

STATE OF SOUTH CAROLINA

 ORIGINAL

IN THE SUPREME COURT

Certiorari to Anderson County

R. Scott Sprouse, Circuit Court Judge

MAXWELL E. SIPES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000231

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I.** Did trial counsel err in failing to investigate and obtain the prosecutrix's entire medical file including all medical records prior to trial rather than midway through the trial in order to establish reasonable doubt regarding the state's theory that forcible anal penetration occurred in the case and to prove the defense's theory that there was an alternate cause (mainly chronic constipation from psychotropic medicines) for the prosecutrix's prolapsed colon?
- II.** Did trial counsel err in failing to preserve a Fifth Amendment issue for appellate review in petitioner's case?

STATEMENT

Petitioner Maxwell Sipes was found guilty of first degree criminal sexual conduct per jury trial held during the March 2007 term of the Anderson County General Sessions Court before Judge Alexander MaCaulay and received a sentence of imprisonment for a period of thirty years, suspended upon the service of twenty-five years and five years probation. App. 1 – 616. David Stoddard represented petitioner at trial, and Assistant Solicitor Mindy Hervey appeared on behalf of the state.

Petitioner appealed his conviction, but his case was affirmed on November 2, 2009, by the South Carolina Court of Appeals. See State v. Sipes, Unpublished Op. No. 2009 UP-540 (November 19, 2009). See app. 810 – 811. On January 20, 2010, the South Carolina Court of Appeals denied petitioner’s petition for rehearing, and on May 2, 2011, the South Carolina Supreme Court denied petitioner’s petition for writ of certiorari seeking review of the Court of Appeals’ decision in the case.

On January 31, 2012, petitioner filed a PCR application with the Anderson County Office of the Clerk of Court. App. 617 – 623. The respondent filed a return dated March 2, 2013, requesting that a PCR hearing be held in the case. App. 624 – 629.

A PCR hearing was convened on June 9, 2016, at the Anderson County Courthouse before Judge R. Scott Sprouse. App. 631 – 804. Petitioner was present at the PCR hearing and represented by J. Falkner Wilkes, and Assistant Attorney General Johanna C. Valenzuela appeared on behalf of the state.

On January 24, 2017, Judge Sprouse issued an Order of Dismissal in the case. App. 807-830. Petitioner appealed the Order. This petition follows.

QUESTION I

Trial counsel erred in failing to investigate and obtain the prosecutrix's entire medical file including all medical records prior to trial rather than midway through the trial in order to establish reasonable doubt regarding the state's theory that forcible anal penetration occurred in the case and to prove the defense's theory that there was an alternate cause (mainly chronic constipation from psychotropic medicines) for the prosecutrix's prolapsed colon.

The state's theory of the case was that petitioner committed forcible sodomy upon the prosecutrix, who testified that during the year 2002, petitioner whom her biological mother married, would come to her room and put his "privates" in her "back privates", i.e., her rectum. Tr. 108, l. 10 – p. 130, l. 24.

The state's case consisted of five witnesses: the prosecutrix and her mother, the police officer who arranged for a forensic interview of the prosecutrix, and Doctors Dolford F. Payne and Allison Foster DeFelice.

Trial counsel was unable to properly cross-examine the state's doctors during the state's case-in-chief because he had not retrieved all of the medical records of the prosecutrix at that time. The testimony from the two doctors who testified on behalf of the state verified the state's theory of the case.

Dr. Dolford F. Payne testified that he entered the case pursuant to a call from an emergency room employee requesting his services as a surgeon to repair the prosecutrix's rectal prolapse because her rectum was falling outside of her body. Dr. Payne surmised that this malady was caused by a forcible entry into her rectum that was long term or multiple times. App. 61, l. 16 – p. 64, l. 24; Tr. 66, l. 9-17; App. 71, l. 1-5. Dr. Payne testified that the prosecutrix was not experiencing chronic constipation or ordinary constipation from

psychological drugs; and therefore, the inference was that forcible sodomy occurred in this case, which established the state's theory of the case. Tr. 63, l. 20 – p. 65, l. 11; Tr. 70, l. 3 – p. 71, l.

5. Dr. Payne diagnosed Sipes as follows:

Q. When Ciera first presented to you as a patient, did you have any suspicions as to what was causing her rectal prolapse?

A. Well, again, I have to – you know, what I have is I have a diagnosis of rectal prolapse in the emergency room. And then what I do is I sit down and talk with the patient. And so the patient at that point told me that that's what had occurred. Then my job is to try and exclude some other possibility that would instantly allow me another diagnosis as to why that occurred. And I could not do that.

Q. And why is that?

A. Because her history wasn't significant, and also we had done the flexible sigmoidoscopy which did not show any other cause of it to be coming from the colon or rectum.

Q. So that was medically the only cause that you knew was to confirm her complaint of this forcible sodomy in her past?

A. That is correct

Q. And you were able to rule out the other causes that you normally see in patients presenting with this symptom?

A. We were able to pretty much exclude them. Can I a hundred percent exclude them? The answer to that is no because she was also on psychological medication. But she did not have the symptom of normal people with having psychological medications. App. 74, l. 6 – p. 75, l. 5.

Licensed Clinical Psychologist Allison Foster DeFelice testified that Ciera's behavior (reviewing her forensic interview) was consistent with abuse. Tr. 239, l. 1 – p. 241, l. 5.

Petitioner testified at trial and explained that he was married to the prosecutrix's mother and noticed that she (prosecutrix) had problems, and that he tried to get her help from a

psychologist. Petitioner testified that he did not do the things the prosecutrix accused him of doing. App. 442, l. 3 – p. 461, l. 17.

During the PCR hearing, defense counsel was asked about the prosecutrix's Carolina Behavioral Health records (4 pages) that he had prior to trial, and thereafter, counsel admitted that he found out that more pages from the center should have been sent in, and that he had not received all of the records when petitioner's trial commenced, and that the full set of records did not come in until the state's two doctors had already testified during the state's case in chief. App. 637, l. 2 – p. 646, l. 25.

Counsel stated that the theory of the case for the defense was that the prosecutrix fabricated her allegation in response to her parents' custody battle and a divorce that were brewing at the time, and that there was an alternate theory to explain the rectal prolapse, which was chronic constipation due to psychotic drug use by the prosecutrix and her underlying psychological issues such as borderline personality disorder issues. App. 644, l. 2 – p. 649, l. 6. However, when Dr. Payne (state's witness) testified that the “[prosecutrix did not have symptoms of normal people having psychological medication.]” (App. 75, lines 3 -5), there was no way to rebut that diagnosis that went against the defense without counsel being privy to the prosecutrix's entire Carolina Behavioral Health medical file, which would have revealed that she had a long history of taking psychiatric medications, especially since Dr. Payne testified that one cause of a prolapsed colon is constipation that comes from individuals who have a long history of taking psychiatric medications. Counsel admitted in effect that it would have been beneficial to have challenged Dr. Payne's opinion by showing an alternate cause of her prolapsed colon, which would have been constipation from psychiatric medicines, had he been privy to all of her medical health treatment records. App. 649, l. 5 – p. 651, l. 20; App. 658, l. 1-13.

The prosecutrix in the instant case had a long history of taking psychiatric medications. The entire health medical file of the prosecutrix showed use of laxatives, use of suppositories, bingeing, purging, and vomiting, bulimic, anorexic, all of which would also have supported constipation as an alternate cause for the prosecutrix's prolapsed colon. App. 656, 26, l. 10 – p. 657, l. 10; App. 671, l. 1-20; App. 673, lines 1-23; App. 674, lines 1-25. In addition, the records contained the reasons for the psychological medications, which included the mental conditions of the prosecutrix, such as borderline personality disorder, adjustment disorder with mixed disturbance, bi-polar (untold), anti-social behavior, oppositional defiant disorder, dysthymic disorder, anxiety disorder, major depressive disorder, and the medications prescribed for the conditions, such as Remeron, Ambien, Goodone, Trazodone, Depakote, Augmentin, Zantac, Effexor, Paxil, Luvox, Adderall, and Risperdal and Celexa. All of this should have been presented to Dr. Payne on cross-examination during the state's case in chief by defense counsel to assert chronic constipation as an alternate theory for the prosecutrix's rectal prolapse. App. 658, l. 16 – p. 663, l. 4; App. 664, l. 10 – p. 665, l. 11; App. 669, lines 19-24. Additionally, the records would have shown that the prosecutrix engaged in wrist cutting with a knife. App, 665, l. 12-17; App. 667, l. 23 – p. 668, l. 2. Furthermore, the prosecutrix's medical records revealed "mom 30 ccs (for) constipation." App. 670, lines 6-8. Moreover, there were reports of psychosis, hallucinations (visual) and auditory), delusions (green men, monkeys, mice, black images) and paranoid ideations. App. 671, l. 21 – p. 672, l. 13.

Regarding the above information that was not brought to Dr. Payne's attention on cross examination by defense counsel because counsel was not privy to the entire medical file of the prosecutrix during the state's case in chief, the following admission was submitted by counsel at the PCR hearing:

Q. Was Dr. Lund gone by the time you got these records (witness excused)?

A. I believe so.

Q. To the extent that those things in these records could have established alternative causation they would have been desirable in your theory of the case?

A. Yes. App. 674, lines 17-25.

Equally troubling was the fact that defense counsel was unable to examine his own doctor (defense witness Dr. Lund) by corroborating his testimony that constipation indeed is the usual cause of rectal prolapse by presenting him with questions from the extensive medical file of the prosecutrix for corroboration in support of a conclusive diagnosis from Dr. Lund that this information regarding the psychological problems and medication assigned to the prosecutrix would have explained the reason for the prolapsed colon, i.e., constipation (chronic) rather than sexual abuse in support of this theory by the defense.

Also, the trial transcript revealed that counsel did not question the second doctor, who was the state's last witness, about the prosecutrix's entire medical file because counsel was not privy to the entire medical file at that time. Dr. DeFelice testified that the behavior of the prosecutrix was consistent with sexual abuse and that she saw no ill motives (i.e. fabrication of the stories). App. 253, l. 7 – p. 260, l. 11; App. 266, l. 16 – p. 274 l. 13.

After Dr. Payne's testimony and before Dr. DeFelice's testimony, counsel admitted that he didn't "know if he asked for the records," but apparently the trial judge issued an order for the records, and afterwards the judge said "the order is signed [and] now you're going to have to take care of it." Tr. 216, l. 20 – p. 218, l. 7. Counsel admitted during the PCR hearing that there were additional medical records for the prosecutrix that he did not have at trial that he asked for

the judge to help him obtain. App. 681, lines 4-13. Counsel admitted further during the PCR hearing that he did not have the entire medical records prior to trial to support the defense theory that there was an alternate cause of the rectal prolapse, i.e., chronic constipation from psychotropic medications in order to challenge Dr. Payne's conclusion, which was in effect that forcible anal penetration caused the rectal prolapse in accordance with the state's theory of the case. App. 681, l. 20 – p. 688, l. 8. Counsel added that he was unaware of these psychotropic medications the prosecutrix took, which caused chronic constipation and ultimately, her rectal prolapse condition. App. 689, lines 10-17. Moreover, counsel admitted that had he been armed during the state case-in-chief with this evidence of chronic constipation from psychotropic medicines, then he would have been able to better challenge Dr. Payne on cross examine and create reasonable doubt of any guilt and also present a stronger defense with respect to the theory that there was an alternate cause for the rectal prolapse that had nothing to do with the sexual abuse allegation against petitioner. Tr. 60, l. 6-25. Note that Dr. Lund explained at trial that there were three things that caused rectal prolapse and that constipation was one of those things. App. 698, l. 6 - p. 699, l. 3. Additionally, counsel admitted that he did not get all of the records until after the trial commenced and that this prejudiced the defense in effect as petitioner's defense was that constipation was an alternate cause for the rectal prolapse. App. 711, lines 4-7. Tr. 724, l. 5 – p. 727, l. 9; App. 727, l. 10-13. Counsel added that the prosecutrix's entire medical file showed that she had preoperative constipation on April 3, 2002, but that he did not have the information and did not use it at trial. App. 728, l. 1 – p. 729, l. 9.

Lastly, the prosecutrix's entire medical file would have showed that she suffered from borderline personality traits and behavior, which would have benefitted petitioner's defense that the sexual misconduct claim was fabricated due to her mental instability and impeached Dr.

DeFelise's testimony that she could not have been diagnosed with such a malady at that age. App. 731, l. 21 – p. 733, l. 12. Again, counsel in effect admitted that he was unable to cross examine Dr. Lund about how the prosecutrix had chronic constipation, which Dr. Lund stated would cause a prolapsed colon, because he did not have the prosecutrix's records in its entirety prior to trial. App. 734, l. 8 – p. 736, l. 16.

Defense attorneys have a duty to conduct reasonable investigations in a case. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). With respect to an attorney's failure to present defense evidence, compare the reversals in Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009) and Council v. State, 380 S.C. 159, 181 S.E.2d 670 S.E.2d 356 (2008) where the Courts found counsels ineffective in failing to present evidence of mental illness as mitigating evidence. In Rosemond, the Court held that trial counsel erred in failing to present evidence of the defendant's mental illness as a mitigating factor at sentencing, and that but for the prejudice that resulted due to this error, a reasonable probability exists that a penalty other than death would have occurred. In Council, trial counsel was found ineffective in failing to present only limited mitigation evidence, which prejudiced the defendant to the extent that a penalty other than death might have occurred in the case. Also, see Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006). With respect to counsel being ineffective with respect to the cross-examination of a witnesses, compare the case of Walker v. State, 397 S.C. 226, 723 S.E.2d 610 (2013), where the Court held that counsel was ineffective in failing to investigate into and present an alibi defense, and in failing to cross-examine the victim's time discrepancies regarding the incident and the nurse's report regarding time that corroborated this discrepancy.

Here, the state alleged that the prosecutrix's prolapsed colon was due to sexual abuse, and the state's doctor affirmed the same during the state's case in chief, and the state rested without any

meaningful cross-examination of the state's doctors by defense counsel in the form of a challenge to their conclusions and without any meaning direct examination to corroborate the testimony of the doctor who appeared as a defense who testified in line with the defense theory that constipation caused the prolapsed colon, all because counsel did not have the entire medical file of the prosecutrix in the case,

Counsel's deficient representation in this regard violated petitioner's right to competent representation under the Sixth Amendment per Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984), and but for counsel's error, there was a likelihood that reasonable doubt would have been established and this meant that the outcome of petitioner's trial might have been different.

QUESTION II

Trial counsel erred in failing to preserve a Fifth Amendment issue for appellate review in petitioner's case.

The testimony of the prosecutrix's mother that violated petitioner's Fifth Amendment right follows:

Q. After your [marital] separation [from petitioner] you filed a child abandonment warrant, I understand against Max down in Georgie is that right?

A. No. That was for child support. When I was going through child support getting my kids medical help because my daughter was needing prolapsed rectum surgery, [petitioner] quit his job. When Eddie Colbert went to look for him, he would not come for the interview. When Eddie Colbert, the investigator looked for him to question him about the sexual abuse, [petitioner] quit his job and left. So I had to go get assistance. Tr. 193, l. 6-16.

Counsel objected and moved for a mistrial, but the judge denied the motion for a mistrial and offered a curative instruction, but had no curative instruction was ever given. Tr. 198, l. 23 – p. 199, l. 6.

During the PCR hearing, petitioner testified that curative instructions generally do not help, but in effect that he did not remember why he did not follow up on this. App. 716, l. 12 – p. 720, l. 22.

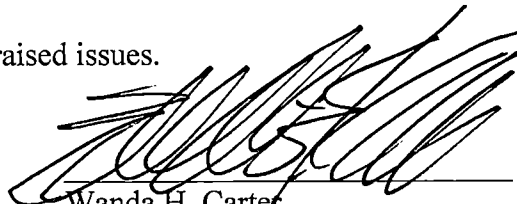
This Fifth Amendment issue was raised on appeal and the appellate court ruled as follows:

PER CURIAM: Maxwell E. Sipes appeals his conviction for first-degree criminal sexual conduct, arguing the trial court erred in denying his motion for a mistrial. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) (“No issue is preserved for appellant review if the objecting party accepts the judge’s ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial.”); State v. Council, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999) (“The decision to grant or deny a motion for a mistrial is a matter within a trial court’s sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law.”). App. 810

The defendant has a Fifth Amendment right to remain silent and thus a due process violation occurs if there is a comment on this right to remain silent as the state may not directly or indirectly comment on a defendant’s right to remain silent. Doyle v. Ohio, 426 U.S. 610 (1976); State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004); Payne v. State, 355 S.C. 642, 586 S.E.2d 857 (2003). Here counsel’s failure to preserve this Fifth Amendment issue for appellate review by securing the curative instruction and objecting to it constituted deficient representation and violated petitioner’s right to competent counsel at trial as guaranteed under the Sixth Amendment. See Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). But for counsel’s error in this regard, a reasonable probability exists that the outcome of petitioner’s trial or appeal would have been different.

CONCLUSION

Based on the foregoing arguments, counsel for petitioner requests that the Court grant the petition and allow full briefing on the above-raised issues.

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of August, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

MAXWELL E. SIPES,

PETITIONER

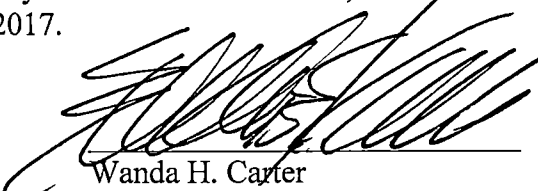
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STATE OF SOUTH CAROLINA,

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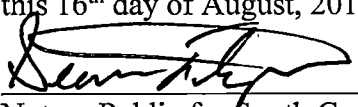
CERTIFICATE OF SERVICE

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 Lindsey McCallister, 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 Maxwell E. Sipes, #320502, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 16th day of August, 2017.



Wanda H. Carter
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 16th day of August, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022