STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SUMTER COUNTY
Court of Common Pleas

George C. James, Jr, Circuit Court Judge

2013-CP-43-0037
Appellate Case No. 2014-001566

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S.C. Supreme Court

Russell Earley .....Respondent,

v.

State of South Carolina, ...Petitioner.

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether any probative evidence supports the PCR Court's finding that Trial Counsel was ineffective for failing to object and request a mistrial when Applicant was impeached by his comment posted on Victim's Facebook where the Facebook comment was public, Applicant clearly knew about the Facebook comment prior to testifying, and he lied under oath that he had not had any contact with Victim?

STATEMENT OF THE CASE

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. The Applicant was true bill indicted at the July 2009 term of the Sumter County Grand Jury for Criminal Solicitation of a Minor. (2009-GS-43-712). Charles T. Brooks, III, Esquire, represented Applicant. Applicant proceeded to trial and on July 19, 2012, Applicant was found guilty. The Honorable Benjamin H. Culberston, sentenced Applicant without negotiations and recommendations to eight years imprisonment.

A Notice of Appeal was filed with the South Carolina Court of Appeals. An Order of Dismissal was issued on September 21, 2012, after Applicant notified the Court of his desire to withdraw the appeal. The Remittitur was issued on October 8, 2012

Petitioner filed an application for PCR on January 7, 2013 (2013-CP-43-37). The State made its Return on or about April 9, 2013, and the matter was scheduled for an evidentiary hearing before the Honorable George C. James, Jr., on February 24, 2014. Petitioner was present and represented by Tommy Thomas, Esquire. The State was represented by Daniel Gourley of the Office of the South Carolina Attorney General. In a written order signed June 30, 2014, Judge James granted Petitioner's application. The State appealed Judge James's order.

This Petition of Writ of Certiorari follows.

STANDARD OF REVIEW

In a post-conviction relief (PCR) action, the PCR applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The findings of the PCR court will not be upheld when they are not supported by probative evidence. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996); Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

ARGUMENT

No probative evidence supports the PCR Court's finding that Trial Counsel was ineffective for failing to object and request a mistrial when Applicant was impeached by his comment posted on Victim's Facebook where the Facebook comment was public, Applicant clearly knew about the Facebook comment prior to testifying, and he lied under oath that he had not had any contact with Victim.

Certiorari is warranted in this case because the PCR Court improperly applied Rule 5 to social media posting. The PCR Court found Trial Counsel was ineffective for failing to object and request a mistrial based on an alleged discovery violation regarding Petitioner's comment on Victim's Facebook page. Although Rule 5 may be applicable in certain scenarios involving social media, the PCR Courts analysis was the product of a fatally ridged and myopic understanding of the jurisprudence that governs the Rule 5 framework.

In the instant case, Petitioner testified in his own defense. On cross-examination, the solicitor asked the Petitioner if he had had any direct contact with Victim from the day of the incident up to the time of trial, a period of almost four years. (App. p. 182 line 5-19). The Petitioner, under oath, stated that he had not had any contact with the Victim since the date of the incident. (App. p. 182 lines 5-21). However, the solicitor had a copy of victim's Facebook page illustrating that Petitioner had posted a message on the Victim's Facebook wall the week before trial. The message simply stated "see ya." (App. p. 182 lines 5-21). After Petitioner denied having had any contact with the Victim, the solicitor impeached him with his message. (App. p. 182 lines 20-23).

The PCR Court found that the comment posted on the Victim's Facebook page was a "statement" made by the defendant, the existence of which was known to the State under Rule 5(a)(1)(A). (App. p. 346). In finding that the comment was a "statement" the PCR Court

concluded that comment was typed by the defendant and electronically transmitted to the victim. (app. 346-347). The PCR Court further found that the "statement" was relevant, as used by the State, for the purpose of attacking the Petitioner's credibility and for the purpose of establishing the inference that Petitioner was attempting to intimidate the victim. (App. p. 346-347). The PCR Court concluded that the Facebook comment made by Petitioner was ultimately relevant to the issue of credibility. (App. p. 349). The PCR Court further found that the Facebook comment was material to the preparation of Petitioner's defense. In support of his finding, the PCR Court noted Trial Counsel's testimony that had he known about the comment, he would have counseled Petitioner not to lie under oath when questioned about the Facebook comment.

Additionally, the PCR Court found Petitioner was prejudiced because had Trial Counsel objected and moved for a mistrial, the Trial Court would have been required to grant a mistrial. (App. p. 349). The PCR Court found curative instruction would not have been sufficient to cure the prejudice resulting from the State's failure to disclose the statement. (App. p. 348). The PCR Court concluded that Trial Counsel's failure to move for a mistrial left Petitioner's credibility severely damaged with little room for rehabilitation.

A. The Facebook posting is not subject to Rule 5 analysis.

The PCR Court's finding that the State's failure to turn over the Petitioner's comment on Victim's Facebook page amounted to a Rule 5 violation was in error. Facebook is a widely-used social media website, available for free to anyone with an e-mail account, whose stated mission is "to give people the power to share and make the world more open and connected." Mazzone, Facebook's Afterlife, 90 N.C. L.Rev. 1643, 1646 (2012) (quotation omitted); see also Democko, Comment, Social Media and the Rules on Authentication, 43 U. Tol. L.Rev. 367, 376 (2012) (discussing access to Facebook). Facebook and other social media sites are becoming the

dominant mode of communicating directly with others, exceeding e-mail usage in 2009. Diss, Note, Whether You "Like" It or Not: The Inclusion of Social Media Evidence in Sexual Harassment Cases and How Courts Can Effectively Control It, 54 B.C. L.Rev. 1841, 1842 (2013).

A profile page "is a webpage that is intended to convey information about the user." Ehling, 961 F.Supp.2d at 662. "By default, Facebook [profile] pages are public." Id. When a user shares something publicly, "anyone including people off of Facebook can see it." Facebook, http:// facebook.com/help/211513702214269?refid=69 (last visited March 8, 2015); see also Diss, supra at 1844 n. 17 ("Public information is available to anyone, even to people without an account on [Facebook]."). Alternatively, Facebook users can restrict access to their Facebook content using Facebook's customizable privacy settings. Ehling, 961 F.Supp.2d at 662. "Access can be limited to the user's Facebook friends, to particular groups or individuals, or to just the user." Id.

Rule 5(a)(1)(A) provides in pertinent part that upon request the prosecution shall permit inspection and copying of any relevant written or recorded statements made by the defendant within the *possession, custody or control of the prosecution* or the existence of which is known to the prosecution. Rule 5(a)(1)(C) provides that the prosecution, upon request, shall permit the defendant to inspect and copy papers, etc., within the possession of the prosecution "and which are material to the preparation of his defense...."

In support of its findings, the PCR Court relied heavily on State v. Lawton, 382 S.C. 122, 675 S.E.2d 454 (Ct. App. 2009) such reliance was in error. There, the Court of Appeals considered whether a letter written by the defendant to his ex-wife was a "statement" under Rule 5, SCRCrP. Id. Lawton was indicted for burglary and weapons charges after entering his ex-

girlfriend's home. Id. at 125. Before trial, he wrote his ex-wife a letter in which he stated, "I know that my story is full of lies, but no more than hers, mine just have to be better than hers." Id. The letter was not disclosed to the defense. Id. The defendant testified and the solicitor produced the letter on cross-examination, and the defendant objected based on the State's failure to disclose in violation of Rule 5(a)(1)(A). Id. at 126.The trial judge overruled the objection on that basis. Id. The trial court further stated that the letter involved Lawton's credibility, which the trial court viewed as merely collateral, thereby rendering the letter not "relevant" within the meaning of 5(a)(1)(A). Id. On appeal, the Court of Appeals held that the letter should have been disclosed to the defense because it was "clearly relevant". Id. The court also ruled that the statement was also material to the preparation of Lawton's defense under Rule 5 (a)(1)(C). Id. at 127.

The PCR Court's reliance on Lawton is misplaced. First, Lawton involved written letters sent *privately to a single person*, Lawton's ex-wife. Lawton, 382 S.C. at 125, 675 S.E.2d at 456 (2009). Lawton could reasonably assume that the letters sent to his ex-wife would remain private and not be accessed by a third-party, including the State. Unlike Lawton, Petitioner's comment was posted on Facebook. As previously noted, Facebook is a public forum that is accessible by anyone, including non-Facebook members. Petitioner cannot reasonably assume that his communication via a public forum would have remained private between himself and the Victim.

Second, Lawton no longer had access to the letters when he mailed them to his ex-wife. Clearly, the State was the sole possessor of the letters when they obtained them from Lawton's ex-wife. As such, the letters written by Lawton were in the sole "possession, custody, or control of the prosecution." Rule 5 SCRCrP. The State's failure to turn over the

letters in Lawton amounted to a Rule 5 violation. Unlike Lawton, Petitioner, along with the public, had access to Petitioner's Facebook comment. Petitioner cannot credibly argue that his comment was in sole "possession, custody, or control of the prosecution" where it was publicly accessible to the entire world. The Facebook comment simply was not in possession of the prosecution. U.S. Meregildo, 920 F.Supp.2d 434 (2013) (holding because the government never possessed Parson's Facebook account, it had no obligation to acquire it). As a result, the State failure to disclose Petitioner's Facebook comment, which was readily available by both Petitioner and the public, cannot amount to a Rule 5 violation. See State v. Moses, 390 S.C. 502, 519-20, 702 S.E.2d 395, 404 (Ct.App. 2010) ("Moses failed to show that he could not obtain other evidence of comparable value by other means; in fact, the State provided defense counsel with a high school yearbook to help Moses in identifying other witnesses who were present in the cafeteria"); Anderson v. Leeke, 271 S.C. 435, 438-39, 248 S.E.2d 120, 122 (1978) ("Although not expressly stated in the opinion, we think it is implicit that the Brady rule applies only to favorable evidence which the prosecution has but which is unavailable to the defendant"). Based off of the foregoing, the PCR court's finding that Trial Counsel was deficient for failing to object to the use of the statement under a Rule 5 violation was in error as no Rule 5 violation occurred.

2. The use of Petitioner's Facebook comment did not prejudiced Petitioner.

Assuming *arguendo*, that this Court imputes a duty on the State to turnover a defendant's comment on a public form, accessible by anyone in the general public, Petitioner cannot show any resulting prejudice for Trial Counsel's failure to object. In Lawton, the Court of Appeals found that there was a reasonable probability that Lawton would not have testified had he known the State possessed such *strong impeachment evidence*. Lawton, 382

S.C. at 127, 675 S.E.2d at 457 (2009) (emphasis added). Lawton's letters contained the sentence "I know that my story is full of lies, but no more than hers, mine just have to be better than hers." Id. at 125. It is clear that the statement within the letters were certainly relevant and detrimental to Lawton's defense. The statement bore directly on the veracity of his version of events. In the instant case, Petitioner's statement "see ya" on the Victim's Facebook page can hardly be said to be so prejudicial as to affect the outcome of Petitioner's trial. The solicitor did not use it to undermine the Petitioner's version of events. To the contrary, the statement was only used when Petitioner, under oath, lied about his contact with Victim. Had Petitioner not lied under oath, the solicitor would have had no reason to impeach Petitioner.

The PCR Court's finding that Petitioner was prejudiced due to Trial Counsel's failure to object and request a mistrial because it left Petitioner's credibility severely damaged with little room for rehabilitation also ignores clear precedent regarding cumulative impeachment. Petitioner being impeached with his Facebook comment was hardly the straw that broke the camels back. Petitioner knew, prior to testifying, that he would be impeached with his 2003 prior bank robbery. (App. p. 164 line 8—p.165 line 5). Notably, Petitioner was not only impeached with 2003 conviction, but also *volunteered* that he had eight additional convictions. (App. p. 184 lines 10-25). To simply assert that the State's use of the Facebook comment to further impeach the Petitioner was so prejudicial as to impact the outcome of Petitioner's trial is absurd.

To the contrary, this Court has consistently held that the State's failure to disclose impeachment evidence is not so prejudicial as to affect the validity of trial where the impeaching evidence would not have had a meaningful impact on the witnesses' credibility.

State v. Ferguson, 300 S.C. 408, 388 S.E.2d 642 (1990) (finding that the exclusion of impeaching evidence is not prejudicial where it has no meaningful impact on a witness's credibility); State v. Gunn, 313 S.C.124, 137, 437 S.E.2d 75, 82 (1993) (finding the nondisclosure of other impeaching evidence does not deprive the defendant of a fair trial). Petitioner cannot establish any prejudice, in light of Petitioner's credibility already being tarnished by his 2003 bank robbery conviction and the fact that he volunteered an additional eight convictions.

Furthermore, in contrast to Lawton, there is no evidence the non-disclosure of the comment would have factored into Petitioner's decision to take the stand. The PCR Court acknowledged that Petitioner would have to take the stand to rebut the State's evidence regardless of his prior knowledge about the comment. This, knowing the State would impeach him with the comment was immaterial to his defense strategy.[1] Based off of the foregoing, Respondent submits the PCR court erred in finding Petitioner was prejudiced by the State's failure to turn over impeaching evidence.

[1] Respondent also submits prior knowledge of State's planned use of the comment would not have deterred Petitioner from being untruthful when asked about his communication with Victim. If Petitioner could not be trusted to abide by the court's ruling on the admissibility of his eight other convictions, he could also not be trusted to abide by any advice from counsel regarding how to answer the solicitors questions about communication with the victim.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling. If this Court grants certiorari, the State asks permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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March 8, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County
Court of Common Pleas
The Honorable George C. James, Jr., Circuit Court Judge

RUSSELL EARLEY,

RESPONDENT,

v.

THE STATE OF SOUTH CAROLINA,

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Petition for Writ of Certiorari and Appendix**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Tommy Arthur Thomas, Esq.
PO Box 88
Irmo, SC 29063

This 9th day of March, 2015

CAROLINE COLLINS
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAR - 9 2015
S.C. Supreme Court

March 9, 2015

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Russell Earley v. State of South Carolina**
Lower Court Case No. 2013-CP-43-037
Appellate Case No. 2014-001566

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the Petition for Writ of Certiorari as well as the Appendix in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Daniel Gourley
Assistant Attorney General
SC Bar No. 100934

DG/cc
Enclosures

cc: Tommy Arthur Thomas (2 copies)