

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

Honorable William A. McKinnon, Circuit Court Judge

RICKY EUGENE PASSMORE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001737

PETITION FOR WRIT OF CERTIORARI

TAYLOR D GILLIAM
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

APR 01 2019

S.C. SUPREME COURT

INDEX

INDEX..... i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT.....4

CONCLUSION.....10

ISSUE PRESENTED

Whether the PCR court erred in denying relief, where trial counsel failed to object to the admission of a prejudicial recorded telephone call Petitioner made to his daughter, where the call was so offensive that it caused the trial judge to sever Petitioner's case from his co-defendant's?

STATEMENT

On August 22, 2013, Petitioner was indicted by a York County grand jury on the charges of burglary in the first degree, kidnapping, possession of a weapon during the commission of a violent crime, and criminal domestic violence of a high and aggravated nature. App. 6 ll. 7 – 14; App. 425 – 426. He proceeded to trial before the Honorable John C. Hayes, III and a jury on March 31, 2014. App. 1. Jessica Holland appeared on behalf of the State, and Dan Hall, now Judge Hall represented Petitioner.¹

Petitioner was scheduled to be tried with his brother and co-defendant, Micky Passmore. App. 6 ll. 14 – 16. Following a motion to sever by Micky Passmore, Petitioner proceeded to trial alone. App. 12 l. 2 – App. 19 l. 21. The jury found Petitioner guilty of burglary in the first degree and not guilty on the remaining charges. App. 277 l. 16 – App. 278 l. 5. Judge Hayes sentenced Petitioner to thirty years' incarceration. App. 284 ll. 8 – 9.

Petitioner appealed, and the Court of Appeals affirmed. State v. Passmore, Op. No. 2016-UP-097 (S.C. Ct. App. filed March 2, 2016). Petitioner then filed a timely application for post-conviction relief on February 16, 2017. App. 286 – 292. It contained allegations of ineffective assistance of counsel. App. 288. The State made its Return on or about June 8, 2017. App. 293 – 297.

An evidentiary hearing was convened on August 1, 2018 before the Honorable William McKinnon. App. 298. Stephen W. Fowler represented Petitioner, and Julie Coleman appeared on behalf of the State. Petitioner, the assistant solicitor, and trial counsel testified at the hearing.

¹ For ease of reference, Petitioner will respectfully refer to Judge Hall as trial counsel.

Judge McKinnon took the matter under advisement and issued an Order of Dismissal on September 10, 2018. App. 406 ll. 8 – 9; App. 411 – 424.

This petition follows.

ARGUMENT

The PCR court erred in denying relief, where trial counsel failed to object to the admission of a prejudicial recorded telephone call Petitioner made to his daughter, where the call was so offensive that it caused the trial judge to sever Petitioner's case from his co-defendant's.

Relevant facts

Trial counsel failed to object to the admission of a highly prejudicial telephone call surreptitiously recorded by his daughter. Deemed a "redneck rant" by trial counsel, this telephone call contained racist and offensive language which shocked the conscience. Even with its admission, the jury still found Petitioner not guilty of criminal domestic violence of a high and aggravated nature, kidnapping, and possession of a weapon during the commission of a violent crime. Had trial counsel objected to the admission of the recorded telephone call, a successful argument could have been made to suppress it, and Petitioner could have been acquitted of the burglary charge.

The events giving rise to Petitioner's arrest did not result in any injuries. On June 19, 2013, Petitioner called his sixteen year old daughter at around 12:30 a.m. App. 117 ll. 5 – 22. Petitioner's daughter recorded the telephone call, and she shared it with her mother and Petitioner's ex-wife, Julia Coleman as soon as she got off the phone with him. App. 97 ll. 3 – 19. After listening to the recording, Coleman went back to sleep. Id. Approximately five hours after the call was placed, Petitioner came into the house where his daughter and Coleman lived along with Petitioner's son. App. 117 l. 23 – App. 119 l. 20.

Petitioner's son opened the door and Petitioner and his brother, Micky Passmore, came into the home. App. 97 l. 22 – App. 98 l. 6. Petitioner's son ran to a neighbor's house and called 911. App. 100 ll. 8 – 9. Petitioner and Micky then left the home. App. 100 ll. 10 – 20. According to Coleman, Petitioner was looking for her new boyfriend, Chip. App. 98 ll. 10 – 19. Coleman indicated that Chip had previously left around 10:30 the previous evening. App. 96 l. 22 – App. 97 l. 2.

At the outset of trial, counsel for Micky Passmore, Peter Nosal moved to sever the Passmore brothers' trials. App. 12 ll. 2 – 3. In support of his motion, Nosal described the audio recording of the telephone call as "incredibly prejudicial; it is offensive, it is reprehensible, it is shocking to say the least." App. 12 ll. 2 – 15. The assistant solicitor agreed that "the tape is incredibly declamatory and offensive." App. 13 ll. 20 – 21.

After listening to the audio, the trial court granted the motion to sever. App. 19 ll. 15 – 21. The very first lines of the State's opening statement directly quoted the audio recording. App. 44 l. 24 – App. 45 l. 2. During trial, a recording of the telephone call was entered without an objection by trial counsel. App. 120 ll. 11 – 17. The recording was played for the jury at trial and during the State's closing argument. App. 131 ll. 1 – 11; App. 250 l. 3 – App. 253 l. 2.

According to the State, this telephone call "completely illuminate[d] the entire case" and served as "the State's entire case as to exactly why" the Passmore brothers were at Coleman's home. App. 15 ll. 16 – 19. As noted by the assistant solicitor, "[i]f you remove this call the case does not even resemble in actuality what it actually was." Id. Counsel for Micky Passmore correctly stated that "[their] whole case is based on this audio tape." App. 18 ll. 14 – 15.

At his evidentiary hearing, Petitioner indicated that he expressed a desire to trial counsel for the recorded telephone call to be suppressed based on its prejudicial nature. App. 355 ll. 4 –

24. Trial counsel testified that he was appointed to Petitioner's case. App. 367 ll. 11 – 12. He recalled that the recorded call was approximately twenty minutes long and included "a conversation [Petitioner was] having with his daughter about his ex-wife having an African American boyfriend in the house." App. 376 l. 5 – App. 377 l. 19.

Trial counsel characterized the recording as embarrassing. App. 377 l. 20 – App. 378 l. 24. When asked whether he had a basis for suppression, trial counsel responded that "the State's position was that it was important to show motive and intent why he went" to Coleman's home. Id. Counsel admitted that he did not move to exclude the recorded conversation at trial, and he could not recall whether Petitioner asked him to do so. App. 378 ll. 10 – 24. On cross-examination, trial counsel reiterated that he did not file a suppression motion, because Petitioner "was always insistent that that recording was the truth, and he wanted ... everybody to hear the whole truth." App. 394 ll. 13 – 20.

The Order of Dismissal found that the recording was "terrible evidence and hurt [Petitioner's] case." App. 416. The Order of Dismissal also discussed trial counsel's testimony that "this phone call showed [Petitioner's] motive, his intent, and his reason for going over to [Coleman's] home on the night of the crime." Id. For this reason, he should have moved to suppress it.

Discussion

Trial counsel offered an honest summary of the telephone call: "It was 20 minutes of conversation with his daughter expressing great displeasure about the ex-wife's relationship with this African American boyfriend." App. 376 l. 5 – App. 377 l. 19. Based on the prejudicial nature of the profanity-laced and racism-riddled telephone call Petitioner made to his daughter, trial counsel should have objected to its admission and sought to suppress it.

To establish a claim of ineffective assistance of counsel, petitioner must show counsel's representation fell below an objective standard of reasonableness and that defendant was prejudiced by such deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992).

In order to prove that counsel's performance was deficient, an applicant must show that his counsel failed to render reasonably effective assistance under prevailing professional norms. Cherry v. State, 300 S.C. at 117–18, 386 S.E.2d at 625. In order to prove that he was prejudiced by his counsel's deficiency, an applicant must show that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Although analyzed under a slightly different lens, the granting of Micky Passmore's motion for severance indicated that this recording was unfairly prejudicial. “A motion for severance is addressed to the sound discretion of the trial court.” State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct.App.2002). “A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt.” State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct.App.2005).

Although not much reasoning was given regarding the trial judge's decision to grant the severance motion, the reason the motion was made in the first place illuminates the issue. As previously discussed, counsel for Micky Passmore described the recording as “incredibly prejudicial” and “offensive,” and the assistant solicitor agreed that the recording was

“declamatory and offensive.” App. 12 l. 2 – App. 13 l. 21. Based on the offensive nature of the audio recording, trial counsel should have sought to suppress it or redact the offensive portions.

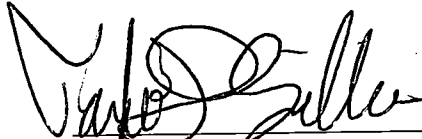
Only relevant evidence is admissible. Rule 402, SCRE. “ ‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. Even if evidence is relevant, it “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE. “Unfair prejudice” means an undue tendency to suggest a decision on an improper basis. State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998).

“The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court.” State v. Johnson, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). “However, photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to the issues at trial.” Id. “To be classified as unfairly prejudicial, photographs must have a ‘tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.’ ” State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010) (quoting State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)). When juxtaposing the prejudicial effect of evidence against the probative value, for purposes of the rule providing that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, the determination must be based on the entire record and will turn on the facts of each case. Gilchrist, supra, 329 S.C. at 627, 496 S.E.2d at 427.

Much like photographs, the audio recording heard by the jury was calculated to arouse prejudice of the jury and should have been excluded. When evidence's prejudicial effect outweighs its probative value, it should be excluded, even if otherwise relevant. State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008). The racism and profanity could have been redacted, but such a request was not made. As a result, the entire call was admitted, and the jury passed judgment on Petitioner. Had the call been excluded or redacted, the jury would not have heard about why Petitioner was going over to Coleman's house and thereby rendered a not guilty verdict on the burglary charge. If the State was unable to prove that Petitioner entered the home with the intent to commit a crime, the jury would have acquitted him on the only charge for which he was found guilty.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charge against him, and remand the case for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of April, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

—————
Certiorari to York County

Honorable William A. McKinnon, Circuit Court Judge

—————
RICKY EUGENE PASSMORE,

PETITIONER

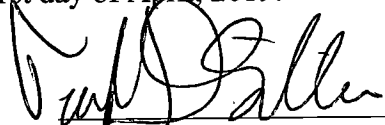
V.

STATE OF SOUTH CAROLINA,

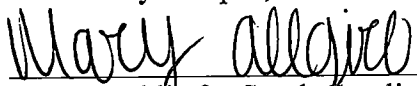
RESPONDENT

—————
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 Janell Gregory, 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 Ricky Eugene Passmore, #315667, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 1st day of April, 2019.


Taylor D. Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 1st day of April, 2019.

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