

STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal From Edgefield County
The Honorable William P. Keesley, Circuit Court Judge

JUL 9 - 6 2015

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Opinion No. 2015-UP-174 (S.C. Ct. App. filed April 1, 2015)

Appellate Case No. 2015-001342

Tommy S. Adams, Respondent,

v.

STATE OF SOUTH CAROLINA, Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for Petitioner hereby certifies a Petition for Rehearing was filed in the South Carolina Court of Appeals on April 16, 2015 and denied by Order filed May 21, 2015.

QUESTIONS PRESENTED

1. Did the intermediate appellate court err in reversing the PCR Judge in holding counsel was ineffective in failing to object to the admission of Adams' statement to police because it was improper character evidence?

STATEMENT OF THE CASE

Adams was indicted at the September 2003, term of the Edgefield County Grand Jury for Lewd Act on a Child Under Sixteen (2003-GS-19-0416), and Criminal Sexual Conduct with a Minor, First-Degree (2003-GS-19-0418). (App. p.19). James B. Huff, Esq., represented him. (App. p.1-175). On October 12-14, 2005, Adams proceeded to trial and was found guilty as indicted. (App. p.1-174). The Honorable John C. Few sentenced him to confinement for fifteen (15) years for the Lewd Act on a Child Under Sixteen and thirty (30) years for Criminal Sexual Conduct with a Minor—1st Degree. The sentences were ordered to be served consecutively. (App. p.173, lines15-25). Adams filed a Motion for a New Trial on or about June 23, 2006. (App. p.176-182). Judge Few issued an Order denying Adams's Motion for a New Trial on July 10, 2006. (App. p.183).

A timely Notice of Appeal was filed and perfected of Adams' behalf. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Adams, Op. No. 2006-UP-560 (S.C. Ct. App. filed October 10, 2008). (App. p.199). The Remittitur was sent on October 18, 2008.

On February 23, 2009, Adams filed an Application for Post-Conviction Relief. (App. p.200-219). The State filed its Return on July 7, 2009. (App. p.222-226). An evidentiary hearing into the matter was convened on December 2, 2010 at the Lexington County Courthouse. (App. p.260-390). Adams was present at the hearing and was represented by Teresa Norris, Esq. The Respondent was represented by A. West Lee, Esq., of the South Carolina Attorney General's Office. The Honorable William P. Keesley denied and dismissed Adams' Application for PCR by Order dated September

12, 2011. (App. p.441-464).

After a petition for writ of certiorari and return to petition for certiorari were filed, the case was transferred to the South Carolina Court of Appeals. The court of appeals granted the petition for writ of certiorari by order filed July 1, 2013. After oral argument, the court of appeals reversed the PCR judge's denial of relief on April 1, 2015. Adams v. State, Op. No. 2015-UP-174 (S.C. Ct. App. filed April 1, 2015). Petitioner filed a timely Petition for Rehearing, which the court of appeals denied by order filed May 21, 2015.

ARGUMENT

The intermediate appellate court erred in reversing the PCR Judge in holding counsel was ineffective in failing to object to the admission of Adams' statement to police because it was improper character evidence.

Certiorari is warranted because the intermediate appellate court committed certain error in reversing the PCR Judge and holding that Adams met his burden to prove counsel's performance was deficient and ineffective in failing to object to Adams' admissible "turtle comment" statement. Even if the statement was inadmissible to support the intermediate appellate court's conclusion that counsel's performance was deficient, ample probative evidence supports the PCR Judge's finding that Adams' failed to meet his burden to prove Strickland's prejudice prong. The intermediate appellate court's error is further magnified where counsel made the contemporaneous strategic decision to not object under the presumption that Adams' would testify on the defense's behalf and neutralize any inferential taint from the "turtle comment."

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

EFFECTIVE ASSISTANCE OF COUNSEL

For an applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably

effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

The Strickland court noted:

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland, 466 U.S. at 689, 104 S. Ct. at 2065.

STATEMENT OF FACTS

At trial, Investigator Bledsoe testified to statements made by Adams in the non-custodial interview:

Solicitor: What did [Adams] say?

Bledsoe: [Adams] denied the allegations, but he made some odd statements to me that day.

Solicitor: What were those statements?

Bledsoe: [Adams] mentioned something about he talked frankly with his children -- his older children about sex... he told "AW" his older child -- his stepchild -- that "Your cooter belongs to your daddy, and if anybody wants to touch that or bother that, you need to tell them to ask me."

Solicitor: Had you disclosed to him prior to that time what the allegations were against him?

Bledsoe: Yes, sir, I did.

(App.p.67, lines 1-20). At the PCR hearing, counsel testified Adams' statement was admissible because it was a statement given by the accused that could be and was reasonably interpreted as an admission of guilt to the underlying offense. (App.pp.77-8;

p.85). Counsel noted the statement was harmful but was open to a neutral and positive meaning. (App.p.86). Counsel testified, “[the statement] would indicate to me it was more of a father saying, “Don’t let anyone touch you inappropriately” (App.p.336, lines 23-5).

Furthermore, counsel testified to making the tactical decision to “counterpunch” the State’s testimony on Adams’ statement concerning admissions of inculpatory conduct towards the victim by calling Adams’ to testify to the defense’s alternative interpretation. (App.p.336). Counsel reasoned Adams was the witness to address the defense’s interpretation (App.p.336). Counsel testified that as a result of his pre-trial consultations with Adams, they had discussed and had agreed upon the tactical decision to call Adams to testify in the defense’s case-in-chief. (App.pp.334-35). Adams changed his mind and communicated his desire to not take the stand during the defense’s case-in-chief. Counsel noted “matter of fact, I was somewhat surprised that he made the decision not to testify.” (App.p.334, ln. 19-21).

In denying and dismissing Adams’ PCR Action, the PCR Judge found Adams failed to meet his burden to prove Strickland’s deficiency prong on two grounds. First, the PCR Judge rejected Adams’ notion that his statement that “your cooter belongs to your daddy” was inadmissible and did not warrant an objection. Second, and in the alternative, the PCR Judge found counsel’s testimony concerning the tactical decision to not object here constituted valid trial strategy even if the statement had been inadmissible. (App.p.456).

The PCR Judge also found Adams failed to meet his burden to prove Strickland’s

prejudice prong. The PCR Judge announced, “there has been no showing by [Adams] that the outcome of his trial would have been different if this objection had been made.” (App.p.457).

A.

The intermediate appellate court erred in reversing the PCR Judge in finding Adams met his burden of proving counsel’s performance was deficient. Adams’ statement was admissible.

“Generally, only those parts of a confession or statement made to police which are relevant and material to the crime charged should be received into evidence.” State v. Nelson, 331 S.C. 1, 16, 501 S.E.2d 716, 723 (1998). “Under Rule 401, SCRE, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy” State v. Cheeseboro, 346 S.C. 526, 548, 552 S.E.2d 300, 311 (2001). “Unlike a prior bad act, which always raises the risk of an improper inference based on character, a statement is an actual communication of thought which may or may not give rise to an impermissible inference, depending upon what is said and circumstances under which it is said.” State v. Gilchrist, 329 S.C. 621, 629, 496 S.E.2d 424, 428 (1998).

In State v. Cheeseboro, the court held a letter drafted by the defendant was relevant because it established the defendant’s need for money as a motive for murder. Cheeseboro, 346 S.C. at 548, 552 S.E.2d at 311. In State v. Cutro, the court held the memorabilia from the deceased victim’s seized from the defendant was relevant to the State’s theory to show defendant’s motive to gain attention. State v. Cutro, 365 S.C. 366,

618 S.E.2d 890 (2005).

The statement in the present case concerned Adams' conduct towards the child victim on a matter incredibly relevant to the State's case against him: the child victim's sexuality. Adams' contention that the statement was not relevant to the underlying charges is patently absurd. A reasonable facial interpretation shows Adams' comment was material to the evidence and testimony presented at trial. Certainly, a proclamation of dominion and control to an eleven-year old child victim regarding her sexual autonomy implied an ability to stifle disclosure. Furthermore, the child victim testified she feared retribution for non-compliance, let alone reporting the abuse to her mother, an older sibling, or an adult at school. (App.p.41).

The solicitor argued in closing that the Adams' statements evidenced a zealous motive to safeguard dominion and control over the child victim's sexual autonomy necessary for exploitation. The solicitor summarized the State's case against Adams as a "betrayal of [child victim]'s trust." (App.pp.138-42; p.142, ln 9-10). Alternatively, the defense's case made Adams' character an issue in the case from opening statement on and opened the door to the admissibility of the statement on other grounds. Thus, the PCR Judge made the correct finding that an objection here lacked merit for numerous reasons.

Second, the probative value of the statement was not substantially outweighed by the prospect of unfair prejudice. Here, the PCR Judge correctly found "the cooter comment" was presented in its entirety and was not presented out of context. The State submits context shows the statement was not prejudicial. A general desire for a parent to

safeguard a child's virtue certainly does not insinuate criminal behavior.¹ See State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005) ("collecting memorabilia of a deceased child, while perhaps uncommon, is not behavior that itself indicates a bad character."). Therefore, the State requests this Court grant certiorari to reverse the intermediate appellate court and affirm the PCR Judge's finding that Adams' failed to meet his burden to prove counsel rendered deficient performance that resulted in prejudice.

B.

The intermediate appellate court erred in reversing the PCR Judge's factual finding that Adams' failed to meet his burden on Strickland's prejudice prong where there is ample probative evidence to support the PCR Judge's factual finding.

The intermediate appellate court held "[f]inally, we find there was not overwhelming evidence of Adams' guilt; therefore the PCR Court erred in finding Adams failed to prove prejudice." On the relevant issue, the PCR Judge found that "Applicant has failed to show that he was prejudiced by counsel's alleged ineffectiveness." (App.p.456). The intermediate appellate court abused its discretion here when it departed from the standard of review on whether there is probative evidence to support the PCR Court's finding of fact. See Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996) (the Court will not uphold the findings of the PCR court if no probative evidence supports those findings). Thus, the intermediate appellate court's holding constituted an improper

¹ The word "cooter" is a red herring. Any interchangeable synonym of a child's genitals would not change the analysis here. The State posits that the "turtle word" probably holds substantially less shock value in rural Edgefield County than it held to the intermediate appellate court. Simply, Petitioner cannot cry outrage about the "turtle word" when he chose the verbiage when being questioned about the offenses by law enforcement. See U.S. v. Pellerito, 878 F.2d 1535, 1543 (1st Cir. 1989) ("If counsel was ineffective in any sense, it was only because the client rendered him so, first by keeping Noriega in the dark, and then, by refusing to heed his advice. That is not the sort of "ineffectiveness" for which relief can be granted")

burden shift to the State. In the PCR forum, the applicant holds the burden to prove by a preponderance of evidence that his attorney's alleged error undermined the PCR court's confidence in the outcome of the trial. Jackson v. State, 355 S.C. 568, 570, 586 S.E.2d 562, 563 (2003).

Ample Probative evidence supports the PCR Judge's finding that Adams failed to meet this burden to prove Strickland's prejudice prong. The State's case hinged on the credibility of the minor victim's testimony. The Trial Judge made the following comment during sentencing: "As I sit here today, however, I completely agree with the verdict of the jury. I am convinced that these acts took place." See Cutro, 332 S.C. at 117, 504 S.E.2d at 332 ("The trial judge, not [the intermediate appellate court], is in the best position to be the arbiter of [the witness'] credibility"). Furthermore, counsel presented other evidence to show that Adams was a commendable and caring parent; creating a counter-inference that Adams' statement evidenced his concern over the chastity of his children. Albeit indirectly, counsel also elicited testimony that would have neutralized the "turtle comment's" potential taint on an Edgefield County jury. Therefore, the State requests this Court grant certiorari to reverse the intermediate appellate court and affirm the PCR Judge's finding that Adams' failed to meet his burden to prove counsel rendered deficient performance that resulted in prejudice.

C.

Last, the intermediate appellate court erred in holding that counsel's decision to not object to the admission of the "turtle comment" was outside the ambit of valid trial strategy.

Counsel made a sound tactical decision to not object to Adams' statement by eliciting testimony from Adams on the matter. Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). As counsel astutely articulated at the evidentiary hearing before the PCR Judge, the statement at issue held two objectively reasonable interpretations. Certainly, Adams was the appropriate witness to testify to his intent in making the statement to support his version that it showed he was apparently a good parent that cared deeply about the chastity of his children.

Arguendo, had the statement been inadmissible, counsel's strategy to not object in favor of "counterpunching" by calling Adams as a defense witness to explain his version of the context of the statement constituted valid trial strategy that bars an assignment of deficient performance. See Bullock v. Carver, 297 F.3d 1036 (10th Cir. 2002) (emphasis added) (counsel's failure to object to molest victim's statements and hearsay was not ineffectiveness where he believed the objection would be futile and where the statements served the interest of showing allegedly suggestive interview techniques).

The intermediate appellate court cites to Dawkins v. State² to support its holding on the propriety of counsel's strategy in not objecting: "[f]urther, we find trial counsel's explanation he did not object to the statement because he did not want to waive a red flag before the jury was not a reasonable trial strategy because the issue could have been litigated outside of the presence of the jury." Id. Yet, Dawkins reiterates this Court's long held pronouncement that a defense attorney's decision to not object to inadmissible evidence out of fear of drawing further attention to inadmissible evidence, standing alone,

² Dawkins v. State, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001).

will not provide safe harbor from an assignment of deficient performance under Strickland. Id. The State posits that the intermediate appellate court's holding here is contrary to the controlling case, Rhodes v. State, 349 S.C. 25, 33, 561 S.E.2d 606, 610 (2002), where this Court held that the attorney's decision to not object to inadmissible evidence in favor of attacking and utilizing its admission in the defense's presentation of its case constituted a valid trial strategy and effective assistance of counsel.

[Rhodes' attorney] stated at the PCR hearing he purposely sought to convert this evidence to petitioner's advantage by portraying it as rumor. He brought this out in his cross-examination of Thompson and based much of his closing argument on the idea that the victims' identifications stemmed purely from rumor and innuendo.

Id. (emphasis added). In the present case, counsel made a similar decision to forgo an objection to admissibility in order to attack and convert the State's evidence as a sword for the defense's case.

What is lost in translation to the intermediate appellate court was that counsel's valid trial strategy was ultimately unrealized because of Adams' unforeseen decision to not testify. The long standing principle has governed PCR jurisprudence that a defense attorney does not hold a duty of clairvoyance to anticipate either changes of law or facts during challenged representation. Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). Strickland explicitly states "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690 (emphasis added); Phoenix v. Matesanz, 233 F.3d 77, 84 (1st Cir. 2000) (strategic choices are given greater latitude during trial when time is short.).

After numerous pre-trial consultations, strategy sessions, and countless hours of preparation, Adams made an impromptu decision to not testify. Adams has only himself to blame on this matter. Therefore, the State requests this Court grant certiorari to reverse the intermediate appellate court and affirm the PCR Judge's finding that counsel's decision to not object here constituted valid trial strategy here.

Accordingly, the intermediate appellate court erred in concluding Adams met his burden of proving counsel was either deficient or ineffective in failing to object to Adams' admissible statement. Even if the "turtle comment" was inadmissible, the test on the bloody pieces of glass from the crime scene. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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By: 
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July 6, 2015

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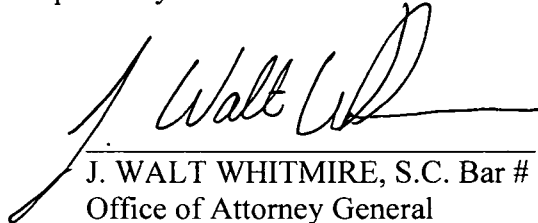
State of South Carolina, Petitioner.

CERTIFICATE OF SERVICE

I, J. Walt Whitmire, certify that I have today served the within Petition for Writ of Certiorari and Appendix upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Ms. Teresa L. Norris, Esquire
Blume Norris & Franklin-Best, LLC
900 Elmwood Ave., Ste. 101
Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served.
This 6th day of July, 2015.



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