

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SUMTER COUNTY
Court of Common Pleas

The Honorable George C. James, Jr., Circuit Court Judge
Case No. 2013-CP-43-0037

Appellate Case No. 2014-001566

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S.C. Supreme Court

RUSSELL EARLEY.....RESPONDENT,

v.

STATE OF SOUTH CAROLINA.....PETITIONER.

BRIEF OF RESPONDENT

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S.C. Rules of Criminal Procedure:

Rule 5 (a)(1)(A)

STATEMENT OF ISSUES ON APPEAL

The PCR Court correctly found that trial counsel was ineffective in failing to object and requesting a mistrial when Respondent was impeached by his comments posted on the Victim's Facebook page.

STATEMENT OF THE CASE

Respondent is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. The Respondent 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 Respondent. Respondent proceeded to trial and on July 19, 2012, Respondent was found guilty. The Honorable Benjamin H. Culberston, sentence Respondent 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 Respondent notified the Court of his desire to withdraw the appeal. The Remittitur was issued on October 8, 2012.

Petitioner 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. Petitioner was present and represented by Tommy Thomas, Esq. 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 Petitioner's Application. The State Appealed Judge James' Order.

STANDARD OF REVIEW

The proper standard for review of a post-conviction 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, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Respondent bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

For a Respondent to be granted PCR 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).

If there is any evidence to support finding of Post Conviction Relief, then those findings must be upheld. Holland v. State 322 S.C. 111, 470 SE 2nd 378 (1996).

ARGUMENT

The PCR Court correctly found that trial counsel was ineffective in failing to object and requesting a mistrial when Respondent was impeached by his comments posted on the Victim's Facebook page.

In the original trial the Respondent testified in his own defense. On cross-examination, the solicitor asked the Respondent if he had had any direct contact with the victim from the day of the incident up to the time of the 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 Petitioner had posted a message on the Victim's Facebook wall the week before the trial. The message simply stated "see ya." (App. p. 182, lines 5-21). After petitioner denied having had any contact with the Victim, the solicitor impeached his with his message. (App. p. 182, lines 20-23).

Trial counsel testified that he was aware that the victim's Facebook page had a cartoon of a man with a caption reading "Smoke weed all day" and that the Respondent was aware of that (App. p.331, Lines 6-16). He testified that unbeknownst to him, the Respondent had posted a message on the victim's Facebook page the week prior to trial saying something to the effect of "See ya"(App. p. 314, lines 2-12). He summarized the solicitor's cross-examination of the Respondent about any communication with the victim, and that the Respondent denied any communication. However, the solicitor then brought out the Facebook posting and the Respondent admitted that communication. (App. p. 314, lines 10-21) Trial counsel testified that the Respondent did not tell him about the Facebook posting. He testified that the cross-examination on that issue was

devastating because the Respondent was caught in a blatant lie and the sole issue in the case was the credibility of the victim and the Respondent. He testified that if he had known about it, he would have advised the Respondent to either not testify or to not deny communicating with the victim.

The PCR Court found that the comment posted on the Victim's Facebook page was a "statement" made by the Respondent, 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 Respondent 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 the 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 to be truthful under oath when questioned about the Facebook comment. (App. p. 317, line 4-25 – p. 318, lines 1-25)

Additionally, the PCR Court found the 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 Petitioner's credibility severely damaged with little room for rehabilitation.

The PCR Court further found that in State v. Lawton, S.C. 122, 675 S.E. 2d 454 (Ct. App. 2009), the Court of Appeals considered whether a letter written by the defendant to his ex-wife was a "statement" under Rule 5, SCRCrP. 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." The letter was not disclosed to the defense. 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). The State argued Rule 5 did not apply because the statement was used on cross-examination. The trial judge overruled the objection on that basis. 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 Rule 5(a)(1)(A). On Appeal, the Court of Appeals held that the letter should have been disclosed to the defense because it was "clearly relevant". The Court also ruled that the statement was also material to the preparation of Lawton's defense under Rule 5 (a)(1)(C) (App. p. 345).

The PCR Court in considering the Lawton case decision found that the Lawton Court held the State must produce statements relevant to the issue of credibility. Though Lawton's letter in and of itself raised direct issues of credibility, the Facebook posting made by the Respondent was ultimately relevant to the issue of credibility.

Specifically addressing the argument of the Appellant, the Respondent would assert:

- A. The PCR Court was correct in its finding that the Facebook posting is subject to Rule 5 analysis. Clearly this comment is a statement made by the Respondent and it is within the possession, custody or control of the Prosecution. The Appellant argues that this Facebook comment was not in the Sole possession, custody or control of the prosecution. That this comment was publicly accessible to the entire world. This is not factually correct. There are a number of privacy settings that can be placed by the use of a Facebook page. And it is indisputable that this statement was in the possession of the prosecution and not disclosed to the defense.
- B. The Appellant argues that the PCR Court's reliance on State v. Lawton is in error. The Appellant argues that Lawton involved written letters sent privately to a single person and that Lawton had no access to the letter after mailing it to his ex-wife. While the posted comment may have had a wider circulation than a letter, it still had the same effect and was ultimately relevant to the issue of credibility.
- C. The use of Respondent's Facebook comment was prejudicial. The Appellant argues that the statement "see ya" could not be so prejudicial as to affect the outcome of Respondent's trial. However it was used to effectively attack the Respondents credibility and could easily be implied to be a threat. Therefore, it is extremely prejudicial to the Respondent.

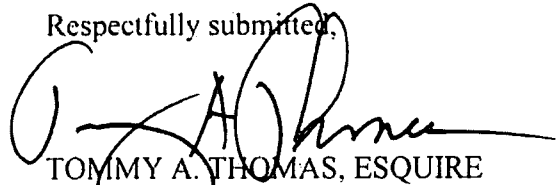
The PCR Court concludes that "The trial Judge would have been compelled, upon proper motion, to grant a mistrial. A curative instruction would not have been sufficient to cure the prejudice resulting from the State's failure to disclose the statement. Again,

victim/defendant credibility was the paramount, if not the sole, issue for the jury to determine. Trial counsel's failure to move for a mistrial left the Applicant's credibility severely damaged with little room for rehabilitation. (App. p. 348-349)

CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's ruling.

Respectfully submitted,



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November 17, 2015

STATE OF SOUTH CAROLINA
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Appellate Case No. 2014-001566

Russell Earley #199848 Respondent,


v.

State of South Carolina Petitioner.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for Respondent in the above action, hereby certify that I placed in the United States Mail, a copy the Brief of Respondent with postage prepaid, and the return address clearly shown on said envelope to Daniel Gourley, Esq. at:

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