STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Clifton Newman, Circuit Court Judge

GEORGE GRANT JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213347

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the PCR court err in failing to find trial counsel ineffective for opening the door for testimony to be admitted regarding Grant's pending CDVHAN charge with the same victim?

2. Did the PCR court err in failing to find trial counsel ineffective for not objecting pursuant to Rule 403, SCRE, that the pending CDVHAN charge was prejudicial and should not come in after the trial judge ruled that the CDVHAN was relevant and admissible?

STATEMENT

In November 2006, the Anderson County Grand Jury indicted George Grant, Jr. on the charges of burglary first degree, kidnapping, and criminal sexual conduct first degree (CSC). On August 12, 2008, Grant proceeded to trial before the Honorable J. Cordell Maddox, Jr. and a jury. Grant was represented by Scott Robinson, and the state was represented by Kristin W. Reeves. The jury found Grant not guilty of the burglary first degree, but found him guilty of the CSC first degree and the kidnapping. App. 305, ll. 1 – 25. Judge Maddox sentenced Grant to twenty-four years on the CSC suspended to fourteen years with five years probation; and to twelve years on the kidnapping to run concurrently. App. 326, ll. 13 – App. 327, ll. 9. Grant's attorney filed a notice of appeal. The Court of Appeals affirmed Grant's convictions and sentences on June 14, 2011. State v. Grant, Op. No. 2011-UP-295 (Ct. App. filed June 14, 2011).

On February 22, 2012, Grant filed an application for post-conviction relief (PCR). The state filed a return on May 22, 2012. An evidentiary hearing was held on October 2, 2012 before the Honorable Clifton Newman. Grant was represented by Linda Whisenhunt, and the state was represented by Karen Ratigan. On December 3, 2012, Judge Newman filed an order denying Grant's application and dismissing it with prejudice. Grant's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for opening the door for testimony to be admitted regarding Grant's pending CDVHAN charge with the same victim.

Grant was convicted of events alleged to have occurred on September 1, 2006. The accuser, who was the former girlfriend of Grant and with whom he had lived until recently, alleged that she was awakened at around midnight or 1:00 am when Grant entered the bedroom she was sharing with her two children. According to her, Grant "dragged" her out of the bedroom and into the living room, and sexually assaulted her twice on the living room floor. Afterward, he took her to her spare bedroom and sexually attacked her two more times. One child attempted to call 911, but, according to her testimony, he took the phone away from her. The next morning, the accuser drove Grant to another location. She then called 911, and the investigation began. App. 78, ll. 25-App. 96, ll. 10.

Before the trial started, the state made a motion to be allowed to introduce as Lyle[1] evidence a pending charge against Grant of criminal domestic violence of a high and aggravated nature, against this accuser, that allegedly occurred on July 23, 2006, five weeks before these other crimes allegedly occurred. App. 60, ll. 2-6. The state wanted to admit this evidence under the theories of motive and intent. App. 60, ll. 1 – App. 68, ll. 22. The judge ruled that this conduct did not meet the Lyle standard, but ruled that it may become admissible, but that it depends "upon whether the Defendant testifies and what he says on cross." The judge also stated that "depending on what trial counsel asks the accuser on cross, the pending charge could become relevant on redirect." App. 66, ll. 9-12.

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[1] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

The accuser testified at trial. On cross-examination, Grant's trial counsel elicited from her the fact that she never characterized the attacks as a "sexual assault." App. 97, ll. 4- App. 98, ll. 20. Counsel confirmed that she told the police they had sex 5 times that night. He explored the fact there was no lighter found at the scene. App. 99, ll. 1-25. Grant helped pay her bills, and they just separated in July of that year. He explored that she knew Grant went to live with a female friend. Then he explored the fact that the police pictures did not show signs of struggle. App. 102, ll. 22- App. 103, ll. 16. He cross examined her on the fact that one could barely see a scratch in a photograph; that there were neighbors who lived nearby; there was no sign of a struggle on the couch; that the bedroom was not in disarray; there was no mark on the sheets suggesting he tried to light them on fire; that there was no evidence a bottle of alcohol had been opened; no sign of struggle in the kitchen; that she never told the police that appellant "jerked" her into the living room. App. 96, ll. 16- App.110, ll. 21.

After this, the state made a motion to be allowed to enter evidence concerning the pending CDVHAN from the earlier assault:

> MS. REEVES: There was a CDV high and aggravated incident where the Defendant beat up the victim. And Mr. Robinson just went through every picture and pointed out no signs of struggle. She didn't resist him very much. No neighbors heard her screaming. Mr. Robinson thinks just because he doesn't use the word consensual, he can get into all these other reasons why she didn't resist and not open the door for me to talk about why she didn't resist. I think it's clear that she didn't resist, and she did put that in her statement to the nurse. She didn't resist—or actually in her statement to the officers. She didn't resist because she was scared of him. He's hurt her before. So I think clearly he's opened the door for me to talk about this.

App. 111, ll. 19- App. 112,ll. 7

Counsel objected by saying he did not open the door. App. 112, ll. 9 – App. 113, ll. 25.

> MR. ROBINSON: Well, I'm go back to the—I'm going back to the rule itself, Your Honor, as far as the motive, identity. There are pieces of this—of this rule that are involved in this case. Common scheme or plan—

THE COURT: You can't use character and you can't prior bad acts. Okay. That's what we're talking about.

MR. ROBINSON: Right.

THE COURT: What—we've got beyond the bad acts. She wants to do it to show criminal. Tell me why you haven't opened the door. That's what I want to hear.

App. 114, ll. 1-10.

Counsel explained he was trying to discredit the witness by attacking her credibility.

THE COURT: Well, I'm sure that was one facet of your cross-examination, but I think the other facet was to show she consented to it although you didn't use the words. But just the fact that there was no evidence of a ruckus or anything other than the bedspread being pulled off the cover. And then you got into where you move around when you sleep.

App. 115, ll. 19-25.

The judge ultimately allowed the evidence into the trial:

THE COURT: All right. I'm going to allow you to go into the prior beating or whatever transpired five weeks prior because of the way the cross . . .

It's not that you did anything wrong, Mr. Robinson, but I think the insinuations you were making during the cross examination, I think, opens the door for the State to explain from this witness why she was afraid of the man and why she basically probably cooperated because of that fear.

App. 116, ll. 20- App. 117, ll. 2.

The solicitor then elicited testimony from the accuser regarding the prior incident. She testified that appellant "beat" her on July 23rd. after he found a letter she had written to a lover. He allegedly held her in the bedroom for 2 hours, and hit her three more times in the ear when she tried to call 911. She testified to her injuries: "scar tissue in my face, a hole in my tongue, contusions in the back of my head and ear bleeding." App. 126, ll. 8-12. The state then moved a number of photographs from that incident into evidence. App. 126, ll. 13-25. She had bruises on her chest

from his kicking her, and he allegedly kicked her in the back of the head. App. 119, ll. 21- App. 130, ll. 11.

Counsel objected to the accuser's testimony as leading and "going into what I mentioned in my cross." App. 124, ll. 15-17. He also objected to the introduction of the photographs saying "same objection as before." App. 126, ll. 21-15.

At his PCR hearing, Grant testified that his trial attorney was ineffective for opening the door to a pending CDV (CDVHAN) charge Grant had with the same accuser, his ex-girlfriend, that the trial judge allowed to come in. Trial counsel had told him in his opinion it would be better for Grant not to testify because it was very important that this pending CDVHAN charge not come out at trial. It was Grant's understanding that trial counsel's strategy was to keep that pending charge out. App. 346, ll. 3 – 25; App. 353, ll. 1 – App. 354, ll. 25. Grant believed that if his trial counsel had done things differently that Grant would not have been convicted. App. 349, ll. 6 – 15.

Grant testified that he was innocent because the sex was consensual. App. 358, ll. 1 – 10. Grant stated that he had a prior CDV from 2004 that was with a different woman. App. 359, ll. 17 – App. 360, ll. 1.

Trial counsel testified that he "believed that Grant had a pending charge but he was not sure exactly.", and later said he had no independent recollection of the CDVHAN charge. App. 360, ll. 6 – 25; App. 371, ll. 5 – App 372, ll. 12. After reviewing the transcript, trial counsel testified that his strategy in Grant's case was that the sex was consensual although it may have been rough at times. Grant said that they had been in a relationship, and she let him in the house and they had consensual sex. App. 372, ll. 13 – App. 373, ll. 24.

Counsel's strategy was also to undermine the accuser's credibility. App. 373, ll. 25 – App. 374, ll. 25.

Trial counsel said he tried to keep the pending CDV charge out as he knew it would be detrimental to his strategy for it to come in. He believed he argued against the state's pretrial motion to admit the charge that it was too prejudicial and was not relevant under Rule 404, SCRE. The judge ruled pretrial that the pending charge was not admissible, but that it was a fine line and the judge would re-evaluate it depending on counsel's cross examination of the accuser. App. 375, ll. 2 – App. 378, ll. 5.

Counsel did not believe that he opened the door but the trial judge ruled that he did. The judge let the pending CDVHAN come in. App. 378, ll. 8 – App. 380, ll. 24.

The PCR attorney argued in his closing that trial counsel failed to walk the fine line between discrediting the accuser and preventing the pending CDVHAN charge from coming in. PCR attorney argued that this was an improper exercise of professional judgment. App. 390, ll. 15 – App. 391, l. 18.

The PCR judge ruled that he found Grant's testimony to not be credible while he found trial counsel's testimony to be credible. App. 414. The PCR judge ruled that Grant did not meet his burden of proving trial counsel opened the door to testimony that prejudiced his case.

Where ineffective assistance of counsel is alleged 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, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable

professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Supreme Court held that to prove that counsel was ineffective, the applicant for post-conviction relief (PCR) must show that counsel's performance was deficient, and there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.

In their opinion, the Court of Appeals held that an appellant cannot complain of prejudice resulting from the admission of evidence to which he opened the door. State v. Grant, Op. No. 2011-UP-295 (Filed June 14, 2011).

Trial counsel opening the door to allow a pending CDVHAN charge involving the same accuser to come into evidence was extremely prejudicial to Grant. But for that, there was a reasonable probability that the jury would have believed the sex was consensual. Because of the prior CDVHAN incident, the jury had cause to believe the accuser complied with the sex out of fear.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not objecting pursuant to Rule 403, SCRE, that the pending CDVHAN charge was prejudicial and should not come in after the trial judge ruled that the CDVHAN was relevant and admissible.

Before the trial started, the state made a motion to be allowed to introduce as Lyle[2] evidence a pending charge against Grant of criminal domestic violence of a high and aggravated nature, against this accuser, that allegedly occurred on July 23, 2006, five weeks before these other crimes allegedly occurred. App. 60, ll. 2-6. The state wanted to admit this evidence under the theories of motive and intent. App. 60, ll. 2- App. 68, ll. 22. The judge ruled that this conduct did not meet the Lyle standard, but ruled that it may become admissible, but that it depends "upon whether the Defendant testified and what he says on cross." The judge also stated that "depending on what trial counsel asked the accuser on cross, the pending charge could become relevant on redirect." App. 66, ll. 9-12.

Trial counsel argued against the state's motion that the pending charge of CDVHAN was too prejudicial to come in. He argued also that it did not fit under Rule 404, SCRE. App. 64, ll. 19 – App. 65, ll. 24.

The accuser testified at trial. On cross-examination, Grant's trial counsel elicited from her the fact that she never characterized the attacks as a "sexual assault." App. 97, ll. 4- App. 98,ll. 20. Counsel confirmed that she told the police they had sex 5 times that night. He explored the fact there was no lighter found at the scene. App. 99, ll. 1-25. Grant helped pay her bills, and they just separated in July of that year. He explored that she knew he went to live with a female friend. Then he explored the fact that the police pictures did not show signs of struggle. App. 102, ll. 22- App.

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103,ll. 16. He cross examined her on the fact that one could barely see a scratch in a photograph; that there were neighbors who lived nearby; there was no sign of a struggle on the couch; that the bedroom was not in disarray; there was no mark on the sheets suggesting he tried to light them on fire; that there was no evidence a bottle of alcohol had been opened; no sign of struggle in the kitchen; that she never told the police that appellant "jerked" her into the living room. App. 96, ll. 16- App. 110, ll. 21.

After this, the state made a motion to be allowed to enter evidence concerning the pending CDVHAN from the earlier assault:

> MS. REEVES: There was a CDV high and aggravated incident where the Defendant beat up the victim. And Mr. Robinson just went through every picture and pointed out no signs of struggle. She didn't resist Grant's trial attorney argued against the state's motion pretrial to keep the pending CDVHAN charge Mr. Robinson thinks just because he doesn't use the word consensual, he can get into all these other reasons why she didn't resist and not open the door for me to talk about why she didn't resist. I think it's clear that she didn't resist, and she did put that in her statement to the nurse. She didn't resist—or actually in her statement to the officers. She didn't resist because she was scared of him. He's hurt her before. So I think clearly he's opened the door for me to talk about this.

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App. 100, ll. 19-25.

The judge ultimately allowed the evidence into the trial:

> THE COURT: All right. I'm going to allow you to go into the prior beating or whatever transpired five weeks prior because of the way the cross . . .
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> It's not that you did anything wrong, Mr. Robinson, but I think the insinuations you were making during the cross examination, I think, opens the door for the State to explain from this witness why she was afraid of the man and why she basically probably cooperated because of that fear.

App. 116, ll. 20- App. 117, ll. 2.

> The only objection made by trial counsel was: "I just want to---I'll make my objection on the record as well, Your Honor."

App. 117, ll. 3 – 24.

When the state questioned the accuser on redirect, trial counsel made no objection under Rule 403, SCRE, that the testimony was prejudicial. App. 119, ll. 21 – App. 130, ll. 14.

At his PCR hearing, Grant testified that his trial attorney was ineffective for opening the door to a pending CDV (CDVHAN) charge Grant had with the same accuser, his ex-girlfriend, that the trial judge allowed to come in. Trial counsel had told him in his opinion it would be better for Grant not to testify because it was very important that this pending CDV charge not come out at trial. It was Grant's understanding that trial counsel's strategy was to keep that pending charge out. App. 346, ll. 3 – 25; App. 353, ll. 1 – App. 354, ll. 25. Grant believed that if his trial counsel had done things differently that Grant would not have been convicted. App. 349, ll. 6 – 15.

Trial counsel testified at the PCR hearing that after the trial judge ruled the pending charge was relevant because counsel had opened the door, counsel did not object. Trial counsel admitted that he did not object that the charge was not relevant under 404, and was prejudicial. Although counsel argued in pretrial that the charge was more prejudicial than probative, he did not renew his objection at trial after the judge allowed the charge to come in. App. 381, ll. 3 – App. 383, ll. 17.

The PCR judge ruled that Grant did not meet his burden in proving that trial counsel opened to door to testimony that was prejudicial to Grant. The PCR judge ruled that he found trial counsel's testimony to be credible while he found Grant's testimony to not be credible. App. 416. The PCR judge ruled that trial counsel did not err in failing to ask the trial judge to address the issue of the pending charge under a Rule 403, SCRE, analysis. The PCT judge wrote that it was clear that the trial judge was aware from the beginning of trial that this issue was more probative than prejudicial. Therefore, it was not necessary for trial counsel to make a specific objection on that ground. App. 417.

Where ineffective assistance of counsel is alleged 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, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional

errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

In Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000), the Supreme Court held that trial counsel was ineffective for failing to argue that the prejudicial effect of admitting the defendant's prior convictions outweighed their probative value; credibility was crucial in the prosecution for distribution of crack cocaine, as the jury had to choose between the defendant's and Law Enforcement Division agents' version of events, and the defendant was impeached with evidence of two convictions for possession of cocaine that were four and five years old.

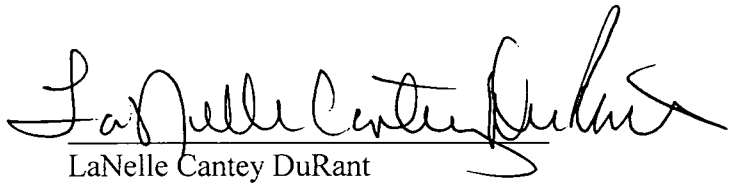
Grant's trial attorney was ineffective for not objecting to and arguing against the pending CDVHAN charge coming in as it was more prejudicial to Grant than probative to the case. Credibility was also crucial as it was the accuser's word against Grant's, and the pending charge was not a conviction so it had not been proven.

The trial judge had already ruled the pending charge was not coming in depending upon trial counsel's cross examination. Therefore, but for trial counsel's error, the jury would not have heard of the prior incident. Trial counsel was on notice from the judge that he needed to be extremely careful on cross examination.

CONCLUSION

Based on the above, certiorari should be granted, and the convictions and sentences reversed, and the case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Anderson County
Clifton Newman, Circuit Court Judge

GEORGE GRANT JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. George Grant, #291536, Tyger River Correctional Institution, 200 Prison Road, Enoree, SC 29335-9308, this 21st day of August, 2013.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of August, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.