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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable R. Scott Sprouse, Circuit Court Judge

JASON ERVIN BLACK,

RESPONDENT-PETITIONER,

V.

STATE OF SOUTH CAROLINA,

PETITIONER-RESPONDENT.

APPELLATE CASE NO. 2021-000525

BRIEF OF RESPONDENT- PETITIONER

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ISSUE PRESENTED

The PCR court granted respondent-petitioner a new trial because of the ineffective assistance of appellate counsel. Respondent-petitioner argues that, alternatively, the PCR court erred in finding that trial counsel was not ineffective and preserved for appellate review whether the defense witness could be impeached with a remote conviction for throwing a deadly missile.

STATEMENT

Respondent-petitioner Jason Black was tried in Pickens County before the Honorable John C. Few and a jury on June 25, 2007. App. 1. Peter Them represented the State and John DeJong represented Black. App. 1. The jury convicted Black of first-degree criminal sexual conduct with a minor and lewd act. App. 333, l. 10 – 18. Judge Few sentenced Black to concurrent terms of imprisonment of twenty years for the CSC charge and fifteen years for lewd act. App. 339, l. 8 – 13. On direct appeal, Black was represented by Joseph L. Savitz, III.¹ App. 341. This Court and the Supreme Court affirmed. App. 367. App. 420.

On July 2, 2013, Black filed a PCR application. App. 439. On March 4, 2021, a hearing was held before the Honorable R. Scott Sprouse. App. 483. Don A. Thompson represented Black and Lillian L. Meadows represented the State. App. 483. Judge Sprouse granted PCR relief. App. 530. Both the State and Black sought certiorari. After referral from the Supreme Court, this Court granted both parties' petitions and this brief of respondent-petitioner follows.

¹ The Supreme Court's published Opinion, State v. Black, 400 S.C. 10, 732 S.E.2d 881 (2012), lists only Breen Richard Stevens as appellate counsel, but Mr. Stevens inherited this case from Mr. Savitz and the issues on appeal were already selected by Mr. Savitz.

STANDARD OF REVIEW

The appellate court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)).

ARGUMENT

The PCR court granted respondent-petitioner a new trial because of the ineffective assistance of appellate counsel. Respondent-petitioner argues that, alternatively, the PCR court erred in finding that trial counsel was not ineffective and preserved for appellate review whether the defense witness could be impeached with a remote conviction for throwing a deadly missile.

Introduction

At the outset, it is important to emphasize that the argument made in this brief is an alternative argument about the deficient performance prong of Strickland. Respondent-petitioner Black agrees with the ruling of the PCR court that trial counsel preserved the issue of the admissibility of all of the witness's convictions, including the one at issue in this case, throwing a deadly missile. But appellate counsel and the State (during the direct appeal) argued that the issue was not preserved for appeal.

One of Black's lawyers was at fault regarding the prior conviction. The deficient performance prong is satisfied by the inaction of trial counsel or appellate counsel. Frankly, regarding the outcome of this case, it does not matter which lawyer was deficient. Either way, the prejudice analysis is the same and is dispositive of both cross-petitions. If this Court determines that appellate counsel was correct and trial counsel did not preserve the issue, then it should take up the issue presented here by Black: trial counsel's deficient performance. But again, the dispositive analysis is the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984)

The State seems to agree with Black about the form this Court's analysis should take, but of course disagrees about the outcome. State's Ret. Cert. at 10-13 and n.4. The State agrees that the "record supports" trial counsel's recollection that all three convictions were addressed.

State's Ret. Cert. at n.4. While the State does not specifically concede that trial counsel preserved the objection to the throwing a deadly missile conviction, the State spent the vast majority of its Return arguing the prejudice prong of Strickland. It seems the parties agree prejudice is the dispositive factor. Black therefore asks this Court to consider all arguments made by both the State and Black—regardless of in which cross-briefing such arguments appear—on the ultimate issue of prejudice.

Deficient Performance

The PCR court granted respondent-petitioner Jason Black (“Black”) relief based on a finding of ineffective assistance of appellate counsel. App. 537-39. Implicit in the PCR court’s ruling is that appellate counsel failed to raise a preserved issue. App. 537-39. Appellate counsel raised the admissibility of two out of three convictions used to impeach Black’s witness, Richard Bush (“Bush”). App. 353.

Bush was impeached with two manslaughter convictions and a conviction for throwing a deadly missile. App. 289, l. 9 – 290, l. 3. All three convictions occurred on the same day. App. 289, l. 9 – 290, l. 3. Appellate counsel only raised the admissibility of the manslaughter convictions. App. 353. At the PCR hearing, appellate counsel testified that he did not believe the admissibility of the throwing a deadly missile conviction was preserved. App. 519, l. 7 – 520, l. 8. The PCR court found that trial counsel properly objected and preserved the issue of the admissibility of the deadly missile conviction. App. 537.

The solicitor listed the deadly missile conviction along with the two manslaughter convictions during the discussion with the trial judge. App. 275, l. 17 – 276, l. 15. When trial counsel stated his objection, he did not refer specifically to the deadly missile conviction. App. 281, l. 10 – 285, l. 20. Nor did trial counsel refer specifically to the two manslaughter

convictions. App. 281, l. 10 – 285, l. 20. He argued in general terms that the convictions were not probative and were inadmissible. App. 281, l. 10 – 285, l. 20.

When the solicitor began cross-examining Bush about his prior convictions, trial counsel made a single objection. App. 289, l. 4 – 290, l. 3. The solicitor asked Bush if he was in criminal court in Florida on the date of the convictions and trial counsel stated, “Objection, Your Honor, as previously stated.” App. 289, l. 9 – 290, l. 3. The trial judge overruled the objection. App. 289, l. 9 – 290, l. 3.

The solicitor then asked about the two manslaughter convictions. App. 289, l. 9 – 290, l. 3. Trial counsel made no further objection. App. 289, l. 9 – 290, l. 3. The solicitor then asked about the deadly missile conviction. App. 289, l. 9 – 290, l. 3. Trial counsel made no further objection. App. 289, l. 9 – 290, l. 3.

Either trial counsel or appellate counsel performed deficiently regarding the deadly missile conviction. See Stone v. State, 419 S.C. 370, 798 S.E.2d 561 (2017) (analyzing twin failures on related issue of trial and appellate counsel). As this Court made clear in its decision in Black’s direct appeal, appellate counsel did not raise the issue of the admissibility of the deadly missile conviction. This Court stated, “However, the State also impeached Petitioner’s witness with a 1987 conviction for shooting/throwing a deadly missile. This conviction occurred at the same time as the manslaughter convictions and ostensibly arose from the same set of facts. Since Petitioner does not challenge the use of this conviction to impeach Bush’s credibility, this ruling, right or wrong, becomes the law of the case.” State v. Black, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012).

Trial counsel arguably failed to raise a sufficiently specific objection to the deadly missile conviction to preserve the issue for appeal. See State v. Byers, 392 S.C. 438, 444, 710

S.E.2d 55, 58 (2011) (holding that objections must be made with specificity to preserve issue for appellate review). It could also be argued that trial counsel failed to make a contemporaneous objection to the solicitor's deadly missile conviction question. See State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."). On direct appeal, the State argued trial counsel failed to preserve any objection regarding Bush's prior convictions. App. 411-13. If the State (on direct appeal) and Savitz were correct, then the PCR court erred in finding trial counsel did not perform deficiently and this Court should reverse that finding and analyze the prejudice prong of Strickland.

Prejudice

The trial judge succinctly made the case for prejudice in this appeal in his ruling admitting Bush's prior convictions. App. 284, l. 5 – 19. Then-Judge Few stated that "The importance of the witness' testimony here is critical. It's a very important piece of testimony. If his testimony is true, then it means that this crime could not have even happened at all." App. 284, l. 5 – 9. Bush testified that Black and Minor were never alone together in the bedroom and "That, of course, makes the issues of credibility, his credibility essential." App. 284, l. 10 – 14.

This criminal sexual conduct case boiled down to a basic credibility contest between four witnesses, two for the State and two for the defense. See State v. Stukes, 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016) ("Furthermore, we do not believe this case is amenable to a harmless error analysis. Our review of the record indicates this case hinged on credibility. Victim said it was rape; he said it was consensual."). Complainant, who was fifteen at the time of the alleged incident, said she had sex with Black in the bedroom of Bush's single-wide trailer while Bush was in the next room. App. 94, l. 18 – 99, l. 16. Complainant's friend, CH, testified that

Complainant told her about the sex that evening and showed her blood in her underwear. App. 152, l. 5 – 154, l. 8.

Black testified in his own defense and denied having sex with Complainant. App. 228, l. 11 – 15. Black testified that he and Complainant never left Bush’s living room. App. 245, l. 4 – 18. Black testified that Bush also was in the living room the entire time. App. 245, l. 14 – 23. Bush testified that Complainant never went into the bedroom. App. 269, l. 24 – 271, l. 2. To render a verdict, the jury had to decide whether to believe Complainant and CH or Black and Bush.

The Supreme Court granted certiorari to review this Court’s unpublished opinion affirming Black’s convictions. App. 393. After oral argument, the Court issued a published Opinion finding that the trial judge erred in allowing impeachment of Bush with the two manslaughter convictions. State v. Black, 400 S.C. 10, 26-27, 732 S.E.2d 880, 889 (2012). The Court found the error harmless because of the unappealed admission of the deadly missile conviction. Id. at 27-31, 732 S.E.2d at 890-91. The Opinion stated, “We find the jury’s knowledge of this conviction unquestionably established the fact that Bush was a former convict, and it would have similarly diminished the jury’s view of his character.” Id. This Court discussed the other evidence in the State’s case and Black’s own prior CSC convictions, but in the Conclusion section of the Opinion, made clear that the specific prejudice complained of by the error—the diminishment of Bush’s credibility—was harmless because of the admission of the deadly missile conviction which was “now law of the case.” Id.

The Black opinion noted that the deadly missile conviction “occurred at the same time as the manslaughter convictions and ostensibly arose from the same set of facts.” Id. It would have

been analyzed in an identical fashion to the two manslaughter convictions. Under the same analysis, admission of the deadly missile conviction would also have been error.

If counsel's deficient performance had not prevented the Supreme Court from considering the error of admitting the deadly missile conviction, then the primary reason the error was found harmless would not have existed. The Court would have been able to analyze whether an error affecting Bush's credibility was harmless without the distorting effect of the unappealed deadly missile conviction. Without that distortion, the error would have led to a reversal of the conviction.

In Stukes, the Supreme Court recognized that errors in criminal sexual conduct cases that are primarily credibility contests are rarely harmless. Stukes at 500, 787 S.E.2d at 483. The defendant in Stukes testified that his sex with the adult complainant was consensual. Id. at 496-97, 787 S.E.2d at 481. The Stukes Court concluded that the error, which bolstered the complainant's credibility, was not "amenable to a harmless error analysis." Id. at 500, 787 S.E.2d at 483. Black's testimony here was pitted against the complainant and as then-Judge Few recognized, Bush's testimony was "critical" and his credibility "essential." If the jury believed Bush, then the alleged crime did not happen. Instead, the jury heard that Bush was a violent criminal with two manslaughter convictions and a conviction for throwing a deadly missile.

The State's argument is based primarily on the Black opinion's recitation of the other evidence in the case in its harmless error analysis. The problem with the State's argument is it asks this Court to weigh the credibility of the witnesses.

The State challenges Black's credibility because of his prior CSC convictions. It challenges Bush's credibility because of his admission that he had been a heavy drinker, even though Bush testified that he was not drinking on the day of the alleged sexual encounter. App.

268, 1. 2 – 5. While these are certainly fair criticisms of the witnesses’ credibility, these points must be made to a jury, not an appellate court. Black is entitled to have a jury weigh his and Bush’s credibility. See State v. Witherspoon, 418 S.C. 641, 643, 795 S.E.2d 685, 686 (2016) (reversing CSC conviction because of “the centrality of the issue of credibility in this case, and the absence of other overwhelming evidence of petitioner’s guilt”); Chappell v. State, 429 S.C. 68, 81, 837 S.E.2d 496, 502 (Ct. App. 2019) (reversing because CSC case “hinged” on credibility).

Pantovich v. State, 427 S.C. 555, 832 S.E.2d 596 (2019) also neutralizes one of the State’s arguments—that because the error only pertained to a witness’s credibility and not Black’s, the error is diminished to the point it is harmless. State’s Pet. Cert. at 17-19. In Pantovich, the defendant called several character witnesses. Id. The defendant asked for an instruction on “good character,” which the trial court refused to give. Id. Appellate counsel (the same attorney as in Black’s case) failed to appeal this issue and the Supreme Court reversed in PCR. Id.

In Pantovich, the error only affected how the jury assessed the defendant’s character witnesses, but this Court found that the error satisfied Strickland prejudice. Id. The Pantovich Court noted that a jury should be entitled to consider such information. Id. at 564, 832 S.E.2d at 601. The Supreme Court’s Opinion in Black made a nuanced distinction between assailing character and assailing credibility when analyzing the admissibility. The Black Court found that the stale convictions attacked Bush’s character because the convictions had nothing to do with truthfulness. If, as in Pantovich, erroneous jury instructions about how to evaluate character were reversible error, then erroneous admissions of bad character are reversible error—especially in a he-said-she-said sexual abuse case.

Black should be allowed to have an untainted jury assess Bush's credibility. A close reading of Black's harmless error analysis supports that but for appellate counsel's failure, this case would have been reversed on direct appeal. The Black Court cited the other evidence in the case in its harmless error analysis, but did not qualify it as done in some cases. The Court could have said that even without the deadly missile conviction, the error would have been harmless. But the Court said the deadly missile conviction "**and** the record as a whole" rendered the error harmless. Black at 30-31, 732 S.E.2d at 891 (emphasis added).

Without the deadly missile conviction, this case falls under the Stukes rule that errors relating to credibility in sex cases are infrequently harmless. The "record as a whole" has flaws and do not amount to overwhelming evidence of guilt. The complainant's friend's testimony concerning blood is subject to a credibility test by a jury. The complainant's ability to recall items in Bush's bedroom does not mean that she had sex in Bush's bedroom and is not a reason to wholly discount Bush's testimony. The PCR court's prejudice analysis was correct and this Court should affirm on that basis.

CONCLUSION

For the foregoing reasons, the judgment of the PCR court should be affirmed.



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This 20th day of December, 2023.