

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

 ORIGINAL

Certiorari to Aiken County

Honorable Edgar W. Dickson, Circuit Court Judge

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JAN 22 2018

BENJAMIN PAUL GREEN,

S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001388

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Pachak
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 trial counsel was ineffective in failing to investigate by using an expert to find
7-8 lines missing from a computer chat site?

STATEMENT

Petitioner was convicted of criminal sexual conduct with a minor in the second degree and criminal solicitation of a minor after a jury trial held before the Honorable Doyet A. Early, III on June 15-17, 2009, in Aiken County. Respective sentences of twelve (12) and ten (10) years were imposed. Michael D. McMullen, Esq. was trial counsel. Susanna Ringler, Esq. and Susan O. Porter, Esq. were the assistant solicitors. (App. p. 1- p. 291). On September 15, 2009, a motion to reconsider the sentence was heard. (App. p. 292- p. 311). The motion was denied.

An application for post-conviction relief was filed on February 27, 2013. (App. p. 312-p. 320). Respondent filed a return dated June 18, 2013. (App. p. 321- p. 327). An evidentiary hearing was held on September 11, 2015, before the Honorable Edgar W. Dickson. Petitioner was present and was represented by Aimee J. Zmroczek, Esq. Respondent was represented by Daniel F. Gourley, Assistant Attorney General. Petitioner, Christopher Watkins, and trial counsel testified at the hearing. (App. p. 328- p. 409). Another evidentiary hearing was held on June 30, 2016, where Christopher Watkins testified in greater detail. (App. p. 410- p. 470). On December 29, 2016, Judge Dickson issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 471- p. 480).

This petition follows.

ARGUMENT

Trial counsel was ineffective in failing to investigate by using an expert to find 7-8 lines missing from a computer chat site that could have been exculpatory.

Petitioner was convicted of attempted criminal sexual conduct with a minor in the second degree and criminal solicitation of a minor. The investigation started out with law enforcement having an undercover officer pose as a 14 year old girl in online computer chats with petitioner.

Petitioner explained at the evidentiary hearing that after the trial began he asked about an expert because he believed false statements were made about the computer investigation made by the State. (App. p. 334, lines 11-18). Part of the conversations on the computer chats were missing. As examples he brought up p. 110, lines 16-23 and page 114, lines 1-21 of the trial transcript. (App. 334, line 23- p. 337, line 11). Petitioner testified that he believed 7 or 8 lines were missing. He explained that the State admitted copying and pasting from auto archive and admitted missing lines and they tried to cover it up. (App. p. 338, line 3- p. 339, line 11). Petitioner stated that the missing lines would have helped him because they would have shown that he did not introduce himself in a sexual conversation but a normal conversation. (App. p. 339, line 18- p. 340, line 8). He testified that there were also 3 or 4 lines missing at the end of one conversation. It was another instance of copying and pasting that left out other info. (App. p. 341, lines 13-17). If petitioner had an expert this would have been investigated.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S.

668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object to the improper admission of character evidence, or prior bad acts, or illegally obtained statements, confessions, or improper searches. Failing to move for a continuance may also constitute ineffective assistance of counsel. Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006).

In some instances counsel may be held ineffective without a showing of prejudice when he fails to subject the prosecution's case to a meaningful adversarial testing. In such cases prejudice is presumed. Nance v. Ozmit, 367 S.C. 547, 626 S.E.2d 878 (2006).

Failing to investigate is also another ground for ineffective assistance of counsel. In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) the Court wrote:

Without a doubt, "[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." *Thompson v. Wainwright*, 787 F.2d 1447, 1450 (11th Cir. 1986); *see also Strickland v. Washington*, 466 U.S. at 691, 104 S.Ct. 2052. When evaluating the reasonableness of counsel's conduct, "the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland v. Washington*, 466 U.S. at 690, 104 S.Ct. 2052. Moreover, while the scope of a reasonable investigation depends upon the number of issues, "at a minimum, *332 counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case." *Troedel v. Wainwright*, 667 F.Supp. 1456, 1461 (S.D. Fla. 1986), *aff'd*, 828 F.2d 670 (11th Cir. 1987) (emphasis in original).

Trial counsel in this case was ineffective in failing to investigate by not using an expert to find the missing lines from the computer chat site.

CONCLUSION

Petitioner's convictions should be reversed.

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of January, 2018.

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Certiorari to Aiken County

Honorable Edgar W. Dickson, Circuit Court Judge

BENJAMIN PAUL GREEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

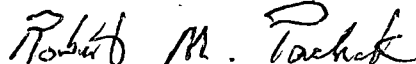
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Benjamin Paul Green 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 Edgar W. Dickson, which was held on September 11, 2015, 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 Benjamin Paul Green.

Respectfully Submitted,


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 22nd day of January, 2018.

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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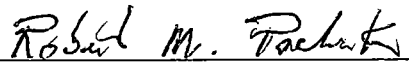
V.

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RESPONDENT

CERTIFICATE OF SERVICE

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 Julie Coleman, 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 Benjamin Paul Green, at 2323 East Boundary Road, Columbia, SC 29223, this 22nd day of January, 2018.


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 22nd day of January, 2018.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.