

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Clarendon County

Honorable Brooks P. Goldsmith, Circuit Court Judge

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CHARLIE BELSER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001705

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JOHNSON PETITION FOR WRIT OF CERTIORARI
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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether the PCR judge erred in refusing to find trial counsel ineffective for not calling an expert to testify at trial in regard to secondary transfer of DNA, a main component of the defense?

STATEMENT

In October of 2011, the Clarendon County Grand Jury indicted Petitioner Belser for criminal sexual conduct with a minor second degree, indictment #2011-GS-14-480. On January 28, 2013, Belser proceeded to jury trial before the Honorable R. Ferrell Cothran. Attorney Scott Robinson represented Belser at trial. Attorney Christopher Durant prosecuted the case on behalf of the State. The jury returned a verdict of guilty and Judge Cothran sentenced Belser to fifteen (15) years. A timely notice of intent to appeal was served on February 7, 2013, and the direct appeal perfected. On September 24, 2014, the South Carolina Court of Appeals dismissed the appeal after review pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). State v. Belser, 2014-UP-335 (S.C.Ct.App. filed September 24, 2014).

On March 30, 2015, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on May 1, 2015. On March 14, 2016, an evidentiary PCR hearing was held before the Honorable Brooks P. Goldsmith. Lance Boozer represented Petitioner at the PCR hearing. Daniel Gourley represented the State. In a written order signed May 29, 2016, Judge Goldsmith denied relief and dismissed the application. A timely notice of intent to appeal was served on August 15, 2016. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for not calling an expert to testify at trial in regard to secondary transfer of DNA, a main component of the defense.

The jury found Petitioner guilty of criminal sexual conduct with a minor, second degree. The minor's mother admitted having a physical relationship with Petitioner. (App. p. 111, lines 14-16). Petitioner's DNA was found on a pair of panties alleged to have been worn by the minor after intercourse with Petitioner. (App. pp. 127-128; p. 197, lines 10-17). The female DNA found in the panties, however, was insufficient for identification. (App. p. 202, lines 19-25).

During the PCR hearing Petitioner testified that during trial he and trial counsel discussed secondary transfer. Petitioner testified:

I said, well, I'm not denying the fact that me and the mother was in a sexual relationship but totally deny the fact that me and the daughter ever messed around, and I told him. I was, like, me and the mother, not only were we in a sexual relationship. We wasn't using – and having unprotected sex and I tell him on numerous occasions when I would ejaculate either in her or when I, you know, didn't, I would wipe off with a towel, put the towel in the hamper that is shared with the rest of the household. And I told him that it's very, very plausible, it's very likely that when I ejaculate into the towel and put it into the hamper, that whatever that was on the towel came in contact with the panties.

(App. p. 349, lines 11-23). Petitioner testified that trial counsel should have retained an expert to testify at trial and validate the defense of secondary transfer. (Tr. p. 353, lines 13-23). Petitioner testified that the secondary transfer theory was a main component of the defense. (App. p. 357, lines 22-24).

Although he could not remember the name, trial counsel testified that he consulted with a DNA expert in reference to secondary transfer and the expert assisted in formulating questions for the cross examination of the State's DNA expert. (App. p. 369, lines 7-15). Trial counsel testified that he did not call the expert to testify at trial because the benefit of calling a defense DNA expert

did not outweigh the benefit of presenting last closing argument. (App. p. 380, lines 1-19). Trial counsel opined that the State's DNA expert admitted everything a defense expert would have testified to. (App. p. 380, lines 5-10). Trial counsel admitted that the overall trial strategy involved the secondary transfer. (App. p. 381, lines 6-13).

In the order of dismissal the PCR judge wrote, "Applicant stated that Trial Counsel was ineffective for failing to call an expert witness to discuss the possibility of secondary transfer." (App. p. 391). The PCR judge refused to find ineffective assistance of counsel and wrote, "Furthermore, Applicant failed to produce any credible evidence or arguments to Trial Counsel's failure to investigate, prepare, defend, or prepare Applicant for trial." (App. p. 395). The PCR judge erred. Trial counsel was ineffective in failing to call an expert to testify at trial in regard to secondary transfer of DNA. Petitioner was prejudiced by the deficient performance.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

Contrary to trial counsel's opinion that the State's DNA expert admitted everything that a defense expert would testify to, the State's DNA expert testified that, while possible, it was

unlikely the DNA matching Petitioner and found in the panties was the result of secondary transfer. (App. p. 206, line 6 – p. 207, 208, lines 1-8). Secondary transfer was the main component of the defense strategy. Trial counsel was ineffective in failing to call a defense DNA expert to validate the secondary transfer theory.


In Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008), this Court wrote:

Secondly, counsel's failure to procure expert witnesses did not render her representation deficient given she vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence. See Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) (finding trial counsel was not deficient in failing to procure an expert witness to challenge DNA evidence presented at trial where the record established that counsel vigorously cross-examined the State's DNA experts and attacked the accuracy of the evidence).

While counsel in the present case was able to cross examine the State's DNA expert, the expert testified that the defense theory of secondary transfer was unlikely. Trial counsel was ineffective in not calling a defense DNA expert to validate the secondary transfer theory. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different.

CONCLUSION

Based on the above argument this Court should grant the petition for writ of certiorari to allow further briefing on the issue.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of May, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

Honorable Brooks P. Goldsmith, Circuit Court Judge

CHARLIE BELSER,

PETITIONER

V.

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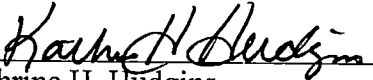
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Charlie Belser states:

1. She is 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 Brooks P. Goldsmith, which was held on March 14, 2016 (Evidentiary Hearing), 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 Charlie Belser.

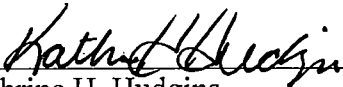
Respectfully Submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 17th 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."


Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

This 17th day of May, 2017.

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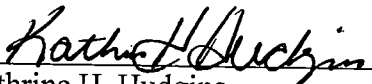
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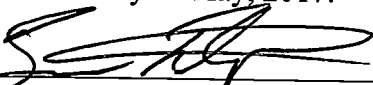
RESPONDENT

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CERTIFICATE OF SERVICE
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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 Julie Coleman, 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 Charlie Belser, #331210, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 17th day of May, 2017.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of May, 2017.



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