STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

CERTIORARI TO SUMTER COUNTY
Court of Common Pleas

George C. James, Jr, Circuit Court Judge

2013-CP-43-0037
Appellate Case No. 2014-001566

Russell Earley .....Respondent,

v.

State of South Carolina, ...Petitioner.

BRIEF OF PETITIONER

ALAN WILSON
Attorney General

DANIEL GOURLEY
Assistant Attorney General
Bar No. 100934

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

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ISSUE PRESENTED

Whether any probative evidence supports the PCR Court's finding that Trial Counsel was ineffective for failing to object and request a mistrial when Applicant was impeached by his comment posted on Victim's Facebook where the Facebook comment was public, Applicant clearly knew about the Facebook comment prior to testifying, and he lied under oath that he had not had any contact with Victim?

STATEMENT OF THE CASE

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. The Applicant was true bill indicted at the July 2009 term of the Sumter County Grand Jury for Criminal Solicitation of a Minor. (2009-GS-43-712). Charles T. Brooks, III, Esquire, represented Applicant. Applicant proceeded to trial and on July 19, 2012, Applicant was found guilty. The Honorable Benjamin H. Culberston, sentenced Applicant without negotiations and recommendations to eight years imprisonment.

A Notice of Appeal was filed with the South Carolina Court of Appeals. An Order of Dismissal was issued on September 21, 2012, after Applicant notified the Court of his desire to withdraw the appeal. The Remittitur was issued on October 8, 2012

Respondent filed an application for PCR on January 7, 2013 (2013-CP-43-37). The State made its Return on or about April 9, 2013, and the matter was scheduled for an evidentiary hearing before the Honorable George C. James, Jr., on February 24, 2014. Respondent was present and represented by Tommy Thomas, Esquire. The State was represented by Daniel Gourley of the Office of the South Carolina Attorney General. In a written order signed June 30, 2014, Judge James granted Respondent's application. The State appealed Judge James's order.

This Petition of Writ of Certiorari was submitted on March 10, 2015. Respondent filed his Return to Petition for Certiorari on May 11, 2015. By Order dated August 20, 2015, this Court granted certiorari. The Brief of Petitioner follows.

STANDARD OF REVIEW

In a post-conviction relief (PCR) action, the PCR applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The findings of the PCR court will not be upheld when they are not supported by probative evidence. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996); Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

ARGUMENT

No probative evidence supports the PCR Court's finding that Trial Counsel was ineffective for failing to object and request a mistrial when Applicant was impeached by his comment posted on Victim's Facebook where the Facebook comment was public, Applicant clearly knew about the Facebook comment prior to testifying, and he lied under oath that he had not had any contact with Victim.

Reversal is warranted in this case because the PCR Court improperly applied Rule 5 to social media posting. The PCR Court found Trial Counsel was ineffective for failing to object and request a mistrial based on an alleged discovery violation regarding Respondent's comment on Victim's Facebook page. Although Rule 5 may be applicable in certain scenarios involving social media, the PCR Courts analysis was the product of a fatally ridged and myopic understanding of the jurisprudence that governs the Rule 5 framework.

In the instant case, Respondent testified in his own defense. On cross-examination, the solicitor asked the Respondent if he had had any direct contact with Victim from the day of the incident up to the time of trial, a period of almost four years. (App. p. 182 line 5-19). The Respondent, under oath, stated that he had not had any contact with the Victim since the date of the incident. (App. p. 182 lines 5-21). However, the solicitor had a copy of victim's Facebook page illustrating that Respondent had posted a message on the Victim's Facebook wall the week before trial. The message simply stated "see ya." (App. p. 182 lines 5-21). After Respondent denied having had any contact with the Victim, the solicitor impeached him with his message. (App. p. 182 lines 20-23).

The PCR Court found that the comment posted on the Victim's Facebook page was a "statement" made by the defendant, the existence of which was known to the State under Rule 5(a)(1)(A). (App. p. 346). In finding that the comment was a "statement" the PCR Court

concluded that comment was typed by the defendant and electronically transmitted to the victim. (app. 346-347). The PCR Court further found that the "statement" was relevant, as used by the State, for the purpose of attacking the Respondent's credibility and for the purpose of establishing the inference that Respondent was attempting to intimidate the victim. (App. p. 346-347). The PCR Court concluded that the Facebook comment made by Respondent was ultimately relevant to the issue of credibility. (App. p. 349). The PCR Court further found that the Facebook comment was material to the preparation of Respondent's defense. In support of his finding, the PCR Court noted Trial Counsel's testimony that had he known about the comment, he would have counseled Respondent not to lie under oath when questioned about the Facebook comment.

Additionally, the PCR Court found Respondent was prejudiced because had Trial Counsel objected and moved for a mistrial, the Trial Court would have been required to grant a mistrial. (App. p. 349). The PCR Court found curative instruction would not have been sufficient to cure the prejudice resulting from the State's failure to disclose the statement. (App. p. 348). The PCR Court concluded that Trial Counsel's failure to move for a mistrial left Respondent's credibility severely damaged with little room for rehabilitation.

A. The Facebook posting is not subject to Rule 5 analysis.

The PCR Court's finding that the State's failure to turn over the Respondent's comment on Victim's Facebook page amounted to a Rule 5 violation was in error. Facebook is a widely-used social media website, available for free to anyone with an e-mail account, whose stated mission is "to give people the power to share and make the world more open and connected." Mazzone, Facebook's Afterlife, 90 N.C. L.Rev. 1643, 1646 (2012) (quotation omitted); see also Democko, Comment, Social Media and the Rules on Authentication, 43 U. Tol. L.Rev. 367, 376

(2012) (discussing access to Facebook). Facebook and other social media sites are becoming the dominant mode of communicating directly with others, exceeding e-mail usage in 2009. Diss, Note, Whether You "Like" It or Not: The Inclusion of Social Media Evidence in Sexual Harassment Cases and How Courts Can Effectively Control It, 54 B.C. L.Rev. 1841, 1842 (2013).

A profile page "is a webpage that is intended to convey information about the user." Ehling, 961 F.Supp.2d at 662. "By default, Facebook [profile] pages are public." Id. When a user shares something publicly, "anyone including people off of Facebook can see it." Facebook, http:// facebook.com/help/211513702214269?refid=69 (last visited March 8, 2015); see also Diss, supra at 1844 n. 17 ("Public information is available to anyone, even to people without an account on [Facebook]."). Alternatively, Facebook users can restrict access to their Facebook content using Facebook's customizable privacy settings. Ehling, 961 F.Supp.2d at 662. "Access can be limited to the user's Facebook friends, to particular groups or individuals, or to just the user." Id.

Rule 5(a)(1)(A) provides in pertinent part that upon request the prosecution shall permit inspection and copying of any relevant written or recorded statements made by the defendant within the *possession, custody or control of the prosecution* or the existence of which is known to the prosecution. Rule 5(a)(1)(C) provides that the prosecution, upon request, shall permit the defendant to inspect and copy papers, etc., within the possession of the prosecution "and which are material to the preparation of his defense...."

In support of its findings, the PCR Court relied heavily on State v. Lawton, 382 S.C. 122, 675 S.E.2d 454 (Ct. App. 2009) such reliance was in error. There, the Court of Appeals considered whether a letter written by the defendant to his ex-wife was a "statement" under Rule

5, SCRCrP. Id. Lawton was indicted for burglary and weapons charges after entering his ex-girlfriend's home. Id. at 125. Before trial, he wrote his ex-wife a letter in which he stated, "I know that my story is full of lies, but no more than hers, mine just have to be better than hers." Id. The letter was not disclosed to the defense. Id. The defendant testified and the solicitor produced the letter on cross-examination, and the defendant objected based on the State's failure to disclose in violation of Rule 5(a)(1)(A). Id. at 126. The trial judge overruled the objection on that basis. Id. The trial court further stated that the letter involved Lawton's credibility, which the trial court viewed as merely collateral, thereby rendering the letter not "relevant" within the meaning of 5(a)(1)(A). Id. On appeal, the Court of Appeals held that the letter should have been disclosed to the defense because it was "clearly relevant". Id. The court also ruled that the statement was also material to the preparation of Lawton's defense under Rule 5 (a)(1)(C). Id. at 127.

The PCR Court's reliance on Lawton is misplaced. First, Lawton involved written letters sent *privately to a single person*, Lawton's ex-wife. Lawton, 382 S.C. at 125, 675 S.E.2d at 456 (2009). Lawton could reasonably assume that the letters sent to his ex-wife would remain private and not be accessed by a third-party, including the State. Unlike Lawton, Respondent's comment was posted on Facebook. As previously noted, Facebook is a public forum that is accessible by anyone, including non-Facebook members. Respondent cannot reasonably assume that his communication via a public forum would have remained private between himself and the Victim.

Second, Lawton no longer had access to the letters when he mailed them to his ex-wife. Clearly, the State was the sole possessor of the letters when they obtained them from Lawton's ex-wife. As such, the letters written by Lawton were in the sole "possession,

custody, or control of the prosecution." Rule 5 SCRCrP. The State's failure to turn over the letters in Lawton amounted to a Rule 5 violation. Unlike Lawton, Respondent, along with the public, had access to Respondent's Facebook comment. Respondent cannot credibly argue that his comment was in sole "possession, custody, or control of the prosecution" where it was publicly accessible to the entire world. The Facebook comment simply was not in possession of the prosecution. U.S. Meregildo, 920 F.Supp.2d 434 (2013) (holding because the government never possessed Parson's Facebook account, it had no obligation to acquire it). As a result, the State failure to disclose Respondent's Facebook comment, which was readily available by both Respondent and the public, cannot amount to a Rule 5 violation. See State v. Moses, 390 S.C. 502, 519-20, 702 S.E.2d 395, 404 (Ct.App. 2010) ("Moses failed to show that he could not obtain other evidence of comparable value by other means; in fact, the State provided defense counsel with a high school yearbook to help Moses in identifying other witnesses who were present in the cafeteria"); Anderson v. Leeke, 271 S.C. 435, 438-39, 248 S.E.2d 120, 122 (1978) ("Although not expressly stated in the opinion, we think it is implicit that the Brady rule applies only to favorable evidence which the prosecution has but which is unavailable to the defendant"). Based off of the foregoing, the PCR court's finding that Trial Counsel was deficient for failing to object to the use of the statement under a Rule 5 violation was in error as no Rule 5 violation occurred.

2. The use of Respondent's Facebook comment did not prejudice Respondent.

Assuming *arguendo*, that this Court imputes a duty on the State to turnover a defendant's comment on a public form, accessible by anyone in the general public, Respondent cannot show any resulting prejudice for Trial Counsel's failure to object. In Lawton, the Court of Appeals found that there was a reasonable probability that Lawton

would not have testified had he known the State possessed such *strong impeachment evidence*. Lawton, 382 S.C. at 127, 675 S.E.2d at 457 (2009) (emphasis added). Lawton's letters contained the sentence "I know that my story is full of lies, but no more than hers, mine just have to be better than hers." Id. at 125. It is clear that the statement within the letters were certainly relevant and detrimental to Lawton's defense. The statement bore directly on the veracity of his version of events. In the instant case, Respondent's statement "see ya" on the Victim's Facebook page can hardly be said to be so prejudicial as to affect the outcome of Respondent's trial. The solicitor did not use it to undermine the Respondent's version of events. To the contrary, the statement was only used when Respondent, under oath, lied about his contact with Victim. Had Respondent not lied under oath, the solicitor would have had no reason to impeach Respondent.

The PCR Court's finding that Respondent was prejudiced due to Trial Counsel's failure to object and request a mistrial because it left Respondent's credibility severely damaged with little room for rehabilitation also ignores clear precedent regarding cumulative impeachment. Respondent being impeached with his Facebook comment was hardly the straw that broke the camel's back. Respondent knew, prior to testifying, that he would be impeached with his 2003 prior bank robbery. (App. p. 164 line 8—p.165 line 5). Notably, Respondent was not only impeached with 2003 conviction, but also *volunteered* that he had eight additional convictions. (App. p. 184 lines 10-25). To simply assert that the State's use of the Facebook comment to further impeach the Respondent was so prejudicial as to impact the outcome of Respondent's trial is in error.

To the contrary, this Court has consistently held that the State's failure to disclose impeachment evidence is not so prejudicial as to affect the validity of trial where the

impeaching evidence would not have had a meaningful impact on the witnesses' credibility. State v. Ferguson, 300 S.C. 408, 388 S.E.2d 642 (1990) (finding that the exclusion of impeaching evidence is not prejudicial where it has no meaningful impact on a witness's credibility); State v. Gunn, 313 S.C.124, 137, 437 S.E.2d 75, 82 (1993) (finding the nondisclosure of other impeaching evidence does not deprive the defendant of a fair trial). Respondent cannot establish any prejudice, in light of Respondent's credibility already being tarnished by his 2003 bank robbery conviction and the fact that he volunteered an additional eight prior convictions.

Furthermore, in contrast to Lawton, there is no evidence the non-disclosure of the comment would have factored into Respondent's decision to take the stand. The PCR Court acknowledged that Respondent would have had to take the stand to rebut the State's evidence regardless of his prior knowledge about the comment. Respondent knowing the State would impeach him with the comment was immaterial to his defense strategy.[1] Based off of the foregoing, Petitioner submits the PCR court erred in finding Respondent was prejudiced by the State's failure to turn over impeaching evidence.

[1] Petitioner also submits prior knowledge of State's planned use of the comment would not have deterred Respondent from being untruthful when asked about his communication with Victim. If Respondent could not be trusted to abide by the court's ruling on the admissibility of his eight other convictions, he could also not be trusted to abide by any advice from counsel regarding how to answer the solicitors questions about communication with the victim.

CONCLUSION

For the reasons stated above, this Court should reverse the PCR Court's grant of Respondent's application for post-conviction relief.

Respectfully submitted,

ALAN WILSON
Attorney General

DANIEL GOURLEY
Assistant Attorney General
Bar No. 100934

By: _____
ATTORNEYS FOR PETITIONER

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Petitioner**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Tommy Arthur Thomas, Esquire
Post Office Box 88
Irmo, South Carolina 29063

This 21st day of October, 2015

CAROLINE COLLINS
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

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OCT 21 2015
S.C. Supreme Court

October 21, 2015

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Russell Earley v. State of South Carolina
Lower Court Case No. 2013-CP-43-037
Appellate Case No. 2014-001566

Dear Mr. Shearouse:

Attached are the original and thirteen (13) copies of the **Brief of Petitioner** in the above referenced case for filing in your office.

Sincerely,

Daniel Gourley
Assistant Attorney General
SC Bar #100934

DG/cc

cc: Tommy A. Thomas, Esquire
Trisha Allen, Victim Services