

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2015-0001769

Roy James Jenkins, #349450,

Respondent,

vs.

State of South Carolina,

Petitioner.

RESPONDENT'S RETURN TO PETITION
FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the testimony of both the Respondent and his trial attorney give the Post-Conviction Relief Judge the required probative evidence to support his findings of fact which granted Respondent Post-Conviction Relief?

STATEMENT OF THE CASE

Roy James Jenkins (hereinafter "Respondent") was arrested on June 26, 2008 on a charge of Criminal Sexual Conduct with a Minor in the Second Degree (11-14). He was ultimately indicted on two separate counts of the same crime as codified by South Carolina Code Section 16-3-655(B). Both indictments involve the same alleged victim. The incidents allegedly occurred in October of 2003 – nearly five years prior to Respondent's arrest.

Respondent's trial did not begin until January 26, 2012 – three and a half years after his arrest. He was represented by attorney Julia Patricia Anderson. On January 27, 2012, the jury found Respondent guilty on both counts. The Court sentenced him to twenty years on each charge, with the sentences to run concurrent. The Court also ordered Respondent be placed on the Sex Offender Registry. Respondent appealed timely, and the Court of Appeals affirmed the conviction and sentence. State v. Jenkins, No. 2013-UP-124 (March 27, 2013).

Respondent filed this underlying application for Post-Conviction Relief on November 8, 2013, citing numerous grounds for relief. His case came before the Court on June 12, 2015. At trial, he requested Post-Conviction relief on three separate grounds:

- (a) Failure to introduce an audio recording of the victim for impeachment purposes;
- (b) Failure to preserve the videotaped testimony of a forensic interviewer for the transcript and record; and
- (c) Failure to strike a specific juror during the trial of the case.

After hearing the testimony of both the Respondent and his trial attorney, along with the testimony of a member of Respondent's family, the Court granted Respondent Post-Conviction Relief in an Order filed on July 28, 2015. The Order granted relief only on the first ground – that of the audiotape. The State of South Carolina, after filing no post-trial motions, filed a timely Notice of Appeal.

STANDARD OF REVIEW

In examining the decisions of a Post-Conviction Relief Judge, this Court must uphold the factual findings of the PCR court if there is “any evidence” of probative value to support them. Webb v. State, 281 S.C. 237, 238, 314 S.E.2d 839, 839 (1984) (citations omitted). Thus, an appellate court must give “great deference to the PCR court's findings of fact and conclusions of law.” Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When such findings deal (in whole or in part) with matters of credibility, an appellate court must “give deference to the PCR court's findings because [that] court lacks the opportunity to directly observe the witnesses.” Lee v. State, 396 S.C. 314, 319, 721 S.E.2d 442, 445 (Ct. App. 2011). Only if there was no probative evidence of any kind to support the findings will a Court overturn the findings of the PCR Court. Holland v. State, 322 S.C. 111, 113, 470 S.E.2d 378, 379 (1996) (citations omitted).

ARGUMENT

THE TRIAL COURT HAD PROBATIVE EVIDENCE – THROUGH THE TESTIMONY OF BOTH THE RESPONDENT AND HIS TRIAL ATTORNEY -- TO SUPPORT ITS FINDINGS AND TO GRANT RESPONDENT POST-CONVICTION RELIEF.

The Sixth Amendment to the United States Constitution grants Defendants in a criminal prosecution the right to the effective assistance of the attorney representing them. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 669 (1984). In a PCR proceeding, applicant bears the burden of proving the allegations in his application. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citation omitted). However, an applicant need only prove his allegations by a preponderance of evidence. Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

To meet that burden, there are two elements an applicant must prove. First, he must show that his attorney's performance was "deficient." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting Strickland at 687). A deficient performance requires a showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. If, however, counsel is able to cite "a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 530, 531 (1992) (citations omitted).

Once an applicant can prove his attorney's performance was deficient, he must then prove that the deficient performance prejudiced him. Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting Strickland at 687). This is such prejudice that the applicant "was deprived of a fair trial." Id. Such prejudice exists when "there is a reasonable probability that, absent the errors, the factfinder would have had a

reasonable doubt respecting guilt. Strickland, 466 U.S. at 695. Even if an attorney is deficient in performance, there is no prejudice if “there is otherwise overwhelming evidence of the defendant's guilt.” Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010).

This Court has a history of finding prejudice in PCR cases where attorneys failed witness credibility was a critical issue in the case. See, e.g., Rutland v. State, Op. No. 27614 (2016) (counsel failed to cross-examine sole independent witness on prior inconsistent statements); Thomas v. State, 308 S.C. 123, 124, 417 S.E.2d 531, 532 (1992) (counsel failed to call as witnesses the only individuals that could cast doubt on the victim's identification); Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013) (counsel failed to object to inadmissible hearsay which bolstered victim’s credibility); Bagwell v. State, 410 S.C. 259, 763 S.E.2d 630 (Ct. App. 2015) (counsel failed to seek blood testing to attack credibility of sole identification witness).

At Respondent’s actual criminal trial in 2012, the State of South Carolina only called four witnesses. (App. p. 2, lines 10-24). A fifth witness testified by way of video.¹ (App. p. 103, lines 13-15). The first, and primary witness, was the victim, who was twenty-two at the time of trial. (App. p. 34, line 1). Her testimony was that Respondent had molested her between the years of 2002 and 2005. (App. p. 49, lines 14-15). She didn’t report the abuse until 2007. (App. p. 49, lines 1-2). There were no eyewitnesses to the allegations. (App. p. 356, lines 1-4). There was no physical evidence to support the allegations. (App. p. 337, lines 2-6). Respondent denied the allegations from the

¹ Although the jury heard the video, it was not transcribed into the record. Respondent testified at his PCR hearing that his attorney’s failure to request that the video be transcribed into the record constituted ineffective assistance of counsel.

beginning, and he wrote a statement to law enforcement denying the allegations. (App. p. 119, line 3-6).

The investigation against Respondent was an extended one, one that Ms. Anderson pointed out in her closing argument in Respondent's case:

[A]nother very interesting thing in this case to me is the fact that she went to the police on August 20th of 2007. There was no warrant – there were never a warrant signed on Roy Jenkins until June 30th of 2008. Now we're talking not – well, almost a year that supposedly the police were investigating this. ... Also I thought it was interesting that the investigating officer, Tonya Alderidge, didn't come to court and didn't testify. It took her a year, nearly a year to get a warrant against Roy and it would have been interesting to find out what she had to say about that."

(App. p. 199, lines 6-20). It took nearly five years after the investigation completed before the case went to trial. (App. p. 336, lines 13-15).

As part of the discovery that Ms. Anderson eventually received, the State turned over an audio recording. At his PCR hearing, the Respondent testified that the State purported that the audio recording contained a conversation between himself and the victim. (App. p. 342, lines 2-4). It was clear to Respondent that the victim's voice was on the recording. (App. p. 342, lines 15-20). However, after listening to the recording, Respondent said it was not his voice. (App. p. 342, lines 5-6). The man in the recording identified himself as "a one-armed, one-legged man." (App. p. 342, line 12). Most importantly, the man in the recording asks the victim, "Why are you doing this to me?" (App. p. 342, line 13).

Respondent testified at his PCR hearing that he wanted the jury to hear the recording. As he indicated at the hearing, "if you played it in front of the jury, and I would have stood up, the jury could have seen that I have, you know, all of my limbs."

(App. p. 342, line 24 – p. 343, line 1). The Court acknowledged in its PCR Order that he had both of his arms and both of his legs. (App. p. 369, lines 7-8).

Respondent believed that his attorney should have cross-examined her on her statements to the person on the audio. (App. p. 343, lines 5-7). His attorney knew he wanted her to put it before the jury. (App. p. 353, line 19). Instead, Ms. Anderson made a motion to suppress the recording. (App. p. 25, line 25 – p. 26, line 7). She argued that “the tape that they’re proposing or they’re introducing into evidence is not my client.” (App. p. 26, lines 5-7). The Solicitor agreed with Ms. Anderson, and (by what appears to be an agreement with the State) the audio was suppressed. (App. p. 26, lines 8-17). At the PCR hearing, Ms. Anderson acknowledged (on direct examination) that “the danger, if it went in, was that it could make him look more guilty if the jury believed it was him.” (App. p. 353, lines 4-7).

However, even Ms. Anderson acknowledged it was a mistake. She testified she “should have tried” to introduce it. (App. p. 353, line 23 – p. 354, line 2). She said she believes “the tape should have been played” and that she “made a big mistake there.” (App. p. 354, lines 5-7). She went on:

[B]ecause the State determined it was not my client, I should have been able to play it because they had been using this against him, and I should have asked – at least asked that it be put into evidence.”

(App. p. 354, lines 12-16).

It was clear, in cross-examination, that Ms. Anderson knew how critical this audio was to police investigation. She admitted that it took “a while” for Respondent to get arrested. (App. p. 360, lines 19-22). The audio recording occurred “shortly before” Respondent’s arrest. (App. p. 361, lines 2-4). It was Ms. Anderson’s belief that “the

phone conversation that [the State] thought was Mr. Jenkins had a lot to do with his ultimate arrest.” (App. p. 361, lines 8-11). Taking all of this testimony into account, the Court found that law enforcement used this audio tape to secure the warrant. (App. p. 369, lines 4-5).

In the eyes of the PCR Court, it was critical that there was no physical evidence to support the allegations. (App. p. 369, lines 21-22). Thus, the credibility of the victim was the “central issue.” (App. p. 369, line 22). As noted by the Court, “[i]f 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, lines 22-24). The Court found that Ms. Anderson’s failure to cross examine the victim on this tape was deficient performance. (App. p. 370, lines 1-2). Further, the Court found that this directly affected the result. (App. p. 370, line 2-3).

The statement “Why are you doing this to me” is a statement by someone accused. If that statement was made by someone other than Respondent, then the victim is accusing someone else ... someone besides the Respondent ... of the crime. In a case where the only evidence of the crime was the statement of the alleged victim, the statements the victim made to anyone about these allegations would be critical to the case. Ms. Anderson did not even attempt to bring this evidence before the jury – she tried (successfully) to keep it from them. It would constitute an inconsistent statement of the victim. It would have been important for the jury to know she was accusing someone else besides the Respondent. She needed to make the effort.

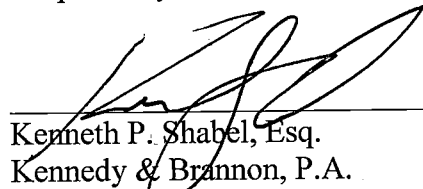
The PCR Court had ample evidence of probative value to find that Ms. Anderson was deficient in her performance. The PCR Court had ample evidence of probative value

to find that there was a reasonable probability that the outcome of the trial would have been different had Ms. Anderson used the audio recording.

CONCLUSION

For the reasons above and on the grounds stated, Respondent respectfully requests that the deny the State's request for certiorari.

Respectfully submitted,



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April 4, 2016

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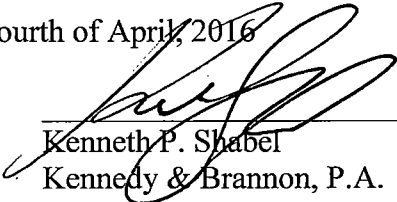
Petitioner.

PROOF OF SERVICE

I certify that I have served the Respondent's Return to Petition for Writ of Certiorari on the Attorneys for the Petitioner by depositing a copy of it in the United States Mail, postage prepaid, on April 4, 2016, addressed to their offices as follows:

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The undersigned so certifies this fourth of April, 2016


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