

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Darlington County

Honorable G. Thomas Cooper, Circuit Court Judge

LARRY JAMES TYLER,

ORIGINAL

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MAY 16 2017

S.C. SUPREME COURT

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-002364

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in not finding trial counsel ineffective for failing to object to the admission of the photos found on Petitioner Tyler's home computer and email of young girls under the age of ten depicted in allegedly "unnatural" positions and one sexually explicit photo with young girl which were inflammatory to the jury and prejudicial to Petitioner Tyler?

STATEMENT

In 2011, Larry Tyler lived with his mother, Ernestine Witherspoon, in Darlington County. App. 274; App. 31, ll. 13 – 25. From July 1, 2011 to September 24, 2011, Doris Brown, the grandmother of the minor and the minor's younger sister, would take the girls to the home where Petitioner Tyler lived with his mother, to visit. At one visit, Tyler gave the minor a cell phone. On their way home in the car, the minor's sister said there was a picture of a naked man on the phone. Ms. Brown took the phone back to where Tyler lived. App. 43, ll. 21 – App. 46, ll. 13.

Tyquan Brown was twenty-one and a cousin of the minor and her sister. He visited Tyler at Petitioner Tyler's home just one time and Tyler gave him the cell phone. In addition to the pictures, Brown noticed some inappropriate drafted text messages that Tyler had written to or about the minor. Brown called the minor's mother and told her what he found. He also gave her the phone. App. 68, ll. 1 – App. 73, ll. 24.

Georgita Brown, the minor's mother, saw the pictures and the drafts. She called the police, met Deputy Eric Hodges and gave him the cell phone. App. 79, ll. 6 – App. 83, ll. 25.

Deputy Hodges got a search warrant for Petitioner Tyler's residence and his vehicle after talking with Ms. Brown. Pictures of young girls in sexually suggestive poses and one picture of young girl in a sex act were found on Tyler's computer and some of his other phones. The deputy found Tyler at a mechanics garage and arrested him for driving under suspension after checking his license. He then told Tyler, after advising him of his Miranda rights, that the deputy was working on another investigation. App. 87, ll. 2 – App. 90, ll. 24.

Petitioner Tyler was arrested and charged with obscene/criminal solicitation of a minor, sexual exploitation of a minor in the second degree, contributing to the delinquency of a minor, and disseminating harmful material to minors. On February 25 – 27, 2013, Petitioner proceeded to trial

before the Honorable Paul M. Burch and a jury in Darlington County. Tyler was represented by Richard Jones, and the state was represented by John Holt, and Patti Parker as the assistant solicitors. App. 1.

In a pretrial motion, defense counsel moved to exclude one of the forty-one photos in evidence that came from Tyler's email account; the others came from his computer. The one photo to be excluded was "significantly different" from the others. App. 21, ll. 7 – App. 22, ll. 10. The state responded that that photo "showed sex" but the "young lady's face was not visible." The solicitor said: "I took that off and inserted the one from the Yahoo account which was visible." However, he reduced all of the photos to thumbnail size on a disk. App. 22, ll. 11 – App. 23, ll. 24. The judge said that they were "going on with the case." App. 24, ll. 12 – 17.

The minor testified that she was twelve years old at time of trial. She said that she and her sister went with their grandmother to visit the mother of Tyler at Petitioner Tyler's mother's home where he lived. He was always taking pictures of them with his cell phone. She said they played a racing game. If Tyler won, he would get a hug from her. If he lost, he would have to pay her a dollar. Tyler always won. She identified the cell phone Tyler gave her and said when they got in the car with their grandmother, they noticed pictures on the phone. One was a girl in a bikini. The other one was a picture of Tyler with blue underwear. App. 51, ll. 2 – App.56, ll. 7. She did not read or see any text messages. App. 59, ll. 1 – App. 60, ll. 8.

The minor's younger sister, who was ten years old at time of the trial, testified next. She, too, said Tyler would take pictures of them, but he took more of her sister. She also testified about the cell phone Petitioner Tyler gave them. She saw pictures of girls with bathing suits and a picture of Tyler with blue drawers. App. 60, ll. 13 – App. 67, ll. 12.

During the trial, Sergeant Shawn Tunsdall testified that he used an extraction device to extract data from Petitioner Tyler's cell phone. The data was placed on a thumb drive and then entered into his laptop so he could burn a disk from it for evidence. App. 95, ll. 11 – App. 97, ll. 14.

Deputy Russ Harrell testified he worked in forensics and evidence with the Sheriff's Department. He seized Tyler's computer, hard drive, and several cell phones. App. 98, ll. 18 – App. 99, ll. 25. He went over the unsent drafted text messages concerning the minor that Tyler had drafted. App. 101, ll. 11 – App. 104, ll. 16. Next, he discussed photos taken from Tyler's desktop computer. Most of the images were of young girls under ten years of age in "unnatural positions." Some had "bare butts" and one photo showed a young girl in a kneeling position and anal sex was being performed on her. Defense counsel made no objection to the photos, State's Exhibit 13, being admitted into evidence. Counsel did not renew his objection to the one photo actually showing a sex act with a child. App. 104, ll.20 – App. 107, ll. 22.

The jury returned verdicts of guilty as charged. Judge Burch sentenced Tyler to respective sentences of eight (8) years, eight (8) years, eight (8) years, and three (3) years. Tyler's attorney filed an appeal which was perfected by the Office of Appellate Defense. The Court of Appeals affirmed Tyler's convictions and sentences on January 14, 2015. State v. Tyler, Op. No. 2015-(Ct. App. filed January 14, 2015). App. 284 – App. 285; App. 265.

On January 2, 2015, Petitioner Tyler filed an application for post-conviction relief (PCR). The state filed a return on September 10, 2015. An evidentiary hearing was held on July 18, 2016 before the Honorable G. Thomas Cooper. Tyler was represented by Lance S. Boozer, and the state was represented by J. Rutledge Johnson. App. 215.

At the PCR hearing, the state asked the court to dismiss Petitioner Tyler's case because he had maxed out his sentence so there were no further issues on his case. The state reported that Tyler

was being held for a hearing for the sexually violent predator program which was a “collateral subsequent” and thus was not “proper for the PCR forum.” App. 218, ll. 1 – App. 219, ll. 2.

PCR counsel argued that Tyler’s PCR had nothing to do with “any sort of collateral consequence” as he wanted a new trial He was challenging “actions that happened at his trial.” App. 219, ll. 9 – 22. Counsel explained that Tyler felt that his lawyer did not do certain things properly at trial, and he wanted the remedy of a new trial. App. 221, ll. 1 – 8.

The PCR judge denied the motion to dismiss as Tyler wanted to proceed with his PCR. App. 224, ll. 1 – 23.

Petitioner Tyler testified at his PCR hearing that he had maxed out his sentence but was currently detained at the Darlington County Detention Center for a determination if he were a sexually violent predator. App. 225, ll. 19 – App. 228, ll. 9. He believed his trial counsel was ineffective for several reasons. He named four reasons. App. 231, ll. 21 – App. 239, ll. 20.

His most prejudicial allegation was that trial counsel was ineffective for failing to object to the admission of the photos taken from Tyler’s computer and email account which were irrelevant and inflammatory. Tyler said it was not child pornography. All of the people on the website were eighteen years or older. App. 234, ll. 13 – App. 235, ll. 19.

Trial counsel, Rick Jones, testified that Tyler “was firmly convinced” that he had done nothing wrong. Counsel said that most of the “information” was not disseminated to the two young girls. Therefore, counsel’s trial strategy was that these were “thoughts that were not meant to be shared with anybody and were inadvertently discovered by their cousin.” App. 247, ll. 20 – App. 250, ll. 11. Counsel hired a computer expert to review everything but the expert found a “whole lot more damaging information on the computer than the state had found.” Counsel did not want any

of that coming in at trial. He was particularly concerned with the picture of the anal sex with the young child. Tyler continued to deny any “culpability.” App. 252, ll. 1 – App. 253, ll. 21.

As concerning the photos, counsel’s strategy was to minimize the pictures as much as possible and to present them himself. App 253, ll. 4 – App. 254, ll. 25.

On November 4, 2016, the PCR judge filed an order denying Petitioner Tyler’s PCR application and dismissing it with prejudice. App. 264 – App. 272. The judge found that Tyler failed to meet his burden of proving that trial counsel was ineffective for not challenging the admission of the photos. The judge found that Tyler could show no prejudice so the allegation had to be denied. App. 269 – App. 270.

Tyler’s PCR counsel filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in not finding trial counsel ineffective for failing to object to the admission of the photos found on Petitioner Tyler's home computer and email of young girls under the age of ten depicted in allegedly "unnatural" positions and one sexually explicit photo with young girl which were inflammatory to the jury and prejudicial to Petitioner Tyler.

In United States v. Cunningham, 694 F.3d 372 (3rd Cir. 2012), the Supreme Court held that the probative value of the video excerpts of pre-pubescent children being bound, raped, and violently assaulted was substantially outweighed by needless presentation of cumulative evidence. The district court had witness testimony, still images and proffered stipulations of the child pornography. The Court also ruled the abuse of discretion by the district court in admitting the excerpts was not harmless.

As in Cunningham, the admission of the photos showing a child involved in sexual activity, and the other young girls in "unnatural" poses with undertones of sexual activity was not needed, Detective Harrell had testified to the contents of the photos including the one of the young child involved in anal sex. App. 104, ll. 20 – App. 107, ll. 22. The photos did not provide any additional information or facts.

The South Carolina Supreme Court held in State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014) that the trial court did not abuse its discretion in admitting pre-autopsy photographs of the victim, who had been mauled by dogs. The Court wrote that the pre-autopsy photos were necessary to show the unaltered condition of the victim and to show the extent and nature of the victim's injuries. And the Court wrote that the dog bites were not ordinary dog bites and most jurors would not be familiar with the type of bite. There were no witnesses. The pathologist felt

compelled to document the injuries prior to the autopsy because he had never seen a situation this extreme.

Tyler's case is distinguished from Collins because the suggestive child photos did not provide additional facts or information for the jury beyond the witness testimony. The scenes were not like unusual dog bites. The photos were unusual for the average juror because they depicted a minor child in sexual activity, and others in "unnatural poses." This fact was already confirmed by the indictments and testimony. .

In State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013), the Supreme Court held that photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions. However in Brockmeyer's case, the photographs of the defendant taken shortly after the shooting was not substantially outweighed by the danger of unfair prejudice in the murder trial. The photographs were necessary to show the defendant's agitated demeanor following the shooting in order to rebut the defendant's claim that he was distraught and crying after the shooting.

The photos in Tyler's case were not needed to show any particular facts and should have been excluded. They were inflammatory and shocking to the conscience. They were not related to the offenses charged concerning the minor.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of

competence required in criminal cases. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005), the Supreme Court held that to preserve an issue for review, there must be a contemporaneous objection that is ruled upon by the trial court. Trial counsel in Tyler's case failed to make a contemporaneous objection when the photo of the young child where someone was performing anal sex on her was admitted. Although he made a pretrial motion to exclude the photo, he failed to preserve the issue by not objecting when it was introduced into evidence.

Tyler was prejudiced by the forty-one photos and particularly the one pornographic photo. Trial counsel was ineffective for not objecting to the photos which were irrelevant to proving the elements of the statutes because they did not involve the minor child. The only purpose of the photos was to inflame the jury and make Tyler appear more guilty of the crimes for which he was charged.

CONCLUSION

Based on the above, Appellant's convictions and sentences should be reversed, and his case remanded for a new trial.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of May, 2017.

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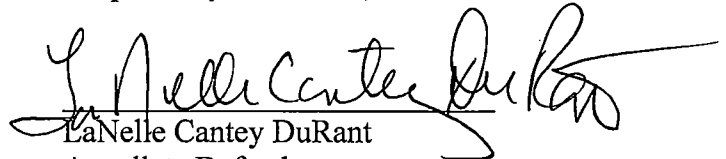
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Larry James Tyler states:

1. She is an 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 G. Thomas Cooper, which was held on July 18, 2016, 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 Larry James Tyler.

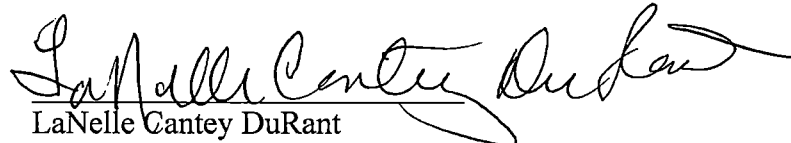
Respectfully Submitted,


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 16th day of May, 2017.

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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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 Johnny James, 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 Larry James Tyler, at 1220 Pineforest Lane, Darlington, SC 29540, this 16th day of May, 2017.


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 16th day of May, 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.