ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

J, Cordell Maddox. Jr., Circuit Court Judge

CLARENCE CRITTENDON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. ~~2008-CP-37-1471~~ 2013-002380

PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN v. STATE

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INDEX

ISSUES PRESENTED

1.

Whether, in a child sex abuse case, trial counsel rendered ineffective assistance in failing to call petitioner's brother who testified at PCR that the child's family had a motive to fabricate the abuse allegations?

2.

Whether trial counsel was ineffective in failing to ask for a speedy trial where a key witness for the defense died before trial from cancer?

STATEMENT

On March 16, 2004, an Oconee County grand jury indicted petitioner for first degree criminal sexual conduct and lewd act upon a child under the age of sixteen. App. 343-46. N. Gruber Sires originally represented petitioner on these charges. App. 182. On July 18, 2006, petitioner was reindicted for first degree criminal sexual conduct. App. 347-48. On December 11-12, 2006, petitioner was tried before the Honorable Alexander S. Macaulay and a jury. App. 1. Chrissy T. Adams and Lindsey S. Simmons represented the State. App. 1. Bruce Byrholdt replaced Sires and represented petitioner at his trial. App. 1. The jury convicted petitioner. App. 172, ll. 5 – 14. Judge Macaulay sentenced petitioner to concurrent terms of thirty years' imprisonment for criminal sexual conduct and fifteen years' imprisonment for lewd act. App. 179, l. 23 – 180, l. 11. Petitioner withdrew his direct appeal. App. 202.

On December 17, 2008, petitioner filed a PCR application. App. 190. On October 3, 2011, the Honorable J. Cordell Maddox, Jr. held a hearing on petitioner's application. App. 204. Kaelon E. May represented the State. App. 204. R. Mills Ariail, Jr. represented petitioner. On January 17, 2012, Judge Maddox denied petitioner's application. App. 270. No notice of appeal was filed.

On October 10, 2012, petitioner filed a PCR application seeking the right to a belated appeal of the denial of his 2008 application. App. 286. On September 16, 2013, the Honorable R. Lawton McIntosh heard the case. App. 320. Judge McIntosh granted petitioner a belated appeal at the hearing and asked the State to prepare an order. App. 332, l. 21 – 333, l. 19. On October 31, 2013, Judge McIntosh entered a written order granting petitioner a belated appeal. App. 338. This petition, and the petition asking the Court to grant a belated appeal, follow.

ARGUMENT

1.

Trial counsel rendered ineffective assistance in failing to call petitioner's brother who testified at PCR that the child's family had a motive to fabricate the abuse allegations.

What the Jury Heard at Trial

Three witnesses testified for the State at petitioner's trial: the child complainant ("Child"), a police officer, and a private contractor who interviewed petitioner for the police. App. 2. The defense called no witnesses. The outcome of the trial centered on the credibility of Child's allegations. Child was in fifth grade when she testified. App. 80, ll. 24 – 25. During the summer before her second grade year, she frequently stayed with her grandmother while her mother worked.[1] App. 82, l. 9 – 83, l. 7. Petitioner lived with Grandmother. App. 83, ll. 8 – 10.

One night Child became scared after watching a scary movie with her little sister. App. 85, ll. 3 – 8. She began screaming, and Grandmother attended to her. App. 85, ll. 3 – 8. Grandmother went back to her bedroom because she had to get ready for work. App. 85, l. 23 – 86, l. 6. Petitioner stayed in the living room with Child. App. 86, ll. 1 – 6. Child laid on "a pallet down on the floor" and started watching a movie. App. 86, ll. 1 – 6. According to Child, petitioner got on the floor with her and put his penis in her mouth. App. 86, ll. 7 – 22. Child also testified that, on another occasion, petitioner performed oral sex on her even though Grandmother was also in the same bed sleeping. App. 86, l. 23 – 87, l. 10. App. 92, ll. 6 – 12. Even though Grandmother was right next to her, Child did not try to awaken her. App. 92, ll. 6 – 24.

[1] Child's testimony is somewhat confusing because she calls her grandmother "Mama." App. 82, l. 21 – 83, l. 7. This petition will refer to the grandmother as "Grandmother."

In her statement to the police, Child alleged anal sex, but denied that occurred at trial claiming that she "was confused." App. 93, ll. 5 – 13. The following colloquy occurred on cross-examination:

> Q. How many times did you talk with [the solicitor] about what you were going to say here today?
>
> A. Two.
>
> Q. And did she ask you the questions before that she asked you today?
>
> A. Yes, sir.
>
> Q. Go over what you were going to say?
>
> A. Yes, sir.
>
> Q. Were you ever in a play at school, have you ever been in a play or anything like that, or program at school or church?
>
> A. Yes, sir.
>
> Q. Where they kind of rehearse things, make sure you get your song right or something like that?
>
> A. Yes, sir.
>
> Q. Is that what you did here today, rehearse things with [the solicitor], kind of go over your…
>
> A. Yeah.

App. 94, l. 17 – 95, l. 9.

The solicitor countered that she had told the child to tell the truth. App. 95, l. 25 – 96, l. 2. The solicitor also asked "And did I ever tell you how to answer the questions?" App. 96, ll. 3 – 4. Child answered, "Yes." App. 96, l. 5. When asked what she meant by that, Child said "[W]henever they asked me a question, I wasn't to say, like, other people's names or stuff like that." App. 96, ll. 7 – 9. The solicitor asked, "I told you not to talk about any other people; is that right?" App. 96, ll.

10 – 11. In a question that drew an objection for leading, the solicitor asked, "And only things that happened to you and things that – not what other people said; is that right?" App. 96, ll. 13 – 19.

The State's next witness was police Officer Greg Reed ("Reed"). App. 97, ll. 6 – 7. Officer Reed testified that he had a forensic interview of Child performed. App. 99, ll. 7 – 16. The police officer who conducted the forensic interview did not testify. However, on cross-examination, the defense pointed out contradictions between Child's trial testimony and her claim, made during the forensic interview, that petitioner ejaculated. App. 111, ll. 1 – 14. In response to the solicitor's earlier specific question of whether "anything [came] out of" petitioner's penis, Child answered, "No." App. 86, ll. 20 – 22.

The State's primary purpose for calling Officer Reid appeared to be showing that the police complied with Miranda v. Arizona, 384 U.S. 436 (1966) in advising petitioner of his rights and introducing him to a private contractor, Michael Lark ("Lark") who interviewed petitioner. App. 105, ll. 1 – 6. Lark was the State's third witness. App. 113, ll. 9 – 10. Lark admitted that petitioner "denied any sexual molestation of [Child]." App. 115, ll. 21 – 24. However, Lark claimed petitioner said that he had a dream his wife was performing oral sex on him and when he woke up, Child was in the bed and not his wife. App. 115, l. 21 – 116, l. 8. Lark claimed petitioner "said that he couldn't say yes or no whether or not his penis had went in [Child's] mouth." App. 116, ll. 5 – 8. The State rested after Lark testified. App. 121, l. 6.

The solicitor emphasized Child's lack of motive to fabricate her allegations during her closing argument:

> **Look at her motive to lie. There is nothing.** She didn't tell you she hated the defendant. She pretty much told you she looked at him as her grandpa. Is her life better because she came forward and told this? This had a tremendous impact on her. It'll impact the rest of her life. It'll impact her family. She told you she was afraid to tell because her grandma would get mad. **There's no motive to lie here; it does not exist.**

App. 138, ll. 13 – 21 (emphasis added). During trial counsel's closing, he attacked Child's credibility because her story changed. App. 143, ll. 1 – 6. Trial counsel did nothing to rebut the solicitor's argument that Child had no motive to lie. App. 142, l. 18 – 147, l. 8, Nor could he, because he failed to present any evidence to support such an argument.

What the Jury Did Not Hear

Timothy Crittendon ("Timothy"), petitioner's brother, testified at the PCR hearing. App. 226, ll. 6 - 12. Timothy described an argument between Child's mother and petitioner. App. 226, l. 13 – 229, l. 3. The argument took place before petitioner's arrest. App. 228, l. 25 – 229, l. 3. Timothy said that Child's mother kept screaming at petitioner, "You gonna leave my mama." App. 227, ll. 2 – 16. Timothy said that Child's mother threatened petitioner telling him, "If you don't leave in thirty days, then you ain't gonna like what I'm gonna do." App. 227, ll. 17 – 24. The police eventually came. App. 227, ll. 10 – 16.

Petitioner provided the context for this confrontation. App. 213, ll. 9 – 21. The women who came to his house and threatened him were his step-daughters. App. 213, ll. 9 – 21. Petitioner admitted he had been cheating on their mother. App. 213, l. 17 – 21. He admitted that his stepdaughters knew of his infidelities because they "had seen me somewhere." App. 213, ll. 18 – 21. Petitioner testified that his stepdaughters gave him a "thirty-day ultimatum" to leave their mother or something would happen to him. App. 214, l. 17 – 215, l. 7.

Petitioner said three witnesses could have testified about this incident: Timothy, Timothy's girlfriend, Tiffany Burch, and his mother-in-law, Sarah Hill ("Hill"). App. 213, l. 1 – 215, l. 10. Hill died of cancer in January 2006, before petitioner's trial. App. 213, ll. 1 – 8. Petitioner sent letters to his original attorney, Sires, explaining the confrontation with his stepdaughters and the

possibility of these three witnesses testifying. App. 215, l. 19 – 216, l. 6. Petitioner also remembered conveying this information to trial counsel. App. 216, ll. 7 – 14.

Trial Counsel's Testimony at PCR

The State did not call petitioner's first lawyer, Sires. Trial counsel took over petitioner's case in July 2006, after petitioner's defense witness Sarah Hill died. App. 230, ll. 15 – 23. Trial counsel testified that he did not call Timothy to testify because Timothy was incarcerated at the time of trial and he did not know whether he would be a credible witness. App. 231, ll. 10 – 13. Trial counsel admitted that he originally tried to talk Timothy, but once he found out Timothy was incarcerated he made no further attempt to speak with him. App. 237, ll. 7 – 17. Trial counsel stated, "I didn't think it would be beneficial." App. 237, ll. 7 – 17. Trial counsel testified that Tiffany Burch was uncooperative. App. 231, ll. 1 – 7.

The PCR Court's Order

The PCR court did not make a specific finding that Timothy was not a credible witness; it only found that Timothy's testimony would not have been helpful. App. 278 – 79. PCR court stated that Timothy's testimony "does not provide any support to applicant's assertion that he was set-up." App. 279. The court additionally found that Timothy's testimony "would have provided nothing more for the defense." App. 279. The PCR court ultimately concluded that petitioner could not show any prejudice from the failure to call Timothy. App. 279 – 80.

Discussion

Timothy's testimony was essential to petitioner's defense. Trial counsel was ineffective in failing to interview Timothy. The PCR court did not find that trial counsel acted reasonably in failing to interview Timothy, nor could it have because counsel can only make a strategic decision after a thorough investigation of the facts of the case. Wiggins v. Smith, 539 U.S. 510, 521-22

(2003). This Court recently held that trial counsel's failure to interview an important witness was deficient performance. Walker v. State, 407 S.C. 400, 405-06, 756 S.E.2d 144, 146-47 (2014).

The PCR court erred in its prejudice analysis. See Strickland v. Washington, 466 U.S. 668 (1984). Walker provides an excellent example. In Walker, the petitioner's conviction was reversed because trial counsel failed to call an alibi witness. Walker at 405-07, 756 S.E.2d at 146-48. See also Pauling v. State, 331 S.C. 606, 610, 503 S.E.2d 468, 470-71 (1998) (applying rule of ineffectiveness in failure to call a favorable witness outside of the alibi context). The key issue at trial was the identity of the victim's assailant and the alibi witness was essential to the defense. Walker at 405-07, 756 S.E.2d at 146-48. In this case, the key issue was Child's credibility. Without Timothy, the solicitor's suggestion that Child had no motive to lie could not be rebutted. Petitioner simply had no defense without Timothy's testimony. The PCR judge in Walker found the alibi witness credible. Id. at 406, 756 S.E.2d at 147. Here, the PCR judge did not find Timothy's testimony lacked credibility. The court only found that it would not have been helpful. Even trial counsel admitted that the only defense theory was reasonable doubt and the chance of victory was "slight." App. 238, ll. 8 – 17.

Without any real defense in the case, the failure to call Timothy prejudiced petitioner because without Timothy, the defense of fabrication had no chance of success. This evidence was highly probative. See Schmidt v. State, 288 S.C. 301, 342 S.E.2d 401 (1986). In Schmidt, a child sex abuse case, the trial judge excluded defense witnesses who would testify about hard feelings between the defendant and the child's family. Id.at 302-03, 342 S.E.2d at 402. This Court reversed, finding that the defendant had the right to raise what it called the "'vendetta' issue." Id. at 303, 342 S.E.2d at 402. Because evidence of the vendetta would have established "motive, bias, and prejudice on the part of the alleged victim and her family," the Court found it "clearly

relevant." Id. A prejudice analysis similar to Schmidt should have been conducted in this case. The PCR court therefore erred in finding no prejudice and this Court should grant certiorari with the ultimate relief of a new trial.

2.

Trial counsel was ineffective in failing to ask for a speedy trial where a key witness for the defense died before trial from cancer.

Relevant Facts

The alleged abuse occurred during the summer of 2003. App. 82, ll. 6 – 8. An arrest warrant for petitioner was signed on December 9, 2003. App. 43, l. 25 – 44, l. 3. Petitioner was interviewed by Officer Reed and Lark on January 21, 2004. App. 41, ll. 16 – 21. Petitioner was in custody at the time of the interview. App. 44, ll. 7 – 8. Petitioner was indicted on March 16, 2004.

Petitioner's first attorney was N. Gruber Sires ("Sires"). App. 182. On October 29, 2004, a bond hearing was held before the Honorable J.C. Nicholson, Jr. App. 182. Sires represented petitioner at this hearing. App. 182. Judge Nicholson asked the State when the case would be tried. App. 186, l. 24 – 187, l. 1. The State responded they would try to set it for the December 2004 term. App. 187, ll. 2 – 5. Petitioner and Sires agreed they would be ready for trial in December. App. 210, ll. 9 – 12. Petitioner was re-released on bond. App. 210, ll. 10 – 12.

One year and eight months later, in June 2006, petitioner was unexpectedly arrested for failing to appear. App. 208, ll. 15 – 22. It turned out that petitioner was mistakenly arrested. App. 209, ll. 15 – 25. Sires then told petitioner that he had not "looked at the case in a number of years because he thought at the same time as I did that the case no longer existed." App. 209, ll. 1 – 9. Petitioner asked for Sires to be relieved and trial counsel began representing petitioner. App. 209, ll. 4 – 10. Petitioner testified that Sires never told him he had a right to a speedy trial. App. 212, ll.

2 – 13. Petitioner testified that the delay prejudiced him because Hill died. App. 213, ll. 1 – 8. He was finally tried on December 11, 2006, approximately two years from the time he was arrested. App. 1.

Discussion

The PCR court erred in finding that petitioner suffered no prejudice from the delay of his trial. App. 277-78. The right to a speedy trial is guaranteed by the Sixth Amendment. U.S. Const. amend. VI; Barker v. Wingo, 407 U.S. 514, 515 (1972). "A defendant has no duty to bring himself to trial." Barker at 527. When considering a speedy trial violation on direct review, a court must consider the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Id. at 530. Because this case is on collateral review, the defendant's assertion of his right intertwines with counsel's effectiveness. Sires failed to advise petitioner of his rights and Sires thought the case was no longer pending. App. 209, ll. 1 – 9. This failure to communicate with petitioner and preserve his defense constitutes deficient performance.

Sires' failure also prevented trial counsel from asserting any speedy trial claim. App. 238, ll. 18 – 24. Trial counsel testified that he saw no invocation of a speedy trial right in the file. App. 238, l. 25 – 239, l. 2. Trial counsel also seemed to indicate that he did not think speedy trial motions were worth filing. App. 239, ll. 4 – 7.

The delay in this case was approximately two years. A delay of more than a year is presumptively prejudicial and triggers the Barker inquiry. Doggett v. United States, 505 U.S. 647, 652 n.1 (1992). See also State v. Waites, 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978) (finding delay of two years and four months triggered Barker). The State offered no reason for the delay at the PCR hearing.

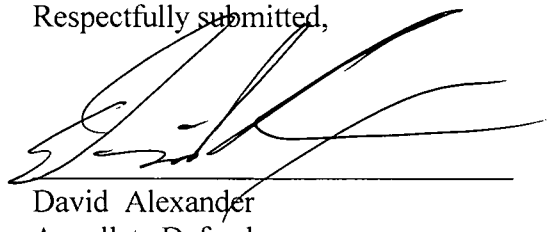
Barker described the impairment of a defense as the "most serious" prejudice a defendant can suffer from delay. Barker at 532. "**If witnesses die** or disappear during a delay, **the prejudice is obvious.**" Id. (emphasis added). Under Barker, petitioner was obviously prejudiced by Hall's death. Along with Timothy, she would have provided evidence of a motive for Child to fabricate her allegations. The prejudice from Strickland and from Barker at this point merge. Sires' ineffectiveness, especially after the bond hearing when the State told Judge Nicholson the case would be tried in December of 2004, led to petitioner being unable to present a complete defense.

Hall's death begs the question of the remedy. A new trial will not be sufficient because petitioner could not present her testimony. Defendants may obtain a dismissal with prejudice because of the denial of a right to a speedy trial. See United States v. Graham, 128 F.3d 372, 376 (6th Cir. 1997) (reversing a defendant's conviction because of the prejudicial effect of the disappearance of witnesses). Because of Hall's death, the indictments should ultimately be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari, order further briefing and either order petitioner's convictions reversed pursuant to Issue 2 or a new trial pursuant to Issue 1.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of June, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marion County
J. Cordell Maddox, Jr., Circuit Court Judge

CLARENCE CRITTENDON,

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V.

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RESPONDENT

APPELLATE CASE NO. 2008-CP-37-1471

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 have been served on John Walt Whitmire, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201and Clarence Crittendon, #266744, at McCormick Correctional Institution this 18th day of June, 2014.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of June, 2014.
Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.