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SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Roger L. Couch, Circuit Court Judge

ROBERT S. HORTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001608

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. Did the PCR court correctly grant Petitioner a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) where the undisputed evidence showed trial counsel failed to file a notice of appeal following Petitioner's trial?
- II. Did trial counsel render constitutionally deficient and prejudicial assistance by failing to object to the use of a "security" blanket or pillow by the alleged seventeen-year old victim during her testimony?

STATEMENT

During its November 2011 term, a Spartanburg County grand jury indicted Petitioner for criminal sexual conduct with a minor in the second degree. App. 678-679. The state, represented by Jennifer Jordan and Susan Reese, called the case for trial before the Honorable J. Derham Cole on July 9, 2012. App. 1. Michael D. Brown represented Petitioner. App. 1. The jury found Petitioner guilty as charged. App. 549, lines 16-20. Judge Cole sentenced Petitioner to eighteen years' imprisonment. App. 554, lines 12-17; App. 680. On April 29, 2013, Petitioner filed a pro se notice of appeal, which was dated April 15, 2013. App. 568. Petitioner's proof of service indicated he served the notice on the South Carolina Court of Appeals and the Spartanburg County Clerk of Court. App. 569. Petitioner's filing included a letter to the Court of Appeals explaining he had instructed his trial lawyer to file the notice of appeal, but the request was refused unless Petitioner paid an additional sum. App. 571-572. On May 6, 2013, the Court of Appeals dismissed the notice because it was not timely served. App. 574. Remittitur was issued on May 24, 2013. App. 575.

On July 17, 2013, Petitioner filed an application for post-conviction relief (PCR). App. 576-604. On March 26, 2015, an evidentiary hearing was held before the Honorable Roger L. Couch. App. 610. Leah B. Moody represented Petitioner, and Suzanne H. White represented the state. App. 610. By an order filed on July 7, 2015, Judge Couch granted Petitioner's request for a belated review of his direct appeal issues, but denied relief as to all other grounds. App. 668-677.

Petitioner filed a notice of appeal. In compliance with this Court's directive in Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986), Petitioner is filing this petition for writ of certiorari

addressing the issue of the waiver of his direct appeal as well as an additional post-conviction relief issue, and Petitioner is filing a brief addressing his direct appeal issue simultaneously.

ARGUMENT

I. The PCR court correctly granted Petitioner a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) where the undisputed evidence showed trial counsel failed to file a notice of appeal following Petitioner's trial.

Relevant facts

Petitioner retained trial counsel to represent him at his trial concerning allegations of criminal sexual conduct with a minor in the second degree. App. 614, lines 17-24. In fact, Petitioner retained trial counsel even before the charges were brought because Petitioner was aware of the investigation and sought legal advice during that time. App. 614, line 25 – App. 615, line 4. When the police sought Petitioner's arrest, trial counsel assisted Petitioner in arranging for his voluntary surrender. App. 615, lines 3-4; App. 203, lines 3-12. In July of 2012, trial counsel represented Petitioner at the trial. App. 1. When the jury found Petitioner guilty, trial counsel represented Petitioner during the brief sentencing hearing before the judge. App. 551, line 1 – App. 554, line 22.¹

At the conclusion of the sentencing hearing, the trial judge informed Petitioner that he had the “right to appeal the verdict of the jury and the sentence of the court.” App. 554, lines 17-19. He further advised Petitioner that he “must file any notice of [his] intention to appeal those decisions within ten days.” App. 554, lines 19-20. Most important for this issue, the judge informed Petitioner that trial counsel would assist him with his notice of appeal. App. 554, line 21. However, when the sentencing proceeding concluded, trial counsel's representation ceased

¹ The jury was unable to reach a unanimous verdict on one count of criminal sexual conduct with a minor in the second degree. Thus, the judge granted a mistrial on that count. App. 546, line 20 – App. 547, line 22; App. 550, lines 17-22.

as counsel neither consulted with Petitioner on his right to appeal nor filed a notice of appeal on his behalf.

According to Petitioner, he and trial counsel discussed what would happen in the event the jury convicted Petitioner. During that discussion, trial counsel assured Petitioner he would file a notice of appeal on his behalf. App. 637, lines 2-8. However, Petitioner discovered trial counsel never filed a notice of appeal. App. 637, lines 16-17. While Petitioner was in the Department of Corrections, Petitioner's family attempted to contact trial counsel about filing a notice of appeal, but the family received no response from trial counsel. App. 637, lines 18-25.

On April 29, 2013, Petitioner filed a pro se notice of appeal, which was dated April 15, 2013. App. 568; App. 638, lines 1-9. Petitioner's proof of service indicated he served the notice on the South Carolina Court of Appeals and the Spartanburg County Clerk of Court. App. 569. Petitioner's filing included a letter to the Court of Appeals explaining he had instructed his trial lawyer to file the notice of appeal, but the request was refused unless Petitioner paid an additional sum. App. 571-572. On May 6, 2013, the Court of Appeals dismissed the notice because it was not timely served. App. 574; App. 638, line 10 – App. 639, line 10. Remittitur was issued on May 24, 2013. App. 575.

At the PCR hearing, trial counsel claimed he had no recollection of a discussion with Petitioner regarding filing a notice of appeal. App. 656, lines 20-25. He did not recall discussing the possibility of an appeal at all with Petitioner. App. 656, lines 20-23; App. 657, lines 9-12; App. 657, lines 19-21; App. 658, 8-18; App. 660, lines 7-9; App. 660, lines 17-18 (“we didn't discuss anything after the trial.”). Although trial counsel remembered Petitioner's brother contacting him for files, which he provided, he recalled no request for the filing of a notice of appeal. App. 657, lines 1-4.

Concerning his general practice, trial counsel stated that he only filed a notice of appeal on behalf of a client if the client made a specific request. App. 659, lines 7-9. He noted “that situation” had not happened “that often.” App. 659, lines 9-10. He indicated he would have a “direct conversation” with a client about filing a notice of appeal. App. 659, lines 21-23.

At the conclusion of the PCR hearing, Petitioner asked the judge to grant a belated direct appeal. App. 664, line 21 – App. 665, line 4. The state argued against such relief. Generally, the state argued, Petitioner “failed to meet his burden of proof as to these allegations” and that all decisions made by trial counsel were “strategic.” App. 665. Further, the state argued that because trial counsel “testified that he was never requested to file an appeal” and that Petitioner was “advised on the record” of his right to appeal, Petitioner was not entitled to belated review. App. 665.

In his order, Judge Couch granted Petitioner’s request for a belated direct appeal. App. 674-675. Judge Couch found “the testimony of both [Petitioner] and Counsel to be credible [on] this issue.” App. 675. The PCR court “affirmatively” found Petitioner “did not knowingly and voluntarily waive his right to a direct appeal.” App. 675. Thus, the court found Petitioner was entitled to a belated review of his direct appeal issues. App. 675.

Discussion

“The appropriate scope of review of this Court is that any evidence of probative value is sufficient to uphold the PCR judge’s findings.” Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). When a client is convicted and sentenced, trial counsel has a duty to make certain the client is fully aware of the right to appeal. In re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991); White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). “In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the

procedure in Anders v. California, 386 U.S. 738 (1967).” Smith v. State, 309 S.C. 413, 424 S.E.2d 480 (1992).

There is no doubt that “[f]ollowing a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal.” Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). Further, “[i]n the absence of an intelligent waiver by the defendant counsel *must* either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967).” Id. (emphasis added). “To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739-740 (2010). The United States Supreme Court has “long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner professionally unreasonable.” Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000). There is no doubt “that counsel had a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonable demonstrated to counsel that he was interested in appeal.” Id. at 480.

The PCR judge’s ruling is supported by Petitioner’s testimony that trial counsel indicated, prior to the verdict, that he would file a notice of appeal if Petitioner were found guilty. Further, the judge’s ruling is supported by trial counsel’s admission that he did not discuss with Petitioner his right to an appeal. Although the trial judge informed Petitioner of his right to appeal, the trial judge informed Petitioner that trial counsel would further advise him regarding his right to appeal. The record is clear that trial counsel failed in his duty to ensure Petitioner was aware of his right to appeal following the trial. Trial counsel admitted that he did not discuss Petitioner’s appellate rights and did not file a notice of appeal. In fact, trial counsel said he and Petitioner did not speak after the

sentencing. See Clark v. State, 396 S.C. 164, 719 S.E.2d 708, (Ct. App. 2011)(noting that where defense counsel testified that he never spoke to the defendant at the end of the trial, the testimony demonstrated “that trial counsel could not have ascertained whether [the defendant] wanted to appeal his conviction”). The record is clear that trial counsel failed in his duty to file a notice of appeal in the absence of Petitioner’s intelligent waiver. As Judge Couch found, there was no evidence of an intelligent and voluntary waiver of his right to an appeal. Therefore, this evidence supports the PCR judge’s conclusion that Petitioner is entitled to a belated appeal pursuant to White, supra. Petitioner respectfully requests this Court affirm the PCR judge’s decision and grant belated review of his direct appeal issue.

II. Trial counsel rendered constitutionally deficient and prejudicial assistance by failing to object to the use of a “security” blanket or pillow by the alleged seventeen-year old victim during her testimony.

Relevant facts

Trial

Petitioner and Minor’s mother, Stephanie Horton, married in 2004 when Minor was between nine and eleven years old. App. 70, lines 5-8; App. 126, lines 13-23; App. 375, lines 5-6. At the time, Minor had a younger sister as well. App. 70, lines 9-11; App. 70, lines 17-19; App. 375, lines 16-18. During their marriage, Petitioner and Stephanie had two children together. App. 70, lines 12-13; App. 95, lines 10-14; App. 128, lines 1-2; App. 156, lines 16-23; App. 375, lines 19-20; App. 393, lines 6-16. Petitioner worked outside of the home while Stephanie homeschooled the children. App. 72, line 22 – App. 74, line 13; App. 128, lines 11-16; App. 129, lines 9-11; App. 380, line 23 – App. 381, line 5. Stephanie explained that Minor had a learning disability and required one-on-one attention. App. 128, lines 17-25.

In November of 2007, Petitioner injured his back, which required surgery and rendered him unable to work. App. 74, lines 14-15; App. 131, lines 9-14; App. 140, lines 3-10; App. 377, line 22 – App. 378, line 11. As a result of Petitioner’s injury, his ability to be sexually intimate was greatly reduced. App. 140, lines 18 – App. 141, line 23; App. 394, line 21 – App. 395, line 7. In the summer of 2008, Petitioner’s injury recovered sufficiently so that he could return to work. App. 132, lines 13-18. In the intervening time, Petitioner convalesced at home, and Stephanie continued to homeschool the children. App. 74, lines 16-18; App. 131, line 9 – App. 133, line 7; App. 140, lines 11-16; App. 378, lines 12-18; App. 379, line 15 – App. 380, line 15; App. 382, lines 6-10.

Also, during this time, Minor had mono and her ability to have visitors or leave her residence was restricted. App. 139, lines 13-22; App. 382, line 14 – App. 384, line 21.

In May of 2008, Minor wrote a note to Stephanie alleging sexual abuse by Petitioner. App. 133, line 8 – App. 134, line 12; App. 88, line 14 - App. 90, line 9; App. 556. Stephanie confronted Petitioner about the allegations, and he denied any sexual misconduct. App. 135, lines 18-20; App. 138, line 25 – App. 139, line 3. At the trial, Minor, who was seventeen-years old, testified that Petitioner sexually abused her for over a year with the abuse starting when she was twelve-years old. App. 69, lines 4-5; App. 79, lines 17-19 App. 84, line 24 – App. 85, line 1; App. 91, lines 21-24. According to Minor, Petitioner made her rub and lick his “private part.” App. 78, lines 8-12; App. 79, line 23 – App. 80, line 18. She claimed he also licked her “private part.” App. 78, lines 13-15; App. 79, lines 6-7.

Minor claimed the abuse occurred when she was home alone with Petitioner and when her mother and siblings were in the home. App. 76, lines 5-22; App. 80, line 11 – App. 81, line 15. One incident, Minor claimed, occurred while her mother was in the next room with Minor’s infant brother. App. 81, line 16 – App. 82, line 24. Minor alleged that when Petitioner made her lick and rub his penis in her bedroom closet, “stuff came out” and went onto the floor. App. 83, line 11 - App. 84, line 18.²

The testimony revealed that during the time of the alleged abuse, Minor was talking to older boys on the computer and suffered consequences for this disobedience. App. 97, line 20 – App. 98, line 12; App. 160, line 24 – App. 161, line 23. Additionally, Minor admitted to seeing pornography on the computer. App. 98, lines 13-21. Further, the testimony revealed that while Minor had mono,

² Testing by SLED on a portion of the carpet from Minor’s closet floor was positive for semen and the DNA profile developed from the carpet matched Petitioner. App. 351, lines 16-22; App. 354, lines 11-16.

her biological father stopped visiting her and this estrangement continued even after she got well. App. 95, line 15 – App. 96, line 23; App. 150, lines 1-23; App. 386, line 1 – App. 387, line 10. Minor was distraught over her biological father’s abandonment. App. 96, line 22 – App. 97, line 9; App. 150, lines 5-8; App. 391, line 4 – App. 392, line 12.

In addition to good character witnesses who testified on Petitioner’s behalf, Petitioner testified and denied any sexual misconduct with Minor. App. 398, lines 5-16. Petitioner admitted his addiction to pornography and his shame associated with such an addiction. App. 402, line 23 – App. 403, line 25; App. 422, line 20 – App. 424, line 14. Additionally, Petitioner explained that his semen was on the closet floor because of his pornography addiction. While alone in the house, Petitioner viewed pornographic material, reaching a physically climatic point. When he heard a noise outside the home, he was alarmed and ran to Minor’s room to look out the window to determine the source of the noise. Upon hearing the screen door slam, he walked into Minor’s closet to avoid detection because his penis remained erect. While in the closet, he was unable to control his physical reaction to the pornography resulting in his ejaculation. App. 425, line 17 – App. 427, line 16.

In her closing, the solicitor argued that one look at Minor revealed she was “much younger, much younger than her biological age.” App. 505, lines 8-10. The solicitor explained that Minor was “simple” and “naïve” as revealed in her answering of questions. App. 505, line 10; App. 505, line 19. According to the solicitor, “as long as the question was clear to [Minor], as long as there was a one part question, she [could] answer it fine.” App. 505, lines 11-13. However, when someone, particularly defense counsel, asked Minor a two-part question, Minor “would answer the second part [of] the question, not the first part.” App. 505, lines 13-17.

There was no mention of the security pillow or blanket or any comfort item in Minor's possession during her testimony in the trial transcript. Consequently, the record is devoid of any discussion of the necessity of the comfort item to enable Minor, who was seventeen-years old at the time of the trial, to testify.

PCR hearing

Petitioner testified that trial counsel failed to object to the Minor using a blue security blanket or pillow during her testimony because this conduct aroused the passions and prejudices of the jury. App. 635, line 21 – App. 636, line 1. Petitioner explained that Minor was seventeen-years old at the time of the trial, but “clutch[ed] a big fluffy security pillow just like a child would” during her testimony. App. 636, lines 4-6. This conduct permitted the state to present Minor to the jury as a “little bitty child.” App. 636, lines 7-8.

When questioned about the alleged victim's use of a “security blanket or pillow” during her testimony, trial counsel stated he did not pay attention to her outside of the courtroom. App. 656, lines 4-9. However, when she walked into the courtroom carrying the security item, he did not find it to be “something that initially shocked the conscience.” App. 656, lines 9-11.

PCR order

According to the PCR judge, trial counsel testified that “he did not raise an issue about the victim's security blanket because he was not aware of it until she came into the courtroom with it.” App. 674. The PCR judge held Petitioner failed to meet his burden of proof concerning this PCR claim. App. 674. According to the judge there was “no evidence that an objection made to the victim's security blanket would have affected the outcome of the trial.” App. 674.

Discussion

In order to show ineffective assistance of counsel as a ground for relief, Petitioner 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.” Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel’s performance was deficient and fell below reasonable professional norms; and 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). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

The Sixth Amendment to the United States Constitution provides that “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed....” U.S. Const. Am. VI. The Fourteenth Amendment forbids states to “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Am. XIV. Pursuant to this Due Process Clause, the United States Supreme Court held an individual’s right to a jury trial pursuant to Sixth Amendment is applicable to the states. Duncan v. Louisiana, 391 U.S. 145, 149-150 (1968); see also State v. Warren, 273 S.C. 159, 255 S.E.2d 668 (1979). Additionally, South Carolina’s Constitution provides that “Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury.” S.C. Const. Art. I, § 14.

The Fifth, Sixth, and Fourteenth Amendments require that the state must prove each element of a crime beyond a reasonable doubt. See State v. Brown, 360 S.C. 581, 595, 602 S.E.2d 392, 400 (2004) (“[T]he United States Supreme Court recently has re-emphasized the constitutional protections of surpassing importance contained in the Fourteenth Amendment’s due process clause and the Sixth Amendment right to a jury trial, which indisputably entitle a defendant to a jury determination that he is guilty of every element of the crime which he is charged, beyond a reasonable doubt.”)(internal quotations omitted); see also In re Winship, 397 U.S. 358 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”); Jackson v. Virginia, 443 U.S. 307, 314 (1979) (“A meaningful opportunity to defend, if not the right to trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused.”).

The Rules of Evidence serve to safeguard an individual’s rights to due process of law and an impartial jury. One of the most important of those rules is the rule requiring exclusion of evidence where the probative value is substantially outweighed by the danger of unfair prejudice arising from that evidence. Here, the danger of unfair prejudice by permitting the alleged victim to use a “security blanket or pillow” while testifying outweighed any probative value the use of the item could have provided to the jury. Generally, all relevant evidence is admissible. Rule 402, SCRE. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE. However, even relevant evidence must “be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Rule 403, SCRE. Thus, consideration of whether evidence is relevant and admissible requires consideration of the

evidence's probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two. The links among Rules 401, 402, and 403 are undeniable.

The starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. “‘Probative’ means ‘[t]ending to prove or disprove.’” State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). According to this Court, “[p]robative value’ is the measure of the importance of that tendency to the outcome of a case.” Id. at 610, 759 S.E.2d at 165. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. “The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.” State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). “‘Unfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.’” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)(quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, “[t]he term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” Old Chief v. United States, 519 U.S. 172, 180 (1997). “Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its

probative value, for instance, an appeal to emotion.” United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003).

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

Although the issue does not concern the use of a closed courtroom or of videotaped sessions, an examination of the statute permitting such is helpful to analyze the probative value aspect of the equation in the present case. The General Assembly requires courts to “treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate.” S.C. Code Ann. § 16-3-1550(E). This Court has held that in order for a trial court to permit closed or taped sessions, the “trial just must make a case-specific determination of the need for videotaped testimony.” State v. Murrell, 302 S.C. 77, 80-81, 393 S.E.2d 919, 921 (1990). This determination requires consideration of “the testimony of an expert witness, parents or other relatives, other concerned and relevant parties, and the child.” Id. The trial court must find use of an alternative procedure is necessary to prevent a witness from suffering the trauma of testifying in the defendant’s presence. Maryland v. Craig, 497 U.S. 836, 856-857 (1990).

This finding of necessity for closed or taped testimony as required by South Carolina’s statute is echoed by other state courts addressing whether witnesses may hold comfort items while testifying. See e.g., State v. Dye, 309 P.3d 1192 (Wash. 2013); Gomez v. State, 25 A.3d 786 (Del. 2011); State v. Dickson, 337 S.W.3d 733 (Mo. Ct. App. 2011); State v. Powell, 318 S.W.3d 297

(Mo. Ct. App. 2010); State v. Marquez, 951 P.2d 1070 (N.M. Ct. App. 1997); State v. Palabay, 844 P.2d 1 (Hawai'i Ct. App. 1992); State v. Cliff, 782 P.2d 44 (Idaho Ct. App. 1989). With no finding of necessity of the presence of the comfort item for the alleged victim in the present case, measuring the probative value of the presence of the item as it relates to the ability of the alleged victim to testify is difficult. However, nothing in the record indicated the seventeen-year old required the comfort item to testify or that she had any difficulty in testifying. The only note about possible difficulty in her testifying was the prosecutor's closing argument indicating the seventeen-year old struggled to answer compound questions asked by defense counsel. Such difficulty lay in the type of questions and the trickiness anyone faces by compound questions. A comfort item in the form of a security blanket or pillow would hardly alleviate such a stress.

Having determined the low probative value of the presence of the comfort item to the witness's testimony, next, the analysis must turn to the danger of unfair prejudice. In this case, that danger was extreme. Two South Carolina cases illustrate the very extreme nature of the danger of unfair prejudice presented. First, in State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007), this Court held a solicitor's closing argument during the penalty phase of a capital trial required reversal. The solicitor informed the jury that if death were not the verdict, then the jury would be declaring "open season on babies" in the county. Id. Additionally, the solicitor told the jury that he expected the verdict to be death. Id. at 223, 641 S.E.2d at 881. Finally, he concluded wheeling the deceased baby's crib, which was displayed in a large black shroud, in a mock funeral procession in the courtroom. Id. Any of the three would have required reversal. Id. Although this Court was analyzing the closing argument in light of the statutory requirement that a death sentence not be imposed under the influence of passion, prejudice, or any other arbitrary factor, the legal principles apply to the present case because the danger of unfair prejudice often involves the jury's

decision being based on passion, prejudice or other arbitrary factor. See id. at 222, 641 S.E.2d at 881.

Second, the Court of Appeals addressed a case in which a witness approached the witness stand with an urn in her hands containing the ashes of the deceased for whose death the defendant was on trial. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013). The trial judge stopped the witness from taking the stand and excused the jury. Id. Thereafter, the judge issued a curative instruction. Id. at 258, 746 S.E.2d at 501. The Court of Appeals held a mistrial was not required because the curative instruction cured any alleged error or prejudice. Id. Further, the court noted the defendant could not demonstrate that any juror saw the item in the witness's hand or could identify the item as an urn. Id. Although the issue of error was not before the Court of Appeals, it appears clear that all parties involved recognized the danger of the witness taking the stand with the urn.

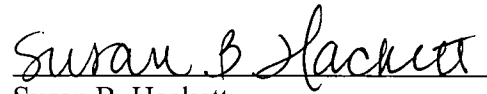
Balancing the extreme danger of unfair prejudice arising from the holding of a comfort item, such as a security blanket or pillow, with the low probative value of having the item present in the courtroom in light of no finding by the trial court that such an item was necessary or even a presentation of such facts to the trial court by the prosecution demonstrates the probative value was substantially outweighed by the danger of unfair prejudice. Trial counsel's failure to object to the presence of the item, or at a minimum require a necessity finding, was deficient performance. The question for counsel was not whether the item's presence "shocked the conscience," as trial counsel testified at the PCR hearing, but whether the item's presence would permit the jury to make a decision on a basis other than the evidence before it, such as emotion or prejudice. Trial counsel's failure was prejudicial where the only evidence against Petitioner was the testimony of the seventeen-year old alleged victim who claimed the abuse occurred three years prior to the trial and

in areas open to others in the household. Although the police recovered Petitioner's semen from Minor's bedroom closet, the semen derived from Petitioner alone and could not prove a sexual assault. The use of the comfort item permitted the state to bolster its case and explain away weaknesses. The state relied upon Minor's learning disability to explain why she waited to make the allegations and why her allegations were, at times, confusing. The weakness of the state's case against Petitioner was demonstrated in the jury's inability to reach a verdict on one of the counts.

CONCLUSION

As to Issue I, Petitioner respectfully requests this Court affirm the PCR court's finding that he is entitled to a belated direct appeal. As to Issue II, Petitioner respectfully requests this Court reverse the decision of the PCR court denying relief concerning trial counsel's failure to object to the alleged seventeen-year old victim's use of a security blanket or pillow when testifying.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of January, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County
Roger L. Couch, Circuit Court Judge

ROBERT S. HORTON,

PETITIONER,

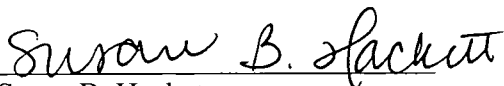
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

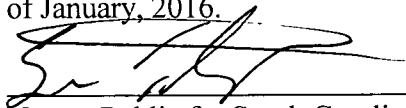
CERTIFICATE OF SERVICE

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 Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Robert S. Horton #351540, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 8th day of January, 2016.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of January, 2016.


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

My Commission Expires: October 30, 2022.