STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Edgefield County

R. Lawton McIntosh, Circuit Court Judge

GEORGE A. JONES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001000

PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
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

Did the PCR court properly grant Petitioner a belated PCR appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) where the undisputed evidence showed Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application?

STATEMENT

On April 8, 2008, Dr. Elizabeth Gordineer was working in the local emergency room when Minor arrived complaining of painful urination. App. 118, ll. 3-9; App. 132, l. 23 – App. 133, l. 2. Minor had been treated recently for a urinary tract infection. App. 118, ll. 9-11. When the doctor examined Minor's genitals, she found ulcers that appeared to be herpes. App. 118, ll. 14-17. Subsequent testing revealed Minor had genital herpes or type two herpes. App. 119, ll. 16-21. According to Dr. Gordineer, genital herpes is "extremely contagious" and "as long as there's some sort of contact, sexual contact, you can transmit that virus." App. 121, ll. 16-21. There has to be "touching of some sort where there is some exposure to the virus." App. 121, ll. 21-23. She was emphatic that it is not necessary for there to be contact between genitals. App. 121, l. 25 – App. 122, l. 1. The state's infectious diseases expert explained that transmission of herpes requires "close contact." App. 222, ll. 3-4. Nevertheless, the expert opined that Minor's genital infection of herpes type two virus "suggests that she's had genital contact with someone who also has type [two] herpes who infected her through some close sexual contact." App. 248, ll. 12-18.

Dr. Gordineer contacted DSS to report that Minor had herpes. App. 120, ll. 4-5. DSS referred the case to Lamaz Robinson with the Johnston Police Department. App. 155, ll. 3-19. When Minor was initially questioned, she denied any sexual contact. App. 146, l. 19 – App. 147, l. 3; App. 328, ll. 14-24; App. 330, ll. 4-8. However, when Minor's story changed and upon learning the allegations were against Minor's father, Petitioner, Robinson placed Minor into emergency protective custody with DSS. App. 128, ll. 4-18; App. 157, ll. 1-4.

Ultimately, Minor claimed that when she was between the ages of seven and nine, Petitioner did not live with her, but he would stay overnight during occasional visits. App. 130,

ll. 7-11; App. 139, ll. 12-18. Minor claimed that Petitioner would get her from her bedroom, which she shared with her brother, and take her into the living room. App. 135, ll. 4-9. She further claimed that Petitioner would tell her to lie on the couch and put a pillow on her head. App. 135, ll. 14-19. After she would put the pillow over her face, Petitioner, she alleged, would tell her to pull down her pants. App. 136, ll. 7-9. Minor claimed she would then "feel, like a finger or something in [her] wrong spot." App. 137, ll. 10-11. Other times, according to Minor, Petitioner would only "[l]ike rub on the outside of [her] private spot." App. 138, ll. 16-18. Minor explained that she thought Petitioner had his clothes on "when all of this was happening." App. 148, ll. 5-9. Minor never felt anything wet, and Petitioner never had to clean up any liquids. App. 148, ll. 14-19.

On April 11, 2008, Robinson interrogated Petitioner. App. 157, ll. 16-20. Petitioner denied the allegations made by Minor. App. 172, l. 24 – App. 173, l. 1.

Subsequently, Robinson also obtained a court order to test Petitioner for herpes. App. 169, l. 22 – App. 170, l. 3. On July 17, 2009, Petitioner's blood was drawn for testing. App. 170, ll. 4-13; App. 179, ll. 17-20. Testing conducted by Mullins Laboratory showed Petitioner's blood was positive for herpes. App. 192, ll. 16-24. However, the blood test did not distinguish between the two types of herpes. App. 194, ll. 20-25; App. 236, ll. 20-25; App. 239, ll. 10-16. Therefore, it was unknown whether Petitioner had herpes one or herpes two. App. 194, ll. 20-25. Concerning the blood test, the expert opined that "70, 80, 90 percent of people will have a positive test" for herpes because the disease is very common. App. 244, ll. 12-20. The state's expert explained that type one "causes infections usually around the mouth, around the lips and the tongue, sometimes inside the mouth and the cheek." App. 216, ll. 21-24. On the other hand,

type two shows infection "in the genital area." App. 217, ll. 10-13. The expert put it simply: "[T]ype 1 is above the belt and type 2 is really below the belt." App. 217, ll. 19-20.

On July 29, 2009, an Edgefield County grand jury indicted Petitioner for lewd act with a minor (2009-GS-19-349). App. 689-690. On November 10, 2009, an Edgefield County grand jury indicted Petitioner for criminal sexual conduct with a minor (CSCM) in the first degree (2009-GS-19-409). App. 692-693. On February 2-5, 2010, the state, represented by Ervin J. Maye and H. Franklin Young, III, called the case to trial before the Honorable William P. Keesley and a jury. App. 1. Adrian Falgione represented Petitioner. App. 1.

During the trial, Lamaz Robinson testified without objection that he learned that Minor had disclosed that her father was the perpetrator. App. 156, ll. 19-22.[1] Raymond Olszewski, an employee at the Assessment and Resource Center, was qualified as an expert in forensic interviewing of child sexual abuse victims and child sexual abuse. App. 299, ll. 17-22; App. 302, ll. 8-16.[2] Olszewski interviewed Minor on April 14, 2008. App. 304, ll. 4-9. He explained that what he and other forensic interviewers do is conduct "sort of the *expert* interview of the alleged victim." App. 307, ll. 18-21 (emphasis added). Without objection, Olszewski testified that he saw no "red flags" indicating Minor had been coached or had a motive to fabricate the

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[1] See Rule 801(d)(1)(D), SCRE (providing that a prior statement by a witness that is "consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident" is not hearsay); State v. Simmons, 423 S.C. 552, 816 S.E.2d 566 (2018); State v. Brown, 286 S.C. 445, 334 S.E.2d 816 (1985).

[2] When the judge qualified Olszewski as an expert in front of the jury, trial counsel indicated he was preserving his previous objections. App. 302, ll. 14-16. However, when the court conducted an in camera hearing concerning the admissibility of the recording of the forensic interview, trial counsel put forward no objection to or argument against his qualification as an expert. App. 282, ll. 1-3; App. 294, ll. 6-23. The qualification of Olszewski was clearly objectionable. See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013).

allegations. App. 314, l. 17 – App. 316, l. 12.[3] He also testified, without objection, that he found Minor's story was consistent. App. 316, ll. 13-22.[4] On cross-examination, trial counsel elicited that Olszewski recommended counseling for Minor. App. 326, ll. 20-25.[5] Most disturbingly, the solicitor questioned Olszewski about conducting the forensic interview in a "neutral fashion" and whether the "purpose" of "doing so [is] to search for the truth." App. 333, ll. 22-25.[6] Olszewski responded affirmatively, stating, he was "just as interested in finding out if nothing happened as" in "if something happened." App. 334, ll. 1-2.

Petitioner, testifying in his own defense, denied any sexual contact with Minor. App. 391, l. 22 – App. 392, l. 15. Petitioner also informed the jury that he lived at the residence with Minor, her mother, and her brother. App. 383, l. 19 – App. 384, l. 6; App. 385, ll. 16-22. Petitioner's testimony was corroborated by James Calliham, who owned and operated a local furniture and appliance business. App. 377, ll. 12-21. Calliham was familiar with Petitioner because he had sold Petitioner a number of items over the years. App. 377, l. 22 – App. 378, l. 2. Calliham detailed numerous purchases, including air conditioners and a washing machine, made

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[3] It is elementary that a witness may not comment on the credibility of another witness; therefore, this testimony was objectionable because Olszewski indicated that Minor was credible because he saw no "red flags" suggesting she had been coached. See State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011).

[4] Olszewski's testimony that Minor's story was consistent was given to explain why he believed Minor's story and why he determined there were no "red flags" suggesting Minor had been coached. Thus, this testimony was objectionable. See Jennings, supra.

[5] Trial counsel elicited inadmissible and improper vouching testimony by asking Olszewski if he recommended counseling for Minor because such a recommendation carries with it an implicit understanding that he believed Minor. See State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015).

[6] No witness may comment on the credibility of another witness. Olszewski's testimony that the purpose of the forensic interview was to "search for the truth," was a direct comment on Minor's credibility. See Jennings, supra.

by Petitioner dating back to June 14, 2002, and ending on August 28, 2007. App. 378, l. 3 – App. 380, l. 21. According to Calliham, the items purchased by Petitioner were delivered to his home – the one he shared with Minor, her mother, and her brother. App. 378, l. 3 – App. 380, l. 21. Additionally, Petitioner contradicted Minor's testimony regarding the sleeping arrangements. Petitioner explained that he slept in the bed with Minor's mother, who was his girlfriend and the mother of his children. App. 385, ll. 19-25.

The jury found Petitioner guilty as charged. App. 477, ll. 2-13. Judge Keesley sentenced Petitioner to thirty years in prison for CSCM and to fifteen years in prison for lewd act. App. 485, ll. 9-14; App. 691; App. 694. He ordered the sentences to be served concurrently. App. 485, l. 15; App. 691; App. 694.

Petitioner filed a notice of appeal, which was perfected by Wanda Carter by the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 488-499. The issue raised on appeal concerned the trial court's denial of the directed verdict motion concerning the CSCM charge due to the failure of the state to present evidence of penetration. App. 488-499. On February 29, 2012, the Court of Appeals dismissed the appeal. App. 500-501; State v. Jones, 2012-UP-120 (S.C. Ct. App. filed Feb. 29, 2012). Remittitur was sent on March 16, 2012. App. 502.

On April 18, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 503-525. The application was assigned case number 2012-CP-19-100. App. 503-525. An evidentiary hearing convened before the Honorable R. Lawton McIntosh on November 14, 2013. App. 532. Walt Whitmire represented the state, and Courtney Clyburn-Pope represented Petitioner. App. 532. On November 21, 2013, Judge McIntosh filed a Form 4 Judgment stating the decision of the court was to deny the application and directing the state to prepare a proposed

order. App. 673-374. Petitioner sent a letter to the Edgefield County Clerk of Court requesting his counsel file a notice of appeal. App. 671. The Clerk forwarded a copy of the letter to Clyburn-Pope on April 21, 2014. App. 672. Nevertheless, Clyburn-Pope did not file a notice of appeal.

On October 27, 2017, Petitioner filed a second PCR application. App. 604-632. This application was assigned case number 2017-CP-19-367. App. 604-632. The matter proceeded to a hearing before the Honorable William A. McKinnon on April 18, 2018. App. 645. Kristy Goldberg represented Petitioner, and Al Simon represented the state. App. 645.

At the PCR hearing, Petitioner explained that Clyburn-Pope did not provide him with her contact information over the course of her representation of him. App. 653, ll. 8-10. At the conclusion of the hearing, the judge announced that he was denying relief to Petitioner. App. 653, ll. 13-18. Petitioner informed Clyburn-Pope that he wanted to appeal the judge's decision. App. 653, ll. 24-25. Clyburn-Pope responded that she would be in touch with him. App. 654, ll. 1-2. Petitioner never saw the judge's order from April 1, 2014. App. 654, ll. 3-5. On April 14, 2014, Petitioner sent a letter to the Clerk of Court requesting an appeal. App. 654, ll. 10-20. Petitioner did not have Clyburn-Pope's contact information; therefore, he sent his request to the Clerk. App. 654, ll. 17-20. Petitioner wrote to the Supreme Court inquiring about the status of his appeal. App. 656, ll. 1-7. He learned that the Court had no record of his appeal. App. 656, ll. 8-16. As a result, Petitioner filed a second application for PCR. App. 604-632; App. 657, ll. 4-5.

PCR counsel remembered receiving the order of dismissal in Petitioner's case. App. 663, l. 24 – App. 663, l. 1. She did not recall having any contact with Petitioner about the order. App. 664, ll. 2-4. She explained her "firm's practice was was [sic] that when [she] received

those orders, [her] paralegal would mail those orders out." App. 664, ll. 4-5. She could not "confirm whether or not that was done." App. 664, l. 6. She did not have any documentation to show that the order was sent to Petitioner. App. 664, ll. 6-7; App. 665, ll. 7-10. While it was PCR counsel's practice to meet with her PCR clients after the hearing, she did not recall if she met with Petitioner after his hearing. App. 664, ll. 8-15. Importantly, she could not recall if she had any discussions with Petitioner regarding his appeal. App. 664, ll. 16-20.

By an order filed May 21, 2018, Judge McKinnon dismissed Petitioner's second PCR application with the exception of granting him a belated appeal of his first PCR case pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 676-688. Judge McKinnon found Petitioner requested appellate review of his first PCR application. App. 680. Additionally, Judge McKinnon found Petitioner was denied an opportunity to seek appellate review from the denial of PCR relief in his first PCR action due to Clyburn-Pope's failure to file a notice of appeal. App. 680. Judge McKinnon found Petitioner's testimony that he orally requested PCR counsel file a notice of appeal was credible. App. 680. He also found Petitioner's testimony that he wrote a letter to the Clerk of Court, which was forwarded to Clyburn-Pope, requesting an appeal was credible. App. 680. Judge McKinnon found Petitioner proved he was entitled to a belated appeal of his first PCR action. App. 680-681.

On May 29, 2018, Petitioner served his notice of appeal. This petition for writ of certiorari follows.[7]

[7] Petitioner is filing a petition for writ of certiorari pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) along with this petition for writ of certiorari.

ARGUMENT

The PCR court properly granted Petitioner a belated PCR appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) where the undisputed evidence showed Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application.

The PCR court properly granted Petitioner belated appellate review of his initial PCR application because Petitioner was denied his right to appeal the dismissal of his first PCR application. See Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). In South Carolina, "[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application." Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). Pursuant to the rules and statutes governing PCR proceedings, an applicant is entitled to a full adjudication on the merits of the original petition. Id. This includes the right to seek appellate review of the denial of PCR and the right to assistance of counsel in that appeal. Id. at 261, 523 S.E.2d at 755-56. This Court held an individual can appeal a denial of a PCR application after the statute of limitations has expired if the individual either (1) requested and was denied an opportunity to seek appellate review or (2) did not knowingly and intelligently waive the right to appeal. Austin, 305 S.C. at 455, 409 S.E.2d at 396.

This Court held that the procedures prescribed by Anders v. California, 386 U.S. 738 (1967) applied in PCR matters. Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1998). Thus, appellate counsel is required to engage in a conscientious investigation of the possible grounds of appeal and brief arguable issues before appellate counsel may ask to withdraw. Anders, 386 U.S. at 744. The United States Supreme Court held: "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae." Id.

The undisputed evidence showed Petitioner wished to appeal the PCR judge's denial of his PCR application. Thus, evidence in the record amply supports Judge McKinnon's finding that Petitioner is entitled to belated appellate review of his first PCR application. Judge McKinnon found Petitioner "requested appellate review be sought." App. 680. As Judge McKinnon found, Petitioner "informed PCR counsel in person of his desire to appeal the decision" of the first PCR judge. App. 680. Additionally, his desire was made clear in Petitioner's letter to the local Clerk of Court in which he requested PCR counsel file and serve a notice of appeal. App. 671; App. 680. Petitioner explained that he could not contact his PCR counsel directly because he did not have a mailing address for her. App. 671; App. 680. The Clerk of Court indicated his letter was sent to his PCR counsel on April 21, 2014. App. 672; App. 680. Nevertheless, PCR counsel did not file an appeal on Petitioner's behalf. As Judge McKinnon found Petitioner "was denied an opportunity to seek appellate review from the denial of PCR relief in his first PCR action as a result of PCR counsel's failure to file a notice of appeal from the order of dismissal." App. 680.

During the second PCR hearing, PCR counsel offered no reason or explanation for her failure to file a notice of appeal for Petitioner. App. 680. As Judge McKinnon found, "PCR counsel testified she did not recall whether or not [Petitioner] asked her to file [a] notice of appeal or whether or not she ever received anything in the mail from him." App. 680. In essence, PCR counsel "could not confirm or deny his testimony." App. 680. PCR counsel had no "copies of any correspondence between herself and [Petitioner] or notes in her file to submit to the court relevant to this issue." App. 680.

Judge McKinnon found "[Petitioner]'s testimony was credible in that he made known to PCR counsel orally and in writing his desire to appeal the order denying PCR relief in his prior action, and he relied on [PCR counsel] to file the notice of appeal." App. 680. In conclusion, Judge

McKinnon found Petitioner "was denied his opportunity to appeal the denial of relief from the prior action when PCR counsel did not file the notice of appeal that was requested." App. 681. Judge McKinnon determined Petitioner established he was entitled to belated appellate review of his first PCR action. App. 680-681.

Under these circumstances, the PCR court's decision granting Petitioner belated appellate review of his first PCR application should be upheld. See Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) ("The appropriate scope of review of this Court is that 'any evidence' of probative value is sufficient to uphold the PCR judge's findings."). Simply stated, Petitioner is entitled to his one fair bite at the apple. See Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002).

CONCLUSION

Petitioner respectfully requests this Court affirm the PCR judge's conclusion that Petitioner is entitled to a belated appeal of the denial of post-conviction relief.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of January, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Edgefield County

R. Lawton McIntosh, Circuit Court Judge

GEORGE A. JONES,

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 Kelly Oppenheimer, 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 George A. Jones, #254442, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 18th day of January, 2019.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 18th day of January, 2019.

Mary Allgood (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.