

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Pickens County

MAY 19 2016

Honorable Perry H. Gravely, Circuit Court Judge

S.C. SUPREME COURT

BOBBIE ALBERT MCCANN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000196

JOHNSON PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to call certain defense witnesses to testify on his behalf at trial because their testimony would have been favorable to the defense.

STATEMENT

Petitioner Bobbie McCann was convicted of lewd act upon a child and two counts of first degree criminal sexual conduct with a minor during the April 2012 term of the Pickens County General Sessions Court before Judge Robin Stilwell. Petitioner was sentenced to imprisonment for an aggregate term of thirty years. David Cantrell represented petitioner at trial, and Assistant Solicitor Jenny Hamaker appeared on behalf of the state. App. 1 – 323. Petitioner appealed, but his convictions and sentences were affirmed. See, State v. McCann, Op. No. 2014-UP-355 (S.C. Ct. App. filed October 8, 2014).

On January 16, 2015, petitioner filed a PCR application with Pickens County Office of the Clerk of Court. App. 325-335. The respondent filed a return dated May 29, 2015, requesting that a hearing be held in the case. App. 336-339.

A hearing was convened on December 14, 2015, at the Pickens County Courthouse before Judge Perry H. Gravely. Petitioner was represented by R. Mills Arial, and Assistant Attorney General Karen Ratigan appeared on behalf of the state. App. 341-361.

On January 10, 2016, Judge Gravely issued an Order of Dismissal denying and dismissing the PCR allegations of ineffective assistance of counsel submitted by petitioner. App. 363-367.

Petitioner appealed Judge Gravely's Order of Dismissal in the case. This petition follows.

ARGUMENT

Trial counsel erred in failing to call certain defense witnesses to testify on his behalf at trial because their testimony would have been favorable to the defense.

Petitioner was convicted of criminal sexual conduct and lewd act on a minor in this case. At trial, the prosecutrix testified that petitioner touched her “boobies” with his mouth, and that he touched her private with his mouth and finger, and that he used his private to touch her butt, and that he made her touch his penis. App. 116, l. 3 – p. 133, l. 14. The prosecutrix testified that this happened at her grandmother’s house.

Toni Durnil, who is the mother of the prosecutrix, testified that her mother baby-sat her daughter, who was the prosecutrix, and that her mother and petitioner (mother’s boyfriend) were living under one roof beginning in March, 2008. Durnil explained that on December 29, 2009, her daughter, i.e., the prosecutrix, disclosed instances of sexual abuse that had been happening at “grandma’s” home. Durnil testified that her daughter added that these incidents occurred in the bedroom and living room and on her swing. Durnil took her daughter to the hospital on that same night on December 29, 2009, after learning of these incidents App. 75, l. 10 – p. 94, l. 4. Dr. Bill Chiles, who practiced at the Oconee County Medical Center, examined the prosecutrix during the early morning hours of October 30, 2009, and found no signs of trauma. App. 149, l. 21 – p. 152, l. 21. Also, Dr. Mary Crosswell examined the prosecutrix and found no physical evidence of sex abuse. App. 196, l. 2 – p. 212, l. 21.

Child Protective Services Investigator Michelle Gerald stated that after interviewing the prosecutrix, the sexual abuse was disclosed to her. App. 191, l. 5 – p. 193, l. 11. Rita Burgess who was the Sherriff’s Office Investigator assigned to the case, testified that the prosecutrix disclosed the sexual abuse to her and added that the events occurred at the grandmother’s home.

App. 161, l. 2 – p. 165, l. 22. Christine Carlberg conducted a forensic interview of the prosecutrix about the allegations, which she videotaped and submitted to the jury at trial. App. 254, l. 1 – p. 260, l. 14.

Petitioner did not testify at trial and offered no defense witnesses to testify in his defense.

During the PCR hearing, petitioner testified that counsel advised that he didn't need witness, but that he (petitioner) wanted witnesses to testify at trial based on the following testimony:

A. That girl and her mama, she was my fiancée and she was with me and three other girls were with me and a guy—I don't know his name.

Q. So what were they going to testify to?

A. She would testify that I did not do it, because the child told 'em that I didn't do it.

Q. Did you tell Mr. Cantrell that you had witnesses that would testify that the child admitted that you did not do it?

A. Yes.

Q. Who were these witnesses?

A. I can't draw on the names. I went to church with one of them. And the other one is my friend that I go see, her daddy – she was there. I really don't know the names.

Q. So the only thing that you're able to say is that you were told by these people who were, I guess, part of a conversation with the victim saying you didn't do this crime?

A. Yeah. I was around but her mama told me, sat there and told me "that child's told everybody that you did not do things to her."

Q. You don't have any contact information to be able to call these people, or anything like that?

A. No, sir, I didn't -- I wasn't able to get them on the stand.

Q. I mean – well, that’s two different things. You didn’t tell him about those witnesses. Why didn’t you do that?

A. I told him that I got witnesses. He subpoena those people, or whatever you call it.

Q. Did they come?

A. Yeah. Oh. Yeah.

Q. So they were there?

A. Yeah.

Q. Who were those people?

A, My daughter said that there were three ladies. I don’t know their names. One of them was my girl, her name was Margaret – App. 348, l. 16 – p. 351, l. 14.

Trial counsel testified and explained that he talked to certain potential witnesses who lived in the same trailer park, but that they did not possess any useful information that would have benefitted the defense. App. 356, l. 20 – p. 358, l. 19.

The PCR judge ruled that “petitioner failed to meet his burden of proving trial counsel should have been subpoenaed witnesses for trial...[because] he spoke to several potential witnesses and that they [would have] add[ed] little value to the defense’s case.” App. 365-366.

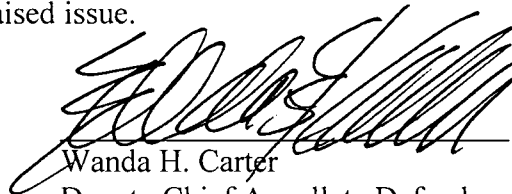
A defendant has a right to present witnesses in his defense. Faretta v. California, 422 U.S. 806 (1975); State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986). See Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998), where the Court held that trial counsel was ineffective in failing to call as a defense witness a triage nurse who would have corroborated the defendant’s lack of penetration defense on a sexual assault charge. See also Thomas v. State, 308 S.C. 123, 417 S.E.2d 531 (1992), where counsel erred in failing to call the emergency medical personnel who would have testified that the victim stated immediately after the attack that she did not know her assailant where the

victim was the sole witness to the rape. Also, compare, Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), where the Court held that defense counsel performed deficiently in failing to hire an independent expert witness to assess the gun residue evidence, especially where there was evidence that the victim had the gun in question and was ready to fire, but the gun went off after the defendant grabbed it, and where the initial finding was that no gunshot residue appeared on the victim, but a subsequent finding on the question of whether gunshot residue was on the victim resulted in an inconclusive finding.

In the instant case, counsel erred in failing to call the potential witnesses in question to testify on behalf of the defense in petitioner's case. This error was tantamount to deficient legal representation in violation of the Sixth Amendment, such that but for the error, a reasonable likelihood exists that the outcome of petitioner's trial would have been different. See Hill v. Lockhart, 484 U.S. 52 (1985).

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court grant the petition and allow full briefing on the above raised issue.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of October, 2016.

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PETITION TO BE RELIEVED AS COUNSEL
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Counsel for Bobbie Albert McCann states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's trial before Judge Perry H. Gravely, which was held on December 14, 2015 (PCR), and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
Therefore, counsel requests that the Court relieve her as counsel for Bobbie Albert McCann.

Respectfully Submitted,

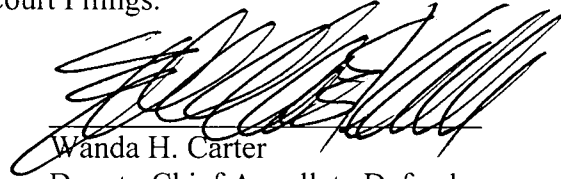

Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 19th day of October, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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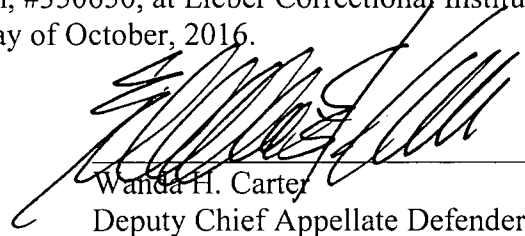
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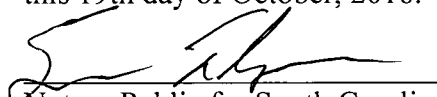
RESPONDENT

—————
CERTIFICATE OF SERVICE
—————

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Bobbie Albert McCann, #350650, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 19th day of October, 2016.


Wanda H. Carter
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 19th day of October, 2016.

 (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.