

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM Horry COUNTY
Court of Common Pleas

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JUL 12 2017

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

S.C. SUPREME COURT

Appellate Case No. 2017-000242

Timothy Young, Respondent,

v.

State of South Carolina, Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

DAVID B. TARR
S.C. Bar # 8803

1313 Elmwood Avenue
Columbia, SC 29201
(803) 238-7967

ATTORNEY FOR RESPONDENT

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QUESTIONS PRESENTED

1. Should this Court decline to grant certiorari on the grounds that the State failed to file a Rule 59(e) Motion to Alter or Amend Judgment after it received the PCR Court's Order Granting Application For Post-Conviction Relief?
2. 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 has no problem with the Statement Of The Case except as to paragraph 2 and footnote 1 where the State claims that Respondent's attorneys filed an Anders brief in the appeal of his underlying conviction at trial in this case. In fact, Respondent's attorneys filed an appeal where they raised an issue regarding the trial court's ruling that Respondent and his attorneys should not have access to a psychotherapist's¹ notes after the trial court conducted an in camera review of said records. Respondent's appellate counsel argued that these records should have been reviewed by the trial judge for potential Brady materials and not just whether they should have been discoverable under Rule 5.

In addition, Respondent would point out that after receiving a copy of the Order Granting Application For Post-Conviction Relief that the State did not file a Motion to Alter or Amend Judgment under Rule 59(e).

¹ The notes in question were taken by psychotherapist Denise Searce who is one of the two witnesses that respondent believes was erroneously qualified as an expert at his trial.

STATEMENT OF THE FACTS

Respondent believes that a full review of the facts of this case must be outlined so that this Court can have a more complete understanding of the context and climate in which the allegations of CT were made. Without this context, this Court may not be clear as to Judge Burch's statement in his Order Granting Application for Post-Conviction Relief that is tantamount to a harmless error analysis. In his Order, Judge Burch states that "due to the nature of the evidence in this case" Counsel's failure to object to the lack of testimony offered by the State regarding the reliability of their two experts "was clearly prejudicial". Only with a full recitation of the facts of this case can it be made clear that the failure to object to the qualification of these two witnesses as experts was clearly prejudicial and thus, not harmless error.

In January of 2009, Mr. Young was living in Myrtle Beach with his wife Nicole Young. APP p. 812. Mrs. Young was formerly married to Chad Turbeville of North Carolina. Nicole and Chad had two daughters named CT And TT. APP pp. 812-13. At that time, the girls were 7 and 10 years old, respectively. Chad and Nicole had been involved in a bitter divorce and had an ongoing battle between the two of them over custody and visitation issues involving the two girls. APP pp. 813-14. At that time, Chad had full custody of the minor children and Nicole had visitation rights. APP p. 774. The girls would come down to South Carolina from time to time and stay with their mother and applicant for the weekend and then return to North Carolina. APP p. 813.

In August of 2008, CT started having some problems and began seeing counselor Ms. Denise Searce. APP. p. 248. In November of 2008, CT disclosed to Ms. Searce that her mother Nicole had touched her genitals inappropriately. APP p. 251. At that time, CT was referred to North Carolina DSS and was interviewed by Ms. Yolanda Daniels. APP. p. 251. In November, Ms. Daniels expressly asked CT if her step father Mr. Tim Young had ever touched her inappropriately and the child said no. APP. pp.

776-777. However, on January 16, 2009, CT disclosed to Ms. Denise Scarce that Mr. Young had touched her genitals with his fingers and mouth. APP p. 259. It is interesting that this disclosure occurred three days after yet another hearing in North Carolina Family Court regarding visitation. APP p. 258. No allegation of any inappropriate touching was ever made by CT's sister TT. APP p. 812. Also, it has been established that after the initial disclosure against her mother Nicole in November of 2008, all visitation ceased and the girls did not return to their mother and step father's home in South Carolina. APP pp. 777-778. Therefore, there was no opportunity for Mr. Young to have molested his step daughter in between the time that she said he had not touched her inappropriately and the time that she said he had.

In January of 2009, applicant was interviewed by the Horry Police Department and asserted his innocence. APP p. 816. In fact, Mr. Young has maintained his innocence from the moment he was first made aware of these allegations until the present day. APP Generally. In February of 2009, Tim was arrested. APP. pp. 306, 817. Shortly thereafter, his family hired Mr. Paul Cannerella to defend him. APP p. 818. From that time up through the trial of the case in April of 2011, Mr. Cannerella represented Mr. Young. At trial, the relevant evidence regarding Tim's guilt or innocence consisted solely of the testimony of 9 year old CT. APP Generally. There was no physical evidence. There were no eye witnesses. There were no other alleged victims. Tim Young testified on his own behalf denying the allegations. It was a classic case of he said, she said. APP. pp. 770-71. At the trial, Mr. Cannerella neglected to ask the alleged victim any questions regarding her initial statement in November of 2008 that Tim never touched her. APP. pp. 221-236. Furthermore, even though Mr. Cannerella had gone through the trouble of getting an out of state subpoena for Ms. Yolanda Daniels, he told her not to come and therefore she was never present to tell the jury in her own words that CT had told her Tim did not molest her. APP. p. 779. Two other witnesses who were qualified as experts did in fact testify. Ms. Denise Scarce was qualified as a child abuse assessment expert and Ms. Diane Nordeen who conducted

the forensic interview of the alleged victim was qualified as an expert in child development as it relates to forensic interviewing. Mr. Cannerella did not object to either of these witnesses being qualified as experts. (APP. Generally).

STANDARD OF REVIEW

Respondent agrees with the Petitioner as to the standard of review in this matter. We believe it cannot be over-stated that 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). Also, 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, 732 S.E.2d 871 (2012).

Furthermore, before the reviewing court may even grant certiorari, it must determine if the question presented in the petition has been preserved for appellate review. This Court must determine that 1) the PCR Judge made specific findings of fact and conclusions of law regarding the issue in question and 2) that petitioner filed a Rule 59(e) motion if the issues are not adequately addressed in order to preserve the issues for appellate review, Marlar v. State, 375 S.C. 407 (2007)

ARGUMENT

- 1. As a threshold matter, this Court should decline to grant certiorari on the grounds that the State failed to preserve its question presented when it failed to file a Rule 59(e) Motion to Alter or Amend Judgment after receiving the P.C.R. Court's Order Granting Application For Post-Conviction Relief.**

This Court should decline to hear the question presented in this case by the Petitioner because the Petitioner failed to file a Rule 59(e) Motion after receiving the Order Granting Application For Post-Conviction Relief. Before an issue is preserved for appellate review in a PCR case, any perceived errors by the complaining party must have been adequately addressed in the Court's Order and supported by specific findings of fact and conclusions of law. If the complaining party takes issue with a certain legal principle cited or has problem with any finding of fact, a Motion to Alter or Amend Judgment must be filed to preserve these perceived errors for review. Marlar, (2007); Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992). No such Motion was filed in this case.

First and foremost, the Petitioner alleges that the PCR court's Order is controlled by an error of law. This assertion, by definition, places upon the Petitioner the obligation under Rule 59(e) to move to alter or amend the judgment. If the State believed that the wrong law was being applied, it had the absolute duty to bring that to the Court's attention before being afforded the opportunity for appellate review. Furthermore, the Petitioner in its Argument cites numerous facts from the trial and PCR records that

were not included in the PCR Court's order. These issues with regards to the Court's findings of fact should have been addressed by a Motion to Alter or Amend Judgment.

Finally, the Petitioner cites a plethora of cases in this Petition that were not included in its proposed order at PCR, nor were they included in Judge Burch's Order Granting Application for Post-Conviction Relief. The PCR Court should have been afforded the opportunity to review and rule upon the issues in the case in light of these additional cases cited by the Petitioner. However due to the State's failure to file a Rule 59(e), Judge Burch had no opportunity to consider the additional case law and arguments by the Petitioner. This is tantamount to sandbagging. Therefore, as the question presented by the petitioner has not been preserved for appellate review under Marlar, this Petition should not be granted.

- 2. 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 evidence of their reliability was correct, completely supported by the record, and the correct legal standard was applied.**

Even if this Court decides that the question presented in the Writ has been preserved for appellate review, the findings of fact and conclusion of law in the PCR court's order are correct and the Petition should be denied. The Petitioner's arguments strain credulity and defy basic logical principles. The Respondent will, when relevant to his argument, outline some of the specious claims made by the Petitioner.

First, Petitioner attempts to claim that the PCR court's Order is erroneously based on State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015). The petitioner argues that trial counsel should not be

required to be clairvoyant and predict future case law. This assertion is correct. However, the PCR court's order was based on State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) which was in existence at the time of the trial of this case. In fact, trial counsel admitted at the PCR hearing that he was aware of White, but that he failed to object to either witness Scarce or Nordeen being qualified as an expert even though no evidence of their reliability was presented by the State. As for Chavis, it was merely included in the Order as a footnote to help further explain why trial counsel's deficient performance was not harmless, but in fact quite prejudicial.

At the trial of this case, Ms. Denise Scarce was qualified as an expert in child abuse counseling and treatment.² APP. pp. 247-48. Typically, in child sex cases, the State will attempt to qualify witnesses as experts in an effort to provide legitimacy to and support the credibility of child sexual abuse victims. These tactics have also been used by the State at times to improperly bolster the testimony of alleged child sexual abuse victims. This is a practice that is at times frowned upon and discouraged by appellate courts. In this case, analyzing whether or not witnesses should have been qualified as experts is critical. This again is due to the fact that the only evidence against the applicant at his trial was the testimony of the 9 year old alleged victim.

In White, this Court established the standard that should be used in determining whether to qualify witnesses providing non-scientific testimony as experts. 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. Both the Respondent and Petitioner agree that this witness had sufficient qualifications. But, as evidenced by the wording of the Petitioner's question presented, there was no evidence of the witness's reliability offered. In fact, there was

² It is interesting to note that Ms. Scarce had only been qualified as an expert one time in a criminal case prior to this case.

absolutely no testimony in the record that would shed light on the relative reliability or unreliability of the testimony of Ms. Scarce. (Tr. Tr. Generally). The petitioner attempts to argue that State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) holds that the reliability of a witness's testimony is not a prerequisite to determining whether or not a witness is an expert and that the real question is the reliability of the underlying area of expertise. This is absolutely preposterous. If the petitioner's logic were the actual law of this state, then every witness who had training, education, and experience in a particular field would be an expert as long as the thinking in that field was deemed reliable. The reliability of the actual witness would be irrelevant. Therefore, any witness who was trained in DNA analysis would be an expert even if that particular person bungled every analysis he or she ever performed. What Tapp does say is that you don't look at whether the witness's testimony is reliable, rather you determine the potential reliability of the witness prior to that witness being qualified.

At the P.C.R hearing, Mr. Cannerella acknowledged that he did not object to the lack of testimony provided during voir dire of the witness pre-qualification regarding her reliability. APP. p. 788. He testified that he was familiar with State v. White. APP. p. 786. However, he acknowledged that there was no testimony offered as to Ms. Scarce's reliability and yet he did not object. Under State v. White, counsel's failure to object was deficient and that because of the nature of the evidence in this case, was clearly prejudicial.

In the present case, other than the testimony of CT, there was no other evidence of guilt offered by the State against the Defendant at trial. Under these circumstances, the improper qualification of Ms. Scarce is far from harmless. The credibility of the child witness was the cornerstone of the state's case. Any testimony improperly admitted that would tend to enhance CT's credibility is not harmless. In State v. Mitchell, 378 S.C. 305, 662 S.E.2d 493 (2008) this Court found that "whether an error is harmless depends on the circumstances of the particular case (Id. At 316, 499). Furthermore, this court stated in State v. Mizell, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) that when

determining whether or not a trial error is harmless the reviewing Court must look to “whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict”. Therefore, the PCR court was correct to grant a new trial on this issue, because due to the nature of the evidence in this case it cannot be said that the result would have been the same beyond a reasonable doubt if the witness had not been qualified.

The Petitioner argues that the “expert witnesses” did not testify about any conclusions as to the minor child, so their reliability is irrelevant. However, the improper qualifying of witness Scarce is even more troubling due to the specific nature of her testimony. Ms. Scarce was allowed, because of her expert qualification, to explain to the jury why CT’s delayed reporting was normal for child sex victims. APP. pp. 261-266. This improper bolstering of the credibility of the only witness offering evidence against the defendant is untenable. Also, Ms. Scarce was allowed to comment on and bring into evidence the findings of another doctor who examined CT but did not testify at trial. APP. pp. 268-69. She testified that Dr. Frank Stevens found CT to be suffering from PTSD. She would not have been allowed to bring this evidence out if she had not been improperly qualified as an expert. This further affected the applicant’s quest for a fair trial because his attorney was unable to cross examine Dr. Stevens. Such a cross examination could have uncovered that CT’s PTSD could have been caused by the abuse she suffered at the hands of her mother, as opposed to any alleged actions by Respondent. The Petitioner attempts to argue that trial counsel’s failure to object was not ineffective because it was a valid trial strategy to not object to the lack of reliability testimony offered by the State as to these two “expert witnesses”. However, it is precisely these types of statements made by Denise Scarce at the trial that make the failure to object to her being qualified as a witness so egregious. When there is no other evidence of guilt but the word of a young child involved in a heated custody battle, any improper bolstering testimony by a so-called expert that should not have been qualified as such cannot be harmless. For example, there have been numerous S.C. cases where appellate courts have ruled that

the strategy to not object employed by trial counsel was not valid. These cases include: Dawkins v. State, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001) (the jury might think “he was trying to hide something”) and in Gallman v. State, 307 S.C. 273, 276-77, 414 S.E.2d 780, 782 (1992) (did not want to confuse or upset the jury). Similarly, in this case, it was clearly not a valid trial strategy for trial counsel to not object to the qualification of these two witnesses because he “didn’t want to do anything to make the jury to think that she’s some great kind of witness”. If he had objected, the witnesses may and should not have been qualified as experts and then jury may have never heard from them. The qualification of Denise Scarce as an expert and the resulting testimony was completely improper and trial counsel was ineffective for failing to object. Therefore, the PCR Court’s ruling was the only correct ruling that could have been made.

As to witness Diane Nordeen, at the trial of this case Ms. Diane Nordeen was qualified as an expert in child abuse assessment as it relates to forensic interviewing. APP. p. 335. Typically, in child sex cases, the State will attempt to qualify witnesses as experts in an effort to provide legitimacy to and support the credibility of child sexual abuse victims. These tactics have also been used by the State at times to improperly bolster the testimony of alleged child sexual abuse victims. This is a practice that is at times frowned upon and discouraged by appellate courts. In this case, analyzing whether or not witnesses should have been qualified as experts is critical. This again is due to the fact that the only evidence against applicant at his trial was the testimony of nine year old alleged victim who was involved in a heated custody battle.

Again, in State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), this Court established the standard that should be used in determining whether to qualify witnesses providing non-scientific testimony as experts.

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. Both the Respondent and Petitioner agree that this witness had sufficient qualifications. However, there was absolutely no testimony in the record that would shed light on the relative reliability or unreliability of the testimony of Ms. Nordeen.

Again, at the PCR hearing, Mr. Cannarella acknowledged that he did not object to the lack of testimony provided during voir dire of the witness pre-qualification regarding her reliability. APP p. 788. He testified that he was familiar with State v. White. However, he acknowledged that there was no testimony offered as to Ms. Nordeen's reliability and yet he did not object. Under State v. White, the PCR Court found that counsel's failure to object was deficient and that because of the nature of the evidence in this case, was clearly prejudicial. And similarly, as was the case with Ms. Scarce, it was not a valid trial strategy to not object to the qualification of the witness when there was no evidence of her reliability.

In the present case, other than the testimony of CT, there was no other evidence of guilt offered by the State against the Defendant at trial. The PCR Court found that due to the nature of the evidence in this case that the improper qualification of Ms. Nordeen was far from harmless. Again, in Mitchell, this Court found that "whether an error is harmless depends on the circumstances of the particular case. Furthermore, again this court stated in Mizell, that when determining whether or not a trial error is harmless the reviewing Court must look to "whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict". Therefore, the PCR court was correct to grant a new trial on this issue, because due to the nature of the evidence in this case it cannot be said that the result would have been the same beyond a reasonable doubt if the witness had not been qualified. The credibility of the child witness was the cornerstone of the state's case. Any testimony improperly

admitted that would tend to enhance CT's credibility is not harmless. Therefore, it was correct for the PCR Court to rule that a new trial must be granted on this issue.

CONCLUSION

For the reasons stated above, this Court should decline to review the question presented in this Writ as it was not preserved for appellate review, or in the alternative, decline to grant the Petition for Writ of Certiorari and sustain the lower court's ruling.

Respectfully submitted,

DAVID B. TARR
S.C. Bar # 8803

1313 Elmwood Avenue
Columbia, SC 29201
(803) 238-7967

By: 
ATTORNEY FOR RESPONDENT

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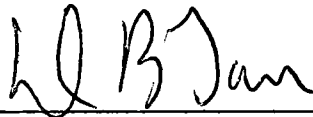
State of South Carolina, Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return To Petition for Writ of Certiorari has been served upon opposing counsel by hand-delivering two (2) copies to:

Jessica E. Kinard
Assistant Attorney General
Robert C. Dennis Building
Columbia, SC 29211

This 12th day of July, 2017



David B. Tarr, Bar # 8803
Attorney For Respondent