

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Honorable J. Mark Hayes, Circuit Court Judge

RECEIVED

Dec 10 2020

SC Court of Appeals

TIMOTHY EARL BEHELER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-000892

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding plea counsel was not ineffective for failing to prepare for trial?

STATEMENT

In 2013, a Laurens County grand jury indicted petitioner for two counts of criminal sexual conduct with a minor and for contributing to the delinquency of a minor. App. 279-90. On May 31, 2016, petitioner pled guilty before the Honorable Donald B. Hocker and a jury. App. 1. Lance Sheek represented the State and Michael Gambrell represented petitioner. App. 1. Judge Hocker sentenced petitioner to concurrent terms of fifteen years' imprisonment on the CSC charges and time served on the contributing charge. App. 18.

Petitioner filed a PCR application and a hearing was held on February 28, 2018, before the Honorable J. Mark Hayes. App. 45. Carson Henderson represented petitioner and Justin Hunter represented the State. App. 45. On May 2, 2018, Judge Hayes denied petitioner's PCR and this petition for certiorari follows. App. 265.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the Court. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. The Court reviews questions of law without deference to trial courts. Id. See also Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

The PCR court erred in finding plea counsel was not ineffective for failing to prepare for trial.

Despite concrete evidence that DSS maintained a file on the minor complainant and had dismissed a previous allegation against petitioner as unfounded, plea counsel failed to obtain it. App. 60-61, 65-66, 82-84, 89-90. Plea counsel asked for and obtained from the court an order requiring DSS to produce its file on complainant. App. 45. DSS produced nothing in response. App. 45-46. Even though he knew DSS had been involved with the child, plea counsel failed to pursue the matter and obtain any records from DSS. App. 61, 66, 89-90.

Plea counsel also failed to interview potential witnesses. App. 61-63. The police lost a list of potential witnesses who could have testified about complainant's sexual activity and plea counsel did nothing to find these witnesses. App. 93-95. Complainant had a child and petitioner was conclusively proved **not** to be the father. App. 93, 127. Plea counsel did not visit the scene where the alleged crime took place. App. 77. Plea counsel did not have a copy of complainant's forensic interview in his file. App. 56. The State's best evidence was a statement from petitioner admitting to having sex with complainant, but petitioner did not remember giving the statement because of his prescription medication. App. 122-23. Plea counsel told petitioner it would not matter and would be his word versus that of the SLED agent. App. 120.

Petitioner testified at the PCR hearing that complainant's aunt put her up to making the allegations because petitioner confronted the aunt about not taking care of complainant's mother. App. 127-129. Complainant's mother had cancer and the aunt often refused to take her to her treatments. App. 127-29. When petitioner confronted the aunt, the aunt retaliated by having the child make these allegations. App. 127-29. Complainant admitted this on the phone to her mother.

App. 130-31. Unfortunately, the mother died before the case was called for trial and she could testify. App. 123-24.

Petitioner would not have pled guilty but for plea counsel's complete failure to prepare for trial. App. 131-135, 139-41. Trial counsel has a duty to conduct a full investigation and present a complete and coherent defense. Wiggins v. Smith, 539 U.S. 510, 524 (2003); Strickland v. Washington, 466 U.S. 668 (1984). Part of this duty includes investigating the case and interviewing witnesses. See Council v. State, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008).

Had petitioner's attorney prepared, petitioner would not have been forced into pleading guilty against his will. "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 566 U.S. 156, 162 (2012). "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel." Padilla v. Kentucky, 559 U.S. 356, 363-69 (2010) (internal quotations omitted).

Petitioner was left with a choice of going to trial with an attorney who had interviewed no witnesses, had not visited the crime scene, may not have watched the forensic interview, and had not obtained potentially valuable impeachment material for the complainant and risking a hefty sentence, or pleading guilty. See Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006) (addressing breakdown in adversarial testing of State's case and complete denial of counsel). Plea counsel's conduct left petitioner with no choice at all.

The PCR court erred in focusing on the amount of evidence and proving prejudice under Strickland v. Washington, 466 U.S. 668 (1984). App. 273. The PCR court treated the failure to prepare and the analysis of the voluntariness of the guilty plea as two separate inquiries. App. 273-75. The analysis of the voluntariness of petitioner's plea looks solely to the plea hearing colloquy. App. 274-75. The correct prejudice analysis is whether petitioner would have pled guilty if represented by an attorney who was adequately prepared. Plea counsel's failure to prepare did not

leave petitioner with a reasonable choice. Petitioner unequivocally stated during the PCR hearing that he would have gone to trial if plea counsel had been ready to mount “a vigorous defense.” App. 133-34. This Court should grant certiorari and reverse petitioner’s convictions.

CONCLUSION

For the foregoing reasons, petitioner's convictions should be reversed and this case remanded for a new trial.

s/David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of December, 2020.

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CERTIFICATE OF SERVICE
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Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies that true copies of the Petition for Writ of Certiorari in the above referenced case has been served upon Brianna Lynn Schill, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Timothy Earl Beheler, #257965, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 10th day of December, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER