

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Lancaster County

RECEIVED

Honorable R. Markley Dennis, Circuit Court Judge

SEP 18 2017

JOSEPH BRADLEY LOFTIN,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000667

PETITION FOR WRIT OF CERTIORARI

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding that trial counsel rendered effective assistance of counsel where he failed to properly preserve Petitioner's meritorious motion to introduce evidence of the Complainant's alleged sexual activity with persons other than Petitioner during the timeframe listed in the indictment?

STATEMENT OF THE CASE

On April 3, 2008, the Lancaster County Grand Jury returned an indictment against Petitioner Joseph Loftin for criminal sexual conduct (“CSC”) with a minor second degree, indictment number 2008-GS-29-494. App. 597. The grand jury returned an amended indictment against Loftin for criminal sexual conduct (“CSC”) with a minor second degree on October 13, 2011. App. 599. A jury tried Petitioner on October 18-20, 2011, before the Honorable Brooks P. Goldsmith. After the jury was unable to announce a unanimous verdict, the trial judge granted Petitioner's motion for a mistrial. App. 421. On February 9, 2012, the Lancaster County Grand Jury returned an additional indictment against Loftin for lewd act on a minor on February 9, 2012, indictment number 2008-GS-29-206. App. 601.

On February 14-16, 2012, Loftin appeared for trial before the Honorable Brooks P. Goldsmith and jury. Loftin was represented by Frances Bell, and the State was represented by assistant solicitor Curtisha Mingo. App. 1. The jury found Loftin guilty of both indicted offenses. App. 395. Judge Goldsmith imposed concurrent sentences of ten years for the lewd act offense and twelve years for the CSC offense. App. 404 – 405. Following a hearing held February 22, 2012, Loftin’s motion for reconsideration of his sentence was denied. App. 414.

Loftin was represent on direct appeal by John Delgado of Bluestein, Nichols, Thompson & Delgado. App. 416; App. 467. The Court of Appeals held oral argument in the case on September 9, 2014. On December 17, 2014, the Court filed an unpublished opinion affirming Loftin’s convictions and sentences. App. 483. The remittitur was sent on January 6, 2015. App. 489.

On May 8, 2015, Loftin filed his application for post-conviction relief (“PCR”). App. 490. The State filed its return on July 7, 2015. App. 510. On July 12, 2016, an evidentiary

hearing was held before the Honorable R. Markley Dennis. Loftin was represented by Nathan Sheldon, and the State was represented by assistant attorney general Patrick Schmeckpeper. App. 516. An Order of Dismissal denying post-conviction relief was filed on March 2, 2017. App. 589.

This appeal follows.

ARGUMENT

The PCR court erred in finding that trial counsel rendered effective assistance of counsel where he failed to properly preserve Petitioner's meritorious motion to introduce evidence of the Complainant's alleged sexual activity with persons other than Petitioner during the timeframe listed in the indictment.

Relevant Facts

The Trial

Loftin and Complainant's mother, Virginia Threatt, began their romantic relationship in approximately 2002. The couple soon moved in together, along with Threatt's two children. Loftin's daughter from a prior marriage would also stay with them. They eventually had another daughter of their own. App. 66, l. 25 – 68, l. 24; App. 125, l. 20 – 126, l. 25; App. 145, ll 22 – 153, l. 8. Having had relationship difficulties but agreeing to stay together through the holidays, Loftin moved out of the home that he shared with Threatt and the children soon after Christmas 2007. App. 86, l. 17 – 87, l. 3; App. 136, ll. 19 – 133, l. 7; App. 339, ll. 15-24.

On January 4, 2008, Complainant's friend, Shakesha S., made a report to the school principal that Loftin had been sexually abusing Complainant, who was twelve years old at the time. App. 59, l. 6 – 60, l. 12; App. 166, ll. 13-16. Complainant initially denied any abuse when confronted, but eventually alleged that Loftin had oral and vaginal intercourse with her over the five month period from August 2007 through December 2007. The Complainant, who was seventeen years old by the time of Loftin's second trial, said that she considered herself to be Loftin's girlfriend and believed that he would leave her mother to be with Complainant when she turned eighteen. App. 68, l. 18 – 106, l. 12. Loftin testified in his own defense and denied any sexual relationship with Complainant. App. 334, l. 23 – 359, l. 1.

A neighbor and close friend of Complainant, Abigail C., claimed that she was alone in the house with Loftin and Complainant when he offered them alcohol and twenty-dollars to Complainant to “make-out” with him. She claimed that the two went to Complainant’s room where she heard “kissing noises.” App. 107, l. 10 – 118, l. 14. Notably, when Complainant described the supposed “alcohol” and “twenty-dollar” incidents, she described them as two separate events that occurred a few days apart. App. 68, l. 21 – 72, l. 17. Threatt claimed that her relationship with Complainant was strained during the relevant time period but that Complainant and Loftin seemed “close.” App. 128, l. 22 – 130, l. 25. She also alleged that Loftin and Complainant slept on the pull-out couch together, but said that she saw nothing wrong with it at the time. App. 131, ll. 2-25. Loftin denied that such was a regular occurrence. App. 353, l. 25 – 354, l. 6. The State presented evidence that Loftin purchased a pregnancy test for Complainant on December 9, 2007, just days after he received a vasectomy that the solicitor argued was done in an effort to prevent Complainant from becoming pregnant. App. 84, l. 13 – 86, l. 16; App. 134, l. 10 – 135, l. 17; App. 298, l. 1 – 299, l. 19. Loftin admitted that it appeared that a pregnancy test was purchased at CVS with a VISA gift card that he received from his employer, but said that he had given it to Complainant to give to her mother in the event she needed it to complete her Christmas shopping. App. 348, l. 11 – 349, l. 23.

A physical exam conducted on Complainant revealed a “deep cleft” in her hymen, indicative of either penile penetration or a high velocity car accident. App. 278, l. 4 – 280, l. 2; App. 282, l. 25 – 283, l. 20. The State also presented testimony regarding testing for sperm and DNA, which revealed that Loftin’s DNA was on a purple comforter found on the bedroom floor of Complainant, on an egg crate mattress in Complainant’s brother’s room, on an egg crate mattress on the living room sofa bed, and on Loftin’s own bed sheets from the home he moved to

after he separated from Threatt. App. 241, l. 9 – 263, l. 12. Loftin explained that the purple comforter moved around the house. App. 344, ll. 4-22. Even the evidence technician noted that the purple comforter was on the floor and that a tan comforter was on the bed. App. 214, ll. 13-19.

On February 13, 2014, trial counsel filed a written, pre-trial motion to allow evidence related to Complainant's sexual knowledge and history. App. 588. Following the presentation of opening arguments, trial counsel made an oral motion to admit the evidence. The trial judge denied the motion and instructed counsel to request a sidebar when necessary. App. 49, l 14 – 56, l. 22. No sidebar was ever made or *in camera* testimony presented related to the motion.

The Direct Appeal

On direct appeal, appellate counsel for argued that the trial court erred in not allowing the [Appellant] to inquire into Complainant's prior sexual activity because it was relevant and not barred by the Rape Shield Statute. App. 427. He argued:

While the Rape Shield Statute lists certain exceptions allowing inquiry into a Complainant's sexual activities, South Carolina's appellate courts have carved out exceptions to the statute that are not included in the statute's text. *See State v. Finley*, 300 S.C. 196, 387 S.E.2d 88 (1989) (Evidence offered for a purpose other than to attack the complainant's morality); *State v. Lang*, 304 S.C. 300, 403 S.E.2d 677 (Ct. App. 1991) (Impeachment); *State v. Grovenstein*, 340 S.C. 210, 530 S.E.2d 406 (2000) (Alternative source of a child complainant's sexual knowledge).

App. 429 – 430. In Loftin's case, inquiry into the Complainant's prior sexual activities should have been permitted to rebut the implication created by Dr. Singleton's testimony that the Complainant had been vaginally penetrated during a sexual act. App. 431 - 434. Additionally, the evidence should have been admitted to rebut the implication that Complainant's only reason

for taking a pregnancy test would have been if she feared that she had gotten pregnant by Loftin and provided an alternative source for the pregnancy concern. App. 434 - 437.

The State's responsive brief focused primarily on the lack of issue of preservation with respect to the second issue, noting that the Court's ruling was made *in limine*, there was no *in camera* testimony, and that many of the arguments made on appeal were not presented to the trial judge. The State also argued that the evidence was not relevant, but made no effort to distinguish the case law cited in the Loftin's brief. App. 458 – 462.

Ultimately, the Court of Appeals issued its opinion affirming Loftin's convictions, finding the second issue unpreserved for its review. App. 486. The Court found that the trial court's motion on Loftin's pretrial motion was a ruling *in limine* and not a final ruling on the issue and rejected the futility argument raised on appeal. App. 486. The Court further ruled: "[I]t is not clear exactly what testimony would have been elicited from the line of questioning Loftin sought to ask, and Loftin failed to make many of the arguments he now raises on appeal." App. 487. The Court explained:

Loftin did not clarify whom he wished to question on these matters or what conclusive questions he might seek to ask. Loftin never argued, as he does on appeal, that he should be permitted to inquire into whether Victim was sexually active with another person during the relevant time period. No motion was ever made by Loftin to question any witnesses specifically concerning whether Victim was sexually active with anyone besides Loftin during this time. As well, though Loftin argues on appeal that the questions were relevant to show an alternative explanation for the results of Victim's medical exam and the reason she would be concerned with taking a pregnancy test, he never made this argument to the trial court and the first time he mentions the "Alternative Explanation Theory" and related law on such is in his appeal. Additionally, when the solicitor argued to the trial court the questions Loftin sought to ask were precluded by the Rape Shield Statute because they did not fit within one of the three exceptions, Loftin failed to argue, as he does on appeal, that our courts

recognize exceptions beyond those specifically enumerated in the statute. Accordingly, these arguments are not preserved on appeal.

App. 487. The Court likewise found that Loftin's argument that the evidence was admissible under the Rape Shield Statute's pregnancy exception, was never made to the trial court, and, therefore, unpreserved for appellate review. App. 488.

The Post-Conviction Relief Hearing and Order of Dismissal

At the post-conviction relief hearing, trial counsel maintained that he did properly preserve the argument for appeal, despite the Court of Appeals' ruling to the contrary. App. 525, l. 23 – 531, l. 23; App. 548, l. 19 – 550, l. 17; App. 551, l. 5 – 553, l. 11. He further averred that appellate counsel should have raised the failure of the trial court to allow the testimony because the Rape Shield Statute does not apply to lewd act. App. 553, ll. 3-11. This further reflects trial counsel's lack of understanding, as the solicitor conceded at trial that such was the case. However, she objected that the evidence was still inadmissible because it was irrelevant, and the trial judge agreed. App. 54, l. 13 – 56, l. 15. Trial counsel failed to provide any substantive response regarding the relevance of the proposed evidence and never requested to elicit *in camera* testimony to build his case for relevance.

At the PCR hearing, trial counsel noted that he represented Loftin at a family court matter in October 2008, at which time the Complainant was obviously pregnant. There was never any allegation that the baby belonged to Loftin; rather, it was a result of sexual relationship that Complainant had with her boyfriend. Trial counsel was not sure when the sexual relationship with the boyfriend began, but reasoned that the pregnancy likely commenced in February or March 2008, a mere month or two after the allegation was made against Loftin. He agreed that had the sexual activity with the boyfriend commenced prior to the January 9, 2008 physical

examination, it could have provided an alternate explanation for the “deep cleft” to the hymen. App. 527, l. 21 – 528, l. 22; App. 529, l. 8 – 531, l. 9.

Loftin also testified at the PCR hearing. Prior to making the allegation against him, Complainant had been sneaking out of the house to see a boy named Brandon and was caught with pornographic magazine in the clubhouse she shared with her brother and neighbors. The parents had called the police several times to ask that Brandon be removed from the house. App. 563, l. 3 – 564, l. 16; App. 565, ll. 3-10. Loftin maintained his innocence and theorized that the allegations against him were retribution for leaving Threatt, who had told his parents that if Loftin ever tried to leave her “she would make sure she got [him].” App. 565, ll. 12-18.

PCR counsel argued that trial counsel was deficient in failing to preserve the motion *in limine* for appellate review and that Loftin was prejudiced because the evidence could have provided alternative explanations for the abnormality on the physical examination and the reason that Complainant would have purchased a pregnancy test on her own. App. 575, l. 18 – 577, l. 6; App. 578, ll. 5-23. The State argued that though found unpreserved by the Court of Appeals, trial counsel had a reasonable belief that he had preserved the issue for appeal. App. 579, ll. 1-12. The State also averred that Loftin was not prejudiced by the alleged deficiency because of the evidence that corroborated the victim and its claim that Loftin’s trial testimony lacked credibility. App. 579, l. 12 – 580, l. 14. In response, PCR counsel asserted that the one of the no-enumerated exceptions to the Rape Shield Statute likely applied to evidence that the Complainant was engaged in other sexual activity during the time period listed in the indictment. App. 581, ll. 3-25. The PCR judge disagreed, essentially determining that had the issue been properly preserved for appeal, then the Loftin’s conviction would still have been affirmed. He

also found that evidence against Loftin was “tough to overcome.” App. 582, l. 1 – 583, l. 13; App. 584, l. 1 – 585, l. 15.

In the Order of Dismissal, the PCR court found that trial counsel failed to properly preserve for appellate review the issue of whether or not the victim's alleged sexual activity with persons other than Loftin was admissible. App. 592. However, the Court ruled that Loftin failed to meet his burden of showing prejudice, stating: “Given the substantial corroborative evidence supporting the victim’s version of events, as well as the severe credibility problems with Loftin’s trial testimony, this Court finds he has failed to meet his burden to prove ineffective assistance of counsel.” App. 592; App. 593.

Discussion

A. Right to Effective Assistance of Counsel and Standard of Review

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). “Where allegations of ineffective assistance of counsel are made, the question becomes, ‘whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.’ ” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

A PCR applicant has the burden of proving his entitlement to relief by a preponderance of the evidence. Wigington v. State, 413 S.C. 578, 584, 776 S.E.2d 407, 410 (Ct. App. 2015) (citing Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) and Rule 71.1(e), SCRCPP). First, the applicant must demonstrate counsel’s representation was deficient, which is

measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel’s performance in such a manner that, but for counsel’s error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

While this Court gives great deference to a PCR judge’s findings of fact, Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), “[a] PCR judge’s findings will **not** be upheld if such findings are not supported by probative evidence.” Horton v. State, 306 S.C. 252, 255, 411 S.E.2d 223, 225 (1991) (emphasis added); Gallman v. State, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992). Further, the Court will review questions of law *de novo*, and reverse the decision of the PCR court when it is controlled by an error of law.” Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

B. Trial Counsel Rendered Deficient Performance

Trial counsel was deficient in failing to preserve the motion to allow evidence of the Complainant’s prior sexual history during the time period of the indictment. The Court of Appeals found that trial counsel failed to renew his objection from the Court’s *in limine* ruling, failed to elicit any in camera testimony to support his motion, failed to point the trial court to the exceptions that existed beyond the plain language of the Rape Shield Statute, and failed to argue the relevance of the potential evidence to the matters at issue at trial as alternative explanations for the procurement of the pregnancy test and the physical findings of a “deep cleft” in the hymen. App. 483. These preservation rulings are now the law of the case, and were advocated

for by the State on direct appeal. See App. 458 – 462. Flexon v. PHC-Jasper, Inc., 413 S.C. 561, 571, 776 S.E.2d 397, 403 (Ct. App. 2015), cert. denied (Aug. 4, 2016) (“Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.”).

“The proper measure of counsel’s performance remains whether he has provided representation within the range of competence required by attorneys in criminal cases.” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The PCR judge seemed hesitant to find that trial counsel rendered deficient performance, indicating that the written order should indicated that “he [trial counsel] was acting reasonably but I think in fairness to the applicant, okay, it wasn't preserved, and no question, so we don't know it.” App. 584, l. 22 – 585, l. 13. Ultimately, the written order of dismissal included a finding that “counsel failed to properly preserved for appellate review the issue of whether or not the victim’s alleged sexual activity with persons other than Loftin was admissible.” App. 592. The Court then wrote: “However, Loftin failed to meet his burden to show prejudice,” indicating an implicit ruling that the failure to preserve the issue for appeal was deficient. In the event that the PCR judge’s ruling was not sufficiently clear, the PCR court should have found that trial counsel’s failure to preserve the issue raised on direct appeal was deficient. See, e.g., McHam v. State, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013) (finding trial counsel’s failure to renew the Fourth Amendment objection constituted deficient performance that satisfies the first prong of the Strickland test).

C. Petitioner was Prejudiced by Trial Counsel’s Deficiency

While the State would not concede deficiency at the PCR hearing, the main thrust of its argument and the findings in the Order of Dismissal were that the Loftin was unable to show

prejudice. Under the second prong of the analysis in *Strickland*, the PCR applicant “must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” *Id.*


At the hearing, the PCR judge indicated that prejudice was not shown because the Court of Appeals would likely have affirmed Loftin’s conviction had they reached the merits of the issue on appeal. App. 582, l. 1 – 583, l. 13. The PCR judge was actually correct to focus on the likelihood of success on the motion to allow evidence of the Complainant’s sexual history, but was incorrect in his result. The well-reasoned brief of Appellant from Loftin’s direct appeal explains the applicable case law and how the evidence was both relevant to the case and admissible had the issue been properly presented and preserved. App. 427 – 437.

In the Order of Dismissal, the Court focused upon the other evidence against Loftin, finding that Loftin’s credibility was “irreparably harmed” by the inconsistency between his testimony and the receipt evidence presented related to the purchase of the pregnancy test and the additional corroborating testimony. App. 592 – 593. The PCR judge characterized the testimony of the other witness, Abigail C., reflected that she was “present for portions of the abuse, saw Loftin offer the victim money if she allowed him to sexually abuse her, and subsequently heard them kissing in the next room.” App. 593. Abigail C.’s testified that Loftin offered she and Complainant alcohol. They were both drinking when Loftin offered Complainant twenty dollars to “make out” with him. They alleged went to Complainant’s room, shut the door, and Abigail C. heard “kissing noises.” App. 109, l. 22 – 110, l. 25. When Complainant described the supposed “alcohol” and “twenty-dollar” incidents, she described

them as two separate events that occurred a few days apart. App. 68, l. 21 – 72, l. 17. Thus, Abigail C.'s testimony did not provide "strong" corroboration of Complainant's allegations. App. 593. Rather, it appeared the inconsistent story of a young girl trying to protect her best friend, Complainant, from what she thought were legitimate claims of abuse. Like most cases of this nature, it was up to the jury to decide who they believed. Had evidence of Complainant's other sexual activity during the relevant time period been admitted into evidence, it would have further weakened the State's circumstantial case against Loftin.

CONCLUSION

Based on the foregoing, Petitioner Joseph Bradley Loftin respectfully requests that this Court grant the petition for writ of certiorari and order further briefing on the issue(s) raised herein. In the event this Court dispenses with further briefing, Petitioner requests that his convictions be reversed and he be granted a new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of September, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable R. Markley Dennis, Circuit Court Judge

JOSEPH BRADLEY LOFTIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the 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 Petition for Writ of Certiorari and a copy of the Appendix have been served on Joseph Bradley Loftin, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 18th day of September, 2017.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

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

 (L.S)

Notary Public for South Carolina

My Commission Expires: July 3, 2023