

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2015-001464

Marshall D. McGaha,..... Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

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MAY 31 2016

SC SUPREME COURT

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QUESTION PRESENTED

1. 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 OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the March 2011 term of General Sessions for two counts of lewd act upon a child (2010-GS-23-7403, -7405) and two counts of first-degree criminal sexual conduct (CSC) with a minor (2010-GS-23-7404, -7406). (App.pp.279-86). Thomas Hoskinson, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On August 10, 2011, the Honorable D. Garrison Hill sentenced Petitioner to concurrent terms of life imprisonment for each count of first-degree CSC with a minor and fifteen (15) years for one count of lewd act upon a child (2010-GS-23-7403). Judge Hill levied a consecutive fifteen (15) year sentence for the second count of lewd act upon a child. (App.p.277; pp.287-90).

A notice of appeal was filed at the South Carolina Court of Appeals. Susan B. Hackett, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner on appeal. The Court of Appeals affirmed Petitioner's convictions and sentences on June 26, 2013. State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (Ct. App. 2013). The remittitur was sent on July 17, 2013.

Petitioner filed an application for post-conviction relief (PCR) on May 2, 2014 (2014-CP-23-2476). (App.pp.291-300). A hearing was convened at the Greenville County Courthouse on April 21, 2015. (App.pp.305-48). Petitioner was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Edward W. Miller denied relief in an order filed June 8, 2015. (App.pp.351-57).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRPC.

ARGUMENT

The PCR judge did not err in denying Petitioner’s request for a continuance.

Petitioner argues the PCR judge erred in denying Petitioner’s request for a continuance so that he could attempt to obtain records from the South Carolina Department of Social Services (DSS). This allegation is without merit.

A.

At the beginning of the PCR hearing, counsel for Petitioner noted he had given her the names of several witnesses he wanted contacted. Counsel stated these witnesses: were not able to provide any useful information, were unable to be contacted, or did not return phone messages or letters. (App.pp.308-09). Counsel also stated Petitioner wanted her to “subpoena a number of DSS workers” regarding a DSS case involving the victims’ mother, but that she did not believe this was relevant. (App.p.309).

Petitioner stated he “called DSS on the people” and that the criminal charges against him were retaliatory. (App.pp.310-13). Petitioner admitted trial counsel unsuccessfully tried to have DSS records introduced at trial. (App.p.312). Petitioner stated he needed a continuance “so I can get – subpoena the witnesses and stuff.” (App.p.313).

The PCR judge questioned PCR counsel about the relevance of the DSS records in this PCR action, given that trial counsel had attempted to have those records introduced during Petitioner's trial. (App.pp.313-14). PCR counsel stated the question of whether Petitioner reported drug usage in the victims' home could be relevant but the PCR judge was not swayed because "[trial counsel] had those records, obviously, and was aware of the DSS investigation." (App.p.314). The PCR judge found "[t]he trial judge ruled it was not relevant" and held "I'm not going to grant a continuance or a motion to continue this discovery to go into a nonrelevant subject." (App.pp.317-18). The arguments in Petitioner's PCR application then proceeded to a full evidentiary hearing.

B.

The PCR judge did not abuse his discretion in denying Petitioner's request for a continuance of his PCR hearing so that he could attempt to obtain records from DSS concerning the victims' mother.

"In South Carolina the grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record." State v. Hill, 409 S.C. 50, 59, 760 S.E.2d 802, 807 (quoting Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007)). Furthermore,

[w]hen a motion for a continuance is based upon the contention that counsel for the defendant has not had time to prepare his case[,] its denial by the trial court has rarely been disturbed on appeal. It is axiomatic that determination of such motions must depend upon the particular facts and circumstances of each case.

State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) (quoting State v. Babb, 299 S.C. 451, 454–55, 385 S.E.2d 827, 829 (1989)). "[R]eversals of refusal of

continuance are about as rare as the proverbial hens' teeth." State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957).

The PCR judge did not abuse his discretion in denying the continuance request because a continuance was not warranted in this case. The applicant in a post-conviction relief action has the burden of proving his issues by a preponderance of the evidence. See 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."); see also Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRPC. As the applicant files the PCR application, he or she clearly knows the substance of the issues and allegations raised within the application that will later be litigated in court. Petitioner filed the PCR application in this case on May 2, 2014 and – according to the Greenville County Public Index – PCR counsel was appointed on November 18, 2014. The PCR hearing was then scheduled to be heard on April 21, 2015. Petitioner had approximately one year to prepare his PCR case to be heard. Further, Petitioner's appointed PCR counsel had five months to marshal the facts and evidence that would need to be presented at the PCR hearing. PCR counsel was clearly advised by Petitioner prior to the scheduled PCR hearing that he would like DSS records and/or witnesses but counsel admitted to the PCR judge that she did not believe the DSS information would be relevant. (App.p.309). PCR counsel never stated she was unprepared to proceed with Petitioner's PCR case that day.

Rather, it is clear from the PCR transcript that PCR counsel had thoroughly prepared Petitioner's case (including attempting to contact numerous witnesses) and presented several issues for review but that the PCR judge did not find Petitioner was either credible or successful in meeting his burden of proof. (App.p.347; pp.354-55). Specifically, the PCR judge noted "I

don't find his testimony to be credible. By his own admission he – it's acknowledged that he told me an untruth." (App.p.347). The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved."); see also Kolle v. State, 386 S.C. 578, 593, 690 S.E.2d 73, 81 (2010) (Pleicones, J., concurring) (stating the appellate court's deference to the PCR court's credibility findings is so great that it required the court to uphold the PCR court's determination even when the trial record unequivocally contradicted the testimony at the PCR hearing). Based upon the full record before this Court, the PCR judge did not abuse his discretion in denying Petitioner's request for a continuance.

Regardless, Petitioner's argument also fails because he was not prevented from testifying about the alleged DSS issue at trial. Trial counsel was clearly aware of Petitioner's contention that his criminal charges were in retaliation to his notification to DSS of the victims' mother's actions. During trial, trial counsel cross-examined the victims' aunt. The aunt testified DSS had been involved with these victims prior to their disclosure of sexual abuse. (App.p.144). When trial counsel attempted to ask about prior family court determination, the assistant solicitor objected to testimony about "Family Court actions," the parties approached the bench, and trial counsel moved on from the subject. (App.pp.144-45). The record does not reflect that either party was prevented from offering testimony about prior DSS involvement with the victims.

Petitioner testified in his own defense at trial and did not state his belief that his criminal charges were in retaliation for allegedly having contacted DSS. In any event, trial counsel's failure to pursue the DSS matter at trial would be harmless error given the strong evidence of Petitioner's guilt that was presented at trial. See State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987) (noting any "error is also subject to a harmless error analysis"); see also State v. Livingston, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984); ("[W]here guilt is conclusively proven by competent evidence and no rational conclusion can be reached other than the accused is guilty, a conviction will not be set aside because of insubstantial errors not affecting the result.").

C.

Accordingly, Petitioner failed to meet his burden of proving the PCR judge abused his discretion in refusing to grant a continuance in this case. See State v. Williams, 321 S.C. at 459, 469 S.E.2d at 51; State v. Lytchfield, 130 S.C. at 409, 95 S.E.2d at 859.

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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Attorney General

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By: 
ATTORNEYS FOR RESPONDENT

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CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same into inter-agency mail and addressed to:

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 31st day of May, 2016.



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ATTORNEY FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

May 31, 2016

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

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SC SUPREME COURT

Re: Marshall D. McGaha v. State
Appellate Case No. 2015-001464

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Senior Assistant Attorney General
S.C. Bar # 68331

Enclosures

cc: Kathrine H. Hudgins, Esquire
Trisha Allen, Victim Services (without enclosure)