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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2012-213168

Derek S. Carter,..... Petitioner,

v.

State of South Carolina,.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED

1. Did the PCR judge correctly find Petitioner failed to meet his burden to prove S.C. Code Ann. § 16-3-85(A)(1) is facially unconstitutional?

2. Did the PCR judge correctly find counsel's performance reasonable in advising Petitioner on the merits of entering a guilty plea?

STATEMENT OF THE CASE

The Anderson County Grand Jury indicted Petitioner at March 2001 term of General Sessions for great bodily injury upon a child (2001-GS-04-763) and homicide by child abuse (2001-GS-04-1204). (App.pp.377-82). Robert E. Treacy, Jr., Esquire represented Petitioner.

The State called its case to trial on June 11, 2011. At the Jackson v. Denno[1] hearing, Investigator Carpenter testified to the two statements Petitioner made prior to being charged. On October 20, 2000, Petitioner lied about the circumstances surrounding the toddler victim's death. On October 25, 2000, outlined the child abuse that led to the victim's death. Petitioner stated the abuse started when he moved in with Ila Carter after the victim's natural mother had died. Harsh instances of corporal punishment escalated into depravity when the victim was unable to control her bowl movements and bladder. The birth of a new child caused further tension. Petitioner witnessed Ila inflict appalling physical injuries on the victim. As the abuse further escalated, Petitioner began inflict physical injuries to the victim. Petitioner and Ila acted in together in the mutilation of the victim's vagina. Petitioner chained the victim to a harness that was secured by a "screw eyebolt" into the floor. Petitioner stated an incident occurred that triggered the victim's second hospitalization in 2000.

At the Denno hearing, Petitioner testified to the circumstances surrounding his two statements. Petitioner testified he was emotionally devastated from the victim's recent death during the interviews. Petitioner conceded he lied about the victim's history

[1] Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964)

of abuse and the circumstances of the latest injury to the medical staff. (App.p.120). Petitioner stated he was uncertain if the victim would survive when he made false statements here. (App.pp.111-21).

At the pre-trial hearing, Dr. Woodard testified in a limited capacity. He testified that he conducted the victim's autopsy and determined the cause of death as massive swelling to the brain. He further noted the presence of a subdural hematoma that would have manifested within two days of the victim's hospitalization. The victim was significantly at risk of "Second Blow Syndrome" after the April 2000 head trauma which rendered each subsequent blow to the head more dangerous. Dr. Woodard testified that in his medical opinion the victim suffered from Battered Child Syndrome. (App.pp.125-52).

The trial judge found Petitioner's statements were made freely and voluntarily. (App.pp.167-9). After a short recess, Petitioner opted to plead guilty as indicted.

At the subsequent guilty plea hearing, Petitioner ensured the plea judge he discussed the charges with counsel and understood the exposure to incarceration. Petitioner further announced he was pleading guilty because he was guilty. The solicitor incorporated the prior testimony into the plea record. Petitioner's did not dispute the solicitor's account of the offense, reassured the plea judge he was guilty, and he told the plea judge that the State's pre-trial testimony was substantially accurate. The Honorable John W. Kittredge sentenced Petitioner to thirty years for homicide by child abuse and twenty years for great bodily injury upon a child. The sentences were to be served concurrently. Petitioner did not appeal his conviction or sentence. (App.pp.175-204).

Petitioner filed an Application for Post-Conviction Relief (2002-CP-04-1791) on

July 9, 2002 (App.pp.206-12). A hearing was convened at the Anderson County Courthouse on December 8, 2005. Petitioner was present and represented by Hugh Welborn, Esquire. Daniel Grigg, Esquire of the South Carolina Attorney General's Office represented Respondent. Petitioner's motion to withdraw his PCR action was granted in an order dated December 8, 2008. (App.p.218).

Petitioner filed a successive and untimely Application for Post-Conviction Relief (2009-CP-04-2033) on May 15, 2009. (App.pp.219-25). The Honorable Alexander S. Macaulay ordered an evidentiary hearing on the merits of Petitioner's the successive and untimely Application in an order filed June 2, 2010. (App.pp.271-2). An evidentiary hearing was convened on March 8, 2012 at the Anderson County Courthouse. (App.pp.321-68). Petitioner was present and was represented by Tommy Thomas, Esquire. Respondent was represented by Kaelon May, Esquire, of the Office of the Attorney General.

At the PCR hearing, Petitioner testified he was unaware of the alleged constitutional infirmity of the Homicide by Child Abuse Act "HCA" when he pled guilty and withdrew his first PCR action. (App.pp.327-30). Petitioner testified he now feels that he was not guilty for causing his daughter's death because Ila inflicted the injury. (App.p.330).

At the PCR hearing, counsel testified Petitioner had unrealistic expectations. (App.p.348). Counsel testified that Petitioner's admissions and conduct at the Greenville Hospital implicated his guilt as a principle. Counsel testified that preventing Petitioner from spending the rest of his natural life in prison was significantly more important than

presenting a speculative constitutional law argument. (App.pp.350-51).

The Honorable R. Lawton McIntosh denied and dismissed Petitioner's Application in an order dated May 16, 2012. (App.pp.369-75). The PCR judge found A motion to alter or amend judgment was filed on Petitioner's behalf on August 24, 2012. (Supp. App.pp.162-3). The PCR judge denied the motion. (Supp. App.pp.163-64).

A Petition for Writ of Certiorari was filed on Petitioner's behalf. This appeal follows.

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I.

Certiorari is not warranted where Petitioner lacks standing to mount a Due Process Clause challenge to S.C. Code Ann. § 16-3-85 (A)(1) because Petitioner's conduct clearly applied to the statute. Petitioner's Equal Protection Clause challenge to § 16-3-85 (A)(1) is without merit.

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner failed to meet his burden to prove his conviction or sentence constituted violation a due process violations or an equal protection violation.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "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) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

"The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." State v. Michau, 355 S.C. 73, 76, 583 S.E.2d 756, 758 (2003) (quoting Curtis v. State,

345 S.C. 557, 571, 549 S.E.2d 591, 598 (2001)). "The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies." Huber v. S.C. State Bd. of Physical Therapy Exam'rs, 316 S.C. 24, 26, 446 S.E.2d 433, 435 (1994). A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application. Toussaint v. State Bd. of Med. Exam'rs, 303 S.C. 316, 400 S.E.2d 488 (1991). "This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." Curtis, 345 S.C. at 569, 549 S.E.2d at 597 (2001). "A possible constitutional construction must prevail over an unconstitutional interpretation." Id., at 569-70, 549 S.E.2d at 597. "[O]ne to whose conduct the law clearly applies does not have standing to challenge it for vagueness as applied to the conduct of others." In re Amir X.S., 371 S.C. 380, 391, 639 S.E.2d 144, 150 (2006) (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)).

Respondent submits the record clearly shows Petitioner's conduct fell within the purview of S.C. Code Ann. § 16-3-85 (A)(1) that states, "[a] person is guilty of homicide by child abuse if the person causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life." Under § 16-3-85(B)(1) "child abuse or neglect" is defined "as an act or omission by any person which causes harm to the child's physical health or welfare." § 16-3-85(B)(2)(a) further defines "harm to a child health occurs

where a person **inflicts** or **allows to be inflicted** upon the child physical injury." (emphasis added). "In this state, indifference in the context of criminal statutes has been compared to the conscious act of disregarding a risk which a person's conduct has created, or a failure to exercise ordinary or due care." State v. Jarrell, 350 S.C. 90, 99, 564 S.E.2d 362, 367 (Ct. App. 2002).

Petitioner's monstrous conduct constituted the commission of "child abuse and neglect" under Subsection § 16-3-85(B)(1) because Subsection (B)(2)(a) narrowly provides for two scenarios to qualify an actor's conduct as culpable for a child's physical injury. Subsection (B)(2)(a) is the gatekeeper provision that subjects the Homicide by Child Abuse Statute only to an actor who either directly inflicts harm that causes physically injury to a child or allows a third party to inflict harm that causes injury to a child. The later provision, "allows to be inflicted," functions within the body of the statute to prevent an inconsistent application of the law. To permit a third party to inflict physical injury upon a child intuitively requires an actor to possesses (1) prior or contemporaneous knowledge of a third party inflicting physical harm to a child; and (2) the authority to "not allow" the harm. Thus an actor must have care, custody, or control of a child in order for his conduct to fall within the purview of the statute. See State v. Jarrell, 350 S.C. 90, 99, 564 S.E.2d 362, 367 (Ct. App. 2002) ("A parent has a specific and undelegable duty to serve the best interests of her child and should make every effort not to knowingly place her child in harm's way.").

Here, Petitioner maintained full legal custody of the victim as the lone surviving biological parent the victim. Petitioner exercised the discretion to not permit the victim to

visit her maternal grandparents. Petitioner exercised his custody and control over the victim in a manner that left her entirely vulnerable to the most heinous acts of abuse.

Petitioner disclosed instances where he idly watched Ila "slap" the victim, "throw and push her to the floor," and choke the victim while simultaneously shaking her. (App.p.28, lines 20-1; p.29, line 13; p.29, line 16-7). Thus by his own admission, Under § 16-3-85(B)(1) his conduct clearly applied to the committing "child abuse or neglect" under § 16-3-85(B)(1). Petitioner's allowed Ila to escalate the seriousness of the assaults. As a result, the victim was hospitalized in April 2000 when a head injury resulted in a subdural hematoma that is "traditionally not produced outside a fall from massive height, or automobile accidents." (App.p.144, lines 12-5). After Ila accepted responsibility, Petitioner lied on her behalf to cover the abuse. (App.pp.143-4; p.199).

On the morning of October 14, 2000, another incident necessitated the victim's hospitalization that resulted from another subdural. Even presuming Petitioner's argument on its face that Ila was solely responsible for inflicting the death blow, Petitioner's conduct applies to § 16-3-85 (A)(1) because he knowingly allowed Ila's assaults to escalate and reach a point where death the victim's death was probable, if not inevitable.[2] The Chief Justice summarized the HCA in the following manner that places Petitioner's clearly places Petitioner's conduct within the crosshairs of the statute:

> the homicide by child abuse statute criminalizes the specific infliction of abuse as well as the failure to protect a child

[2] Respondent notes Petitioner's argument that, "[t]here was never any evidence inflicted the injury that caused the minor's death" effectuated an improper burden shift. (PWC Page 10). Petitioner pled guilty and admitted his guilt under Subsection (A)(1). See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) Furthermore, Petitioner's references made to pro se documents attached to filings in the lower court were not introduced at the lower court proceeding. These documents lack authentication and are at best incomplete. See App.pp.225-56; pp.273-320; see also Rule 227(f)(1), SCACR.

> from abuse which results in the death of that child while exhibiting an extreme indifference to human life. In this way, the statute **incorporates more than just the act** that causes the death—it **criminalizes the course of conduct which results** in the death of a child.

State v. Fletcher, 379 S.C. 17, 27, 664 S.E.2d 480, 485 (2008) (Toal, C.J. dissenting) (emphasis added). The trial judge echoed a similar sentiment in sentencing Petitioner and stated, "While the defendant, Petitioner, may not have been physically present nor had struck the final blow, defendant had already sentenced his own daughter to death through his unspeakable inhumane treatment of the victim." (App.p.203, lines 20-4).

Respondent submits the record is ripe with horrific instances of Petitioner's conduct that applies to § 16-3-85(A)(1)'s intent requirement. "Extreme indifference is in the nature of "a culpable mental state ... and therefore is akin to intent." Jarrell, 350 S.C. at 98, 564 S.E.2d at 397 (citing State v. Vowell, 276 Ark. 258, 634 S.W.2d 118, 119 (1982)). Here, twenty to twenty-five separate injuries were discovered on the victim's body. Counsel candidly told the trial judge that Petitioner grew more physically abusive to the victim as time passed. (App.pp.197-8). Physical injuries were discovered on the victim's feet, vagina, and ears that were consistent with Petitioner's admissions of physical abuse. (App.pp.38-9; pp.144-5). Twenty to twenty-five separate injuries were discovered on the victim's body. (App.p.139). Petitioner attempted provided inconsistent statements to police. See State v. Holder, 382 S.C. 278, 678 S.E.2d 690 (2009).

State v. Neuman, 384 S.C. 395, 403-04, 683 S.E.2d 268, 272-73 (2009), is instructive to the present case. The Appellant argued he had standing to argue the statute at issue was vague because he intended to utilize the correctional officers in a manner not

conventionally associated with the use of a hostage. Id. However, this Court rejected Neuman's argument based upon his admissions conveyed the general conduct at issue. Here, the HCA clearly applied to Petitioner's conduct, as established by his own admissions.

Next, Respondent submits Petitioner's equal protection challenge is without merit. "The Equal Protection Clause provides that no State shall deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1. A classification does not violate the Equal Protection Clause if (1) "similarly situated" members in a class are treated alike; (2) the classification rests on some reasonable basis; and (3) the classification bears a reasonable relation to a legitimate legislative purpose." McKnight v. State, 378 S.C. 33, 52, 661 S.E.2d 354, 364 (2008). In McKnight v. State, this Court held persons prosecuted for criminal abortion are not similarly situated to person prosecuted under the HCA. Id. § 16-3-85 (A)(2) states, "that a person is guilty of homicide by child abuse if the person: knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven." In State v. Smith, this Court announced,

> We find the language of section 16-3-85 **unambiguously signals** the General Assembly's intent to codify **two distinct crimes**—homicide by child abuse as **a principle offense** pursuant to section (A)(1) and homicide by aiding and abetting pursuant to section (A)(2), each with distinct elements and sentencing ranges.

State v. Smith, Op. No. 27328 (S.C. Sup.Ct. filed Oct. 30, 2013) (emphasis added). This Court in Smith further noted Subsection (A)(2) is not a lesser-included of Subsection

(A)(1). Smith, Op. No. 27328. The different elements required to prove causation and intent under Subsection (A)(1) prevent persons prosecuted under (A)(2) from arbitrary enhancement at the solicitor's whim. Most significantly, persons prosecuted under Subsection (A)(1) must have committed an act of child abuse as defined under Subsection (B)(1) and further qualified under Subsection (B)(2)(a). In comparison, Subsection (A)(2) strikingly is not qualified by any gatekeeper provisions. Furthermore, this Court in Smith held recent application of the common law principles do not uniformly apply in the context of HCA statute. Smith, Op. No. 27328.

Therefore, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms in not advising Petitioner to proceed to trial solely in order to preserve meritless constitutional arguments for appeal. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance.

II.

Certiorari is not warranted where the PCR judge correctly found Petitioner failed to meet his burden to prove counsel was ineffective for allegedly misadvising him to plead guilty.

Evidence of probative value supports the PCR judge's finding that counsel's advisce to Petitioner to plead guilty as indicted constituted reasonable performance.

"A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). "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).

First, counsel reasonably advised Petitioner that the State had a factual basis to charge and his convict him under § 16-3-85 (A)(1). Second, Petitioner presented novel constitutional challenges where there was no case law at the time of trial to guide counsel on the matter. See Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) (Our courts have "never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial.). Last, the PCR judge correctly found counsel exercised reasonable trial strategy in advising Petitioner on entering a guilty plea. Once counsel's motion sever Petitioner's charges and suppress Petitioner's statements were decided against him, counsel pursued a reasonable mitigation strategy. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

("Accordingly, [the courts] must be wary of second-guessing trial counsel's tactics."). Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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By: _____
ATTORNEYS FOR RESPONDENT

Oct 30th, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Anderson County
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

DEREK S. CARTER,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Carmen V. Ganjehsani, Esq.
1330 Lady St. Suite 401
Columbia, SC 29201

This 30th day of October, 2013

Troyeshi Brailey
LEGAL ASSISTANT for the Respondent

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
NOV - 4 2013
S.C. Supreme Court

October 30, 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Derek S. Carter v. State of South Carolina**
Appellate Case No.: 2012-213168

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General

JWW/tb
Enclosures

cc: Carmen V. Ganjehsani, Esq. (2 copies with all the attachments)

J. Walt Whitmire, **Assistant Attorney General**
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The Honorable Daniel E. Shearouse
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