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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Civil Action No. 2014-CP-32-4479

Glenn Edwin Vanover,Petitioner,

v.

State of South CarolinaRespondent.

BRIEF OF PETITIONER

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STATEMENT OF ISSUE ON APPEAL

- I. The circuit court err in holding that petitioner's trial counsel was not ineffective in failing to properly investigate claims that the victim made unfounded allegations of a sexual nature against a former teacher?

STATEMENT OF THE CASE

The Petitioner, Glenn Vanover, was charged in Lexington County with two counts of criminal sexual conduct with a minor under the age of eleven (CSC), first-degree in violation of S.C. Code Annotated Section 16-3-655 (Indictment Nos. 2011-GS-32-2356; -2357). This was a delayed reporting case, with the claims made in February 2011 based upon alleged conduct occurring between 2004 and 2007. On August 28, 2012, the Petitioner proceeded to trial as charged before the Honorable Perry Buckner. After hearing the testimony, the jury found Petitioner guilty as indicted on both offenses. Petitioner was sentenced to two terms of twenty-six (26) years imprisonment. App. p. 511-512.

The Petitioner timely appealed his conviction and sentence to the South Carolina Court of Appeals. The lone issue appealed was whether the circuit court erred in admitting testimony concerning prior bad acts of the defendant toward the mother of the alleged victim. In an unpublished opinion, the Court of Appeals affirmed the Petitioner's conviction and sentence as the issue was not properly preserved. State v. Vanover, 2013-UP-481 (S.C. Ct. App. filed December 23, 2013). The Petitioner did not pursue a further appeal in this Court.

On December 10, 2014, the Petitioner timely filed an Application for Post-Conviction Relief with the Lexington County Clerk of Court raising multiple issues. An evidentiary hearing into the matter was convened on April 19, 2016, before the Honorable Perry H. Gravely, presiding circuit judge. On June 17, 2016, the PCR court issued an Order of Dismissal which denied relief on all of the Petitioner's claims. App. p. 478. The Order of Dismissal was filed June 22, 2016, and an accompanying Form 4 Judgment issued on

June 27, 2016, with the parties being served with a copy of the Order of Dismissal that same date.

The Petitioner timely filed and served a Motion to Reconsider pursuant to Rule 59(e). App. p. 485. A Return to Motion to Reconsider was filed by the State on July 21, 2016. App. p. 497. On July 28, 2016, the PCR court issued a one page Order denying Applicant's Motion to Reconsider without oral argument. App. p. 506. The Order denying reconsideration was filed on August 12, 2016, with a copy being mailed to counsel of record on August 15, 2016. The Petitioner timely filed and served his Notice of Appeal from both of the PCR court's orders on September 14, 2016. A Petition for a Writ of Certiorari was filed on March 27, 2017, together with the Appendix. A Response in Opposition submitted on July 26, 2017 and a Reply in Support filed on August 17, 2017. An Order was filed on February 6, 2019, Vanover's petition for a writ of certiorari was granted on the issue addressed herein.

STANDARD OF REVIEW

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove a claim of ineffective assistance of trial counsel, the moving party must show that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Id. In other words, the

Petitioner must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.

On appeal, a PCR court's findings will be upheld if there is any evidence of probative value supporting them. Cherry v. State, 300 S.C. 155, 386 S.E.2d 624 (1989). If no probative evidence is found, the reviewing court will reverse the lower court's findings. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000). While deference is given to factual findings of the trial court, questions of law are reviewed de novo. See State v. Smalls, 422 S.C. 174, 810 S.E.2d 836 (2018).

ARGUMENT

I. The PCR court erred in concluding that defense counsel was not ineffective in failing to investigate and present evidence of the false allegations made by the victim against Kenneth Pace.

As a general rule, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, *supra*, 446 U.S. at 691; see also Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008)(citing Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007)). "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Lounds (citing Ard, 642 S.E.2d at 597). Both this Court and the Court of Appeals have recognized that the failure to investigate and to present favorable testimony at trial constitutes ineffective assistance of counsel. See McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008); Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).

FACTUAL ALLEGATIONS

In 2011, when the victim, Petitioner's daughter, was 14 years of age, she reported to school officials that Petitioner sexually assaulted her on multiple occasions between 2004 and 2007, when she was eight to ten years of age. App. p.509-510. With the delay in reporting, there was no physical evidence to support the allegations. While evidence was presented that when the victim was in the seventh grade she raised a similar claim to her mother, the defense presented testimony that the allegations were later withdrawn by the victim. App. p. 116-117; 188; 204; 211. The defense presented testimony from Petitioner and the victim's mother that the instant allegations were manufactured because the victim had not been doing well in school, had been getting in trouble, and was being disciplined at home. App. p. 189-190; 211-213. The victim admitted that when she made the original claim when she was in the seventh grade and when she raised the allegations that gave rise to the instant charges, she was not doing well in school. App. p. 130; 137-138. Both times the victim made the allegations refer to the same time period of alleged abuse. No new conduct was alleged to have occurred between the first reporting to her mother and the second reporting which gives rise to these charges.

There were no eyewitnesses to the offense, and no forensic evidence to corroborate the victim's allegations. The jury's determination was based solely upon the testimony of the victim who raised the allegations and the remainder of the family (Petitioner, the victim's mother, and the victim's grandmother) who denied the allegations. Thus, the case was determined based upon the credibility of the witnesses. Thus, evidence that the victim

had previously made false allegations of this nature against a third party would have severely impaired her credibility and effected the verdict.

To support the defense's theory that the victim manufactured the allegations as a way to avoid punishment or improve her situation, the defense presented evidence that the first time the victim raised allegations of sexual misconduct by Petitioner, the victim was angered that her older brother was given a car for his 16th birthday and she was not permitted to go with he and his friends. App. p.185-186. Immediately after the Petitioner told the victim she could not go with her brother and his friends, she pulled her mother aside and made the allegations. When the victim and her mother spoke further about the allegations, the victim alleged the assaults occurred between the ages of "two to six," later changing to ages "eight to ten." App. p. 187. In response to these accusations, the victim was permitted to do what she wanted, go and stay with a friend of hers. App. p.118-119; 186. According to the victim's testimony, she stayed with the friend for two months, but at no point in time did she disclose to the parents of that friend the reasons she left her parent's home. App. p. 118-119. The victim's mother testified that the length of the stay was only three days. App. p. 186.

After being allowed to stay with her friend, the victim went with the Petitioner and her mother to her grandmother's house. While at her grandmother's house, her grandmother suggested she would have a "lie detector test done. We will get this taken care of right now." App. p. 188. According to the victim's mother and her grandmother, the victim then admitted she was lying. App. p. 188; App. p. 204.

The second time these allegations against Petitioner were levied was approximately two years later in February 2011, when the victim was a ninth grader at Batesburg High School. App. p. 189. Again, this report was of the same alleged conduct as the initial report with no allegation of any intervening conduct by Petitioner. During that time, she was not doing well in school, and according to her mother's testimony, the victim was constantly getting in trouble in school. App. p. 189. The victim's mother also testified that the victim had missed an excessive number of days at school. App. p. 190. In response, Petitioner and the victim's mother disciplined the victim – "No phone. No TV. Just your bed and books. You come in from school, you go to your room. You come out to eat, you go to your room." App. p. 190. This restriction lasted, on estimate, two weeks before the victim made the instant allegations to a teacher at her school. App. p. 190.

Petitioner proceeded to trial in Lexington County General Sessions on August 28-29, 2012, 5 to 8 years after the offending conduct was alleged to have occurred. Testifying on behalf of the State was Mike Horne, the teacher to whom the victim reported the allegations, Deputy Jonathan Grooms, the school resource officer for Batesburg-Leesville High School, the victim, Officer Mary Longshore, who was involved in the investigation, and Constance Lambert with DSS. All of the State's witnesses except the victim could only report on their observations of the victim during her reporting process. Thus, credibility of the victim was key.

During the victim's trial testimony, she reported that she first told her mother of the alleged abuse after watching her parents argue because "I thought she should know that." App. p. 117. According to the victim, this was when she was in the seventh grade,

approximately two years after the victim reported that the last assault had occurred. App. p. 117. When questioned why it took the victim two years to tell her mother, the victim testified “I seen the way he treated my mom and how he hit her.”¹ App. p. 118.

The defense presented the testimony of Melanie Vanover, the victim’s mother and Petitioner’s wife, Margaret Vanover, the victim’s grandmother and Petitioner’s mother, Petitioner, and Mike Horne was recalled to outline that the victim’s school records were available. As outlined herein, Petitioner’s theory of the case was that the victim engaged in a pattern of getting in trouble, or otherwise seeking to improve upon her plight, and would raise allegations of abuse. The victim’s brother’s receipt of a new car, Petitioner’s refusal to allow the victim to go with her brother and his friends, and her desire to stay with a friend all supported the defendant’s theory regarding the initial report of abuse to the victim’s mother. Similarly, the victim’s troubles in school and her punishment at home supported the Petitioner’s rationale for her manufacturing the allegations. As these two situations involved only the Petitioner, evidence of a similarly manufactured allegation against a third party would have given significant credence to the theory, and thereby increased the likelihood the jury might return a different verdict.

Not presented to the jury was the fact that around the same time that the victim initially made the report against Petitioner, the victim made another unfounded allegation of a sexual nature against a teacher of hers, Kenneth Pace. Mr. Pace was not called as a

¹ General objection was made by defense counsel, but the Court in overruling the objection treated it as one of hearsay and cautioned the victim not to testify as to what someone else said. No further clarification or argument was presented by defense counsel despite the fact that the statement was clearly one of a prior bad act. This issue formed the basis of Petitioner’s direct appeal.

witness in the trial, but during the PCR hearing, he testified that an allegation was made that he asked the victim about her underwear, her menstrual period, and her boyfriends. App. p. 355-56. Mr. Pace immediately went to the administration and reported the allegations, denying the same. App. p. 356. She was removed from his class, App. p. 356, but Mr. Pace had no adverse action taken against him in response. App. p. 357. Even more relevant to the defense is the fact that these false accusations against Mr. Pace correspond to his reprimand of the victim in class, after providing several warnings, and ultimately giving the victim detention. App. p. 352. The day after assigning detention, the accusations arose. App. p. 355.

While trial counsel was familiar with the name Kenneth Pace, and that “there was some allegation about the alleged victim” (App. p. 327), counsel never spoke with Mr. Pace. App. p. 334. No investigation was done by trial counsel into the allegations against Mr. Pace. As a result, the victim was not questioned about the accusations. Mr. Pace did not testify at the trial. No evidence was submitted to the jury regarding the victim’s false accusations of a sexual nature against Mr. Pace in an attempt to avoid punishment.

In the Order of Dismissal, the PCR court does not address whether a reasonable investigation would have required, at a minimum, an interview of Mr. Pace. Instead the PCR court incorrectly notes the allegations against Mr. Pace were that he inquired into the color of her underwear and merely concludes that “the Court finds Applicant did not establish the testimony would have been admissible. Further this Court finds Applicant failed to show that the failure to introduce the testimony prejudiced Applicant.” App. p.

481-82. Such a summary conclusion on this issue are unsupported by any probative evidence.

Beginning with Strickland's performance prong, defense counsel was under a duty to investigate prior false allegations of a sexual nature. As an initial matter, this case was a delayed reporting case, so there was no physical evidence to support the allegations. Thus, the credibility of the witnesses was key. Secondly, the theory of the defense was that the victim manufactured accusations to avoid punishment and improve her circumstances. Having a prior allegation against a teacher to avoid detention would have clearly supported this theory of the defense and undermined the victim's credibility. That the victim levied an earlier accusation against the Petitioner is one thing; making such an unfounded allegation against another person strengthens the argument immensely.

Defense counsel's testimony was that he was aware of Mr. Pace and that some situation had arisen between Mr. Pace and the victim involving her underwear. At a minimum, this would have caused a reasonable attorney to inquire further, especially when the facts align with the theory of the case. No such inquiry was made, however. As the credibility of the victim was the heart of the State's case, it is clear that counsel was under a duty to investigate. See generally Rompilla v. Beard, 545 U.S. 374, 394 (2005) (O'Connor, J., concurring) (concluding that the defense attorneys' performance was deficient for failing to investigate a matter that "would be at the very heart of the *prosecution's* case") (emphasis in original).

Defense counsel failed to meet this critical obligation. As he admitted before the PCR court, he never spoke to Mr. Pace. App. p.334. While defense counsel did receive and

review the discovery, and also speak with the family about the victim and the charges, both the discovery materials provided by the State and the notes from the victim's mother contained references to her false accusations against Mr. Pace. Once he was armed with reference to these accusations against Mr. Pace, it was imperative for defense counsel to investigate how further to use this information to discredit the victim and corroborate the defense's theory. Had defense counsel undertaken any investigation, he would have learned was that the victim only raised these denied allegations immediately after Mr. Pace had "written her up" in class for misconduct. Appx. p.351, l. 22 through p.353, l. 9. Mr. Pace also elaborated that the allegations had been more than simply inquiring as to the color of underwear, but also included an inquiry as to the victim's menstrual cycle and whether she had a boyfriend. Appx. p.355, ll. 18-21. Thus, the sexual nature of the allegations against Mr. Pace, similar to those against Petitioner, are readily apparent. The circumstances Mr. Pace testified to are remarkably similar to those allegations made against Petitioner: victim gets in trouble, and makes allegations of a sexual nature in an effort to avoid discipline.

In Miller v. State, 379 S.C. 108, 665 S.E.2d 596 (2008)(abrogated on other grounds, State v. Smalls, 422 S.C. 174, 810 S.E.2d 836 (2018)), this Court was able to evaluate the reasonableness of counsel's actions in the context of a limited defense – third party guilty. The defendant in Miller averred that counsel was ineffective for failing to properly cross examine a witness regarding the specifics of other armed robberies that the eye witness engaged in with the defendant's nephew who was similar in appearance and the robberies were similar to the instant robbery. The Miller Court concluded trial counsel was deficient

in failing to elicit these similarities considering the third party defense. Here, the defense was that the victim manufactured the allegations to escape punishment. Trial counsel failed to investigate or question any witnesses regarding the victim's prior allegations levied against a teacher when he punished her for conduct occurring within his classroom. Like with Miller, based upon the limited defense, it was crucial for trial counsel to elicit testimony that showed the similarities. See Miller, 379 S.C. at 116, 665 S.E.2d at 600. In the instant matter, trial counsel failed to reveal the similarities in the accusations because he failed to investigate the matter at all.

Turning to Strickland's prejudice prong, the Petitioner contends that the PCR court's findings are both controlled by an error of law and unsupported by any probative evidence. As noted above the PCR court summarily concluded that the Petitioner failed to show he was prejudiced by counsel's failure. The PCR court was to determine whether or not there was a reasonable probability that the result of the trial would have been different had counsel investigated the claims against Mr. Pace and presented such evidence to the jury. See McKnight, 378 S.C. at 43-46, 661 S.E.2d at 359-360 (finding prejudice where a defense expert refuted the cause of the victim's death for homicide by child abuse but was not called by the defense). It is hard to credibly believe that there is a reasonable probability that the result of the trial would have been the same had the jury learned that the victim had previously made these allegations against Mr. Pace the day after he put her in detention. The facts parallel the theory of the case, but come from a third party witness who has no interest in the instant prosecution. The testimony is clearly relevant to the instant situation, and hardly can it be said that had allegations as similar as these been

admitted during Petitioner's trial, that the verdict would be the same. Thus, the deficiency of counsel is "sufficient to undermine the confidence in the outcome of the trial." See McLaughlin v. State, 352 S.E. 476, 483, 575 S.E.2d 841, 844 (2003).

Rather than conduct the foregoing analysis, the PCR court simply determines that Petitioner did not establish the testimony would have been admissible. This conclusion appears to substitute for any additional analysis. Such is an improper conclusion.

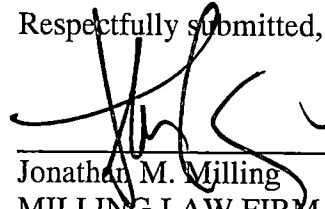
At a minimum, had trial counsel learned of the prior unfounded accusations against Mr. Pace, he could have effectively cross examined the victim on the point. A defendant in a criminal case is guaranteed a right to "meaningful" cross examination pursuant to the Sixth Amendment. See State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998); State v. Cheeseboro, 346 S.C. 526, 544, 552 S.E.2d 300, 309 (2001). "(A)ny matter is a proper subject of cross-examination which is responsive to testimony given on direct examination, or which is material or relevant thereto, and which tends to elucidate, modify, explain, contradict or rebut testimony given in chief by the witness." State v. Allen, 266 S.C. 468, 483, 224 S.E.2d 881, 887 (1976)(citing with approval 98 C.J.S. Witnesses s 378 at 134—5 (1957))(overruled on other grounds). Clearly counsel would have been able to cross examine the victim regarding the Pace situation. See SCRE Rule 608(b)(1). Further, had trial counsel conducted any investigation, he could have questioned other witnesses who testified at trial, notably the defendant and the defendant's wife, regarding the allegations against Mr. Pace, both of whom discussed the allegations with Mr. Pace as outlined in the testimony at the PCR hearing. See SCRE Rule 608(b)(2). That the conduct may not be proved by extrinsic evidence does not operate to preclude this inquiry.

The State in opposing the grant of certiorari argues Rules 403 and 404(b) of the South Carolina Rules of Evidence would prevent admission of the victim's earlier accusation against Mr. Pace. Citing a "marked dissimilarity," the State fails to acknowledge that "a close degree of similarity exists when the 'similarities outweigh the dissimilarities.'" See State v. Scott, 405 S.C. 489, 500, 748 S.E.2d 236, 242 (Ct. App. 2013)(quoting State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 278). Here, the victim levied an accusation against a male authority figure who punished her as a result of her improper conduct. The accusations by the victim arose immediately following the punishment, and in an attempt to deflect from her own conduct. The victim's allegations both were of an improper sexual nature, although to varying degrees. The "similarities outweigh the dissimilarities." See Scott, supra. Clearly such evidence demonstrates the motive of the victim – avoid punishment, and also reveals a common scheme or plan. See SCRE 404(b). Using these same facts, the probative value of revealing the victim's prior false allegations of such a similar nature outweighs the danger of any unfair prejudice. See SCRE Rule 403. The PCR Court's decision was controlled by an error of law in concluding that the evidence was inadmissible, and therefore Vanover respectfully petitions this Court for a grant of certiorari.

CONCLUSION

For the reasons stated, Petitioner's prior counsel was defective as a matter of law and Petitioner was prejudiced thereby. The Petitioner asks this Court to vacate his conviction, and grant him a new trial.

Respectfully submitted,



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March 7, 2019