THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable R. Lawton McIntosh, Circuit Court Judge

Case No.: 2011-CP-32-0402
Appellate Case No.: 2013-002473

Timothy J. Wilson,.....Respondent-Petitioner,

vs.

State of South Carolina,.....Petitioner-Respondent.

RESPONDENT-PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Whether the lower court erred in finding that trial counsel was effective in his preparation and investigation of Respondent-Petitioner's case prior to trial and committed an error of law in crafting a new standard of reasonableness. Whether the lower court also erred in failing to address the prejudice prong of the Strickland analysis.

II. Whether the lower court erred in finding that trial counsel was not ineffective and R-P was not prejudiced as a result of counsel's failure to fully cross-examine Gregory H. Robinson when he was called as a witness by the State at trial.

III. Whether the lower court erred in finding that trial counsel was not ineffective when he opened the door to testimony during the cross-examination of Jessica Wilson and the State's reply witness regarding a completely unrelated allegation of sexual abuse involving Jessica Wilson.

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact and conclusions of law. McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984). However, questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF THE CASE

Respondent-Petitioner adopts Petitioner-Respondent's Statement of the Case for purposes of this cross-appeal.

ARGUMENT

I. The lower court erred in finding that trial counsel was effective in his preparation and investigation of Respondent-Petitioner's case prior to trial and committed an error of law in crafting a new standard of reasonableness. The lower court also erred in failing to address the prejudice prong of the Strickland analysis.

At trial, counsel argued vehemently for a continuance for more time to prepare and for time to obtain experts to assist with Respondent-Petitioner's trial. App. p. 86. Counsel explained that R-P had been on military assignment in California, so he had not been able to meet with him and review discovery. App. p. 87-88. As a result, he obtained a prior continuance that gave him "approximately four weeks to, you know, do everything I needed to do as far as preparing for this case." App. p. 88, lns. 3-9. Counsel described the case, as follows:

> It's kind of like the baby that the private bar didn't want, the public defender's office ended up with and we've got to take care of it. It's not even that, it's worse than that. It's kind of like the baby with serious health defects that we've been asked to care of with no insurance. And we're in a situation now where we're trying this case with our arm tied behind our back because we weren't able to obtain experts.

App. p. 90, lns. 12-20. Counsel also addressed the likelihood of a PCR being granted due to his lack of preparation and experts, he stated: "If we were to try this case as it sits now, it will come back. It will come back in PCR, it will be granted and this case will end up being tried again."[1] App. p. 90, lns. 2-5. Counsel's request for a continuance was denied. App. p. 104.

At the evidentiary hearing, R-P detailed the three meetings he had with counsel prior to trial. App. p. 909. He also explained his understanding that counsel's **strategy** was to get a continuance. App. p. 931. He remembered the shock that counsel exhibited when they first met, which was explained by counsel during the sentencing hearing and at the evidentiary hearing. App. pp. 744-45, 910, 1011. At the evidentiary hearing, counsel explained that R-P was not the

[1] At the evidentiary hearing, R-P explained that counsel's comments put him in the mindset that "there's no hope." App. p. 933, lns. 7-8.

stereotypical public defender client, and he addressed R-P's innocence, as follows: "I believe him. I still believe him. I don't think he did it." App. p. 1011, ln. 9 – 1012, ln. 2.

At the evidentiary hearing, the only testimony and evidence in the record (trial transcript) made it clear that counsel was not prepared and that counsel thought it was prejudicial for him to proceed unprepared and without experts to trial. Nevertheless, the lower court found that counsel did not fail to properly prepare or investigate nor was he ineffective for failure to utilize experts. App. pp. 787, 789. R-P submits that the lower court's finding is not supported by the record and must be reversed. Additionally, the lower court cited to the controlling case law in the Order Granting Application for Post Conviction Relief, but decided to craft a new standard of reasonableness in finding that "counsel prepared in an adequate manner in consideration of his caseload as public defender." App. p. 787. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The proper measure of counsel's performance remains whether he has provided representation within the range of competence required by attorneys in criminal cases."). Clearly, this finding by the lower court is an error of law and is not the standard promulgated by this Court. Therefore, the lower court must be reversed.

Despite a majority of the evidentiary hearing being spent on demonstrating the prejudice R-P suffered due to counsel's failure to properly prepare, the lower court declined to even address the prejudice prong of the Strickland analysis as to R-P's claims of ineffective preparation.[2] App. p. 788. R-P submits that the court's failure to address the prejudice prong as it related to preparation and fully address it as related to the experts is a matter of clear error and requires reversal. As the record reflects, R-P submits that trial counsel's admitted lack of

[2] The lower court did mention the prejudice prong as it related to the claim of ineffective assistance for failure to utilize experts. App. p. 789-90.

preparation prejudicially evidenced itself in counsel's failure to utilize available discovery materials, failure to utilize experts, and failure to properly prepare R-P for his trial testimony.

To meet his burden and show said prejudice, R-P first went through the discovery materials and the evidence that counsel failed to utilize at trial. In sum, R-P explained that there was information contained in the victim's two page narrative and ARC reports that would have aided in his defense. App. p. 917- 928, Supp. App. pp. 26-48. R-P also explained how counsel's failure to utilize the ARC reports and the DSS safety plan contained in the discovery opened the door to the State's use of the DSS worker (Christalyn Thompson) as a rebuttal witness to R-P's wife, who was a vital witness for the defense. App. pp. 981-3, Supp. App. p. 56. Additionally, both R-P and counsel testified about counsel's failed attempt to introduce and cross-examine Thompson on an intake report that she did not complete. App. pp. 964-5, 1019-21, Supp. App. pp. 51-55. Specifically, counsel testified that he had planned to go into a line of questioning due to the report detailing the victim's allegations involving her brother, which were not investigated or prosecuted. App. p. 1020. He testified that the report would have been helpful and would have aided in his argument regarding the victim's credibility. App. p. 1020.

Turning to the issue of experts, Gaye Allen-Cooke was called at the evidentiary hearing and qualified as an expert in the area of clinical therapy involving children and family interviews, specializing in the area of sexual and physical trauma and abuse. App. p. 855, lns. 4-11. Dr. Donna Schwartz-Watts was also called and qualified as an expert in the area of forensic psychiatry. App. p. 829. The lower court properly summarized the experts' testimony as follows:

> Gaye Allen-Cook testified that she reviewed the case materials, including the forensic interview video, and met with Applicant. She explained that she found Applicant to be "appropriately remorseful" and to struggle with social anxiety. PCR Transcript pp. 46-7. She addressed her review of the forensic interview video and concluded that her only concern was the length of the interview. PCR Transcript p. 44. She expressed concern with the number of people that spoke

> with the victim regarding her disclosure prior to the forensic interview and explained "delayed disclosure." PCR Transcript pp. 44-5. She testified that she would have been willing to review the video with defense counsel, assist in preparation for trial and be utilized as a witness at trial. PCR Transcript pp. 48, 61.
>
> Dr. Donna Schwartz-Watts testified that she reviewed the case materials and evaluated Applicant. She went through her findings from her evaluation of Applicant, which included a normal sexual history and a finding that he was "low risk" to reoffend. PCR Transcript pp. 21-2, 23. She indicated that if she had been contacted prior to his trial, she would have arranged for a physiologic assessment. PCR Transcript p. 23. She explained in detail that Applicant suffers from a social phobia, which impaired his ability to testify at trial. PCR Transcript pp. 16-17, 23, She testified that she could have informed trial counsel of this phobia and assisted him with prepping Applicant for trial. PCR Transcript p. 23. When asked by the State, Dr. Schwartz-Watts indicated that this could include medication. PCR Transcript p. 30.

App. 788-9.

Additionally, the lower court noted trial counsel's testimony that both experts would have been helpful, especially with explaining R-P's anxiety. App. pp. 789, 1013-14. As was explained by both R-P and counsel, there was not enough time to prepare for trial and R-P's testimony is a prime example of that lack of preparation. At the evidentiary hearing, counsel testified that he had no idea about R-P's phobia / anxiety and it helped explain why he came across so "flat" and "unbelievable." App. pp. 1014-15. Counsel explained that in his meetings with R-P it was "clear to me he didn't do it" but on the stand he came across as if he was just saying words -- "like somebody who had an anxiety issue." App. p. 1014, lns. 13-23. When asked about his preparations for his evidentiary hearing testimony and his lack of preparation and awareness of his phobia prior to his trial testimony and the impact it had on his testimony, R-P explained:

> I thought I sounded crazy at times. I feel like I didn't get my point across a lot. I feel like it was shut down at some point because I just didn't know how to get what I was trying to say across... There is a lot of things I wanted to say and I didn't, things I said that I shouldn't, and I didn't

realize I actually said that. In looking back, you see it, and you're, like, okay, well, obviously, that didn't make sense.

App. p. 976, lns. 5-13. R-P then gave several specific examples from his trial testimony. App p. 976-7.

In the Order Granting Application for Post Conviction Relief, the lower court correctly held that both parties admitted that the trial boiled down to credibility, and the inadmissible vouching testimony, which bolstered the victim's credibility, impacted the outcome of the trial and prejudiced R-P. App. pp. 800-2, See Respondent-Petitioner's Return to Petition for Writ of Certiorari. In contrast, the lower court failed to even address the prejudicial impact of counsel's failure to obtain the services of Dr. Schwartz-Watts and properly prepare Applicant for his trial testimony, which was his credibility assessment by the jury. Clearly, counsel's failures directly affected the outcome of R-P's trial that hinged on the credibility of the witnesses due to no findings of physical abuse.[3]

Additionally, counsel conceded that Gaye Allen-Cook's testimony regarding delayed disclosure, her concern over the number of people the victim spoke with and/or disclosures prior to the forensic interview and her area of expertise in child/family therapy would have helped him present the case and give the jury "a more full picture." App. p. 1015. Despite counsel's vehement argument for experts at trial and his admissions that the experts called at the evidentiary hearing would have positively affected the defense, along with the court's finding regarding the importance that credibility played in the case, the lower court "struggled" to find prejudice from counsel's

[3] When asked by the lower court at the evidentiary hearing, counsel for P-R stated agreed that it was a "credibility case" and stated that "there was a medical doctor who testified about no physical findings" of abuse. App. p. 1056, lns. 7-15.

failure to utilize the aforementioned experts and see how it would have affected the outcome of trial.

Ironically, the instant case is somewhat similar to Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), where the trial court found counsel exercised reasonable trial strategy even though counsel failed to testify or offer such an explanation. Simply put, the record in Lounds stood in contrast to the lower court's finding as it does here. Under the any evidence standard of review, R-P submits that the record contains counsel admission at trial and at the evidentiary hearing that he was not prepared for trial and that prejudice would (did) result from his lack of preparation. As previously argued, the lower court crafted a new bar for the standard of reasonableness, specifically aimed at public defenders, in order to excuse counsel's admitted failure, which amounts to an error of law. Finally, the lower court failed to address the resulting prejudice readily apparent in the record. Therefore, R-P submits that the lower court erred and must be reversed.

II. The lower court erred in finding that trial counsel was not ineffective and R-P was not prejudiced as a result of counsel's failure to fully cross-examine Gregory H. Robinson when he was called as a witness by the State at trial.

As detailed above, trial counsel argued vehemently at the beginning of the trial for a continuance for more time to obtain experts. The court denied his request for a continuance, but the State called Gregory H. Robinson, a licensed professional family counselor, regarding his treatment of the victim. Even though counsel was admittedly trying the case with "one arm tied behind his back," he failed to utilize his cross-examination of Mr. Robinson to aid in R-P's defense. App. p. 90, lns. 18-20.

At the evidentiary hearing, Mr. Robinson acknowledged that he was called by the State at trial. App. p. 314, 886. He further acknowledged that he was asked about his meetings with the victim on direct and cross-examination. App. pp. 887-8. He recalled trial counsel asking him if the victim was the only person he saw in the family and that he attempted to go into the family systems approach, but that counsel did not give him the opportunity to explain the theoretical family systems approach or that he met with R-P. App. pp. 379, 888-9. At the evidentiary hearing, he explained that his preferred approach is the theoretical family systems approach, he further explained:

> The theory behind that goes something along the lines that if there is some type of behavior in a family member – in my case, I specialize with children and adolescents – that behavior can be explained in the context of family and so, therefore, the training that I have recieived entails getting family members involved in trying to, a, problem solve why this behavior exists, why it continues, and looking at how we can use the family as a whole to try to isolate the symptom or the behavior, and if it's a symptom that is undesirable, to make it go away.

App. p. 888, lns. 8-18. As a result of this approach, he met with R-P on two occasions. Despite the State arguing that R-P failed to even contact law enforcement and was not actively involved or advocating for his daughter, trial counsel failed to elicit testimony that R-P met with Mr.

Robinson and information about those meetings. At the evidentiary hearing, Mr. Robinson testified that R-P showed concern for the victim, wanted to improve the family situation, admitted his faults in parenting, and was motivated and enthusiastic about the therapy approach. App. pp. 889-91. R-P submits that Mr. Robinson's testimony would have directly refuted the State's argument that he was not concerned or advocating for his daughter.

Additionally, Mr. Robinson made it clear that he spoke with the victim prior to her forensic interview. As Gaye Allen-Cook explained, she had serious concerns about the number of people the victim spoke to prior to completing her forensic interview. Not only did counsel fail to call Gaye Allen-Cook to point out the number of pre-interview disclosures and/or discussions, but he also failed to address the matter through Mr. Robinson and elicit testimony that his meetings with the victim occurred before her forensic interview. As Gaye Allen-Cook testified, such interactions with Mr. Robison could have tainted the forensic interview, which was the State's primary piece of evidence due to no medical findings of abuse.

In Ard v. Catoe, 372 S.C. 454, 642 S.E.2d 590 (2007), this Court upheld the lower court's finding of ineffective assistance of counsel and prejudice when counsel failed to cross-examine the SLED agent (Powell) called by the State and elicit testimony that would have been helpful to the defense. At a deposition prior to the PCR hearing, SLED Agent Powell offered testimony that questioned the prior findings and established that there was evidence on the victim's hands that "was consistent with gunshot residue and could have come from her handling a weapon." Id. at 328, 642 S.E.2d at 594-5.

Similarly here, counsel missed a golden opportunity to utilize the State's witness to elicit testimony favorable to the defense. When asked, trial counsel admitted that he did not have a reason for not eliciting the testimony and stated "that's probably oversight on my part." App. pp.

1015, ln. 25 – 1016, ln. 7. He further testified that Mr. Robinson's testimony at the evidentiary hearing "would have helped." App. p. 1016, lns. 12-15. As argued above, both sides conceded at trial that the case boiled down to credibility. Here, trial counsel's failure kept testimony that would have heightened R-P credibility and potentially weakened the credibility of the forensic interview out of trial. In a case where counsel claimed to trying the case at a disadvantage, R-P would ask this Court to finding that the lower court's ruling that cites to counsel's admission but states the court is not "convinced" that such is ineffective assistance is not supported by the record and must be reversed. App. p. 793.

III. The lower court erred in finding that trial counsel was not ineffective when he opened the door to testimony during the cross-examination of Jessica Wilson and the State's reply witness regarding a completely unrelated allegation of sexual abuse involving Jessica Wilson.

R-P submits that the lower court erred in finding that trial counsel was not ineffective when he opened the door to testimony during the cross-examination of Jessica Wilson and the State's reply witness regarding a completely unrelated allegation of sexual abuse involving Jessica Wilson. In the Order Granting Application for Post Conviction Relief, the lower court summarized the trial record, as follows:

> At trial, Jessica Wilson was called as a witness for the defense[4]. On direct the following testimony was elicited:
>
> Trial Counsel: What made you stand by your husband in this situation?
>
> Ms. Wilson: I have always been told to go with your gut feeling. My heart and my gut tell me that he did not do this.
>
> Trial Transcript p. 558, lns. 20-24. During cross-examination, the State asked Ms. Wilson the following question: "Now, when you were young, isn't is true that your sister accused your father of molesting her?" Trial Transcript p. 575, lns. 17-18. Trial counsel immediately objected and jury was sent out while the court heard arguments. Trial Transcript pp. 575-581. In making his ruling, the trial court concluded that the questions by trial counsel regarding "her gut and all of this" had "opened the door to this line of inquiry." Thereafter, the State was allowed to elicit testimony regarding her siding with her father after the accusations made by her sister and questions regarding her "gut" feelings. Trial Transcript pp. 584-5. In trying to explain the questions about her "gut," Ms. Wilson explained that she contacted DSS and wanted to talk to the detective, but she was informed that she could not contact the detective. Trial Transcript p. 586. When asked who she spoke with at DSS, she indicated that she did not remember but it may have been Christalyn. Trial Transcript pp. 586-7.
>
> As a result of her testimony, the State called Arleen Callahan and Christalyn Howard in reply. While on the stand, Ms. Callahan explained that she had separated from her husband due to his drinking when the incident took place between her husband and her daughter that Ms. Wilson had been asked about. Trial Transcript p. 596. She explained that Ms. Wilson took her father's side even though he was charged and convicted of sexually abusing her sister. Trial

[4]Jessica Wilson is the mother of the victim and wife of Applicant.

> Transcript pp. 596-7. When Christalyn Howard took the stand in reply, she testified that she never informed Ms. Wilson that she could not call the detective and she encouraged her to talk to the victim[5]. Trial Transcript pp. 600-1.

At the evidentiary hearing, R-P addressed the above testimony and explained the impact it had on the trial:

> It brought in something that was irrelevant because Jessica, she didn't have a relationship with her father through the entire time that I've known her. And I was, you know, with her for 14-plus years. And so for them to say that there was some connection between her and her father, I mean, the only reason, as she said, was because her sister told her that, you know, their father didn't do it. He wasn't a part of our lives, so it wasn't a relationship she had with her father at all. So for them to even bring in something that was so un-relevant, it really hurt her credibility and my credibility at the same time because if they hurt her credibility, it's all about credibility, so it's in turn, hurting the case.

App. pp. 985, ln. 14 – 986, ln. 1.

When trial counsel was called to the stand, he admitted that he opened the door to the "detrimental" testimony due his line of questioning, which he wished he would have "better crafted. App. pp. 1023, 1025. Since he did not have experts the family members he called were his experts on the victim and he "had to rely heavily on them." App. p. 1024, lns. 18-22. He explained that the testimony caused the jury to perceive more than the actual events and the court interrupted and asked: "What do you mean by that?" App. pp. 1023, ln. 23 – 1024, ln. 2. Trial counsel responded:

> It almost – you know, I'm not trying to disrespect anyone that was in the courtroom that day, but it became almost like a mini circus, you know, because they – started going into this detail about Dad and, you know, this prior – the stuff that happened when she was younger, and there was the some back and forth between, you know, the prosecutor and the witness at the time about what actually happened and whose side she was on. It really just kind of got away from what we were here for, you know.

[5] In the trial transcript, the name Christalyn Thompson Howard is given for the witness. Yes, on some of the exhibits and throughout the evidentiary hearing, she is referred to as Christalyn Thompson.

App. p. 1024, lns. 3-12. On cross-examination, the State asked if he would have called Ms. Wilson knowing that the cross would come in, and counsel responded that it was a distraction and that he thought he would not call her. App. p. 1035, lns. 10-23.

In the Order Granting Application for Post Conviction Relief, the lower court summarized the trial and evidentiary hearing testimony and held: "This Court agrees with trial counsel's assessment that the testimony elicited as a result of his direct examination of Ms. Wilson was detrimental to Applicant's case, yet this Court finds that trial counsel did not provide assistance that fell below reasonable professional norms in his decision to call and in the questions asked of Ms. Wilson at trial." App. p. 805. Despite noting the resulting prejudice, the lower court excused counsel's decision to call Jessica Wilson to the stand with minimal preparation and question her in a manner that threw the door wide open to highly damaging testimony that it appears the State was chomping at the bit to introduce. Simply put, the State was prepared to put on the "mini circus" and counsel walked right into their trap. Here, counsel was admittedly unprepared and the evidentiary hearing transcript is riddled with his admissions to omissions, mistakes and oversights. This is not a case were counsel was adequately prepared, made a well-reasoned judgment on calling a necessary witness and that judgment call came back to bite the defense. Here, without offering any analysis or the ever popular "trial strategy" excuse, the lower court errantly found counsel's decision and questioning did not fall below reasonable professional norms. R-P submits that this finding is not supported by the record and must be reversed.

CONCLUSION

For the above stated reasons, Respondent-Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari and reverse the above argued findings of the lower court.

Respectfully submitted,

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This 3rd day of November, 2014.

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CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Respondent-Petitioner, hereby certify that I placed in the US mail this 3rd day of November 2014, a copy of a Return to Motion to Dismiss and Petition for Writ of Certiorari, to J. Benjamin Aplin of the Attorney General's Office, at:

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November 3, 2014