record bench conference and, subsequently, the parties fail to memorialize the conference on the record.

A significant portion of the prior Order involved a review of the numerous bench conferences that were not placed on the record. This Court acknowledged the analytical hardship in addressing trial counsel's failure to assure a proper record was developed for appellate review. Notwithstanding the difficulty the trial transcript presents, this Court, once again, opines that for post-conviction purposes,

when examining the present PCR record, Applicant has failed to establish the element of prejudice. Additionally, Applicant has failed to establish what issue an appellate court would have reversed.

3. FAILURE TO MOVE FOR A MISTRIAL

Mr. Johnston's failure to move for a mistrial was also reconsidered. This issue examines the Solicitor's closing argument. In the prior Order, the Solicitor's comment "I am thoroughly convinced beyond any doubt in my mind that he is guilty" was accepted as not proper. (Trial Tr. 460-461). No assertation has ever been made to this Court that the comments should have been made by the Solicitor. The issue was the corrective action requested by Mr. Johnston. This Court agrees with the assertation that these comments can justify a motion for a mistrial.

During the Solicitor's closing statement, Mr. Johnston objected, regrettably during an off-the-record bench conference, resulting in the trial judge giving the jury a curative instruction to disregard the comments made by the Solicitor. At the PCR hearing, Johnston testified that, at the time, he was satisfied with the curative instruction and therefore, did not make a motion for mistrial. (PCR Nov. 2018 Tr. 107-108). Johnston acknowledged that, in retrospect, he should have asked for a mistrial. (PCR Nov. 2018 Tr. 108-109).

While the Solicitor's comments were clearly not proper, and should not have been made, Johnston's decision at the time of trial was to seek a curative instruction and he was satisfied with the instruction that was given to the jury. He chose not to move for a mistrial, even though such a motion would have been the appropriate remedy. The fact that his objection was made in an off-the-record bench conference did not deny applicant an issue of appellate review as Johnston acknowledged his decision was to only request a curative instruction. As reflected in the prior Order, this Court cannot find Trial Counsel was deficient in requesting a curative instruction rather than a mistrial.

4. OTHER GROUNDS

The additional grounds raised in the Motion for Reconsideration and /or Relief from Judgment or Order to Amend, Alter or Modify the Court's Order have been considered by the Court. The Court declines to further alter or amend its prior Order. Thus, unless specifically referenced as being altered or amended herein, the prior Order remains the Order of this Court.

CONCLUSION

Based on all of the foregoing, this Court finds and concludes that Applicant has established deprivations that would require this Court to grant his application, specifically the Court finds that Applicant has shown that his trial counsel, Mr. Johnston, was deficient/ineffective and acted unreasonably by not interviewing witness Smith prior to calling her during the trial.

IT IS THEREFORE ORDERED:

1. **The Motion for Reconsideration and/or Relief from Judgment or Order to Amend, Alter or Modify has been granted, and**

2. **The Applicant is granted a new trial.**

AND IT IS SO ORDERED THIS 31st **day of** May **2023.**

J. Mark Hayes, II
Presiding Judge
Seventh Judicial Circuit

Cherokee, South Carolina