

STATE OF SOUTH CAROLINA
In The Supreme Court

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SC SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2015-001769

Roy James Jenkins, #349450, Respondent,

v.

State of South Carolina, Petitioner.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the post-conviction relief judge erred in finding Respondent satisfied his burden of proving trial counsel was ineffective for failing to introduce a recording of a phone call between the victim and an unidentified male where trial counsel provided valid strategic reasons for excluding the recording, no testimony or evidence was provided to show the recording would have been admissible, and Respondent failed to introduce, play, or provide a transcript of the recording but merely testified about some of the content of the recording.

STATEMENT OF THE CASE

In December 2008, the Spartanburg County Grand Jury indicted Respondent for two counts of criminal sexual conduct with a minor, second degree (2008-GS-42-7197, counts 1 and 2). The Applicant was represented by J. Patricia Anderson, Esquire ("Counsel"). On January 27, 2012, the Applicant proceeded to trial before the Honorable John C. Hayes and a jury. The jury found Respondent guilty as indicted on both counts. Judge Hayes sentenced Applicant to two concurrent terms of twenty years.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. Following the submission of a brief pursuant to Anders v. California, 386 U.S. 738 (1967), the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Jenkins, No. 2013-UP-124 (filed March 27, 2013). The court of appeals returned the remittitur to the circuit court on April 16, 2013.

Respondent filed an Application for post-conviction relief on November 8, 2013. Respondent filed a return on or about August 15, 2014. The Honorable R. Scott Sprouse convened an evidence hearing on the application at the Spartanburg County Courthouse on June 12, 2015. Respondent was present and represented by Kenneth P. Shabel, Esquire. The post-conviction relief judge granted relief in an order filed July 28, 2015.

STANDARD OF REVIEW

When reviewing questions of fact, this Court may affirm the post-conviction relief judge's grant relief only if there is probative evidence to support his findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624) (1989)). However, the Court must overturn the post-conviction relief judge if there is no probative evidence to support his findings. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) (citing Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996)). When reviewing questions of law, the Court conducts a *de novo* review, and must reverse the post-conviction relief judge when his decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014) (quoting Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013)).

ARGUMENT

The post-conviction relief judge erred in finding Respondent satisfied his burden of proving trial counsel was ineffective for failing to introduce a recording of a phone call between the victim and an unidentified male where Trial counsel provided valid strategic reasons for excluding the recording, no testimony or evidence was provided to show the recording would have been admissible, and Respondent failed to introduce, play, or provide a transcript of the recording.

The victim ("Victim") was 22 years old by the time of Respondent's trial. Respondent and his wife adopted Victim, who was also his wife's biological niece, when she was about seven years old. (App. p. 34, lines 8-18). Victim testified that shortly after she was adopted, Respondent began asking her "to do small favors for him, like massage his back or massage his feet and legs and things like that . . ." (App. p. 36, line 23-p. 37, line 4). Victim testified that between the ages of 11 and 14, Respondent began to "ask [her] to massage his penis for him. . . . [which] later that progressed into oral sex." (App. p. 37, lines 7-16). Victim testified that around the age of 14 or 15 Respondent's requests "graduated into more of an intercourse." (App. p. 40, lines 8-11). Victim testified Respondent told her he had "a prostate problem," (App. p. 40, lines 22-23), and that he would say: "If I don't get off, then I'll get backed up." (App. p. 40, lines 23-25). Victim testified Respondent would abuse her anywhere from two to three times a week. (App. p. 41, lines 4-5). Victim testified she was punished when she did not perform the acts and was rewarded when she did. (App. p. 37, lines 18-19; p. 41, lines 11-25; p. 51, lines 22-23).

Victim moved out of the home when she was seventeen, right before her senior year, (App. p. 45, lines 3-6), and the sexual relationship with Respondent did not continue after that. (App. p. 45, lines 11-18). After leaving, Victim disclosed the abuse to a family friend, Judy Smith. (App. p. 46, lines 1-25). Victim eventually moved in with Smith where she stayed for about a year. (App. p. 67, line 7-p. 68, line 6). Victim then disclosed the abuse to Melanie, who was silent at first, then began to cry and told Victim she was sorry and that she would talk to

Respondent. (App. p. 47, lines 10-18). Victim said that a week later, Melanie "changed her opinion and no longer believed [her]." (App. p. 47, lines 18-22). Victim then filed a report with the Spartanburg County Sheriff's Office. (App. p. 47, line 21-p. 49, line 2). In July 2007, after Victim had moved out, Respondent's truck was stolen from the driveway and that he and Melanie suspected Victim's boyfriend had stolen it. (App. p. 65, line 6). Victim testified she had nothing to do with the theft. (App. p. 65, lines 20-25).

Two State's witnesses testified they had heard Respondent was calling Victim his second wife. (App. p. 74, lines 12-19; p. 79, lines 6-23). Additionally, Victim and another witness testified that Respondent would sometimes slow dance with Victim in bars. Susan Hughes, a coworker of Melanie's, testified that on one occasion Respondent took Victim driving and that Victim had a bathing suit on and she had a "hickie" on her shoulder. (App. p. 78, lines 17-23; App. p. 82, lines 2-3). She also testified that she thought Respondent was messing with Victim because of the way he looked at her and acted around her. (App. p. 79, lines 19-23).

Judy Smith testified Victim "was an unhappy child and she acted like there was something wrong." (App. p. 88, line 2-3). Smith testified that Victim's behavior improved and that she seemed happier when she came to live in her home. (App. p. 89, lines 2-4). Smith further testified Victim never wavered in her convictions or changed her story about the incidents with Respondent. (App. p. 90, lines 7-12).

Respondent testified in his own behalf at trial. He denied Victim's accusations and testified that he was surprised by Victim's accusations of abuse and that he never touched her sexually. (App. p. 110, line 24-p. 11, line 7). Respondent testified he made a statement to the investigator with the sheriff's department that he had not abused Victim. (App. p. 118, line 15-p. 119, line 5). Respondent testified that the "second wife" comments were "a family joke." (App.

p. 120, lines 17). He stated it was "no more than how women nag at men all the time about things, and [Victim] was a constant nagger." (App. p. 120, lines 18-21). He said that "[n]o one took it serious. . . It's just a joke." (App. p. 120, lines 21-24). Respondent testified that the truck was stolen from his yard July 16, 2007, and that Victim reported the abuse to the police on August 20, 2007. (App. p. 116, lines 1-4; App. p. 134, lines 21-p. 135, line 6). Respondent testified he thought that Victim was "trying to get back even with [him] for stealing [his] trucks, cars, . . ." (App. p. 128, lines 22-23), and because he "was so rough to them." (App. p. 129, lines 8-11).

Melanie also testified for Respondent, and stated that in August of 2007 Victim told her that Respondent had sexually abused her. (App. p. 141, lines 10-12). She testified that she did not believe her, (App. p. 141, lines 18-19), but that Victim "was broke down and tearful[.]" and she "tried to console her. . . ." (App. p. 141, lines 23-24). She denied that she told Victim she was sorry. (App. p. 141, line 20-p. 142, line 1). Neal and Nick Jenkins, Victim's adoptive brothers, and five other relatives testified for the defense as well. (App. pp. 149-81).

At his evidentiary hearing on his post-conviction relief ("PCR") application, Respondent alleged counsel was ineffective for suppressing "the audio recordings that the State was going to try to prove. . . because [Respondent] did not want it suppressed." (App. p. 334, 13-17). Respondent testified that, as part of discovery, the State provided Counsel with an audio recording. (App. p. 341, lines 19-23). Respondent testified that the State "tried to say that that was [him] talking with [Victim]. (App. p. 342, lines 3-4). Respondent denied that it was his voice. (App. p. 342, lines 5-6). Respondent also testified to the following:

Q: Okay. Was there anything on the tape said by the person that was supposed to be you that, in your mind, made it clear it wasn't you?

...

A: It stated that, "I'm a one-armed, one-legged man. Why are you doing this to me? I need my checkbook back."

...

Q: So your daughter is on the recording, and there's this other guy that they said was you?

A: That's—that's what it played.

(App. p. 342, line 7 –p. 343, line 20).

Respondent testified he wanted the audio recording played "Because if [it was] played it in front of the jury, and [he] would have stood up, the jury could have seen that [he has] . . . all of my limbs." (App. p. 342, line 24-p. 343, line 1). And because "I would not be the man that's in the video [sic] because of my speech." (App. p. 343, lines 3-4). Respondent testified that he "felt [Counsel] should have cross-examined [Victim] on that." (App. p. 343, lines 5-7).

Counsel testified that she first sought to suppress the tape because she was "afraid that a jury might determine that it was [Respondent] on the tape." (App. p. 352, lines 19-24). Counsel testified as follows on cross-examination:

Q So the audiotape was that the State had was someone essentially admitting to this; is that what they thought or—"

A Yes.

Q Okay. And so the danger, if it went in, was that it could make him look more guilty if the jury believed that was him?

A Yes.

(App. p. 352, line 25-p. 353 line 6).

Counsel then testified she had been practicing law for approximately 25 years at the time of Respondent's trial and that she had represented defendants in cases involving criminal sexual conduct charges before. (App p. 353, lines 9-14). Counsel testified her defense strategy was to show that Respondent was not guilty and Victim had motive to make the allegations against him. (App. p. 357, lines 2-3). Counsel testified she tried to show that Victim's motive was that she

"had a boyfriend that the family did not approve of, and he had [allegedly] stolen . . . their truck and the police were called, and she got mad because of this." (App. p. 356, line 19-p. 357, line 1).

Counsel testified that Respondent wanted the audiotape to come in but that she advised him it would be risky, and that that was why she ultimately made the motion to suppress the audiotape. (App. p. 353, lines 15-19). She also acknowledged that the State acknowledged the voice was not Respondent's. (App. p. 353). The State ultimately did not seek to introduce the tape at trial. (App. p. 26, lines 5-14; App. p. 369). When Petitioner questioned Counsel regarding how she intended to have the audiotape admitted when the speaker was not Respondent and the State did not plan to introduce it, she simply testified she should have tried. (App. p. 354, line 8-p. 355, line 1).

The PCR judge found that Counsel was ineffective for "failing to introduce an audio recording of the victim for impeachment purposes." (App. p. 368). Specifically, the PCR judge found that:

According to the testimony of both [Respondent] and [Counsel], it appears that law enforcement did not immediately arrest Applicant for the charges and that there was a significant period of time after the allegations came about before he was arrested. At a time shortly before the Applicant's arrest, law enforcement became aware of a phone conversation involving [Victim]. Another individual in the conversation questioned the victim as to why she would do this to him and may have confessed to the crime.

The other voice in the recording was purported to be the Applicant. It was shortly after this conversation came to light that Applicant was arrested. Therefore, this Court concludes that law enforcement used said audio tape in securing a warrant for defendant's arrest.

(App. p. 368-69). The PCR judge further stated that "If the alleged victim had perpetuated a fraud in the preparation of the audio tape, that piece of evidence would have direct exculpatory effects at trial." (App. p. 369).

A. Deficiency

The PCR judge erred in finding counsel was ineffective for failing to seek to introduce the audio recording of the phone call between Victim and an unidentified male where Counsel gave a valid trial strategy for not wanting the jury to hear the recording. .

In a PCR action, the applicant has the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must show 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The Respondent must prove both that counsel's performance was deficient and that such deficient performance prejudiced him. Strickland, 466 U.S. at 688.

The Court measures counsel's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117-18, 326 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). In other words, the question is whether counsel "provided representation within the range of competence required" in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687). The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Here, Counsel testified that at the time of trial, she wished to suppress the tape because she was worried that the jury might believe it was Respondent. The PCR judge erred in overlooking Counsel's testimony about her valid trial strategy for excluding the recording.

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984).

On collateral review, the PCR Court is required to "indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance[.]" Strickland v. Washington, 466 U.S. 668, 689 (1984). This presumption is necessary because "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. (citing Engle v. Isaac, 456 U.S. 107 (1982)). Furthermore, the courts "must be wary of second-guessing defense counsel's trial tactics," Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64 (2011) (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992)), and "where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance." Whitehead v. State, 308 S.C. at 122, 417 S.E.2d at 531 (citing Goodson v. United State, 564 F.2d 1071 (4th Cir. 1977)). "A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984)

Despite Counsel's unequivocal feelings about Respondent's conviction, she nevertheless testified that she chose to move to suppress the audiotape because she was afraid the jury might

determine that it was Respondent on the tape. (App. p. 352). Respondent failed to produce the audio tape at the PCR hearing. Furthermore, there was no evidence presented at the PCR hearing to invalidate Counsel's valid trial strategy. Petitioner submits that the PCR judge erred in finding Respondent satisfied his burden to overcome the presumption of effective assistance where Counsel gave a valid trial strategy for failing to seek to introduce the audiotape.

B. Prejudice

Petitioner submits that there is no competent evidence in the record to support the post-conviction judge's finding that Respondent met his burden of proving Counsel's alleged error in failing to seek admission of the audiotape prejudiced him. Petitioner submits that the Court erred in finding that Respondent's testimony alone as to the contents of the tape was sufficient to satisfy his burden of proving Counsel was ineffective for failing to introduce the tape.

Respondent had the burden of proving prejudice in his PCR action. 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."). To prove prejudice, an applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. at 694. On other words, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695. Strickland v. Washington, 466 U.S. 668, 695, 104 S. Ct. 2052, 2068-69, 80 L. Ed. 2d 674 (1984). "In making this determination, [the PCR court] must consider the totality of the evidence before the judge or jury." Id. at 694.

By failing to introduce the actual recording or a transcript thereof, Respondent has failed to satisfy his burden of showing there is a reasonable probability that the introduction of this audio recording would have affected the outcome of Respondent's trial. There was not enough evidence presented to the PCR judge for him to make a determination about either the contents of the phone call or whether the recording would have even been admissible at the trial. The only contents of the tape that were revealed to the court were: "I'm a one-armed, one-legged man. Why are you doing this to me? I need my checkbook back." Petitioner submits that without hearing the actual recording and with only hearing Respondent's interpretation of its contents, the PCR judge was not in a position to determine whether the tape had any exculpatory qualities. Petitioner submits this statement is utterly meaningless without context of at least one of the speakers. See *Glover v. State*, 318 S.C. 8, 12, 425 S.E.2d 25 (1995) (finding mere speculation as to what an alleged beneficial witness' testimony would have been does not satisfy the prejudice prong).

Respondent presented no evidence at the PCR hearing that would support the PCR judge's finding that this evidence would have been admissible at trial if Counsel had sought to introduce it. The court also states "the other individual indicates that he had one arm and one leg. It was clear to the Court that [Respondent] had both of his arms and both of his legs." (App. p. 369). Petitioner submits the statement that the speaker had one arm and leg was hyperbole and the jury would have interpreted it as such. Therefore, had such statement been introduced, there is no evidence it would have changed the outcome of Respondent's trial.

Accordingly, Petitioner submits that where Respondent failed to introduce the recording or a transcript thereof, the PCR judge could erred in finding Petitioner satisfied his burden of

proving that there is reasonable probability that the introduction of this audio recording would have affected Respondent's conviction.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant certiorari to review the post-conviction relief judge's erroneous finding or error and prejudice.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

February 1, 2016.

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Spartanburg County
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2015-001769

ROY JAMES JENKINS,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Petition for Writ of Certiorari and Appendix**, has been served upon opposing counsel by mailing one (1) copy in the United States mail, postage prepaid:

Mr. Kenneth Philip Shabel, Esquire
Campbell & Shabel, LLC
175 Magnolia Street, Suite 201
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This 1ST day of February, 2016.



ASHLEY HAWORTH
LEGAL ASSISTANT



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FEB 01 2016
SC SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

February 1, 2016

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

RE: Roy James Jenkins v. State of South Carolina
Appellate Case No. 2015-001769pwc

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Petition for Writ of Certiorari** and two copies of the Appendix in the above-referenced case.

Sincerely,

Alicia A. Olive
Assistant Attorney General
SC Bar No. 102089

AAO/ah
Enclosures

cc: Kenneth P. Shabel, Esquire