STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Jan 04 2021

S.C. SUPREME COURT

Certiorari to Florence County

Honorable William H. Seals, Circuit Court Judge

LEONARD BROCKINGTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000752

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

INDEX

ISSUE PRESENTED

Whether the PCR court erred in denying relief, where trial counsel admitted he failed to object to two impermissible questions asked of a forensic interviewer that bolstered the credibility of a minor in a circumstantial evidence case, where trial counsel denied that the failure to object was part of a trial strategy, and where the PCR court incorrectly and retroactively applied South Carolina law that was not in effect at the time of Petitioner's trial?

STATEMENT

Petitioner was inducted in March 2012 by a Florence County grand jury for two offenses: criminal sexual conduct with a minor in the first degree and lewd act on a minor. App. 476. He proceeded to a four-day trial before the Honorable Michael G. Nettles on April 21, 2014. App. 1. Henry M. Anderson, Jr. represented Petitioner; Patricia Singleton and Robert Wells appeared on behalf of the state.

After the jury asked multiple questions and asked to view evidence again, only a verdict as to the lewd act charge was returned. App. 388 ll. 6 – 16. The jury found Petitioner guilty on that offense and was hopelessly deadlocked on the CSC indictment. Id. Petitioner maintained his innocence. App. 392 ll. 3 – 7. Judge Nettles sentenced Petitioner to fifteen years on the lewd act offense. App. 393 ll. 17 – 20.

Petitioner's conviction was affirmed. State v. Brockington, Op. No. 2016-UP-416 (S.C. Ct. App. filed Oct. 5, 2016). On April 13, 2015, Petitioner filed an application for post-conviction relief. App. 395. It contained various allegations of ineffective assistance of counsel. App. 397 – 399; App. 402 – 408. The state made its Return sixteen months later, on or about August 18, 2016. App. 409 – 413.

Over two-and-a-half years later, an evidentiary hearing was held before the Honorable William H. Seals, Jr., on March 7, 2019. App. 414. Jonathan Waller represented Petitioner; Samuel L. Key appeared on behalf of the state. Petitioner and trial counsel testified at the hearing. The PCR court heard testimony regarding the issue raised herein. The state seemingly conceded deficiency on the part of trial counsel but contended there was no prejudice. App. 22 – 25. The PCR court took the matter under advisement. App. 454 ll. 1 – 2. An Order of Dismissal was issued on April 23, 2020. App. 456 – 474.

In denying relief on the issue raised herein, the Order of Dismissal relied heavily on Briggs v. State, 421 S.C. 806 S.E.2d 713 (2017). App. 470 – 473. Based on Briggs, which came out three years after Petitioner's trial, the PCR court reasoned that trial counsel was not deficient. Id. The PCR court found that Dr. Benedetto's testimony was admissible because trial counsel opened the door in accordance with specific language in Briggs, even though Briggs had not yet been decided by this Court.

This petition follows.

ARGUMENT

The PCR court erred in denying relief, where trial counsel admitted he failed to object to two impermissible questions asked of a forensic interviewer that bolstered the credibility of a minor in a circumstantial evidence case, where trial counsel denied that the failure to object was part of a trial strategy, and where the PCR court incorrectly and retroactively applied South Carolina law that was not in effect at the time of Petitioner's trial.

Relevant facts

The majority of evidence supporting Petitioner's current appeal originated from trial counsel's testimony at the PCR hearing. Counsel was retained to represent Petitioner. App. 438 ll. 11 – 20. Acting upon complaints from Minor, the daughter of Petitioner's girlfriend, the state indicted Petitioner in March 2012 and took him to trial over two years later.

Counsel plainly stated that this was purely a circumstantial evidence case, with Minor's allegations and accompanying testimony being the main hurdles to a not guilty verdict at trial:

> The only evidence that they had against Leonard was the little girl. I mean they had nothing to corroborate it, no DNA, no - - I mean they had absolutely nothing. The only thing they had was the little girl's testimony, and I mean I don't - - I don't think Leonard did it.
>
> I'll go to my grave, I don't think Leonard did it. I don't think he had anything to do with it. I don't think you wake up when you're 50-some years old and go, hey, I think I'll go molest a little child today. You just don't do that.

App. 439 ll. 5 – 13; App. 444 ll. 21 – 24. Counsel characterized his trial strategy as pointing out inconsistencies in Minor's testimony. App. 439 l. 14 – 440 l. 7.

During cross-examination at the PCR hearing, trial counsel was asked about two questions and resulting answers elicited by one of the state's witnesses at trial. App. 447 ll. 6 –

19. Alicia Benedetto, a clinical psychologist with the South Carolina Department of Mental Health, performed a forensic interview with Minor on October 21, 2011. App. 220 l. 1 – 224 l. 22. She was qualified as an expert clinical psychologist in the area of child sexual abuse. App. 230 ll. 10 – 17. Dr. Benedetto remarked that at the outset of forensic interviews, the following instructions are provided to the child:

> So we will ask them to please make sure that we are understanding things correctly, to tell the truth, and a part of telling the truth is to correct us if we get something wrong.

App. 222 ll. 2 – 5. The solicitor asked Dr. Benedetto if "anything [was] used in the interview with [Minor] to prevent any type of influence?" App. 225 ll. 8 – 13. When the response was that the forensic interviewers try to ask non-leading questions, the solicitor then posed the following two questions:

> Q: Was there anything about [Minor's] disclosure that caused you to believe it was the result of third-party influence?
>
> A: No. That is something we would very carefully explore to make sure that there doesn't appear to be influence of either a parent or some other source, or motivation by the child. Nothing that she stated to be supported that.
>
> Q: And was there anything in her disclosure that was affected in any way by suggestibility, or coaching?
>
> A: Well, you know, that is a question obviously for the jury to determine. As far as that we look for in the interview; for example, is the child able to correct the interviewer when the interviewer maybe gets something wrong, and [Minor] was able to do that sort of thing.
>
> So she would make sure that I was getting the right idea and spelling things right, and that sort of thing, so …

App. 227 ll. 4 – 22. Counsel did not object to either question.

The state relied on the above testimony in closing argument as well, thus compounding the failure to object:

> [Dr. Benedetto] told you there was no sign of third party influence or coaching, and the way she knew that was that she looked for the details. [Minor] gave a lot of details. She said [Minor] self corrected so when she said something, she said, oh, no, that wasn't correct.
>
> That was a sign, she said, that there was no influence. She also told us about the vague disclosures and how some children will tell immediately and some say I don't know, not want to talk about it.

App. 346 ll. 1 – 9. This followed the final line in the state's opening which requested that the jury render a verdict that "speaks the truth" at the end of trial. App. 88 ll. 16 – 19.

At the PCR hearing, trial counsel admitted he should have objected to the above improper questions. He answered in the negative when asked if there was a trial strategy behind not objecting to those questions. App. 447 ll. 7 – 19. He agreed that the state was attempting, in a roundabout fashion, to inquire of the expert whether Minor could be believed. Id. The exchange between PCR counsel and trial counsel, in its entirety, illustrates the disconnect between the PCR court's eventual ruling and the evidence elicited at the hearing:

> Q: Mr. Anderson, there's two questions on that page.
>
> The first one says: Was there anything about [Minor's] disclosure that caused you to believe that it was a result of third-party influence?
>
> And the other is: Was there anything in her disclosure that was affected in any way by suggestibility or coaching?
>
> Did you feel that that was kind of a roundabout way of asking if the girl could be believed?
>
> A: Probably a backdoor way.
>
> Q: Okay. **Was there a trial strategy behind not objecting to those questions?**
>
> A: **No, sir.**
>
> Q: Okay.
>
> A: **I should've objected.**

App. 447 ll. 6 – 19 (emphasis added). During redirect, the state did not ask any follow-up questions regarding a trial strategy.

During closing discussions at the PCR evidentiary hearing, an exchange occurred between PCR counsel and the PCR judge as to whether an objection would have made a difference. PCR counsel articulated the reasoning behind the line of cases which held that remarks like Dr. Benedetto's are improper and objectionable. App. 448 l. 18 – App. 454 l. 2. PCR counsel pointed out the irreversible harm that is done when an expert like Dr. Benedetto is allowed to vouch for the credibility of a minor in a case like Petitioner's:

> When you have an adult who is qualified as an expert who, you know, was introduced as Dr. Benedetto, that is going to have the jury have - - you know, certainly take their - - give them more credibility. And if that person is then vouching for the credibility of the child's story, that is no longer the child's testimony. Now … the jury should believe it because this doctor is telling them this is what happened. So I think that would have certainly had an outcome on the trial.
>
> Judge, clearly, looking at the … verdict of the jury, the jury was conflicted on the … veracity of the claims because the child had certainly made allegations that had led to a charging of the CSC. So I think the … impermissible vouching for the child's credibility certainly would have affected the outcome of this case.

App. 450 l. 16 – 451 l. 6.

The section of the PCR court's Order of Dismissal regarding the failure to object to Dr. Benedetto's impermissible bolstering testimony begins with a reference to Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017). App. 470. Outside of an offhand reference to Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002), the Briggs opinion is the exclusive rationale for denying relief on this issue. The Briggs opinion was filed on October 25, 2017. Petitioner's trial began April 21, 2014.

The PCR court relied on two paragraphs from Briggs for the notion that trial counsel, in 2014, opened the door to otherwise impermissible testimony, based on a 2017 South Carolina Supreme Court opinion. As will be explained below, this rationale is logically and legally indefensible.

Discussion

The findings of the PCR court are flawed in numerous respects, and Petitioner should receive a new trial. It is puzzling how the PCR court found counsel's trial strategy reasonable based on a published opinion that had not yet been written, especially considering trial counsel's testimony at the PCR hearing that there was no trial strategy behind not objecting. App. 447 ll. 7 – 19. The PCR court attributed a position to trial counsel, that he had a reasonable trial strategy, that was both impossible—considering the state of the law at the time, and in direct contravention to trial counsel's testimony. The reasoning of the PCR court is unsupported by both the law in South Carolina and the facts in Petitioner's case.

Minor's testimony, particularly her remarks at the forensic interview, was the single most important piece of evidence in Petitioner's trial. The failure to object allowed Minor's credibility to be bolstered such that the jury found Petitioner guilty on the lewd act charge. As incorrectly found by the PCR court, there was no trial strategy involved in the failure to object. This was an error by trial counsel, plain and simple, and one that likely made a difference in Petitioner's case.

The jury demonstrated considerable hesitation in finding Petitioner guilty, going as far as to not reach a verdict on the CSC offense. Critically, two juror notes indicate the jury's split on the two offenses. App. 377 l. 25 – 386 l. 20. This followed multiple requests to view the forensic interview. App. 377 l. 11 – 386 l. 20. Had counsel objected to the two improper

questions asked of Dr. Benedetto, the scales would have tipped in Petitioner's favor, or in the alternative, the matter could have been raised on direct appeal.

Briggs is instructive only insofar that it contains a detailed timeline of cases discussing the limits of permissible witness testimony, specifically forensic interviewer testimony. Briggs was charged with criminal sexual conduct with a minor in the first degree as well as lewd act upon a child. Briggs, 421 S.C. 316, 320-21, 806 S.E.2d 713, 715-16. He went to trial in August 2010 and was convicted. Id. Briggs filed a post-conviction relief action claiming trial counsel was ineffective in permitting the forensic interviewer to give opinion testimony that she believed the victim's accusations. Id. at 321, 806 S.E.2d at 716. The PCR court granted relief, and this Court affirmed.

This Court outlined recent cases dealing with "the permissible limits of a forensic interviewer's testimony in the context of the prohibition against improper bolstering." Id. at 322, 806 S.E.2d at 716. This Court specifically referenced five cases from 2011-2015: State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015); State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015); State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013); State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012); State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011). Because Briggs' trial date was 2011, the state contended in that case that Briggs' attorney still provided effective assistance. Briggs at 322, 806 S.E.2d at 716. In holding that the failure to object was reasonable, this Court reiterated the prohibition against comparing an attorney's actions by future standards. Id. Citing Strickland v. Washington, this Court noted "we may not judge the reasonableness of counsel's performance by standards that developed later." Id. at 322, 806 S.E.2d at 717. Strickland held that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the

circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 at 694.

In Briggs, this Court discussed the previously mentioned five cases, each of which was published after Briggs' trial date. As a result, this Court explored State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009), Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010), and State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989). Between those three cases, as well three of the other opinions (Jennings, Whitner, and Kromah), trial counsel in Petitioner's case should have known to object. The reasonableness that existed in Briggs—that counsel may not have been fully aware of the law which was still developing—does not exist in the matter at hand. Trial counsel admitted that he should have objected; there was no trial strategy for failing to object.

Turning to the portion of Briggs that the PCR court in Petitioner's case relied on in order to find trial counsel's failure to object reasonable, the case contains the block quoted language found in the Order of Dismissal. App. 471. The Order of Dismissal omitted a specific reference to Stone v. State, for the point that "trial counsel should have objected to those components of the … testimony as to which counsel felt he had a reasonable persuasive argument for exclusion." 419 S.C. 370, 386, 798 S.E.2d 561, 570 (2017).

As previously mentioned, Briggs came out over three years after Petitioner's trial. Counsel admitted he had no trial strategy at all and that he should have objected. The PCR court erred by ascribing to him some sort of trial strategy that involved opening the door to coaching or suggestibility and then not objecting to questions to the forensic interviewer at a time when this area of law was rapidly developing. The PCR court erred in finding that counsel adopted a trial strategy based on a prescient understanding of what the law was going to be three years

down the road. Based on the clear and unequivocal testimony of trial counsel on this issue, he missed the objections as to these two questions with Dr. Benedetto.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). "Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

This Court has held that it is improper "for an expert to comment on the veracity of a child's accusations of sexual abuse." State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); see State v. Dawkins, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989) (finding therapist indicating he believed victim's allegations were genuine was improper); see also Smith v. State, 386 S.C.

562, 569, 689 S.E.2d 629, 633 (2010) (finding a "forensic interviewer's…opinion testimony improperly bolstered the Victim's credibility").

In Dawkins, this Court held that it was improper for the prosecution to ask an expert witness who had treated the alleged victim whether her symptoms were genuine. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989). In that case, the solicitor asked Dr. Banks, a psychiatrist who had treated the alleged victim, "Based on your examination and your observations of Pamela, are you of the impression that her symptoms are genuine?", and the response was in the affirmative. Id. at 393, 377 S.E.2d at 302. Rather than ruling on Dawkins' subsequent motion for a mistrial, the trial judge gave a curative instruction. Id. This Court stated that "[a]lthough it was improper for the prosecutor to pose the question, it was not of such magnitude to effect the outcome of the trial." Id. at 394, 377 S.E.2d at 302.

In State v. Jennings, this Court reversed two convictions of committing a lewd act upon a minor following the trial court's erroneous admission of a forensic interviewer's written reports which improperly vouched for the minor children's credibility. 394 S.C. 473, 716 S.E.2d 91 (2011). The written reports were created by forensic interviewer Shauna Galloway-Williams and contained sections called "Regarding Allegations of Abuse" and "Conclusion of Interview" that bolstered the minors' credibility and averred that the children provided "a compelling disclosure of abuse." Id. at 476-7, 716 S.E.2d at 93. This Court held that the reports allowed the forensic interviewer to improperly vouch for the children's veracity:

> In each report, the forensic interviewer stated that during the interviews, each child had "provide[d] a compelling disclosure of abuse by [appellant]." The forensic interviewer further concluded that each of the children provided details consistent with the background information received from their mother, the police report, and the other children. **There is no other way to interpret the language used in the reports other than to mean the forensic interviewed believed the**

> **children were being truthful.** We therefore find the trial court erred in allowing the State to introduce the reports.

Id. at 480, 716 S.E.2d at 94. (emphasis added). This Court held that conclusions in the reports improperly vouched for the children's veracity and, thus, the trial court abused its discretion by admitting the reports into evidence. This Court further held the error was ***not*** harmless because there was no physical evidence presented at trial and, therefore, the children's credibility was the sole issue in the case. Id. at 94- 95, 716 S.E.2d at 480.

In State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), this Court set forth general guidelines regarding prohibited testimony. In Kromah, the defendant was convicted of infliction of great bodily injury upon a child and unlawful neglect of a child. Id. at 343-4, 737 S.E.2d at 492. The state relied on testimony from Heather Smith, a forensic interviewer; the minor child did not testify. Id. at 348, 737 S.E.2d at 494. This Court held that the issue was preserved for review, addressed it on the merits, but concluded it was harmless beyond a reasonable doubt.

Smith interviewed the minor child at the Assessment and Resource Center, a non-profit child abuse evaluation and treatment center. Id. at 350, 737 S.E.2d at 495. Smith's testimony at trial was that the minor child had given a compelling finding for child abuse. Id. at 351, 737 S.E.2d at 496. This Court held the admission of portions of her testimony was error:

> [E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others. It is undeniable that the primary purpose for calling a "forensic interviewer" as a witness is to lend credibility to the victim's allegations. When this witness is qualified as an expert the impermissible harm is compounded.

Id. at 358, 737 S.E.2d at 499-500.

This Court further noted that "although an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attack more significance to the testimony of experts." Id. at 357, 737 S.E.2d at 499.

Two non-exclusive lists were offered as general guidelines, one containing examples of inadmissible testimony, the other entailing permissible statements. In the former category were five prohibited categories: 1) that the child was told to be truthful; 2) a direct opinion as to a child's veracity or tendency to tell the truth; 3) any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a "compelling finding" of abuse; 4) any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or 5) an opinion that the child's behavior indicated the child was telling the truth. Id. at 360, 737 S.E.2d at 500. By contrast, the following types of statements were described as proper testimony: 1) the time, date, and circumstances of the interview; 2) any personal observations regarding the child's behavior or demeanor; or 3) a statement as to events that occurred within the personal knowledge of the interviewer. Id.

The two questions posed to Dr. Benedetto by the solicitor crossed the line that existed in 2014. Counsel should have objected, and the failure to object prejudiced Petitioner. An objection likely would have resulted in the testimony being struck from the record and a curative instruction being given. Without the bolstering, the jury may have been split on the lewd act charge as well. At the least, it would have preserved the matter for argument on appeal, perhaps contributing to the shifting landscape at the time. Because no objection was lodged, however, the jury heard the expert witness who conducted the forensic interview bolster Minor's credibility. The numerous cases prohibiting such conduct would have secured relief for Petitioner, either at trial or on appeal, had trial counsel objected.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari to allow further briefing.

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of January, 2021.