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SEP 23 2016

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

September 23, 2016

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

Re: **Billy Shane Miller, Respondent v. State, Petitioner**
Case No. 2013-CP-42-3190

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.

We are in receipt of the post-conviction relief hearing transcript in the above captioned matter. We have calendared the State's Petition for Writ of Certiorari to be due 30 days from today's date. If this date, October 24, 2016, is incorrect or inconsistent with your records please contact this office.

If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

Alicia A. Olive
Assistant Attorney General

cc: Timothy Ray, Esquire
South Carolina Department of Corrections
Spartanburg County Clerk of Court
Solicitor Barry J. Barnette
Office of Appellate Defense
Trisha Allen, Victim Services

STATE OF SOUTH CAROLINA
In The Supreme Court

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SEP 23 2016

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Jr., Circuit Court Judge **S.C. SUPREME COURT**

Case No. 2013-CP-42-3190

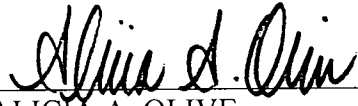
Billy Shane Miller, Respondent,

v.

State of South Carolina, Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Larry B. Hyman's order dated August 4, 2016 and filed August 24, 2016 granting post-conviction relief to the Respondent. The State received notice of entry of the order on August 24, 2016. A copy of the order on appeal is attached to this notice.

By: 
ALICIA A. OLIVE
Assistant Attorney General
S.C. Bar # 102089
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

September 23, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
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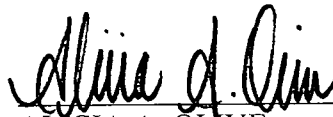
State of South Carolina, Petitioner.

PROOF OF SERVICE

I, Alicia A. Olive, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Mr. Timothy M. Ray, Esquire
184 N. Daniel Morgan Ave.
Spartanburg, SC 29306

I further certify that all parties required by Rule to be served have been served this 23rd day of September, 2016.



ALICIA A. OLIVE
S.C. Bar. #102089
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
Attorney for Petitioner

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
BILLY SHANE MILLER 259358)
PETITIONER,)
VS.)
STATE OF SOUTH CAROLINA)
RESPONDENT)

IN THE COURT OF COMMON PLEAS

CASE NO. 13-CP-42-3190

ORDER

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2016 AUG 24 PM 4:45
M. HOPE BLACKLEY

This matter came before this Court on November 9, 2015. In such hearing, the State was represented by Alicia Olive of the South Carolina Attorney General's Office, and the Petitioner was represented by Timothy Ray. Petitioner was tried and convicted of Contributing to the delinquency of a Minor, Criminal Sexual Conduct with a Minor 2nd Degree, and Criminal Sexual Conduct 3rd Degree on April 13, 2011. Among other things, Petitioner claimed that his trial counsel was ineffective for failing to interview witnesses on his behalf. After reviewing the record of the trial and hearing the testimony presented in this action, this Court agreed with Petitioner. Thereafter, the State filed a Motion to Reconsider. This motion was heard on July 7, 2016, and again, after reviewing the record of the trial, hearing the testimony presented in this action, and considering the statements made by counsel for the parties, this Court agrees with Petitioner.

FACTS

The testimony in this case showed that Defense counsel was presented with a list of possible witnesses that could have been used by the Defense in the trial. Defense counsel testified that she never attempted to contact any of the witnesses on the list, in order to interview them to determine if their testimony would have been useful to the Defense at trial. Defense counsel decided that the witness testimony would not be useful, without the benefit of having interviewed any of them.

Petitioner provided several of the witnesses that were included in the list given to trial counsel, and their testimony was given. The testimony of the witnesses was such to show that the alleged victim stated her age to be 18 or 19 years old. The alleged victim had visited Petitioner's home previously with her father's girlfriend, Stephanie Maddox. The alleged Victim had claimed that she and Stephanie Maddox had been exotic dancers. The alleged victim was also seen driving a car into the early hours of the morning. There was also testimony tending to show that alleged victim carried herself and spoke using words and phrases normally heard from adults. At one point, one witness stated that when he knocked on Petitioner's door, the alleged victim opened it and was topless at the time. She then asked the witness what he thought of her breasts.

At trial, counsel for Petitioner presented evidence from social media wherein the alleged victim claimed to be eighteen years old. At the time of Defendant's trial, it was a defense to

Criminal Sexual Conduct with a Minor 2nd Degree that a defendant was reasonably mistaken as to a victim's age and believed her to be sixteen years of age or older. The alleged victim testified at trial that the Defendant had actual knowledge of her age because she had previously told him she was fourteen years old. No other testimony was presented that alleged Defendant's actual knowledge of the alleged victim's age.

Furthermore, Michael Kimbrell testified to the fact that he was transferred from prison to Spartanburg where the Assistant Solicitor, Mr. Gray, spoke with him to ask him to testify against Mr. Miller. Mr. Kimbrell stated that he told Mr. Gray that he could not testify against Mr. Miller because the alleged victim stated that she was either eighteen or nineteen years old. Mr. Gray chose not to use Mr. Kimbrell's testimony at trial.

The alleged victim also stated that she had been given drugs and that she was intoxicated to the point that she was mentally incapacitated and physically helpless to resist engaging in sex acts with Petitioner. Petitioner's witnesses, however, stated that the alleged victim was coherent and understood what was happening around her before, during, and after the time period that she alleged that Petitioner had sex with her. One witness also testified that, the time of the alleged sexual battery, the victim did not want to leave Petitioner's home, and that she was eventually convinced to go to another friend's home. The friend's home was located near the alleged victim's home. Mr. Kimbrell testified to the fact that while at the friend's home the alleged victim consumed Valium, and until then had only consumed methamphetamine and possibly marijuana. Mr. Kimbrell stated that it was after consuming Valium that the alleged victim became more incoherent. The alleged victim's father arrived at that home very angry, and he contacted police to file a report. Jonathon Isom testified to the fact that the alleged victim told him that her statements to police were not true and that her father was forcing her to follow through with the prosecution of Petitioner.

ANALYSIS

The analysis that is required in this situation is two-pronged. First, was defense counsel deficient in her representation of Billy Miller. Second, was defense counsel's deficiency prejudicial to Petitioner.

As defense counsel, a strategic decision must be reasonable, and at a minimum, witnesses must be interviewed to determine if their testimony could be helpful. As the South Carolina Supreme Court has stated in *Ard v. Catoe* 372 S.C. 318 (2007) defense counsel must conduct a reasonable investigation, and at a minimum, defense counsel must interview potential witnesses and conduct an independent investigation into the facts and circumstances of the case. This Court finds that Defense counsel's strategic decision to not attempt to interview any of the potential witnesses on the list that was given to her, especially considering the testimony of four of those witnesses presented to this Court, was unreasonable and Defense counsel was ineffective in assisting Petitioner in the trial of his case.

Next, this Court must look at the facts of the case and the testimony that some of the witnesses would have presented at trial if defense counsel had interviewed them and subpoenaed them to testify. Impeaching the Defendant's accuser became paramount in this case because her testimony was the only evidence that alleged that the Defendant knew her age, and that she was incapacitated

and helpless to resist when the Defendant engaged in intercourse with her. The testimony of Petitioner's witnesses would have directly contradicted the alleged victim's testimony. This Court finds it very likely that the Defendant's trial would have had a different outcome by the strength of this testimony alone. However, that testimony would be given greater deference when combined with the social media evidence that was presented at trial and would have increased the likelihood that the trial would have resulted in a favorable verdict for the Defendant. Either way, the failure of Defense Counsel to present the witness testimony at trial was prejudicial to Defendant

Additionally, the witness testimony, also gave insight into the alleged victim's awareness of what was going on around her. The testimony tended to show that the alleged victim knew what was happening to her and around her until she later took a Valium when she arrived to a different friend's home. One particular witness even testified how the alleged victim answered the door when he knocked, and stated that she was topless and had a conversation with him.

The seriousness of Petitioner's charges and the evidence against him required that defense counsel interview witnesses. Without the knowledge of what a witness will say, defense counsel has no ability to determine if such witness will fit into her trial strategy. In this case, it appears that defense counsel chose to attack the alleged victim's credibility, and the fact that she held herself out to be older. The testimony of the witnesses would have been used for that exact defense. The testimony would have also been used to show that the alleged victim was conscious and aware of what was occurring when the Defendant engaged in sexual intercourse with her.

DECISION

Defense counsel was deficient in her representation of Defendant at trial. The Defendant was charged with very serious crimes, and when given a list of possible witnesses who may be able to present testimony that would help the Defendant, it is the responsibility of defense counsel to attempt to interview those witnesses. Here, if Defense Counsel had attempted to interview the witnesses, at least the witnesses that have now testified, she would have realized that *their testimony* was vital to the defense of the case.

Furthermore, it is the opinion of this Court that if the testimony that has now been presented to this Court is very persuasive in favor of the Defendant, and if such would have been presented to the jury at the trial of the case, then the outcome would have most likely been in favor of the Defendant.

Therefore, the failure of Defense Counsel to interview and present this witness testimony in the trial of the case demonstrated deficiency in Defense Counsel's representation of the Defendant and was prejudicial to Defendant. This Court's decision now, is the same as previously; a new trial should be granted.

Additionally, the State has not made any convincing argument as to why this Court's decision should be reversed. The State has not shown that Defense Counsel was not deficient in her representation of Defendant, nor has the State been able to show that the Defendant was not prejudiced by Defense Counsel's failure to interview and present witnesses of which she had been given notice. Therefore, the State's motion to reconsider should be denied.

THEREFORE, IT IS ORDERED, that:

Petitioner is hereby granted the relief requested, and a new trial is granted as to his convictions of Criminal Sexual Conduct with a Minor 2nd Degree, and Criminal Sexual Conduct 3rd Degree.


IT IS FURTHER ORDERED, that:

Petitioner is denied the relief requested as it pertains to his conviction of Contributing to the Delinquency of a Minor, and that conviction will remain.

IT IS FURTHER ORDERED, that:

The State's Motion to Reconsider is hereby denied.

GIVEN under my hand and the Seal of this Court this the 4 day of ^{Aug}~~July~~, 2016.



The Honorable Larry B. Hyman Jr.
Judge, Court of Common Pleas
Spartanburg, South Carolina.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2016 AUG 24 PM 4:45
H. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
BILLY SHANE MILLER 259358)
PETITIONER,)
VS.)
STATE OF SOUTH CAROLINA)
RESPONDENT)

IN THE COURT OF COMMON PLEAS

CASE NO. 13-CP-42-3190

ORDER

2016 JUN 12 PM 2:02

This matter came before this Court on November 9, 2015. In such hearing, the State was represented by Alicia Olive of the South Carolina Attorney General's Office, and the Petitioner was represented by Timothy Ray. Petitioner was tried and convicted of Contributing to the delinquency of a Minor, Criminal Sexual Conduct with a Minor 2nd Degree, and Criminal Sexual Conduct 3rd Degree on April 13, 2011. Among other things, Petitioner claimed that his trial counsel was ineffective for failing to interview witnesses on his behalf. After reviewing the record of the trial and hearing the testimony presented in this action, this Court agrees with Petitioner.

The testimony in this case showed that Defense counsel was presented with a list of possible witnesses that could have been used by the Defense in the trial. Defense counsel testified that she never attempted to contact any of the witnesses on the list, in order to interview them to determine if their testimony would have been useful to the Defense at trial. Defense counsel decided that the witness testimony would not be useful, without the benefit of having interviewed any of them.

Petitioner provided several of the witnesses that were included in the list given to trial counsel, and their testimony was given. The testimony of the witnesses was such to show that the alleged victim stated her age to be 18 or 19 years old, and that it was reasonable to believe that such statements were true. The witnesses testified to the alleged victim's manner of speaking, the fact that she drove a vehicle during the nighttime and early morning hours when it was dark, her appearance, that the alleged victim and her father's girlfriend were often together and stated that they both had previously been exotic dancers, and other details which would lead the Petitioner to reasonably believe that the alleged victim was above the age of sixteen.

At the time of Defendant's trial, it was a defense to Criminal Sexual Conduct with a Minor 2nd Degree that a defendant was reasonably mistaken as to a victim's age and believed her to be sixteen years of age or older. The alleged victim testified at trial that the Defendant had actual knowledge of her age because she had previously told him she was fourteen years old. No other testimony was presented that alleged Defendant's knowledge of the alleged victim's age. Therefore, impeaching the Defendant's accuser became paramount. The testimony of Petitioner's witnesses directly contradicted the alleged victim's testimony, and there is a reasonable probability that the outcome of the trial would have been different if those witnesses had been presented in defense of the Petitioner.

The alleged victim also stated that she had been given drugs and that she was intoxicated to the point that she was mentally incapacitated and physically helpless to resist engaging in sex acts with Petitioner. Petitioner's witnesses stated that the alleged victim was coherent and understood what was happening around her before, during, and after the time period that she alleged that Petitioner had sex with her. One witness also testified that, the time of the alleged sexual battery, the victim did not want to leave Petitioner's home, and that she was eventually convinced to go to another friend's home. The friend's home was located near the alleged victim's home. At the friend's home the alleged victim consumed Valium, and until then had only consumed methamphetamine and possibly marijuana. Her father arrived at that home, very angry, and he contacted police to file a report. One witness later stated that the alleged victim told him that her statements to police were not true and that her father was forcing her to follow through with the prosecution of Petitioner. Again, Petitioner's witnesses could have provided valuable testimony and there was a reasonable probability that the trial's outcome would have been different.

As defense counsel, a strategic decision must be reasonable, and at a minimum, witnesses must be interviewed to determine if their testimony could be helpful. As the South Carolina Supreme Court has stated in *Ard v. Catoe* 372 S.C. 318 (2007) defense counsel must conduct a reasonable investigation, and at a minimum, defense counsel must interview potential witnesses and conduct an independent investigation into the facts and circumstances of the case. This Court finds that Defense counsel's strategic decision to not attempt to interview any of the potential witnesses on the list that was given to her, especially considering the testimony of four of those witnesses presented to this Court, was unreasonable and Defense counsel was ineffective in assisting Petitioner in the trial of his case.


THEREFORE, IT IS ORDERED, that:

Petitioner is hereby granted the relief requested, and a new trial is granted as to his convictions of Criminal Sexual Conduct with a Minor 2nd Degree, and Criminal Sexual Conduct 3rd Degree.

IT IS FURTHER ORDERED, that:

Petitioner is denied the relief requested as it pertains to his conviction of Contributing to the Delinquency of a Minor, and that conviction will remain.

GIVEN under my hand and the Seal of this Court this the 8 day of January, 2016.


The Honorable Larry B. Hyman Jr.
Judge, Court of Common Pleas
Spartanburg, South Carolina.

2016 JAN 12 PM 3:12