STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Case No. 2013-001351

Adam Lee Berard, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Did the PCR court properly find Counsel was not ineffective in his direct examination of Petitioner and thus, no prejudice was shown due to the overwhelming evidence of Petitioner's guilt?

STATEMENT OF THE CASE

Adam Lee Berard, ("Petitioner"), was indicted at the August 2008 term of the York County Grand Jury for Assault and Battery with Intent to Kill (ABWIK) and Criminal Sexual Conduct (CSC), 1st degree (2008-GS-46-3020). He was also indicted at the September 2009 term of the York County Grand Jury for Kidnapping (2009-GS-46-3928) and Burglary, 1st degree (2009-GS-46-3929). Gary Lemel, Esquire, represented the Petitioner. From December 14-18, 2009, Petitioner proceeded to trial and was convicted of all counts as indicted. The Honorable John C. Few sentenced him to confinement for twenty (20) years for ABWIK, thirty (30) years, consecutive, for CSC, 1st degree, thirty (30) years, consecutive to the ABWIK conviction but concurrent with the CSC conviction, for Kidnapping and life for Burglary, 1st degree.

Petitioner filed a timely Notice of Appeal with the South Carolina Court of Appeals. An Anders brief was submitted on his behalf. The South Carolina Court of Appeals affirmed his conviction and sentence. State v. Berard, Op. No. 12-UP-320 (S.C. Ct. App. Filed May 30, 2012). The Remittitur was sent on June 20, 2012.

Petitioner subsequently filed an application for post-conviction relief (PCR) on December 17, 2010. Respondent made its Return on July 19, 2012, after receiving the Remittitur from Petitioner's direct appeal. On May 17, 2013, an evidentiary hearing was held at the Moss Justice Center in York, SC. Petitioner was present and represented by Jennifer M. Creech, Esquire. Respondent was represented by J. Rutledge Johnson of the South Carolina Attorney General's Office. On May 28, 2013, the Honorable John C. Hayes, III denied and dismissed Petitioner's application by written Order. Petitioner subsequently filed a Petition for Writ of Certiorari. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard for reviewing 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, 386 S.E.2d 624 (1989). In a PCR proceeding, the Petitioner bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. The PCR court properly found Counsel was not ineffective in his direct examination of Petitioner and thus, no prejudice was shown due to the overwhelming evidence of Petitioner's guilt.

Petitioner asserts the PCR court erred in finding Counsel effective in his representation where the trial court found Counsel "opened the door" to the admission of evidence regarding Petitioner's prior criminal record, including a conviction for gross sexual conduct. This argument is without merit.

At trial, there was a stipulation between the State and Counsel that the State would be limited to informing the jury that Petitioner was on YOA probation and parole for a misdemeanor offense at the time of the incident and was required to wear an ankle bracelet as a special condition of such parole. The State agreed not to mention that Petitioner was a registered sex offender due to his prior criminal history. (App. p. 39 lines 15-25).

At the end of the State's case, Counsel moved for a directed verdict on the charge of criminal sexual conduct, focusing on the issue of penetration. (App. p. 741-742). Specifically, Counsel argued that Victim had not testified that penetration had occurred and that the State failed to produce evidence sufficient to allow a jury to determine the penetration element of criminal sexual conduct. The trial court denied this motion, finding Victim testified Petitioner raped her and that through this testimony, the jury could infer there was penetration. (App. p. 742-743). Later in this discussion, Counsel asked that the State only be allowed to impeach Petitioner with the fact that he has been convicted of a felony rather than the specific offense. (App. p. 752 lines 4-12). The trial court ruled that Petitioner's sexual conviction would be excluded because "it creates an unfair prejudice that [the trial court] think[s] is such that the probative value does not outweigh it and so [the trial court] would exclude it." (App. p. 753 lines

7-9). However, the trial court allowed the impeachment of Petitioner on the burglary and Assault and Battery of a High and Aggravated Nature (ABHAN) convictions and explained that it would instruct the jury on how those convictions could be used in their deliberations. (App. p. 753 line 10- p. 754 line 15).

Petitioner then testified to his version of the events of June 7, 2008. Petitioner testified, "I actually remember that I assaulted my grandmother (Victim)." (App. p. 774 line 24). He also admitted that he dragged Victim inside of her house by her legs. (App. p. 775 lines 16-19). Petitioner then stated that Victim was clothed before the incident, but could not remember at what time Victim became unclothed. (App. p. 775 lines 7-14). Petitioner remembered his shorts were off during the incident. (App. p. 775 line 19). Petitioner then claimed he was not in a sexual position with Victim. (App. p. 776 lines 16-19).

Later, Petitioner stated to the jury, "I deserve to be convicted of [the Assault and Battery with Intent to Kill] charge because what I did was wrong and there is no excuse for it." (App. p. 783 lines 23-24). Then, the following colloquy occurred concerning the criminal sexual conduct allegation:

Q: At any point in time did you try to commit any sort of sexual act with your grandmother?
A: Absolutely not.
Q: Did you do that?
A: Never.

(App. p. 784 lines 4-8).

Additionally, Counsel asked, "Are you guilty of trying to attempt or commit any sort of a criminal sexual conduct you grandmother?" to which Petitioner responded, "Absolutely not." (App. p. 785 lines 1-3).

When Counsel finished his direct examination of Petitioner, the State renewed its motion to cross-examine Petitioner concerning his prior conviction for gross sexual imposition in Ohio. The trial judge ruled Counsel opened the door to the State introducing Petitioner's prior sex-related conviction because, as the trial judge stated, Counsel asked Petitioner would he commit criminal sexual conduct against his grandmother. (App. p. 786 lines 13-19 (specifically "would you do that")). The trial court further explained that those questions indisputably placed Petitioner's character at issue. (App. p. 786 lines 22-23). The trial court then explained that under a SCRE 403 analysis, because Counsel and Petitioner chose to introduce traits Petitioner's character that he was not the type of person who would commit this kind of an act, Petitioner's Ohio conviction for gross sexual imposition would be admissible. (App. p. 787 line 25- p. 789 line 2).

On cross-examination, the State asked Petitioner about his prior convictions for ABHAN, Attempted Burglary and Gross Sexual Imposition, to which Petitioner admitted being convicted of all three. (App. p. 819 lines 6-13).

At the PCR hearing, Counsel admitted the trial judge ruled that he opened the door to the introduction of Petitioner's prior convictions through his direct examination of Petitioner. (App. p. 963 line 16-19.) Counsel then explained the reason for the trial judge's ruling was "[b]ecause [Counsel] used the word would or the word would was used in the answer, [the trial judge] ruled that that was the introduction of a character element and therefore opened the door to [Petitioner's prior convictions]." (App. p. 964 lines 5-8). Later, Counsel testified that the trial strategy, because of the physical evidence against Petitioner, was to have Petitioner admit he committed ABWIK, to which Petitioner agreed; however, Counsel stated it was Petitioner's decision to testify in this case. (App. p. 966 line 16- p. 968 line 19).

On cross-examination, Counsel testified that while opening the door to allow Petitioner's prior convictions to be introduced at trial was prejudicial to Petitioner's case, "[g]iven the weight of the evidence in this case, and given the restraint that [the State] showed, I can't say that I think the case turned on that one thing." (App. p. 974 lines 5-8). Later in Counsel's testimony, the following colloquy occurred:

> Q: But isn't there overwhelming evidence that [Petitioner] was [at the scene of the incident] and committed at least the ABWIK and then there is evidence sufficient for the jury to find him guilty on the other [charges]?
> A: Clearly there was evidence sufficient because [the jury] did find [Petitioner] guilty.

(App. p. 977 lines 10-15).

The PCR court held it respectfully disagreed with the trial court's ruling that Counsel's questioning of Petitioner "opened the door" to the introduction of Petitioner's prior conviction for gross sexual imposition from Ohio. (App. p. 1014). The PCR court found Counsel's questions were proper and arguably necessary. (App. p. 1014). It was only Petitioner's answer which possibly "opened the door" on cross-examination. The PCR court further held the trial judge's finding that Petitioner had placed his character at issue and allowed the introduction of his prior conviction for gross sexual imposition was Petitioner's own doing and not Counsel's. (App. p. 1015). The PCR court lastly found Counsel's testimony credible and found Counsel's representation adequate under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). (App. p. 1015).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Petitioner must

overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. First, the Petitioner must prove counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Additionally, error is harmless where it could not reasonably have affected the trial's outcome. State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008). No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Id. In considering whether error is harmless, a case's particular facts must be considered along with various factors including:

> ... the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id. at 484, 663 S.E.2d at 360.

Furthermore, where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (S.C. 1991).

The PCR court correctly held Counsel was effective in his representation and his questioning of Petitioner on direct examination. The PCR court also properly found that, in spite of the trial court's ruling, Counsel "asked no question which "opened the door."" (App. p. 1014).

During the trial, Counsel asked Petitioner:

Q: At any point in time did you try to commit any sort of sexual act with your grandmother?
A: Absolutely not.
Q: Did you do that?
A: Never.

(App. p. 784 lines 4-8).

Additionally, Counsel asked, "Are you guilty of trying to attempt or commit any sort of a criminal sexual conduct you grandmother?" to which Petitioner responded, "Absolutely not." (App. p. 785 lines 1-3).

Further, the prosecution only asked Petitioner one question concerning his prior conviction for gross sexual imposition. (App. p. 819 lines 12-13). The prosecution did not emphasize this conviction or even mention it in its closing argument. See (App. pp. 842-854).

In this case, the trial court clearly misunderstood Counsel's questions and injected the word "would" into the colloquy that followed Petitioner's direct examination. The word "would" was never mentioned in Counsel's questions or Petitioner's answers. "Would" was the lynchpin for the trial court deciding Counsel's questioning of Petitioner "opened the door" to allow the State to inquire about Petitioner's prior convictions. Counsel asked only if Petitioner had committed the act in question and did not ask about Petitioner's character or whether he was the type of person who would commit such an act. The trial court's erroneous analysis of what Counsel actually asked led to the incorrect decision to allow Petitioner to be cross-examined concerning his prior conviction for gross sexual imposition. Had the trial court correctly

understood Counsel's questions, it would have known that Counsel did not ask about Petitioner's character of whether Petitioner would have committed this kind of act. Therefore, the PCR court correctly held that it disagreed with the trial court's decision and that Counsel asked no question which "opened the door" to the admission of Petitioner's prior conviction for gross sexual imposition.

Moreover, the prosecution only asked Petitioner one question about the prior conviction, did not emphasize this conviction and did not utilize this conviction in closing argument. See Branyon v. State, 304 S.W.3d 166 (2009) (holding petitioner suffered no prejudice from defense counsel opening the door to Petitioner's prior arrest because the arrest was not emphasized by the prosecution, not alluded to after petitioner's testimony and was not in the prosecution's closing argument).

Nevertheless, even if the trial court was correct in admitting Petitioner's prior sex-related conviction, the error of Counsel was harmless beyond a reasonable doubt in light of the entire trial and the overwhelming evidence of Petitioner's guilt in this case. See Page, *supra;* Ford, *supra.*

Petitioner's argument focuses solely on the Criminal Sexual Conduct conviction. However, even if the PCR court erred in finding Counsel effective in his representation and if the trial court was correct that Counsel "opened the door" to the introduction of Petitioner's prior criminal history, the outcome of Petitioner's case would have been the same due to the evidence and testimony at trial.

First, Petitioner clearly admitted that he committed ABWIK against Victim. Petitioner testified, under oath, at his trial, "I actually remember that I assaulted my grandmother (Victim)." (App. p. 774 line 24). Petitioner also testified, "I deserve to be convicted of [the Assault and

Battery with Intent to Kill] charge because what I did was wrong and there is no excuse for it." (App. p. 783 lines 23-24).

Second, Petitioner undoubtedly committed Burglary, 1st degree. S.C. Code Ann. § 16-11-311(A) states:

> A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:
> (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:
> (a) is armed with a deadly weapon or explosive; or
> (b) causes physical injury to a person who is not a participant in the crime; or
> (c) uses or threatens the use of a dangerous instrument; or
> (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm.

In this case, Victim testified Petitioner did not have a key to her house and had to knock on her door to enter her house. (App. p. 679 lines 2-6). Victim later testified she did not invite Petitioner into her house, but made him stay outside on her porch while the two conversed. (App. p. 684 lines 3-8). Victim then stated when she turned around to re-enter her house, Petitioner hit her in the back of the head. (App. p. 686 line 22- p. 687 line 4). Victim testified that although she did not remember much, she remembered being inside of her house, but stated she did not walk inside on her own. (App. 689 lines 23-25). Further, Victim testified Petitioner was either stabbing or hitting her with an object. (App. p. 690 lines 17-21). Moreover, Victim stated Petitioner removed her pants and was trying to or was having sex with Victim. (App. p. 692 line 16- p. 693 line 2). Victim lastly testified she did not consent to having sexual contact with Petitioner. (App. p. 694 lines 5-8).

Plainly, according to Victim's testimony, Petitioner committed Burglary, 1st degree. Petitioner entered Victim's dwelling without her consent with intent to commit ABWIK, Kidnapping and/or Criminal Sexual Conduct, 1st degree. Petitioner also, in effecting entry or

while in the dwelling, admittedly assaulted Victim with deadly or dangerous instrument, causing physical harm to Victim, who was not a participant in the crime. Thus, the jury in this case correctly found Petitioner guilty of Burglary, 1st degree. Interestingly, this was the conviction which garnered Petitioner a life sentence, not the Criminal Sexual Conduct conviction, which is at the center of Petitioner's argument. Therefore, even if Petitioner was acquitted of the Criminal Sexual Conduct, 1st degree charge, the outcome of Petitioner's trial would have been the same.

Third, Petitioner kidnapped Victim within the meaning of S.C. Code Ann. § 16-3-910. (Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law...is guilty of a felony...). See also State v. Berntsen, 295 S.C. 52, 54, 367 S.E.2d 152, 153 (1988) ("Under § 16-3-910, kidnapping requires proof of an unlawful act taking one of several alternative forms: seizure, confinement, inveiglement, decoy, kidnapping, abduction, or carrying away.) As Victim testified, she did not enter the house on her own after being assaulted by Petitioner and was confined on the ground and sexually assaulted. See (App. pp 688-693). Additionally, Petitioner admitted that he dragged Victim inside of her house after he assaulted her. (App. p. 775 lines 15-19). Either of these actions proves Petitioner seized Victim, carried her into her house and confined her inside of her own home. Clearly, Petitioner's action satisfied the elements of kidnapping under S.C. Code Ann. 16-3-910, and the jury rightfully found Petitioner guilty of this crime.

Consequently, based on the testimony and evidence presented at trial, specifically the testimony of Victim and Petitioner, there is overwhelming evidence that Petitioner committed ABWIK, Burglary, 1st degree and Kidnapping as well as Criminal Sexual Conduct, 1st degree.

Therefore, no prejudice can be shown by Counsel's alleged error pursuant to Ford, *supra*. As such, Petitioner has failed to show that but for Counsel's alleged error of "opening the door" to the introduction of Petitioner's prior criminal records, the outcome of Petitioner's would have been different pursuant to Cherry, *supra*.

Accordingly, there is clear "evidence of probative value" to support the PCR judge's findings. Cherry, *supra*. Therefore, Petitioner has failed to meet his burden of proof as to this argument.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
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Assistant Attorney General
S.C. Bar # 78871

By: _____
ATTORNEYS ~~FOR RESPONDENT~~

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March 27, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

The Honorable John C. Hayes, III, Circuit Court Judge

ADAM LEE BERARD, 310249

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
SC Commission of Indigent Defense
1330 Lady Street; Suite 401
Columbia, South Carolina 29211

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

This 27th day of March 2014.

CHANDRA E. YOUNG
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ALAN WILSON
ATTORNEY GENERAL

March 27, 2014

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

***RE:* Adam Lee Berard, 310249 v. State of South Carolina**
2013-001351

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,

J. Rutledge Johnson
Assistant Attorney General

JRJ:cey
Enclosures

cc: Susan B. Hackett, Esquire
Trisha Allen, Victim Services