

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Letitia H. Verdin, Circuit Court Judge

RECEIVED

OCT - 7 2015

S.C. Supreme Court

JOSEPH PAUGH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000072

PETITION FOR WRIT OF CERTIORARI

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX.....1

ISSUE PRESENTED2

STATEMENT3

ARGUMENT8

CONCLUSION11

ISSUE PRESENTED

Whether Petitioner's Sixth Amendment rights to the effective assistance of counsel were violated where the PCR court erroneously ruled that defense counsel offered a strategic reason for failing to move for a mistrial based upon the solicitor's deliberately inflammatory single question cross-examination of Petitioner when defense counsel could not recall why he did not move for a mistrial, thus, there was no evidence to support the ruling of the PCR court?

STATEMENT

Introduction

Petitioner's daughter ("Minor"), who was sixteen-years-old at the time of trial, belatedly maintained that her father had sexually abused her (attempted penetration and oral sex) on several occasions when she was younger. App. 59 - 63. Minor claimed that the sexual abuse began when she was five years old and stopped when she was eleven years old because her father moved to Baltimore, Maryland, following her parents' divorce. *Id.*; App. 70 - 72.

Indictment

On August 12, 2009, Petitioner was indicted by the Greenville County Grand Jury for one count of first degree criminal sexual conduct with a minor. App. 374 - 375.

Trial

On October 13 - 14, 2010, Petitioner proceeded to trial before the Honorable D. Garrison Hill and a jury. Christopher D. Scalzo represented Petitioner. The State was represented by Assistant Solicitor Bryna S. Seay.

Trial Testimony of Minor

Minor testified that when she turned fourteen, her father called to wish her a happy birthday and told her that "he was having another kid." App. 71, ll. 17 - 72, ll. 10. Minor also testified that her father told her: "I'm having a little girl, but I'm not going to love her no more than I love you." *Id.* Minor claimed that this statement immediately made her think about how she would not be able "to protect her" half-sister. *Id.*

Minor maintained that the next day she was staying at her grandmother's home and that she told her grandmother that "Joe had molested me." App. 72, ll. 23-24. Minor also claimed that her grandmother "believed [her] right from the bat." *Id.* Minor testified that her grandmother was the

first person she had ever told this information and that her grandmother subsequently notified the police. App. 72 - 74.

Minor claimed that she was afraid of her father because she claimed he threatened her; if she told anyone about the alleged sexual abuse, he would have DSS take her away from her mother and grandmother, and that he would kill her. App. 63 - 64.

Trial Testimony of Dr. Nancy Henderson

Dr. Henderson examined Minor following her disclosure of the alleged abuse. On direct-examination, Dr. Henderson testified that she obtained Minor's "medical history" and that Minor had indicated to her during the medical examination that she had been sexually assaulted. App. 120, ll. 1 - 121, ll. 19.

Dr. Henderson also testified that Minor's medical evaluation was normal, but that Minor's normal exam still could be consistent with the medical history of sexual assault in her case because "[i]n my experience, as well as in the medical literature, the majority of time children will have normal exams when they're evaluated for child sexual abuse." App. 156, ll. 4 - 157, ll. 8.

On cross-examination, Dr. Henderson testified that in obtaining Minor's "medical history," she did not refer to any of Minor's prior medical records or contact Minor's pediatrician. App. 158, ll. 15 - 160, ll. 10. Instead, Dr. Henderson relied solely on what Minor had told her and the physical examination, which was normal (no physical evidence present). *Id.*

Trial Testimony of Petitioner

Petitioner denied sexually abusing Minor. App. 209, ll. 5-10. He testified that he and his ex-wife, Minor's mother, had a volatile marriage. App. 211, ll. 8-22. Petitioner also recounted that Minor's mother had attempted to hold him in contempt for failure to pay child support. App. 211, ll.

23 - 213, ll. 14. Petitioner explained that he only had an eighth grade education and was frequently unable to pay the full amount of child support. App. 206, ll. 23-25; App. 208, ll. 15 - 209, ll. 2.

On cross-examination, the solicitor demanded "*[h]ow do you look at yourself in the mirror every day after what you did to your daughter.*" App. 220, ll. 9-10. (*emphasis added*). After the trial judge sustained defense counsel's contemporaneous objection, the solicitor stated, "I withdraw the question . . . And I have no further questions." *Id.* at ll. 13-14. Defense counsel then replied, "I don't have any redirect, Judge." *Id.* at ll. 10. Defense counsel did not move for a mistrial.

Direct Appeal

On June 21, 2012, Appellate Defender Dayne C. Phillips, filed a brief on Petitioner's behalf in the South Carolina Court of Appeals. App. 277 - 292. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence by way of an unpublished opinion. *State v. Paugh*, Op. No. 2012-UP-659 (S.C. Ct. App. filed December 19, 2012); App. 318 - App. 319.

PCR Application

On November 19, 2013, Petitioner filed an application for post-conviction relief (PCR) asserting that trial counsel was ineffective for, among other allegations, failing "to object to the Assistant Solicitor's improper comment and [failing] to request a mistrial thereafter." App. 321 - 337. The State filed a return on May 28, 2014. App. 338 - 341.

PCR Evidentiary Hearing

An evidentiary hearing was held before the Honorable Letitia H. Verdin on October 22, 2014. App. 344 - 362. Brian P. Johnson represented Petitioner. Senior Assistant Deputy Attorney General Karen C. Ratigan represented the State. Petitioner and trial counsel, Christopher Scalzo, testified at the evidentiary hearing.

Testimony of Petitioner

Petitioner recalled that the State's only question on cross-examination was, "[h]ow do you look at yourself in the mirror, every day after what you did to your daughter?" App. 350, ll. 11-12. Petitioner did not believe that defense counsel objected to this improper and highly inflammatory question, nor did counsel move for a mistrial. *Id.* at ll. 13-21. Petitioner testified that the State's case alleged that he repeatedly sexually abused Minor from 1998 until 2004. App. 350, ll. 22 - App. 351, ll. 22.

Testimony of Defense Counsel

When asked, defense counsel agreed that Petitioner's case was a "he said, she said swearing match" and that the State had no physical evidence of the abuse. App. 355, ll. 11-25. Defense counsel did not specifically remember if he attempted to narrow the six year time frame alleged by the State, but noted that it would have been his standard practice to pressure the State into committing to a shorter timeframe. App. 356, ll. 4-22.

Defense counsel stated that he did object to the solicitor's only cross-examination question and that the solicitor agreed to withdraw the question as a result. App. 359, ll. 4-20. Counsel conceded that he did not ask for a mistrial, likely because the solicitor withdrew the question: "I don't think I asked for a mistrial. I don't know why. I think I felt like it was resolved by her withdrawing the question." App. 360, ll. 1-11.

Order of Dismissal

On December 8, 2014, Judge Verdin issued an order of dismissal denying Petitioner's application. App. 363 - 373. The PCR court ruled that defense counsel was not ineffective for failing to move for a mistrial following the State's cross-examination of Petitioner. App. 367 - 368.

The PCR court summarily held that, “in this instance it is appropriate to defer to trial counsel’s professional judgment” App. 368.

ARGUMENT

Petitioner's Sixth Amendment rights to the effective assistance of counsel were violated where the PCR court erroneously ruled that defense counsel offered a strategic reason for failing to move for a mistrial based upon the solicitor's deliberately inflammatory single question cross-examination of Petitioner when defense counsel could not recall why he did not move for a mistrial, thus, there was no evidence to support the ruling of the PCR court.

Introduction

The State's case against Petitioner was a credibility battle. There was no physical evidence supporting the allegations against Petitioner. At the PCR evidentiary hearing, defense counsel candidly admitted that he could not specifically recall why he did not move for a mistrial following the state's inflammatory and improper one question cross-examination of Petitioner asking, "[h]ow do you look at yourself in the mirror, every day after what you did to your daughter?"

Counsel could only speculate that, during the trial, he believed that the solicitor's withdrawal of the question "resolved" any prejudice created by the improper question. App. 360, ll. 5-11. Accordingly, Counsel failed to articulate an objectively reasonable trial strategy supporting his decision not to move for a mistrial. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness").

Therefore, the PCR court erred in holding that trial counsel provided effective assistance of counsel. App. 368; *See 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

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).

Thus, 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.” *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

Deficient Performance

In this case, trial counsel’s performance was deficient, as it fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687-88. Specifically, although trial counsel has the authority to make certain tactical decisions involving trial strategy without the defendant’s consent, trial counsel’s professed strategy was invalid under an objective standard of reasonableness. *See Roseboro*, 317 S.C. at 294, 454 S.E.2d at 313.

The solicitor’s sole question to Petitioner on cross-examination was an unfair trial tactic that was deliberately calculated to inflame the jury’s emotions and to bolster Minor’s credibility in a case with no corroborating physical evidence. *See: State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805, *cert denied*, 534 U.S. 977 (2001) (solicitor cannot vouch for the credibility of a witness by expressing or implying her personal opinion concerning a witness’ truthfulness); *State v. McGill*,

191 S.C. 1, 3 S.E.2d 257 (1939) (a solicitor "is a quasi-judicial officer, and. . . that a solicitor must not, because of the high position he holds, say things, or do things, which would have any effect to prevent a citizen, however humble, from obtaining the fair and impartial trial he is entitled to under the law."); *see also State v. Craig*, 267 S.C. 262, 265, 227 S.E.2d 306, 308 (1976) ("conduct of the prosecutor calculated to arouse prejudice against the accused, and to prevent him from having a fair trial will not be tolerated.").

It is readily apparent that the solicitor knew her question was improper and that she made a tactical decision to ask it anyway. In contrast, defense counsel provided no strategic reason for failing to move for a mistrial. Counsel did not even request a curative instruction, which would have provided the jury with a valuable corrective from the court.

Accordingly, the PCR court erred in finding that, defense counsel's failure to move for a mistrial was a "matter of trial strategy" and an objectively reasonable exercise of counsel's professional judgment. App. 368; *See Strickland*, 466 U.S. at 687-688.

Prejudice

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). Petitioner's case was a "swearing match" during which one of the State's most effective weapons was the disgust engendered by the mere allegation of incestual child sexual abuse.

The solicitor's one question cross-examination was designed to capitalize on that loathing and to inculcate the jurors into overlooking the lack of physical or any other corroborative evidence. *Accord: State v. Quattlebaum*, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000) (finding that deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice). 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. 368; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See Strickland*, 466 U.S. 668.

CONCLUSION

Based on the foregoing reasons, Petitioner Joseph Paugh's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", written over a horizontal line.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of October, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Letitia H. Verdin, Circuit Court Judge

JOSEPH PAUGH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000072

CERTIFICATE OF SERVICE

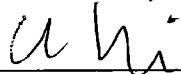
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire this 7th day of October, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th
day of October, 2015.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.