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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
ON BEHALF OF RESPONDENT-PETITIONER

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QUESTION PRESENTED BY THE STATE

Where this Court previously determined the trial court's admission of two voluntary manslaughter convictions—which were used to impeach the defense witness—constituted harmless error, the post-conviction relief court erred in finding Black was prejudiced by appellate counsel's failure to additionally argue the trial court erred by allowing the State to impeach the same witness with a remote conviction for shooting or throwing a deadly missile because the defense witness's credibility was already compromised and because Black's credibility was significantly compromised by the fact that he had previously been convicted of criminal sexual conduct with a minor.

JASON BLACK'S COUNTER-QUESTION PRESENTED

In respondent's direct appeal, where the Supreme Court specifically faulted appellate counsel for failing to raise the admissibility of a remote conviction and based its harmless error analysis on that specific failing, the PCR Court correctly granted relief.

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. App. 341. The Court of Appeals and this 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's petitions for certiorari were granted by this Court.

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

In respondent's direct appeal, where the Supreme Court specifically faulted appellate counsel for failing to raise the admissibility of a remote conviction and based its harmless error analysis on that specific failing, the PCR Court correctly granted relief.

Introduction

Resolution of this case depends upon the prejudice prong of Strickland¹ and harmless error analysis. This Court must look in two places. First, this Court must closely read the Supreme Court's 3-2 decision finding harmless error in Jason Black's direct appeal. Second, it must look at the record and find whether—in the PCR context—harmless error equates to overwhelming evidence of guilt. In this child sex case that was a credibility contest, no evidence of guilt exists that would overwhelm the specific prejudice of improperly impeaching Black's witness who testified that he was innocent.

The Testimony at Trial

Complainant testified she was fifteen years old when she began dating Black, who was 26. App. 83-85. She met Black at Warpath Landing where they laid on the beach and talked. App. 85-88. They left to meet Complainant's friend, Candie, who took Complainant to work at a Japanese restaurant. App. 88-89. Complainant was hiding her relationship with Black from her parents. App. 84.

Complainant got off work at 9:00 and went to a skating rink. App. 89-90. She and Black spoke on the phone while Complainant was at the skating rink. App. 90-91. Black asked her to come to his friend, Richard Bush's trailer. App. 90-91. Candie and her friend Travis took

¹ Strickland v. Washington 466 U.S. 688 (1984)

Complainant to Bush's trailer. App. 92. Candie, Travis, and Complainant all went inside. App. 92-93. Candie and Travis left after about 10-15 minutes. App. 96.

While Bush was still in the living room watching TV, Complainant said Black asked her to come into the bedroom. App. 96-97. After kissing, Complainant and Black had what would have been consensual sex (as described by Complainant) if Complainant had been of legal age. App. 97-99. Complainant originally told police that she wiped ejaculate off herself, but in her trial testimony she claimed Black wiped it off with a rag. App. 122-23.

When they went back into the living room, Candie had returned, and Complainant left with Candie. App. 99. Complainant spent the night at Candie's house. App. 99. Complainant said she noticed blood in her underwear when she got back to Candie's house. App. 100-01. She washed the underwear at Candie's house. App. 101. Candie testified that she saw "a little bit of blood in them." App. 140.

The following Wednesday, Complainant's mother confronted her about Black. App. 101-04. From the questions her mother asked, Complainant believed her mother "knew something might have happened." App. 101-04. A couple of days later, she told her mother what happened with Black because she believed her mother "already knew." App. 101-04. Complainant described her mother as "angry" and admitted that when her mother gets angry, she wanted to please her mother. App. 114-15.

On cross-examination, Candie admitted that she was fifteen when she was driving Complainant that night and disregarded the restrictions on her license. App. 143-44. Candie agreed that Bush was at the house when she arrived and when she returned to pick up Complainant. App. 148-153.

Black testified in his own defense and denied having sex with Complainant. App. 228. Bush was friends with Black. App. 233. Bush had no driver's license and was on disability, so Black would take him on errands. App. 233. Black agreed that he met Complainant at Warpath Landing and dropped her off with Candie. App. 234-35.

Black testified that he was a die-hard race fan and the Chevy Rock and Roll 400 race at Richmond came on at 7:30PM. App. 234-35. Black did not have cable, so he went to Bush's single-wide trailer to watch the race. App. 234-36. The race was still on when Complainant, Candie, and Candie's boyfriend arrived. App. 242-43. Dale Jr. eventually won the race. App. 246.

Complainant went outside on the porch for a few minutes and when she returned, she told Black that Candie was taking her boyfriend home. App. 244-45. Black said Complainant was at the trailer with him and Bush for about forty-five minutes. App. 245. During that time, Complainant never left the living room. App. 245. Black never left the living room. App. 245. Bush never left the living room. App. 245. Black never went to Bush's bedroom with Complainant. App. 246.

Bush was the trial's last witness. He was sixty-six years old, but nothing was wrong with his hearing. App. 263, 267. He could see fine with his glasses. App. 267. He remembered watching the race with Black and the cable channel that broadcast the race (TNT). App. 264. Bush said Complainant and her two friends came to his trailer. App. 265. Complainant stayed on the couch watching the race with him and Black. App. 270. Black and Complainant never went in any bedroom. App. 270.

The Improper Impeachment

Before the solicitor began his cross-examination of Bush, the trial judge excused the jury to hear argument about impeaching Bush with his prior convictions. App. 271-285. The solicitor stated his intention to impeach Bush with two convictions for manslaughter and a conviction for shooting/throwing a deadly missile. App. 275-77. Defense counsel objected that the convictions were too old. App. 278-79.

The trial judge decided to allow the impeachment. App. 282-85. As part of the basis for his ruling, the court stated that Bush's "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. The court added, "That, of course, makes the issues of credibility, his credibility essential." App. 284.

Defense counsel stated he would "have to object to it when the Solicitor gets into it. Obviously, I have no further argument but I will have to object to it." App. 285. When the solicitor asked Bush, "And on or about that date, were you in criminal court in Florida—" and defense counsel objected "as previously stated." App. 289. The trial court overruled the objection. App. 289. The solicitor then asked about both manslaughter convictions and the shooting/throwing a deadly missile conviction, and ended his cross-examination. App. 289-90.

The Appeal

Black was represented by Joseph L. Savitz, III, on appeal. App. 348. The issue Savitz raised was, "The trial judge committed reversible error by allowing the State to impeach Black's corroborating witness with two Florida manslaughter convictions from 1987, as this evidence violated Rules 404 and 609, SCRE." App. 344. The brief mentioned the deadly missile conviction, but only argued that admission of the manslaughter convictions were error. App. 346

The Supreme Court granted certiorari to review this Court's unpublished opinion affirming Black's convictions. App. 393. After oral argument, the Supreme 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.

The 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.

Discussion

The Supreme Court's Opinion does not support the State's contention that had the deadly missile conviction also been appealed, the result would have been the same. 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. The deadly missile conviction 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 the appeal had been properly raised,² then the primary reason the Court found the error to be 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 Supreme Court would have reversed Black's conviction.

In State v. Stukes, 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016), the 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. Like in Stukes, 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.

² The State contends that Savitz did not perform deficiently and had a strategic reason for not raising the deadly missile error. State's Brief at 10. But a closer reading of the State's contention shows that crediting Savitz with a strategic decision only means that the error would still have been objectively harmless. State's Brief at 11. Crediting Savitz with a strategic decision does not make sense for three reasons. First, as the State makes clear on page 9, it is not supported by the record because Savitz testified that he thought that the deadly missile issue was not preserved. Second, because the missile conviction arose from the same set of facts, it would not be reasonable to omit it from the appellate brief because the legal analysis was the same. Finally, as the State's argument reveals, any analysis of ineffective assistance of appellate counsel will always boil down to prejudice—whether appellate counsel failed to raise a winning issue. Current appellate counsel for Black cannot imagine any legitimate scenario in which an appellate lawyer would intentionally omit a winning issue for strategic reasons. Whether appellate counsel is ineffective will almost always be solely a question of law and will not depend on any testimony from appellate counsel.

The State asks this Court to find that the Supreme Court’s Opinion decided the harmless error question even if Savitz had presented a proper appeal. State’s Brief at 12-14. The State hangs its hat on two observations in the Opinion. First, that Complainant could “describe some of the contents of Bush’s bedroom.” Black at 30, 732 S.E.2d at 891. This observation is hardly devastating. Complainant and Bush agreed that she had been in Bush’s trailer multiple times. App. 111. And the “contents” Complainant described were hardly anything extraordinary: a television, a bed, a table lamp, and a comforter. App. 97. App. 124.

The second is Candie’s corroboration of blood in Complainant’s underwear. Again, this testimony is not conclusive. The fifteen-year-old Candie said she saw a “little bit of blood” and admitted she had been driving that night on a restricted license with her boyfriend in the car. Candie and Complainant were both two teenagers likely in trouble with their parents. Furthermore, Candie’s testimony makes Bush’s testimony even more important. Bush’s testimony discredits both of them.

This Court must also contend examine whether, in the PCR context, overwhelming evidence of guilt exists that undoes the specific prejudice from appellate counsel’s error. See Smalls v. State, 422 S.C. 174, 190-91, 810 S.E.2d 836, 844-45 (2018). Because this case was only about the credibility of Complainant, Candie, Black, and Bush, it is not an overwhelming evidence of guilt case. No confession, DNA evidence, or combination of physical and corroborating evidence exists. Id. The specific error—an error pertaining to credibility—has the specific prejudice needed for reversal in a sexual assault swearing match.

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. 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. 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.

Black should also 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.

CONCLUSION

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



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This 31st day of July, 2024.

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Appeal from Pickens County

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V.

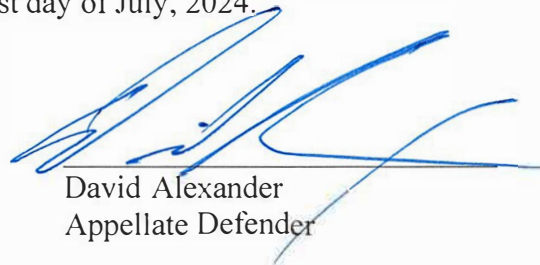
STATE OF SOUTH CAROLINA,

PETITIONER-RESPONDENT.

APPELLATE CASE NO. 2021-000525

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Brief of Respondent on Behalf of Respondent-Petitioner in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Jason Ervin Black, #322628, at 195 Country Club Dr., Pickens, SC 29671, this 31st day of July, 2024.



David Alexander
Appellate Defender

ATTORNEY FOR
RESPONDENT-PETITIONER

From: [Pollard, Shelby](#)
To: [SC - BROWN MELODY; Angela Brown](#)
Cc: [Alexander, David](#)
Subject: 2021-000525 Jason E. Black v. The State - Brief of Respondent on Behalf of Respondent-Petitioner
Date: Wednesday, July 31, 2024 4:24:00 PM
Attachments: [Cover Letter to AG 7.31.24 Brief of Respondent on Behalf of Respondent-Petitioner.pdf](#)
[2021-000525 Jason Black v. The State - Brief of Respondent on Behalf of Respondent-Petitioner.pdf](#)

Good Afternoon,

Attached for service in the above-referenced case is the Brief of Respondent on Behalf of Respondent-Petitioner. This will be filed today, July 31, 2024, with the Court of Appeals via email filing.

Thank you,
Shelby

Shelby Pollard

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