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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Edward W. Miller, Circuit Court Judge

MARSHALL DEWITT MCGAHA,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2015-001464

BRIEF OF PETITIONER

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ISSUE PRESENTED

When Petitioner went to trial for two counts of criminal sexual conduct with a minor and two counts of lewd act upon a child, did the PCR judge err in refusing to allow PCR counsel to obtain records from the South Carolina Department of Social Services [DSS] to verify that DSS investigated the family of the minor witnesses based on a report of drug abuse made by Petitioner in order to establish an ineffective assistance of trial counsel claim for failing to use the DSS records to establish bias and motive to misrepresent pursuant to Rule 608(c) SCRE?

STATEMENT

In March of 2011, the Greenville County Grand Jury indicted Petitioner for two counts of criminal sexual conduct with a minor and two counts of lewd act upon a child, indictments #2010-GS-23-7403, 7404, 7405 and 7406. On August 8, 2011, Petitioner proceeded to jury trial before the Honorable D. Garrison Hill. Thomas M. Hoskinson represented Petitioner at trial. Bryna S. Seay prosecuted the case. The jury returned with verdicts of guilty. Judge Hill sentenced Petitioner to two concurrent life sentences for the criminal sexual conduct with a minor charges, fifteen years concurrent for one of the lewd act charges and fifteen years consecutive for the other lewd act charge. A timely notice of intent to appeal was filed and the direct appeal perfected. On June 26, 2013, the South Carolina Court of Appeals affirmed the convictions and sentences. State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (Ct.App. 2013).

On May 2, 2014, Petitioner filed an application for post-conviction relief. The State filed a return on October 30, 2014. On April 21, 2015, an evidentiary hearing was held before the Honorable Edward W. Miller. Caroline M. Horlbeck represented Petitioner at the PCR hearing. Karen C. Ratigan represented the State. In a written order signed June 4, 2015, Judge Miller denied relief and dismissed the application. A timely notice of intent to appeal was served on July 2, 2015, and a petition for writ of certiorari was filed on February 22, 2016. On May 31, 2017, this Court granted the petition for writ of certiorari. This brief of petitioner follows.

ARGUMENT

When Petitioner went to trial for two counts of criminal sexual conduct with a minor and two counts of lewd act upon a child, the PCR judge erred in refusing to allow PCR counsel to obtain records from the South Carolina Department of Social Services [DSS] to verify that DSS investigated the family of the minor witnesses based on a report of drug abuse made by Petitioner in order to establish an ineffective assistance of trial counsel claim for failing to use the DSS records to establish bias and motive to misrepresent pursuant to Rule 608(c) SCRE.

In the application for post- conviction relief Petitioner alleges that the charges were brought against him in retaliation for him reporting the family to DSS for drug abuse. (App. pp. 291-300). At the beginning of the PCR hearing counsel for Petitioner advised the PCR judge that she had not obtained DSS records as requested by Petitioner. (App. p. 309, lines 8-21). PCR counsel offered to try and obtain the DSS records but admitted that she would not be able to get the records that day. (App. p. 309, lines 17-21). PCR counsel advised the judge that in the past DSS records had been "extraordinarily" difficult to obtain. (App. p. 309, lines 17-21). While PCR counsel was initially unsure of the relevance of the DSS records[1], Petitioner told the PCR judge, "That's where it all stemmed from, from me calling DSS on them. The mom had 3,300 and something milligrams of crack in her system and said she wasn't addicted to crack no more. The 83 year old great-grandma, she tested positive for crack cocaine. That little 5-year-old kid tested positive for crack cocaine. Omega Lab – that's right here And Becky, she told me, she said, 'I'll get you,' she said, 'I'll put you away forever for getting DSS involved." (App. p. 312, lines 14-22). 'Becky' is Rebecca Chastain, the guardian grandmother of the minors. The minors are sisters who lived with their grandmother, their great grandmother, another sister and the Petitioner.

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[1] As discussed below, if the DSS records confirm that Petitioner reported the family for drug abuse, the records would be relevant. PCR counsel, however, could not determine relevancy without reviewing the records.

At trial during the cross examination of Jessica Hufflin, an aunt of the minors, trial counsel asked, "Are you aware that in March that Family Court determined that - " (App. p. 144, lines 24-25). The State objected and an off the record bench conference was held. (App. p. 145, lines 1-8). The judge's ruling during the bench conference was not placed on the record but no further questions in regard to family court were asked. Trial counsel failed to question the grandmother, Rebecca Chastain, about a DSS action or family court. (App. pp. 149-155).

Addressing the DSS records, the PCR judge stated, "Mr. Hoskinson was aware of the DSS pending action and attempted to go into it at trial." (App. p. 313, lines 14-15). At the time of the PCR hearing, trial counsel, Thomas M. Hoskinson, was living in South America and did not testify at the hearing. (App. p. 307, lines 21-25). The PCR judge went on to state, "And the judge ruled . . . obviously, that he was not allowed to. By implication, we'll assume that happened, because the objection was made, there was a bench conference, and his examination went in a different direction, the defense lawyer's examination. So by implication, Judge Hill told him, 'No, you can't go there,' based on the solicitor's relevance objection. How does that – and then this matter was appealed" (App. p. 313, line 17 – p. 314, line 1). As discussed below, this issue was not preserved for appeal.

The PCR judge then asked PCR counsel, "Can you explain to me why there is – that it's possible that it now becomes relevant just because we're in a post- conviction relief action?" (App. p. 314, lines 5-7). PCR counsel explained, "Well, Judge, I think the relevance would be Mr. McGaha would have used that as a defense, and he seems to be saying that he is the reporter, he is the one who reported the drug usage by the mother and perhaps other family members while the children were present. And his position is that this charge was levied against him in retaliation. I think it becomes relevant in that DSS would need to come in and confirm or deny that he was the

reporter in this case." (App. p. 314, lines 8-17). The PCR judge ruled, "Mr. Hoskinson had those records, obviously, and was aware of the DSS investigation. So by implication, I don't think that argument holds water." (App. p. 314, lines 18-20). While the limited questioning about family court by trial counsel indicates that he was aware of prior family court proceedings, the record does not indicate what, if any records trial counsel obtained.

Petitioner told the PCR judge, "I want to have DSS workers and all here, the ones that interviewed all the people and all." (App. p. 317, lines 6-7). The PCR judge stated, "Well, I've ruled on that. The trial judge ruled it was not relevant, the Court of Appeals reviewed the record and did not require it to be done. I am not going to do it in this proceeding." (App. p. 317, lines 8-11). If the trial judge ruled that the DSS action was irrelevant, it was done during an off the record bench conference and not placed on the record. Petitioner correctly noted that the appellate court did not address the issue in regard to family court or the DSS records as the issue was not preserved for appellate review. (App. p. 317, lines 12-13). The PCR judge stated, "By implication, they agreed with it." (App. p. 317, line 14). The PCR judge erred. The appellate court did not address the issue because it was not preserved for review.

The issue raised on direct appeal involved whether the trial court erred in trying the charges involving the two minors together. State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (Ct.App. 2013). The trial judge's ruling on the family court questioning or DSS action was not placed on the record. Trial counsel failed to question the grandmother about the DSS action. As a result, the Court of Appeals did not rule on the issue involving the DSS action and did not "by implication agree with it." Trial counsel was ineffective in failing to preserve for appeal any ruling about family court questioning or DSS action. Additionally, trial counsel was ineffective for failing to question the grandmother about Petitioner's report to DSS. The information was relevant because,

if verified, it shows bias and a motive to misrepresent pursuant to Rule 608(c). If need be, trial counsel should have used the DSS records and called witnesses to verify that Petitioner reported drug abuse by the family to DSS.

In the order of dismissal the PCR judge wrote, "This Court finds the Applicant failed to meet his burden of proving trial counsel should have contacted witnesses to use at trial. As these witnesses did not testify at the PCR hearing, however, the Court cannot speculate as to what impact their testimony would have had upon the Applicant's trial." (App. p. 355). PCR counsel was unable to subpoena the DSS witnesses to testify at the PCR hearing because she had been unable to obtain the DSS records. PCR counsel informed the PCR judge that she had not obtained the DSS records. This Court should remand the case for an additional evidentiary hearing to verify that DSS investigated the family and ordered drug testing as a result of a report made by Petitioner. Once established, the DSS records form the basis of an ineffective assistance of trial counsel claim based on trial counsel's failure to use the records to show bias and a motive to misrepresent pursuant to Rule 608(c) SCRE. The PCR judge erred in refusing to allow PCR counsel time to obtain the DSS records.

The DSS records are relevant. Rule 401, SCRE, provides, "'Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In State v. Sims, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002), this Court wrote:

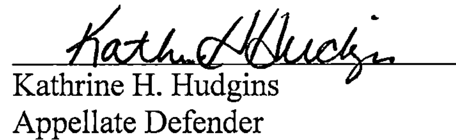
> Rule 608(c), SCRE, provides that "bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c) "preserves South Carolina precedent holding that generally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.' " State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) (quoting State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976)).

DSS records indicating that Petitioner reported the family for drug abuse are probative on the issue of bias and should have been used at trial. The fact that Petitioner reported drug abuse to DSS has a legitimate tendency to throw light on the accuracy, truthfulness and sincerity of the testimony of the aunt, Jessica Hufflin, and the grandmother, Rebecca Chastain. The jury should have known that Petitioner reported the family for drug abuse to DSS in making their credibility findings with regard to these two witnesses. Trial counsel should have used this information to argue that the allegations against Petitioner were fabricated in retaliation for reporting the family to DSS.

The applicant in a PCR hearing bears the burden of establishing that he is entitled to relief. Lomax v. State, 379 S.C. 93, 100, 665 S.E.2d 164, 168 (2008). "This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law." Id. at 101, 665 S.E.2d at 168. The PCR judge's findings that the trial judge found that the DSS records were irrelevant and that the appellate court addressed the issue with regard to the DSS records constitute errors of law. Petitioner is unable to meet his burden of proof without obtaining the DSS records, as offered by PCR counsel.

CONCLUSION

Based on the above argument, this Court should remand the case for an additional evidentiary hearing to address the DSS records and trial counsel's failure to use the records to establish bias and motive to misrepresent.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of June, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

MARSHALL DEWITT MCGAHA,

PETITIONER,

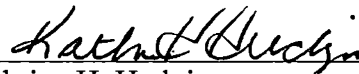
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Marshall Dewitt McGaha, #250923, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 29th day of June, 2017.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 29th day of June, 2017.

(L.S)

Notary Public for South Carolina
My Commission Expires: May 12, 2027