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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

CLARK D. THOMAS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2015-002286

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the PCR judge err in finding that Petitioner abandoned the allegation that trial counsel was ineffective for not asking the judge to instruct the jury with the lesser included offense of criminal domestic violence when there was evidence in the record from which the jury could find Petitioner guilty of the lesser included offense rather than the offense of criminal domestic violence of a high and aggravated nature?

2. Did the PCR judge err in refusing to find trial counsel ineffective for making extremely disparaging comments about Petitioner in his opening statement and closing argument, describing Petitioner as immoral and sexually deviant?

3. Did the PCR judge err in refusing to find trial counsel ineffective for not reviewing medical records which contradicted Petitioner's wife's testimony that Petitioner hit her in the face and chipped her teeth?

4. Did the PCR judge err in failing to make findings of fact that the kidnapping offense did not include a sexual element?

ARGUMENTS

1. The PCR judge erred in finding that the allegation that trial counsel was ineffective for not asking the judge to instruct the jury with the lesser included offense of criminal domestic violence when there was evidence in the record from which the jury could find Petitioner guilty of the lesser included offense rather than the offense of criminal domestic violence of a high and aggravated nature was abandoned.

The PCR judge found that the PCR allegation that trial counsel was ineffective in failing to request the lesser included offense of criminal domestic violence had been abandoned. (App. pp. 1119-1121). Finding the issue abandoned, the PCR judge failed to address the merits of the claim. As discussed in the petition for writ of certiorari, the issue in regard to the lesser included offense of criminal domestic violence was raised at the evidentiary hearing during Petitioner's testimony and the testimony of trial counsel. When the PCR judge erroneously found the issue abandoned in the order of dismissal, Petitioner properly filed a motion to alter or amend pursuant to rule 59(e). The PCR judge denied the Rule 59(e) motion. The PCR judge erred in finding that the issue was abandoned.

In the return to the petition for writ of certiorari Respondent discusses at length the wife's testimony and then writes, "Therefore, it is more than appropriate that Petitioner was charged with criminal domestic violence of a high and aggravated nature. Thus, the PCR court correctly ruled that Petitioner's trial counsel was not ineffective for failing to request a jury instruction of the lesser-included offense of criminal domestic violence." (Return p. 9). First, in determining whether to charge a lesser included offense, the question is not whether it is appropriate to charge the greater offense. Instead, as this Court wrote in State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004):

> The law to be charged is determined by the evidence presented at trial. State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986). A trial judge must charge a lesser

included offense if there is any evidence from which the jury could infer the defendant committed the lesser rather than the greater offense. Brightman v. State, 336 S.C. 348, 350-351, 520 S.E.2d 614, 615 (1999). Conversely, a trial judge does not err by refusing to charge a lesser included offense where there is no evidence tending to show the defendant was guilty only of the lesser offense. State v. Funchess, 267 S.C. 427, 429, 229 S.E.2d 331, 332 (1976).

In the present case there was evidence from which the jury could infer that Petitioner committed the lesser rather than the greater offense. While the wife testified that physical actions by Petitioner were non-consensual, Petitioner testified that he and his wife participated in consensual sex involving bondage, duct tape, shackles, handcuffs and electrical shock from a stun gun. (App. pp. 612-615). The jury found Petitioner not guilty of criminal sexual conduct first degree. The jury could have found that the sexual acts were consensual and did not constitute any type of criminal domestic violence. The jury however, could have concluded that the officer's testimony that he saw Petitioner carrying his wife against her will (App. p. 302, line 25 – p. 303, lines 1-7) constituted the lesser included offense of criminal domestic violence. If requested, the judge should have instructed the jury with the lesser included offense of criminal domestic violence.

Second, the PCR judge did not rule that trial counsel was not ineffective for failing to request a jury instruction on the lesser-included offense of criminal domestic violence. Instead, the judge incorrectly found the issue abandoned. This Court should reverse the finding by the PCR judge that the issue was abandoned and remand to allow the PCR judge to make findings of fact and conclusion of law in regard to trial counsel's failure to request the lesser included offense of criminal domestic violence.

2. The PCR judge erred in refusing to find trial counsel ineffective for making extremely disparaging comments about Petitioner in his opening statement and closing argument, describing Petitioner as immoral and sexually deviant.

Respondent argues that that trial counsel's comments in opening statement and closing argument describing Petitioner as immoral and sexually deviant were part of a sound trial strategy in an attempt to render sympathy from the jury regarding the struggles of both Petitioner and his wife. (Return pp. 9-11). Trial counsel's extremely disparaging comments went far beyond a strategy of garnering sympathy for Petitioner. As discussed in detail in the petition for writ of certiorari, trial counsel repeatedly portrayed Petitioner in an extremely negative light. Arguing that the sexual activities between Petitioner and his wife involving bondage, duct tape, shackles, handcuffs and electrical shock from a stun gun were all consensual activities is a valid trial strategy. Attributing their sexual activities to drug addiction may have been a valid trial strategy. Describing Petitioner as immoral and a sexual deviant, however, is not a valid trial strategy. Such a characterization garners disdain rather than sympathy. Disdain leading the jury to believe that Petitioner's actions constituted kidnapping and criminal domestic violence.

In Lounds v. State, 380 S.C. 454, 465, 670 S.E.2d 646, 651 (2008), this Court found trial counsel ineffective writing, "The pounding of Newell's fist into his palm only served to highlight the inference that petitioner and the other man had threatened the use of force. This form of argument did not advocate in petitioner's favor, but rather tended to support the State's theory on kidnapping. Therefore, we hold Newell's closing argument comments were improper and constituted deficient performance." In the present case trial counsel's comments describing Petitioner as immoral and a sexual deviant did not advocate in Petitioner's favor, but rather tended to support the State's theory that the acts were not consensual and constituted kidnapping and criminal domestic violence. Immoral sexual deviants commit nonconsensual acts, as argued by the State. Petitioner, on the other hand, testified that the acts were consensual. Consensual sex acts, even if viewed as unusual by others, should not be described by trial

counsel as immoral and deviant. Trial counsel should not have described Petitioner as immoral and sexually deviant. As in Lounds, Petitioner was prejudiced by the improper characterizations of Petitioner.

3. The PCR judge erred in refusing to find trial counsel ineffective for not reviewing medical records which contradicted Petitioner's wife's testimony that Petitioner hit her in the face and chipped her teeth.

Trial counsel admitted that he did not review the medical records prior to trial. (App. p. 1075, lines 10-13). The PCR judge found that the medical records did not contradict the testimony of the wife. (App. p. 1136). The PCR judge's finding is not supported by the record. "If there is any evidence to support the findings of the PCR judge, those findings must be upheld. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, this Court will not uphold the findings of a PCR court if no probative evidence supports those findings. Cartrette v. State, 323S.C. 15, 448 S.E.2d 553 (1994)." Holland v. State, 322 S.C. 111, 113, 470 S.E.2d 378, 379 (1996). At trial Petitioner's wife testified that Petitioner hit her in the face and chipped a couple of her teeth. (App. p. 158, lines 20-24). Officer Talbot testified that he thought the wife had a "busted lip." (App. p. 309, lines 4-5). The wife's medical records from the emergency room, however, note no injuries to her face or teeth. The records were introduced in evidence during the evidentiary hearing, marked as Defendant/Applicant's #1. (App. pp. 1240-1250).

Respondent argues, "In the case at hand, Petitioner failed to present any evidence that would impeach the victim and her medical records. Therefore, Petitioner failed to meet his burden of proof required to show ineffective assistance of counsel." (Return p. 12). The medical records contradict the wife's testimony that Petitioner hit her in the face and chipped a couple of her teeth.

Respondent additionally argues that trial counsel articulated a valid explanation for why he did not review the medical records. "Here, Petitioner's trial counsel articulated a valid explanation for why he did not review the victim's medical records prior to trial and how it would most likely have not made a difference in the outcome of the trial, had it been raised as an issue." (Return p. 12). An attorney's performance is not immunized from 6th Amendment challenge by simply labeling the actions as "trial strategy." Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984). Trial counsel's complete failure to review the wife's medical records cannot be deemed a valid trial strategy.

Trial counsel was ineffective for not reviewing medical records which contradicted Petitioner's wife's testimony that Petitioner hit her in the face and chipped her teeth. Petitioner was prejudiced by the deficient performance. The defense was based on consent. Credibility of the wife's testimony was a crucial factor to be determined by the jury. The medical records contradicting her testimony that Petitioner hit her in the face and chipped her teeth reflect that her testimony was not credible. See Pauling v. State, 331 S.C. 606, 610, 503 S.E.2d 468, 470 (1998). There is a reasonable probability that, but for counsel's failure to review and use the medical records, the result of the proceedings would have been different.

4. The PCR judge erred in failing to make findings of fact that the kidnapping offense did not include a sexual element.

Trial counsel was ineffective in failing to ask the trial judge to make a finding that the kidnapping did not include a criminal sexual offense. The PCR judge found that such a request was not necessary writing, "This Court finds that sex offender registry is a statutory requirement associated with a conviction for the offense of kidnapping. This Court finds counsel was not ineffective in this regard. This Court finds this allegation is wholly without merit." (App. p. 1137).

The PCR judge's finding that sex offender registry is a statutory requirement associated with a conviction for the offense of kidnapping constitutes an error of law.

In Hazel v. State, 377 S.C. 60, 63-64, 659 S.E.2d 137, 139 (2008) this Court wrote:

> Section 23-3-430 has been through many changes since its enactment in 1994. In the beginning, the statute provided that a person convicted of kidnapping shall be referred to as a sex offender. § 23-3-430(8) (Supp.1995). The statute was amended in 1996 and kidnapping was deleted from the listing of offenses that require one to register as a sex offender. § 23-3-430(C) (Supp.1996). In 1998, the statute was again amended and kidnapping was re-added as one of the enumerated offenses. An exception was added to state that if the court makes a finding on the record that the offense did not include a criminal sexual offense, then a defendant convicted of kidnapping would not be required to register as a sex offender. § 23-3-430(C)(15) (Supp.1998).
>
> The statute was again amended in 1999. This amendment rewrote the kidnapping subsection to state that a person convicted of kidnapping a person eighteen years of age or older would be required to register as a sex offender. The exception was again included and stated that no registration would be required if the court made a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense. § 23-3-430(C)(15) (Supp.1999).(footnote omitted).

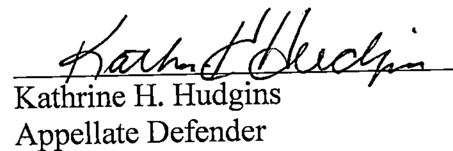
The statute does not require a person convicted of kidnapping a person eighteen years or older to register as a sex offender if the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense. The PCR judge erred in finding that trial counsel was not ineffective for failing to ask the trial judge to make a finding that the kidnapping conviction did not include a criminal sexual offense or attempted criminal sexual offense because sex offender registry is a statutory requirement associated with a conviction for the offense of kidnapping.

Respondent argues that, "Because Petitioner failed to meet his burden to show that his kidnapping conviction did *not* include a sexual offense, he therefore failed to show ineffective assistance of counsel in this regard." (Return p. 13). Petitioner met his burden in proving that trial

counsel failed to ask the trial judge to make a finding that the kidnapping conviction did not include a criminal sexual offense or attempted criminal sexual offense. There is a reasonable probability that if trial counsel had asked the judge to make a finding, the judge would have found, as the jury found, that the sexual acts were consensual and the kidnapping offense did not include a criminal sexual offense. As discussed in the petition for writ of certiorari, Petitioner asks this Court to remand the case for findings in regard to the fact that the kidnapping conviction did not include a criminal sexual offense.

CONCLUSION

Based on the question presented in issue one, this Court should remand the case back to the PCR judge for findings of fact and conclusion of law in regard to the allegation that trial counsel was ineffective for failing to request the lesser included offense of criminal domestic violence. Based on the questions presented in issues two and three, this Court should grant the petition for writ of certiorari to allow further briefing on the issues. Based on the question presented in issue four, this Court should remand the case back to the PCR judge for a finding of whether or not Petitioner's kidnapping conviction had a sexual offense.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of September, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

CLARK D. THOMAS,

PETITIONER,

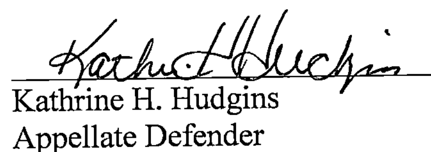
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

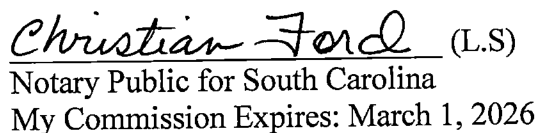
The undersigned hereby certifies that a true copy of the Reply to Return to Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon J. Rutledge Johnson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Clark D. Thomas, #187845, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 7th day of September, 2016.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me this 8th day of September, 2016.

 (L.S)

Notary Public for South Carolina
My Commission Expires: March 1, 2026