

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Honorable John C. Hayes, Circuit Court Judge

JAMIE EDWARD MORRIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000104

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

INDEX

INDEXi

ISSUE PRESENTED 1

STATEMENT2

ARGUMENT3

CONCLUSION9

PETITION TO BE RELIEVED AS COUNSEL.....10

ISSUE PRESENTED

Did the PCR Court err in holding that Petitioner received effective assistance of counsel where trial counsel failed to object to a question and answer regarding a brain injury suffered by a child one to two years prior to the child's death when the cause of death was a drug overdose?

STATEMENT

Petitioner was indicted by a Pickens County Grand Jury for aiding and abetting homicide by child abuse during its 2008 term. App. 1209 – 1210. On July 23, 2008, he, along with co-defendants Donna Lynn Phillips, Petitioner's mother, and Latasha Diane Honeycutt, the child's mother, each of whom were charged with homicide by child abuse or neglect, proceeded to a five-day trial before the Honorable D. Garrison Hill and a jury. App. 1; App. 16 – 17. Jenny L. Barwick and W. Douglas Richardson, Jr. represented the State. John W. DeJong represented Petitioner. James P. O'Connell represented Defendant Donna Lynn Phillips, and H. Chase Harbin represented Defendant Latasha Diane Honeycutt.

The jury found Petitioner guilty as indicted. App. 1126 ll. 7 – 12. Judge Hill sentenced Petitioner to a term of twelve years' imprisonment, suspended to eight years followed by two years' probation. App. 1144 ll. 5 – 9.

Petitioner's conviction and sentence were affirmed by the South Carolina Court of Appeals. State v. Morris, Op. No. 2014-UP-112 (S.C. Ct. App. filed March 12, 2014). On March 10, 2015, he filed a timely application for post-conviction relief. App. 1146 – App. 1156. Petitioner's application contained allegations of ineffective assistance of trial and appellate counsel, including claims that trial counsel failed to object under SCRE 403, failed to file motions, and allowed prosecutorial misconduct. App. 1154 – App. 1156. The State made its Return on or about July 28, 2015. App. 1158 – App. 1162.

An evidentiary hearing was conducted on December 5, 2016 before the Honorable John C. Hayes, III. App. 1164. R. Mills Ariail, Jr. represented Petitioner, and Patrick Schneckpeper appeared on behalf of the State. Petitioner and trial counsel testified during the hearing. Petitioner submitted handwritten amendments to his post-conviction relief application during the

hearing. App. 1173; App. 1211 – 1217. Those amendments contained the ground which is the subject of this Petition, namely that any discussion of the deceased minor’s previous brain injury “was a violation of [Petitioner’s] rights as promulgated under Rule 403.”¹ App. 1211. Trial counsel failed to object.

On December 7, 2016, Judge Hayes issued his order denying Petitioner relief. App. 1200 – 1208. In particular, he found that trial counsel’s failure to object did not serve as adequate grounds for ineffective assistance of counsel because the testimony about the brain injury was not in violation of Judge Hill’s pre-trial ruling regarding limitations on testimony. App. 1204.

This Petition for Writ of Certiorari follows.

¹ The handwritten amendments were admitted as Petitioner’s Exhibit 1, although there was no testimony regarding their contents.

ARGUMENT

The PCR Court erred in holding that Petitioner received effective assistance of counsel where trial counsel failed to object to a question and answer regarding a brain injury suffered by a child one to two years prior to the child's death when the cause of death was a drug overdose.

Introduction

Petitioner was the father of a now-deceased 21-month old child, Minor. App. 132 ll. 14 – 16; App. 207 ll. 14 – 21. He was tried, along with his mother, Donna Phillips, and Minor's mother, Latasha Honeycutt for aiding and abetting Phillips. Phillips and Honeycutt were tried for homicide by child abuse. App. 16 l. 18 – App. 18 l. 1.

Counsel for Petitioner's mother sought a pre-trial ruling that would allow prior DSS involvement, the mention of foster parents, and previous brain injuries suffered by Minor to come into evidence in an attempt to distance his client's involvement with Minor's death.

Judge Hill ruled that evidence was inadmissible under Rule 403, SCRE. App. 100 ll. 3 – 12.

Discussion

According to statements made by Petitioner and his co-defendants, Minor was picked up by Petitioner and his mother, co-defendant Phillips, on Friday, March 14, 2008, from Honeycutt, Minor's mother and Petitioner's co-defendant. Petitioner and Phillips took care of Minor over the course of the weekend and returned him to Minor's mother, co-defendant Latasha Honeycutt, on Sunday afternoon, March 16, 2008. Minor appeared to be sick, so Petitioner gave Honeycutt the Medicaid card for Minor. App. 137 l. 23 – App. 142 l. 14; App. 148 l. 11 – App. 158 l. 13;

App. 166 l. 10 – App. 169 l. 22. The next morning, Monday March 17, 2008, Honeycutt noticed that Minor was not breathing so she called 911. App. 167 ll. 18 – 21.

Minor was transported by EMS to Easley Baptist Hospital. App. 265 ll. 11 – 17. The cause of death was determined to be an overdose of hydrocodone in the form of the cough syrup Tussionex. App. 461 l. 21 – App. 462 l. 19. A bottle of Tussionex bearing a prescription for co-defendant Phillips was delivered by Phillips to law enforcement. App. 386 l. 18 – App. 387 l. 8; App. 400 ll. 2 – 5. Petitioner told law enforcement that his mother, Phillips, kept Tussionex in a pumpkin in her closet. App. 510 ll. 11 – 16. On two occasions over the course of the weekend that Petitioner and Phillips had Minor, Phillips “got the medication down” from the pumpkin, but Petitioner did not see Minor receive any of the medication. App. 510 ll. 17 – 20. The caps were on the bottle, but Minor was playing with the bottles. App. 510 ll. 21 – 25.

At trial, Dr. Robert Foerey was qualified as an expert in forensic toxicology. App. 541 ll. 7 – 12. He testified that Tussionex was “probably given sometime between midnight on Sunday up until the time in which [Minor] was found. So approximately 24 or 36 hours before the blood was drawn.” App. 553 ll. 5 – 13.

Prior to trial, counsel for Phillips moved *in limine* for a ruling which would allow discussion of prior brain injuries, DSS involvement, and foster parents. App. 99 ll. 5 – 15. Judge Hill ruled: “evidence about prior care of the child in the custody of DSS or the foster parents is not admissible. Specifically, I find that whatever relevance that historical fact may have is vastly outweighed by the danger of unfair prejudice, or confusion of the issues, and other considerations of Rule 403.” App. 99 ll. 16 – 23. Regarding the timeline pre-indictment, Judge Hill stated:

I find that the events that occurred before the dates of the indictments, as has been explained to me so far, would not have relevance to those issues. And even if it

did, the relevance is minimal compared to the overwhelming prejudice it would cause to the Defendants, and confusion it would [sow] with the jury. And it could inject improper considerations into their deliberations, and with the risk that they would decide the case on something other than the facts, and be prejudiced by the history of the child's care as bearing on the Defendants.

App. 100 ll. 3 – 12.

However, counsel for co-defendant Phillips asked Dr. Michael Ward on cross-examination about a brain injury “of [Minor] about a year or two” before the alleged overdose. App. 609 ll. 19 – 21. Counsel for Petitioner did not object to the question or answer, even though both were in direct contravention to Judge Hill's ruling regarding incidents which took place prior to the indictments.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The right to the effective assistance of counsel extends to the plea bargaining process. Hill v. Lockhart, 474 U.S. 52, 57-59 (1985); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), overruled on other grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000).

In order to show ineffective assistance of counsel as a ground for relief, Petitioner 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, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional

errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Prior to trial, counsel for Phillips candidly informed the trial court that his client, Phillips, believed that all evidence regarding the health of Minor should be admissible:

Your Honor, my client has instructed me to say that she believes all this evidence ought to come in. The child had a flu shot prior to being delivered [from DSS to Honeycutt] ... on Wednesday. It could have been in the morning. So we're only talking about a five-day period of time.

The child had a flu shot, and had suffered from a brain injury that occurred about a year before - - two brain injuries. And this is all relevant information as to what could have happened to this child, what could have happened if maybe these toxicologists knew this and knew that this child had some kind of brain injury, maybe - - just maybe that might have made them say, wait, that changes the whole scale there.

App. 96 ll. 3 – 16.

Judge Hill denied counsel's request and found that the "events that occurred before the dates of the indictments ... would not have relevance." App. 100 ll. 3 – 12. Nonetheless, counsel for Phillips later spoke about the brain injury and elicited a response from an expert witness regarding said injury. Counsel for Petitioner did not object.

The Order of Dismissal indicated that "neither DSS nor foster care were mentioned in relation to the injury suffered by the child." App. 1204. However, Judge Hill's pre-trial ruling encompassed more than DSS and foster care. The scope was larger than that—events that occurred before the dates of the indictment were determined to be irrelevant. App. 101 ll. 3 – 12. Judge Hill's ruling included a detailed explanation which offered some insight as to why he excluded such testimony:

[T]he relevance is minimal compared to the overwhelming prejudice it would cause to the Defendants, and confusion it would [sow] with the jury. And it could inject improper considerations into their deliberations, and with the risk that they would decide the case on something other than the facts, and be prejudiced by the history of the child's care as bearing on the Defendants.

App. 101 ll. 3 – 12 (emphasis added).


Trial counsel should have objected to the testimony, as it was in violation of the pre-trial ruling as well as Rule 403, SCRE:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The probative value of a brain injury from one to two years ago, as made clear by Judge Hill, is minimal. Highlighting such an injury only served to prejudice Petitioner in a largely unfair manner, to confuse the issues, and to mislead the jury. Counsel for Phillips was aware of Judge Hill's pre-trial ruling, and he violated it with his question. Petitioner's counsel should have objected and perhaps even moved for a mistrial. A brain injury is a severe injury, and for the jury to hear about Minor's prior health history was dangerously prejudicial. Petitioner received ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.


Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of August, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jamie Edward Morris states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge John C. Hayes, which was held on December 5, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Jamie Edward Morris.

Respectfully Submitted,



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

This 18th day of August, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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."



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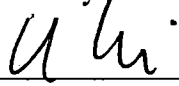
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CERTIFICATE OF SERVICE
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon DeShawn H. Mitchell, 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 Jamie Edward Morris, #351758, at Livesay Pre-Release Center, Post Office Box 580, Una, SC 29378, this 18th day of August, 2017.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 18th day of August, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025