

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Berkeley County
Kristi Lea Harrington, Circuit Court Judge

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SEP 16 2013

S.C. Supreme Court

SHAWN LEONARD GLENNON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000046

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Did the PCR court err in holding trial counsel was not deficient for failing to object testimony from Petitioner's wife about and alleged pornography addiction during trial on a charge of secretly filming his stepdaughter in the bathroom?

- II. Does the record support the PCR court's finding that trial counsel was not deficient in advising Petitioner his case was "winnable" and he need not accept the State's plea offer where the illegally made video tape was found in his nightstand along with his camcorder, where Petitioner admitted secretly keeping the tape, where Petitioner admitted to his wife numerous times that he made the tape, and where he never denied making the tape to police when they arrested him?

STATEMENT

On May 27, 2010, Petitioner Shawn Glennon's wife searched through his nightstand drawer and found a camcorder tape. App. 110, l. 18 – App. 111, l. 17. She watched the tape on Petitioner's camcorder and saw a surreptitious recording of her teenaged daughter—Petitioner's stepdaughter—unclothed in the bathroom. App. 111, l. 9 – App. 114, l. 5. The tape showed the stepdaughter during May of 2008, when she had to use Petitioner and his wife's shower after knee surgery. App. 278, l. 20 – App. 279, l. 5.

On September 8, 2010, a Berkeley County grand jury indicted Petitioner on one count of voyeurism. App. 363-364. The maximum time he faced in prison upon a conviction was three years. App. 249, ll. 8-13. The State offered Petitioner a plea bargain of three years probation.¹ App. 274, l. 10-17. In April of 2011, Petitioner hired Michael O'Neal to represent him against the charges. Tr. 295, ll. 12-14. He advised Petitioner that he had a "winnable" case, and Petitioner proceeded to trial in front a jury and the Honorable R. Markley Dennis, Jr. on June 29, 2011. App. 1; App. 274, l. 17 – App. 275, l. 3. Ashley Cornwell and Anne Williams represented the state. App. 1.

At trial, the State elicited without objection testimony from Petitioner's wife that he had for some time suffered an addiction to pornography:

Q: Why were you looking through his nightstand to begin with?

A: Well, because three months after we got married I discovered that he had a porn addiction. And it had been, uh, — what we fought about most of the time during our marriage was him lying to me about when he was doing it, telling me that he wasn't doing it. I would constantly catch him, find notes in his pocket when he'd come from work with website after website after website or porn sites. We

¹ Trial counsel stated that the State offered Petitioner's registration as a sex offender to be left to the discretion of the trial judge. However, under S.C. Code Ann. § 20-3-430(c)(12), registration as a sex offender would have been mandatory had Petitioner accepted the plea.

went to counseling over it, to try to resolve the issue. So I just figured that it was more pornographic material.

App. 111, l. 18 – App. 112, l. 7. She testified that after finding the tape, she sent him numerous texts asking about it, and he texted her back that “he always ruins everything good in his life and that there was nothing that he could say to make this any better.” App. 115, ll. 1-11. She sent a final text that if Petitioner admitted making the tape, she would not press charges; otherwise, she would call the police. Tr. 190, l. 23 – App. 191, l.5. Petitioner admitted to making the tape, and at trial he explained that he did it because he believed she would not accept his denial and because he wanted an opportunity “to tell her the truth. She needed to know the truth about what happened to our daughter.” App. 191, ll. 6-18. However, he admitted that, although opportunities had arisen, he never denied to her making the tape or that someone else was responsible. App. 191, l. 22 – App. 192, l. 9. Petitioner’s wife also sought for Petitioner to get therapy for making the tape, and he admitted he complied and attended therapy sessions. App. 197, l. 19 – Tr. 198, l. 11.

Petitioner’s wife testified that after two months, she decided it would be best to turn Petitioner in to the police. App. 147, l. 14 – App. 148, l. 5. On cross-examination, the State elicited testimony from Petitioner that at the police station once he was arrested, he told police he and his wife had an agreement that he would comply with her requirements to attend church and counseling, and he asked what his legal options were against her because he now felt blackmailed. App. 199, l. 3 – App. 200, l. 18.

Petitioner testified that in the spring of 2010, he was cleaning the house and the camcorder was in its usual place on the mantle. App. 185, ll. 7-23. Curious as to what was on it, he watched the tape and did not know who made it. App. 185, l. 17 – App. 186, l. 15. He said sometimes his stepson or other stepdaughter would have friends over to the house. Tr. 188, ll. 17-24. Although he was “irate,” he wanted to wait until his wife came home to decide what to do about the situation.

App. 186, l. 16 – App. 187, l. 4. Nevertheless, his temper eventually settled down, and he decided that he would wait because his relationship with his wife was rocky at the time, and the situation could exacerbate their problems. Tr. 187, l. 5 – Tr. 188, l. 7. Therefore, he decided to hide the tape in his drawer. Tr. 188, ll. 8-16.

The jury found Petitioner guilty, and the trial judge sentenced him to three years imprisonment and registration as a sex offender. App. 243, ll. 20-25; App. 249, ll. 8-15.

Petitioner filed an application for post-conviction relief on December 19, 2011, claiming ineffective assistance of counsel. App. 257-260. The State filed a return on June 8, 2012. App. 261-264; App. 331. On October 1, 2012, a hearing was held before the Honorable Kristi Harrington. App. 266. Ashleigh R. Wilson represented the State, and Marybeth Mullaney represented Petitioner. App. 267.

At the PCR hearing trial counsel testified that he advised Petitioner that his case was winnable:

I went over the facts of the case with him. I talked to him. Found out his side of the story. Looked at all the discovery. And after I finished my investigation, I told him, I said, You have a winnable case. Of course, I – as I always tell all my clients, no matter how good your case is, there is still a chance we could lose it. I said, But your choice is pretty simple: You either take their offer or fight about it, have a jury trial. I showed him all the evidence that I had discovered. I explained to him the plan I had for trial, and it was his decision to take the plea.

App. 274, l. 17 – App. 275, l. 3. He also testified that prior to trial, Petitioner warned him that his wife accused him of being addicted to porn and had police search the family computer for evidence of the websites he had visited. App. 297, ll. 14-24. Rather than objecting to the State's adducing testimony of the alleged addiction at trial, trial counsel stated his strategy was to allow it without objection and bring out that police checked the computer and found no evidence of pornographic

websites, nor was there any physical evidence of the list of sites he allegedly kept. App. 297, l. 14 – App. 298, l. 16.

Petitioner also testified and said that he followed trial counsel’s advice to proceed to trial after trial counsel said his case was “very winnable.” App. 311, 3-12. He also testified that had trial counsel told him he would likely be convicted, he would not have proceeded to trial but would have accepted the State’s plea offer to avoid prison time. App. 312, ll. 9-13; App. 317, l. 18 – App. 318, l. 11.

On November 9, 2012, the PCR court issued its order dismissing Petitioner’s claims. App. 331-341. The order stated that Petitioner freely and voluntarily rejected the State’s plea offer and it was unlikely that Petitioner would have pled guilty in any event. App. 338. The order also stated the State’s presentation of evidence regarding the alleged pornography addiction was not objectionable and Petitioner was not prejudiced by the testimony because Petitioner’s wife agreed police found no pornography on the family computer and because Petitioner testified that he did not have a pornography addiction. App. 339.

On November 19, 2012, Petitioner filed a motion to reconsider, arguing trial counsel’s deficiency in advising Petitioner his case was winnable and in failing to object to the testimony of Petitioner’s alleged pornography addiction. App. 342-355. The State filed a response December 17, 2012. App. 357-359. The same day, the PCR court issued a form order summarily denying the motion. App. 361-362.

ARGUMENT

I. The PCR court erred in holding trial counsel was not deficient for failing to object testimony about Petitioner's alleged pornography addiction because it was merely evidence of bad character meant to prove Petitioner made the video of his stepdaughter in the bathroom, and it was therefore inadmissible.

The PCR court erred in holding trial counsel was not deficient for failing to object testimony about Petitioner's alleged pornography addiction because it was merely evidence of bad character meant to prove Petitioner made the video of his stepdaughter in the bathroom, and it was therefore inadmissible. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. Where trial counsel argues he based his decision on a trial strategy, he must articulate a valid reason for the decision. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing *Goodson v. United States*, 564 F.2d 1071 (4th Cir. 1977)).

The South Carolina Rules of Evidence and case law preclude the introduction of evidence of a defendant's other crimes, wrongs, or acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) identity, (3) a common scheme or plan, (4) the absence of mistake or accident, or (5) intent. Rule 404(b), SCORE; *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). As explained by this Court in *State v. Wesley Smith*, 391 S.C. 353, 361, 705 S.E.2d 491,495 (2011), in order to introduce evidence of some other act by the defendant under one of the exceptions, the prosecutor must lay a proper foundation. At the outset, the prosecutor must prove by clear and convincing evidence that the defendant committed the other act, if the defendant was not convicted of the act. *Id.* (citing *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d

480, 483 (2008)). Next, the prosecutor must articulate the logical connection between the other act and one of the five exceptions listed in Rule 404(b), SCRE. *Id.* (citing *State v. Pagan*, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006)). This requires a showing of how the evidence of the other act will assist the fact-finder in understanding a material issue in the case related to one of the Rule 404(b), SCRE, exceptions. *Id.* If the trial judge determines the prosecutor has satisfied both requirements, then the judge must determine whether the probative value outweighs the prejudicial effect pursuant to Rule 403, SCRE. *Id.* (citing *State v. Stokes*, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009)).

“[C]haracter evidence is not admissible ‘for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged.’” *State v. Nelson*, 331 S.C. 1, 6, 501 S.E.2d 716, 718-19 (quoting *State v. Peake*, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990)). In particular, character evidence or evidence of prior bad acts is not admissible to establish motive unless the defendant’s alleged motive is at issue or is not apparent from the operative act of the alleged offense. *Id.* at 10-11, 396 S.E. 2d at 721.

In this case, Petitioner’s wife’s testified that he had a pornography addiction for some time, and his problem lead to fighting and Petitioner’s lying to her about viewing pornograhly. The testimony was prima facie evidence of Petitioner’s past behavior for the purpose of establishing Petitioner’s propensity to discover and view pornographic materials.

Even if the testimony was not excluded by the foregoing rule, trial counsel should have required the State both to prove the instances of Petitioner’s viewing pornography by clear and convincing evidence and to lay a proper foundation supporting one of the exceptions under Rule 404(b). Trial counsel would have likely prevailed on both grounds. The State had no evidence of

the addiction other than the wife's testimony, and the connection between the lawful viewing of pornography on occasion with illicitly and secretively filming a member of one's household in the bathroom to show motive would have been tenuous.

Trial counsel admitted he was aware of the allegation before trial. He testified that his strategy was to allow the testimony and counter it with testimony that police did not find any pornography on his computer. The reasoning behind such a strategy was not valid because simply objecting would have prevented the jury from ever hearing the prejudicial testimony in the first place. Attempting to refute the testimony permitted the jury to find the wife more credibility and thereby find that Petitioner had an unusual proclivity to view pornography.

Thus, the PCR court erred in summarily declaring the wife's testimony was admissible. It also erred in finding that allowing the testimony was a valid part of a reasonable and successful trial strategy through which no prejudice resulted.

II. The record does not support the PCR court's finding that trial counsel was not deficient in advising Petitioner his case was winnable and he need not accept the State's plea offer because of the overwhelming evidence against him, including his own admissions on multiple occasions.

The record does not support the PCR court's finding that trial counsel was not deficient in advising Petitioner his case was winnable and he need not accept the State's plea offer because of the overwhelming evidence against him, including his own admissions on multiple occasions. The right to effective assistance of counsel extends to plea negotiations. *See Missouri v. Frye*, 132 S. Ct. 1399, 1408 ("This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."). Counsel's performance can be deficient based on incorrect advice to a defendant deciding whether to accept a plea offer. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012) ("As to prejudice, respondent has shown that but for counsel's deficient

performance there is a reasonable probability he and the trial court would have accepted the guilty plea. In addition, as a result of not accepting the plea and being convicted at trial, respondent received a minimum sentence 3 & half times greater than he would have received under the plea. The standard for ineffective assistance under *Strickland* has thus been satisfied.” (citations omitted)); *Boyers v. State*, 104 So.3d 1230, 1231-32 (Dist. Ct. App. Fla. 2012)(“An allegation that counsel was ineffective in advising a defendant to reject a plea offer premised on assurances that a trial would produce a more favorable result can be the basis of a cognizable rule 3.850 claim where the result is ultimately less favorable and the defendant alleges that he would have accepted the plea had he been properly advised.”).

In this case, the record is clear that trial counsel told Petitioner he had a winnable case and did not advise him against accepting the State’s plea offer. In other words, he had told Petitioner that he had a realistic and considerable chance to defeat the charge at trial. The record also shows trial counsel never fully warned Petitioner about the very serious chance he would lose at trial based on the nearly insurmountable evidence against him and the miniscule evidence in his favor. Petitioner’s wife found the camcorder tape in his nightstand next to his camcorder. Someone with access to Petitioner’s bathroom at times when his stepdaughter showered had to have made the tape. Almost immediately after she discovered the tape, Petitioner texted his wife that “he always ruins everything good in his life and that there was nothing that he could say to make this any better.” He then explicitly admitted to making the tape to her. In an attempt to remedy his wrongdoing, he went to therapy sessions and to church. The record reveals he talked with police about his admission to making the tape and never denied it to them. The only evidence available to exonerated Petitioner was his own testimony. His claim that he recently found the tape and wanted to reveal it at the right

time was hopelessly flimsy considering the tape would have sat undiscovered in the camcorder on the mantle for nearly two years. He could also only muster bare speculation of third-party guilt.

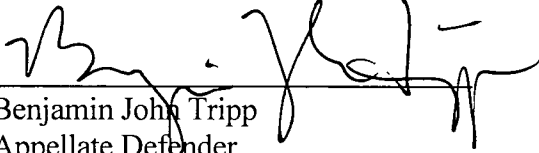
Trial counsel testified that he believed Petitioner had a winnable case after fully investigating the case and analyzing the discovery. The PCR court could not have found the testimony credible because no evidence existed in Petitioner's favor at trial. Trial counsel testified that he hedged his advisement by saying a chance always exists to lose at trial. This statement was nothing more than a boilerplate caveat which would have made no meaningful impression on a client who has been told his case was winnable and came down to a "simple choice." Thus, trial counsel was deficient in advising Petitioner about the State's plea offer.

Petitioner also testified that had he known he would likely have been convicted, he would not have proceeded to trial but would have accepted the State's plea offer to avoid prison time. Faced with guaranteed sex offender registry and either three years of probation or a severe likelihood of three years of imprisonment, reason dictates a finding that Petitioner would have chosen the former absent any evidence in the record to the contrary. Accordingly, the PCR court erred in concluding Petitioner was not denied effective assistance of counsel based on trial counsel's advice to reject the State's plea offer and proceed to trial.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner Shawn Glennon's petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of September, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Berkeley County
Kristi Lea Harrington, Circuit Court Judge

SHAWN LEONARD GLENNON,

PETITIONER,

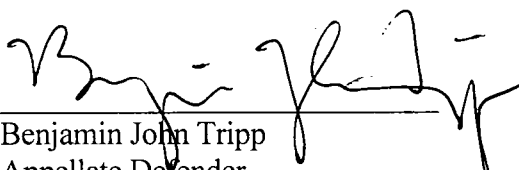
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

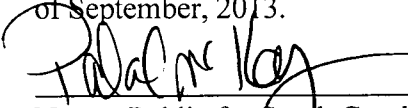
CERTIFICATE OF SERVICE

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 Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of September, 2013.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of September, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.