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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Trial Judge
The Honorable Paul M. Burch, Post-Conviction Relief Judge

Appellate Case No. 2017-000242

Timothy Young, ...Respondent,

v.

State of South Carolina, ...Petitioner.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Is the PCR Court's finding that counsel was ineffective for failing to object to the qualification of two non-scientific experts when the State did not introduce any information about their reliability supported by any probative evidence or controlled by an error of law?

STATEMENT OF THE CASE

Respondent is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In March 2011, the Horry County Grand Jury indicted Respondent for one (1) count of Criminal Sexual Conduct, First Degree (2011-GS-26-01088) and one (1) count of Lewd Act on a Minor Child (2011-GS-26-01089). Paul V. Cannarella, Esquire represented Respondent. On April 7, 2011, Respondent proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. The jury found Respondent guilty as indicted on all charges. Judge Culbertson sentenced Respondent to imprisonment for twenty-five (25) years for the count of Criminal Sexual Conduct, First Degree and ten (10) years for the count of a Lewd Act on a Minor Child. The sentences are set to run concurrently.

Respondent filed a timely notice of appeal. Laura L. Hiller, Esquire and Jonathan M. Hiller, Esquire, both of Hiller & Hiller, P. A., perfected the appeal with the filing of an Anders[1] brief. The South Carolina Court of Appeals affirmed Respondent's conviction and sentence after review on June 5, 2013. State v. Young, Op. No. 2013-UP-236 (S.C. Ct. App. filed June 5, 2013). On August 22, 2013, the Court of Appeals denied Respondent's petition for rehearing. The Supreme Court denied Respondent's subsequent petition for writ of certiorari on January 8, 2014. Remittitur was returned December 13, 2013.

The Respondent, through his attorney, David Tarr, Esquire, filed an application for post-conviction relief on November 6, 2014. On May 12, 2016, counsel filed an amended application for post-conviction relief. An evidentiary hearing into the matter was convened on May 12, 2016 at the Horry County Courthouse before the Honorable Paul M. Burch. Respondent was present

[1] Anders v. California, 386 U.S. 738 (1967).

and represented by Mr. Tarr, and the State was represented by Assistant Attorney General Jessica E. Kinard. Judge Burch granted relief in an order signed January 3, 2017, and filed January 6, 2017. Petitioner filed a notice of appeal on February 10, 2017. This petition for writ of certiorari follows.

STATEMENT OF THE FACTS

A minor child, CT, disclosed to a psychotherapist, Denise Scearce, that her mother and stepfather, the Respondent, had been inappropriately touching her.[2] Scearce was treating both CT and her sister after they began exhibiting behavioral and emotional problems in the summer of 2008. The initial disclosure was CT believed her mother was touching her inappropriately. Upon hearing this, CT's biological father, who had primary custody, suspended visitation between the children and their biological mother after their visit in October of 2008. Several months later, on January 14, 2009, CT disclosed to her stepmother that her stepfather, the Respondent, had been touching her as well. App. p. 211.[3] When asked why she did not disclose this earlier, she said that she wanted to reveal them one at a time, and his abuse had started later. App. p. 208:14 – 209;7. All of these disclosures were made in North Carolina and involved the North Carolina Department of Social Services, as that was the minor child's primary state of residence. However, the abuse occurred in Myrtle Beach, South Carolina, where the Respondent and his wife (the victim's biological mother) lived. The investigation into these allegations involved the Department of Social Services in both North and South Carolina, and mental health and abuse specialists in both states.

[2] Her specific allegation was that her mother believed her vulva was red, so she applied Neosporin. App. p. 206; 2-5.

[3] Her specific allegation regarding Respondent was that he had performed oral sex on her and digitally penetrated her. App. p. 212;2-18.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review in a post-conviction relief action is whether "**any** evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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 (1984); Butler, at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, at 689. An applicant must overcome this presumption in order to receive relief. Cherry, at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under

professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, at 688. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. 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).

ARGUMENT

I. The PCR Court's finding that counsel was ineffective for failing to object to the qualification of two non-scientific experts when the State did not introduce any information about their reliability is unsupported by any probative evidence and controlled by an error of law.

The PCR Court erred in granting relief because no probative evidence supports the PCR Court's deficiency finding counsel was ineffective for failing to object to the reliability of two expert witnesses the State presented. As a starting point in analyzing the need for and appropriateness of expert witnesses, South Carolina Rule of Evidence 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE. In determining the admissibility of expert testimony, South Carolina courts make three inquiries. "First, the court must determine whether 'the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.'" Graves v. CAS Medical Systems, Inc., 401 S.C 63, 74, 735 S.E.2d 650, 655 (2012) (quoting Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010)). "Second, the expert must have 'acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter,' although he 'need not be a specialist in the particular branch of the field." Id. "Finally, the substance of the testimony must be reliable." Id.

In making this particular ruling, the PCR Court relied on State v. White. 382 S.C. 265, 676 S.E.2d 684 (2009). Specifically,

> Under White, there is a two pronged test that must be met before a witness providing non-scientific testimony may be qualified as an expert witness. First, the qualifications of the witness must be sufficient. Second, there must be a determination that the expert's

> testimony will be reliable. For purposes of this hearing, this Court finds that the parties agree that this witness had sufficient qualifications. However, this Court finds a lack of testimony regarding reliability. See Tr. Tr. [*sic*]
>
> At the evidentiary hearing, trial counsel acknowledged that he did not object to the lack of testimony provided during voir dire of the witness pre-qualification regarding her reliability. PCR Tr. p. 24. He testified that he was familiar with State v. White, Id. at p. 22. However, he acknowledged that there was no testimony offered as to Ms. Scearce' s reliability but he failed to object. This Court finds that counsel's failure to object was deficient and that because of the nature of the evidence in this case, was clearly prejudicial.

App.p. 839.

The order also references the matter of State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015) in a footnote, arguing that it should apply to the case at bar because both trials took place in 2011. App.p.839, footnote 1. This was erroneous because counsel is not required to be clairvoyant and anticipate the Chavis' holding that was issued **four years** after Applicant's trial. Recently, this Court found that the lower court erred in granting relief on the basis that defense counsel should have objected to an instruction contrary to State v. Daniels, 401 S.C. 251, 254, 737 S.E.2d 473, 474 (2012), five years before Daniels was issued. Nathaniel Teamer v. State, 416 S.C. 171, 786 S.E.2d 109 (2016). This Court held "that the PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se." Id. In reaching this result, this Court declared the following:

> This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law. E.g., Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law. . . ." (citing Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993))), *overruled on other grounds* by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765 ("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.").

Id.

The essence of Young's argument regarding the precedential value of Chavis at the time of his trial is that if other attorneys are making an argument against precedent, then counsel is ineffective if not joining in. The Fourth Circuit rejected this argument in Kornaharens v. Evatt, 66 F.3d 1350 (4th Cir. 1995). In that case, a Charleston attorney admitted being aware of an issue on appeal to the United States Supreme Court challenging state law in another case, but the Fourth Circuit rejected an argument that he was ineffective for failing to forecast the change in law resulting from that other case, holding "the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law." Id. at 1360. The Fourth Circuit concluded, "[b]ased on this clear precedent, we cannot say that, under the facts of this case, [counsel's] trial performance was constitutionally deficient because he followed a long-standing and well-settled rule of South Carolina criminal law-even when that rule was under attack in the United States Supreme Court at the time of trial." Id. Accordingly, counsel was not ineffective for failing to object to the reliability of either expert.

In the alternative, there is ample case law to establish that both experts were properly qualified and, therefore, counsel was not ineffective in failing to object to their qualifications. Regarding Ms. Nordeen, whom the State offered as an expert in the fields of forensic interviewing and child development, during *voir dire* the State established the elements of RATAC testing that she implemented, as well as its status as a peer-reviewed method. App. p.320; 11-25. Further, the State established that Ms. Nordeen gave over 550 RATAC interviews, and was qualified as an expert with regard to the use of RATAC and issues of child development in the past. App. p.321; 1-14. Trial counsel conducted *voir dire* with Ms. Nordeen, focusing on

her methods, and questioned her on their reliability in particular. App. p.321;24 – 322;25. In fact, Ms. Nordeen testified she was appearing in order to provide information regarding the interview process, not to give an ultimate opinion on what happened, or to provide an opinion as to the child's truthfulness. App. p.323; 1-15. During *voir dire* and proffer, the trial judge questioned whether Ms. Nordeen needed to be qualified as an expert in order to testify as to whether the RATAC method was followed, as he believed that was a factual question. App. p.323; 16-p.325;16. The State expressed a desire to have Ms. Nordeen qualified as an expert in childhood development so that she could testify that testing was appropriate for age and development. App. p. 325; 17 – 329;7. Ms. Nordeen was ultimately qualified before the jury as an expert in the field of child development as it related to forensic interviewing. App. p. 335;18-20. Ms. Nordeen testified to the way that she conducted the forensic investigation with the minor child. This included testimony such as the types of questions that would be beneficial, what the child would understand, and if dolls would be used. She further testified about questions that were confusing for the child, and whether that confusion was normal. App. p.343;20 – 344;4.

Similarly, just as Ms. Nordeen did not testify to any conclusions about the minor child, neither did Ms. Scearce. After a lengthy *voir dire*, Ms. Scearce was qualified as an expert in child sexual abuse counseling and treatment. App. 247; 25 – 248; 2. She did not testify to a method, as Ms. Nordeen did, but testified to her educational background, work experience, licensure, and professional affiliations. App. p.238; 2 – 240;18. Upon request of the trial court, further testimony was elicited about why she is qualified to form an opinion or diagnosis. App. p. 244;7 – 247;3. Regardless, Ms. Scearce did not testify to an ultimate opinion regarding the minor child. She testified as to her mental health diagnosis, including the diagnosis of a psychiatrist to whom she referred the minor child, as well as to how that diagnosis changed during the course of

treatment. App. p. 253;10-15; p.254;8-21. Ms. Scearce also testified about the existence and relevance of delayed or piecemeal disclosures in children, including that the phenomenon is not unusual. Specifically regarding ineffective assistance of counsel in dealing with this expert, defense counsel objected several times when the State seemed to ask about whether symptoms that the minor child presented were consistent with sexual abuse. App. p. 266;25 – 268;4. These objections were all sustained.

Neither witness opined as to the results of their interaction with the minor child or her family; rather, each testified as to how they conducted their respective investigation or course of treatment and whether it was appropriate and valid.[4] For these reasons, the holdings in White and Chavis do not apply, and an analysis of reliability was unnecessary. Rather, these witnesses' testimony and qualifications fall under the purview of State v. Jones, 417 S.C. 319, 790 S.E.2d 17 (Ct. App. 2016)[5]. In Jones, the expert at issue testified as to the validity, peer review, and widespread use of her methods, specifically the RATAC method, just as Ms. Nordeen did in the case at hand. Id. The Court of Appeals held that "the [trial] court adequately performed its gatekeeping function in ensuring the foundational requirements of her expert testimony were met in this case. See White, 382 S.C. at 274, 676 S.E.2d at 688 (noting "[t]he foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach"). Therefore, we find no reversible error as to the reliability issue." Id., 417 S.C. at 333, 790 S.E.2d at 25. The facts in this case align much more closely with Jones than they do with Chavis, thus allowing the distinction made by the Court of Appeals to be made in this matter, as well. Quite simply,

[4] Additionally, there was a video of the forensic interview that was published to the jury along with a corrected transcript for the jury to follow along with, which was corrected on the record pursuant to Ms. Nordeen's testimony. App. p.356.

[5] This matter is currently listed as "ready for consideration" by this Court on C-Track (Appellate Case Number 2016-001933).

because these experts never testified to any conclusions as to the minor child, their reliability is not in question, and neither White nor Chavis apply.

Furthermore, the requirement of showing reliability only relates to the area of expertise, and not the reliability of an expert witness' testimony. State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012) ("To be clear, the reliability of a witness's testimony is not a prerequisite to determining whether or not the witness is an expert."). The trial court must take care in its undertaking of the gatekeeper function without infringing on the jury's duty as a factfinder, the gatekeeper role merely requires the trial court "decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010).

The admission of expert testimony is within the sound discretion of the trial court. State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). The need for this standard is astutely explained by the United States Supreme Court as follows:

> [The abuse of discretion] standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.

Kumho Tire Company v. Carmichael, 526 U.S. 137, 152 (1999).

In further consideration of a pure ineffective assistance of counsel claim, the Court may find it beneficial to consider trial counsel's stated strategy regarding cross-examination of the expert witnesses. On page 791 of the Appendix, during his direct examination during the PCR evidentiary hearing, trial counsel states,

> ...maybe I should have fought hard to get her to be not qualified as an expert or vet her or voir dire her. You know, but you're kind of doing that, I mean, most of that voir dire takes place – I didn't want to do anything to make that jury think that she's some great kind of witness, you know, that's got all this expertise that if she thinks the symptoms are consistent, then yeah, the child did it.

App. 791;6-13.

Counsel's articulation of valid trial strategy defeats a claim of ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546; 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Strickland requires extreme deference to counsel's strategic judgments that are adequately investigated; as Strickland explains: "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . ." Strickland, 466 U.S. at 690-91.

"Courts generally entrust cross-examination techniques, like other matters of trial strategy to the professional discretion of counsel." Henderson v. Norris, 118 F.3d 1283, 1287 (8th Cir. 1997). "The cross-examination of a witness is a delicate task; what works for one lawyer may not be successful for another." Id. The Eighth Circuit observed "there are few, if any, cross-examinations that could not be improved upon." Id. (citation and quotation marks omitted).

The Ninth Circuit held, "We give 'great deference' to 'counsel's decisions at trial such as refraining from cross-examining a particular witness.'" Brown v. Uttecht, 530 F.3d 1031, 1036 (9th Cir. 2008) (quoting Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000)). In Uttecht, the Ninth Circuit affirmed the determination that counsel was not ineffective for declining to cross-

examination of an expert witness based on the awareness "that a cross-examination of [expert] 'might well have backfired.'" Uttecht, at 1036-37 (quoting Yarborough v. Gentry, 540 U.S. 1, 7 (2003)); see generally Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (finding one could only speculate whether counsel could have done a better cross-examination of a doctor, therefore, applicant did not meet his burden of proving prejudice).

For these reasons, the PCR court erred in holding that trial counsel was deficient. Trial counsel could not have anticipated the ruling in Chavis and, therefore, could not have objected on that ground. Regardless of that fact, it is improper to hold these experts to the ruling in Chavis, as they did not testify to any ultimate conclusions. Rather, they testified to their experiences with the child, whether the information gleaned from the child was an appropriate response to the method, and made no determinations whatsoever as to whether that information was reliable or true. Here, as in Jones, the trial court performed a gatekeeping function through careful *voir dire* and rulings when objections were made, thus preventing potentially inappropriate testimony from reaching the jury. Trial counsel made all appropriate objections and cannot be found deficient and, therefore, cannot be found to have prejudiced the Respondent. The PCR court's ruling is not supported by probative evidence and is based on an error of law.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA, PETITIONER,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Petition for Writ of Certiorari and Appendix** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

David B. Tarr, Esquire
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This 12th day of June, 2017

MALLORY MORRIS
LEGAL ASSISTANT