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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Edgar W. Dickson, Circuit Court Judge

RICHARD RATLIFF,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001868

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED

1.

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to irrelevant and prejudicial physical evidence found in Petitioner's bedroom, hotel room, and car as improper character evidence thereby failing to preserve the issue for appellate review since the state admitted the evidence for the sole purpose of proving Petitioner had the propensity to commit the offenses for which he was on trial?

2.

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the solicitor's improper comments during his closing argument since the comments were calculated to arouse the jurors' passions?

STATEMENT

A Lexington County Grand Jury indicted Petitioner at the October 1, 2007 term of General Sessions for three counts of second degree criminal sexual conduct (CSC) with a minor, three counts of criminal solicitation of a minor, and two counts of lewd act on a minor. App. 827-842. His case was called to trial on February 24, 2009 before the Honorable R. Knox McMahon, and a jury. App. Assistant Solicitors David Stumbo and Emily Howard represented the state, and Robert T. Williams, Sr. represented Petitioner. App. 1.

On February 26, 2009, the jury found Petitioner guilty. App. 628, l. 9 – 629, l. 15. He was sentenced by Judge McMahon to twenty years imprisonment for one count of second degree CSC with a minor, twenty years consecutive for the second count of second degree CSC with a minor, twenty years concurrent for the third count of second degree CSC with a minor, fifteen years consecutive for one count of lewd act on a minor, fifteen years concurrent for the second count of lewd act on a minor, ten years consecutive for one count of criminal solicitation of a minor, ten years concurrent for the second count of criminal solicitation of a minor, and ten years concurrent for the third count of criminal solicitation of a minor. App. 274, l. 5 – 275, l. 7. The total sentence handed down by the court was sixty-five years.

The South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Ratliff, Op. No. 2012-UP-033 (S.C. Ct. App. Filed January 25, 2012); App. 678-679.

On April 12, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 680-705. The state filed a return to this application dated January 4, 2013. App. 706-713. Petitioner filed an amended application for post-conviction relief on July 3, 2013 raising the issues argued in this petition. App. 714-716. The matter proceeded to an evidentiary hearing on August 15, 2013 before the Honorable Edgar W. Dickson. App. 717. Assistant Attorney General J. Walt

Whitmire represented the state, and Jason S. Chehoski represented Petitioner. App. 717. By order dated August 18, 2014, Judge Dickson denied Petitioner relief. App. 811-826.

This petition for writ of certiorari follows.

ARGUMENT

1.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to irrelevant and prejudicial physical evidence found in Petitioner's bedroom, hotel room, and car as improper character evidence thereby failing to preserve the issue for appellate review since the state admitted the evidence for the sole purpose of proving Petitioner had the propensity to commit the offenses for which he was on trial.

Facts at Trial

Petitioner, who was sixty-five years old at the time of his arrest, was tried for sex offenses involving three minors between the ages of ten and thirteen in Lexington County. The allegations surfaced after Petitioner moved from South Carolina to Virginia in the spring of 2007. During a pretrial suppression hearing, it was revealed that the Lexington County Sheriff's Office had contacted local law enforcement in Virginia and asked them to search Petitioner's bedroom in the home he shared with his mother and brother. Sergeant Thompson with the Wythe County Sheriff's Office testified that the Lexington authorities had instructed him to look for pornography. App. 51, l. 18 – 54, l. 7. Thompson maintained that Petitioner's brother and bedridden mother gave him consent to search an upstairs bedroom. App. 54, l. 8 – 55, l. 16.

Thompson's pretrial testimony and his testimony before the jury were consistent. He told the jury that he found between ten and twelve photographs of an older male and a middle-aged female that were sexual in nature inside the bedroom. He also found a handgun, sex toys, K.Y. Jelly, and panties for a young female. He said the sex toys were in the shape of a male penis and were often referred to as dildos. App. 402, l. 14 – 403, l. 23. Thompson also maintained that he found several DVD cases inside the bedroom, but was unware of the nature of the DVDs because he

"didn't really look at them that close." App. 403, l. 24 – 404, l. 5. He did not seize any of these items. Instead, he left the residence and notified Investigator Richard Vaughn, who took over the investigation, of his findings. App. 404, ll. 6-23.

Investigator Vaughn, also from the Wythe County Sheriff's Office, likewise testified both pretrial and before the jury that he had gone to the home Petitioner shared with his mother and brother and was given consent to search an upstairs bedroom. App. 410, l. 18 – 411, l. 2. He said Sergeant Thompson told him he had seen "some panties, some sexual toys, some photographs, and a handgun" inside the bedroom the previous evening. App. 410, ll. 3-13. When Vaughn went to the home the next morning, he maintained he "found three pairs of small G. string panties on top of a chest of drawers and one pair on top of a nightstand." He also found a DVD "labeled Blond and Anal." App. 415, ll. 2-19. Moreover, Vaughn identified the contents of seven photographs he had taken of items found inside the bedroom. He testified:

> Exhibit 5 is a picture of Mr. Richard Ratliff, several Polaroid photographs of him, nude exposing his anus and his genital areas and also photographs of a middled-age female exposing her genital areas. Exhibit 7 is, again, a middled-age female and Mr. Richard Ratliff performing oral sex on a female.
>
> Exhibit 8 is Mr. Richard Ratliff nude masturbating. Exhibit 9 is a strap-on dildo with photographs of several children. One of the Polaroid photographs is Minor 2. That's Exhibit 9. Exhibit 13 is a picture, Polaroid photograph, of Minor 2 on the back of a car.
>
> Exhibit 16 is a plastic bag that we located in the upstairs bedroom beside the bed. In this bag were small G. string panties, several photographs of Minor 2 and other children, K.Y. lubricant, dildos, and sexual toys. Exhibit 17 is a second photograph of those sexual toys, young girls panties, K. J. jelly lubricant.
>
> Q. Thank you, Sheriff Vaughn. I will keep with you State's 16 and 17 and refer you specifically to 16 to start with. You described that as a bag with sex toys and pictures in it?
>
> A. Yes.

Q. Is that how you found that bag or how did you find that bag?

A. Yes, the bag was closed up beside the bed near the nightstand.

Q. The picture that was laid out on the bed that you identified as Minor 2 on the back of a car, was that in that bag of stuff?

A. Yes, it was.

Q. I will refer you to State's 17 again. What color are the girl's panties in that, State's 17?

A. There's a white pair of panties with some blue trim and appears to be a light blue or greenish color and then underneath there is another bluish colored panties.

Q. Thank you, Sheriff Vaughn.

App. 435, l. 8 – 436, l. 22.

In addition to photographing all of the evidence Vaughn found in the bedroom, he also seized all of the items and notified the Lexington County Sheriff's Office of his discovery. App. 434, ll. 12-14.

Petitioner was ultimately arrested at the hotel room he was renting in West Columbia, South Carolina after the three minors gave written statements to law enforcement. App. 472, l. 5 – 474, l. 9. Detective Ed Prestigiacomo with the Lexington County Sheriff's Office testified that when he entered Petitioner's hotel room and placed him under arrest, he "immediately saw items in the room to include a dildo, strap-on dildo, panties, which turned out to be thongs later on for a little girl, K.Y. jelly, and some other items." App. 474, ll. 16-23. All of these items were in a bag on the floor next to the bed. Prestigiacomo said he also found a box of condoms on the hotel bed. App. 474, l. 24 – 475, l. 4.

Furthermore, Detective Prestigiacomo claimed that after Petitioner was arrested and placed in handcuffs, he gave the officers consent to search his car that was parked outside the hotel room.

Inside the center console of the car, Prestigiacomo found a photograph of Petitioner naked holding his penis. App. 488, ll. 18-23. Prestigiacomo also testified that in the back of the car behind the passenger seat he found "a label package for a three-pack of lace thongs for a teenager." App. 490, ll. 4-9.

Trial counsel objected to the admission of this prejudicial evidence on two grounds. He objected to the evidence seized from Petitioner's bedroom in Virginia because law enforcement entered the residence without a warrant and the testimony that Petitioner's brother and mother consented was hearsay since neither were present to testify at trial. See App. 81, l. 7 – 82, l. 9; see also App. 416, ll. 5-8; see also App. 434, ll. 21-22. He also objected to the evidence found in Petitioner's bedroom, hotel room, and car based on a lack of relevance. See App. 478, l. 22; see also App. 480, ll. 6-7; see also App. 483, ll. 2-21; see also App. 488, ll. 10-11. The court overruled all of these objections. When issuing his ruling, the trial judge cited State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998) and stated, "I find the testimony is very different in this case than what was presented in Nelson. This testimony is not - - this exhibit is not presented for purposes of attacking the Defendant's character or characteristics of pedophile or anything of that nature. I think it is relevant. I think it's admissible under 401. The 403 analysis, in looking back at State versus Alexander, I find that it is highly probative. The probative value substantially outweighs the danger of unfair prejudice." App. 424, l. 15 – 425, l. 3.

Direct Appeal

On direct appeal, Petitioner argued that the trial court erred by admitting irrelevant and prejudicial character evidence found in Petitioner's bedroom, hotel room, and car under State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998) because the only purpose of the evidence was to reflect

on Petitioner's "character as a sexual pervert" and to assert that he committed the alleged acts because he had a propensity to commit sexual offenses. App. 653-654.

The Court of Appeals found the argument was not preserved for appellate review, noting that an issue is not preserved when the party argued one ground at trial and another on appeal. The court also noted that "[a]n issue is not preserved for review merely because a trial court mentions it." App. 678-679.

PCR Hearing

Trial counsel, Robert ("Theo") Williams, testified that he moved pretrial to suppress the evidence seized from Petitioner's bedroom in Virginia because law enforcement entered the residence he shared with his mother and brother without a warrant. After two law enforcement officers testified that the mother and brother gave them consent to search Petitioner's upstairs bedroom, Williams objected because whether the mother and brother consented was hearsay and Petitioner could not confront these witnesses since they were not present at trial. Lastly, Williams testified that he objected to all the evidence seized from Petitioner's bedroom, hotel room, and car based on relevance, but he did not object based on the evidence being unduly prejudicial and improper character evidence. App. 776, l. 3 – 777, l. 15.

Order of Dismissal

The PCR court found trial counsel was not ineffective for failing to object to the admission of Petitioner's personal effects seized by law enforcement from his bedroom, hotel room, and car. The court found the evidence was not unduly prejudicial and corroborated the minor complainants' allegations. App. 823. The court further found that the "personal effects here were highly relevant to and probative of [Petitioner's] guilt, especially as they related to the solicitation charges." App. 823. Lastly, the court found the evidence "formed a distinct part of the *res gestae*." The court

stated that the evidence was "clearly admissible" and thus trial counsel was not ineffective for failing to object to the evidence as improper character evidence. App. 823-824.

Discussion

Trial counsel was ineffective for failing to object to the physical evidence found in Petitioner's bedroom, hotel room, and car under Rule 403, SCRE, and as improper character evidence since the state admitted the evidence for the sole purpose of proving Petitioner had the propensity to commit the offenses for which he was on trial. See State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998). Because trial counsel only objected to the evidence based on a lack of relevance, he failed to preserve the issue for appellate review.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); see Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

"In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue. Nelson, 331 S.C. at 6, 501 S.E.2d at 718 (citing

Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989)). This rule is "grounded on the policy that character evidence is not admissible 'for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged.'" Id. (quoting State v. Peake, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990)). Additionally, under Rule 403, SCRE, relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."

In Nelson, our Supreme Court held evidence seized from Nelson's bedroom was inadmissible because its only relevance was to show Nelson, who was charged with criminal sexual conduct with a minor, was a pedophile. This Court stated, "Such evidence could only invite the jury to infer [Nelson] was acting in conformity with this character trait when he committed the crimes with which he was charged. Because this is an improper basis upon which to determine guilt, the evidence should not have been admitted." Id. at 7, 501 S.E.2d at 719.

In this case, trial counsel's performance was deficient, as it clearly fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. Trial counsel should have objected to the admission of the evidence found in Petitioner's bedroom, hotel room, and car on grounds that it was improper character evidence that the state sought to admit to prove Petitioner had the propensity to commit the sexual offenses for which he was on trial. The evidence was clearly inadmissible and its only relevance was to reflect on Petitioner's character as a sexual pervert. Moreover, the evidence was used to invite the jury to infer criminal disposition. Trial counsel also should have objected under Rule 403, SCRE, since it is clear that the probative value of the evidence was outweighed by the danger of unfair prejudice to Petitioner.

Petitioner was prejudiced because trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced

a just result." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692). Specifically, Petitioner was prejudiced because trial counsel's failure to object on this ground prevented the Court of Appeals from properly reviewing the trial court's ruling that this case was different from Nelson and that the evidence admitted in Petitioner's trial was not presented for purposes of attacking his character or to show that he had the characteristics of a sexual pervert. See App. 424, l. 15 – 425, l. 3. If trial counsel would have properly preserved this issue for appellate review, the outcome of Petitioner's direct appeal would have been different since it is clear this evidence should not have been admitted. At a minimum, trial counsel should have indicated that he disagreed with the trial court's ruling that this case was distinguishable from Nelson and that the probative value of the evidence outweighed its prejudicial effect.

Furthermore, Petitioner was prejudiced because this evidence likely led the jury to convict Petitioner on an improper basis. This Court should reverse Petitioner's convictions and sentence and remand for a new trial.

2.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the solicitor's improper comments during his closing argument since the comments were calculated to arouse the jurors' passions.

Facts at Trial

During his closing argument, the solicitor told the jury:

> At the beginning of this case, ladies and gentlemen, you heard Solicitor Howard argue to you about these girls' faces. She wants you to remember their names and their faces. Remember Minor 1 who you heard first. She wants you to remember Minor 2 who you heard from second, and she wants you to remember Minor 3 who we heard from third.
>
> I submit to you, ladies and gentlemen, that those are faces you may remember while you are deliberating on this case, but there is a face and things that these three girls are going to remember their entire life. It's the face of this man right here.
>
> I want you to take a good look at it. That is the face that these three girls are going to remember every time they start a new relationship with a young man, every time when they get older when they have any kind of experience that should be good in life, a healthy relationship with another human being, they are going to remember what that man did to them when they were 10 or 11 years old.

App. 582, l. 13 – 583, l. 8.

Trial counsel did not object to this improper argument.

PCR Hearing

During the PCR hearing, trial counsel, Robert ("Theo") Williams, testified that he does not object every time the solicitor says something improper during closing arguments. He explained, "If I think it's bad enough to object to, I'll object to it. And obviously if you try murder cases, those

kind of inflammatory type of things in closing arguments happen all the time. You just have to see how bad it is before you bound up and object to it or not." App. 784, l. 12-24.

In regards to the specific argument made by the solicitor in this case detailed above, Williams testified that he "would expect the Solicitor to say that." He said, "I think closing argument by definition is an appeal to emotional circumstance. I don't think that that was so far that if I had stood up and objected, it would do anything more than to cause a spotlight about paying attention to that. So the jury would say, 'Did you see him object to that?' And they'd start focusing on that statement. And it might even come back to be worse than what that statement was." App. 785, l. 14 – 786, l. 6.

Order of Dismissal

The PCR court found Petitioner failed to meet his burden to prove counsel was ineffective for failing to object to the solicitor's closing argument. The court found "the solicitor's comments were reasonable inferences from the trial" because "[s]exual abuse leads to continued and prolonged harm." App. 824. Moreover, the court found that trial counsel offered a valid trial strategy for not objecting to the improper comments. App. 824. The court noted that an objection would have drawn "further attention to the fact that sexual abuse of children leave lasting scars on the victims in this particular case." App. 824.

Discussion

Trial counsel rendered ineffective assistance of counsel when he failed to object to the solicitor's improper comments during his closing argument because his comments were calculated to arouse the jurors' passions and were highly prejudicial to Petitioner.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that

the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686; see Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry, 300 S.C. at117-118, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson, 325 S.C. at 186, 480 S.E.2d at 735 (citing Strickland, 466 U.S. at 668).

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." State v. Von Dohlen, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004) (citing State v. Copeland, 231 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) and State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981)). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609-610, 602 S.E.2d at 744 (citing Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998) and Copeland, 321 S.C. at 324, 468 S.E.2d at 624). "Solicitors are bound to rules of fairness in their closing arguments." State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (citing State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)).

In this case, trial counsel's performance was deficient, as it clearly fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. Trial counsel should have objected to the solicitor's improper comments during his closing argument. The sole purpose of

these comments was to inflame the jury and arouse their passions. The PCR court's finding that "the solicitor's comments were reasonable inferences from the trial" because "[s]exual abuse leads to continued and prolonged harm" is respectfully incorrect and not supported by the record. See App. 824. There was no expert testimony that sexual abuse "leads to continued and prolonged harm" or that it can impact an individual's future relationships. None of the three minors attended counseling after the alleged sexual abuse and none testified that the alleged abuse had impacted their relationships with others or had caused them any "prolonged harm." The solicitor's improper comments that the minors would remember Petitioner's face and "what that man did to them" "every time they start a new relationship" was not a reasonable inference from the record. See App. 583. The comments incorrectly asserted the alleged victims could never be happy or have a normal relationship because of Petitioner's alleged conduct.

Petitioner was prejudiced because trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692). Specifically, Petitioner was prejudiced because the solicitor's improper comments likely led the jury to convict Petitioner on an improper basis and affected the outcome of his trial. Therefore, this Court should reverse his convictions and sentence and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issues presented.

Respectfully submitted,

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of April, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Edgar W. Dickson, Circuit Court Judge

RICHARD RATLIFF,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 29201, this 2nd day of April, 2015.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day of April, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.