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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Allendale County

Alexander S. Macaulay, Circuit Court Judge

Opinion No. 2014-UP-013 (S.C. Ct. App. filed January 8, 2014)
08-CP-03-00285.

RODERICK BRADLEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2009-145087

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on February 27, 2014.

QUESTION PRESENTED

Did the Court of Appeals err in refusing to remand the case for findings on the merits where the PCR judge erroneously found the PCR issue procedurally barred and thus failed to make findings on the merits of the issue and instead, the Court of Appeals, denying relief and finding no showing of prejudice, addressed the merits of the PCR allegation that counsel was ineffective for failing to request that the trial judge, during voir dire, ask if any member of the jury pool was a rape victim when later, during a post trial motion for new trial, one of the jurors who found petitioner guilty of criminal sexual conduct with a minor second degree admitted that she was a rape victim?

STATEMENT OF THE CASE

In December 2003, the Allendale Grand Jury indicted Petitioner for criminal sexual conduct with a minor second degree, indictment #2003-GS-03-209. On August 25, 2004, Bradley proceeded to jury trial before the Honorable Paul M. Burch. John D. Bryan represented Petitioner at trial. Susan Rowell prosecuted the case. The jury returned a verdict of guilty and Judge Burch sentenced Petitioner to eleven years. A timely notice of intent to appeal was filed on petitioner's behalf.

On September 7, 2004, Petitioner filed a motion for new trial pursuant to Rule 29(b) SCRCrimP. alleging that two jurors intentionally concealed information during voir dire and jury selection. James A. Brown, Jr. Esquire represented Petitioner for the post trial motion. Susan Rowell was present for the State. On April 22, 2005, the South Carolina Court of Appeals held the appeal in abeyance and remanded the case to the trial court to address the rule 29(b) motion for new trial. On August 18, 2005, Judge Burch held a hearing on Petitioner's motion for a new trial. During the hearing the State argued that the affidavit alleging that jurors intentionally concealed information during voir dire was not credible and objected to further questioning. Judge Burch did not allow further questioning but asked one of the jurors, "Have you ever been the victim of a crime that you consider to be a violent crime?" (App. p. 290, lines 13-14). The juror answered, "No it wasn't a violent crime, but I have been raped." (App. p. 290, line 15). On August 22, 2005, petitioner filed a motion to reconsider the Rule 29(b) motion for new trial and reconvene certain jurors. In a written order signed October 10, 2005, Judge Burch denied the motion for new trial and all other post hearing motions.

A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Bradley, Op. No. 2007-

UP-532 (S.C.Ct.App. filed November 19, 2007). On November 12, 2008, petitioner filed an application for post conviction relief. The State filed a return on June 1, 2009. Petitioner filed an amended application on June 1, 2009. On August 31, 2009, an evidentiary hearing was held before the Honorable Alexander S. Macaulay. Michele Mangiaracina represented Petitioner at the PCR hearing. Mathew J. Friedman was present on behalf of the State. In a written order signed October 1, 2009, Judge Macaulay denied relief and dismissed the application. A timely notice of intent to appeal was filed on October 27, 2009. On June 21, 2010, a petition for writ of certiorari was filed in the South Carolina Supreme Court. On September 4, 2012, the South Carolina Court of Appeals granted the petition for writ of certiorari and ordered further briefing.

The brief of petitioner was filed on February 7, 2013. The brief of respondent was filed on May 13, 2013. On November 12, 2013, a three judge panel of the South Carolina Court of Appeals heard oral arguments in the case. In an unpublished opinion filed January 8, 2014, the Court of Appeals affirmed. Bradley v. State, Op. No. 2014-UP-103 (S.C.Ct.App. filed January 8, 2014). The petition for rehearing was filed on January 22, 2014, and denied on February 27, 2014. This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in refusing to remand the case for findings on the merits where the PCR judge erroneously found the PCR issue procedurally barred and thus failed to make findings on the merits of the issue and instead, the Court of Appeals, denying relief and finding no showing of prejudice, addressed the merits of the PCR allegation that counsel was ineffective for failing to request that the trial judge, during voir dire, ask if any member of the jury pool was a rape victim when later, during a post trial motion for new trial, one of the jurors who found petitioner guilty of criminal sexual conduct with a minor second degree admitted that she was a rape victim.

Initially, in the petition for writ of certiorari appealing the denial of relief by the PCR judge and the subsequent brief of petitioner, Petitioner challenged the PCR judge's finding that Petitioner's PCR allegation was procedurally barred by S.C. Code §17-27-20(b) when Petitioner alleged that trial counsel was ineffective for failing to object when the trial judge, during voir dire, failed to ask if any member of the jury pool was a rape victim and later, during a post trial motion for new trial, one of the jurors who found petitioner guilty of criminal sexual conduct with a minor second degree admitted that she was a rape victim. (Petition for Writ of Certiorari, Brief of Petitioner). The PCR judge did not rule on the merits of the PCR claim as he found the claim procedurally barred. In both the petition for writ of certiorari and the brief of petitioner a remand to the PCR court for a decision on the merits was requested.

The Court of Appeals correctly found that the PCR judge erred in finding the PCR allegation of ineffective assistance of counsel was procedurally barred. The Court of Appeals, however, rather than remanding the case to the PCR court for findings on the merits, addressed the merits of the claim writing, "We find Bradley's PCR allegation of ineffective assistance of counsel fails on the merits. At the PCR hearing, Bradley chose to rely on the record and presented no evidence of prejudice." Bradley v. State, Op. No. 2014-UP-103 (S.C.Ct.App. filed January 8, 2014)(citations omitted). (App. to Petition for Writ of Certiorari p. 2). In the petition for rehearing

Petitioner submitted that the Court of Appeals erred in deciding the issue on the merits when the PCR judge erroneously found the issue procedurally barred and did not make a finding on the merits. (App. to Petition for Writ of Certiorari pp. 3-4). Additionally, Petitioner argued that the Court of Appeals erred in finding no prejudice resulting from counsel's failure to ascertain, during voir dire, if any member of the jury was a rape victim when, later, during a post trial motion for new trial, one of the jurors who found petitioner guilty of criminal sexual conduct with a minor second degree admitted that she was a rape victim. The petition for rehearing was denied on February 27, 2014. (App. to Petition for Writ of Certiorari p. 12). The Court of Appeals first erred in deciding the merits of the ineffective assistance of counsel claim when the PCR judge had not yet made a finding on the merits of the claim. Additionally, in deciding the merits of the claim, the Court of Appeals erred in finding no prejudice resulting from counsel's deficient performance resulting in a rape victim sitting as a juror in criminal sexual conduct with a minor trial.

During voir dire the judge asked the following question:

> Have any of you had close friends or yourself or had a close relative, immediate family member, that's been a victim of a violent crime?

(App. p. 36, lines 17-19). None of the potential jurors responded. Juror 43, Juror 117 and Juror 54, were seated on the petit jury. (App. p. 349). Trial counsel did not object to the ambiguous nature of the question and did not specifically request that the judge ask if any member of the jury pool was a victim of rape or criminal sexual conduct.

On September 4, 2004, less than two weeks after Petitioner's conviction, Juror 54 signed a sworn affidavit stating that during jury deliberations in petitioner's case, Juror 43 and Juror 117 disclosed that they had been victims of rape. Juror 54's affidavit stated that "every member of the jury heard these statements." (App. pp 292-293).

The alleged victim in Petitioner's case delayed two weeks in reporting the incident. The delay became an issue at trial. (App. p. 84, lines 8 – p. 54, 55, lines 1-6; p. 90, lines 8-16). Juror 54's post-trial affidavit stated that "[o]ne of these jurors explained that her personal experience as a victim of rape explained the delay in the report of sexual battery allegations which was an issue in the case at bar. Every member of the jury was present when this statement was made." (App. pp 292-293).

Petitioner moved for a new trial on the basis that Juror 43 and Juror 117 intentionally concealed their history as rape victims in *voir dire*. (App. pp. 236-238). On August 18, 2005, a hearing was held on the motion for new trial. Juror 54 testified that Juror 43 admitted to being a rape victim during deliberations at appellant's trial. She testified that she saw Juror 43 in the courthouse on the morning of the post-trial hearing, and that Juror 43 denied her previous statement. (App. p. 5, lines. 5-25). Juror 43 did not testify at the post trial hearing[1]. When asked about the timeframe of the alleged disclosures, Juror 54 testified as follows:

> We went around, everybody went around, everybody stated their opinion as to why he was guilty, and if you didn't find him guilty, why. You had to say that. [Juror 43] said she's -- said why the little girl waited so long to tell her parents, because she was raped when she was younger and she waited a long time. Both of them [Jurors 43 and 117] stated that. (App. p. 6, line 24 – p. 7, lines 1-5).

Juror 54 testified that she was acquainted with some of Petitioner's family members and went to their home after his trial. She said that "everyone was emotional, crying," and that they asked her "what when on" in the jury room. She testified that she relayed the information in her

[1] In the order denying a new trial the judge noted that Juror 43's testimony was not necessary because the defense had no remaining peremptory strikes available at the time Juror 43 was chosen. (App. p. 299). According to the notes by the court reporter, however, defense counsel only used five of the ten allotted strikes. (App. p. 31).

affidavit, and that she was contacted later to execute the affidavit. (App. p. 10, lines 4 - p. 11, lines 1-24; p. 14, lines 16-20; p. 17, lines. 4-13). Juror 54 testified that she did not disclose her social acquaintance with petitioner's family because she believed, according to the court's questions, that she could give both sides a fair trial. (App. p. 11, lines 16 - p. 12 - 14, lines 1- 11).

Juror 117 was the only other witness to testify during the hearing on the motion for new trial. She denied that anyone disclosed being a rape victim during deliberations. The State objected to additional questions about the affidavit's underlying allegations. The trial judge ruled, "I'm going to end it here. Based on that testimony of the family and everything that went on after that, based on that response this hearing is over." (App. p. 288, lines 15 – 18).

Defense counsel requested the opportunity to proffer all pertinent testimony about the allegations. (App. p. 25, lines 18 - p. 26, lines 1- 7). The court did not allow additional witnesses but questioned Juror 117 as follows:

> Q: This is highly unusual, but I'm going to do this on my own. Based on my prior *voir dire* a year ago, I'm going to pose this question. Have you ever been the victim of a crime that you consider to be a violent crime?
>
> A: No, it wasn't a violent crime, but I have been raped.

(App. p. 290, lines 10-15).

In the order of dismissal the trial judge wrote, "This Court has made a finding of fact that neither the affidavit nor the testimony of Juror [54] is credible. Because Juror [54's] affidavit is not credible, no evidentiary hearing on the alleged concealment was required. Assuming *arguendo* that an evidentiary hearing was required, I conclude as a matter of law, that Juror [117] did not intentionally conceal information during *voir dire*." (App. p. 297).

On direct appeal the South Carolina Court of Appeals affirmed the holding of the trial judge writing, "Given the court's limited scope of review, the trial court's credibility findings, Juror [117's] testimony, and the interest in protecting the integrity of jury deliberations this court is constrained to affirm the trial court's holding the jurors did not intentionally conceal information." State v. Bradley, Op. No. 2007-UP-532 (S.C.Ct.App. filed November 19, 2007).

On November 12, 2008, petitioner filed an application for post conviction relief. On June 1, 2009, petitioner filed an amended application. In ground C of the amended application for post conviction relief petitioner specifically alleges, "Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution by trial counsel's failure to question jurors, through the trial judge, to determine a challenge for cause and to elicit facts enabling the intelligent use of preemptory strikes. State v. Woods, 345 S.C. 583 at 587, 550 S.E.2d 282 (2001)." (App. p. 321). During the PCR hearing, counsel proceeded solely on ground C alleged in the amended indictment. (App. p. 324, lines 14 – p. 325, lines 1-2). PCR counsel argued that trial counsel was ineffective in failing to ascertain if prospective jurors had been the victim of rape or sexual battery. (App. p. 326). At the close of the PCR hearing the PCR judge stated, "All right, I find that there is a preclusion by the direct appeal in this particular case. The issue now raised on post-conviction relief is a matter that should have been, could have been raised, if at all, in the direct appeal and, in fact, was addressed by the opinion of the Court of Appeals. Application denied." (App. p. 339, lines 4-9). In the order of dismissal the PCR judge wrote:

> **This Court need not address the merits of Applicant's allegations.** This Court finds that these allegations raise direct appeal issues that are procedurally barred by S.C. Code Ann. §17-27-20(b)(2003). Post conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A

> post conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The applicant raised these issues in a post-trial motion and on direct appeal. The trial court denied the post-trial motion and the Court of Appeals affirmed the conviction and sentence. Accordingly, this court summarily dismisses these allegations. (App. p. 344) (emphasis added).

The PCR judge erred. The issue raised on direct appeal was whether the jurors intentionally concealed the fact that they were rape victims. The issue of whether trial counsel was ineffective in failing to object when the trial judge, during voir dire, failed to ask if any member of the jury pool was a rape victim, the issue raised in post conviction relief, was not raised below and could not have been raised on direct appeal.

The Court of Appeals properly found that the PCR judge erred in finding that petitioner's allegation of ineffective assistance of counsel was procedurally barred. Based on the fact that the PCR judge did not rule on the merits of the ineffective assistance of counsel claim, the Court of Appeals should have remanded the case and given the PCR judge an opportunity to rule on the merits of the claim. Instead, the Court of Appeals decided the merits of the claim writing, "We find Bradley's PCR allegation of ineffective assistance of counsel fails on the merits. At the PCR hearing, Bradley chose to rely on the record and presented no evidence of prejudice." The Court of Appeals erred in failing to remand the case. Additionally, the Court of Appeals erred in refusing to find prejudice where a rape victim sat as a juror in a rape case.

Trial counsel was ineffective in failing to ascertain if prospective jurors were victims of rape or sexual battery. Petitioner was prejudiced by the deficient performance. At the time Juror 117 was seated on the jury, trial counsel had only used three strikes. (App. p. 31). If trial counsel had objected to the general questions asked about being the victim of a violent crime and instead had

asked if any of the jurors had been victims of rape, Juror 117's positive response would have resulted in Petitioner using a peremptory strike for Juror 117 or possibly asking that Juror 117 be struck for cause. The present case is distinguished from Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999) and Magazine v. State, 361 S.C. 610, 606 S.E.2d 761 (2004). In Palacio the South Carolina Supreme Court reviewed a finding by the PCR court that counsel was ineffective for failing to use a peremptory strike as her client instructed. In reversing the PCR court, the South Carolina Supreme Court found that jury selection is not a defendant's right but rather a matter of trial strategy. The Palacio Court wrote, "a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Id. at 516, 511 S.E.2d at 68. The challenge in the present case was not to counsel's exercise of strikes but to counsel's failure to ascertain information about prospective jurors and use a peremptory strike or a possible strike for cause in order to prevent the victim of rape to sit as a juror in a trial for criminal sexual conduct with a minor second degree.

In Magazine v. State, 361 S.C. 610, 606 S.E.2d 761 (2004), the South Carolina Supreme Court agreed that counsel failed to properly evaluate and select jury members but found that respondent failed to present evidence that counsel's error resulted in a violation of respondent's right to a trial by a competent and impartial jury. In the present case, counsel's failure to ascertain information about whether prospective jurors were victims of rape or sexual battery resulted in a rape victim sitting on the jury in a rape case. Prejudice in the present case is demonstrated by the fact that if counsel had provided reasonably effective assistance of counsel by ascertaining if prospective jurors had been the victim of rape or sexual battery, counsel would have learned that Juror #117 was a rape victim and would have struck her from the jury.

In State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001), an intentional juror concealment case, the Court wrote, "When a juror conceals information inquired into during *voir dire,* a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986)." 345 S.C. at 587-588, 550 S.E.2d at 284.

In Jones v. Cooper, 311 F.3d 306, 310 (4th Cir. 2002) the United States Court of Appeals for the Fourth Circuit wrote:

> In McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984), the Supreme Court set forth a particularized test for determining whether a new trial is required in the context of juror deceit during voir dire or on jury questionnaires. That two-part test states that in order to obtain a new trial, the defendant "must first demonstrate that a juror failed to answer honestly a material question ... and then further show that a correct response would have provided a valid basis for a challenge for cause." Id. at 556, 104 S.Ct. 845. The Court noted that a "trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information **which objectively he should have obtained from a juror on *voir dire* examination**." *Id.* at 555, 104 S.Ct. 845. Although in McDonough the juror's incorrect response in voir dire was an honest mistake, the test applies equally to deliberate concealment and to innocent non-disclosure, as our sister circuits have held. See, e.g., Zerka v. Green, 49 F.3d 1181, 1185 (6th Cir.1995); United States v. Langford, 990 F.2d 65, 68 (2d Cir.1993); Artis v. Hitachi Zosen Clearing, Inc., 967 F.2d 1132, 1141–42 (7th Cir.1992); Burton v. Johnson, 948 F.2d 1150, 1158 (10th Cir.1991); United States v. St. Clair, 855 F.2d 518, 522–23 (8th Cir.1988); United States v. Scott, 854 F.2d 697, 698 (5th Cir.1988). Although McDonough was a federal civil case on direct appeal, rather than a state criminal case on federal habeas review, we have expressly recognized its applicability also to federal habeas review. See Fitzgerald v. Greene, 150 F.3d 357, 362–63 (4th Cir.1998) (emphasis added).

On direct appeal in the present case the South Carolina Court of Appeals held that the jurors did not intentionally conceal information. In footnote #2 the Court makes note of the ambiguous nature of the voir dire question. Based on the finding by the Court that the juror's failure to disclose that she was a rape victim was not intentional, the Court did not address

prejudice. State v. Bradley, Op. No. 2007-UP-532 (S.C.Ct.App. filed November 19, 2007). The two prong test of McDonough, however, applies to deliberate as well as innocent non-disclosures. The non-disclosure by Juror #117 was deemed innocent because trial counsel failed to specifically ask during voir dire if any member of the panel was the victim of rape or criminal sexual conduct as opposed to the victim of a violent crime. If counsel had properly conducted voir dire and specifically asked if any member of the panel was the victim of rape or criminal sexual conduct, Juror #117's truthful answer would have provided a race neutral basis to exercise a peremptory strike and possibly a valid basis for a challenge for cause. If she had intentionally concealed the fact that she was a rape victim, Petitioner would be entitled to a new trial pursuant to Woods. Counsel's deficient performance prevented Petitioner from striking a rape victim as a juror in his trial for criminal sexual conduct with a minor. This constitutes prejudice for purposes of post conviction relief and warrants the granting of a new trial.

While prejudice is shown, as discussed above, under the specific facts of this case, prejudice should be presumed when a victim of rape sits as a juror in a rape case. At the time Juror 117 was called Petitioner had only used three of the ten allotted peremptory strikes. (App. p. 31). If Petitioner had known that Juror 117 was the victim of rape, Petitioner would have struck her from the jury. In State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001), the Court wrote:

> All criminal defendants have the right to a trial by an impartial jury. U.S. CONST. amends. VI and XIV; S.C. CONST. art. I, § 14. To protect both parties' right to an impartial jury, the trial judge must ask potential jurors whether they are aware of any bias or prejudice against a party. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). "Through the judge, parties have a right to question jurors on their *voir dire* examination not only for the purpose of showing grounds for a challenge for cause, but also, within reasonable limits, to elicit such facts as will enable them

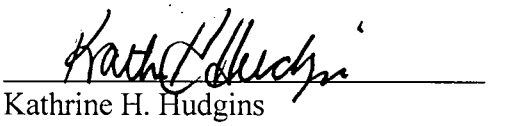
> intelligently to exercise their right of peremptory challenge." Gulledge, 277 S.C. at 370, 287 S.E.2d at 490.

Petitioner was denied the right to intelligently exercise his right to peremptory challenges and strike a victim of rape from service on the jury. Petitioner may have been denied the right to strike a juror for cause. Because of counsel's deficient performance in failing to specifically ascertain if any members of the jury pool were victims of rape, a victim of rape sat as a juror in petitioner's trial for criminal sexual conduct with a minor. No further showing of prejudice should be necessary.

CONCLUSION

Based on the above argument, this court should reverse the conviction based on ineffective assistance of counsel and remand for a new trial. Alternatively, this Court should remand the case to the PCR court to make findings on the merits of the ineffective assistance of counsel claim.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 29th day of May, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Allendale County
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RODERICK BRADLEY,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2009-145087

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Ashleigh R Wilson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and the S.C. Court of Appeals and Mr. Roderick Bradley, # 304569 at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936 this 29th day of May, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of May, 2014.

Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: