STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County
Court of Common Pleas
The Honorable R. Markley Dennis, Circuit Court Judge

Appellate Case No. 2017-000667

JOSEPH BRADLEY LOFTIN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
SC Bar No. 101813

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

RESPONDENT'S QUESTIONS PRESENTED

Did the PCR Court correctly hold that Petitioner would not have prevailed on appeal had the issue been preserved for appellate review as the prejudice prong cannot be satisfied by Petitioner?

STATEMENT OF THE CASE

Procedural History

Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lancaster County. During its April 2008 term, the Lancaster County Grand Jury indicted Petitioner for second-degree criminal sexual conduct with a minor (2008-GS-29-0494). During its February 2012 term of the Grand Jury also indicted Petitioner for committing a lewd act on a minor (2012-GS-29-0206). Francis Bell, Esquire represented Petitioner. On February 16, 2012, Petitioner proceeded to trial before the Honorable Brooks P. Goldsmith and a jury. The jury convicted Petitioner as indicted. Judge Goldsmith sentenced Petitioner to concurrent terms of twelve years' imprisonment for criminal sexual conduct, and ten years for lewd act.

A notice of appeal was filed at the South Carolina Court of Appeals. John Delgado, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Loftin Op. No. 2014-UP-472 (filed December 17, 2014). The Remittitur was issued on January 6, 2015.

On May 8, 2015, Petitioner filed an application for post-conviction relief. Respondent made its return on July 7, 2015 requesting an evidentiary hearing be convened. An evidentiary hearing was held on July 12, 2016, at the Lancaster County Courthouse before the Honorable R. Markley Dennis. Petitioner was present at the hearing and was represented by Nathan Sheldon, Esquire. Respondent was represented by Patrick L. Schmeckpeper, Esquire, of the South Carolina Attorney General's Office. Petitioner testified on his own behalf at the evidentiary hearing. Petitioner's father, John Loftin, and trial counsel, Francis Bell, Esquire, also testified. Thereafter, Judge Dennis denied Petitioner's PCR application by written order filed March 2,

2017.

Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his Petition for Writ of Certiorari and Appendix. This Return to Petition for Writ of Certiorari follows.

Factual History

Petitioner repeatedly sexually assaulted the victim from August to December 2007 while during this time he had assumed the role of her stepfather. The events came to light in January 2008, when the victim's friend, Shakesha after being told by the victim about what was happening decided to tell the principal because she thought the victim needed help. (App.p.59-60).

Victim testified Petitioner lived with her and her mom since she was eight years old until he moved out in December 2007. She was twelve years old when a normal father/daughter relationship turned into an improper sexual relationship instead. The grooming process started when Petitioner gave alcohol to her and her friend Abby. Petitioner gave her some kind of fruity drink and she was sitting on his lap. That was the last thing victim remembered that day. On another day, Petitioner offered victim twenty dollars to make out with him and he touched her private area. (App.p.67-72).

This conduct escalated to intercourse for the first time in a deer stand in Fort Lawn, Chester County. Petitioner showed victim a condom and asked her if she knew what it was and victim indicated she did. Then Petitioner pulled down her pants. Victim was shocked and did not know what to do. Petitioner had intercourse with her and told her not to tell her mom. She did not tell her mom because she did not know what would happen if she did. (App. p.72-75).

After that, Petitioner and victim had intercourse every day. The sex would occur in the mother's house in Lancaster County in mother's bed, victim's bed, her brother's bed, the sofa

bed, mother's car and also the deer stand. Petitioner started sleeping with victim on the sofa bed every night where they had sex. At this time, victim's mother was having seizures, was on a lot of medication, and slept a lot. Petitioner also had sex with victim in her brother's bedroom while her mother was at work. Her brother was not present in the house when this occurred because he went to his grandmother's next door when he arrived home from school. (App.p.75-79).

Petitioner also performed oral sex on victim. Additionally, one time Petitioner used a vibrator ring with victim. Petitioner told victim that he did not love her mother and when victim turned eighteen years of age, they would run away together. Petitioner also said bad things about her mother. Victim believed Petitioner and she wanted to run away with him. The sexual conduct kept occurring until December 2007, when Petitioner and victim's mother broke up. (App.p.80-83).

Victim testified Petitioner ejaculated during intercourse with the victim on her bed and her brother's bed. One time, Petitioner bought her a pregnancy test and after she used it, Petitioner made her throw it out in the woods. Petitioner also told her he was getting a vasectomy. Petitioner and mother ended their relationship after Christmas in 2007 and Petitioner moved out of the residence. (App.p.84-86).

Later, after the victim's mother and Petitioner broke up, victim heard them on the phone together talking about getting back together. Victim became enraged and took the phone away from her mother. Victim had previously told her friends Shakesha and Abby about the abuse. Victim was called to the principal's office at school and initially denied the abuse, but then admitted that it had occurred. She would also recover the pregnancy test from the woods with her mother. (App.p.86-89).

Abby testified at trial that Petitioner gave her and victim alcohol. Abby was eight years

old at the time. Abby also testified that Petitioner asked victim to make out for twenty dollars. Petitioner and victim went into victim's bedroom and Abby heard kissing noises from victim's room. Abby never told her mother about what happened. (App.p.109-112).

Victim's mother testified that she and Petitioner started having a relationship when victim was eight years old. Mother had a good relationship with victim until late summer in 2007, when victim became distant. "Then it was almost like she hated me." (App.p.129). In contrast, Petitioner and victim seemed to become closer. "She would talk to him, she wouldn't talk to me." (App.p.130, lines 18-25). Victim's mother verified that Petitioner and victim started sleeping on the couch together, which at the time did not concern her, but in retrospect she recognized it should have concerned her. (App.p.151, lines 20-25). She testified she was speaking with Petitioner on the telephone about getting back together when victim snatched the phone from her and got upset. Victim calmed down after she spoke with Petitioner. (App.p.139). She testified that victim's bedding was never used on her bed. (App.p.165).

A Target receipt from the Target store in Monroe was introduced into evidence. (App.p. 200-203). A receipt from the CVS pharmacy in Lancaster was also put into evidence, which showed the purchase of a pregnancy test. (App.p.297-298). Evidence proved that the pregnancy test was purchased with a gift card given to Petitioner at a company Christmas party. (App.p.308-310; pp. 319-320). Additionally evidence was presented that Petitioner had a vasectomy in December 2007. (App.p.36). Semen detected on victim's comforter was a one in forty-five quadrillion match with Petitioner. Semen on an egg crate mattress from the couch was also a match. Additionally, semen on an egg crate mattress from the brother's bedroom was a match with Petitioner's DNA. (App.p.243-245).

Dr. Singleton testified she examined victim on January 9, 2008, and Victim had a deep

cleft at the six o'clock position of the hymen that was consistent with sexual abuse. Dr. Singleton also testified that victim reported issues indicative of trauma: Victim had difficulty sleeping, was sad and crying frequently, was having difficulty making friends, was not doing well in school, and was cutting herself. She also had nausea and vomiting. (App.p.277-281).

Petitioner testified he had the vasectomy because he already had four children. He denied any sexual activity with victim. He denied he slept on the sofa with victim. He claimed he gave victim's mother the gift card after he purchased an item the same day the pregnancy test was purchased, but he denied purchasing the pregnancy test. (App.p.336-349, p. 355).

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 decision is whether "**any** evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). However, appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624. Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or

omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. 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, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

I. The PCR Court correctly denied the PCR on grounds that Petitioner failed to carry his burden of proving the prejudice prong where the court found Petitioner would not have prevailed on appeal had the issue been preserved for appellate review.

Petitioner asserts the PCR court erred in finding that trial counsel rendered effective assistance of counsel where counsel 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. This argument is without merit as even if trial counsel was deficient for failing to preserve the issue, the PCR court correctly denied the PCR on grounds that Petitioner failed to carry his burden of proving the prejudice prong where the court found Petitioner would not have prevailed on appeal had the issue been preserved for appellate review

The PCR court found Petitioner had failed to prove trial counsel was ineffective with regard to this allegation. In support of its decision, the PCR court found there was substantial corroborative evidence supporting the victim's version of events, as well as the severe credibility problems with Petitioner's trial testimony. The PCR court went on to find 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 Petitioner was admissible. However, the PCR court noted Petitioner failed to meet his burden to show prejudice. Specifically, the PCR court noted a review of the record – alongside counsel's credible testimony – indicates that Petitioner's credibility was irreparably harmed by evidence regarding the purchase of a pregnancy test for the victim. Counsel said that he was (App.p.592).

> "scared to death" of the pregnancy test "because [Petitioner] would not admit that he bought it, and I wasn't with him, but the evidence strongly indicated that he would be the one to purchase the thing. And therefore when the jury came back

> in the second trial and wanted to rehear that part of the testimony my heart hit my foot because I was so scared to death of that one piece of evidence."

(App.p.593). The PCR court also noted given the importance of credibility in this case, the defects in Petitioner's own testimony were practically insurmountable. The PCR court further found the victim's testimony was strongly corroborated by another witness who was present for portions of the abuse, saw Petitioner offer the victim money if she allowed him to sexually abuse her, and subsequently heard them kissing in the next room.

This Court has previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475–76, 746 S.E.2d at 47 ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim.") (citing Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is **meritorious** and that the verdict would have been different absent the evidence that should have been excluded." (emphasis in McHam)). Therefore, before a post-conviction relief court can find an applicant has prevailed on a claim of ineffective assistance of trial counsel for failing to preserve a ground for

appellate review, the court must determine the underlying claim was meritorious and a reasonable probability that it would have resulted in reversal and a new trial.

In this case, the post-conviction relief court correctly found that Petitioner would not have prevailed on appeal had trial counsel properly preserved his argument for appellate review. Petitioner argues that trial counsel's motion to have evidence introduced of the victim's alleged sexual activity with persons other than Petitioner during the timeframe listed in the indictment should have been granted as there was an exception to the Rape Shield Statute available. However, this argument is without merit as the evidence was completely irrelevant to the trial.

Pursuant to Section §16-3-659.1 of the South Carolina Code and commonly known as the Rape Shield Statute, victims of criminal sexual conduct are protected from inquiries into their past sexual history except in very limited circumstances. Under the statue,

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656; however, evidence of the victim's sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant introduced to show source or origin of semen, pregnancy, or disease about which evidence has been introduced previously at trial is admissible if the judge finds that such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. Evidence of specific instances of sexual activity which would constitute adultery and would be admissible under rules of evidence to impeach the credibility of the witness may not be excluded.
>
> (2) If the defendant proposes to offer evidence described in subsection (1), the defendant, prior to presenting his defense shall file a written motion and offer of proof. The court shall order an in-camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new evidence is discovered during the presentation of the defense that may make the evidence described in subsection (1) admissible, the judge may order an in-camera hearing to determine whether the proposed evidence is admissible under subsection (1).
> SC Code Ann. §16-3-659.1

Additionally, South Carolina's appellate courts have carved out exceptions to the general prohibition of evidence regarding a victim's sexual conduct beyond those expressly enumerated in the statute. See State v. Finley. 300 S.C. 196, 387 S.E.2d 88 (1 989) (Allowing this evidence when 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) (Allowing this evidence for impeachment); State v. Grovenstein, 340 S.C. 210, 530 S.E.2d 406 (2000) (Allowing this evidence for alternative source of a child complainant's sexual knowledge).

Here, had Petitioner's motion been persevered for appellate review, it would not have been meritorious and resulted in a reversal on appeal because there was no evidence to support breaking the shield and admitting the evidence. Petitioner argues the alternative source theory would have allowed evidence of the victim's sexual history to be introduced however that is not the case. Petitioner's allegation of a rendezvous between the victim and some boy fails to establish a reasonable basis to inquire as to her sexual activity prior and during the time she was being assaulted by Petitioner. Nothing in the record suggests victim was sexually active prior or during the period of time Petitioner was having intercourse with her and there was no dispute about the source of semen or disease. The trial court did not abuse its discretion in excluding this irrelevant line of questioning which would have been prejudicial to the state. See State v. McGuire, 272 S.C. 547, 550, 253 S.E.2d 103, 104 (1979) ("Merely asking a question that has no basis in fact may be prejudicial").

Furthermore, the victim's subsequent pregnancy has no relevance to the case. While her pregnancy is proof that she was sexually active in March 2008, it does not indicate that she was sexually active at any time before the disclosure in the first week of January 2008 or her examination by Dr. Singleton on January 9, 2008. It should be noted Petitioner was accused of

sexually abusing the victim from August to December 2007. Moreover, contrary to Petitioner's arguments, her pregnancy does not provide an alternative explanation for the purchase of the pregnancy test or for the results of Dr. Singleton's examination. Therefore, the trial court did not err in excluding testimony in this regard under the rape shield statute (S.C. Code §16-3-659.1) and on the grounds of relevancy. Consequently, the PCR court did not err in concluding Petitioner failed to carry his burden of proof.

Additionally, as the PCR judge noted there was substantial corroborative evidence supporting the victim's version of events, as well as the severe credibility problems with Petitioner's trial testimony. Therefore, even if trial counsel had requested a specific ruling on the issue of the rape shield statute, Petitioner has not shown that there is a reasonable probability the outcome of the trial would have been different because his underlying claim fails on its merits. Under these circumstances, Petitioner has not established the requisite prejudice to support his claim of ineffective assistance of counsel. McHam, 404 S.C. at 481–82, 746 S.E.2d at 50. See generally Foye, 335 S.C. 586, 518 S.E.2d 265 (holding PCR was properly denied where the applicant did not prove he was prejudiced by trial counsel's deficient performance in failing to preserve an issue at trial).

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
SC Bar No. 101813

By: _____
ATTORNEYS FOR PETITIONER

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

February 2, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lancaster County
Court of Common Pleas
The Honorable R. Markley Dennis, Circuit Court Judge

Appellate Case No. 2017-000667

Joseph Bradley Loftin, ... Petitioner,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, DeShawn H. Mitchell, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

Laura R. Baer, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia SC 29211-1589

I further certify that all parties required by Rule to be served have been served. This 2nd day of February, 2018.

DESHAWN H. MITCHELL
S.C. Bar # 101813
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
FEB 02 2018
S.C. SUPREME COURT

February 2, 2018

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Joseph Bradley Loftin v. State of South Carolina**
Appellate Case No. 2017-000667
Lower Court Case No. 2015-CP-29-0619

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

DeShawn H. Mitchell
Assistant Attorney General
SC Bar #101813

DHM/jacc
Enclosures

cc: Laura R. Baer, Esquire
Trisha Allen, Director - Victim Advocacy Division (without enclosure)