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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Charleston County

G. Thomas Cooper, Circuit Court Judge

JEREMIAH TURNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000127

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance for failing to object to the admission of a videotape of a forensic interview on the basis that its admission violated the Confrontation Clause because the complainant was no longer available for cross-examination?

STATEMENT

On March 2, 2009, a Charleston County grand jury indicted petitioner for four counts of first-degree criminal sexual conduct with a minor and one count of lewd act on a minor. App. 747; 756-774. On April 5, 2010, petitioner was tried before the Honorable J.C. Nicholson, Jr. App. 1. Debbie Herring-Lash and G. Rutledge Durant represented the State. App. 1. Andrew D. Grimes and Megan Ehrlich represented petitioner. App. 1. The jury convicted petitioner on all counts. App. 665, l. 18 – 667, l. 5. Judge Nicholson sentenced petitioner to concurrent terms of thirty year's imprisonment for first-degree CSC and fifteen years' imprisonment for lewd act. App. 674, ll. 2 – 21. Petitioner's appeal pursuant to Anders v. California, 386 U.S. 738 (1967) was dismissed. State v. Turner, Op. No. 2012-UP-362 (S.C. Ct. App. June 13, 2012). Supp. App. 1 – 15. Tristan M. Shaffer represented petitioner on appeal. Supp. App. 1 – 15.

On July 16, 2013, petitioner filed a PCR application. App. 677. On September 10, 2014, a hearing was held before the Honorable G. Thomas Cooper, Jr. App. 690. James K. Falk represented petitioner. App. 690. Ashleigh R. Wilson represented the State. App. 690. On December 15, 2014, Judge Cooper denied petitioner's PCR application. App. 746. This petition follows.

ARGUMENT

Trial counsel provided ineffective assistance for failing to object to the admission of a videotape of a forensic interview on the basis that its admission violated the Confrontation Clause because the complainant was no longer available for cross-examination.

In this sexual abuse case, the complainant, Minor, accused petitioner of molesting her. App. 209, l. 9 – 221, l. 15. Petitioner was Minor's mother's boyfriend. App. 208, ll. 8 – 9. Minor claimed petitioner forced her into oral and anal sex. App. 209, l. 9 – 221, l. 15. Minor moved to Florida after her mother found out about the alleged abuse. App. 223, ll. 12 – 14.

Minor was the State's first witness. App. 201, ll. 22 – 25. The trial recessed for the evening after Minor finished her direct testimony. App. 225, l. 5 – 226, l. 18. After the jury left the courtroom, the solicitor expressed a concern that Minor's mother would lose her job if she did not show up for work the next day. App. 226, ll. 19 – 23. The trial judge stated he would send notice to her employer that she was in court pursuant to a subpoena and told her to be present in the morning. App. 226, l. 24 – 227, l. 23.

The next morning, Minor took the stand for cross-examination. App. 229, ll. 14 – 23. Trial counsel asked Minor about "making a movie" in Florida with her counselor. App. 237, ll. 16 – 22. She asked Minor whether she remembered promising to tell the truth in the "movie" she made in Florida. App. 237, l. 25 – 238, l. 5. Trial counsel asked whether she practiced answering questions with her mother before going to make the "movie." Tr. 240, l. 21 – 242, l. 24. Trial counsel did not cross-examine Minor about any specific statements she made on the forensic interview video or any inconsistencies between what she said on the video and her testimony at trial.

Minor's mother was the State's second witness. App. 254, l. 18 – 255, l. 10. The mother testified that the forensic interview was originally scheduled to be done in Charleston, but the family moved before it could be done so it was conducted in Florida. App. 265, l. 24 – 267, l. 19.

Before the lunch break, the trial judge asked the State if it intended to call "the lady that took the video." App. 310, ll. 9 – 10. The solicitor indicated that the forensic interviewer would be their "next to last witness" and that the State would finish its case the next day. App. 310, l. 11 – 311, l. 15. The trial judge told defense counsel not to plan on calling any witnesses for the rest of the day. App. 311, ll. 13 – 18.

After lunch, the State changed its plan and stated its intention to call the forensic interviewer as its next witness and introduce the video. App. 312, ll. 1 – 22. Trial counsel moved for parts of the video to be stricken because it was inconsistent with Minor's trial testimony. App. 313, l. 25 – 315, l. 9. In making its ruling, the trial judge stated the defense already "had the opportunity to cross examine the child." App. 315, ll. 6 – 8. The trial judge then stated, "And I understand she's not here, so you can't recall her for cross examination of the—of the inconsistencies." App. 315, ll. 10 – 15.

At the PCR hearing, trial counsel testified that even though he was not certain, he believed that Minor had left to return to Florida at this point in the trial. App. 698, ll. 4 – 11. When asked if he could point to anywhere in the trial transcript where he had objected to Minor leaving, trial counsel answered that he would not have objected to the child leaving because he doubted he would have wanted to call her as a witness. App. 699, l. 12 – 699, l.15. Trial counsel ultimately agreed it appeared Minor was absent from the trial before the forensic interview was introduced. App. 715, ll. 4 – 5.

After the trial judge denied the defense's objection to the video on an evidentiary basis and motion to redact, trial counsel then objected on the basis that the video violated the Confrontation Clause. App. 323, ll. 4 – 23. Trial counsel's entire argument was: "Because it is a new statute, I would also object that it does violate the confrontational clause by bringing the video—" App. 323, ll. 17 – 19. The trial judge immediately interrupted, stating, "You had her earlier. You had all the confrontation you wanted." App. 323, ll. 20 – 21. The trial judge then immediately denied the motion after trial counsel stated, "I understand." App. 323, ll. 22 – 23. When asked if there was anything else he wanted to put on the record, trial counsel answered, "No sir." App. 323, l. 25 – 324, l. 2.

At the PCR hearing, petitioner raised the issue of trial counsel's failure to make a specific argument under the Confrontation Clause because Minor was no longer available for cross-examination. App. 694, ll. 1 – 7. App. 698, l. 4 – 699, l. 24. App. 714, l. 3 – 715, l. 13. In his opening statement, petitioner told the PCR court that he would focus on possible arguments that could have excluded the forensic interview. App. 694, ll. 1 – 7. Trial counsel admitted at PCR that he did not make any argument about the unavailability of Minor and the Confrontation Clause to exclude the video. App. 714, l. 3 – 715, l. 13. The PCR judge denied relief on this ground, finding that trial counsel "objected to the admissibility of the video on the basis that it violated the Confrontation Clause." App. 751.

The PCR court erred in denying relief on this ground. Trial counsel was ineffective for failing to make his Confrontation Clause argument with sufficient specificity for it to be raised on appeal. A party must clearly present his grounds at trial to preserve it for appeal. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). The ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial. State v. Smith, 337 S.C. 27,

522 S.E.2d 598 (1999). In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912 – 13 (Ct. App. 2004).

The fact that this issue was not preserved for appeal is further indicated by the fact that appellate counsel filed an Anders brief. The failure to preserve an issue for appeal constitutes ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 746 S.E.2d 41 (2013). In McHam, trial counsel failed to make a contemporaneous objection after losing a motion in limine. Id. Appellate counsel filed an Anders brief. Id. The State attempted to argue that no prejudice existed because of the Anders review. Id. This Court rejected that argument, stating that under the Anders procedure, the court reviews the entire record "for any *preserved* issues with potential merit." Id. (emphasis in original). The McHam Court held that trial counsel's performance was deficient. Id. Just as in McHam, trial counsel's failure to preserve this issue for appeal constitutes deficient performance. See Strickland v. Washington, 466 U.S. 668, 687 (2011).

Petitioner was prejudiced by the failure to preserve this issue. Petitioner must show 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). The Confrontation Clause provides that a criminal defendant shall have the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. See also Crawford v. Washington, 541 U.S. 36, 53-54 (2004). The video of the forensic interview was clearly testimonial evidence. Davis v. Washington, 547 U.S. 813 (2006). Because the child was unavailable for cross-examination at the time the video was introduced, it should have been excluded pursuant to the Confrontation Clause.

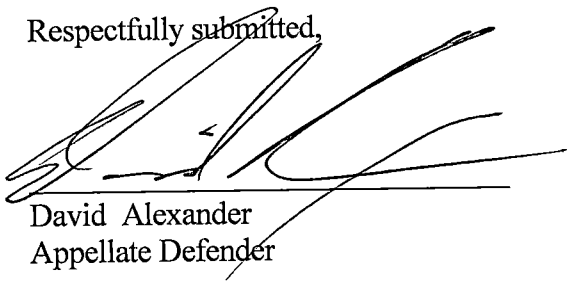
The Supreme Court's recent decision in State v. Anderson, Op. No. 27588, Shearouse Adv. Sheet No. 30 (Aug. 5, 2015), does not preclude this argument. In Anderson, the defendant argued the admission of the videotape was barred by the Confrontation Clause because the child was not recalled by the State after the videotape was played, violating Maryland v. Craig, 497 U.S. 836 (1990). Id. The Court rejected this constitutional challenge to the admission of the video. Id. The basis for the Court's ruling was that appellant could call the child as an adverse witness. Id.

Unlike in Anderson, petitioner could not call Minor as an adverse witness because she was gone. The trial judge recognized that Minor was gone, but ruled that petitioner "had all the confrontation you wanted." App. 323, ll. 20 – 21. Trial counsel should have raised the Confrontation Clause issue with the specific ground that Minor was absent and unavailable for cross-examination. The failure to do so constitutes ineffective assistance of counsel that prejudiced petitioner. This Court should grant certiorari with the ultimate relief of a new trial.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of reversing petitioner's conviction and granting him a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of August, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
G. THOMAS COOPER, CIRCUIT COURT JUDGE

JEREMIAH TURNER,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jeremiah Turner 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 September 10, 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 Jeremiah Turner.

Respectfully submitted,

David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 13th day of August, 2015

STATE OF SOUTH CAROLINA

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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 J. Rutledge Johnson, Esquire and Jeremiah Turner, #340197, at Broad River Correctional Institution this 13th day of August, 2015.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day
of August, 2015.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: July 23, 2023.