

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Sep 28 2020

S.C. SUPREME COURT

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Certiorari to Union County

Honorable Michael G. Nettles, Circuit Court Judge
—————

CLEVELAND EDWARD YOUNG,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000367
—————

JOHNSON PETITION FOR WRIT OF CERTIORARI
—————

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ISSUE PRESENTED

Whether the PCR court erred in finding that trial counsel provided effective representation where counsel failed to hire an independent expert to rebut the medical testimony presented by the state?

STATEMENT OF THE CASE

On January 28, 2015, Sarah Arnold, a second grade teacher at Foster Park Elementary School in Union, South Carolina, saw Minor, a seven year old girl, emulating sexual acts with a yogurt stick that Minor had brought from the cafeteria after lunch. App. 88, ll. 21-25; App. 90, ll. 2-10. Arnold pulled Minor aside to ask her what she was doing with the yogurt stick. App. 90, l. 7-App. 91, l. 5. Minor responded by calling the yogurt stick a “wienie” and told Arnold that she had been sexually abused while visiting her aunt’s home. App. 91, ll. 10-15; App. 92, ll. 1-3.

Minor’s statements were reported to the authorities and Minor was subsequently interviewed by Marlanda Dekine, a forensic interviewer with the Children’s Advocacy Center in Spartanburg, South Carolina. App. 106, ll. 9-11; App. 107, ll. 15-22. Minor also underwent a sexual abuse examination performed by Dr. Nancy Henderson. App. 150, ll. 13-19.

Petitioner, who was a friend of Minor’s aunt, was indicted by a Union County grand jury for criminal sexual conduct with a minor, first degree, and criminal sexual conduct with a minor, third degree, during the August 2015 grand jury term. App. 567-570. The state, represented by John Anthony, called the case to trial before the Honorable R. Knox McMahon and a jury on March 28, 2016. App. 1. Petitioner was represented by Erik Delaney and Jennifer Williams. App. 1.

At trial Minor testified that she would go to visit her “Aunt Nita” and “BB” in Whitmere, South Carolina, sometimes staying overnight. “BB” was identified as Cleveland Young, Petitioner. Minor alleged that Petitioner would take her outside behind some buildings on the

property and “hump”¹ her. App. 72, ll. 1-21. Minor stated that the assaults happened “more times than she could count.” App. 74, ll. 2-5. Minor testified after Petitioner “humped” her he would take a wet rag and wipe “yellow stuff” from his “weenie.” App. 73, ll. 17-20; App. 78, ll. 15-22.

Dr. Henderson testified that she performed a sexual abuse examination of Minor. App. 150, ll. 13-16. The examination did not reveal any injury to Minor’s vaginal or rectal areas. Dr. Henderson testified that this was not uncommon in sexual abuse cases as those areas tend to heal very quickly. However, Minor did test positive for rectal chlamydia. App. 152, ll. 7-14; App. 153, ll. 10-19; App. 155, ll. 1-9.

Dr. Henderson testified that chlamydia presents without symptoms in about fifty percent of the cases, making it the number one sexually transmitted infection. She further stated that it was easily treated with antibiotics. App. 157-158. She also testified that there was some evidence that asymptomatic chlamydia could clear the body on its own, without treatment. However, the research she referenced was based on a 2005 study that monitored only pregnant women. App. 158-160.

During the cross examination of Dr. Henderson, Counsel Delaney questioned whether the study she had referenced regarding asymptomatic chlamydia resolving without treatment had flaws based on the testing method used. Counsel Delaney also questioned whether the percentage of cases where the disease cleared without treatment was actually as high as 44%. Dr. Henderson clarified that Counsel Delaney appeared to be referencing other studies that had been conducted in the past. She testified that the testing method used in the 2005 study was

¹ During the forensic interview Minor reported that Petitioner engaged in anal and vaginal sex with her, as well as required her to perform oral sex on him. Minor did not testify to any alleged oral sex during the trial. App. 74-75.

significantly more accurate than the method of testing Counsel Delaney had asked her about. Further, she testified the 2005 study had a much higher rate of participants clearing the virus without treatment than prior studies. App. 171-172.

Petitioner was subsequently tested for chlamydia. The results were negative. App. 212, ll. 2-4. Additionally, DHEC² had no records of Petitioner ever having been diagnosed with, or treated for, any STD. App. 212, ll. 5-11.

The only witness the defense called to testify was Minor's aunt, Anita "Nita" Kinard. App. 255. Kinard testified that Petitioner lived with her, but he had a separate bedroom. While the two had shared some "intimate encounters" early on, they were not romantically involved and worked together to rescue dogs. App. 258, l. 9-App. 259, l. 4. Kinard stated that Minor never said anything bad was occurring with Petitioner. Additionally, she testified that she never observed anything unusual between Petitioner and Minor. App. 265, ll. 14-19; App. 266, ll. 3-7.

The jury found Petitioner guilty as indicted. Judge McMahon sentenced Petitioner to two consecutive terms of life imprisonment, pursuant to the life without parole notice that had been served upon Petitioner prior to trial. App. 374, ll. 1-10; App. 378-380. Petitioner appealed his convictions and sentences. The South Carolina Court of Appeals dismissed the appeal pursuant to Anders v. California³ on June 28, 2017.

On March 19, 2018, Petitioner filed an application for post-conviction relief attaching one hundred and four pages of allegations, case law, and documents. App. 382-492. The state submitted its return on July 3, 2018. App. 493-501. An evidentiary hearing was held before the

² South Carolina Law (S.C. Code Ann. § 44-29-10) and Regulations (61-20) require reporting of specified contagious and infectious diseases and conditions to the local health department "in the form and manner as prescribed by DHEC in regulations concerning infectious diseases. This includes the reporting of STD's.

³ 386 U.S. 738 (1967)

Honorable Michael G. Nettles on January 10, 2020. The state was represented by Brianna Schill. Petitioner was represented by Rodney Richey. App. 502. At the start of the hearing PCR Counsel Richey clarified that Petitioner would be going forward on allegations of failure to investigate a favorable plea offer, failure to discuss the “pros and cons” of the case, failure to investigate the case, failure to have a coherent trial strategy, and failure to zealously represent Petitioner. App. 505, ll. 15-20.

Petitioner testified that he asked Counsel Delaney to hire a forensic pediatrician to work on his case. Petitioner was told that they would have to go in front of a judge to request funding and that it would be approximately \$250 an hour to hire an expert. App. 513, ll. 12-20. Petitioner stated that after doing some research he gave Counsel Delaney the name of Alicia Feaster, but that Counsel Delaney did not contact her or any other potential experts. App. 514, ll. 2-20. Petitioner also testified that when he reviewed the forensic interviews with Counsel Delaney, Delaney stated that something was “not right” with the interviews. App. 519, ll. 17-25.

Counsel Delaney testified that the strategy for trial was to focus on the fact that Petitioner had never had chlamydia, challenge the lack of physical evidence, and to point out the inconsistencies in Minor’s statement to create reasonable doubt. App. 533, ll. 12-21. Regarding hiring a possible expert, Counsel Delaney stated that Kinard, not Petitioner, had provided him with the name of Alicia Feaster. Kinard wanted Counsel Delaney to have Feaster watch the forensic interviews of Minor. Counsel Delaney testified that he did not think he needed to hire an expert to review the forensic interviews of Minor in this case. App. 532, ll. 2-25.

Outside of the request for Feaster, or someone else, to review the forensic interviews of Minor, Counsel Delaney testified that there was no other request for an expert. App. 533, ll. 3-9. Counsel Delaney believed that he had been able to obtain favorable testimony from the state’s

expert forensic pediatrician and testified that he did not think there was anything else he could have done to impact the outcome of Petitioner's trial. App. 537, l. 1-App. 538, l. 22.

In the order of dismissal, the PCR court couched the issue of Counsel Delaney's failure to hire Feaster, or any expert, as a claim of failure to investigate. The order stated that based on the testimony presented at the hearing Petitioner had not met his burden of proving deficient performance or prejudice. Specifically, the court ruled that Counsel Delaney had investigated Petitioner's case and that Petitioner had not provided the court with any evidence showing that any further investigation, including hiring an expert, would have had a possible effect on the results of Petitioner's trial. The court noted that, even if Petitioner could show deficiency, he could only speculate as to prejudice because he did not produce Feaster, or another expert, to testify at the PCR hearing. App. 561-562.

ARGUMENT

The PCR court erred in finding that trial counsel provided effective representation where counsel failed to hire an independent expert to rebut the medical testimony presented by the state.

Counsel Delaney testified that the trial strategy in Petitioner’s case was to challenge the STD testimony, lack of physical evidence, and forensic interviews of Minor. However, Counsel Delaney did not consult with any experts in the field of pediatric forensics. Counsel Delaney relied solely on the experts that the state called. While he was able to elicit some helpful testimony, it is reasonable to conclude that he would have been able to present a much more favorable defense with an expert of his own.

It is well established that counsel has a duty to undertake reasonable investigations. Strickland v. Washington, 466 U.S. 668, 691 (1984). Therefore, “[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); “[A]t a minimum, counsel has the duty 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) (emphasis in original).

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland, *supra*. Pursuant to Strickland an applicant must show that counsel’s performance was deficient and that counsel’s “deficient performance prejudiced the defendant to the extent that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’”

Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688). Importantly, the standard in Strickland is not only that the outcome would have been different but that *the errors are such that they undermine the proper functioning of the adversarial process such that the trial cannot be relied upon as having a just result*. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

Petitioner's strongest defense at trial was that he did not test positive for chlamydia, had no record of ever testing positive for any STD, and therefore could not be the perpetrator of the abuse. This defense was severely undercut by the state's expert testifying that there were studies that supported the contention that chlamydia can clear the body without treatment. Without a defense expert to counter this argument of spontaneously clearing chlamydia, the jury was left with only the word of the state's expert to consider.

During the cross-examination of Dr. Henderson, Counsel Delaney made reference to other studies with lower success rates and flawed testing methods. This indicated that he knew the argument the state would make regarding Petitioner's negative chlamydia test. However, Counsel Delaney did not hire an expert to explain why the study referenced would not apply to Petitioner. His questioning of Dr. Henderson actually served to bolster the results of the study the state relied on during trial. This was deficient performance.

The adversarial testing process did not properly function in Petitioner's trial. Without an expert to testify on behalf of the defense, there was no meaningful challenge to an important piece of the state's case. The positive chlamydia test of Minor was the only physical evidence of abuse. It was necessary that Counsel Delaney make clear to the jury that Petitioner not only did not have any history of a STD, nor any history of treatment for a STD, but that he also could not have

spontaneously cleared the virus. To successfully present this argument to the jury required a medical expert to testify for the defense. The failure of counsel to hire such an expert was deficient performance that prejudiced Petitioner. Had the jury had the testimony of an expert that contradicted the state's expert testimony, it is likely that the outcome of the case would have been different. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of September, 2020.

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Counsel for Cleveland Edward Young states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Michael G. Nettles, which was held on January 10, 2020, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 her as counsel for Cleveland Edward Young.

Respectfully Submitted,

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 28th day of September, 2020.

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S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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.”

s/Jessica M. Saxon
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This 28th day of September, 2020.