

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County
Steven H. John, Circuit Court Judge

SHANNON MCGEE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE # 2014-000297

JOHNSON PETITION FOR WRIT OF CERTIORARI

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The PCR court erred in finding that trial counsel rendered effective assistance where trial counsel failed to conduct a reasonable pre-trial investigation and had trial counsel conducted such investigation, he would have become aware of the testimony of a crucial witness who should have testified at trial to create reasonable doubt of Petitioner’s guilt. 5

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ISSUE PRESENTED

Whether the PCR court erred in finding that trial counsel rendered effective assistance where trial counsel failed to conduct a reasonable pre-trial investigation and had trial counsel conducted such investigation, he would have become aware of the testimony of a crucial witness who should have testified at trial to create reasonable doubt of Petitioner's guilt?

STATEMENT

Indictments

On June 14, 2006, Petitioner Shannon McGee was indicted by the Georgetown County Grand Jury for (1) second degree criminal sexual conduct with a minor; (2) a lewd act on a minor child; and (3) assault with intent to commit second degree criminal sexual conduct with a minor. App. 598-605.

Trial and Guilty Verdict

On September 18, 2006, Petitioner proceeded to a jury trial before the Honorable Roger L. Couch. App. 1. Petitioner was represented by Stuart M. Axelrod, and the State was represented by Assistant Solicitor Robert Bryan. Id. The jury returned verdicts of guilty as charged. App. 209, ll. 5-14. Pursuant to S.C. CODE ANN. § 17-25-45, Judge Couch sentenced Petitioner to life without parole for second degree criminal sexual conduct with a minor, twenty years concurrent for assault with intent to commit second criminal sexual conduct with a minor, and fifteen years concurrent for lewd act upon a child. App. 215, l. 22 – 216, l. 10.

On September 22, 2006, Petitioner moved for a new trial or, in the alternative, to grant a mistrial based on numerous grounds including the fact that the State failed to disclose a letter from a witness demonstrating a willingness to make a deal in exchange for testimony. App. 218-243. Judge Couch denied the motion for a new trial. App. 249.

Direct Appeal

Petitioner filed an appeal of his convictions and sentences with the South Carolina Court of Appeals. Appellate Defender Katherine H. Hudgins of the Office of Appellate Defense filed an appellant's brief on behalf of Petitioner, arguing that the Trial Court erred

in refusing to grant a new trial based on the assistant solicitor's failure to disclose a letter from a witness, Aaron Kinloch, who had been incarcerated with Petitioner at the county jail, demonstrating a willingness to make a deal in exchange for testimony. App. 245-256. On November 19, 2009, the Court of Appeals issued an opinion affirming Petitioner's convictions. App. 277-278. Petitioner sought a writ of certiorari from the South Carolina Supreme Court, which the Supreme Court denied on January 20, 2011. App. 581-582. The remittitur was issued on February 7, 2011. App. 279.

Application for Post-Conviction Relief, Evidentiary Hearing and Order of Dismissal

On February 14, 2011, Petitioner filed his application for post-conviction relief ("PCR") alleging claims of the ineffective assistance of both trial counsel and appellate counsel, as well as allegations of prosecutorial misconduct. App. 280-285. Petitioner filed a first amendment to the PCR application on March 7, 2011. App. 292-341. The State filed its Return on March 23, 2011. App. 347-354. Petitioner filed a second amendment to his PCR application on January 25, 2012. App. 358-361.

An evidentiary hearing was held before the Honorable Steven H. John on December 19, 2013. App. 362-439. Petitioner was represented by William L. Runyon, Jr., and the State was represented by Assistant Attorney General Joshua L. Thomas. App. 362. Petitioner's trial counsel and Petitioner both testified at the hearing, as well as witness Michael Jerome Jones. App. 366-428.

Judge John denied Petitioner's PCR application in an Order of Dismissal filed January 23, 2014. App. 580-597. This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding that trial counsel rendered effective assistance where trial counsel failed to conduct a reasonable pre-trial investigation and had trial counsel conducted such investigation, he would have become aware of the testimony of a crucial witness who should have testified at trial to create reasonable doubt of Petitioner's guilt.

Relevant facts of trial

Petitioner was convicted of sexually abusing his stepdaughter. At trial, the stepdaughter admitted that she called defense counsel and told him that Petitioner never touched her and she simply wanted revenge because Petitioner was mean and yelled a lot. App. 75, ll. 18-25. She also admitted telling defense counsel that her family made her say things about Petitioner that were not true because the family did not like the fact that her mother had a relationship with Petitioner. App. 75, ll. 13-21. At trial, however, the stepdaughter testified that her mother forced her to recant the allegations against Petitioner. App. 69-71,

At trial, Aaron Kinloch testified that he and Petitioner were at the county jail at the same time. App. 101-102. Kinloch testified that Petitioner discussed his charges, denied using his penis but admitted using his finger. App. 109-110. Prior to the start of the trial, the State advised the Trial Court and defense counsel that Kinloch had a pending charge for receiving stolen goods. App. 25-26. The assistant solicitor advised the judge that he had not offered Kinloch a deal. App. 24, l. 22 – 23, l. 11. The assistant solicitor, however, did not make the court or defense counsel aware that he had received a letter from Kinloch demonstrating a willingness to testify in exchange for a plea.

On September 22, 2006, Petitioner moved for a new trial or, in the alternative, to grant a mistrial based on numerous grounds including the fact that the State failed to

disclose a letter from Kinloch to the assistant solicitor demonstrating a willingness to make a deal in exchange for testimony. During the post-trial motion for a new trial, the assistant solicitor admitted that he received a letter written by Kinloch, who testified against Petitioner at trial. App. 226, ll. 8-17. The letter was admitted as a court's exhibit during the post-trial motion and defense counsel acknowledged that he had never seen the letter. App. 228, ll. 1-20. The letter from Kinloch to Assistant Solicitor Robert Bryan is dated August 4, 2006, and stamped as received by the solicitor's office on August 7, 2006. In the letter Kinloch explained that he knew what happened between Petitioner and the victim and stated, "[I]f you wish to speak to me, I'm willing to help, if you are cause I do need your help." App. 523-525. In a written order dated November 9, 2006, Judge Couch denied the motion for a new trial. App. 249.

Relevant facts of the evidentiary hearing

Trial counsel testified that he represented Petitioner in his trial. He said he only received notice that the case was being called for trial three days prior. App. 366, ll. 12-17; 369, l. 24 – 370, l. 14. He said he filed the required discovery motions, but said he was not made aware of Aaron Kinloch's testimony prior to trial and that he was surprised by it. He thought Kinloch's testimony caused him to lose the case and caused jury to find Petitioner guilty. App. 371, l. 16 – 374, l. 4.

Trial counsel testified that Petitioner's defense to him was that the stepdaughter was lying because Petitioner had reprimanded her for maybe having sex with her boyfriend. Because she was reprimanded, she brought the alleged charges against Petitioner. App. 378, ll. 2-10.

Michael Jerome Jones testified that back in the summer of 2006, he was detained in the Georgetown County Detention Center. App. 403, ll. 9-24. He said he was in jail with Petitioner and had an opportunity to discuss the case with Petitioner. App. 404, ll. 5-22. He also testified that the assistant solicitor in Petitioner's case came to the jail looking for a "snitch" on Petitioner and pulled Jones out of his cell, wanting to discuss Petitioner's case. App. 404, l. 23 – 405, l. 10.

Jones said he told the assistant solicitor that he could not testify against Petitioner because Petitioner had told him that he did not do what he was accused of and had only disciplined the child because he was sneaking out the window. App. 405, ll. 15-21. Jones went back and told Aaron Kinloch about all of this and what the assistant solicitor was wanting Jones to do. App. 405, ll. 21-23. Jones said he told Kinloch that the assistant solicitor needed somebody to testify against Petitioner and Kinloch "took that and ran with it." App. 405, l. 23 – 406, l. 1. Kinloch then wrote the letter to the assistant solicitor looking for a deal. App. 406, l. 8-20.

Jones further testified that the assistant solicitor told him that if he would testify against Petitioner, the assistant solicitor would drop Jones' pending charges. According to Jones:

[The assistant solicitor] didn't care what I got up on the stand and said about [Petitioner], long as I testified. That's all he wanted. He just wanted somebody out at the jail to say [Petitioner] threw a piece of paper on the ground, [Petitioner] did this. That was it.

App. 407, ll. 14 – 25.

Jones said he had informed Petitioner before his trial that the assistant solicitor had asked Jones to testify against Petitioner. App. 409, ll. 19-22. Jones testified that Petitioner was aware that the assistant solicitor was looking for people to testify against him and that

Jones had told Kinloch this information. App. 410, ll. 3-6. Jones said he never spoke to Petitioner's trial counsel though. App. 410, ll. 7-15.

At the evidentiary hearing, Petitioner testified that he never confessed to Kinloch. App. 412, ll. 11-13. Petitioner said he only became aware that his case was coming up for trial on Monday the Friday before. App. 414, ll. 7-17. He testified that his trial counsel tried to get a continuance because trial counsel was not prepared for Petitioner's case. App. 414, l. 18 – 415, l. 2. Petitioner further testified that his trial counsel did not properly investigate his case and that if trial counsel had investigated the case, he would have realized that Aaron Kinloch was only testifying against Petitioner in exchange for a deal. App. 417, l. 8 – 419, l. 4.

Petitioner also asserted that Michael Jones was listed as a witness for Petitioner's trial but did not testify at trial. Petitioner testified that he wanted Jones to testify about his conversations with Petitioner and what Jones told Petitioner about Kinloch. App. 423, ll. 10-14. Petitioner asserted that he gave the name of Jones to his trial counsel as a lead and requested his trial counsel to call Jones as a witness at trial. Petitioner also told his trial counsel that he knew the assistant solicitor was "going around asking people to testify" against him. App. 424, l. 22-425, l. 9. Petitioner further testified that his trial counsel never even talked to Jones until the day of trial. App. 425, l. 21 – 426, l. 3. Michael Jones was listed as a witness on the State's potential witness list. App. 512-514.

Michel Jones also signed an affidavit averring the following:

1. That in July 2006, the assistant solicitor trying Petitioner's case met with him and requested that he testify against Petitioner but that he refused;

2. That after Jones met with the assistant solicitor, he advised Aaron Kinloch of the conversation. Jones averred that Kinloch was facing serious time on a pending charge and mentioned he was going to contact the assistant solicitor. Kinloch also stated he was willing to lie about Petitioner in order to work out a deal with the State;
3. That Petitioner denied any wrongdoing to Jones; and
4. Jones advised Petitioner before his trial date that he was willing to testify but that he was never called as a witness. Jones averred that if he had been called as a witness, his trial testimony would have been consistent with the testimony contained in his affidavit.

App. 527.

Order of Dismissal

Judge John filed his Order of Dismissal on January 23, 2014, concluding that Petitioner had not established any constitutional violations or deprivations that would require the PCR court to grant his PCR application. Judge John denied Petitioner's PCR application and dismissed it with prejudice. App. 580-597. The PCR court found that Petitioner had failed to meet his burden of proving that his trial counsel was ineffective in failing to conduct a pre-trial investigation and further ruled that Petitioner had failed to show what information could have been uncovered had his trial counsel conducted a more thorough pre-trial investigation. App. 590.

Discussion

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction ... has two components." Strickland v. Washington, 466 U.S. 668, 687 (1984). The defendant must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice. Id. To satisfy the first prong, a defendant must show counsel's performance "fell below an objective standard of reasonableness." Franklin v. Catoe, 346 S.C. 563, 570-71, 552 S.E.2d 718, 722 (2001). "To

prove prejudice, an applicant must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different." Id. at 571, 552 S.E.2d at 723.

The petitioner in a PCR hearing bears the burden of establishing his entitlement to relief. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). The appellate court will reverse if there is no probative evidence to support the PCR court's findings or the decision is controlled by an error of law. Miller v. State, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008).

The PCR court erred in finding that trial counsel was not ineffective for failing to conduct a thorough pre-trial investigation where had trial counsel fully investigated Petitioner's case, trial counsel would have been aware of Michael Jones' willingness to testify at Petitioner's trial that (1) the assistant solicitor had visited the jail in search of inmates who would testify against Petitioner and requested Jones to testify against Petitioner; (2) Jones refused to testify against Petitioner because Petitioner had told him that he was not guilty of the offenses charged against him and had only disciplined the stepdaughter because she was sneaking out the window; (3) Jones told Aaron Kinloch that the assistant solicitor in Petitioner's case was looking for witnesses against Petitioner; and (4) Kinloch then told Jones he was going to contact the assistant solicitor and was willing to even lie to obtain a deal from the State on his own pending charges.

Petitioner had given his trial counsel the name of Michael Jones as a potential lead. Michael Jones was listed as a potential witness on the State's witness list. Petitioner's trial counsel was therefore aware of Michael Jones and should have at a minimum interviewed Jones. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation,

which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011).

Had Petitioner’s trial counsel interviewed Michael Jones as a part of his pre-trial investigation, he would have known to call Jones as a witness at Petitioner’s trial. The testimony of Jones would have cast doubt on Kinloch’s testimony that Petitioner had confessed to him. In a case that depended only on the credibility of the stepdaughter, who herself had already once recanted her allegations, and Kinloch, a jailhouse informant looking for a deal, the testimony of Jones would have significantly aided Petitioner’s defense at trial.

Therefore, where Jones’ testimony would have created reasonable doubt on Kinloch’s claim that Petitioner had confessed to him, trial counsel was deficient in failing to interview Jones as a part of his pre-trial investigation and then call Jones as a trial witness. See Dove v. State, 337 S.C. 298, 523 S.E.2d 459 (1999) (holding trial counsel was ineffective for failing to subpoena victim’s medical records and use them at trial where these records revealed victim’s past suicidal tendencies and history of depression and were crucial to petitioner’s defense that victim committed suicide); Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998) (holding where only evidence of a sexual battery was the victim’s testimony, trial counsel was ineffective for failing to call as defense witness triage nurse whose notes indicated that victim stated she was not penetrated); Thomas v. State, 308 S.C. 123, 417 S.E.2d 531 (1992) (holding trial counsel’s performance was deficient in failing to call the medical personnel who would have testified that immediately after the attack the victim said she did not know her assailant where this testimony would have cast doubt on

the victim's identification of the petitioner); Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991) (finding trial counsel ineffective for failing to subpoena witness who would have testified that he saw the petitioner leaving a lounge three blocks from the victim's home at 1:45 a.m. when the victim testified that she was raped at her home and then she went to her sister's house, arriving between 2:00 and 2:15 a.m.).

Therefore, the PCR court's ruling that trial counsel was not ineffective in failing to conduct a pre-trial investigation was not supported by the evidence. Petitioner is accordingly entitled to a new trial for his trial counsel's failure to interview material witness Michael Jones and subsequently call Jones as a witness at trial.

CONCLUSION

For the reasons set forth herein, Petitioner Shannon McGee respectfully requests this Court to grant his Petition for Writ of Certiorari with the ultimate relief of a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of September, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GEORGETOWN COUNTY
STEVEN H. JOHN, CIRCUIT COURT JUDGE

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Shannon D. McGee states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on December 19, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Shannon D. McGee.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender
ATTORNEY FOR PETITIONER

This 4th day of September, 2014.

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CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Shannon D. McGee, #147120, at Lieber Correctional Institution this 4th day of September, 2014.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of September, 2014.

Bailey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.



SCCID

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

September 4, 2014

Joshua L. Thomas, Esquire
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: Shannon D. McGee v. State of South Carolina

Dear Joshua:

Enclosed are two copies of the Johnson petition for writ of certiorari and the appendix in the above case that I filed today with the S.C. Supreme Court.

If you have any questions concerning this matter, please contact me.

Sincerely,

Carmen V. Ganjehsani
Appellate Defender

CVG/brr

Enclosures