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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI - PCR-GREENVILLE COUNTY
Court of Common Pleas
Alex Kinlaw, Jr., Circuit Court Judge

Appellant Case No. 2020-000678
Lower Case № 2018-CP-23-05668

The State, ... Respondent,

vs.

Polly McAbee Hindman ..... Petitioner

PETITION FOR WRIT OF CERTIORARI

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Question II: Did the Post Conviction Relief Judge err in failing to find trial counsel was ineffective when trial counsel failed to introduce evidence that the legal name of the half sister of Polly Hindman was Betty Riddle as the State argued the signature of "Betty Riddle" was improper because the name was not spelled correctly?

Question III: Did the Post Conviction Relief Judge err in finding that trial counsel was not ineffective when he failed to object to the improper bolstering testimony of Officer John T. Martin when he testified that after completing his investigation he signed the warrants?

Procedural History

On February 17, 2017, the State tried Polly Hindman in Greenville County General Sessions Court for exploitation of a vulnerable adult in violation of South Carolina Code § 43-35-85. She was convicted on December 14, 2016, and was sentenced to 5 years suspended upon 90 days in the Home Incarceration Program, the balance suspended to 5 years probation. She filed an initial Notice of Appeal. The appeal was withdrawn on August 21, 2018, and the South Carolina Court of Appeals formerly dismissed the appeal on August 29, 2018.

Ms. Hindman filed her Post-Conviction Relief application on November 6, 2018. The Post Conviction Relief hearing was held on April 15, 2019. By order dated July 19, 2019, and filed on July 23, 2019, Judge Alex Kinlaw, Jr. denied her relief. A Rule 59 Motion was filed on July 30, 2019. By order filed on April 1, 2020, this motion was denied. Ms. Hindman filed her Notice of Appeal on April 23, 2020.

Factual History

The charges against Ms. Hindman arose out a an allegation that she, through her sister Leisa Norris, improperly appropriated various sums from the checking account of Bette Riddle, who was the half-sister of Ms. Hindman and Ms. Norris.[1] At the trial, Ms. Hindman was represented by retained counsel James P. O'Connell from Greenville.

During the trial, the State introduced several checks payable to Ms. Hindman and drawn from the account of Bette Riddle. The State contended that these checks represented funds improperly taken from the checking account of Bette Riddle. Ms. Hindman contended that a

[1] The correct name is Betty Riddle. Documents were introduced at the Post Conviction Relief Hearing that establishes "Betty" is the legal spelling of the first name of the half sister.

substantial portion of the checks were for the pre-payment of the funeral expenses of Ms. Riddle. The State contended in the opening, "It was not in her best interest for her to pay funeral expenses to the tune of $13,000, which, by the way, these check weren't payable to McAfee Mortuary or Woodlawn Mortuary. They're paid directly to the Defendant, which she deposited in her checking account the day before she commits her to Marshall Pickens." App. at 29, ll 13-18. In closing, in reference to the money paid to Ms. Hindman, the State argued Ms. Norris, the sister of Ms. Hindman, "would write checks completely out of numerical sequence to Ms. Hindman for about 13 grand for a funeral of which there has been absolutely no evidence presented to you today, other than her [Ms. Hindman] testimony, that there is such a funeral, plot, burial, casket, marker that is in existence today." App. at 139, ll 17-22.

The testimony at trial was that Ms. Hindman was paid over $13,000 from the checking account of her half sister, Ms. Riddle. App. at 45, ll 14-18. The testimony at trial as to who signed the checks payable to Ms. Hindman is confusing at best. Ms. Norris testified one of the checks discussed above was written by her. As she testified, "The check I wrote for her for the funeral, I know I signed my name on it because I've got a copy of it at home." App. at 52, ll 22-24. She further testified she did not know if Ms. Riddle signed the check or not. App. at 53, ll 2-4. Who actually signed the checks is not relevant as Ms. Hindman was not charged with forgery. She was only charged with improperly taking money from the checking account of Ms. Riddle regardless of who signed the checks.

The State also contended that Ms. Hindman misused the power of attorney given to her. App. at 143, ll 17-20; 147, ll 16-25. The transcript does not establish that Ms. Hindman ever used a power of attorney to take any funds from Ms. Riddle. The State presented no testimony

that Ms. Hindman ever used a power of attorney issued to her for any purpose. If this were the only ground for a conviction of Ms. Hindman, no facts would support the conviction. The thrust of the State's case was the improper obtaining of funds from the checking account of Ms. Riddle. As to this charge, the State relied primarily upon the approximately $13,000.00 that Ms. Hindman contended was to pay her back for the pre-payment of the funeral expenses.

At the post conviction relief hearing, Ms. Hindman testified she gave her attorney numerous documents which established that the monies received by her were in fact a refund of monies paid for the pre-paid funeral of Ms. Bette Riddle and other expense incurred on behalf of Ms. Riddle. She introduced at the Post Conviction relief hearing numerous documents supporting this fact. Also introduced at the PCR hearing was the deposition of the manager of the funeral home.[2] He confirmed Ms. Hindman paid for the funeral expenses of Bette Riddle. He also introduced numerous documents that supported his testimony. The documents were attached to the deposition. Cliff Gaddy testified at the Post Conviction Relief hearing he had no problem locating the manager of the funeral home and arranging his testimony in the deposition.

James P. O'Connell testified that either Ms. Hindman gave him numerous documents concerning the payment of the funeral expenses or they were obtained through discovery. App. at 330, ll 2-21. He did recall Ms. Hindman being very helpful in providing him with any documents he requested. In fact, at the trial when Ms. Hindman was being cross examined about Mr. Leonard Riddle purchasing a funeral plot, she stated, "No, ma'am. All I know is I've got my funeral contract right here." App. at 107, ll 20-21. Mr. O'Connell did not introduce the contract

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[2] This deposition was taken pursuant to notice to the attorney general's office. The deposition was taken by Cliff Gaddy, who represented Ms. Hindman at the restitution hearing and started the appeal on her behalf.

nor follow up on her statement in re-direct examination. He did not explain why he elected not to interview any personnel from the funeral home or introduce the documents provided to him either through discovery or by Ms. Hindman. He apparently elected to rely exclusively upon the testimony of Ms. Hindman to establish the truthfulness of her testimony.

At the trial, Mary Ellen Cervetti, a corporate investigator for BB&T, the bank where Ms. Riddle maintained her account, testified for the State. Without objection from defense counsel, Ms. Cervetti testified as to numerous conversations she had with the bank employees who actually had the direct dealings with Ms. Hindman and her sister. Mr. O'Connell testified he never interviewed the employee at BB&T with whom Ms. Hindman and her sister had the original conversation.

John T. Martin, a deputy with the Greenville County Sheriff's Department was an investigating officer in the case. He never testified as to any interviews with Ms. Hindman. He had no document to introduce at trial. The sole purpose of his testimony was to state he conducted an investigation and signed warrants on Ms. Hindman and her sister. The sum and substance of his testimony was he believed they were guilty and signed a warrant for their arrest. No objection was made to the conclusion by Deputy Martin. Mr. O'Connell testified he did not believe the testimony was improper.

The sole defense was the testimony of Ms. Hindman and her husband Robert L. Hindman. No exhibits were introduced by the defense, notwithstanding the fact that numerous documents existed. Ms. Hindman testified at the Post Conviction relief hearing she had the document with her at the trial.

Question I

Did the Post Conviction Relief Judge err in failing to find trial counsel was ineffective when trial counsel declined to introduce checks in his possession or investigate the case and subpoena the funeral director which evidence would establish that Polly Hindman pre-paid for the funeral for her half sister in the amount of 20,000 and other expenses incurred by Mr. Hindman on behalf of her half sister and did not steal these amounts from her half sister?

Even under the previous "mockery of justice" standard of review, this Post Conviction Relief case should be reversed. *State v. Pendergrass*, 270 S.C. 1, 4, 239 S.E.2d 750, 751 (1977)(recognizing the new standard of review of "normal competency standard"). The adversarial system completely failed in this case.

Polly Hindman, to help her trial counsel, spent a considerable amount of time obtaining records to prove that the monies represented by checks paid to her were for the benefit of her half sister, Bette Riddle. App. at 282, ll 3-23; 329, l 19 to 330, l 13. These documents, including checks written by Ms. Hindman to pre-pay the funeral expense of her half sister, were in the possession of trial counsel at the time of trial. While he had not interviewed the funeral director, he still had documents in his possession at trial that would completely exonerate Ms. Hindman.

The fact is axiomatic that a trial counsel has a duty to throughly investigate a case and interview all possible witnesses and explore all possible defenses. *McKnight v. State,* 378 S.C. 33, 378 S.E.2d 33 (2008); *Cobbs v. State,* 305 S.C. 299, 408 S.E.2d 223 (1991). In this case the defense should have been rather straight forward and not overly complicated. Ms. Hindman denied she ever took any money from her sister's account except that which was proper. She

stated the approximately $13,000 in checks paid to her was for reimbursement for funeral expense paid on behalf of her half sister. The deposition introduced at the Post Conviction Relief hearings shows that this fact could be proven with a single independent witness. Even without the agent from the funeral home, the documents that were obtained by Ms. Hindman before the trial, and in the possession of her trial counsel, easily could have caused the jury to reach a different result.

As our Supreme Court has said "[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (internal citations omitted). Here, trial counsel knew of potential witnesses from the funeral home as he admitted he had in his possession documents from the funeral home. He failed to even make a phone call to determine the availability of the witness. While her testimony was not presented at the Post Conviction relief hearing, trial counsel also failed to interview the woman who had the conversation with Ms. Hindman and her sister at the bank. This fact also illustrates he did not diligently defend Ms. Hindman.

In determining whether a Post Conviction relief defendant is entitled to relief, our Supreme Court has said, "In order to prove trial counsel was ineffective, the PCR applicant must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Rutland v. State*, 415 S.C. 570, 576, 785 S.E.2d 350, 353 (2016). Under the facts of this case, clearly the performance of trial counsel in failing to procure a key independent witness who would support the testimony of Ms. Hindman was deficient. As noted above, he even failed to introduce

documents in his possession that would also have exonerated Ms. Hindman.

The question is whether these deficient performances were prejudicial to Ms. Hindman. With no facts in the record to support such a conclusion, the Post Conviction Relief judge found the errors of trial counsel not to be prejudicial.

Under the facts of this case, the prejudice is readily apparent. As noted previously, Ms. Hindman testified from the stand that she had documents to back up her testimony. When no such documents were introduced, the only logical assumption a juror could make is they either did not exist or they did not support her claim. During closing argument the solicitor argued, with credibility based upon the facts at the trial, "[S]he would also write checks completely out of numerical sequence to Ms. Hindman for about 13 grand for a funeral of which there has been absolutely no evidence presented to you today, other than her testimony, that there is such a funeral, plot, burial, casket, marker that is in existence today." App. at 139, ll 17-22. She further argued, "And Ms. Hindman walked away with over 16 grand. And she has not presented one shred of evidence to show you that she did not take that and put it in her checking account." App.. at 142, l 24 to 1143, l 2. Based upon the deposition and exhibits presented at the hearing, there is ample evidence that the expenditures described by Ms. Hindman were in fact paid for the benefit of Ms. Riddle. This evidence would have impacted the decision of the jury.

The Post Conviction relief judge denied relief as to the failure to introduce the checks of Ms. Hindman payable to the funeral home for her half sister's funeral expanses. He noted that trial counsel was aware that checks existed that were written by Ms. Hindman and he did not introduce them at trial. App. at 394-395. In holding counsel's performance in failing to introduce the check not to be ineffective, the Court said, "In any ineffectiveness case, a particular

decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgment." App. at 395. The PCR judge never attempted to explain why the withholding of checks written by Ms. Hindman that establishes that she personally paid for the funeral expenses was a reasonable judgment call by defense counsel. No evidence in this record supports the finding of the PCR judge that the failure to introduce checks written by his client to the funeral home was a reasonable strategic decision. When documents exist that would exonerate a client, no strategic decision would justify not introducing the records. Neither the trial counsel nor the PCR judge ever questioned the authenticity of the documents. Failing to introduce evidence that would exonerate his client in ineffectiveness as a matter of law and as a matter of law prejudicial.

In ruling that trial counsel was not ineffective for his failure to interview and subpoena the director of the funeral home, the PCR judge said, "It was not necessary for counsel to call this witness at trial, who presumably would have offered the same testimony as he did in his deposition, because the evidence was already before the jury during Applicant's trial." App. at 396. This position completely ignores the fact that the director of the funeral home would have independent first hand knowledge of the fact that Ms. Hindman used her own funds to pay for the funeral expanses of Ms. Riddle. The PCR judge completely ignored the fact that this testimony would have completely undermined the closing argument of the State that "there has been absolutely no evidence presented to you today, other than her testimony, that there is such a funeral, plot, burial, casket, marker that is in existence today." App. at 139, ll 119-22. No facts in this record support a conclusion that the failure to subpoena a witness that would exonerate his client was a reasonable decision. Nor was the testimony of Wesley Matthew James or the checks

cumulative. "Evidence of a different kind or of different circumstances tending to establish or disprove the same fact is not cumulative, nor is circumstantial evidence tending to prove a fact cumulative of evidence which tends to directly establish the same fact." *State v. Green*, 603 S.W.2d 50, 51 (Mo. Ct. App. 1980). The testimony of Mr. James was not of the same kind or circumstances as Ms. Hindman and her husband. In *Skipper v. South Carolina*, 476 U.S. 1, 8, (1986) United States Supreme Court recognized witnesses independent from family members are so different that they cannot be considered cumulative witnesses. The Court held, "The evidence petitioner was allowed to present on the issue of his conduct in jail was the sort of evidence that a jury naturally would tend to discount as self-serving. The testimony of more disinterested witnesses—and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges—would quite naturally be given much greater weight by the jury." The same principle applies in this case. The jury could treat the testimony of Ms. Hindman and her husband as self serving.

Under the theory used by the Post Conviction Relief judge, once a defendant testifies he was elsewhere at the time of the crime, any additional alibi witness would be cumulative. The failure of trial counsel to call such a witness would not be ineffective. This is not the law in South Carolina. *Grier v. State*, 299 S.C. 321, 384 S.E.2d 722 (1989)

After Ms. Hindman filed a Rule 59 Motion, the PCR judge slightly modified his position and stated that the testimony of the funeral director "would not have provided any rebuttal evidence to the State's argument that Applicant was guilty of the indicted offense through her actions with regard to the power of attorney and deed." App. at 407. This is an implied finding that the testimony of the funeral director was credible. The problem with this argument is that no

evidence of abusing the power of attorney to obtain money was ever presented to the jury.[3] The record establishes that Ms. Hindman and her sister attempted, through the power of attorney, to add Ms. Norris' name to the account of Ms. Riddle, but the bank did not permit this. No evidence in this case supports the claim that Ms. Hindman ever used a power of attorney. No money was lost through the power of attorney. As to the deed, the State never argued the deed was used to defraud Ms. Riddle. The deed was placed in the name of Ms. Norris. The undisputed testimony was that Ms. Riddle deeded the property to Ms. Norris. In her will, Ms. Riddle had left the house to Ms. Norris. App. at 46, l 14 to 43, l 6. In the opening or closing argument, the State never claimed the deed to the house was part of the case.

As to the spelling of the name discussed above, the solicitor implied the documents using the spelling "Betty" were fraudulent. In her opening and closing arguments she made an issue of the spelling of "Bette." App. at 27, ll 7-8; 140, ll 21-25. The legal name for Ms. Riddle is "Betty," as noted by the evidence introduced at the Post Conviction Relief hearing. App. at 292, ll 5-21. Had this evidence been presented at the trial, the assistant solicitor would not have been able to make such an argument. The errors were prejudicial to Ms. Hindman. When the true facts are known, that which has the sinister implication argued by the prosecutor, is easily explained. No facts in this record support the conclusion that the failure to introduce evidence of the legal name of Ms. Riddle was not prejudicial to Ms. Hindman.

Question II

Did the Post Conviction Relief Judge err in failing to find trial counsel was

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[3] Trial counsel also did not ask for a directed verdict on this ground. His grounds for a directed verdict were the failure to prove Ms. Riddle was a vulnerable adult and that Ms. Hindman had not obtained any money. App. at 88, l 11 to 89, l 20; 129, ll 2-11; 342, ll 13-16.

ineffective when trial counsel failed to introduce evidence that the legal name of the half sister of Polly Hindman was Betty Riddle as the State argued the signature of "Betty Riddle" was improper because the name was not spelled correctly?

Furthermore, trial counsel was deficient in failing to introduce evidence that the correct spelling of the name of Bette Riddle was "Betty." In her closing argument, the assistant solicitor argued that the document was a forgery as an 82 year old woman would not suddenly misspell her name. App. 140, ll 21-25. The documents introduced at the Post Conviction Relief hearing established beyond refute that the correct and legal spelling of her legal name was "Betty." The failure to introduce the records Ms. Hindman had in her possession at the time of trial, enabled the State to make the prejudicial argument they made. This argument simply gave additional credibility to the State's closing argument that had Ms. Hindman had the check, she would have introduced them.

Due to the failure of trial counsel to produce available evidence, the defense of Ms. Hindman was prejudiced. The truth is the legal spelling of Bette Riddle's name is "Betty." This failure of trial counsel was prejudicial to Ms. Hindman.

Question III

Did the Post Conviction Relief Judge err in finding that trial counsel was not ineffective when he failed to object to the improper bolstering testimony of Officer John T. Martin when he testified that after completing his investigation he signed the warrants?

Trial counsel was further ineffective in not objecting to the testimony of Deputy John T. Martin. In the context of criminal sexual conduct cases, our Supreme Court has taken a strong position on the issue of improper vouching or bolstering. *See*, *Tappeiner v. State*, 416 S.C. 239,

785 S.E.2d 471 (2016); *State v. Kromah*, 401 S C. 340, 358, 737 S.E.2d 490, 499 (2013); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011); and *State v. Dawkins,* 297 S.C. 386, 377 S.E.298 (1989). In this case Deputy Martin was first permitted to testify without objection to the statement "Once I completed the probate hearing - - once the probate hearing was completed, I made a decision to go ahead and file criminal charges." App. at 85, ll 10-13. He then was permitted to testify as to the evidence he reviewed. None of this was relevant to the guilt or innocence of Ms. Hindman. Finally he was asked:

> Q. Based on your criminal investigation of this case, your review of the documents, once you completed your investigation, what did you do?
> A. I signed the warrants.
> Q. On who?
> A. On both of - - Polly and Leisa.
> Q. Polly. Full name please.
> A. Polly Hindman and Leisa - - Leisa Norris.
> Q. What did you charge them with?
> A. I charged both of them with exploitation of a vulnerable adult.
> Q. Okay. And that is the Defendant here today?
> A. Yes, ma'am.
> App. at 86, ll 10-22.

These questions and answers contributed nothing to the facts of the case. The only impact of these questions and answers had was to tell the jury, and not in a subtle fashion, that based upon the officer's investigation, he believed Ms. Hindman to be guilty. The testimony did nothing more than bolster the credibility of the case for the government by the officer giving his opinion as to guilt. Such evidence has long been held not admissible in our state. "The presumption of adequate representation based on a valid trial strategy disappears when trial counsel acknowledged there was no trial strategy in mind when he failed to object to the improper hearsay and bolstering testimony." *Smith v. State*, 386 S.C. 562, 568, 689 S.E.2d 629,

633 (2010). Trial counsel gave no adequate explanation as to why he did not object to the improper testimony.

The PCR judge in the Order dismissed this issue by saying "Although Applicant alleges that investigator Martin gave improper testimony at Applicant's trial, Applicant did not provide supporting testimony as to this allegation at her PCR hearing." App. at 399. In her Rule 59 Motion, Ms. Hindman brought to the attention of the PCR judge that such a request had been made. App. at 403.

The Court erred in failing to recognize that the trial attorney was cross-examined by the attorney for the applicant in his failure to object to the overview testimony of John T. Martin. Therefore, testimony was presented as to this issue. Specifically, trial counsel was asked about the questioning of Officer Martin. App. 64, ll 2-20. Furthermore, counsel for applicant questioned trial counsel about the overview testimony of Officer Martin being objectionable. The officer testified to was an overall summary of the case, and he did not impart any new information to the jury. The use of such overview testimony has been found to be objectionable by several courts. *United States v. Flores-De-Jesus*, 569 F.3d 8, 18 (1st Cir. 2009) ("In our view, there is no meaningful difference between the endorsement of credibility offered by the government's overview witness and the endorsement offered by the vouching prosecutor.") *United States v. Etienne*, 772 F.3d 907, 914 (1st Cir. 2014) ("The overview witness commonly goes on to testify about a defendant's specific role in the charged conspiracy. In other words, far from providing an 'overview' of the case, the witness actually testifies that the defendant is guilty of the crime charged."). Here, trial counsel impermissibly allowed Officer Martin, in essence, to tell the jury Ms. Hindman and her sister were guilty based upon his investigation.

The permitting of the investigating officer to simply tell the jury he believed Ms. Hindman was guilty was inadmissible. The record contains no evidence to establish that this was not prejudicial to Ms. Hindman. Trial counsel gave no explanation for his failure to object other than "that's a question for law school." App. at 338, l 15. The Post Conviction Relief judge erred in failing to find counsel was ineffective in not objecting to the testimony and that Ms. Hindman was not prejudiced by his failure to object.

CONCLUSION

The failures of trial counsel in this case were so great that even under the mockery of justice standard, Polly Hindman should be entitled to relief. As the record of ineffectiveness of counsel and prejudice to Polly Hindman is so great, this Court should review the record in this matter, grant the Petition for Writ of Certiorari, dispense with further briefing and issue an order remanding this case for a new trial.

June 12, 2020

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