STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Robin B. Stilwell, Circuit Court Judge

SAMUEL LAMONT WHITNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001951

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Whether Petitioner's Sixth Amendment Rights were violated when trial counsel failed to object and move for a mistrial during closing argument where the State posited, in violation of the trial court's ruling on the matter, that Petitioner was predisposed to sexually abuse his daughter because Petitioner stated in a secretly recorded telephone conversation with his daughter that his father had sexually abused him as a child?

STATEMENT

Procedural History

In August 2007, Minor, Petitioner's eleven-year old daughter, accused Petitioner of forcing her to perform oral sex on him when she was five years old. App. 145, ll. 13 – App. 147, ll. 7. Minor disclosed this allegation after reading a children's book that her mother, Anna Grady, had checked out from the library about "good and bad secrets." *Id.* Grady apparently asked all of her children almost monthly whether anyone had tried to "touch them." App. 406, ll. 1-25.

Grady and Petitioner never married. At the time of the allegation, they had a tense relationship, principally over the prominent role Grady's current husband played in Minor's life. App. 19, ll. 1 – App. 420, ll. 25. Grady and Petitioner also fought over Grady's inattention to Minor's health. App. 391, ll. 6-22. Grady had ignored Minor's swollen appendix for so long that Petitioner took Minor to the hospital where she had lifesaving emergency surgery. *Id.* Petitioner and Grady also disagreed about what school Minor should attend. App. 366, ll. 6 – App. 367, ll. 20.

After Minor's disclosure of the alleged abuse, Grady confronted Petitioner. App. 398 ll. 14 – App. 399, ll. 23. Petitioner adamantly denied the abuse. *Id.* Grady's husband convinced her that they should secretly record Petitioner's next conversation with Minor. App. 152, ll. 1 – App. 153, ll. 20.

Recorded Telephone Call

On August 5, 2007, Grady arranged a phone call from Minor to Petitioner. App. 153, ll. 18 – App. 154, ll. 9. Grady sat next to Minor while she talked with her father. App. 434, ll. 3 – App. 435, ll. 24. Unknown to either Minor or Petitioner, Grady's husband was eavesdropping and recording the conversation from a phone in the master bedroom. App. 425, ll. 13-25. During the conversation, Petitioner tearfully apologized to Minor and stated that "the drug monster that made

me do it." App. 522, ll. 1-12. Petitioner also claimed that his father sexually abused him as a child. App. 28.

Grady and her husband turned the tape over to police. App. 127, ll. 12-24. Petitioner was arrested. App. 459, ll. 3-9. After being advised about the recording, Petitioner stated that law enforcement "had only been given [the] parts of the tape that the mother . . . wanted [them] to hear." App. 331, ll. 2-16.

Indictment

Petitioner was indicted during the February, 2009 term of the Greenville County Grand Jury on one count of first degree criminal sexual conduct with a Minor. App. 864 – App. 865. Christopher Scalzo was appointed to represent Petitioner.

Pre-Trial Suppression Hearing

On March, 11, 2009, Petitioner proceeded to trial before the Honorable Victor Pyle. App. 1 – App. 34.[1] The State was represented by Assistant Solicitor Christy Sustakovitch. Before trial, Petitioner moved to suppress the recording of his conversation with Minor on the grounds the recording violated the Wiretap Act included within South Carolina Homeland Security Act. App. 17; S.C. Code Ann. § 17-30-30 (2002).

The Wiretap Act prohibits recording a conversation without the prior consent of one of the parties to that conversation. S.C. Code Ann. § 17-30-30(B) – (C) (2002). Petitioner alleged that Grady and her husband did not secure the prior consent of Minor or of Petitioner when they recorded the telephone call. App. 22 – App. 23. The State countered that the doctrine of "vicarious consent" allowed Grady and her husband to record the conversation if they "acted reasonably and in good faith, with Minor's best interest." App. 19 – App. 22. In addition, the State argued that

[1] The pre-trial hearing transcript contained only page numbers, not the lines to cite.

equivalent federal statute[2], which the General Assembly adopted, had been held by federal courts to encompass the doctrine of vicarious consent. *Id.*; *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998).

Judge Pyle concluded that the doctrine of vicarious consent was not found within the statute and that prior consent by one of the parties to the conversation was required. Accordingly, Judge Pyle suppressed the recording. App. 23.

Interlocutory Appeal to the South Carolina Court of Appeals.

The State filed an interlocutory appeal alleging that the trial court lacked jurisdiction to hear Petitioner's motion to suppress. App. 35. The Court of Appeals agreed with the State and ordered Petitioner to submit a motion to suppress the recording to it.[3] App. 55 – App. 58.

On July 2, 2009, Petitioner filed a motion to suppress the recording with the Court of Appeals. App. 61 – App. 85. On July 15, 2009, the State filed a Response. App. 86 – App.121. On July 20, 2009, Petitioner filed a Reply to the State's response. App. 122 – App. 135.

On July, 22, 2009, the Court of Appeals held a hearing to determine the admissibility of the recording. App. 137 – App. 204. Grady and her husband testified for the State and the Court took oral arguments from the parties. *Id.* On July 27, 2009, the Court of Appeals issued an Order Denying Petitioner' Motion to Suppress which concluded that vicarious consent permitted Grady and her husband to record the conversation between Minor and Petitioner. App. 206.

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[2] 18 U.S.C § 2511(2)(d).

[3] The procedure for suppressing an unlawfully intercepted communication under the Wiretap Act is set out in S.C. Code Ann. § 17-30-110(A)-(B). Before trial, the party seeking to suppress must move before both the trial court and the "reviewing authority". The reviewing authority is a three judge panel of the South Carolina Court of Appeals, who must hear the motion on an expedited basis. For the communication to be admissible the three judge panel must unanimously conclude that it was lawfully intercepted. The State has a right to appeal an order granting a motion to suppress and the judges of the South Carolina Court of Appeals *en banc* have initial appellate jurisdiction over the appeal.

The Court held that Anna Grady and her husband had the authority to consent on behalf of Minor because they had "a good faith and objectively reasonable belief that intercepting daughter's conversation with [Petitioner] was necessary and in daughter's best interest." *Id.* The court also determined that the South Carolina Wiretap Statute mirrors the related federal statute and as such the General Assembly intended the Wiretap Act to embrace the doctrine of vicarious consent. *Id.*

Trial and Direct Appeal

On November 2, 2009, Petitioner proceeded to trial before the Honorable John C. Few and jury. App. 208. Petitioner filed a pre-trial motion to redact portions of the now-admissible recording where Petitioner stated that his father sexually abused him as a child, arguing that it was impermissible propensity evidence and unduly prejudicial. App. 292, ll. 17-25. Judge Few ruled that he would not remove the references in the recording to Petitioner being sexually abused by his father as a child because the references were relevant to the confession. App. 297, ll. 7 – App. 298, ll. 24.

However, the judge cautioned the State against arguing that because Petitioner was sexually abused as a child by his father, Petitioner was more likely to sexually abuse his own daughter, because this would constitute an impermissible propensity argument. App. 297, ll. 20-22. The trial court further noted that, "a normal person makes connection between [sexual abuse that] was done to this child and when the child grows up, he does it to his own children." App. 295, ll. 23 – App. 296, ll. 9.

During the presentation of the State's case, Grady testified on re-cross examination, over Petitioner's objection, that she would not let Petitioner's father babysit Minor because she knew that Petitioner's father had sexually abused Petitioner as a child. App. 409, ll. 1-11. This line of

questioning was in response to Scalzo's cross-examination where he asked Grady if she ever accused Petitioner of leaving Minor in the care of his father. App. 408, ll. 3-17.

At trial, the State called a forensic interviewer to testify regarding her conclusions on the veracity of Minor's disclosure. App. 550, ll. 21 – App. 582, ll. 7. The State also called a child psychiatrist to testify on the "dynamics of delayed disclosure of sexual abuse." *Id.* Scalzo elected to forego the right of final argument by entering an exhibit into evidence illustrating that Petitioner was incarcerated for a large portion of the timeframe during which the State alleged the incident of sexual abuse occurred. App. 588, ll. 11 – App. 589, ll. 4.

During closing argument, the State repeatedly emphasized their belief that Petitioner's sexual abuse at the hands of his father made Petitioner more likely to have sexually abused Minor. App. 627, ll. 13-22. The State quoted portions of the recording where Minor asked Petitioner how he felt about his father's abuse. App. 625, ll. 15 –App. 626, ll. 21. The State also argued, without objection, that "you [the jury] heard the testimony that he was sexually assaulted as a child. If that is true, ***that is a terrible thing. But it does not excuse. It may explain better why this happened.*** It does not excuse it." App. 627, ll. 18-22 (*emphasis added*).

Petitioner was found guilty and sentenced to thirty years imprisonment. App. 640, ll. 12-25; App. 653, ll. 16-21. Petitioner appealed. The South Carolina Supreme Court affirmed Petitioner's conviction and approved the adoption of "vicarious consent". App. 765 – App. 783; *State v. Whitner*, 399 S.C. 547, 732 S.E.2d 861, (2012). This Court held that the Gradys acted in "good faith and in an objectively reasonable manner" comporting with Minor's best interests. *Id.* The Court also concluded that the forensic interviewer's testimony did not impermissibly bolster Minor's credibility. *Id.*

PCR Application and Evidentiary Hearing

On February 8, 2013, Petitioner filed an application for post-conviction relief (PCR) alleging that trial counsel was ineffective for not moving for a mistrial and that trial counsel conspired with the State to "illegally gain jurisdiction of the South Carolina Court of Appeals." App. 784 – App. 794. On October 23, 2013, State filed its Return. App. 790 – App. 795. On June 16, 2014, the State filed an amended Return.

An evidentiary hearing was held before the Honorable Robin D. Stilwell on June 19, 2014. App. 796 – App. 852. Petitioner was represented by Caroline Horlbeck and the State was represented by Assistant Attorney General Karen Ratigan.

Petitioner stated that Scalzo should have objected to the interlocutory appeal as "the State knew very well that [the recording was] illegal and that [it] had no appealability [*verbatim*] to challenge [Judge Pyle's] decision." App. 820, ll. 6-10. Petitioner also stated that Scalzo should have moved for a mistrial before Judges Pyle and Few based on prosecutorial misconduct. App. 822, ll. 5-17.

Scalzo testified that the telephone recording was the most crucial piece of evidence in the case. App. 831, ll. 3-14. Scalzo conceded that the suppression argument was a complicated issue and that the procedure for suppressing the recording at the Court of Appeals had never been done before. App. 832, ll. 21 – App. 833, 16.

On cross-examination, Scalzo admitted that his questioning of Grady likely opened the door for the State to generate testimony about the sexual abuse of Petitioner by his father. App. 842, ll. 3 – App. 844, ll. 25. Scalzo confessed, "I don't know if that opened the door or not. . . . It was discussed by [Petitioner] and I in terms of the overall story, obviously, about what happened in [his]

history. I just simply didn't use that - - I don't know if it's a defense but I just simply didn't use that set of facts as an argument." *Id.*

Order of Dismissal

Petitioner's application was denied by an Order of Dismissal issued on August 12, 2014. App. 853 – App. 861. Specifically, the court ruled that Petitioner had failed to meet his burden of demonstrating how Scalzo was ineffective for failing to request a mistrial from Judges Pyle and Few as Petitioner "failed to articulate a legal issue that would support the granting of a mistrial." App. 857.

ARGUMENT

Petitioner's Sixth Amendment Rights were violated when trial counsel failed to object and move for a mistrial during closing argument where the State posited, in violation of the trial court's ruling on the matter, that Petitioner was predisposed to sexually abuse his daughter because Petitioner stated in a secretly recorded telephone conversation with his daughter that his father had sexually abused him as a child.

Trial counsel was ineffective for failing to object to the State's closing argument, which strongly inferred that Petitioner had the propensity to sexually abuse his daughter because he had been sexually abused by his father. App. 627, ll. 18-22. If trial counsel opened the door to this propensity argument during his cross-examination of Anna Grady by asking if she ever left Minor in the care of Petitioner's father, he was deficient for asking the question. App. 407, ll. 12 – App. 409, ll. 11. Grady responded that she did not allow Petitioner's father to be alone with Minor, and further stated on re-direct examination that she feared Petitioner's father would sexually abuse Minor as he had sexually abused Petitioner. App. 409, ll. 1-11.

Counsel's performance was deficient because he did not have a strategic reason for asking the question, gained nothing in asking it, and did not move to strike Grady's answer as non-responsive. App. 841, ll. 15 – App. 845, ll. 21 Moreover, the State used counsel's cross-examination to introduce its propensity argument which exceeded the limitations the trial court placed on evidence of Petitioner's father's sexual abuse. App. 297, ll. 20-22.

If it were not for trial counsel's deficient performance, the outcome of the proceeding would have been different. Therefore, the PCR court erred in holding that trial counsel provided effective assistance of counsel. App. 566 – 581; *See* U.S. Const. amend. VI; *see also Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims: a PCR applicant must show that counsel's performance was deficient and that the deficiency prejudiced the outcome of the proceedings).

Discussion

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in *Strickland*, 466 U.S. 668. "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted).

"The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant 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*, 466 U.S. at 692.

During closing argument, "[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

Where the defense has opened the door to otherwise inadmissible evidence and invited a reply by the State, such a reply is limited to evidence was necessary to "right the scale." *U.S. v.*

Young, 470 U.S. 1, 13, 105 S.Ct. 1038, 1045 (1985); *see also State v. Allen,* 266 S.C. 468, 224 S.E.2d 881 (1976), *overruled on other grounds by State v. Torrence,* 305 S.C. 45, 406 S.E.2d 315 (1991) (presenting character witnesses, defendant placed his good character with the admitted purpose of establishing his propensity for nonviolence, *defendant placed this specific character trait in issue*)(*emphasis added*). A party cannot complain of prejudice from evidence to which he opened the door. *State v. Robinson,* 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991).

Deficient Performance

Trial counsel's representation was deficient because he opened the door during his cross-examination of Minor's mother to testimony regarding sexual abuse of Petitioner by his father and then failed to object to the State's closing argument that Petitioner, having been a victim of incestuous sexual abuse himself, was more likely to have sexually abused his daughter. App. 627, ll. 18-22; *Strickland*, 466 U.S. 668.

The trial court's pretrial ruling on the admissibility of evidence of Petitioner's experience of sexual abuse by his father was explicitly limited to explaining the context of the recording. App. 297, ll. 7 – App. 298, ll. 24; *State v. Nelson*, 331 S.C. 1, 15, 501 S.E.2d 716, 723 (1998) (only those parts of a confession or statement relevant and material to the crime charged should be received into evidence). Despite having moved before trial to redact all references to Petitioner's sexual abuse by his father, trial counsel asked Grady during cross-examination what members of Petitioner's family were involved in Minor's life. App. 408, ll. 1-20. Minor's mother responded that she did not allow Petitioner to leave Minor alone with his father. *Id.* Trial counsel did not move to strike her answer as non-responsive and abruptly terminated the cross-examination. *Id.*

On redirect the State asked Grady why she did not want Minor around Petitioner's father. App. 409, ll. 1-11. Grady stated that she knew Petitioner's father had sexually abused him as a child

and that she feared he would do the same thing to Minor. *Id.* Counsel objected and was summarily overruled, seemingly because the court thought the defense "opened the door" to this testimony. *Id.* During closing argument, the State stressed to the jury that Petitioner's abuse at the hands of his father, "may explain better why [Petitioner] might have sexually abused his daughter." App. 627, ll. 13-22. This argument went well beyond the limitations set by the trial court in its pre-trial ruling, but drew no objection from trial counsel.

Trial counsel admitted that he had no strategic reason for bringing out information about Petitioner's father while cross-examining Grady. App. 841, ll. 15 – App. 845, ll. 21; *see Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness). Trial counsel conceded that the State used his cross-examination of Grady as way to bring to the jury's attention the sexual abuse in Petitioner's past and that his questioning likely opened the door to that testimony. App. 844, ll. 3-8.

Accordingly, the PCR court erred in finding that counsel's performance was not deficient because counsel was unable to demonstrate how his professed trial strategy was objectively reasonable "under prevailing professional norms." *See Strickland*, 466 U.S. at 687-688, 104 S.Ct. at 2064-2065; *Cherry*, 300 S.C. 115, 386 S.E.2d 624.

Prejudice

As to prejudice, 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." *Strickland*, 466 U.S. at 692. The State elicited damning testimony from Grady on her distrust of Petitioner's father due his sexual abuse of Petitioner. App. 407, ll. 12 – App. 409, ll. 22.

Trial counsel was unable to cure the prejudice caused by the testimony because trial counsel opened the door to it. App. 842, ll. 3 – App. 844, ll. 25. The prejudicial impact of the testimony was

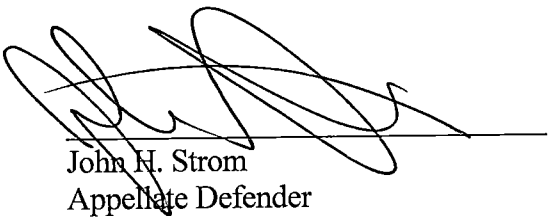
compounded when the State, without objection from trial counsel, portrayed Petitioner's alleged sexual abuse of his daughter as a foreseeable consequence of Petitioner having been sexually abused by his own father. App. 627, ll. 18-22. The State argued that the sexual abuse experienced by Petitioner was unfortunate, but not an excuse for his conduct. In other words, the sexual abuse Petitioner experienced gave him the propensity to sexually abuse his daughter, but that this supposed predisposition in no way excused or diminished his culpability.

The solicitor's improper comments during closing argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." App. 857; *Vaughn v. State*, 362 S.C. 163, 170, 607 S.E.2d 72, 75 (2004) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 642, 94 S.Ct. 1868 (1974)). Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." App. 857; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted).

CONCLUSION

For the foregoing reason, this Court should grant the petition with the ultimate relief of a new trial for Petitioner Samuel L. Whitner.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of May, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

SAMUEL LAMONT WHITNER,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2014-001951

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Samuel Lamont Whitner states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on June 19, 2014. In his opinion seeking certiorari from the order of dismissal is without merit.

3. He 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 him as counsel for Samuel Lamont Whitner.

Respectfully submitted,

John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

This 15th day of May, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

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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 Karen Ratigan, Esquire and Samuel Lamont Whitner, #263066, at Broad River Correctional Institution this 15th day of May, 2015.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of May, 2015.

Barbara Reed (L.S.)

Notary Public for South Carolina
My Commission Expires: October 24, 2021.