

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

DEC 29 2015

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

S.C. Supreme Court

Appellate Case No. 2015-000542

Keith DeSue, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

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QUESTION PRESENTED

1. Did the PCR court err by finding trial counsel articulated a valid strategic reason for opening the door to the admission of Minor's prior consistent statements pursuant to State v. Jeffcoat, 350 S.C. 392, 565 S.E.2d 321 (Ct. App. 2002) when the record conclusively demonstrates counsel had not read Jeffcoat and was unfamiliar with its holding when he asked Minor about whether she was coached by her adoptive parents and the solicitor, and by finding Petitioner was not prejudiced by counsel's deficient performance when three separate witnesses were permitted to testify in detail about the specific statements Minor made to them about the alleged sexual abuse?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the December 2010 term of General Sessions for first-degree criminal sexual conduct with a minor (2009-GS-23-4190). (App.pp.250-51). Scott D. Robinson, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On January 10, 2012, the Honorable C. Victor Pyle, Jr. sentenced Petitioner to twenty-five years imprisonment. (App.p.194).

A notice of appeal was filed at the South Carolina Court of Appeals. On November 7, 2013, the Court of Appeals issued an order dismissing the appeal based upon Petitioner's request. (App.pp.193-95). The remittitur was sent on November 26, 2013. (App.p.196).

Petitioner filed an application for post-conviction relief (PCR) on January 16, 2014 (2014-CP-23-0257). (App.pp.197-203). A hearing was held at the Greenville County Courthouse on December 16, 2014. (App.pp.210-41). Petitioner was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Eugene C. Griffith, Jr. denied relief in an order filed February 11, 2015. (App.pp.243-49).

STANDARD OF REVIEW

The proper standard for review of a PCR 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, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their

application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving both that trial counsel's representation was deficient and that he was prejudiced as a result.

Petitioner argues trial counsel erred because he opened the door to additional testimony about the victim's statements about her sexual abuse by Petitioner. Petitioner argues he suffered prejudice as the result of this additional testimony. This argument is without merit.

A.

At trial, the eight-year-old victim testified her biological father (Petitioner) "put his private spot in mine" and that it hurt. (App.p.43; pp.45-46; p.48; p.50). When asked if "this kind of thing happen[ed] one time or more than one time," the victim testified it happened three times. (App.p.52). The victim testified Petitioner told her not to tell anyone what happened. (App.p.51). On cross-examination, trial counsel asked the victim if she had discussed with her stepparents and the assistant solicitor about what her testimony would be, and she stated that she had. (App.pp.56-58).

The assistant solicitor then argued, outside of the jury's presence, that Jeffcoat would allow her to present the victim's "prior consistent statements to other persons." (App.pp.59-60). Trial counsel noted he had not read Jeffcoat and the trial judge allowed him time to study it and determine if he could distinguish it from the case at bar. (App.p.60). Trial counsel subsequently agreed with the assistant solicitor's position and the trial judge allowed the State "to rebut." (App.pp.65-66). Dr. Breann Bailey (the

pediatric emergency room doctor), Officer Jonathan Taylor (the officer who met with the victim at the emergency room), and James Austin (the investigator in this case who had since retired) were allowed to testify in more detail about the victim's description of the abuse. (App.pp.81-82; pp.95-96; pp.101-05).¹

B.

At the PCR hearing, Petitioner argued the assistant solicitor was allowed to bolster the victim's testimony because trial counsel asked her questions that opened the door to such. (App.pp.215-17). Petitioner stated he did not believe trial counsel knew these questions would hurt his case. (App.p.217). Petitioner admitted, however, that trial counsel also brought out the victim's conflicting stories and inconsistencies during trial. (App.pp.223-24).

Trial counsel testified Petitioner proclaimed his innocence, so the case went to trial. (App.p.227). Trial counsel testified his trial strategy was to argue inconsistencies in the victim's statements, the lack of conclusive evidence of sexual assault, and that the blood in the victim's underwear was the result of a bowel condition. (App.p.228). Trial counsel testified he believed at the time that it was worth the risk in order to question the victim about whether she had discussed her testimony beforehand. (App.pp.230-31).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner failed to meet his burden of proving trial counsel did not properly cross-examine the victim. The PCR judge found trial counsel articulated a valid strategic

¹ On the second day of trial, trial counsel argued he believed Jeffcoat was inapplicable and prejudicial. (App.pp.116-17).

reason for asking the victim “about whether she had spoken to several people about the case and what she should testify about.” (App.p.246). The PCR judge also found Petitioner failed to meet his burden of proving he “suffered any prejudice resulting from the application of Jeffcoat in this case because the State presented such strong evidence of his guilt.” (App.p.247).

C.

For an applicant 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); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “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. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

D.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel’s representation was deficient. Trial counsel’s cross-examination of the victim cannot be viewed as ineffective or deficient because the PCR judge found trial counsel articulated a valid strategic reason that he pursued this line of questioning.

(App.p.246). Where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). “Counsel’s strategy will be reviewed under ‘an objective standard of reasonableness.’” Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). “Courts must be wary of second-guessing counsel’s trial tactics.” Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Trial counsel testified he believed asking the victim about whether she had previously discussed her testimony with her guardians and/or the assistant solicitor was worth the risk. Based upon the record in this case, this was a valid trial strategy. The victim was eight years old at trial and five years old at the time of the sexual assault. The victim’s testimony was perfunctory and not very descriptive and, due to her age, often the result of some leading questions by the assistant solicitor. It would have been objectively reasonable for trial counsel to risk additional testimony about prior consistent statements in the hope that questions about potential coaching would lead the victim to waver or open the door to allow impeachment of her testimony. See Huggler v. State, 360 S.C. at 633, 602 S.E.2d at 756. This Court should not view trial counsel’s tactics after reflecting upon the end result of Petitioner’s trial. See Whitehead v. State, 308 S.C. at 122, 417 S.E.2d at 531. As trial counsel articulated a strategic decision for his cross-examination of the victim, the PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel’s performance was deficient.

E.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving he was prejudiced by trial counsel's representation. Whether or not trial counsel was well-versed in Jeffcoat's holding prior to this trial, Petitioner cannot prove prejudice because the State presented abundant evidence that he was guilty of sexually assaulting his daughter. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). The victim testified about the sexual abuse, that it hurt and made her cry, and that Petitioner told her not to tell anyone. (App.pp.46-53). The videotaped forensic interview of the victim was published to the jury. (App.p.137). Blood was found in the crotch of the victim's underwear and the victim testified the blood was from when Petitioner "was doing all that stuff to me down in my private spot." (App.p.58; pp.63-64). There was a laceration on the victim's labia and redness at her vaginal opening. (App.pp.82-83). The victim's hymen was transected on the same side of her body as the laceration on her labia. (App.pp.140-41; pp.145-48).

As such, even assuming arguendo that trial counsel should not have asked the victim about potential coaching, there is no reasonable probability that the admission of additional testimony in fact changed the outcome of Petitioner's case. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625; Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735; see also Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is

overwhelming evidence of guilt). Petitioner failed to meet his burden of proving the prejudice prong of the Strickland test because the State presented overwhelming evidence of Petitioner's guilt and the likelihood of a different result of his trial was highly unlikely. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

F.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance.

As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

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S.C. Supreme Court

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CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

Lara M. Caudy, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 29th day of December, 2015.


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ATTORNEY FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

December 29, 2015

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

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DEC 29 2015

S.C. Supreme Court

Re: Keith DeSue v. State of South Carolina
Appellate Case No: 2015-000542
Lower Court Case No: 2014-CP-23-0257

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc
Enclosures

cc: Lara M. Caudy, Esquire
Trisha Allen, Victim Services Counselor