

ORIGINAL

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal from Spartanburg
The Honorable J. Derham Cole, Post-Conviction Relief Judge

Opinion No. 5372 (S.C. Ct. App. filed December 30, 2015)

Appellate Case No. 2016-000610

FARID A. MANGAL, #320609,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

I.

The Court of Appeals erred in finding counsel was ineffective for not objecting to alleged bolstering where Counsel's performance was not clearly deficient under existing South Carolina law at the time of Respondent's trial, and even if a *de novo* review was appropriate, as the factfinder, the Court of Appeals erred in failing to presume that Counsel performed reasonably under prevailing professional norms and confine its review to the arguments Respondent presented to the PCR court. Regardless, the burden of proof was still on Respondent to show that Counsel's performance on cross-examination could not be explained as valid trial strategy.

A. The authorities on which Respondent relies are not controlling in this case

All but three of the cases to which Respondent cites in his brief are holdings from other state court jurisdictions and therefore are not binding on this Court. See, e.g., St. Andrews Pub. Serv. Dist. Comm'n v. Comm'rs of Pub. Works of Charleston, 289 S.C. 68, 72, 344 S.E.2d 857, 859 (Ct. App. 1986) (noting "cases from other jurisdictions are not binding").

Second, Respondent relies on the case of Tappeiner v. State, 416 S.C. 239, 785 S.E.2d 471 (2016). This case is distinguishable for several reasons. First, in the instant case, the PCR judge found no deficiency or prejudice, notwithstanding that the court did not specifically rule on the bolstering issue, whereas in Tappeiner, the PCR judge found deficiency but no prejudice. Id. at 250, 785 S.E.2d at 476. Second, the issue before the Court in Tappeiner pertained to the solicitor's vouching—not bolstering by an expert witness. Id. at 253-54, 785 S.E.2d at 478-79. Third, although the Court noted that the trial court improperly admitted bolstering testimony over counsel's objection, that testimony came from a school counselor and a rape crisis counselor (rather than a board-certified pediatrician) who both *specifically testified that they believed the victim* in response to the *solicitor's* questioning. Id. at 246 n. 3, 785 S.E.2d at 475 n. 3. As Petitioner has already argued in its Brief of Petitioner, the instant case is not a case in which a counselor (whose sole contact with the victim was to hear her story) testified that she believed

the victim's story. See Pet'r's Br. 23-32. Again, here, Dr. Henderson testified that her conclusion was that the abnormality she observed in the hymen, *based on her physical examination* of the patient in conjunction with her patient's medical history, was consistent with abuse. Therefore, Tappeiner is distinguishable from the instant case and is not controlling law on the bolstering issue.

Respondent argues Counsel "simply did not understand the law prohibiting [bolstering] by medical experts which had been the law since at least 1989." Respondent refers only to State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989), in support of this argument. Resp.'s Br. 4. Petitioner reiterates that Dawkins deals with a therapist—not a physician. See Pet'r's Br. 26-27. Petitioner submits this case does not support the conclusion that Counsel "did not understand the law." Resp.'s Br. 4. Petitioner notes that Respondent's reference to Kromah should be disregarded as that case is not controlling here. State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). Kromah pertains specifically to forensic interviewers and was decided in 2013. See id. Respondent's trial occurred in 2007. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993) ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

B. Even on de novo review, the standard of review in post-conviction relief matters applies to the finder of fact

Assuming arguendo the Court of Appeals correctly engaged in a de novo review, the same standard that applies to the PCR court also applies to appellate courts as the finder of fact in a PCR matter. See Butler, 286 S.C. at 442, 334 S.E.2d at 814 ("Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (citing Strickland, 466 U.S. 668, 690 (1984))); Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989) (holding an applicant must overcome this

presumption to receive relief). The burden was still on Respondent to overcome the presumption that counsel rendered adequate assistance, and regardless of whether the Court conducts a de novo review without deference to the PCR court's findings, the Court of Appeals analysis was akin to a plain error review than a review of the evidence in light of what was presented to the PCR court. The PCR court had the entire record before it, but it was still confined to those arguments that were presented to it. State v. Carlson, 363 S.C. 586, 597, 611 S.E.2d 283, 288 (Ct. App. 2005) ("Arguments not raised to or ruled upon by the trial court are not preserved for appellate review." (citing State v. Wise, 359 S.C. 14, 596 S.E.2d 475 (2004))). Respondent argues that if Counsel had understood the law and made the appropriate objection, he would not have needed to elicit Dr. Henderson's cross-examination testimony. The argument again ignores the standard. Not only does this argument call for speculation, but Counsel's PCR testimony does not support such a conclusion. Petitioner submits that if the Court of Appeals had applied the proper standard of review, it would not have found deficiency, and would have arrived at the opposite conclusion: that Counsel had a valid strategic reason for questioning Dr. Henderson in this manner. See Pet'r's Br. 17-20.

II.

The Court of Appeals erred in finding Respondent satisfied his burden of proving prejudice, and this Court should not consider the propriety or alleged combined effect of Wiley Garrett's testimony because that issue is not before this Court, and to do so would result in a cumulative error analysis, which South Carolina courts have consistently declined to apply. Therefore, this Court should determine whether there is a reasonable probability that but for the admission of the subject portion of Dr. Henderson's testimony, the result of the trial would have been different.

Respondent argues that this Court should find that Counsel's alleged deficiency for failing to object to Dr. Henderson's testimony prejudiced him because of the combined effect of Dr. Henderson's testimony with that of Wiley Garrett's testimony at trial. Respondent's reference to Garrett's testimony is a red herring, and this Court should not consider its propriety or combined effect, but rather, should focus its review on the effect of Dr. Henderson's testimony.

Petitioner submits the Court of Appeals correctly found that the allegations of ineffective assistance of counsel with respect to Garrett's testimony were not preserved. Therefore, there has been no finding that Garrett's testimony was improper,¹ and this Court should not consider the propriety of Garrett's testimony in deciding this matter because it is not an issue before this Court. Second, Petitioner submits this Court must not combine the effect of Dr. Henderson's testimony with the effect of Garrett's because this would amount to a cumulative error analysis. South Carolina courts have consistently declined to engage in cumulative error analysis. See, e.g., Green v. State, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002) (declining to address whether applicant was entitled to relief based on supposed cumulative effect of counsel's alleged errors and recognizing "the threshold to asking cumulative prejudicial question is to first find multiple errors"). See also Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998) (holding ineffective assistance of counsel claims "must be reviewed individuals, rather than collectively").

¹ Petitioner notes again that Kromah is not controlling on this issue because it was decided six years after Respondent's trial.

The prejudice analysis is a "but-for" (i.e., direct causation) analysis: but for the alleged deficiency, there is a reasonable probability the outcome of the proceeding would have been different. Here, the alleged deficiency is Counsel's failure to object to alleged bolstering testimony of Dr. Henderson. Therefore, in determining whether Petitioner satisfied his burden of proving prejudice, this Court should consider the effect of the subject portion of Dr. Henderson's testimony and should not combine any alleged effect flowing from Garrett's testimony. Moreover, there has been no finding of deficiency with respect to Garrett's testimony because the issue was not raised in PCR, and the Court of Appeals found the issue was not preserved; therefore, there is no error to combine. See Green, 351 S.C. at 196-97, 569 S.E.2d at 324-25. In this case, there is no reasonable probability the outcome of Respondent's trial would have been different had Counsel objected to Dr. Henderson's alleged bolstering testimony on direct.

CONCLUSION

For all the foregoing reasons coupled with arguments articulated in the Brief of Petitioner, it is respectfully submitted that the decision of the Court of Appeals be reversed and vacated and the judgment and conviction of the trial court be affirmed.

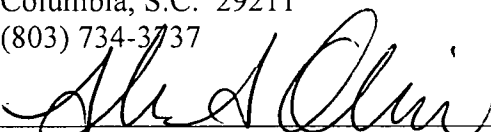
Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Reply Brief of Petitioner** has been served upon the applicant by mailing two (2) copies in the United States mail, postage prepaid, addressed to Petitioner's counsel:

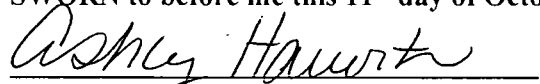
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This 11th day of October, 2016.


ALICIA A. OLIVE
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SWORN to before me this 11th day of October, 2016.


Notary Public for South Carolina.
My Commission Expires: 3-18-23