

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Oconee County
Frank R. Addy, Circuit Court Judge

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SC SUPREME COURT

STEVEN G. FROST,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002098

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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QUESTION PRESENTED

Whether the PCR court erred in denying petitioner relief because it was “simply objectively unreasonable for an experienced attorney to have neglected his client until the eve of trial on a most serious charge that resulted in a presumptive life sentence,” since petitioner was entitled to fact findings based upon what actually occurred in this case, and not on the PCR judge’s presumptions about cases in general?

STATEMENT OF FACTS

Even though Petitioner Steven Frost was indicted for the very serious crime of criminal sexual conduct with a minor in the first degree, he saw his attorney, the Oconee County Public Defender Randy Day for the first time and only time on the Friday before the Monday morning trial: “ On a Friday, told me we was picking a jury Monday, and I said okay. Then Monday came, about an hour and a half later we picked a jury. The next day was Tuesday, went into court. About an hour and a half later, it was after Tuesday. Wednesday, we went up there Wednesday, and it was over with. Forty years.” App. 220, l. 23 – 221, l. 6; 244-245.

There were no defense witnesses presented during the trial, and the state’s case, counting cross-examination, only took 128 pages of trial transcript. App. 128, l. 1 – 131, l. 15. When asked what his plan of a defense was by the trial judge after the state rested, Day responded that there were no eyewitnesses, the defense was not claiming “alibi by any means,” and that any defense case would be “thirty minutes at most.” App. 131, ll. 7-15. The defense rested the following day without presenting any witnesses.¹ App. 139, ll. 15-19.

During deliberations, the jury returned with a question: “Does digital penetration qualify as, one, sexual intercourse or, two, intrusion by an object?” App. 187, l. 18 – 188, l. 5. Judge Cordell Maddox told the jury: “My interpretation is that is would be an intrusion by an object.” App. 188, ll. 2-3. Four minutes later the jury reached a verdict of guilty. App. 188, l. 1 – 189, l. 7.

¹ During the trial the alleged victim alleged petitioner committed a lewd act on her and intrusion became the central issue. App. 76, l. 8 – 77, l. 23. Dr. Sallie Carter was then qualified as an expert in pediatric child abuse examinations without objections. App. 86, ll. 12-19. Dr. Carter alleged that the child had a “healed injury.” App. 96, l. 12 – 97, l. 23.

The solicitor told the judge the sentence would have to be between twenty-five years imprisonment to life imprisonment with “mandatory GPS if he’s ever released from the Department of Corrections and sex offender registry.” App. 191, ll. 11-21. The trial judge told petitioner his was “a life wasted,” and he imposed a sentence of forty years imprisonment,. App. 196, l. 12 – 198, l. 6.

On direct appeal, petitioner was represented by Appellate Defender David Alexander. The issue before the Court of Appeals was whether South Carolina Code Section 16-3-655 required the jury to make a finding that petitioner inserted an object into the alleged victim “when no such requirement exists in the statute, and no evidence supported such a finding?”² The Court of Appeals found this issue was procedurally barred because “the objection must be made ‘with sufficient specificity to inform the circuit court judge of the point being urged by the objector.’” App. 209-210. The court also procedurally barred the issue because it “was not ruled upon by the trial court.” App. 210.

Thus, with his only pre-trial meeting with his Public Defender coming the Friday before his Monday trial, and his one appellate issue procedurally barred by trial counsel’s bungling, petitioner filed an application for post-conviction relief on January 14, 2015. App. 201-208. The state filed a return requesting an evidentiary hearing dated July 16, 2015. App. 211-215.

An evidentiary hearing was convened on September 2, 2015 before the Honorable Frank R. Addy, Jr. Hugh Welborn represented petitioner. Assistant Attorney General John Walter Whitmirè represented the state. App. 216.

As stated, petitioner complained that he had only seen the Assistant Oconee County Public Defender one time a couple of days before his trial began. Petitioner gave him the names of

² The Court can take judicial notice of the final brief filed with it on October 15, 2013.

witnesses for him to telephone before the trial began that Monday. Petitioner said Day “acted like he didn’t even really . . . like it was nothing, I mean.” App. 220, l. 15 – 222, l. 18. Petitioner offered that he could have helped his lawyer if he had only met with him on a prior occasions, rather than a single time. App. 222, l. 25 – 224, l. 12; 225, ll. 13-20.

On cross -examination the assistant attorney general inquired why petitioner had not tried to fire his lawyer if he was that bad. Petitioner responded that he had tried to fire him because he was not helping him in any way. Petitioner produced a letter to Judge Derrick to corroborate his PCR testimony that he had tried to fire his attorney. App. 226, l. 3 – 229, l. 3; App. 237.

Assistant Public Defender Randy Day testified that petitioner was arrested on March 8, 2012 and that he opened the file on March 16, 2012. Day claimed he talked to the solicitor and the investigating officer prior to talking to petitioner. He also stated that a preliminary hearing was held on May 4, 2012. App. 231, ll. 7-23.

Day said he recalled going to the jail to visit other clients, and petitioner would send a message that he would like to see him also. Day maintained on July 10, 2012 “we sat down and went through everything that I had received in discovery, went through everything with him, got the names of witnesses that he wanted and what he thought they would say.” App. 232, ll. 8-12. Day claimed he was fully prepared to go to trial. Day said they went over everything the “state’s witnesses were going to say and why he [Petitioner] said he didn’t believe any of that was true, and we were prepared as best we could.” App. 232, l. 8 – 233, l. 6.

On cross-examination Day said he did not know why petitioner would testify he only met with him one time if that was not true. Day claimed he met with petitioner five or six times at a minimum. App. 233, l. 15 – 234, l. 2.

In his order of dismissal , Judge Addy wrote that: “It is simply objectively unreasonable for an experienced attorney to have neglected his client until the eve of trial on the most serious charge that resulted in a presumptive life sentence.”³ App. 241.

From this order, petitioner is seeking a writ of certiorari pursuant to Rule 243, SCACR.

³ The PCR Court also found Counsel Day’s testimony convincing, and he also ruled petitioner failed on his burden of production to show additional consultations “would have changed the result of trial.” App. 241-242.

ARGUMENT

The PCR court erred in denying petitioner relief because it was “simply objectively unreasonable for an experienced attorney to have neglected his client until the eve of trial on a most serious charge that resulted in a presumptive life sentence,” since petitioner was entitled to fact findings based upon what actually occurred in this case, and not on the PCR judge’s presumptions about cases in general.

Defense counsel had an obligation to speak with witnesses that petitioner provided to him on the eve of the trial when he met petitioner for the first time. As seen, trial counsel did not call any witnesses in petitioner’s defense. After the state rested, it was apparent that defense counsel had not strategy on calling witnesses.

A criminal defendant is entitled to effective representation at trial and on direct appeal. Frasier v State, 306 S.C. 158, 410 S.E.2d 572 (1991); Strickland v. Washington, 466 U.S. 668 (1984). To prove ineffective assistance of counsel, petitioner must show: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) the deficient performance prejudiced petitioner’s case. Gallman v. State 307 S.C. 273, 414 S.E.2d 780 (1992).

In Lounds v. State, 380 S.C. 454, 370 S.E.2d 646 (2008), this Court found defense counsel was ineffective because he did not adequately prepare for trial which caused key witnesses not to be called for the defense. As in this case, counsel for Lounds had ample notice of the trial, yet failed to call necessary witnesses. This Court noted a criminal defense attorney had a duty to perform a reasonable investigation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007).

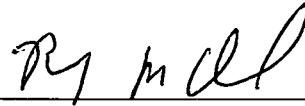
In Lounds, this Court held that even though defense counsel said he did not believe the witnesses that Lounds wanted to testify would not have added much to the defense, this reasoning was not objectively reasonable.

Here, there was no indication that defense counsel had subpoenaed any witnesses as petitioner requested. Defense counsel seemed lost when the trial judge inquired generally about what the defense might offer. Counsel could only muster that whatever they did the next day it should not take longer than thirty minutes. Counsel did even better than that since no witnesses were called in petitioner's defense. This was objectively unreasonable representation, and it ended in a forty-year prison term for petitioner. Petitioner should be granted a new trial.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. M. Dudek", written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of June, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO OCONEE COUNTY
FRANK R. ADDY, CIRCUIT COURT JUDGE

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RESPONDENT

APPELLATE CASE NO. 2015-002098

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Steven G. Frost states:

1. He is the Chief 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 September 2, 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 Steven G. Frost.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 3rd day of June, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

Frank R. Addy, Circuit Court Judge

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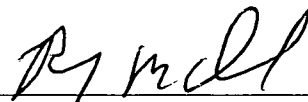
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

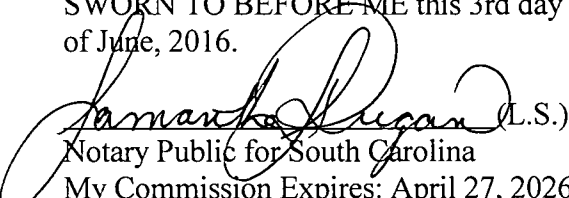
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Patrick Schmeckpeper, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Steven G. Frost, #133769, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 3rd day of June, 2016.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day
of June, 2016.


(L.S.)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.