

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Pickens County

Honorable Letitia H. Verdin, Circuit Court Judge

RICHARD BURTON BEEKMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001012

JOHNSON PETITION FOR WRIT OF CERTIORARI

LaNelle Cantey DuRant
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

ORIGINAL

RECEIVED

JAN 28 2019

S.C. SUPREME COURT

INDEX

INDEX..... i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT

The PCR court erred in not finding trial counsel ineffective for failing to object to the testimony of Dr. Nancy Henderson, the medical expert who examined the eight year old stepson, which was hearsay pursuant to Rule 801(d)(1)(D), SCRE in this criminal sexual conduct case, because her testimony went beyond time and place and was not a hearsay exception under Rule 803(4), SCRE as her examination was for forensic purposes and not for diagnosis and treatment.....6

CONCLUSION.....8

PETITION TO BE RELIEVED AS COUNSEL.....9

ISSUE PRESENTED

Did the PCR court err in not finding trial counsel ineffective for failing to object to the testimony of Dr. Nancy Henderson , the medical expert who examined the eight year old stepson, which was hearsay pursuant to Rule 801(d)(1)(D), SCRE in this criminal sexual conduct case, because her testimony went beyond time and place and was not a hearsay exception under Rule 803(4), SCRE as her examination was for forensic purposes and not for diagnosis and treatment?

STATEMENT

In October 2005, Tina Aiken, a pharmacist, and her two young children moved in with Petitioner Beekman into his home. Beekman and Tina married in June 2006. In the beginning, the two children, a girl (Stepdaughter) and boy (Stepson), seemed to love Beekman and liked being with him. App. 189, ll. 10 – App. 191, ll. 22.

Then, when Stepdaughter was twelve years old, on July 7, 2008, she was sleeping on the sofa in the living room. Her younger brother was sleeping on a smaller sofa in the living room. App. 102, ll. 3 – 25; App. 107, ll. 14 – App. 108, ll. 13. She woke up during the night with Petitioner Beekman allegedly touching her in her private area and her clothes were pulled down. He was touching the bare skin in her private area. When she awoke, he asked for the remote which was in clear view. He left the room when she awoke. App. 111, ll. 1 – App. 114, ll. 25.

The following day, she told her mother what Beekman had allegedly done to her. The mother then left the home and took Stepdaughter and the eight year old Stepson to their grandmother's house. They never returned to Beekman's home. App. 117, ll. 1 – 25; App. 120, ll. 2 – App. 122, ll. 24.

When the daughter told her father, he took her to the Sheriff's Office and reported what happened. App. 123, ll. 10 – 25.

When they arrived at her grandmother's home, Stepson started "freaking out" as pulling his hair, hiding in the closet and crying. He acted really scared. He finally told his sister that Beekman had sexually abused him. App. 124, ll. 19 – App. 128, ll. 22; App. 208, ll. 17 – App. 214, ll. 4. Stepson said that Beekman had touched his "worm" and made him touch Beekman's "worm." The boy also said that Beekman "penetrated" him by "sticking his worm into stepson's butt." App. 169, ll. 6 – App. 173, ll. 24.

On September 15, 2009, the Pickens County Grand Jury indicted Petitioner Beekman on the charges of criminal sexual conduct (CSC) with a minor first degree and committing a lewd act on a child. App. 499 – App. 508.

On July 25-28, 2011, Petitioner Beekman proceeded to trial before the Honorable G. Edward Welmaker and a jury. Beekman was represented by John DeJong, and the state was represented by Jenny Barwick. App. 1. At trial, Stepdaughter testified as to what Beekman allegedly did to her. She described how he touched her private area. App. 111, ll. 1 – App. 114, ll. 25. Stepson also testified at trial about the sexual activities Beekman had allegedly done to him. App. 165, ll. 3 – App. 177, ll. 24. Petitioner Beekman chose not to testify. App. 372.

Dr. Nancy Henderson, the expert in pediatrics, testified that she had examined Stepson on July 31, 2008 which was about three weeks following the July 7, 2008 incident. App. 264, ll. 1 – App. 266, ll. 25. Her testimony included her description of her activities with the patient. She said that she always talked to patients before the exam because she wanted to understand what happened. She wanted to be sure they were safe where they were living, and she wanted to know what tests to administer. She also needed to know what kind of referrals were needed. App. 266, ll. 16 – 25.

Dr. Henderson then described Stepson's complaints and his description of the sexual touching of the genitals and the penetration. App. 267, ll. 3 – 25. The results of Dr. Henderson's examination were that Stepson had a "little bit of redness covering the outer part of his buttocks area and he had a little bit of redness on the top part of his penis, but otherwise, his exam was normal." App. 272, ll. 3 – 12.

The jury returned a verdict of guilty on both charges as indicted. App. 416, ll. 3 – 23. The judge sentenced Petitioner Beekman to thirty years on the CSC with a minor charge and to

fifteen years on the lewd act charge. The sentences were to be consecutive to each other. App. 423, ll. 6 – 25.

Trial counsel filed a notice of appeal. The appeal was perfected by the Division of Appellate Defense of the Commission on Indigent Defense. The Court of Appeals affirmed Beekman's convictions on June 26, 2013. State v. Beekman, Op. No. 5145 (Ct. App. filed June 26, 2013). Beekman filed a petition for rehearing which was denied by the Court of appeals August 22, 2013. Appellate counsel filed a petition for a writ of certiorari to the Court of Appeals with the Supreme Court for Petitioner Beekman. The Supreme Court granted certiorari. Then the Supreme Court affirmed Beekman's convictions on April 13, 2016. State v. Beekman, Op. No. 27623 (Filed April 13, 2016).

On February 10, 2017, Petitioner Beekman filed an application for post-conviction relief (PCR). The state filed a return on July 26, 2017. An evidentiary hearing was held on October 25, 2017 before the Honorable Letitia H. Verdin. Beekman was represented by R. Mills Arial, and the state was represented by Deshawn Mitchell. App. 456.

Petitioner Beekman testified at the hearing that his trial counsel was ineffective because he did not bring out at trial that Beekman had trouble with Stepdaughter prior to these charges being made. And everything about Stepson was a "lie" as it never happened. Trial counsel should have gone into these issues more with both of them. App. 466, ll. 3 – App. 467, ll. 24. Beekman said that he did not take the plea offer because he was not guilty. App. 470, ll. 2 – 23. Beekman said on cross-examination that his trial counsel did an "honest" job for him but did not do a "good" job. App. 468, ll. 1 – App. 469, ll. 22.

Trial counsel testified that he had to cross examine the boy "delicately" because he was a child. It was the child's statement against Beekman's. App. 477, ll. 2 – 17. The state told trial

counsel that Petitioner Beekman made the allegation in his PCR application that trial counsel was ineffective because he failed to object to Dr. Henderson's hearsay testimony. Trial counsel said that he did not object because he thought there was an exception to the hearsay rule for a treating physician who was testifying for diagnostic or treatment purposes. App. 480, ll. 25 – App. 481, ll. 25.

At that point the PCR judge stated: "You're correct." App. 482, ll. 2. Trial counsel then said: "In retrospect, perhaps I should have objected because I don't think Dr. Henderson was really-----let me stop here. Dr. Henderson was doing a forensic examination and not, in one sense, necessarily for diagnosis or treatment. So if we made that distinction, then perhaps, yes, I should have objected." App. 482, ll. 3 – 11.

The PCR judge issued an order on May 21, 2018 denying Beekman's PCR application and dismissing it with prejudice. App. 485 – App. 498. The judge ruled that trial counsel was not ineffective for not objecting to the testimony of Dr. Henderson because the doctor's testimony was properly admitted pursuant to the exception stated in Rule 803(4), SCRE. The judge wrote that Rule 803(4) provided that statements made for the purposes of medical diagnosis or treatment or describing medical history or symptoms or general character of cause as pertinent to diagnosis were admissible pursuant to the trial court's discretion.

PCR counsel filed an appeal. This petition follows.

ARGUMENT

The PCR court erred in not finding trial counsel ineffective for failing to object to the testimony of Dr. Nancy Henderson, the medical expert who examined the eight year old stepson, which was hearsay pursuant to Rule 801(d)(1)(D), SCRE in this criminal sexual conduct case, because her testimony went beyond time and place and was not a hearsay exception under Rule 803(4), SCRE as her examination was for forensic purposes and not for diagnosis and treatment.

Rule 801(d)(1)(D), SCRE, provides that a statement is not hearsay when it is consistent with the victim's testimony in a criminal sexual conduct case, and the statement is limited to the time and place of the incident.

Rule 803(4), SCRE, provides that statements made for purposes of medical diagnosis or treatment and describing medical history or symptoms, pain, insofar as reasonably pertinent to diagnosis or treatment are admissible pursuant to the trial court's discretion.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant 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, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

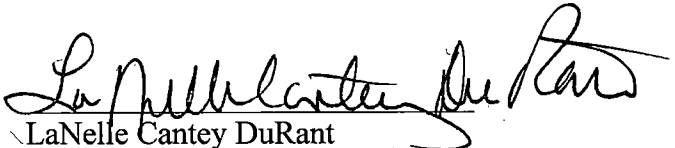
A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), the Supreme Court held that in determining whether the applicant alleging ineffective assistance of counsel has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. In addition, the PCR court should consider the strength of the state's case in light of all the evidence presented to the jury.

Dr. Henderson's testimony was describing a forensic examination to determine if a crime had occurred. Therefore, her testimony should have been limited to time and place. Anything beyond that was hearsay. Trial counsel was ineffective for not objecting and at least requiring a ruling from the trial court on whether the testimony was hearsay.

CONCLUSION

Based on the above, certiorari should be granted, and Petitioner's convictions and sentences vacated, and the case remanded for a new trial.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of January, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Pickens County

Honorable Letitia H. Verdin, Circuit Court Judge

RICHARD BURTON BEEKMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

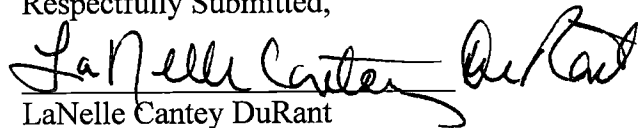
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Richard Burton Beekman states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Letitia H. Verdin, which was held on October 25, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 her as counsel for Richard Burton Beekman.

Respectfully Submitted,



LaNelle Cantey DuRant

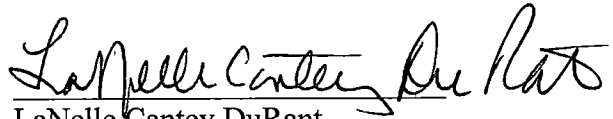
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of January, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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."



LaNelle Cantey DuRant
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

This 28th day of January, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Honorable Letitia H. Verdin, Circuit Court Judge

RICHARD BURTON BEEKMAN,

PETITIONER

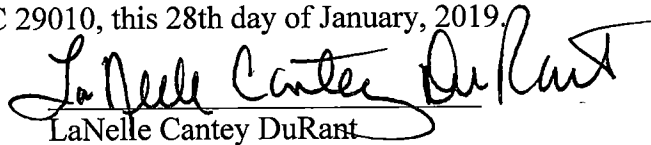
V.

STATE OF SOUTH CAROLINA,

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 Megan Harrigan Jameson, 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 Richard Burton Beekman, #347134, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 28th day of January, 2019.



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 28th day of January, 2019.

 (L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028.