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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
The Honorable D. Garrison Hill, Trial Judge
The Honorable Alex Kinlaw, Jr., Post-Conviction Relief Judge

Appellate Case No. 2019-001306

JERALD D. GASKINS, JR.,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR REHEARING

On February 5, 2025, this Court affirmed in part, reversed in part, and remanded Petitioner's case for a new trial in an unpublished opinion. *Gaskins v. State*, Unpublished. Op. No. 2023-UP-046 (S.C. Ct. App. filed February 5, 2025). Petitioner initiated his PCR action on September 14, 2017, and an evidentiary hearing was convened on the matter on October 24, 2018. Subsequently, the PCR Court denied Petitioner relief by Order filed February 4, 2019, finding that Petitioner failed to establish any constitutional violations that would require his application to be granted. Petitioner appealed the PCR Court's denial of relief, and after further briefing and oral argument, this Court found that trial counsel was deficient, and that Petitioner was prejudiced on two issues.

In regard to the Facebook inquiries, this Court found that “[T]he review of the record reveals trial counsel’s failure to properly object enabled the State to pursue the allegation that [Petitioner] had communicated with another minor female by using a social media alias.” *Id.* at 9. In regard to the restraining order, this Court found that “[t]rial counsel performed deficiently by failing to promptly object at the outset of the ‘restraining order’ inquiry – and later failed to object to the State’s continued inquiry after the trial court sustained his belated objection.” *Id.* at 11. Further, this Court noted, “[a]lthough Petitioner’s credibility was already questionable, this exchange further communicated the solicitor’s belief about Petitioner’s lack of credibility when the two argued over whether or not a restraining order remained in place and an ‘active charge’ was pending.” *Id.* at 11.

Pursuant to Rule 221(a), SCACR, Respondent respectfully petitions this Court for rehearing because this Court has seemingly applied an overly stringent deficiency standard, followed by a prejudice analysis that overlooks the relevant facts and circumstances of this case in regard to both issues contrary to *Strickland*.

I. This Court overlooked the credence given to trial counsel’s testimony that he understood that the Court had ruled on the State’s inquiry into messages allegedly sent by the Petitioner and overlooked that the “Jay Fowler” line of questioning could not have been more prejudicial than the testimony of the minor witness in regard to a 404(b) analysis.

As to this Court’s conclusion that trial counsel was deficient for not objecting to the exchange in regard to the “Jay Fowler” Facebook messages, Respondent submits that this Court did not render its analysis through the lense *Strickland* intended and overlooked the reasonableness of trial counsel’s testimony. There are two reasonable conclusions to be made. As exemplified by trial counsel’s testimony, it was his understanding that his overruled objection meant that the State could question Petitioner about the messages and the State would have to accept his answer. *See*

App. 425-30; 724-25. Thus, the reasonable inference would be that trial counsel believed the ruling applied to messages, Facebook or text. This conclusion requires a finding that trial counsel did object to the messages, thus a deficiency finding on his failure to object would be incorrect, and a further inquiry into prejudice is not necessary.

Alternatively, the second reasonable conclusion, which this Court has found, is that trial counsel should have objected under Rule 404(b), SCRE to the State's inquiry of the "Jay Fowler" messages at the time they were asked. Even so, a prejudice finding based on the specific error must conclude that the error affected the outcome of the trial. This Court did not address the prejudice the Petitioner allegedly suffered and offered a broad conclusion that trial counsel's "deficient performance prejudice[d] the applicant's case." *Gaskins*, at 9. However, deficiency does not automatically infer prejudice, and "a court making the prejudice inquiry must ask if the [Petitioner] has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2096.

Notably, this Court found that trial counsel's failure to object "*enabled* the State to pursue the allegation that he had communicated with another minor female by using a social media alias." *Gaskins*, at 9.(emphasis added). However, the State's pursuit of introducing the messages between Petitioner and any other minors appears to have been in vain. The "Jay Fowler" Facebook messages were not admitted into evidence and the jury never saw the exchanges between "Jay Fowler" and the minor. Further, Petitioner denied that he used the name "Jay Fowler" on Facebook and denied that he sent minors messages under an account named "Jay Fowler." *See* App. 445-46. The only potential prejudice that could have occurred was the State's inquiry of the messages itself, which trial counsel testified he understood from a previous ruling that the State was permitted to ask. *See* App. 724-25. Even so, the State had already presented witness testimony that Petitioner

used Facebook to message another minor. Barton, who was the victim's friend at the time Petitioner was abusing the victim, testified as to her own sexual encounters with Petitioner, which occurred in an identical manner as the victim depicted. *See App. 309-317.*

Given that this Court identified the "Jay Fowler" line of questioning to enable the State's allegation that he communicated with other minors via Facebook, the weight of the witness testimony of Barton should be compared to the "Jay Fowler" line of questioning which was contested and denied by Petitioner. Doing so reveals that Barton's testimony depicts the result the State intended, and that even without the "Jay Fowler" line of questioning, the jury would have reached the same conclusion of Petitioner's guilt. Respondent submits that a deficiency finding on this issue is error, however even upon such a finding, this Court overlooked the evidence that was properly before the jury which would allow the jury to reach the same conclusion of guilt. Petitioner has not shown otherwise.

II. Upon finding that trial counsel's belated objection and omission of supporting grounds for the objection to the restraining order inquiry was deficient, this Court misapprehended the prejudice prong of *Strickland* in its review by overlooking the ample testimony heard prior to the restraining order exchange that hindered Petitioner's credibility and character.

This Court found that trial counsel should have objected earlier in the State's line of questioning in regard to the no contact order Petitioner's fiancé initiated. The State asked Petitioner if there was a no contact order between Petitioner and his fiancé, and the exchange led to a back and forth between the solicitor and Petitioner on whether or not the no contact order had been dissolved. *See App. 446-47.* Trial counsel then objected, and this Court notes "his only objection was that Petitioner and the solicitor were merely arguing at this point." *See App. 447.* This Court appears to take issue with the grounds of the objection and that trial counsel did not object sooner.

At the PCR evidentiary hearing, when asked about the State's question on the restraining order and whether he believed it to be objectionable, trial counsel testified, "I mean given the way that the back and forth went there, it doesn't bother me a whole lot, I don't think it really hurt him in the grand scheme of things as far as this trial goes. But it might be an improper question." (App. 714). *Strickland* "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689, 104 S. Ct. at 2065. Considering the testimony that had already been presented, trial counsel's testimony is a reasonable conclusion supported by the record.

But regardless, even if trial counsel rendered deficient performance, it is not reasonable to conclude that Petitioner was prejudiced by trial counsel's belated objection or lack thereof. That is, Petitioner cannot show a reasonable probability that, but for trial counsel's belated objection or failure to object on different grounds, the outcome of the proceeding would have been different. *See Harrington v. Richter*, 562 U.S. at 112, 131 S.Ct. 770 (explaining that to establish prejudice "[t]he likelihood of a different result must be substantial, not just conceivable"). The PCR Court did not make a prejudice inquiry as to this issue due to the finding that "[c]ounsel objected to the question, the trial court sustained the objection, and [Petitioner] contradicted the solicitor about the charge in front of the jury." (App. 772). However, contrarily, this Court found that trial counsel's belated objection was deficient and in a prejudice analysis, found that Petitioner's credibility was already in question and that the "exchange further communicated the solicitor's belief about Petitioner's lack of credibility[.]" *Gaskins*, at 11.

While it is true that credibility is an essential consideration in this case, here it is not simply the victim's account against the Petitioner's account - or rather his complete denial. Petitioner's

defense was that he did not commit this crime, and the allegations were orchestrated by his ex-wife and the Mucienko family in the midst of their contentious divorce proceedings. *See App. 701.*

The witness testimony the State presented challenging Petitioner's version of events included the testimony of the victim, who described and detailed the ongoing sexual interactions and manipulation over the course of her relationship with Petitioner. The victim's mother, who testified about how Petitioner became close with their family, even helping pay their bills, and how she came to discover the abuse. The victim's sister, who testified that she became suspicious of her sister and Petitioner's relationship. She testified that Petitioner texted her about how much he loved the victim, calling her his "beautiful future wife" and that he missed the victim the most of all out of the Mucienko family. Petitioner's ex-wife testified about the abuse and manipulation she endured over the course of her relationship with Petitioner. She testified that she saw Petitioner and the victim sleeping together in her and Petitioner's home, and that the victim and Petitioner would often be alone together. She testified that after she left Petitioner, she was able to warn the victim's mother of her suspicions in hopes they would believe her. Lastly, Barton, who was 18 at the time of trial, testified that she had met Petitioner at a bad point in her life; custody was taken away from her mother and her grandmother was sick in the hospital. She testified that she had met Petitioner through the victim and began communicating with him through Facebook. At their first encounter, Petitioner invited her over to his home through Facebook message and kissed her in a back room of his home while the victim and his ex-wife were in the living room. After that, she testified to two more sexual encounters with Petitioner, practically identical to the encounters the victim also had with Petitioner.

Petitioner and Petitioner alone, testified in his own defense. He testified that everyone involved was lying and that he was the victim of false accusations, as he had been for his entire

life. *See* App. 439. He simply denied any sexual encounters with the victim and Barton; contended that he saved his ex-wife from an abusive home life and divorced her because she had cheated on him; never sent the victim's sister text messages; and that he only stopped paying the victim's family's bills because he felt they were taking advantage of him.

The nature of Petitioner's character had already been established prior to the exchange regarding the restraining order. Petitioner's ex-wife testified that during their relationship Petitioner had cut her off from friends and family; that Petitioner threatened her with a gun and strangled her twice; that Petitioner would threaten to take their daughter away from her, and that she made false allegations against her own father in efforts of keeping herself safe from Petitioner. It would appear to be unreasonable that the existence of a restraining order between Petitioner and his then fiancé would have hindered his character or credibility any more than had already been portrayed. Further, based on the questions from the jury, the restraining order nor credibility concerns appeared to be relevant to their verdict. The jury inquired about the written description of the indictments, the dates of the indictments and age of the "Plaintiff," presumably the victim, during each of the charges. (App. 507-09).

Respondent submits that a deficiency finding is not supported under these circumstances, nevertheless, Respondent respectfully submits that this Court overlooked the numerous facts of this case supporting Petitioner's conviction, and that Petitioner failed to show the outcome of his trial would have been different had counsel objected in the manner identified by this Court.

[Signature Page to Follow]

CONCLUSION

For all the above reasons, Respondent petitions for rehearing pursuant to Rule 221(a), SCACR, and requests this Court grant rehearing and reinstate Petitioner's convictions.

Respectfully submitted,

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STATE OF SOUTH CAROLINA

Respondent.

Appellate Case No. 2019-000907

PROOF OF SERVICE

I, **Kaylee C. Kemp**, attorney for Respondent, hereby certify that the **Petition for Rehearing** has been forwarded to Petitioner's counsel, C. Rauch Wise, Esq., via email today, February 20, 2025, to rauchwise@gmail.com.

I further certify that all parties required by Rule to be served have been served.

This 20TH day of February 2025.

s/ Kaylee C. Kemp
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From: Kaylee Kemp
Sent: Thursday, February 20, 2025 6:25 PM
To: rauchwise@gmail.com
Cc: Brandy Rankin; Melody Brown
Subject: Gaskins, Jerald - Petition for Rehearing and Proof of Service - February 20, 2025
Attachments: Gaskins, Jerald - Petition for Rehearing - February 20, 2025.pdf

Good evening –

Attached is the State's Petition for Rehearing and Proof of Service in the matter of Jerald Gaskins, Jr. I will be sending it to the Court for filing this evening.

Kind regards,

Kaylee C. Kemp, Assistant Attorney General
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