

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Pickens County

Honorable Letitia H. Verdin, Circuit Court Judge

RECEIVED

JAN 28 2019

S.C. SUPREME COURT

GARY HAMILTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000997

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Trial counsel provided ineffective assistance of counsel when she failed to properly object to Shauna Galloway-Williams being allowed to testify as an expert in the field of child sexual abuse dynamics when there was no evidence presented that her testimony was reliable or that her work product had been peer reviewed as required under *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009).....3

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance of counsel when she failed to properly object to Shauna Galloway-Williams being allowed to testify as an expert in the field of child sexual abuse dynamics when there was no evidence presented that her testimony was reliable or that her work product had been peer reviewed as required under State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009)?

STATEMENT

During the September 2012 term, the Pickens County Grand Jury indicted Petitioner for criminal sexual conduct in the first degree. App. 508 – 509. During the July 2014 term, the Pickens County Grand Jury indicted Petitioner for lewd act upon a child. App. 510 – 511.

Petition proceeded to trial on July 28 – 30, 2014 before the Honorable G. Edward Welmaker, and a jury. App.1. Teal Johnson represented Petitioner. Id. Brandi Hinton represented the state. Id. During the trial, Galloway-Williams testified as an expert in child sexual abuse dynamics. App. 348, l. 19. While trial counsel objected to the testimony as improperly bolstering the complaining witness' testimony, she failed to challenge the reliability of Galloway-Williams' testimony under State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). App. 478, l. 11 – 479, l. 1.

Petitioner was found guilty as indicted. App. 433, l. 25 – 434, l. 7. Judge Welmaker sentenced Petitioner to thirty-two years imprisonment for criminal sexual conduct in the first degree and fifteen years' imprisonment for lewd act upon a child. App. 439, l. 22 – 440, l. 1.

On September 7, 2016, Petitioner filed a post-conviction relief (PCR) application alleging ineffective assistance of counsel for failure to properly challenge Galloway-Williams' testimony. App. 442 – 447. On May 26, 2017, the state filed its return. App. 448 – 454.

On October 25, 2017, Petitioner's PCR hearing was held before of the Honorable Letitia H. Verdin. App. 456. R. Ariail Mills represented Petitioner. Id. Deshawn Mitchell represented the state. Id.

On May 15, 2018, Judge Verdin filed an order of dismissal that found trial counsel provided representation within reasonable professional norms. App. 488 – 507; App. 503 – 505. Judge Verdin also found that Petitioner failed to show exactly what information should have been elicited if the witness had been properly challenged. Id.

ARGUMENT

Trial counsel provided ineffective assistance of counsel when she failed to properly object to Shauna Galloway-Williams being allowed to testify as an expert in the field of child sexual abuse dynamics when there was no evidence presented that her testimony was reliable or that her work product had been peer reviewed as required under State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009).

Relevant Facts

The state alleges the facts as follows. Sometime in the months prior to August 2011, Petitioner improperly touched Minor, the complaining witness. App. 210, l. 23 – 211, l. 23. Petitioner was a family friend to the complaining witness' mother and let the two stay in his home when they were homeless. App. 210, ll. 5 – 10. The complaining witness alleged that Petitioner digitally penetrated her while in his truck, in the parking lot of a church. App. 188, ll. 21 – 22; App. 190, l. 20 – 191, l. 24.

Petitioner voluntarily spoke to police on multiple occasions. App. 239, l. 23 – 240, l. 7. The officers he spoke to allege that Petitioner made inculpatory statements; however, Petitioner is illiterate and it was actually the officers themselves who wrote the statements for Petitioner to sign. App. 253, l. 20 – 254, l. 3. Since Petitioner cannot read, he relied on the word of the officers as to what he was signing. App. 140, ll. 1 – 5. Despite Petitioner's intellectual deficiencies, *none* of the interviews nor the preparation and signing of the written statements were recorded. App. 477, ll. 3 – 10.

During trial, the state sought to admit Shauna Galloway-Williams as an expert in child sexual abuse dynamics. App. 331, l. 15 – 332, l. 11. Galloway-Williams' testimony was proffered. App. 336, l. 18 – 343, l. 2. She testified about: abusers are most often people the child knows, delayed disclosure in children alleging sexual assault, factors that might lead to delayed disclosure,

children's difficulty regarding remembering the time of the alleged abuse, etc. App. 337, l. 22 – 343, l. 2; App. 348, l. 17 – 358, l. 19.

Trial counsel objected to the testimony, but only argued that Galloway-Williams' testimony improperly bolstered the complaining witness' credibility under State v. Douglas. App. 332, l. 15 – 333, l. 12; App. 344, l. 5 – 345, l. 1. Trial counsel argued, "All of [Galloway-Williams'] testimony is... bolstering this child's testimony ... [Galloway-Williams is] just trying to gloss over the impeachable evidence from the state." App. 344, l. 5 – 345, l. 1. Moreover, trial counsel argued that Galloway-Williams testimony would only confuse the jury, added nothing to the state's case, and improper, "for a host of reasons. App. 332, l. 15 – 333, l. 12.

Trial counsel did not object to Galloway-Williams' testimony as unreliable under Rule 702, SCRE, in that there was no evidence presented showing that Galloway-Williams' methods were reliable nor was there any evidence her work product was peer reviewed. App. 478, l. 21 – 479, l. 3. Trial counsel did not ask Galloway-Williams *any* questions during the proffer. App. 343, ll. 19 – 20.

While Galloway-Williams testified about her titles and training, none of her testimony, during the proffer or during trial, presented any evidence that her methods were reliable or that her conclusions were peer reviewed. The trial court admitted Galloway-Williams as an expert in child sexual abuse dynamics and allowed her to testify. App. 346, ll. 2 – 20. During Galloway-Williams testimony in the state's case in chief, trial counsel failed to inquire as to what research Galloway-Williams based her testimony on and failed to ask Galloway-Williams to produce data showing her research was valid.

After Petitioner was found guilty as indicted, he filed a PCR application. App. 442 – 447. Petitioner alleged that trial counsel was ineffective for failure to properly challenge Galloway-Williams' testimony. Id.

At Petitioner's PCR hearing, trial counsel testified that she did not object to Galloway-Williams' testimony as unreliable. App. 478, l. 21 – 479, l. 3. Nor did trial counsel object on the grounds that there was no evidence presented that Galloway-Williams' work product had been peer reviewed. Id. Trial counsel stated that she only provided a "global" objection. App. 478, ll. 18 – 20.

Discussion

Trial counsel provided ineffective assistance counsel when she failed to object to Galloway-Williams' testimony on the grounds that there was no evidence presented that her methods were reliable nor that her work product had been peer reviewed. See State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). Moreover, there is a reasonable likelihood that had trial counsel properly challenged Galloway-Williams' testimony, the outcome of Petitioner's trial would have been different.

All expert testimony must meet the requirements of Rule 702, SCRE. The trial court must confirm the reliability of an expert's testimony to fulfill the duty of its gatekeeping function. This also applies to non-scientific evidence. Id.

In State v. Tapp, 389 S.C. 376, 728 S.E.2d 468 (2012) this Court held that the expert's testimony was, "not properly vetted for its reliability before its admission into evidence as required by... White." Id. at 391, 728 S.E.2d at 476. The trial court in Tapp performed the same deficient vetting process as was performed in the present case. This Court found that the trial court admitted the expert's testimony based solely on a finding that he was qualified as an expert, and did not make a finding on the expert's reliability. Id. at 387, 728 S.E.2d at 474. Therefore, admission was improper. Id.

In State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015) this Court applied the State v. White, supra, principle that child abuse assessment experts should face two threshold

determinations before being admitted into trial. Id. at 106 – 107, 771 S.E.2d at 338 – 339. Namely, this Court held that, “first the qualifications of the expert must be sufficient, and second, there must be a determination that the expert’s testimony will be reliable.” Id.

In Chavis, this Court determined that although the “expert” Mrs. Elliot was sufficiently trained, there was no evidence that her conclusions were accurate. Moreover, this Court held that, “mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures she consistently applies. We find no [such] evidence in this record... and thus find that the threshold reliability requirement of Rule 702 is not met.” Id. at 108, 771 S.E.2d at 339. Accordingly, the trial court abused its discretion when it admitted Mrs. Elliot to testify as an expert. Id.

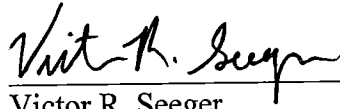
Here, the trial court made no finding that Galloway-Williams’ testimony was reliable nor that her work product was peer reviewed. It was incumbent upon trial counsel to bring that error to the trial court’s attention and her failure to do so constituted deficient performance. The record shows that trial counsel chose only to object to Galloway-Williams’ testimony as improperly bolstering the complaining witness’ credibility. App. 344, l. 5 – 345, l. 1. Moreover, trial counsel provided ineffective assistance when she chose not to question Galloway-Williams’ at all during the proffer. App. 343, ll. 19 – 20.

Trial counsel’s failure to challenge Galloway-Williams’ testimony prejudiced Petitioner because all of Galloway-Williams’ testimony about child sexual abuse cases went uncontested. There is a reasonable probability that the jury convicted Petitioner on the basis of Galloway-Williams’ uncontested and unsupported conclusions without any showing that the methods the “expert” used were reliable, nor any showing that the conclusions she came to were peer reviewed.

It is difficult for a defendant to have a fair trial when allegations as heinous as the present ones are levied against him. However, here the admission of "expert" testimony without determining its reliability and without determining the work product of the "expert" had ever been peer reviewed, rendered the prospect of a fair trial for Petitioner impossible. Therefore, Petitioner is entitled to a new trial.

CONCLUSION

By reason of the foregoing arguments, Petitioner's convictions should be reversed and this case remanded to the Pickens County for a new trial.



Victor R. Seeger
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

GARY HAMILTON,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gary Clifton Hamilton states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
 2. He 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 his opinion, the appeal is without legal merit sufficient to warrant a new trial.
 3. He 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 him as counsel for Gary Clifton Hamilton.

Respectfully Submitted,



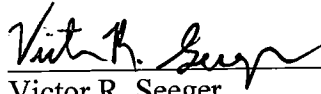
Victor R. Seeger

Appellate Defender
ATTORNEY FOR PETITIONER

This 28th day of January, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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."



Victor R. Seeger
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ATTORNEY FOR PETITIONER

This 28th day of January, 2019.

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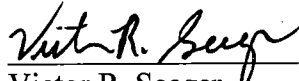
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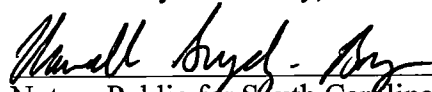
CERTIFICATE OF SERVICE

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 Gary Clifton Hamilton, #360860, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 28th day of January, 2019.



Victor R. Seeger
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: July 26, 2028