

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Edward W. Miller, Circuit Court Judge

RECEIVED

FEB 22 2016

SC SUPREME COURT

MARSHALL DEWITT MCGAHA,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001464

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
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Division of Appellate Defense
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ISSUE PRESENTED

When Petitioner went to trial for two counts of criminal sexual conduct with a minor and two counts of lewd act upon a child, did the PCR judge err in refusing to allow PCR counsel to obtain records from the South Carolina Department of Social Services [DSS] to verify that DSS investigated the family of the minor witnesses based on a report of drug abuse made by Petitioner in order to establish an ineffective assistance of trial counsel claim for failing to use the DSS records to establish bias and motive to misrepresent pursuant to Rule 608(c) SCRE?

STATEMENT

In March of 2011, the Greenville County Grand Jury indicted Petitioner for two counts of criminal sexual conduct with a minor and two counts of lewd act upon a child, indictments #2010-GS-23-7403, 7404, 7405 and 7406. On August 8, 2011, Petitioner proceeded to jury trial before the Honorable D. Garrison Hill. Thomas M. Hoskinson represented Petitioner at trial. Bryna S. Seay prosecuted the case. The jury returned with verdicts of guilty. Judge Hill sentenced Petitioner to two concurrent life sentences for the criminal sexual conduct with a minor charges, fifteen years concurrent for one of the lewd act charges and fifteen years consecutive for the other lewd act charge. A timely notice of intent to appeal was filed and the direct appeal perfected. On June 26, 2013, the South Carolina Court of Appeals affirmed the convictions and sentences. State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (Ct.App. 2013).

On May 2, 2014, Petitioner filed an application for post conviction relief. The State filed a return on October 30, 2014, On April 21, 2015, an evidentiary hearing was held before the Honorable Edward W. Miller. Caroline M. Horlbeck represented Petitioner at the PCR hearing. Karen C. Ratigan represented the State. In a written order signed June 4, 2015, Judge Miller denied relief and dismissed the application. A timely notice of intent to appeal was served on July 2, 2015. This petition for writ of certiorari follows.

ARGUMENT

When Petitioner went to trial for two counts of criminal sexual conduct with a minor and two counts of lewd act upon a child, the PCR judge erred in refusing to allow PCR counsel to obtain records from the South Carolina Department of Social Services [DSS] to verify that DSS investigated the family of the minor witnesses based on a report of drug abuse made by Petitioner in order to establish an ineffective assistance of trial counsel claim for failing to use the DSS records to establish bias and motive to misrepresent pursuant to Rule 608(c) SCRE.

In the application for post conviction relief Petitioner alleges that the charges were brought against him in retaliation for him reporting the family to DSS for drug abuse. (App. pp. 291-300). At the beginning of the PCR hearing counsel for Petitioner advised the PCR judge that she had not obtained DSS records as requested by Petitioner. (App. p. 309, lines 8-21). PCR counsel offered to try and obtain the DSS records but admitted that she would not be able to get the records that day. (App. p. 309, lines 17-21). While PCR counsel was initially unsure of the relevance of the DSS records, Petitioner told the PCR judge, "That's where it all stemmed from, from me calling DSS on them. The mom had 3,300 and something milligrams of crack in her system and said she wasn't addicted to crack no more. The 83 year old great-grandma, she tested positive for crack cocaine. That little 5-year-old kid tested positive for crack cocaine. Omega Lab – that's right here And Becky, she told me, she said, 'I'll get you,' she said, 'I'll put you away forever for getting DSS involved.'" (App. p. 312, lines 14-22). "Becky" is Rebecca Chastain, the guardian grandmother of the minors. The minors are sisters who lived with their grandmother, their great grandmother, another sister and the Petitioner.

At trial during the cross examination of Jessica Hufflin, an aunt of the minors, trial counsel asked, "Are you aware that in March that Family Court determined that - " (App. p. 144, lines 24-25). The State objected and an off the record bench conference was held. (App. p. 145, lines 1-8). The judge's ruling during the bench conference was not placed on the record but no further

questions in regard to family court were asked. Trial counsel failed to question the grandmother, Rebecca Chastain, about a DSS action or family court. (App. pp. 149-155).

The PCR judge asked PCR counsel, “Can you explain to me why there is – that it’s possible that it now becomes relevant just because we’re in a post conviction relief action?” (App. p. 314, lines 5-7). PCR counsel explained, “Well, Judge, I think the relevance would be Mr. McGaha would have used that as a defense, and he seems to be saying that he is the reporter, he is the one who reported the drug usage by the mother and perhaps other family members while the children were present . And his position is that this charge was levied against him in retaliation. I think it becomes relevant in that DSS would need to come in and confirm or deny that he was the reporter in this case.” (App. p. 314, lines 8-17). The PCR judge ruled, “Mr. Hoskinson had those records, obviously, and was aware of the DSS investigation. So by implication, I don’t think that argument holds water.” Later Petitioner told the PCR judge, “I want to have DSS workers and all here, the ones that interviewed all the people and all.” (App. p. 317, lines 6-7). The PCR judge stated, “Well, I’ve ruled on that. The trial judge ruled it was not relevant, the Court of Appeals reviewed the record and did not require it to be done. I am not going to do it in this proceeding.” (App. p. 317, lines 8-11). Petitioner correctly noted that the appellate court did not address the issue in regard to family court or the DSS records as the issue was not preserved for appellate review. (App. p. 317, lines 12-13). The PCR judge stated, “By implication, they agreed with it.” The PCR judge erred in not allowing PCR counsel to obtain the DSS records.

The issue raised on direct appeal involved whether the trial court erred in trying the charges involving the two minors together. State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (Ct.App. 2013). The trial judge’s ruling on the family court questioning was not placed on the record. Trial counsel failed to question the grandmother about the DSS action. As a result, the Court of Appeals

did not rule on the issue involving the DSS action and did not “by implication agree with it.” The PCR judge erred in refusing to allow PCR counsel to obtain records from DSS to verify that, as a result of Petitioner’s report to DSS that the guardian grandmother of the minors allowed the biological mother and the great grandmother to use drugs in the home, DSS found that the mother, the great grandmother and one of the minors tested positive for cocaine. Once verified, this information shows bias and a motive to misrepresent. Trial counsel should have questioned the grandmother about Petitioner’s report to DSS to establish bias and motive to misrepresent pursuant to Rule 608(c) SCRE.

In the order of dismissal the PCR judge wrote, “This Court finds the Applicant failed to meet his burden of proving trial counsel should have contacted witnesses to use at trial. As these witnesses did not testify at the PCR hearing, however, the Court cannot speculate as to what impact their testimony would have had upon the Applicant’s trial.” (App. p. 355). PCR counsel was unable to subpoena the DSS witnesses to testify at the PCR hearing because she had been unable to obtain the DSS records. PCR counsel informed the PCR judge that she had not obtained the DSS records. This Court should remand the case for an additional evidentiary hearing to determine if DSS investigated the family and ordered drug testing as a result of a report made by Petitioner. Once established, the DSS records form the basis of an ineffective assistance of trial counsel claim based on trial counsel’s failure to use the records to show bias and a motive to misrepresent pursuant to Rule 608(c) SCRE.

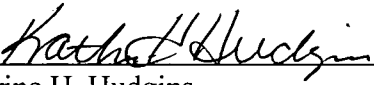
The applicant in a PCR hearing bears the burden of establishing he is entitled to relief. Lomax v. State, 379 S.C. 93, 100, 665 S.E.2d 164, 168 (2008). “This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law.” Id. at 101,

665 S.E.2d at 168. The PCR court's findings on matters of credibility are given great deference by this Court. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). The PCR judge's findings that the trial judge found that the DSS records were irrelevant and that the appellate court addressed the issue with regard to the DSS records constitute errors of law. Petitioner is unable to meet his burden of proof without obtaining the DSS records, as offered by PCR counsel.

CONCLUSION

Based on the above argument, this Court should remand the case for an additional evidentiary hearing to address the DSS records and trial counsel's failure to use the records to establish bias and motive to misrepresent.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of February, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Edward W. Miller, Circuit Court Judge

MARSHALL DEWITT MCGAHA,

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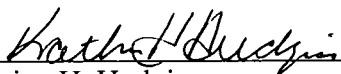
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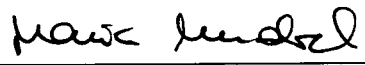
CERTIFICATE OF SERVICE

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 Karen Ratigan, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 22nd day of February, 2016.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of February, 2016.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.