

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Berkeley County
G. Thomas Cooper, Circuit Court Judge

S.C. Supreme Court

TYRONE MOORE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002758

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err by finding trial counsel provided effective representation where counsel failed to seek a ruling from the trial judge on whether the State could introduce Petitioner's prior convictions for lewd act upon a minor and criminal sexual conduct with a minor to impeach his credibility, Petitioner did not testify at trial because counsel advised him that the State could use his prior criminal record to impeach his credibility, and if Petitioner had testified at trial, he would have explained that the allegations against him were not true?

STATEMENT OF THE FACTS

On May 14, 2008, the Berkeley County Grand Jury indicted Petitioner for two counts of lewd act upon a minor. App. 434. On July 27, 2009, Petitioner's case proceeded to a jury trial before the Honorable R. Markley Dennis. App. 1. Eduardo K. Curry represented Petitioner. Debi Herring-Lash and Kristen Neely represented the State. App. 1.

After a two-day trial, the jury found Petitioner guilty of both counts lewd act upon a minor. App. 311 – 312. Judge Dennis sentenced Petitioner to fifteen years' imprisonment on each count, to run consecutively. App. 325. Petitioner appealed his convictions and sentence. Eduardo Curry represented Petitioner on appeal. App. 336.

On June 6, 2012, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentence in an unpublished opinion. See State v. Moore, Op. No. 2012- UP-344 (S.C. Ct. App filed June 6, 2012). The remittitur was issued on June 25, 2012. App. 336.

On January 18, 2013, Petitioner filed a PCR application. App. 328. On October 17, 2013, Respondent filed its return requesting an evidentiary hearing. App. 335. On September 8, 2014, a PCR hearing was held before the Honorable G. Thomas Cooper, Jr. App. 340. Rodney D. Davis represented Petitioner. Ashleigh R. Wilson represented the State. App. 340.

On December 15, 2014, Judge Cooper issued an order of dismissal. Petitioner appealed the judge's order. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge err by finding trial counsel provided effective representation where counsel failed to seek a ruling from the trial judge on whether the State could introduce Petitioner's prior convictions for lewd act upon a minor and criminal sexual conduct with a minor to impeach his credibility, Petitioner did not testify at trial because counsel advised him that the State could use his prior criminal record to impeach his credibility, and if Petitioner had testified at trial, he would have explained that the allegations against him were not true.

Facts at Trial

At the time of his trial, Petitioner was serving as the full-time, senior pastor of Full Word Ministries in Berkeley County. App. 381, lines 2 – 8. The State alleged that, between January 2004 and September 2006, Petitioner committed a lewd act upon two male minors who attended his church. App. 435 – 438. Both alleged victims and their mothers testified during trial.

Minor one was between eleven and twelve years old at the time of the alleged assault. App. 115, lines 14 – 15. Minor one would visit Petitioner's home in Berkeley County after church, sometimes spending the weekend at the home. App. 74 – 75. Minor one, as well as other children who visited Petitioner's home, would play games and watch movies. Petitioner was a "father figure" to minor one. App. 119, lines 14 – 20.

According to minor one, Petitioner bought him school shoes and "a game station." App. 80, lines 10 – 16. One night while minor one was asleep on the couch at Petitioner's house, Petitioner allegedly fondled minor's private area. App. 76 – 77. However, minor one did not tell anyone about this alleged assault until he was questioned by officers at his school on December 11, 2006. App. 98, lines 1 – 24. Minor one gave a written statement to police on that day. App. 86 – 88.

Minor two also spent time at Petitioner's home after church. According to minor two, he and Petitioner would play board games "and did a lot of stuff, activities." App. 126 – 127. Minor two claimed that one night, while asleep on the couch at Petitioner's home, he woke up to find Petitioner sitting beside him and touching his private area. App. 131, lines 11 – 24. Minor two stated that he got up from the couch and locked himself in Petitioner's twins' bedroom. App. 132, lines 1 – 23. Like minor one, minor two did not come forward until being questioned by officers at his school on December 12, 2006. App. 183 – 184. Minor two gave police a written statement on that day. App. 138. There was no forensic evidence in the case. App. 393, lines 1 – 7. Petitioner did not testify. App. 237 – 239.

During sentencing, the solicitor informed the judge that Petitioner had been convicted of lewd act upon a minor in 1989 and was sentenced to six years' imprisonment suspended to fifteen months confinement and two years of probation. App. 315, lines 14 – 17. In 1991, Petitioner was convicted of two counts of criminal sexual conduct with a minor in the second degree and was sentenced to eighteen years' imprisonment with four years of probation. App. 315, lines 18 – 23.

PCR Hearing

Defense counsel testified during the PCR hearing. App. 347. Counsel admitted that he was aware of Petitioner's prior convictions of lewd act in 1989 and criminal sexual conduct with a minor in 1991. Counsel stated that he "covered" the prior convictions with Petitioner and his normal standard was to discuss a client's prior convictions and the possibility that the State will use them for impeachment should the client testify at trial. App. 365, lines 7 – 23.

Defense counsel further explained:

"If in fact my client was going to testify, then I would've gotten a ruling from the Judge to see whether or not they would be able to use his prior criminal record to impeach.

If he's not going to testify, I wouldn't need a ruling from the judge in order to do that because I won't be exposing him to the potential liability."

App. 366, lines 3 – 12.

When asked by PCR counsel whether he could have "moved to try to block the two convictions from being used for impeachment purposes because of the age of the convictions," defense counsel responded:

"Technically, if he was going to testify, yes."

App. 368, lines 3 – 20.

Petitioner testified during the PCR hearing. App. 380. When asked by PCR counsel why he did not testify at trial, Petitioner explained to the court:

"[I] decided not to testify at the counsel of my lawyer. My lawyer emphatically told me at the onset that it would not be wise for me to testify based on my prior—previous record because I really wanted to state my side and to state the truth of the whole situation. And I know that the situation was sensitive and I told him that I wanted to testify and he said it wouldn't be good to testify because of my previous record, that they could use it against me. This was his exact words, they could bring it up and begin to talk to you about that it could prejudice the jurors. And so, based on that, that's why I made the decision not to testify."

App. 386, lines 9 – 23.

If Petitioner had not followed defense counsel's advice to not testify in his defense, Petitioner would have explained that the two minors were cousins and they visited his home because they had a "relationship" with his children. App. 387 – 388. Petitioner would have testified that he never asked the minors to come to his home. He stopped letting the two minors visit because of an altercation that occurred between one of the minors and Petitioner's daughter. App. 388. Petitioner explained that the allegations against him arose after he banned the minors

from his home. App. 388 – 389. Petitioner would have testified that the allegations simply “were not true.”

At the close of the PCR hearing, the judge was “concerned about this issue of the defendant’s prior record.” App. 405. The judge asked defense counsel:

“Did you believe that the record constituted impeachable offenses that if he were to take the stand could have been used against him?”

Defense counsel responded:

“I did not know if it would come in under prior bad acts or if it would be outside the ten year rule.”

App. 405, lines 8 – 10.

The PCR judge further inquired:

“[H]ow could he possibly make the decision whether to testify or not if he doesn’t know what the state has to confront him with to impeach his testimony.”

App. 67, line 25 – App. 68, line 2.

Finally, the judge stated:

“All you had to do was ask the Judge whether or not those offenses, they’re part of the record, could be used to impeach him. And then, he could make an informed decision about whether to testify or not, don’t you think?”

App. 407, lines 10 – 14.

Counsel’s answer did not address the judge’s question. App. 407, line 15 – App. 408, line 21.

Order of Dismissal

Despite expressing his concern, the PCR judge dismissed Petitioner’s application. App. 433. The judge found that Petitioner’s allegation that trial counsel failed to properly advise him of his right to testify at trial was “wholly without merit.” App. 430. The judge wrote that Petitioner

“ha[d] failed to carry his burden of proving counsel violated his right to testify” and Petitioner “was fully advised by both the Court and trial counsel of his right to testify at trial.” App. 431.

The PCR judge also found that Petitioner “was fully advised that his prior record could be used by the State to impeach him if he chose to testify at trial” and Petitioner “knew it was a possibility.” App. 432.

Discussion

The PCR judge erred by finding trial counsel provided effective representation where counsel failed to seek a ruling from the trial judge on whether the State could introduce Petitioner’s prior convictions for lewd act upon a minor and criminal sexual conduct with a minor to impeach his credibility, before Petitioner decided not to testify. Petitioner did not testify at trial because counsel advised him that the State could use his prior criminal record to impeach his credibility. If Petitioner had testified at trial, he would have explained that the allegations against him were not true.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, “whether 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,” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel’s assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. In analyzing this prong, a court will use an objective standard of reasonableness. *Id.* Under this prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688).

Second, the applicant must show that counsel's "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.'" Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

A criminal defendant has a fundamental right to testify or not testify during his trial. State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013) (citing Rock v. Arkansas, 483 U.S. 44, 52 (1987)). "Even more fundamental to a personal defense . . . is an accused's right to present his own version of events in his own words." Rock, 483 U.S. at 52. However, a defendant cannot "be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V; S.C. Const. art. I, § 12.

A criminal defendant's waiver of his Fifth Amendment right against self-incrimination "must be knowing and voluntary." The decision whether or not to testify must be made with knowledge of the consequences of either choice. Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). A defendant who does not testify "forgoes the opportunity to tell the jury his version of events." *Id.* Yet, if a defendant does testify, "he subjects himself to cross-examination, including possible impeachment with prior convictions." *Id.*; Rule 609, SCRE.

Under Rule 609 (a) (2), SCRE, "evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment," for purposes of attacking the witness's credibility. Evidence of a conviction under Rule 609, SCRE, "is

not admissible if a period of more than ten years has elapsed” since the date of conviction or of the release from confinement, “whichever is the later date.” Rule 609 (b), SCRE. Such a conviction may be admissible if “the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.” Rule 609 (b), SCRE. Relevant and otherwise admissible evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Rule 403, SCRE.

The admission of evidence of a similar offense “often does little to impeach the credibility of a testifying defendant while undoubtedly prejudicing him.” State v. Colf, 332 S.C. 313, 504 S.E.2d 360, 361 – 62 (Ct. App. 1998).

See State v. Bryant, 369 S.C. 511, 516 – 517, 633 S.E.2d 152, 155 (2006) (holding that a trial judge should consider the following factors when determining whether prior convictions are admissible: (1) The impeachment value of the prior crime; (2) The point in time of the conviction and the witness’s subsequent history; (3) The similarity of the past crime and the charged crime; (4) The importance of the defendant’s testimony; and (5) The centrality of the credibility issue.).

Here, Petitioner had been convicted of lewd act upon a minor in 1989 and was sentenced to six years suspended to fifteen months imprisonment and two years of probation. Since Petitioner’s trial took place in 2009, the lewd act conviction fell outside of the ten year period outlined in Rule 609 (b) and, therefore, was inadmissible.

Petitioner had also been convicted of two counts of criminal sexual conduct with a minor for which he served eighteen years in prison and four years of probation. Petitioner was released on August 22, 2000, “which would have put the conviction within the ten year time period outlined in Rule 609, SCRE.” App. 432, FN 2. Because the criminal sexual conduct with a minor convictions were similar to the lewd act upon a minor for which Petitioner was on trial, they were explosively

prejudicial and would not have been allowed. In addition to lacking impeachment value, the probative value of the prior convictions was substantially outweighed by their prejudicial effect, which rendered them inadmissible under Rule 403, SCRE.

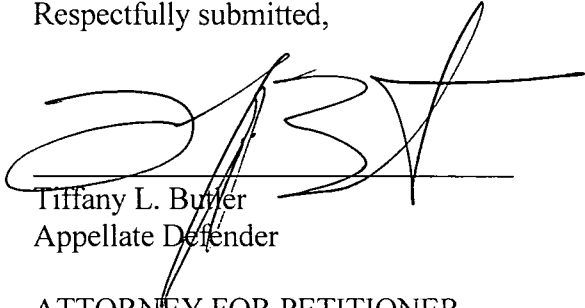
Counsel's failure to request an on-the-record balancing test to determine whether any of Petitioner's prior sexual offenses was admissible deprived Petitioner of his right to testify at trial. While counsel did inform Petitioner that there was a possibility that the State could use his prior convictions for lewd act upon a minor and criminal sexual conduct of a minor to attack his credibility, counsel made no attempt to obtain a ruling from the trial court to determine whether those convictions would be admissible. Because Petitioner did not know for certain whether the State would be allowed to introduce the prior convictions, he could not properly consider the advantages and disadvantages of testifying on his own behalf. Petitioner had insufficient "knowledge of the consequences" of testifying. See Brown, supra.

The PCR judge expressed concerns about the fact that there was no ruling on the admissibility of Petitioner's prior record, as evidenced by his questions during the PCR hearing. Despite the PCR court's credibility finding, Petitioner only had to persuade **one** juror at trial. The only evidence the State presented against Petitioner were the two minors' statements. There was no forensic evidence. There were no independent witnesses. Had Petitioner testified and explained his version of events, there is a reasonable likelihood that one juror would have entertained reasonable doubt.

CONCLUSION

For the reasons argued above, Petitioner Tyrone Moore respectfully requests this Court to grant his petition for writ of certiorari, with the ultimate relief of a new trial.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender
ATTORNEY FOR PETITIONER

This 27th day of July, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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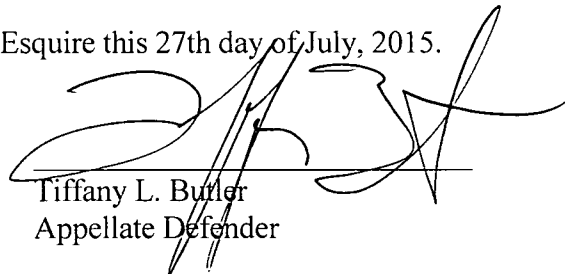
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002758

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 J. Rutledge Johnson, Esquire this 27th day of July, 2015.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of July, 2015.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.