RECEIVED
Oct 19 2020
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition of Writ of Certiorari to Charleston County
Court of Common Pleas
The Honorable Maite Murphy, Post-Conviction Relief Judge
The Honorable Diane S. Goodstein, Plea Judge

Appellate Case No. 2019-001640

JOHN EDWARD HAYNES, #354464, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

BENJAMIN LIMBAUGH
S.C. Bar No. 103334
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S ISSUE PRESENTED

Did the PCR court err by ruling defense counsel was not ineffective where counsel failed to object to the cross-examination of defense witness, Dr. Harari, which elicited his opinion that the alleged victim was the victim of sexual abuse and that she originally denied Petitioner abused her in an effort to protect Petitioner since this testimony constituted improper bolstering opinion testimony that the alleged victim's subsequent claim that Petitioner sexually abused her was actually true, and where defense counsel admitted in retrospect that he should have objected to this inadmissible testimony?

RESPONDENT'S ISSUES PRESENTED

Did the PCR Court properly find that any potential deficiency on the part of trial counsel was not prejudicial to Petitioner where DNA results confirmed the children were Petitioner's and where Petitioner had no viable defense?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections. In May 2010, the Calhoun County Grand Jury indicted Petitioner for incest (2010-GS-09-0069) and criminal sexual conduct with a minor under the age of 16, second degree (2010-GS-09-0070). Mark Wise, Esquire, and Robert Douglas Mellard, Esquire, represented Petitioner. Assistant Solicitors Sarah A. Ford, Esquire, and Benjamin Harrison Bell, Jr., Esquire, prosecuted the case. On February 25-28, 2013, Petitioner proceeded to trial before the Honorable Diane S. Goodstein. The jury found Petitioner guilty as indicted. Judge Goodstein sentenced Petitioner to imprisonment for consecutive terms of ten years for incest, provided that upon the service of five years, the balance is suspended with probation for five years and twenty years for criminal sexual conduct.

Petitioner filed a timely notice of appeal. David Alexander, Esquire, of the Office of Appellate Defense perfected the appeal. Petitioner raised the following issue on appeal: Whether the trial court erred in excluding a psychiatrist as an expert witness on the subject of automatism and sexual performance where the minor victim told her psychologist and a DSS worker that she had sex with appellant while he was drunk and unaware of what happened. The South Carolina Court of Appeals affirmed Petitioner's conviction on May 6, 2015. State v. Haynes, Op. No. 2015-UP-228 (S.C. Ct. App. filed May 6, 2015). The remittitur was returned to the circuit court on December 1, 2015.

Petitioner filed his application for Post-Conviction Relief on December 28, 2015. Respondent filed a return and partial motion to dismiss on August 2, 2017. An evidentiary hearing was held on February 26, 2019 in Calhoun County before the Honorable Maite Murphy. Petitioner verbally amended his application at the conclusion of the hearing to conform to the evidence presented. Petitioner amended to include the following allegation: Trial counsel was ineffective for failing to object to the vouching during the testimony of Dr. Harari. The Order of Dismissal

failed to include a specific finding on this issue and there was no 59e motion filed to reconsider the ruling. A timely Notice of Appeal was filed on September 26, 2019.

STATEMENT OF FACTS

Minor victim was fifteen when she gave birth to her first child and seventeen when she gave birth to her second. App. 246, 11. 1-8. App. 247, 11. 1-7. Appellant John Haynes ("Haynes") is minor victim's stepfather. App. 30, 11. 11 - 12. The State's DNA expert testified that the chances that Haynes was the father of these two children were 99.9%. App. 93, 1.8 -95, 1.24.

At trial, minor victim claimed that Haynes began sexually abusing her when she was approximately twelve or thirteen, eventually forcing her to have intercourse and impregnating her. App. 243, 1. 1 1 - 35, 1. 10. After minor victim denied or said she did not remember making multiple statements regarding Haynes to a psychologist and to a DSS worker, Haynes called both of these witnesses in his case. App. 51, 1. 1 - 60, 1. 2.

Dr. Marc Harari ("Harari") performed a psychological evaluation of minor victim. App. 348, 11. 19-22. Harari testified that minor victim told him that she had sex with Haynes when he was drunk and "entirely unaware that he had sexual relations." App. 350, 1. 20 - 114, 1. 5. She told Harari that she loved her stepfather and wanted to have his children. App. 350, 11. 15 - 19.

The DSS worker, Eula Clark ("Clark") testified that minor victim told her all of her friends were having babies and she wanted a baby, too. App. 430, 11. 18 - 25. She said she loved Haynes and had sex with him because she wanted a baby. App. 431. Minor victim also told Clark that Haynes did nothing wrong and did not know what happened because Haynes was drunk and unaware of what was happening. App. 431, 1. 5 - 127, 1. 20. Minor victim told Clark that she only claimed Haynes raped her because she thought that was what everybody wanted to hear. App. 431, 11. 5 -125. Clark told her a judge would not believe her story and minor victim then claimed Haynes raped her. App. 437,11. 1-25.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR Court properly find that any potential deficiency on the part of trial counsel was harmless error where DNA results confirmed the children were Petitioner's and where voluntary intoxication is not a recognized defense in South Carolina.

First, the PCR court properly dismissed Petitioner's allegation for failing to meet his burden in proving prejudice. Petitioner must prove ***both*** "that counsel's representation fell below an objective standard of reasonableness" ***and*** "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 669, 104 S. Ct. 2052, 2055–56, 80 L. Ed. 2d 674 (1984). "A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Id. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." Id. Petitioner has wholly failed to meet his burden in proving prejudice and therefore the PCR court properly denied relief.[1]

Second, Petitioner has failed to show prejudice resulting from the alleged deficiency of counsel failing to object to the testimony of Dr. Harari. Petitioner can show no prejudice resulting from the alleged deficiency because although Petitioner attempted to raise a defense of automatism based on the minor victim's initial statements that she "seduced" Petitioner when he was drunk and unaware of what was happening, this is not a viable defense in South Carolina.[2] This Court

[1] If issues are not adequately addressed in an order, a Rule 59(e) motion must be filed in order to preserve the issues for appellate review. Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007).

[2] Further, Petitioner failed to present any viable defense to the charges against him at trial, because there was no viable defense that could be properly presented. The only evidence presented at trial indicated Petitioner became voluntarily intoxicated, which is not a defense in South Carolina. South Carolina does not allow voluntary intoxication to serve as a defense. In State v. Vaughn, the South Carolina Supreme Court explained:

> We adopt the rule that voluntary intoxication, where it has not produced permanent insanity, is never an excuse for or a defense to crime, regardless of whether the intent involved be general or specific. Reason requires that a man who voluntarily renders himself intoxicated be no less responsible for

specifically held that "voluntary intoxication, where it has not produced permanent insanity, is never an excuse for or a defense to crime…" State v. Vaughn. 268 S.C. 119, 125-126, 232 S.E.2d 328, 330-331 (1977). It was undisputed at trial that sexual intercourse occurred because the minor victim became pregnant and gave birth to a baby whose DNA matched Petitioner. Therefore, Counsel's deficiency had no effect on the outcome of trial because Petitioner did not have any viable defense to these charges.

The facts of this case are not the typical "he said, she said" pattern that often arises in sexual misconduct cases. Here, it was undisputed the minor victim had two children whose DNA presented a 99.9% chance of them being Petitioner's children. The minor victim was fifteen when she gave birth to Petitioner's first child. She was seventeen when she gave birth to his second. App. 234, ll. 1-8; App. 235, ll. 1-7. Petitioner is the victim's stepfather. App. 230, ll. 11-12. The State offered a DNA expert who testified the chances that Petitioner is the father of the two children were 99.9%. App. 295, l. 8-App. 296, l. 24.

Petitioner cannot show any prejudice resulted from counsel failing to object to Dr. Harari's testimony where the State presented clear, unassailable evidence Petitioner is the father of minor victim's children. Petitioner was convicted of criminal sexual assault with a minor in the second degree. A person is guilty of criminal sexual conduct with a minor in the second degree if (2) the

---

> his acts while in such condition. To grant immunity for crimes committed while the perpetrator is in such a voluntary state would not only mean that many offenders would go unpunished but would also transgress the principle of personal accountability which is the bedrock of all law.

State v. Vaughn. 268 S.C. 119, 125-126, 232 S.E.2d 328, 330-331 (1977) (declining to allow voluntary intoxication to serve as a defense to burglary, housebreaking, and assault with intent to ravish); see also. State v. South. 310 S.C. 504, 508, 427 S.E.2d 666, 669 (1993) ("Furthermore, voluntary intoxication does not relieve an individual from criminal responsibility."). Petitioner never presented any evidence that he was forced to drink alcohol or became intoxicated involuntarily. Even during cross-examination of the victim, the only testimony presented to the jury showed Petitioner "has an alcohol problem and needs help." (App. 267). The only defense presented to the jury was Petitioner was too drunk to know what he was doing. Thus, Petitioner's own evidence merely established that he was voluntarily intoxicated, which is not a defense in South Carolina.

actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim. S.C. Code Ann. § 16-3-655. "Sexual battery" is defined as: "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651. It was undisputed at trial that Petitioner and the minor victim had intercourse (minor victim had two children that had a 99.9% probability of being Petitioner's). Further, it was undisputed that Petitioner had a familial relation to the victim, a custodial relation, and an authoritative position over the victim. Based on this irrefutable proof of intercourse between the minor victim and Petitioner and Petitioner's relation to the victim, there is no reasonable probability the result of the trial would have been different had counsel objected to Dr. Harari's testimony.

Therefore, Petitioner can establish no prejudice from the alleged deficiency where he had not presented a single viable defense for the jury to consider and this Court should deny Certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

BENJAMIN HUNTER LIMBAUGH
S.C. Bar No. 103334
Assistant Attorney General

By: s/ Benjamin Limbaugh
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

October 19, 2020