

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Cherokee County

S.C. Supreme Court

Robin B. Stilwell, Circuit Court Judge

DONALD SCOTT JONES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000778

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find counsel ineffective in failing to object when the State moved to qualify a nurse as an expert in performing sexual assault exams and diagnosing sexual assaults and allowing the nurse to testify that the injuries she observed indicated non-consensual sex?

STATEMENT

In July of 2009 the Cherokee County Grand Jury indicted Donald Scott Jones for criminal sexual conduct first degree and assault and battery with intent to kill, indictments #09-GS-11-840, 841. On May 25, 2010, Jones proceeded to jury trial before the Honorable J. Derham Cole. Thomas Shealy represented Jones at trial. Kim Laskanic and Barry Barnett prosecuted the case. The jury returned verdicts of guilty and Judge Cole sentenced Jones to life without parole pursuant to S.C. code §17-25-45. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals dismissed the appeal. State v. Jones, Op. No. 2012-UP-158 (filed March 7, 2012).

On August 6, 2012, Jones filed an application for post conviction relief. The State filed a return on August 14, 2013. On November 15, 2013, an evidentiary hearing was held before the Honorable Robin B. Stilwell. Shawn M. Campbell represented Jones at the PCR hearing. Suzanne H. White represented the State. In a written order signed March 5, 2014, Judge Stilwell denied relief and dismissed the application. A timely notice of intent to appeal was served on April 4, 2014. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find counsel ineffective in failing to object when the State moved to qualify a nurse as an expert in performing sexual assault exams and diagnosing sexual assaults and allowing the nurse to testify that the injuries she observed indicated non-consensual sex.

The jury convicted Jones of criminal sexual conduct first degree and assault and battery with intent to kill. Kay Spencer, Jones' aunt, testified that Jones stabbed her and then sexually assaulted her. (App. pp. 80-85). Jones testified that he and his aunt were involved in a sexual relationship and on the evening in question she seduced him and they had consensual vaginal and anal sex. (App. pp. 257-259). After sex Jones and his aunt argued about the care of Jones' grandfather, the aunt's father. (App. p. 260, lines 15- 25). Jones testified that his aunt became enraged and slashed his hand with a steak knife. In the ensuing struggle over the knife, the aunt was stabbed. (App. pp. 260-263).

At trial the State offered Sue Mobley as an expert witness in performing sexual assault exams and in diagnosing sexual assaults. (App. p. 138, lines 12-14). Trial counsel did not object and did not conduct *voir dire* as to Mobley's qualifications as an expert. (App. p. 138, lines 15-17). The prosecutor asked Mobley, "To have that sort of bloody drainage and also the injury you noted, would that indicate to you, in your expert opinion consensual or un-consensual, nonconsensual sex?" (App. p. 147, lines 4-7). Mobley answered, "I would classify it as nonconsensual." (App. p. 147, line 8). On cross examination Mobley admitted that the injuries she observed could have been caused by friction during consensual sex. (App. p. 152, lines 11-21).

During the PCR hearing Jones testified that trial counsel failed to fully examine Mobley on her qualifications as an expert. (App. p. 410, line 25 – p. 411, lines 1-19). Trial counsel admitted that he did question Mobley about her qualifications as an expert witness. (App. p. 431, lines 15-

17). Trial counsel admitted that he did not object to Mobley being qualified as an expert. (App. p. 432, line 11).

In the order of dismissal the PCR judge wrote:

In regards to Counsel's manner in questioning the expert witness and his decision to not object to her qualification or request *voir dire*, this Court finds that Counsel was not deficient. This Court finds that Counsel acted in the best interest of Applicant and that Counsel calculated his motions and tactics in an effort to effect the goal of competent and effective advocacy on his client's behalf. It is not necessary that an attorney make every objection or motion that he possibly can under the South Carolina Rules of Procedure. It is only necessary that he or she make those objections and motions which are reasonably calculated to effect the substantive end. In this case, the record would suggest that Counsel did just that.

(App. p. 463). The PCR judge erred.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Counsel was deficient in failing to object to Mobley's qualifications to testify as an expert in performing sexual assault exams and in diagnosing sexual assaults. Jones' was prejudiced by counsel's deficient performance. Jones' defense to the criminal sexual conduct charge was consent. Mobley testified, as an expert in diagnosing sexual assaults, that the injury she observed was a result of nonconsensual sex, a sexual assault. This was an important determination to be made by the jury. While Mobley testified that she has been a sexual assault nurse examiner for over twenty years, counsel failed to challenge her qualification to testify as an expert in "diagnosing sexual assaults."

In Watson v. Ford Motor Co., 389 S.C. 434, 445-447, 699 S.E.2d 169, 175 (2010), the South Carolina Supreme Court wrote:

The admission of expert testimony is governed by Rule 702, SCRE, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge. Stated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge. Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions. See Rule 703, SCRE. On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training. See Rules 602 and 701, SCRE.

For these reasons, expert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find

that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. See State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that the witness was improperly qualified as a forensic interviewing expert where the nature of her testimony was based on personal observations and discussions with the child victim). Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. See Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (observing that to be competent to testify as an expert, a witness must have acquired by reason of study or experience such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony). Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable. See State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (evaluating whether expert testimony on DNA analysis met the reliability requirements).

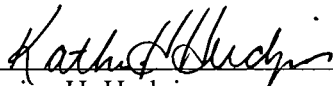
Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability. Thus, only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate. See State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) (observing that the “familiar evidentiary mantra that a challenge to evidence goes to ‘weight, not admissibility’ may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence”). It is against this backdrop that we analyze whether the trial court erred in admitting the challenged expert evidence.

Trial counsel was ineffective in not requiring the State to prove that Mobley was qualified as an expert in performing sexual assault exams and in diagnosing sexual assaults. But for counsel’s deficient performance, there is a reasonable probability the result of the proceedings would have been different. The PCR judge erred in not granting relief based on deficient performance by trial counsel.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of November, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHEROKEE COUNTY
ROBIN B. STILWELL, CIRCUIT COURT JUDGE

DONALD SCOTT JONES,

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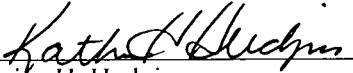
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Donald Scott Jones 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 November 15, 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 Donald Scott Jones.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 17th day of November, 2014

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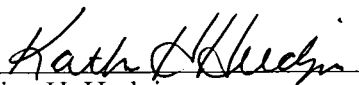
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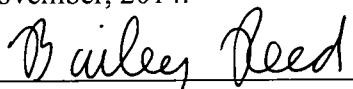
CERTIFICATE OF SERVICE

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 Suzanne H. White, Esquire and Donald Scott Jones, #336980, at Lieber Correctional Institution this 17th day of November, 2014.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of November, 2014.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.