

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County
Brooks P. Goldsmith, Circuit Court Judge

2015-CP-43-1008
Appellate Case No. 2016-000887

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S.C. SUPREME COURT

WAYNE WELLS, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUE PRESENTED

- I. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object when, during jury deliberations in this trial for criminal sexual conduct with a minor second degree, the jury asked if it mattered if the defendant truly believed the victim was eighteen years of age and is ignorance of her age an excuse and the judge answered that it did not matter if the defendant truly believed the victim was over eighteen years of age and ignorance of her age is no excuse?**

STATEMENT OF THE CASE

Wayne Wells, Jr. (“Petitioner”) is currently incarcerated with the South Carolina Department of Corrections pursuant to the Sumter County Clerk of Court’s orders of commitment. Petitioner was true billed indicted at the October 2010 term of the Sumter County Grand Jury for Criminal Sexual Conduct with a Minor-Second Degree (2010-GS-43-337). The charges alleged Petitioner digitally penetrated and/or had sexual intercourse with the minor victim, who was less than sixteen years old but at least fourteen years old. App. 339. Calvin Hastie, Esquire, represented him. Petitioner proceeded to a jury trial and found guilty November 9, 2010. The Honorable W. Jeffrey Young sentenced Petitioner to a twenty year term of imprisonment.

A timely Notice of Appeal was filed on Petitioner’s behalf by Susan Hackett, Esquire. Petitioner filed an Anders brief on the issue of whether the trial court erred in overruling trial counsel’s objection to hearsay testimony provided by the victim concerning how and when Petitioner learned of the victim’s actual age. The South Carolina Court of Appeals dismissed the appeal. State v. Wells, Op. No. 2012-UP-621 (Ct. App. filed November 21, 2012). The Remittitur was issued on December 10, 2012.

Petitioner filed his first application for post-conviction (2013-CP-43-675) relief on April 18, 2013, alleging the following grounds for relief:

1. “Rule Canon 3B(5). C.S.C. Rule 501, SCACR;
 - i. “A judge shall perform judicial duties without bias or prejudice.”
2. Ineffective assistance of counsel;
3. Due Process Violation
 - i. “Due process was violated deprive Applicant of fair trial.”
 - ii. “6th Amendment.”
 - iii. “14th Amendment.”

An evidentiary hearing was held at the Sumter County Courthouse on May 29, 2014. Petitioner was present and represented by Casey Cornwell, Esquire. Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office represented Respondent. The Honorable R. Ferrell Cothran, Jr., denied and dismissed the application in written order filed July 11, 2014.

Petitioner filed a timely *pro se* Notice of Appeal. The South Carolina Supreme Court dismissed Petitioner's appeal in an order dated October 29, 2014, for failure to provide correspondence showing that the transcript had been ordered as required by Rules 243(b) and 207 of the South Carolina Appellate court Rules. The Remittitur was issued on November 14, 2014.

Petitioner subsequently filed a second application for post-conviction relief (PCR) on April 21, 2015 (2015-CP-43-1008), alleging the following grounds for relief:

1. Ineffective Assistance of PCR Counsel
 - a. Failure to file an appeal from the denial of his first PCR application.

Respondent filed its Return on May 28, 2015, requesting an evidentiary hearing solely on the issue of whether Petitioner was entitled to an appellate review of his first post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)¹. An evidentiary hearing on the matter was convened on March 18, 2016, at the Sumter County Courthouse before the Honorable Brooks P. Goldsmith. Petitioner was present at the hearing and represented by Timothy Griffith, Esquire. Assistant Attorney General Daniel Gourley of the South Carolina Office of the Attorney General represented the Respondent.

¹ Respondent initially filed a return and motion to dismiss Applicant's current application as it was filed beyond the statute of limitations and successive to his prior application. The Honorable George C. James, Jr issued a conditional order of dismissal provisionally denying the PCR application. Applicant filed a timely response alleging PCR Counsel was ineffective for failing to file an appeal following the denial of his first PCR application.

Following the hearing, Judge Goldsmith issued an Order Granting an Appeal Pursuant to Austin v. State, signed on March 30, 2016 and filed on April 7, 2016. Petitioner filed a timely Notice of Appeal on April 26, 2016. Petitioner's Appendix, Petition for Writ of Certiorari, and Petition for Writ of Certiorari Pursuant to Austin were filed on February 13, 2017. This Return to the Petition for Writ of Certiorari follows.

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 of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the petitioner 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).

ARGUMENT

I. Probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to object to the trial court's proper jury instruction.

Petitioner argues the PCR court erred in finding Trial Counsel was not ineffective for failing to object to the trial court's correct answer to a jury question asked during deliberations. The PCR court correctly relied on probative evidence and current law in making its decision, and this Court should affirm its findings.

Relevant Law

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCF; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, (1984); Butler, supra.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, supra. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry at 117, 385 S.E.2d at 625 (citing Strickland). 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 at 117-18, 386 S.E.2d at 625.

Discussion

Petitioner argues Trial Counsel was ineffective for failing to object to the trial court’s answer to the jury’s question during deliberation about whether it mattered if Petitioner truly believed the victim was eighteen years of age. However, the PCR court properly found Trial Counsel was not ineffective for failing to object because the trial court’s answer to the jury question was an accurate explanation of the law and therefore was not objectionable.

During the evidentiary hearing, Petitioner testified the victim deceived him and made him believe she was eighteen years old when she was actually fifteen years old. App. 257, line 19-24. He stated that Trial Counsel knew this was his defense, and he argued and testified about this defense at trial. App. 257-58. At trial, during jury deliberations, the jury asked the question, “If the defendant truly believed the victim was 18, does that matter and/or is ignorance of her age no excuse?” App. 198, line 11-13. The trial judge told the jury that no, it did not matter, and it was not an excuse according to the law. App. 198. Trial Counsel did not object to this answer. App. 198. At the evidentiary hearing, Trial Counsel testified he had no objection to the trial judge’s answer to the jury’s question because “the Judge was stating what the law was.” App. 270, line 4-9.

The PCR court relied on this testimony and on the transcript in making its ruling, and it held Trial Counsel's testimony on the subject was credible. App. 280. The PCR court cited to Trial Counsel’s testimony that he did not object because the judge’s answer was not objectionable, and that the judge properly answered the question that ignorance is no excuse in

regard to the victim's age. App. 284. The PCR court then found that Trial Counsel was not ineffective because his actions were reasonable under the circumstances and did not fall below professional norms of reasonableness, and because Applicant failed to meet his burden of proving prejudice. App. 284.

The PCR court's ruling and the trial court's jury instruction were correct and proper under the law. A 1965 article from the Washington and Lee Law Review explains the lack of this defense as it pertained and still pertains to the law in nearly every state in the country:

The uniform rule in the United States has been that a mistake as to the age of a female is not a defense to the crime of statutory rape. It has been followed even though the defendant had a reasonable belief, had exercised care to find out her age, or had been told by the female that she was over age. This rule is an exception to the general defense of mistake of fact, which states that if the defendant believed there existed certain facts, which had they been true would have rendered the action lawful, then he was not guilty because he was incapable of entertaining the intent necessary to constitute the crime.

Mistake of Age As A Defense To Statutory Rape, 22 Wash. & Lee L. Rev. 119 (1965), <http://scholarlycommons.law.wlu.edu/wlulr/vol22/iss1/10>. It is well understood across the country that statutory rape is a strict liability offense.

South Carolina law conforms to the national majority view. S.C. Code Ann. §16-3-655(B)(2) states:

- (B) A person is guilty of criminal sexual conduct with a minor in the second degree if:
- (2) the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim. However, a person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in consensual sexual conduct with another person who is at least fourteen years of age.

The statute is clearly written and only includes three requirements to prove this crime: the victim must be either fourteen or fifteen years old, the defendant must be older than the victim, and the

defendant must have engaged in a sexual battery with the victim. The statute does not include a *mens rea* requirement, and there is no South Carolina case law requiring the State to prove *mens rea* to convict a defendant of this crime.

The legislature drafted the statute without a *mens rea* requirement intentionally for the purpose of protecting young victims who may not yet be mature enough to realize the dangers and implications of sexual activity. Where it is clear that the legislature intended to create a statute with a targeted purpose, the court should not impose another meaning. “A basic rule of statutory construction, which is equally applicable to criminal and civil statutes alike, is that a court must ascertain and give effect to the legislature's intention as expressed in the statute.” State v. Zulfer, 345 S.C. 258, 261–62, 547 S.E.2d 885, 886–87 (Ct. App. 2001). “In construing a statute, a court cannot read into the statute something not within the manifest intention of the legislature as gathered from the statute itself.” Id. at 262, 547 S.E.2d 885 at 886. “If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.” Id. The legislature's intent behind the statutory rape law is clear and should not be altered by the courts. To change the law to allow the defense of mistake of fact to this crime would alter the statute completely and render its purpose invalid.

Despite legislative intent, there is no case law in South Carolina changing the requirements of this statute to include *mens rea*. Even if this statute were to change in the future, the current law, which was the law at the time of Petitioner's trial, does not require *mens rea*, and thus does not allow the defense of mistake of fact. Therefore, the trial court's jury instruction was proper under the law, and Trial Counsel's decision not to object to the jury instruction was correct and proper under reasonable professional norms, as required by Strickland. “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.” Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). Trial Counsel’s representation was proper under the law at the time of the trial.

Petitioner is attempting to change the law by improperly presenting as a post-conviction relief issue something that should have been raised on direct appeal. This Court should not find Trial Counsel ineffective for failing to challenge and change a well-established law. The PCR court properly found that Trial Counsel’s actions were reasonable under the circumstances and he was not deficient in his representation.

The South Carolina criminal sexual conduct law, the transcript, and the relevant testimony from the PCR hearing is all probative evidence that the PCR court relied on in making its decision to deny post-conviction relief. According to the standard of review, because the PCR court’s decision in denying this allegation was supported by the probative evidence above, and because the trial court ruled correctly under South Carolina law, this Court should affirm its denial of the application and deny this Petition for Writ of Certiorari, as certiorari is not warranted in this case.

[signature page to follow]

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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June 29, 2017

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Certiorari to Sumter County

S.C. SUPREME COURT

The Honorable Brooks P. Goldsmith, Circuit Court Judge

WAYNE WELLS, Jr, #314139

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

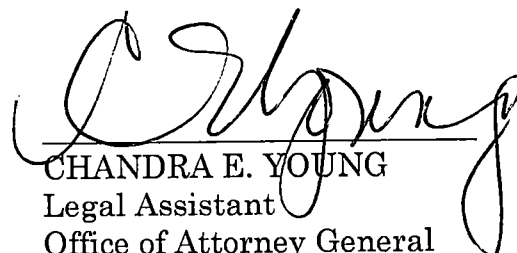
PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
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I further certify that all parties required by Rule to be served have been served.

This 29th day of June 2017.



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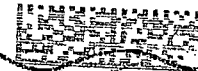
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