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SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

R. Scott Sprouse, Circuit Court Judge

JOSEPH G. COBB

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001960

JOHNSON PETITION FOR WRIT OF CERTIORARI

DAVID ALEXANDER
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel was ineffective in derogation of petitioner's Sixth Amendment right to counsel because he (1) advised petitioner not to testify because he would be impeached with prior convictions that were, in fact, inadmissible; and (2) failed to obtain any ruling from the trial judge on the admissibility of the prior convictions to preserve this issue for appeal?

STATEMENT

On August 23, 2007, a Spartanburg County grand jury indicted petitioner for Second Degree Criminal Sexual Conduct with a Minor. App. 334. On March 9, 2011, petitioner was tried before the Honorable J. Derham Cole and a jury. App. 1. Jennifer A. J. Jordan represented the State. App. 1. Richard H. Welchel represented petitioner. App. 1. The jury convicted petitioner. App. 238, ll. 12 – 23. Judge Cole sentenced petitioner to life imprisonment without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45. App. 243, ll. 9 – 21. On March 27, 2013, the Court of Appeals affirmed petitioner’s conviction after oral argument.¹ State v. Joseph Cobb, Op. No. 2013-UP-122 (S.C. Ct. App. Mar. 27, 2013).

On July 19, 2013, petitioner filed a PCR application. App. 246. On March 19, 2015, petitioner amended his PCR application through counsel. App. 257. On June 8, 2015, the Honorable R. Scott Sprouse held a hearing on petitioner’s application. App. 259. Suzanne H. White represented the State. App. 259. John Brandt Rucker represented petitioner. App. 259. On August 6, 2015, Judge Sprouse denied petitioner’s application. App. 325. No Rule 59(e) motion was filed. This petition follows.

¹ The PCR Court’s Order of Dismissal erroneously states that the Court of Appeals affirmed after review pursuant to Anders v. California, 386 U.S. 738 (1967). App. 326.

ARGUMENT

Trial counsel was ineffective in derogation of petitioner's Sixth Amendment right to counsel because he (1) advised petitioner not to testify because he would be impeached with prior convictions that were, in fact, inadmissible; and (2) failed to obtain any ruling from the trial judge on the admissibility of the prior convictions to preserve this issue for appeal.

Trial counsel's erroneous advice deprived petitioner of his constitutional right to testify in his own defense. A criminal defendant's right to testify is fundamental. U.S. Const. amend. V, VI, XIV. A defendant's right to testify flows from the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Rock v. Arkansas, 483 U.S. 44, 51-53 (1987). "Every criminal defendant is privileged to testify in his own defense, or refuse to do so." Harris v. New York, 401 U.S. 222, 225 (1971). "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Faretta v. California, 422 U.S. 806, 819 (1975).

In this sexual abuse case that lacked physical evidence of intercourse, petitioner's testimony was crucial. Petitioner's statement to the police was admitted in which he said "that he tried to have sex with her but he had difficulty getting an erection. . . ." App. 173, ll. 2 – 7. Petitioner's videotaped statement was also admitted in which he told police "that he had consensual sex with the victim." App. 190, ll. 8 – 14. As petitioner explained at PCR, when he used the phrase "consensual sex" in the video, what he "was calling sex was the kissing of the girl's lips, her neck and the breast area." App. 273, ll. 6 – 10. Petitioner adamantly denied having intercourse. App. 273, ll. 11 – 13.

Petitioner wanted to testify. App. 270, ll. 5 – 11. Trial counsel persuaded petitioner not to testify because he would be impeached with his prior convictions. App. 270, l. 5 – 271, l. 8. These convictions were two manslaughter charges from 1992. App. 270, ll. 23 – 25. Trial counsel did not

advise appellant that these convictions were too old to be used to impeach him at his 2011 trial. App. 271, ll. 1 – 12.

At the PCR hearing, trial counsel admitted that he told petitioner that these prior convictions would be used to impeach him. App. 306, ll. 2 – 11. After being confronted with State v. Bryant, 369 S.C. 511, 633 S.E.2d 511 (2006) during cross-examination on whether the prior manslaughter convictions would have been admissible, trial counsel could only state, “I’m just believing at the time that it may be allowed in, based on the judge that we have.” App. 306, l. 8 – 307, l. 6. Trial counsel then admitted that it was his duty to obtain a preserve such issues for appeal. App. 307, ll. 7 – 11.

Trial counsel obtained no ruling on the admissibility of these convictions. App. 185, l. 23 – 188, l. 22. At no point during the court’s colloquy on petitioner’s right to testify was petitioner’s prior record discussed. App. 185, l. 23 – 188, l. 22. Trial counsel failed to make a motion to settle petitioner’s record so that he could make an informed decision about his right to testify. App. 185, l. 23 – 188, l. 22.

Petitioner’s prior manslaughter convictions were not admissible; therefore, trial counsel’s advice to the contrary constitutes deficient performance. Strickland v. Washington, 466 U.S. 668 (1984). U.S. Const. amend. VI, XIV. Rule 609(b) of the South Carolina Rules of Evidence would have barred the 1992 convictions because of their age:

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party

sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Rule 609(b), SCRE. Petitioner's manslaughter convictions were more than ten years old.

Even if the date of petitioner's release from confinement for the 1992 convictions fell within the ten-year period, they were not automatically admissible. "The party attempting to introduce the prior conviction for impeachment purposes has the initial burden of establishing the basis for its admission." State v. Scriven, 339 S.C. 333, 340, 529 S.E.2d 71, 74 (Ct. App. 2000). "Furthermore, the rule requires the trial judge to balance the probative value of the evidence for impeachment purposes against the prejudice to the accused. Id. at 340, 529 S.E.2d at 75. A trial court should "articulate its ruling and the basis for it, thereby clearly and easily informing the appellate courts that a meaningful balancing of the probative value and the prejudicial effect has taken place as required by Rule 609(a)(1)." Id. at 342, 529 S.E.2d at 75-76. See also State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000) (articulating five factors to consider when balancing probity versus prejudice regarding an accused's convictions).

Trial counsel failed to obtain any ruling on the admissibility of these convictions for impeachment. Without a ruling by the trial judge, the issue was unpreserved for appeal. In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912 – 13 (Ct. App. 2004). In Scriven, the trial judge did not engage "in any meaningful analysis of the relevant factors." Scriven at 342, 529 S.E.2d at 76. The Court of Appeals reversed and remanded for the trial judge to consider the prejudice to the defendant.

Failing to preserve this issue also constitutes deficient performance under Strickland. McHam v. State, 404 S.C. 465, 746 S.E.2d 41 (2013). Petitioner proved that he was prejudiced under Strickland. Trial counsel's erroneous advice deprived petitioner of his fundamental constitutional right to testify. In Blackburn v. Foltz, 828 F.2d 1177 (6th Cir. 1987), trial counsel erroneously advised his client that his prior convictions were admissible if he testified. Blackburn, 828 F.2d at 1182. The Sixth Circuit framed the issue as whether counsel's misadvice deprived the defendant of "a meaningful opportunity to decide whether to testify." Id. The court found prejudice under Strickland because without the defendant's testimony, in part, the adverse witnesses' testimony was "virtually unchallenged." Id. at 1186.

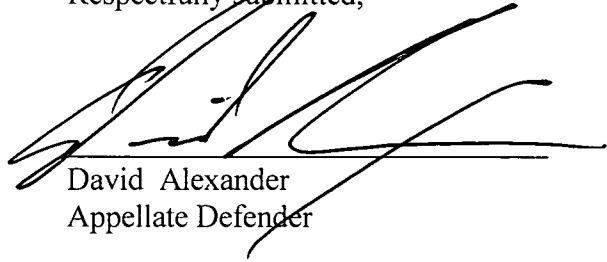
The same prejudice analysis applies to this case. Without petitioner's testimony, his purported confession to "consensual sex" in the video statement could not be explained. No physical evidence corroborated the complainant's testimony regarding penetration. As with most sex crime cases, this case should have been a credibility contest between the complainant's testimony and petitioner's testimony. Trial counsel's errors deprived the jury of hearing petitioner's testimony.

Petitioner acknowledges that the PCR court failed to rule on this issue that was presented at the PCR hearing. Petitioner did not file a Rule 59(e) Motion to seek a ruling from the PCR court. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007). However, because this ground concerns petitioner's fundamental right to testify, the procedural bar of Marlar should not be applied against petitioner because of the neglect of PCR counsel. Martinez v. Ryan, 132 S.Ct. 1309 (2012). This case should be reversed and petitioner granted a new trial.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of reversing petitioner's conviction.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line. The signature is stylized and somewhat cursive.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of April, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
R. SCOTT SPROUSE, CIRCUIT COURT JUDGE

JOSEPH G. COBB

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001960

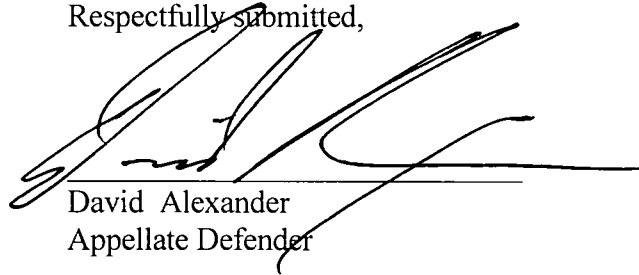
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joseph G. Cobb states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on June 8, 2015. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Joseph G. Cobb.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'DAVID ALEXANDER', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of April, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

R. Scott Sprouse, Circuit Court Judge

JOSEPH G. COBB

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APPELLATE CASE NO. 2015-001960

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson 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 Joseph G. Cobb, #183773, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 28th day of April, 2016.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of April, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026.