

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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May 14 2020

Certiorari to Lexington County

S.C. SUPREME COURT

Honorable Walton J. McLeod, IV, Circuit Court Judge

AUGUST BRYON KREIS III,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001351

JOHNSON 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

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ISSUE PRESENTED

Whether the PCR court erred in denying relief, where trial counsel failed to object to hearsay testimony from a law enforcement officer that exceeded the time and place exception of Rule 801(d)(1)(D) SCRE, where trial counsel previously objected to similar testimony but did not continue to object when the officer began testifying about the disclosure of a different minor?

STATEMENT

In August 2015, Petitioner was indicted by a Lexington County grand jury for three offenses: attempting or committing a lewd act upon a child, criminal sexual conduct with a minor in the second degree, and lewd act upon a child. App. 788 – 793. He proceeded to trial before the Honorable Doyet A. Early, III and a jury on November 2, 2015. App. 1. Thomas Shealy represented Petitioner; Suzanne Mayes and Christopher Samellas appeared on behalf of the state. At the conclusion of the four-day trial, the jury found Petitioner guilty as indicted. App. 416 l. 19 – App. 417 l. 7.

Petitioner requested a life sentence. App. 48 ll. 4 – 5; App. 435 l. 18 – App. 436 l. 16. The trial judge sentenced Petitioner to twenty years on the criminal sexual conduct charge, fifteen years on the committing or attempting a lewd act charge, and fifteen years on the lewd act charge. App. 436 l. 17 – App. 437 l. 7. The sentences were crafted to run consecutively. Id.

Petitioner's convictions were affirmed. State v. Kreis, Op. No. 2018-UP-052 (S.C. Ct. App. filed Jan. 31, 2018); App. 484 – 486. He filed an application for post-conviction relief on March 9, 2018. It contained multiple allegations of ineffective assistance of counsel and contained numerous attachments. App. 491 – 495. The state filed a Return and Partial Motion to Dismiss on or about June 8, 2018. App. 715 – 730. Through counsel, an amendment to Petitioner's PCR application was filed on or about January 22, 2019. App. 713 – 714.

An evidentiary hearing was held on April 5, 2019 before the Honorable Walton J. McLeod. App. 732. Art Aiken represented Petitioner, and Johnny James, Jr. appeared on behalf of the state. Petitioner and trial counsel testified at the hearing.

The PCR judge took the matter under advisement. App. 767 ll. 22 – 23. An Order of Dismissal was filed on July 9, 2019. App. 772 – 787. The PCR judge found that Petitioner failed to meet his burden on four allegations of ineffective assistance of counsel: failure to develop a theme of the case, failure to move for severance, failure to object to hearsay, and failure to cross-examine witnesses. App. 779 – 786.

This petition follows.

ARGUMENT

The PCR court erred in denying relief, where trial counsel failed to object to hearsay testimony from a law enforcement officer that exceeded the time and place exception of Rule 801(d)(1)(D) SCRE, where trial counsel previously objected to similar testimony but did not continue to object when the officer began testifying about the disclosure of a different minor.

Relevant facts

Petitioner contended that the charges in this case were manufactured and followed his decision not to allow his daughter's boyfriend in the house. App. 740 l. 11 – App. 741 l. 4; App. 742 l. 6 – App. 744 l. 17. Petitioner suggested that his daughter and her boyfriend were stealing Petitioner's son's medication. Id. As a result, the daughter, Minor 2, accused Petitioner of molesting her. Id. Petitioner claimed that another one of his daughters, Minor 1, accused him of similar acts when he told her to get a job in order to take care of her dog and three cats. Id. The date ranges on the indictments ran from May 2005 through 2008. App. 788 – 793. Petitioner informed his trial counsel that both girls were lying. App. 745 ll. 20 – 24.

Trial counsel believed Petitioner and testified at the post-conviction relief evidentiary hearing that he believed Petitioner was innocent. App. 756 ll. 3 – 4. At the time of the hearing, trial counsel had been practicing for approximately forty years. App. 749 ll. 20 – 24. Counsel was appointed to represent Petitioner. App. 750 ll. 5 – 6. Counsel described Petitioner as “probably the most intelligent, most complex person I’ve ever met.” App. 750 ll. 13 – 14.

One of counsel's strategies at trial was to point out the small size of the home and suggest to the jury that it was physically impossible for the alleged acts to have occurred without another

member of the house noticing. App. 752 l. 11 – App. 755 l. 4. Counsel estimated that the home was between 12,000 and 14,000 square feet. Id.

Traci Barr, an officer with the Lexington County Sheriff’s Department, testified at trial that she conducted interviews with Minor 1 and Minor 2. App. 221 l. 24 – App. 223 l. 10. The assistant solicitor asked Barr if she was able to determine whether alleged acts had occurred in more than one jurisdiction. App. 224 ll. 5 – 25. Trial counsel objected, and the solicitor contended that the testimony would fall under the time-and-place exception of Rule 801, SCRE. The solicitor rephrased the question and asked Barr about her supplemental report. App. 225 ll. 3 – 25.

Trial counsel again objected on the basis of hearsay when the solicitor asked Barr about specifics regarding the allegations. App. 226 ll. 18 – 23. The trial judge overruled the objection, and the testimony was allowed. Id. Barr then testified similarly regarding the allegations by Minor 1, without objection by trial counsel.

When asked at the PCR evidentiary hearing why he did not object, counsel offered an explanation as to his theory on objections and cross-examination:

Let me talk a little bit about objections and cross-examinations. You only object when it hurts you and it hurts your client. You don’t cross-examine unless you have to clear up a point or go after a point. You don’t just cross-examine just to be talking. A large part of defending a person is not bringing attention to the whoever-the-witness is testimony against your client.

So objections have to be thoughtful. They have to be - - and they have to be meaningful. Cross-examination has to be thoughtful and meaningful. And as you see, when I cross-examined Ms. Barr, it’s very short and to the point. Why? Because I didn’t want to open up any doors that were closed to her. But, yes, I think Ms. Barr was - - or Sergeant Barr was mitigating.

App. 762 ll. 4 – 17. As pointed out by trial counsel, the interviews with Barr followed the initial disclosure of the minors. App. 223 ll. 1 – 10; App. 762 ll. 18 – 20.

Discussion

To establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant's case. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

“An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” Strickland, 466 U.S. at 691, 104 S.Ct. 2052. To establish prejudice, the defendant is required “to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694, 104 S.Ct. 2052. Moreover, no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt. Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009).

In a CSC case, the testimony of a witness regarding the Victim's out-of-court statement is not hearsay when:

[T]he declarant testifies at the trial ... and is subject to cross-examination concerning the statement, and the statement 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.

Rule 801(d)(1), SCRE.

The PCR judge found that Petitioner could not show ineffectiveness with this allegation. App. 784. Located within the Order of Dismissal was the finding:

First, Counsel *did* timely object to at least Barr's testimony regarding Victim 1's disclosures, and arguably to Victim 2's as well. Barr did not testify to the disclosure of any particulars of the abuse beyond time and place, such that the trial court properly overruled Counsel's objections. "The couch" is a place. "Everyone was at the house asleep" describes the time. The court further finds that even if some aspect of Barr's testimony does constitute a "detail" beyond the scope of the time-and-place limitation, the breach beyond the restraints of the rule would be so minimal as to be utterly harmless.

App. 784 (emphasis in original).

Based upon the implicit finding that an error may have occurred based on trial counsel's failure to object, Petitioner was entitled to relief. He was prejudiced by the failure to object. Barr's testimony improperly bolstered the minors' credibility. But for counsel's failure to object, the jury may have found Petitioner not guilty. Counsel candidly admitted that he believed Petitioner was innocent; his failure to object prevented his client from receiving a fair trial.

CONCLUSION

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

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of May, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for August B. Kreis, III 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 Walton J. McLeod, IV, which was held on April 5, 2019, 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 August B. Kreis, III.

Respectfully Submitted,

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of May, 2020.

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.”

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