STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to York County

Honorable R. Lawton McIntosh, Circuit Court Judge

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JUN 18 2018

S.C. SUPREME COURT

LEONARD E. JENKINS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001971

PETITION FOR WRIT OF CERTIORARI

Joanna K. Delany
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ISSUE PRESENTED

Whether the PCR court erred in finding defense counsel provided effective representation where counsel failed to impeach the alleged victim with her prior inconsistent statement that she only "thought" Petitioner touched her?

STATEMENT

Leonard Jenkins (Petitioner) was home one summer day in 2011 taking care of his toddler, Gracey. App. 71, ll. 11-16; App. 483. Petitioner's wife Janet, and his stepdaughters Amber and Kacie were also home in the double-wide, open floor plan trailer. App. 70, ll. 1-3; App. 152, l. 19 – 153, l. 8; App. 85, ll. 14-16; App. 86, l. 2 – 87, l. 2. The twelve-year-old alleged victim (Minor 1) lived "right across the street," was friends with Petitioner's stepdaughter Kacie, and had come over to play as she often did. App. 66, ll. 1-3; App. 68, ll. 2-23; App. 65, ll. 13-19.

Minor 1 said Petitioner's wife Janet was sitting in the living room watching television, Kacie was in the bathroom, and her older sister Amber was in her bedroom. App. 69, l. 10 – 70, l. 20. Minor 1 claimed Petitioner was watching the toddler and washing dishes in the kitchen before he came into the dining room and touched her while she was sitting on the couch in the dining area.[1] App. 69, ll. 13-15; App. 71, ll. 11-12.

Minor 1 claimed Petitioner set the toddler on her lap, reached into her shorts, and touched her vagina while she bounced the toddler on her knee. App. 482 – 484; App. 72, ll. 12-18; App. 73, ll. 6-10.

Minor 1 admitted she knew all the other people were home at the time she claimed Petitioner touched her. App. 86, ll. 16-25. Minor 1 also acknowledged that Petitioner knew "who all was in the house as well." App. 93, ll. 21-23. Minor 1 continued to go over to play with Kacie after the alleged touching. App. 80, ll. 4-16.

The next year, Minor 1 said: "There was this news cast on about somebody being reported for something similar to this case, and my mom was trying to tell me if anything

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[1] Minor 1 said that the home had a couch in the living room and a couch in the dining room, and initially claimed "[t]hey are both different rooms . . ." but later agreed that the kitchen, dining area, and sitting area were actually one big room. App. 86, ll. 7-15; App. 70, ll. 15-20.

happens, if anything went wrong with this, to tell her." App. 80, l. 23 – 81, l. 2. "So I told her." App. 81, ll. 4-5.

Petitioner proceeded to trial before the Honorable Donald Hocker and a jury on August 13, 2013. App. 1. Daniel Hall represented Petitioner, and Jennifer Desch appeared on behalf of the state. App. 1. Petitioner was convicted and sentenced to ten years suspended to three years' incarceration and three years' probation. App. 484. Petitioner was civilly committed to the Department of Mental Health pursuant to the sexually violent predator act. App. 432, ll. 12-24.

On February 14, 2012, Minor 1 had a "forensic interview" by Detective Carson Neely of the York County Sherriff's Department, who videotaped the interview. App. 132, ll. 1-2; App. 136, ll. 5-9; App. 137, ll. 12-14; App. 149, ll. 10-12. Because Minor 1 was thirteen years old when the video was made, the state did not seek to enter the recording into evidence. App. 137, ll. 18-22; App. 111, ll. 7-13.

Minor 1 said in the interview: "I think that his hand was touching," rather than an unequivocal—his hand was touching. App. 92, ll. 2-5. When cross-examined, Minor 1 said she did not remember making this statement to Neely. App. 92, ll. 2-9.

> Q. Do you remember telling Detective Neely on the video that—I think your words were, **I think** that his hand was touching—do you remember saying that? You don't remember that?
>
> A. No.
>
> Q. But after meeting with the solicitor, you are clear about it, right?
>
> A. Yes.

App. 92, ll. 2-9 (emphasis added).

The time frame of the alleged touching cast even further doubt upon its accuracy. Minor 1 began the February interview by claiming the touching occurred two to three months prior to the interview (which would have been winter). App. 139, ll. 17-18. However, after further questioning by Detective Neely, Minor 1 claimed the touching happened during the summertime. App. 140, ll. 3-6; App. 141, ll. 2-6. "[I]t had gotten really hot because it was maybe around 12, 1 o'clock in the afternoon. So we went inside to get something to cool off." App. 68, ll. 16-20.

Defense counsel questioned Minor 1 about her initial claim to Neely regarding when the alleged touch occurred. On cross-examination, counsel asked Minor 1 if she had told Detective Neely it happened two or three months prior to the interview, but Minor 1 said the timing "slipped my head because I was so nervous." App. 83, l. 3 – 84, l. 2. Counsel asked if Minor 1 remembered telling Detective Neely the touching happened right before school started, and Minor 1 said: "I think I meant to say that it was right before school ended, it was right about then." App. 90, ll. 5-10.

Other discrepancies about the circumstances of the alleged offense existed between Minor 1's trial testimony and her statements during the forensic interview. In the videotaped interview, Minor 1 said she was wearing what she had on during the interview—an olive green top—when the touching occurred. App. 84, l. 16 – 85, l. 7. However, at trial, Minor 1 claimed she remembered what she was wearing at the time of the alleged assault, and that it was a blue and white striped top and shorts. App. 73, ll. 11-17. On cross-examination, counsel asked Minor 1 if she remembered telling Neely she was wearing the green top, and she said: "I can't remember exactly what the top was. It was—it was either blue or green. I can't really remember." App. 85, ll. 2-7.

Only two witnesses testified at trial: Minor 1 testified first, and Detective Neely second. App. 2. Trial counsel did not attempt to introduce the video of Minor 1's forensic interview as a prior inconsistent statement for impeachment when he cross-examined Minor 1 and she did not admit to making the prior inconsistent statements. Instead, defense counsel attempted to introduce the video during his examination of Detective Neely, after Minor 1 had been excused. App. 158, ll. 12-17; App. 161, ll. 14-21. App. 103, ll. 9-11.

Defense counsel argued the video was a prior inconsistent statement under Rule 801(d), SCRE. App. 162, l. 25 – 163, l. 13; App. 164, ll. 16-21. The solicitor argued that if defense counsel wanted to impeach Minor 1 with the video, the impeachment should have taken place with Minor 1 and not the detective. App. 169, ll. 3-14; App. 172, l. 22 – 173, l. 4. The judge ruled the video was inadmissible for impeachment, because in his view, Minor 1's statements were not inconsistent. App. 192, l. 14 – 193, l. 23.

After his conviction was affirmed on appeal, Petitioner filed an application for post-conviction relief (PCR), alleging among other grounds, ineffective assistance of counsel and violation of his Sixth and Fourteenth Amendment rights to present a complete defense and confront witnesses due to counsel's failure to introduce the video. App. 414 – 415.

An evidentiary hearing was held on the matter before the Honorable R. Lawton McIntosh. App. 428. Leah Moody represented Petitioner, and Justin Hunter appeared on behalf of the state. App. 428. At the PCR hearing, Petitioner testified he was unable to present a complete defense and confront the witnesses about their inconsistent statements. App. 434, l. 24 – 435, l. 3.

In its order of dismissal, the PCR court found counsel's testimony to be credible, Petitioner's testimony was not credible, and denied Petitioner relief. App. 469; App. 477. The

PCR court found Petitioner failed to show counsel was ineffective in failing to move the forensic video into evidence, because counsel "argued extensively at trial to introduce the video to show inconsistent statements, but the trial court ruled that it would be inadmissible for impeachment because the victim did not deny making the inconsistent statements." App. 471 – 472. "This Court finds that Counsel's actions were not deficient because he did attempt to move the video into evidence but was denied by the trial court. This Court further finds that Applicant has failed to show that he was prejudiced by Counsel's actions." App. 472.

ARGUMENT

The PCR court erred in finding defense counsel provided effective representation where counsel failed to impeach the alleged victim with her prior inconsistent statement that she only "thought" Petitioner touched her.

Inexplicably, defense counsel waited until the detective was testifying before attempting to admit the videotaped interview as a prior inconsistent statement. However, the alleged victim was the person who would be impeached with the video.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. *Gilchrist v. State*, 350 S.C. 221, 226, 565 S.E.2d 281, 284 (2002) (citing *Strickland*, 466 U.S. at 687). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. *Id.*

An accused has a fundamental Sixth Amendment right to confront the witnesses against him. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). "The Confrontation Clause of the Sixth Amendment, which was extended to the states by the Fourteenth Amendment, guarantees the right of a criminal defendant to confront witnesses against him, and this includes the right to cross-examine witnesses." *State v. Holder*, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009) (citing *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)). "The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers." *State v. Turner*, 373 S.C. 121, 130, 644 S.E.2d 693, 698 (2007).

Rule 613(b), SCRE provides in relevant part:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

Defense counsel did not attempt to introduce the video for impeachment during Minor 1's testimony. A credibility assessment of the alleged victim was the sole disputed matter before the jury. There were no eyewitnesses to the alleged event, no physical or forensic evidence, and no confession. Petitioner did not present an alibi or otherwise deny being present in his home during the summer of 2011.

Counsel did not perform effective cross-examination of Minor 1 about the differences between her testimony at trial and her videotaped interview, because she did not admit making the prior inconsistent statements. Minor 1 did not admit that she made differing statements at trial and during the forensic interview—she equivocated when cross-examined.

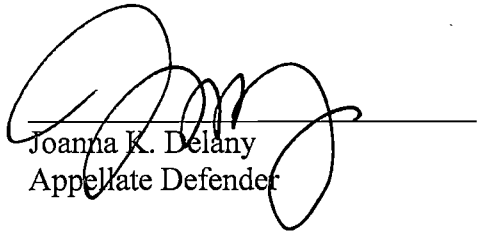
The state's allegation that Petitioner was guilty of lewd act upon a child would have been called into question by the admission of Minor 1's videotaped equivocal statement to the detective that she only "thought" his hand touched her vagina. Admission of the video would also have shown the jury Minor 1's inconsistent statements regarding whether the instance of alleged touching occurred in the winter, end of summer, or beginning of summer. Minor 1's testimony she remembered she was wearing a blue and white striped top would have been impeached by her videotaped statement to the detective she was wearing an olive-green top. These inconsistencies related directly to the reliability of the complaining witness. Taken together, they paint a different evidentiary picture than was presented to the jury because this case hinged on Minor 1's credibility.

The alleged victim's testimony was the only evidence of guilt, and was not corroborated by other testimony. The state did not have a strong case. Defense counsel's failure to attempt to impeach Minor 1 with the video during her testimony prejudiced Petitioner, as Minor 1's testimony was the only evidence of guilt.

Petitioner respectfully submits that had counsel introduced the video to impeach Minor 1's testimony, there is a reasonable probability the jury's verdict would have been influenced.

CONCLUSION

By reason of the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of June, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this 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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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 Megan Harrigan Jameson, 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 Leonard E. Jenkins, #, at Correct Care, 1700 St. Andrews Terrace, Bdlg A, Columbia, SC 29210, this 18th day of June, 2018.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 18th day of June, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: