

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2016-001070
Trial Case No. 2014-CP-23-01295

Dantae Raheev Stukes
(SCDC #350166),

Petitioner

vs.

State of South Carolina,

Respondent.

PETITION
FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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QUESTION PRESENTED

Did the PCR Court properly dismiss Petitioner's application for Post-Conviction Relief in spite of his Trial Counsel's failure to effectively cross-examine the victim on her prior inconsistent statements to police?

STATEMENT OF THE CASE

In May of 2010, Dantae Raheev Stukes (hereinafter "Petitioner") was arrested and charged with Criminal Sexual Conduct with a Minor in the Second Degree. The Grand Jury initially indicted him of the charge in August of 2010 with an indictment alleging that the crime took place between March 1, 2009 and May 30, 2009. Petitioner retained attorney George R. McElveen, III to represent him in his defense against this indictment.

The case came before a jury on March 14, 2012. However, before the jury was even selected, the State moved to orally amend the indictment to cover the dates between January 5, 2009 and May 31, 2009. The Court granted the State's request to amend over Mr. McElveen's objection.

The jury heard from the State's eight witnesses (including the alleged victim) and Petitioner's two witnesses. The jury convicted Petitioner of the crime, and the Court sentenced him to fifteen years in prison. Mr. McElveen filed a timely appeal of the conviction based upon the unfairness of the oral motion to amend the indictment. The Court of Appeals affirmed the conviction in an unpublished opinion filed on January 22, 2014.

Petitioner filed an application for Post-Conviction Relief on March 7, 2014, citing numerous grounds for relief. His case came before the Court on February 16, 2016 for an evidentiary hearing. The evidence at trial centered around multiple allegations of ineffective assistance of counsel, including his trial counsel's failure to properly impeach the alleged victim with prior inconsistent statements;

The Court dismissed Petitioner's application by Order filed on March 30, 2016. Petitioner filed a timely Motion for Reconsideration and Relief from Judgment on April 18, 2016. The Court denied the Motion in a Form 4C order filed on April 28, 2016.

Petitioner perfected his appeal of the denial of his Post-Conviction Relief application on May 19, 2016.

STANDARD OF REVIEW

In order to reverse a denial of Post-Conviction Relief, appellate courts must find errors of law. Sigmon v. State, 403 S.C. 120, 128, 742 S.E.2d 394, 398 (2013). Courts will give deference to the PCR court's determinations of credibility. Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 146 (2014). However, when the ultimate decision of the PCR Court is controlled by errors in law, the appellate courts must reverse. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). Such questions of law are subject to de novo review. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

THE PCR COURT IMPROPERLY DISMISSED PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF, AS HIS TRIAL COUNSEL'S FAILURE TO CROSS-EXAMINE THE VICTIM ON HER PRIOR INCONSISTENT STATEMENT TO POLICE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

Under the Sixth Amendment to the United States Constitution, criminal defendants have the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 669 (1984). In South Carolina, a criminal defendant who feels he was denied his right to effective assistance of counsel must file a Post-Conviction Relief Application, and that criminal defendant 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). An applicant must prove his allegations by only a preponderance of evidence. Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

The preponderance burden requires proving two elements. First, an applicant 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. Second, an applicant must show that the deficient performance prejudiced the applicant. Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting Strickland at 687). This is such prejudice that deprives the applicant of a fair trial. Id. In specific terms, prejudice is a finding of "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Strickland, 466 U.S. at 695. Prejudice exists

when there is probability sufficient to undermine confidence in the outcome of trial.

Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

Over the volume of cases addressing post-conviction relief, appellate courts have often found prejudice where attorneys failed to properly attack witness credibility. See, e.g., 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); Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001) (failure to properly cross-examine witnesses constituted proper grounds for post-conviction relief when the case hinged on victim credibility); State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (credibility is critical in cases the result "turn[s] solely on the credibility of the [victim] and of the [Defendant].")

In Rutland v. State, Op. No. 27614 (S.C. March 30, 2016), the South Carolina Supreme Court found that an Applicant was entitled to Post-Conviction Relief after his trial counsel failed to properly cross-examine the State's key witness with prior inconsistent statements. The PCR judge found this to be deficient performance but did not find it to be prejudicial. Id. p. 5. Therefore, the PCR Judge denied post-conviction relief. Id. On appeal, the Supreme Court found there was prejudice in the deficient performance. Id. p. 6. In so finding, the Supreme Court focused on the "solicitor's reliance on [the witness'] trial testimony' in closing arguments. Id. p. 7. The Supreme Court held that "the solicitor's reliance on [the witness'] uncontroverted trial testimony

highlights trial counsel's deficient performance, and supports a finding the deficient performance undermines confidence in the outcome of the trial." Id.

Similar to Rutland, Petitioner received ineffective assistance of counsel when his trial attorney failed to properly cross-examine the victim with her prior inconsistent statements. At Petitioner's trial, the victim testified the incident occurred on a "Friday." Appendix p. 64, lines 10-11. She testified she had to go to her god sister's house the next day, which is why she thought it was Friday. Appendix p. 64, lines 12-17. The next day would have been Saturday, when there would be no school.

At his PCR trial, Petitioner testified to reviewing the state's discovery responses with his attorney. Appendix p. 347, lines 23-25. He acknowledged reviewing police reports about what the victim said to police. Appendix p. 348, lines 1-3. He was aware (from his review with his attorney) that the victim had made statements to police and that they were different from her testimony at trial. Appendix p. 348, lines 4-8. She told police, however, that Petitioner's wife took her to school the morning after the incident. Appendix p. 348, lines 4-12. She told this to police officer M.A. Thomas, who referenced it in his report. Appendix p. 393, lines 32-33. Officer M.A. Thomas testified at the trial. Appendix p. 148-147. Petitioner's trial attorney had the opportunity to use his report and discuss the inconsistent statement of the child with Officer Thomas, but he did not do so.

The testimony of Petitioner's trial counsel at the PCR hearing showed that credibility was a known issue for him and for the jury. He acknowledged there were inconsistencies between her testimony and her statement to police. Appendix p. 362, lines 18-20. Petitioner's attorney acknowledged that the case "basically boiled down to

the credibility of the victim.” Appendix p. 365, lines 13-15. He was concerned because the victim came across at trial as “a pretty solid witness.” Appendix p. 365, lines 20-21. One of the major problems he had in defending Petitioner was that the wide range of possible dates made it hard to pinpoint an alibi defense. Appendix p. 361, lines 12-15.

Clearly, the credibility of the victim was a concern to him, and it was important to the State in its closing argument, as the argument focused on making the jury focus on trying to “determine if [victim] has told you the truth or not.” Appendix p. 305, lines 19-21. The solicitor stated in her closing argument:

Ladies and gentlemen, I submit to you what we’re trying to determine if [victim] has told you the truth or not is essentially what you’ve got to do. You should also look at the consistency of what she said. When some is telling us something we want to know are they going to back up on it, are they going to change it, is it going to be one story to one person, one story to another person? I submit to you the evidence that [victim] has been completely persistent in telling you what happened to her. She told it to her friends the same way, she told it to the police, the medical examiner, to you and the prosecution. She has not changed her story at all, not wavered, not said, oh, you know that didn’t happen or anything like that.

Appendix p. 305, line 19 – p. 306, line 7.

The jury never heard anything different. The jury never heard any change in the story or wavering. However, there was evidence in Petitioner’s Trial Counsel’s file which showed change and wavering. The Court’s order states that Mr. McElveen “had to walk a fine line at trial in order to point out the discrepancies in the victim’s testimony while keeping in mind that she was a minor and the victim of a sexual assault.”

Appendix p. 376, lines 18-19. What trial counsel did, however, was to start to impeach her with her prior statements but then back off. He got the victim to admit there was a

statement made to police different from her testimony. Appendix p. 101, line 10. She admitted writing a statement to police in her handwriting. Appendix p. 102, lines 5-12. Trial counsel started to introduce the statement but then, after the jury was taken out, withdrew the request. Appendix p. 102, lines 16-22. The jury never heard the inconsistent statement.

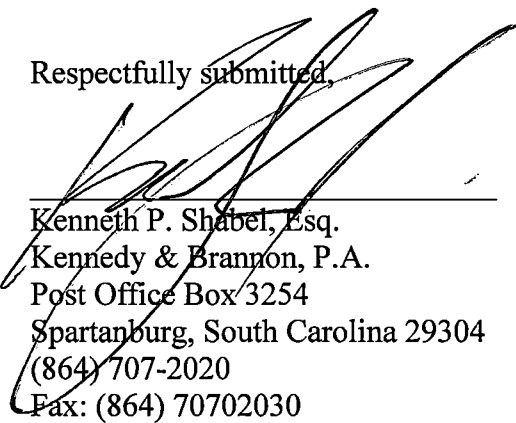
The jury never heard the difference between what the victim told police and what the victim told them under oath. That was not walking a fine line between pointing out discrepancies and dealing with a victim who is minor. That was not even pointing out the discrepancies. Trial counsel's failure to point out and focus on the discrepancies constituted deficient performance. The focus on what the jury saw as (but was not actually) uncontroverted testimony placed further emphasis on the deficient performance.

This was a case without physical evidence. Appendix p. 349, lines 23-24. This was a case without eyewitness testimony. Appendix p. 349, line 25 – p. 350, line 1. Credibility was the critical issue. Trial counsel's failure to explore and cross examine the victim on inconsistencies affected the outcome of the trial. It's reasonable to believe that by doing so, there would have been a reasonable doubt. Petitioner was prejudiced by the deficient performance.

CONCLUSION

For the reasons above and on the grounds stated, Petitioner respectfully requests that this Court grant his request for a Writ of Certiorari to review the trial Court's denial of his Post-Conviction Relief Application.

Respectfully submitted,



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September 6, 2016

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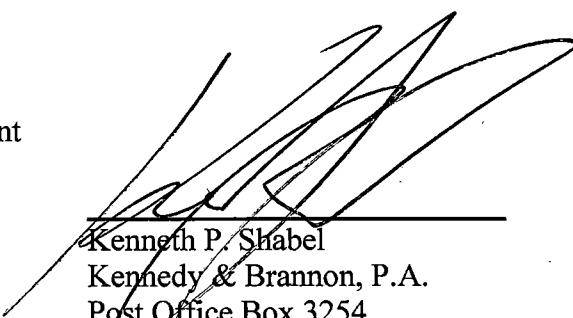
State of South Carolina,

Respondent.

PROOF OF SERVICE

I hereby certify that a copy of the Petition for Writ of Certiorari and Appendix were served upon all counsel of record and/or unrepresented parties by U.S. Postal Service first class mail, postage prepaid, on September 6, 2016 to the address as follows:

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